

Corrigé  
Corrected

CR 2022/14

**International Court  
of Justice**

**Cour internationale  
de Justice**

**THE HAGUE**

**LA HAYE**

**YEAR 2022**

*Public sitting*

*held on Thursday 14 April 2022, at 3 p.m., at the Peace Palace,*

*President Donoghue presiding,*

*in the case concerning the Dispute over the Status and Use of the Waters of the Silala  
(Chile v. Bolivia)*

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**VERBATIM RECORD**

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**ANNÉE 2022**

*Audience publique*

*tenue le jeudi 14 avril 2022, à 15 heures, au Palais de la Paix,*

*sous la présidence de Mme Donoghue, présidente,*

*en l'affaire relative au Différend concernant le statut et l'utilisation des eaux du Silala  
(Chili c. Bolivie)*

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**COMPTE RENDU**

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*Present:*      President Donoghue  
                 Vice-President Gevorgian  
                 Judges Tomka  
                         Bennouna  
                         Yusuf  
                         Xue  
                         Sebutinde  
                         Bhandari  
                         Robinson  
                         Salam  
                         Iwasawa  
                         Nolte  
                         Charlesworth  
Judges *ad hoc* Daudet  
                         Simma  
  
                 Registrar Gautier

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*Présents* : Mme Donoghue, présidente  
M. Gevorgian, vice-président  
MM. Tomka  
Bennouna  
Yusuf  
Mmes Xue  
Sebutinde  
MM. Bhandari  
Robinson  
Salam  
Iwasawa  
Nolte  
Mme Charlesworth, juges  
MM. Daudet  
Simma, juges *ad hoc*  
  
M. Gautier, greffier

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The PRESIDENT: Please be seated. The sitting is open. For reasons duly made known to me, Judge Abraham is unable to join us for today's sitting.

The Court meets this afternoon to hear the reply of Chile on the counter-claims of Bolivia. I invite Mr. Samuel Wordsworth to address the Court. You have the floor, Sir.

Mr. WORDSWORTH:

**THE ABSENCE OF ANY COHERENT LEGAL BASIS FOR THE COUNTER-CLAIMS**

1. Madam President, Members of the Court, I will be making three introductory points on Bolivia's counter-claims before handing over to Professors Boisson de Chazournes and McCaffrey who will be looking in a little more detail at Bolivia's counter-claims 1 and 2. Chile's Agent, Professor Fuentes Torrijo, will then close.

**I. The loss of the legal underpinnings to the counter-claims**

2. First point: on the screen, to the right, you can see Bolivia's counter-claims as originally formulated. In brief terms, counter-claim (*a*) — the channels are Bolivia's (as if it could be otherwise); counter-claim (*b*) — hence the so-called artificial flow is Bolivia's (a legal non sequitur if ever there was one); and counter-claim (*c*) — hence Chile must pay.

(*a*) These claims were the flipside of, and predicated upon, Bolivia's central legal thesis that the so-called artificial flows were excluded from the usual customary international law rules that apply to international watercourses. Against that legal backdrop, it could be claimed — however unconvincingly and implausibly — that Bolivia had sovereignty over the artificial flow and that Chile had to enter into an agreement for compensation with respect to their use.

(*b*) The counter-claims thus fitted hand in glove with Bolivia's declarations sought in response to Chile's claim — you see these now on the left hand of the screen, and you see there the central underpinnings to the counter-claims in declarations (*a*) to (*c*), and in particular at (*b*) where the Court is asked to declare that: "Customary international rules on the use of international watercourses do not apply to the artificially-flowing Silala waters".

3. Now, when one looks at the new counter-claims, there are changes that I will come back to in a moment, but the basic theme remains the same: Bolivia has sovereignty over the artificial flows,

and an agreement is required, with compensation again envisaged. But, when one looks at the declarations that are now sought by Bolivia in response to Chile's claims, the essential legal underpinnings to the counter-claims have simply disappeared. The declaration that is now sought as a corollary, as we learnt for the first time just before 5.30 p.m. yesterday, is that the waters of the Silala — and now there is no exception — *do* constitute an international watercourse. And there is a reference here to the surface water being artificially enhanced. Nonetheless, it appears from the declaration, and we heard it emphasized many times yesterday<sup>1</sup>, that Bolivia's position is now that the waters in their entirety are governed by the usual international law rules. Now, that leads to just two possibilities:

- (i) either it is possible for a counter-claim to be predicated upon two mutually exclusive legal propositions, in this case the proposition that the usual customary international law rules do not apply to the artificially-flowing Silala waters, as well as the contradictory proposition that they do apply;
- (ii) or, possibility two, Bolivia's central counter-claims no longer have any coherent — let alone any tenable — legal basis, and should have been abandoned when Bolivia belatedly abandoned its case that the usual customary international law rules do not apply to the so-called artificial flows.

4. And, it is plain that only the second of these two possibilities holds true.

## **II. Bolivia's amendments to its counter-claims**

5. This leads to my second point. Focusing now on the changes in the counter-claims, which again were introduced for the first time yesterday, you can see that the word "acquired" has been added into counter-claim (*b*), as if that could somehow make Bolivia's position more defensible, and counter-claim (*c*) has been amended so that the right to the claimed agreement and compensation is no longer matched with "[a]ny delivery from Bolivia to Chile of artificially-flowing waters", but rather only concerns "[a]ny request by Chile made to Bolivia for the delivery of the enhanced flow". So counter-claim (*b*) is predicated on Chile asserting an acquired right, which is a very obvious mischaracterization of Chile's case, while counter-claim (*c*) is dependent upon a double

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<sup>1</sup> See e.g. CR 2022/13, p. 10, para. 2 (Eckstein); p. 47, para. 24 (Pellet); and p. 53, para. 5 (Calzadilla Sarmiento).

hypothetical — Bolivia communicating to Chile that it is going to dismantle the channels and Chile requesting Bolivia to retain the channels in place<sup>2</sup> — although Chile has repeated time and again that it encourages Bolivia to dismantle the channels<sup>3</sup>, that it considers the matter to be Bolivia’s business alone<sup>4</sup>, and for good measure that it has not the faintest doubt that dismantling will not materially affect the Silala flows<sup>5</sup>. And I note in passing that despite Mr. Bundy’s fixation, Chile’s reservation in its Application with respect to provisional measures is plainly of no relevance whatsoever to any of this<sup>6</sup>.

