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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2022

Public sitting

held on Monday 11 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)**

VERBATIM RECORD

ANNÉE 2022

Audience publique

tenue le lundi 11 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)**

COMPTE RENDU

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

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
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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comme assistantes techniques.

The PRESIDENT: Please be seated. The sitting is open.

I would like to note that the following judges are present with me in the Great Hall of Justice: Vice-President Gevorgian and Judges Tomka, Yusuf, Xue, Sebutinde, Iwasawa and Charlesworth, while Judges Abraham, Bennouna, Bhandari, Robinson, Salam and Nolte and Judges *ad hoc* Daudet and Simma are participating by video link.

The Court meets this afternoon to hear Chile's second round of oral argument on its own claims.

I shall now give the floor to Mr. Samuel Wordsworth. You have the floor.

Mr. WORDSWORTH:

THE ISSUES IN DISPUTE; THE FACTS AND EXPERT EVIDENCE RELEVANT TO THE SURFACE AND GROUNDWATER FLOWS OF THE SILALA

1. Madam President, Members of the Court, I will be taking stock of the key issues as they now stand at the beginning of this, the second round, before coming back to the facts on ground and surface water flows, including the two facts, as identified in opening, that matter for the Court's determination on the key issues.

I. The key issues as they now stand

2. In terms of taking stock, there are two critical points to take from the first round.

3. First, there is Bolivia's decision to retreat from the case in its written pleadings on sovereignty over the so-called artificial flows allegedly generated by the channels constructed in Bolivian territory pursuant to the express permission of Bolivia. Professor McCaffrey took you through the details last Wednesday, and I will not repeat them now, but, in brief:

(a) Up to last week, Bolivia was claiming that it had exclusive sovereignty over the so-called artificial flows such that any use thereof depended on Bolivia's consent[1], and this was supported by various United States cases and other materials concerning salvaged waters and the like. On this basis, Bolivia claimed that the so-called artificial flows were excluded from the customary

[1] CMB, paras. 104-106, 110, 115 and 120-121; RB, subheading 1, p. 38 and paras. 79-80.

international law rules reflected in the 1997 Convention[2], and subject only to Bolivia's domestic law[3].

(b) That case was none too subtly jettisoned by Mr. Bundy last week and it is now said that there is only sovereignty over the so-called artificial flows in the sense that it is for Bolivia alone to decide whether or not to dismantle the channels on its territory[4].

4. Chile, of course, has no objection to Bolivia abandoning the central legal underpinnings of its defence and counter-claims, but the important point for now is that Bolivia has not abandoned its case that the so-called artificial flows are to be distinguished from "natural" flows and hence are to be accorded some form of different legal treatment[5]. The difference in Bolivia's case is that this erroneous proposition is now supported merely by adjectives — assertions that the Silala is "unique", "particular" and "exceptional" — as opposed to any legal principle, however misconceived[6]. So, while the legal arguments that the Court needs to decide have been reduced, there has been no reduction in the number of issues in dispute.

5. Second, aware that it cannot articulate before you any tenable legal basis for its case on artificial flows, Bolivia has introduced various tortuous arguments as to the nature or existence or prematurity of a dispute, with the aim of making the case go away or at least showing that it has been acting reasonably; and it has asserted that there are shades of ambiguity in Chile's position, when in reality there are none.

6. The underlying desire on Bolivia's part is no doubt that the Court should do as little as possible and send these two States away as if they were two children in a playground, who just need to be told that they must co-operate. Yet the dispute is real; it is now *before* the Court, and there are real issues to be determined as between two States that have not enjoyed diplomatic relations since these were cut off by Bolivia in 1978. In particular, the Court must determine whether the Silala, in its entirety, is an international watercourse subject to the rules of international law reflected in the

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[2] CMB, paras. 79-80 and 109-110; RB, para. 79.

[3] CMB, para. 115.

[4] CR 2022/8, pp. 38-39, paras. 32-33 (Bundy).