6. Now, one might think that it is not without irony that, in its opening speeches<sup>7</sup>, Bolivia should without any basis be seeking to characterize Chile’s claims as hypothetical, and then present a counter-claim in its closing that is based on a combination of events that is not merely speculative but is inconsistent with both Parties’ positions before the Court. One might also note that it is baffling that Bolivia should spend so much time telling you that its channels are harmful to its ecology, saying that the channels are designed to and do lead to enhanced flows that should instead be benefiting the upstream flora, and yet base a counter-claim on maintaining the alleged enhanced flows in return for compensation<sup>8</sup>.

7. But, more important, the reality is that Bolivia is inventing an unheralded hypothetical future scenario on the last day of the hearing simply in order to maintain its counter-claim (*c*) in some shape or form. Of course, the counter-claim will be rejected because it has no basis in actual fact; but it must be asked again whether it would not have been more appropriate for Bolivia just to withdraw the counter-claim once the essential legal underpinnings had disappeared. The same basic point applies to counter-claim (*b*), which is now predicated on a different invention — that Chile asserts some form of acquired right to the flows of the Silala — which, of course, it does not.

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<sup>2</sup> CR 2022/13, p. 39, para. 38 (Bundy).

<sup>3</sup> See e.g. RCh, para. 1.8; APCh, para. 1.18; CR 2022/6, pp. 23-24, para. 30 (Fuentes Torrijo); and CR 2022/12, pp. 21-22, para. 3 (Klein Kranenberg).

<sup>4</sup> See e.g. CR 2022/6, pp. 56-57, para. 2 (Wordsworth).

<sup>5</sup> See e.g. APCh, para. 1.20.

<sup>6</sup> CR 2022/13, p. 38, paras. 34-35 (Bundy).

<sup>7</sup> CR 2022/7, p. 40, para. 16 (*b*) (Forteau).

<sup>8</sup> CR 2022/13, pp. 38-39, para. 36 (Bundy).

Professor McCaffrey will return to counter-claim (b) shortly. On counter-claim (c), there is nothing more that needs to be said.

### **III. The absence of legal merit can only lead to the rejection of Bolivia's contentions**

8. I turn to my third and final point. It is important not to lose sight of the fact that Bolivia's counter-claims have never had any tenable legal basis. It was never tenable to claim that an upstream State could extract groundwater that is part of a free-flowing international watercourse, call it artificial flow, and claim sovereign rights and rights to control and payment with respect to that flow. In respect of this central defect, the counter-claims were always truly the mirror image of Bolivia's untenable defences to Chile's principal claims.

9. Just as with those defences, during this hearing, Bolivia has been repackaging and rewriting its counter-claims but, in doing so, has merely highlighted that they always lacked any legal merit. And again, just as with Bolivia's defences, Bolivia was saying yesterday if Chile can only give us such and such a clarification x or y<sup>9</sup>, or if the Court can only recognize that Chile in fact agrees with us on points u, v and w<sup>10</sup>, the Court will see that the Parties are agreed on our counter-claims and there is no real dispute. But this is all just a way of Bolivia trying to avoid the consequences of its retreat from the case that it had brought. And, just as with Bolivia's defences, it is critical to identify again that the absence of a tenable legal position on Bolivia's part does not translate into the absence of a dispute.

10. Chile came to this hearing prepared to meet a certain case on artificial flows and Bolivia has, reluctant step by reluctant step, been abandoning that case since day one. Indeed, one recalls that on day one of this hearing, there was snow on the ground, whereas on the final day the warmth is such as to make one worry all the more about global warming. The changes in Bolivia's key legal contentions over the course of this hearing have been no less striking. All well and good. But, although Bolivia is saying what it can to avoid, or mitigate, or obscure what it is doing, the Court's response — indeed the *only* judicial response — to a party that cannot make good its legal or factual contentions is a judgment rejecting that party's position. And this is regardless of however much the

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<sup>9</sup> See e.g. CR 2022/13, pp. 27-28, paras. 21-23 (Forteau).

<sup>10</sup> See e.g. CR 2022/13, p. 33, para. 12, and pp. 34-35, paras. 16-21 (Bundy).

retreating party may seek to reformulate and recast and insist on areas of common ground. Just as with Chile's claims, there is a dispute on the central counter-claims that must be resolved, a dispute that of course concerns the existing legal rights and obligations of the Parties with respect to customary international law<sup>11</sup>.

11. Madam President, Members of the Court, it has been an honour to appear before you in this matter, and I ask you to hand the floor to Professor Boisson de Chazournes.

The PRESIDENT: I thank Mr. Wordsworth for his statement and I invite the next speaker, Professor Laurence Boisson de Chazournes, to address the Court. You have the floor, Professor.

Mme BOISSON DE CHAZOURNES :

**LA PREMIÈRE DEMANDE RECONVENTIONNELLE DE LA BOLIVIE DOIT ÊTRE REJETÉE  
AU CAS OÙ LA BOLIVIE NE SE CONFORME PAS À SES OBLIGATIONS  
DE DROIT INTERNATIONAL**

1. Madame la présidente, Mesdames et Messieurs les juges, c'est pour moi un grand honneur de me présenter à nouveau devant votre Cour au nom de la République du Chili.

**I. Le Chili a toujours reconnu la souveraineté de la Bolivie  
sur les chenaux**

2. Lors du premier tour de plaidoiries, le Chili a expliqué qu'il considérait que la Cour se devait de rejeter la première demande reconventionnelle au motif qu'il n'existe pas et qu'il n'a jamais existé de différend quant à la première demande reconventionnelle bolivienne. Cela était sans compter sur l'effet de surprise créé par la Bolivie lors de l'audience du 13 avril.

3. Le Chili a toujours reconnu la souveraineté de la Bolivie sur les chenaux et systèmes de drainage situés sur son territoire. Il a renouvelé cette reconnaissance dans ses écritures<sup>12</sup> et lors des audiences du premier tour<sup>13</sup>. Prenant pour acquis que la Bolivie agirait en conformité avec les obligations de droit international auxquelles elle est tenue, le Chili a indiqué qu'il n'existe pas de différend entre les deux Parties pour ce qui est de la première demande et que, quand bien même

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<sup>11</sup> *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 34 and 37.