[5] CR 2022/7, p. 46, para. 27 *(b)* (Forteau); pp. 53-54, paras. 10-11 (Pellet); CR 2022/8, pp. 38-39, para. 33; p. 42, para. 44 (Bundy).

[6] See e.g. CR 2022/7, p. 18, paras. 3-4 and p. 32, para. 53 (Eckstein) and CR 2022/7, pp. 53-54, paras. 8 and 11 (Pellet).

1997 United Nations Convention, and whether Chile is entitled to its current use of the waters of the Silala. It is the determination of these two issues that will settle the dispute reflected in the first three heads of relief sought by each Party as well as Bolivia's Counter-claims 2 and 3.

II. The existence of a real dispute

7. Now, turning in a little more detail to the issues on the dispute as presented by Bolivia in its opening last week, Professor Forteau's curious position was that there is in fact no dispute between the Parties or that the dispute is without object. Yet the dispute is manifest. Chile, in its first request for relief, seeks a declaration that "[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"[7].

8. Certainly, Bolivia has belatedly accepted that this is true to an extent, but there has been no retraction from the submissions to Bolivia's Counter-Memorial, where it is claimed:

> "*(a)* The waters of the Silala springs are part of an artificially enhanced watercourse;
>
> *(b)* Customary international rules on the use of international watercourses do not apply to the artificially-flowing Silala waters"[8].

9. The fundamental point of disagreement reflected in those competing submissions then follows through into the Parties' competing submissions on equitable and reasonable utilization. Whereas Chile claims that it is entitled to "the equitable and reasonable utilization of the waters of the Silala system in accordance with customary international law"[9], Bolivia seeks a declaration confining the application of this principle to the Parties' entitlement in respect of so-called "naturally-flowing Silala waters"[10], in contradistinction, of course, to the so-called "artificially-flowing Silala waters"[11]. There are then, of course, other issues in dispute, including as to the interpretation to be given to equitable and reasonable utilization and to the exchange of information and notification obligations.

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[7] MCh, Vol. 1, p. 117, Submission *(a)*.

[8] CMB, p. 105, Submissions *(a)* and *(b)*.

[9] MCh, Vol. 1, p. 117, Submission *(b)*.

[10] CMB, p. 105, Submissions *(c)* and *(d)*.

[11] CMB, p. 105, Submission *(b)*.

10. The fact that Chile does not object, and has never objected, to Bolivia removing the channels — the construction of which Bolivia has permitted on its territory — does not somehow negate the existence of the key dispute as to the law and legal principles that apply to the Silala[12]. At most, that fact reinforces the point that Bolivia's position is plainly untenable. It is a nonsense to say that an upstream State can unilaterally elect to drain ground water that would anyway flow to the downstream State, and thereby qualify that water for some special and more favourable legal treatment. It is all the more of a nonsense when the downstream State is saying that the drains can be removed as and when the upstream State wishes. With respect, I fear Professor Forteau is confusing two quite discrete matters: the absence of a tenable defence on Bolivia's part does not translate into the absence of a dispute.

11. In short, it was very puzzling to hear the submission, by reference to *Marshall Islands* v. *United Kingdom*, that there are no clearly opposed or irreconcilable views in this case[13]. Indeed, if that had really been the case, Bolivia would have lodged preliminary objections to jurisdiction, instead of making counter-claims that largely mirror its defences.

12. It was no less puzzling to hear that the dispute is without object — reference being made to *Nuclear Tests (Australia* v. *France)*[14]. There, of course, the Court found that it faced a situation "in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific"[15].

(a) But there has been no equivalent statement by Bolivia in this case, i.e. a statement that *all* the waters of the Silala are subject to the rules reflected in the 1997 Convention, and that Chile is indeed entitled to equitable and reasonable utilization of all those waters, irrespective of some manufactured distinction between so-called artificial and natural waters. Still less has there been a statement from Bolivia that Chile is entitled to its current use of the waters of the Silala.

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[12] CR 2022/7, p. 42, paras. 29-30 (Forteau).

[13] CR 2022/7, p. 48, para. 36 (Forteau).