<sup>12</sup> RCh, par. 1.5 (note de bas de page omise).

<sup>13</sup> CR 2022/9, p. 10-11, par. 4 et p. 12, par. 10 (Boisson de Chazournes).

votre juridiction déciderait qu'un différend existe, celui-ci est devenu sans objet au cours de la procédure.

4. Pour rappel, le Chili n'a pas été impliqué dans la construction de ces chenaux situés en territoire bolivien et ne conteste pas non plus le souhait de la Bolivie de démanteler les chenaux dont la Bolivie lui a fait part pour la première fois au cours de la présente instance<sup>14</sup>. Comme le Chili l'a indiqué<sup>15</sup>, la Bolivie peut procéder au démantèlement des chenaux en accord avec les obligations de droit international qui trouvent application. Et c'est là que le problème surgit.

5. En effet, le Chili pouvait croire en toute bonne foi que les deux Etats s'accordaient sur le fait que l'ensemble des obligations pertinentes de droit international coutumier trouveraient application si la Bolivie procédait au démantèlement des chenaux<sup>16</sup>. Or lors de l'audience du 13 avril, les conseils de la Bolivie ont grandement limité la portée du droit international coutumier applicable en cas de démantèlement des chenaux.

## **II. Les principes de droit international coutumier s'appliquent à tous les cours d'eau internationaux quels que soient leurs profils**

6. Remarquons d'emblée que la Bolivie ne peut pas exciper de «unique circumstances»<sup>17</sup> qui seraient propres aux eaux du Silala pour ne pas respecter ses obligations. Les principes de droit international coutumier s'appliquent à tous les cours d'eau internationaux quels que soient leurs profils. ~~Et~~ Le professeur McCaffrey reviendra sur ce point dans quelques minutes.

7. Circonscrivant ses obligations, la Bolivie a déclaré, sur un ton pour le moins comminatoire, que le démantèlement des chenaux «doit se faire dans le respect des obligations coutumières applicables en matière de dommages transfrontières significatifs (et applicables uniquement à de tels dommages)»<sup>18</sup>.

8. Elle a argué que le devoir d'échanger des renseignements tel que reflété dans l'article 11 de la convention des Nations Unies de 1997 «does not reflect customary international law»<sup>19</sup> et a passé

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<sup>14</sup> CMB, par. 165 *a*) et par. 174.

<sup>15</sup> RCh, par. 1.5 (note de bas de page omise) ; PACH, par. 1.21 (note de bas de page omise).

<sup>16</sup> RCh, par. 1.5 (note de bas de page omise) ; DB, par. 32, 36 et 38.

<sup>17</sup> CR 2022/13, p. 12, par. 10 (Eckstein).

<sup>18</sup> CR 2022/13, p. 27, par. 22 (Forteau).

<sup>19</sup> CR 2022/13, p. 31, par. 7 (Bundy).

sous silence la signification des termes «effet négatif significatif» de l'obligation codifiée à l'article 12 de la convention des Nations Unies, et cela afin d'interpréter à sa guise l'article 12 en l'associant au «risque de dommage significatif»<sup>20</sup>.

9. Pourtant, les obligations codifiées aux articles 11 et 12 reposent sur une pratique internationale établie qui trouve un reflet dans les travaux de la Commission du droit international, les traités internationaux, la pratique des Etats et celle des organisations internationales, notamment les organisations financières internationales.

10. Ces obligations s'inscrivent dans le lignage de l'obligation générale de coopérer, laquelle a le privilège — si l'on peut dire — d'être reconnue par la Bolivie comme relevant du droit coutumier<sup>21</sup>. L'article 11 n'énonce pas de seuil qui déclenche son application. L'ampleur ou les effets d'une utilisation des eaux ne sont pas des critères à prendre en compte dans l'interprétation et l'application du devoir d'échanger des renseignements. Dès lors, l'argument de la Bolivie selon lequel les soi-disantes activités «*de minimis*»<sup>22</sup> de la Bolivie seraient exclues de l'application du devoir d'échanger des renseignements ne trouve pas d'ancrage juridique. La logique qui sous-tend l'article 11 est de permettre que les Etats qui partagent des ressources en eau puissent communiquer les uns avec les autres tant sur les effets positifs que sur les effets négatifs d'une utilisation des eaux. Le devoir d'échanger des renseignements permet d'éviter que l'un des Etats riverains conduise une évaluation unilatérale à propos d'une mesure projetée<sup>23</sup>.

11. L'article 12 prévoit quant à lui un seuil d'application qui n'est pas celui de l'article 7 relatif à l'obligation de ne pas causer de dommage significatif. La Commission du droit international a bien souligné qu'il s'agit d'un autre type de dommage que celui visé à l'article 7<sup>24</sup>.

12. Ajoutons que le respect de l'obligation d'échanger des renseignements et de l'obligation de notification préalable est particulièrement important dans des régions très arides comme l'est le désert d'Atacama où le Silala est situé.

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<sup>20</sup> CR 2022/13, p. 50, par. 30 (Pellet).

<sup>21</sup> CR 2022/7, p. 64, par. 38 (Pellet).

<sup>22</sup> CR 2022/13, p. 31, par. 9 (Bundy).

<sup>23</sup> Projet d'articles sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation, *Annuaire de la Commission du droit international*, 1994, vol. II, deuxième partie, p. 117.

<sup>24</sup> *Ibid.*, p. 117-118.



### **III. La signification du respect des obligations codifiées aux articles 11 et 12 de la convention de 1997 en cas de démantèlement des chenaux**

13. Mesdames et Messieurs les juges, permettez-moi d'expliquer en termes concrets la signification du respect des obligations codifiées aux articles 11 et 12 de la convention de 1997 en cas de démantèlement des chenaux. Les mesures que la Bolivie pourrait prendre aux fins du démantèlement des chenaux en vue de la restauration des zones humides, ainsi que la Bolivie en a exprimé le souhait<sup>25</sup>, sont susceptibles d'entraîner une diminution temporaire dans l'écoulement des eaux du Silala. En effet, parmi ces mesures, il pourrait y avoir l'édification de petites structures dans le but de retenir l'eau dans les zones humides.

14. En outre, il est possible que l'enlèvement des revêtements des chenaux entraîne de manière temporaire des charges excessives de sédiments dans la rivière. Bien que le Chili escompte que la Bolivie adopte les mesures appropriées en matière d'atténuation, une telle opération comporte le risque que ces charges excessives de sédiments s'écoulent en aval et nuisent aux écosystèmes et aux utilisateurs en aval. Le Chili doit être informé de ces mesures, notamment des dates et des méthodes de démantèlement, afin de pouvoir adopter les mesures de prévention ou d'atténuation qui s'avèreraient nécessaires.

15. Ces quelques exemples d'effets potentiels, même temporaires, soulignent l'importance de l'échange d'informations entre Etats riverains et celle de l'obligation de notification pour permettre l'adoption des mesures appropriées.

16. Le Chili réitère que le droit souverain de la Bolivie à démanteler les chenaux doit s'exercer en accord avec *tous* les principes de droit coutumier applicables aux cours d'eau internationaux, y compris l'obligation de coopération qui trouve expression dans les obligations codifiées aux articles 11 et 12 de la convention des Nations Unies de 1997.

17. Mesdames et Messieurs les juges, le Chili considère qu'il n'y a pas de différend entre les deux Parties pour ce qui est de la première demande dans la mesure où la Bolivie se conforme à ses obligations. Quand bien même votre juridiction déciderait qu'un différend existe, celui-ci est devenu sans objet au cours de la procédure pour ce qui est de la souveraineté sur les chenaux. Toutefois, la

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<sup>25</sup> CR 2022/7, p. 61-62, par. 30 (Pellet).

première demande reconventionnelle doit être rejetée au cas où la Bolivie ne respecte pas les obligations auxquelles elle est tenue en droit international.

18. Ceci conclut ma plaidoirie. Il me reste à remercier la Cour de sa bienveillante attention. Je vous saurais gré, Madame la présidente, de bien vouloir donner la parole à M. McCaffrey.

The PRESIDENT: I thank Professor Boisson de Chazournes for her statement. I now give the floor to Professor Stephen McCaffrey. You have the floor, Professor.

Mr. McCaffrey: Thank you very much, Madam President.

#### **BOLIVIA'S SECOND COUNTER-CLAIM REMAINS UNTENABLE**

1. Madam President, distinguished Members of the Court, good afternoon. My task today is to show why the Court must find that Bolivia's second counter-claim remains untenable.

2. Madam President, Members of the Court, in its counter-claim (*b*), the second counter-claim, Bolivia now asks the Court to adjudge and declare that "Bolivia has sovereignty over the artificial flow of Silala waters engineered, enhanced, or produced in its territory and Chile has no *acquired* [this word was added by the Agent of Bolivia yesterday] right to that artificial flow"<sup>26</sup>. In an earlier pleading I addressed Bolivia's arguments with regard to its counter-claim (*b*), and I will do my best not to repeat what I said on that occasion. However, to address Bolivia's pleading, I must lay the groundwork, because Bolivia continues to vacillate on this counter-claim, to the extent that one cannot really determine exactly what Bolivia's position is at any given moment. Mr. Wordsworth has already explained the overall significance of Bolivia's changes in position.

3. In its pleadings before you on Monday and Tuesday, and again yesterday, Bolivia has retreated from the position that it has sovereignty over the artificially enhanced flow. Yet, it still *has not withdrawn* its second counter-claim which I have just read to you. This requires Chile to answer, once more.

4. There is little left to say about Bolivia's counter-claim (*b*) but, just when we think the misbegotten idea of sovereignty over artificial flows has been unceremoniously consigned to the

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<sup>26</sup> CR 2022/13, pp. 55-56, para. 13 (Calzadilla Sarmiento).

dustbin, it reappears in the recycle bin. Bolivia's case is becoming "curiouser and curiouser", and one feels a bit like Alice in Wonderland trying to make sense of it all.

5. But this much is pellucidly clear: the Court must deny Bolivia's second counter-claim because it is wholly unfounded.

### **I. Bolivia yet again changed its position on its second counter-claim**

6. Madam President, distinguished Members of the Court, as Mr. Wordsworth has made abundantly clear, Bolivia has changed its position drastically over the course of these hearings. As to counter-claim (b), Bolivia does not seem to be able to decide whether it has sovereignty over the artificial flow or not. Yesterday we witnessed more of the Bolivian "volte-face", but also more confusion as to its claim of sovereignty over the so-called "artificial" flow of the Silala. Instead of claiming sovereignty over the artificial flow of the Silala, as it once had and which is what counter-claim (b) actually says, Bolivia now says it claims sovereignty only over the artificial works in its territory<sup>27</sup>. Mr. Bundy on ~~Monday~~ *Wednesday* offered the following explanation of Bolivia's counter-claim (b) — and this is a rather long quote:

“[T]his counter-claim is twofold.

— First, as a consequence of Bolivia's *sovereignty over the channel works* and its entitlement to dismantle those works, Bolivia has the *sovereign right to decide* whether the enhanced or 'artificial' surface flow produced by those works will be maintained, or whether it will cease to exist because the works are removed, for example to protect and restore the wetlands. *That* is what is meant by the reference to Bolivia's 'sovereignty' over the enhanced flow.”

A rather tortured explanation, and not consistent either with what the words were originally intended to mean or with the words as they are now on the page, but okay. Continuing the quote from Mr. Bundy:

— “Second, given that Bolivia has the right to decide whether to dismantle the infrastructure, *Chile has no acquired right* to the enhanced flow produced by that infrastructure indefinitely into the future.”<sup>28</sup>

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<sup>27</sup> CR 2022/13, p. 33, para. 13 (Bundy) (footnote omitted) and CR 2022/13, p. 51, para. 31 (Pellet).

<sup>28</sup> CR 2022/13, p. 33, para. 11 (Bundy) (footnote omitted) (emphasis added).

Of course, Chile has never claimed an “acquired right” to the so-called enhanced flow, or more pertinently to the current flow of the Silala<sup>29</sup>, whether “indefinitely into the future” or otherwise. But again, okay.