[14] CR 2022/7, p. 48, para. 35 (Forteau).

[15] *Nuclear Tests (Australia* v. *France,) Judgment I.C.J. Reports 1974*, p. 253, para. 52.

(b) Instead, there has been a concerted attempt on Bolivia's part to mischaracterize Chile's claim as being to an acquired right and to an entitlement to crystallize the status quo[16] — all this in circumstances where Chile has been at pains to make clear that is *not* seeking to restrict any future uses of Bolivia or impinge in any way on a decision on Bolivia's part to remove the channels in its wetlands[17].

13. There are three further points to respond to on the Court's mandate to adjudge the current dispute.

14. First, the argument was made that the dispute was premature[18]. This was a brave submission in light of the fact that, in 2002, Bolivia itself was publicly considering cutting off the flow or, as an alternative, that a dispute be taken to this Court or to international arbitration[19]; and no less brave in light of the fact that Bolivia itself announced that it was bringing the dispute to this Court in 2016[20].

15. Second, Professor Forteau contended that the Court could not make declarations on purely hypothetical matters, and in this respect emphasized the absence of any act by Bolivia to interfere with the flows of the Silala[21].

(a) Well, the absence of what would be an obvious breach of international law is very welcome, but it does not somehow engage the Court's jurisprudence stemming from the *Northern Cameroons* case on the need for its judgments to have "some practical consequence in the sense that [they] can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations"[22]. That is precisely the practical consequence that Chile seeks in this case.

(b) And this, of course is not a case like *Northern Cameroons* or the *Interim Accord* case to which Professor Forteau was referring, where Greece argued that a determination would be devoid of any effect because the Court's judgment would not be able to annul or amend NATO's decision

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[16] CR 2022/7, p. 46, para. 27 *(b)*, and p. 50, para. 40 *(b)* (Forteau); p. 57, para. 19, and p. 58, para. 23, and p. 70, para. 57 (2) (Pellet).

[17] See e.g. RCh, para. 1.8 and APCh, para. 2.68.

[18] CR 2022/7, p. 39, para. 15 (Forteau); p. 52, para. 6 (Pellet).

[19] Press Release from the Ministry of Foreign Affairs of Bolivia, 26 Feb. 2002, MCh, Vol. 3, Ann. 49, p. 131.

[20] See e.g. CR 2022/7, p. 40, para. 17 (Forteau); p. 41, para. 18 *(a)* (Forteau).

[21] CR 2022/7, p. 49, para. 39 (Forteau).

[22] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 34.

on admission of the (then) Former Yugoslav Republic of Macedonia. There is nothing remotely equivalent in the current case, and it is anyway to be recalled that the Court rejected Greece's argument, holding that "a judgment of the Court in the present case would not be without object because it would affect existing rights and obligations of the parties under the Interim Accord and would be capable of being applied effectively by them"[23]. Well, just so here.

16. Third, Professor Forteau also referred to the passage in *Burkina Faso/Niger* where the Court was considering its powers to record, in the operative part of a judgment, an agreement arrived at between the parties before the proceedings were instituted. It distinguished this situation from previous cases whereby agreements were reached during the proceedings and the Court took them into account[24]. It was as if, in a parallel universe, when, in 2019, Chile did indeed seek an evidently reasonable and balanced settlement of this case after receipt of Bolivia's Rejoinder, Bolivia had taken the trouble to respond. But it did not. The Agent for Chile will have a little more to say on the details of the proposed agreement of 2019 later today, but the point for now is that there was no agreement reached, and the relevance of *Burkina Faso/Niger* is, to say the least, unclear.

III. The issues of fact relevant to the Court's determinations on surface and groundwater flows

17. I move to the issues of fact relevant to the Court's key determinations. To recall, there are only two facts relevant to the Court's determinations on the surface and ground waters of the Silala River. The first round, including the cross-examination of the experts, has served to confirm that these two facts are common ground. To recap:

(a) Fact one: as Bolivia accepted last week, the construction of the channels on Bolivian territory, said to generate the so-called "artificial" surface water flows and to have led to a deterioration in the Bolivian wetlands, were constructed by FCAB — an English company — pursuant to the 1908 licence granted by Bolivia. However much Bolivia focuses on alleged degradation of the wetlands in its territory, it remains the case that this is degradation for which Bolivia *alone* could be responsible. Likewise, Bolivia's unilateral decisions cannot somehow impact on the status of

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[23] *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.