7. The takeaway from this explanation by Mr. Bundy is that it constitutes a stunning reversal of position by Bolivia. We are essentially told to disregard its earlier claim of sovereign rights in the artificially enhanced flow<sup>30</sup>. But given the ease with which Bolivia gave up its claim to sovereignty over the artificial flows, one had to wonder whether it could not just as easily succumb anew to the siren song of sovereignty. And that, Madam President and distinguished Members of the Court, is precisely what Bolivia did.

8. This volte-face was in fact executed a head-snapping two times in the same session. The Agent of Bolivia closed Bolivia’s argument by referring once again to its counter-claim (*b*), stating as follows: “Bolivia has sovereignty over the artificial flow of Silala waters engineered, enhanced, or produced in its territory and Chile has no acquired right to that artificial flow.”<sup>31</sup>

9. All this leaves one to wonder in the end what exactly Bolivia is asserting with regard to the “artificial” flow, as it calls it. It appeared as though Bolivia had retreated from asserting sovereignty over the flow of the Silala — a shared international watercourse — only for them to contradict themselves and boldly claim “sovereignty over the artificial flow of Silala waters”<sup>32</sup>.

## **II. Customary international law provides “firm common ground”<sup>33</sup> for the Parties to understand their rights and obligations on the Silala**

10. Madam President, distinguished Members of the Court, we must address the reality of this situation that there is no international agreement between the Parties governing the Silala, despite some efforts to the contrary. The upstream channel works in Bolivia do exist as of now, though Bolivia may remove them in the future, and the waters of an international watercourse, the Silala,

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<sup>29</sup> See CR 2022/6, p. 21, para. 22, and p. 23, para. 27 (Fuentes Torrijo); p. 34, para. 2, and p. 37, paras. 9-10 (Boyle/McCaffrey); CR 2022/12, p. 31, paras. 7-8 (Boisson de Chazournes).

<sup>30</sup> CR 2022/13, p. 33, para. 11 (Bundy).

<sup>31</sup> CR 2022/13, p. 56, para. 13 (*b*) (Calzadilla Sarmiento).

<sup>32</sup> CR 2022/13, p. 56, para. 13 (*b*) (Calzadilla Sarmiento).

<sup>33</sup> *Yearbook of the International Law Commission (YILC)*, 1994, Vol. II (Part Two), p. 93, para. 11, of Commentary to Article 3.

flow through them. Bolivia attempts to confuse us by conflating the artificial works in its territory and the flow of the waters of an international watercourse.

11. In this situation customary international law governs, and as shown in my previous presentations, the customary international law of international watercourses, as reflected in the 1997 United Nations Convention, is perfectly capable of governing, and does govern, the relations between the Parties in respect of the Silala watercourse. The Silala is an international watercourse; customary international law applies to all of the waters of the Silala; Bolivia cannot claim sovereignty over a portion of the waters of a shared international watercourse that would otherwise flow to Chile as groundwater, minus a small change due to evaporation.

12. The novel distinctions invented by Bolivia in this case between “artificial” and “natural” flows, as well as the term “international watercourse whose surface flow has been artificially enhanced”, possess no legal significance and do violence to the law of international watercourses. The same applies to the new references to so-called “enhanced flows”. They therefore cannot be relied on and must be rejected.

13. As mentioned earlier, the 1997 United Nations Watercourses Convention was designed as a framework convention and sets out general legal principles, precisely to address the diversity of international watercourses<sup>34</sup>. As the ILC’s commentary explains, creating the 1997 United Nations Watercourses Convention as a framework agreement also took into account

“the difficulty, as revealed by the historical record, of reaching such agreements relating to individual watercourses without the benefit of general legal principles concerning the uses of such watercourses. It contemplates that these principles will be set forth in the framework agreement. This approach has been broadly endorsed both in the Commission [the International Law Commission] and in the Sixth [or Legal] Committee of the General Assembly.”<sup>35</sup>

Customary international law applies, governs with the clarity of its key principles, and leaves no space for the miasma that is Bolivia’s counter-claim (*b*).

### **III. The implications of Bolivia’s new approach on its second counter-claim**

14. Madam President, distinguished Members of the Court, Bolivia referred to the points on which the Parties are now agreed, “without it being necessary to ask oneself who changed their point

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<sup>34</sup> *YILC*, 1994, Vol. II (Part Two), p. 92, paras. 1-2, of Commentary to Article 3.

<sup>35</sup> *YILC*, 1994, Vol. II (Part Two), p. 92, para. 2, of Commentary to Article 3, footnote omitted.

of view on this or that point”<sup>36</sup>. That would be convenient for Bolivia, I am sure, and continues to gloss over inaccuracies and confusion in how Bolivia portrays how customary international law should be applied in this instance.

15. Mr. Bundy claimed yesterday that “there is nothing in Bolivia’s second counter-claim that is in the least bit contrary to international law”. And that “its second counter-claim is fully justified and entirely consistent with customary international law”. But let’s look at this a bit more closely.

16. There are indeed inaccuracies and unwarranted confusions in how Bolivia considers customary international law to apply in the case before you.

17. First, in its pleadings yesterday, Bolivia finally, for the first time, admitted that “yes, the Silala is subject in its entirety to the law of international watercourses — *in its entirety*, Madam President. And this entirety includes of course surface or underground water, whatever their origin. Can we be clearer?”<sup>37</sup> Chile welcomes this recognition by Bolivia, belated though it may be, that customary international law applies to all of the waters of the Silala.

18. But then Bolivia equivocates by relying again on its novel distinction between “artificial” and “natural” flow. Mr. Bundy stressed yesterday that “[t]he plain fact is that, in the specific circumstances of this case, there *is* a distinction between the ‘natural’ surface flow of the Silala in Bolivia’s territory and the ‘enhanced’ flow”<sup>38</sup>.

19. Despite agreeing that the Silala is an international watercourse<sup>39</sup>, Professor Eckstein stated that “it is not enough to characterize the Silala solely as an international watercourse. Rather, it must be characterized as an international watercourse with artificially enhanced surface flows.”<sup>40</sup> Bolivia provides no legal basis for this distinction whatsoever. Bolivia again claims that the Silala is

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<sup>36</sup> CR 2022/13, p. 46, para. 20 (Pellet), [“sans qu’il soit nécessaire de se demander qui a modifié son point de vue sur tel ou tel point”], unofficial translation.

<sup>37</sup> CR 2022/13, p. 47, para. 24 (Pellet) [“oui, le Silala est soumis dans sa globalité au droit des cours d’eau internationaux - *dans sa globalité*, Madame la présidente. Et cette globalité inclut bien sûr les eaux de surface ou souterraines, quelle que soit leur origine. Peut-on être plus clair ?”], unofficial translation.

<sup>38</sup> CR 2022/13, p. 35, para. 23 (Bundy).

<sup>39</sup> CR 2022/13, pp. 47-48, para. 24 (Pellet).

<sup>40</sup> CR 2022/13, p. 12, para. 10 (Eckstein).

“unique”<sup>41</sup>, “extraordinary”<sup>42</sup>, and “singular”<sup>43</sup>—stating that “this is not your average international watercourse”<sup>44</sup>, as if there were such a thing. Professor Eckstein continued: “Of course, Chile would have you believe that the Silala is simply just another watercourse traversing yet another international frontier. Nothing could be further from the truth.”<sup>45</sup>

20. But, Madam President, despite Bolivia’s portrayal of the Silala as being alone in its “uniqueness” amongst international watercourses, the Silala is in fact quite “normal” in the fact that it is “exceptional”. Watercourses the world over are “unique” in their specific contexts, demands, developments and physical characteristics. These considerations were taken into account and provided for by the International Law Commission in preparing its draft articles that formed the basis of the negotiation of the 1997 Watercourses Convention<sup>46</sup>. The ILC’s solution, as will be recalled, was the “framework agreement” approach of what became the 1997 Convention.

21. Bolivia’s insistence that “it is not enough to characterize the Silala solely as an international watercourse. Rather, it must be characterized as an international watercourse with artificially enhanced flows”<sup>47</sup>, does not reassure Chile. On the contrary, it appears that Bolivia is maintaining its argument that there is a “legal relevance [to] the distinction”<sup>48</sup> between natural and “artificial flows”.

22. This was reflected again when the Agent for Bolivia yesterday requested the Court to reject all of Chile’s submissions<sup>49</sup>, including submission (a), according to which “[t]he Silala River system, together with the subterranean portions of its system, is an international watercourse, the use of which is governed by customary international law”<sup>50</sup>. But then Bolivia requests the Court to adjudge and

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<sup>41</sup> CR 2022/13, p. 10, para. 3 (Eckstein); CR 2022/13, p. 53, para. 5 (Calzadilla Sarmiento).

<sup>42</sup> CR 2022/13, p. 11, para. 7 (Eckstein).

<sup>43</sup> CR 2022/13, p. 18, para. 30 (Eckstein).

<sup>44</sup> CR 2022/13, p. 10, para. 3 (Eckstein).

<sup>45</sup> CR 2022/13, p. 11, para. 7 (Eckstein).

<sup>46</sup> *YILC*, 1994, Vol. II (Part Two), p. 92, paras. 1-2, of Commentary to Article 3.

<sup>47</sup> CR 2022/13, p. 12, para. 10 (Eckstein).

<sup>48</sup> CMB, para. 81.

<sup>49</sup> CR 2022/13, p. 55, para. 12 (Calzadilla Sarmiento).

<sup>50</sup> MCh, p. 107.

declare that “[t]he waters of the Silala constitute an international watercourse whose surface flow has been artificially enhanced”<sup>51</sup>.

23. Madam President, as I have stated previously<sup>52</sup>, and my colleague Professor Boisson de Chazournes underlined on Monday<sup>53</sup>, there is no basis in international law for distinguishing between natural and “artificial” flows. Yet, Bolivia continues to pursue the Sisyphean task of attempting to draw a distinction between the two. You will recall, Madam President, that this novel idea of an “artificial” flow was first introduced by Bolivia *after* Chile filed its Application in an attempt to claim exclusive sovereignty over some portion of the flow of the Silala River. All of which it had claimed sovereignty over earlier. Despite Bolivia’s volte-face on its claim of exclusive sovereignty over the artificial flow, the vestige of this idea of “artificial flow” remains in Bolivia’s last oral pleadings before you and must be clearly rejected by the Court.

24. In further redefining the role of customary international law in inter-State relations, Bolivia in its pleadings before you yesterday argued that “customary international law only lays out general principles which, in the case of a disagreement between riparian States, *must* be implemented by a watercourse agreement taking fully into account the particular characteristics of the river concerned”<sup>54</sup>. Bolivia here mischaracterizes the law of international watercourses by referring to an obligation to conclude an agreement<sup>55</sup>, and wrongly insinuates that customary international law would not be enough to regulate disputes concerning the Silala<sup>56</sup>.

25. In Bolivia’s opinion, this obligation to conclude an agreement should also be understood in the sense that “the modalities of an equitable and reasonable utilization of the waters of the Silala — these modalities will *have* to be subject to a future agreement *if*, as it is allowed to do so,

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<sup>51</sup> CR 2022/13, p. 55, para. 12 (Calzadilla Sarmiento).

<sup>52</sup> CR 2022/6, pp. 18-23, paras. 9-24 (Boyle/McCaffrey); CR 2022/09, pp. 34 and 38-43 paras. 2 and 15-26 (McCaffrey).

<sup>53</sup> CR 2022/12, p. 30, para. 5 (Boisson de Chazournes).

<sup>54</sup> CR 2022/13, p. 50, para. 30 (Pellet) [“le droit international coutumier ne pose que des principes généraux qui, en cas de désaccord entre les Etats riverains, doivent être mis en œuvre par un accord de cours d’eau tenant pleinement compte des caractéristiques particulières de la rivière concernée.”], unofficial translation ; emphasis added.

<sup>55</sup> *YILC*, 1994, Vol. II (Part Two), p. 93, para. 5, of Commentary to Article 3.

<sup>56</sup> *YILC*, 1994, Vol. II (Part Two), p. 92, para. 2, of Commentary to Article 3.