[24] CR 2022/7, p. 48, para. 35 (Forteau), referring to *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 72, paras. 56-57.

the Silala or curtail the nature or content of Chile's rights under the customary rules reflected in the 1997 Convention. This remains the case, regardless of how Bolivia may seek to fit into its legal arguments its unilateral licensing of the construction — and its retention since 1997 — of the channels, that is, whether this is under the guise of some alleged exceptionality, or somehow shoehorned into a case on equitable and reasonable utilization.

(b) Fact two: as all experts agree, the Silala is a coupled surface and ground water system and, whether as surface water or groundwater, all the water will eventually flow to Chile. In the words of DHI's Mr. Jensen, last Friday: "the total amount of flow going from Bolivia into Chile — with and without the canals, groundwater and surface water — will not change"[25]. It follows from the expert agreement that the Silala is an international watercourse in its entirety and, as Bolivia has now accepted, that it cannot tenably be argued that an upstream State has exclusive sovereign rights over alleged artificial flows that would anyway have reached the downstream State as groundwater.

18. Of course, the Court has now heard from the experts on their areas of disagreement and, although in no way critical to the Court's reasoning, we do invite the Court to note seven short points.

19. First, it was remarkable quite how many times last week Bolivia sought to rely on the 131 l/s flow measurement taken by the FCAB's Mr. Fox, in or around 1922, at a point we now know as point C-7[26]; and one suspects that he would have been more than a little surprised by this moment of posthumous fame. Yet while DHI has compared this to a figure of 160 l/s in its reports, Mr. Jensen had to accept last Friday that the series of simultaneous manual measurements taken by Bolivia's Senamhi in 2017-2018 show flows that are consistent with, and in certain cases identical to Mr. Fox'. One can see that not least from DHI's own figure 17, which reveals an average of 131 l/s[27], measured at this point, C-7, by Bolivia's own water services institute.

20. Mr. Bundy suggested in re-examination on Friday that Mr. Jensen had been taken "to a number of selected . . . measurements from a 2017 and 2018 period at C-7"[28]. That is quite wrong.

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[25] CR 2022/11, p. 52 (Jensen).

[26] See e.g. CR 2022/7, p. 29, para. 48 (Eckstein).

[27] DHI Expert Report, CMB, Vol. 2, Ann. 17, p. 384, fig. 17.

[28] CR 2022/11, p. 46 (Bundy).

He was taken to the entirety of the so-called simultaneous measurements taken by Senamhi during its measurement programme of 2017-2018, so far as we were able to find these in Bolivia's annexes. Mr. Bundy also referred to table 7 in Annex G to DHI's 2018 report, which states the measured flow for C-7 as being 154 l/s, but this has been arrived at merely by adding the sum of two flow measurements from points upstream[29], whilst for some reason ignoring the actual manually measured flows at C-7, which are in the region of 131 l/s. And for completeness, in so far as Bolivia wishes to rely on Chile's cross-border flow figure of 170 l/s — you will recall it kept repeating that last week — the obvious point is that this is taken from a point more than 650 m downstream from Bolivia's point C-7 and is anyway just an average of measurements which range from 130 l/s to 230 l/s[30].