Bolivia decides to make use of them — whether it dismantles the canalizations or not.”<sup>57</sup> Bolivia is thus claiming that the Silala will *have* to be subject — will *have* to be subject — to a future agreement *if* Bolivia decides to make use of the waters. This is a misunderstanding of the law of international watercourses and of customary international law more generally. In fact, the ILC pointed out in its Commentaries to the Draft Articles, that

“watercourse States are not under an obligation to conclude an agreement before using the waters of the international watercourse. To require conclusion of an agreement as a pre-condition of use would be to afford watercourse States the power to veto a use by other watercourse States of the waters of the international watercourse by simply refusing to reach agreement. Such a result is not supported by the terms or the intent of article 3. Nor does it find support in State practice or international judicial decisions”<sup>58</sup>.

26. Indeed, the arbitral tribunal in the pathbreaking *Lake Lanoux* case famously pointed out that

“to evaluate in its essence the need for a preliminary agreement, it is necessary to adopt the hypothesis that the States concerned cannot arrive at an agreement. In that case, it would have to be admitted that a State which ordinarily is competent has lost the right to act alone as a consequence of the unconditional and discretionary opposition of another State. This is to admit a ‘right of consent’, a ‘right of veto’, which at the discretion of one State paralyzes another State’s exercise of its territorial competence.”<sup>59</sup>

#### IV. Conclusion

27. Madam President, distinguished Members of the Court, for the foregoing reasons, Bolivia’s counter-claim (*b*) should be rejected.

28. Madam President, Members of the Court, thank you for your kind attention. I would now ask that you to give the floor to the agent of the Republic of Chile, H.E. Ms Ximena Fuentes Torrijo.

The PRESIDENT: I thank Professor McCaffrey for his statement. Before I give the floor to the Agent, I would like to give the floor to Judge Tomka who wishes to put a question to Chile. Judge Tomka, you have the floor.

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<sup>57</sup> CR 2022/13, p. 45, para. 17 (Pellet) [“les modalités d’une utilisation équitable et raisonnable des eaux du Silala — ces modalités devront faire l’objet d’un accord futur si, comme elle en a le droit, la Bolivie décide d’en faire usage — qu’elle démantèle les canalisations ou non.”], unofficial translation; emphasis added.

<sup>58</sup> *YILC*, 1994, Vol. II (Part Two), p. 94, para. 17, of Commentary to Article 3.

<sup>59</sup> *Lake Lanoux case (Spain, France)*, Award of 16 November 1957. Original French *Affaire du lac Lanoux*, in United Nations, *Reports of International Arbitration Awards (RIAA)*, Vol. XII, pp. 281-317. English translations in *International Law Report (ILR)*, Vol. 24 p. 101 (1961); *American Journal of International Law (AJIL)*, Vol. 53, p. 156 (1959); *YILC*, 1974, Vol. II (Part Two), p. 194, from which the above quotation is taken, at p. 197, para. 1065.

Judge TOMKA: Thank you, Madam President. Counsel for Chile, Professor Laurence Boisson de Chazournes, in her pleading requested that the Court reject the first counter claim by Bolivia in case Bolivia does not comply with its obligations under international law (“la première demande reconventionnelle de la Bolivie doit être rejetée au cas où la Bolivie ne se conforme pas à ses obligations de droit international”). My question for Chile is as follows:

Can the Court reject the first counter claim subject to a condition of a future conduct by Bolivia? Wouldn't the Court be deciding on the basis of a hypothetical scenario or for a hypothesis in the future?

Thank you very much, Madam President.

The PRESIDENT: I thank Judge Tomka. The written text of the question will be communicated to the Parties as soon as possible and, at the same time, the Parties will be informed of the time and date by which Chile is to provide its written reply, as well as the date and time by which Bolivia is asked to provide any comments that it may wish to submit.

With that, I now give the floor to the Agent of Chile, Her Excellency Ms Ximena Fuentes Torrijo. You have the floor, Your Excellency.

Ms FUENTES TORRIJO:

**CLOSING STATEMENT BY THE AGENT OF CHILE  
ON THE COUNTER-CLAIMS OF BOLIVIA**

1. Madam President, distinguished Members of the Court. It is an honour to appear again before you to close Chile's second round of oral argument regarding Bolivia's counter-claims.

**I. Summary of Chile's oral arguments regarding  
Bolivia's counter-claims**

2. Bolivia has conceded the main submissions made by Chile, that is, that the Silala River system is an international watercourse governed by customary international law<sup>60</sup>, and that accordingly, both Chile and Bolivia are entitled to the equitable and reasonable use of all of its waters,

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<sup>60</sup> See e.g., *verbatim record of the public sitting held on Wednesday 13 April 2022 (henceforth “CR 2022/13”), p. 10, para. 2 (Eckstein); p. 47, para. 24 (Pellet); and p. 53, para. 5 (Calzadilla Sarmiento).*

including the subsurface portions of the system<sup>61</sup>. Nevertheless, Bolivia has chosen to maintain its three counter-claims before the Court.

3. Chile has never disputed that Bolivia has sovereignty over the channels in its territory and that it is for Bolivia to dismantle the channels in compliance with international law<sup>62</sup>. Bolivia's suggestion that Chile objected to the dismantling in 2002, or in 2010, or at any time, is not supported by the historical documents. Notwithstanding, Bolivia's Agent insists on the need for the Court to decide on counter-claim (a), alleging that Chile is conditioning the dismantling of the channels by asking that any action by Bolivia must comply with international law<sup>63</sup>. This cannot amount to a condition or qualification of Bolivia's rights. It is simply the application of the customary international law that Chile, and now also Bolivia, agree applies to the Silala River in its entirety — even if this is regrettably subject to the Bolivian inaccuracies and confusions to which Professor McCaffrey has just referred.

4. As Chile has explained in its written Reply, counter-claims (b) and (c) amount to a parallel defence to Chile's claims<sup>64</sup>. Therefore, it is difficult for Chile to understand how Bolivia can insist on seising the Court with these counter-claims, that now seem to have lost their legal foundation.

5. Mr. Wordsworth has explained how Bolivia introduced changes to the formulation of its counter-claims (b) and (c), and how these changes have attempted to create a new basis for the counter-claims that is entirely hypothetical and speculative.