21. So, as was put to Mr. Jensen on Friday, there are only two relevant possibilities: either the 2017-2018 Senamhi manual measurements and the Fox measurements are correct, both being at or around 131 l/s, so there has been no change over the hundred years; or the 2017-2018 Senamhi manual measurements taken with modern equipment are wrong, in which case there is no conceivable basis on which it could be said that Mr. Fox, taking measurements 100 years ago with unknown methods, can somehow be taken as correct. The Court will recall that Mr. Jensen's position was that both Mr. Fox's and Senamhi's manual measurements were correct[31]. You can see that at the bottom, on your screens. You see the question, "And so do you agree then that Mr. Fox is correct and therefore one can take these figures as correct also?" And the answer from Mr. Jenson, "I believe, these are also correct, but not because Mr. Fox is correct." Even had he thought otherwise, it would not have mattered. The simple point is that by reference to Bolivia's own manual measurements of 2017-2018, Mr. Fox's measurements support the conclusions of Chile's experts that the channels have not led to a material change in flow.

22. My second point. Great weight was placed in Mr. Bundy's cross-examination of Dr. Wheater on the fact that Chile's experts had not undertaken field studies in Bolivia, and reference

[29] CMB, Vol. 2, Ann. 17, p. 387.

[30] Chile, Expert Report 1, pp. 23-25, figs. 10, 11 and 12, MCh, Vol. 1, pp. 151-153.

[31] CR 2022/11, p. 21 (Jensen).

was made to their failure to walk "a few metres or a few hundred metres across the border"[32], which Bolivia would apparently have agreed to. Yet, one only needs to look at the extent of the work done by Chile's experts on the Chilean side — the drilling of eight boreholes, installation of 164 wetland pieozometers, detailed spring surveys at over 30 sites, and so on — to see that this is wholly unrealistic, to assert that the two States would have been able to agree to Chile's experts conducting a meaningful exercise on Bolivian territory; whereas, as Dr. Wheater explained, Chile had the benefit of the fieldwork carried out by Bolivia's experts[33].

23. Third, as to the DHI model, while the revised estimates put forward by DHI with Bolivia's Reply are in the notably broad range of 11-33 per cent, Mr. Jensen gave two contradictory answers on Friday — to Judge Tomka and to the President — as to what that range represents[34]. It now appears that it does not represent a range at all, but rather the outcome of modelling two different scenarios — the so-called no-canal scenario and a restored scenario where peat has grown back at some unknown date in the future. Consistent with what Mr. Jensen said, this is indeed not clear from the DHI reports, which go on repeatedly about their having carried out a sensitivity analysis to get to the 11-33 per cent range[35], whereas in fact it now appears that these two figures just represent the modelling of two entirely different scenarios. This could scarcely be a more basic matter, and yet we are left confused as to what the DHI figures are actually intended to represent.

24. Fourth, the Court will recall that Chile had to request, and then insist on, the provision of the digital data that DHI had used in its models, Bolivia having initially refused to provide the data[36]. And the data, once supplied, showed that there had been various unexplained and unreported additions of water to DHI's modelling. The difficulty here is not just the failure to report and explain. Rather, all experts agree that the springs are entirely fed by groundwater[37]. Thus, if the model that DHI has created were functioning correctly, all water would enter the near field as groundwater

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[32] CR 2022/10, p. 13 (Bundy).

[33] CR 2022/10, p. 17 (Wheater).

[34] CR 2022/11, p. 54 (Jensen); CR 2022/11, p. 51 (Jensen).

[35] DHI, *Updating of the mathematical hydrological model scenarios of the Silala spring waters with: Sensitivity analysis of the model boundaries*, Apr. 2019, RB, Vol. 5, Ann. 25, pp. 55, 56 and 79-80; WSB, p. 2, para. 7, p. 8, para. 29, and p. 11, para. 42.

[36] Letter from the Court, dated 11 Dec. 2018 and transmitting Note from the Agent of Bolivia dated 11 Dec. 2018.

[37] RB, Vol. 5, Ann. 25, p. 75.

across the model boundary. There should be no need for the artificial addition of any water into the model.

(a) That DHI felt the need to add an unreported 42 l/s to the surface water in the baseline scenario, completely bypassing the groundwater and surface water interactions they were modelling, is evidence that their modelling had gone wrong and was not doing what it was supposed to do.