6. Under counter-claim (b), Bolivia states that Chile has no “acquired” right to the so-called “artificial flow”<sup>65</sup>. With the addition of the word “acquired”, Bolivia seems to be saying that Chile may only use the “artificial flow” in so far as Bolivia decides to maintain the channels. Which brings us back to counter-claim (a). Chile has made clear in its written proceedings that, if the dismantling of the channels results in a decrease in the superficial flow, or a deterioration in water quality, this will not be considered per se a violation of customary international law<sup>66</sup>.

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<sup>61</sup> See e.g., CR 2022/13, p. 11, para. 6 (Eckstein), p. 54, para. 7 (Calzadilla Sarmiento).

<sup>62</sup> Chile's Reply (henceforth “CR”), par. 1.5; Chile's Additional Pleading (henceforth “CAP”), para. 1.21.

<sup>63</sup> CR 2022/13, p. 54, para. 9 (Calzadilla Sarmiento).

<sup>64</sup> CR, para. 1.6.

<sup>65</sup> CR 2022/13, p. 56, para. 13 (b), (Calzadilla Sarmiento).

<sup>66</sup> CAP, para. 1.20.

7. Counter-claim (c) is now based on the double hypothetical to which Mr. Wordsworth referred, that Bolivia will want to dismantle the channels, whereas Chile will request them to be maintained. Chile has already repeatedly confirmed that it is not interested in the maintenance of these channels in Bolivia and indeed encourages dismantlement<sup>67</sup>. Yet, the Agent of Bolivia insists on requesting the Court to pass judgment upon these hypothetical and speculative counter-claims.

8. Bolivia has stated that both Parties have over time changed their positions<sup>68</sup>. This is not the case. Chile has always confirmed the international status of the waters of the Silala and the rights and obligations of Bolivia and Chile as co-riparians of the Silala River system in accordance with customary international law. By contrast, Bolivia has changed position on the fundamentals of its legal case, going back and forth from their position prior to 1999 when they recognized the shared nature of the Silala, to the complete denial of the Silala's international status afterwards; from the invention of the distinction between "naturally" and "artificially" flowing waters during the written proceedings, to disavowing their own creation during this hearing. Even so, yesterday Bolivia's Agent requested the Court to adjudge and declare Bolivia's counter-claims (b) and (c), and by extension, its defences to Chile's claims, that still rely on the distinction between natural and artificial flow<sup>69</sup>. It also questions the extent to which its actions with respect to the Silala River system in Bolivia are subject to customary international law, under counter-claim (a)<sup>70</sup>.

9. Bolivia's way of proceeding explains why Chile has come before the Court to obtain legal certainty with respect to the status and use of the waters of the Silala<sup>71</sup>. When it became clear during the written presentations that Bolivia conceded that the Silala River is an international watercourse, Chile reached out to Bolivia to attempt to reach an agreement. After hearing Professor Pellet yesterday, it is even more difficult to understand that Bolivia decided to ignore Chile's 2019 proposal. But it did so.

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<sup>67</sup> See e.g., *CR*, para. 1.14; *CAP*, para. 2.60; and *verbatim record of the public sitting held on Wednesday 6 April 2022 (henceforth "CR 2022/9")*, p. 24, para. 4 (Boyle).

<sup>68</sup> *CR 2022/13*, p. 18, para. 1 (Forteau), p. 20, para. 5 (Forteau), p. 46, para. 20 (Pellet).

<sup>69</sup> *CR 2022/13*, p. 56, para. 13 (Calzadilla Sarmiento).

<sup>70</sup> *CR 2022/13*, p. 54, para. 9 (Calzadilla Sarmiento).

<sup>71</sup> *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 20; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, I.C.J. Reports 2011 (II), p. 663, para. 53.

10. Bolivia's counter-claims have extended unnecessarily the dispute before this Court. They are based on the same false premises as Bolivia's defences to Chile's claims and therefore must be dismissed in their entirety. And the shifts in Bolivia's position, and the steady retreat from its written pleadings, do not somehow point to the absence of a dispute. They identify the critical need for a judgment that explains and applies the applicable customary international law and introduces clarity into the legal relations between the Parties so far as concerns the Silala.

11. Before reading the final submissions of Chile, allow me, Madam President, to express our sincere gratitude to you and to all the Members of the Court for having listened attentively to both Parties. Our thanks also go to the Registrar of the Court, Mr. Philippe Gautier, and to all the staff of the Court. We extend our gratitude to the interpreters, who have done an excellent job. In particular, we appreciate that these oral pleadings have been interpreted into Spanish. My thanks go also to the Bolivian delegation. And in addition, I would like to express my deepest gratitude to Chile's distinguished counsel, and to the women and men that make up the Chilean delegation; it has been a privilege and an honour to work with you in this case.

## **II. Chile's final submissions on the counter-claims**

12. With respect to the counter-claims presented by the Plurinational State of Bolivia, I will now read the submissions, the signed text of which I have submitted to the Court.

“[T]he Republic of Chile requests the Court to adjudge and declare that:

- (a) To the extent that Bolivia claims sovereignty over the channels and drainage mechanisms in the Silala River system that are located in its territory and the right to decide whether to maintain them, the Court lacks jurisdiction over Bolivia's Counter-Claim a) or, alternatively, Bolivia's Counter-Claim a) is moot; to the extent that Bolivia claims that it has the right to dismantle the channels in its territory without fully complying with its obligations under customary international law, Bolivia's Counter-Claim a) is rejected;
- (b) Bolivia's Counter-Claims b) and c) are rejected.”

Thank you for your kind attention.

The PRESIDENT: I thank Your Excellency. The Court takes note of the final submissions that you have just read on behalf of Chile on the counter-claims of Bolivia.

This brings the present series of sittings to an end. I would like to thank the Agents, counsel and advocates of the two Parties for their statements, as well as the experts called by the Parties for their co-operation. In accordance with the usual practice, I shall request both Agents to remain at the Court's disposal to provide any additional information the Court may require. With this proviso, I declare closed the oral proceedings in the case concerning *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*. The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Judgment. Since the Court has no other business before it today, the sitting is declared closed.

*The Court rose at 4 p.m.*

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