(b) The same basic point applies to the unreported additional 10 l/s of water that DHI has added, selectively, to the simulated results. Mr. Jacobsen suggested that this was to compensate for the difference in the 42 l/s and 31 l/s that DHI also adds[38]. But that cannot be right. The additional 10 l/s has been added directly to the results. It was not added as an input into the model. And, if DHI considered that an error had been made, the proper thing to do was to rerun the model to get correct results, and not to add arbitrary and unexplained amounts of water to the results the model had already produced.

25. Fifth, in answer to a question put by Judge Tomka on an unrelated matter, Mr. Jensen suddenly volunteered that the calculations on which Dr. Wheater was cross-examined last Thursday did not show the effects of the channels, but was instead, "a pure groundwater simulation that compares the level changes of the canals compared to the total water level difference in the catchment"[39]. And one wonders why the point was not put to Dr. Wheater, and one might also wonder whether one of the world's leading hydrologists is really prone to making simple errors; but put simply, Dr. Jensen's point is wrong. Dr. Wheater's simplified analysis assumes all groundwater discharges to the river system, showing the effects on river flows of a reduction of the wetland table by half a metre, due to the channels, and an additional 1 metre layer of peat. And the Wheater and Peach calculation does indeed show that the impacts are negligeable.

26. Sixth, in any realistic modelling of a situation where the channels only reduce the groundwater table by 10 to 45 cm, the inputs would be the same regardless of the scenario being modelled. The groundwater coming into the wetlands cannot magically increase depending on what given scenario is being modelled. Yet when one looks at DHI's Table 1 in its 2018 report[40], that is

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[38] CR 2022/11, pp. 27 and 29 (Jacobsen).

[39] CR 2022/11, p. 52 (Jensen).

[40] DHI Expert Report, Annex H (Expert flow scenarios), CMB, Vol. 5, Ann. 17, p. 67.

precisely what is happening. Compare the inflow figure of 253 l/s for the baseline scenario with the 221 l/s and 216 l/s figures for the other scenarios. So, the inflow into the baseline is much higher and — surprise, surprise — one might think, the modelled output is much higher too. DHI has sought to explain this anomaly by saying that some of the groundwater in the baseline could go other than through the modelled area. Chile's experts have explained that this cannot be correct and is based on a misunderstanding of the geology of the near field area. And, on Friday, on the issue of whether water could find its way around the modelled area, Mr. Jensen stated that "[w]e do not say this is correct", although, most puzzlingly, he went onto suggest that DHI was giving "a conservative estimate on the safe side"[41].

27. Finally, while any ecological degradation, that may be caused by works that Bolivia has licensed is a matter for Bolivia, Chile has made plain that it encourages Bolivia to restore the Silala wetlands, and time and again has emphasized that it could not complain about any drop in water flows or quality caused by dismantling the channels, assuming, of course, Bolivia complies with its international law obligations. Chile also recognizes that the Silala wetland is part — albeit a very small and hydrologically disconnected part — of the 1.4 million ha Los Lípez Ramsar site, which you can see on the screen[42]. On the left of the map, we have added the Silala River in blue and the Silala catchment area in green.

28. At the same time, Chile does note that such degradation as there is, may be caused by a number of factors and — were this an issue that the Court had to resolve — Chile would be noting the absence of a persuasive causal link between the channelization and any degradation. Such would not be supported by the evidence as understood by Drs. Wheater and Peach[43], including by reference to the nearby wetland on Chile's side of the border, and Bolivia's own studies accept that wetland degradation may be attributable to natural causes as well as man-made impacts like channel construction[44]. It may also be noted that the two reports by the Bolivian Foundation for the Development of Ecology (FUNDECO), state that wetland degradation began around 1908, that is

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[41] CR 2022/11, p. 51 (Jensen).

[42] Ramsar Convention Secretariat, *Report Ramsar Advisory Mission No. 84, Ramsar Site Los Lípez, Bolivia*, 2018. CMB, Vol. 5, Ann. 18, p. 115.

[43] WSCh, pp. 23-25.

[44] Appendix A2: Final Report, CMB, Vol. 3, Ann. 17, p. 439.

20 years before the channels were constructed[45]. In short, as Dr. Wheater explained in answer to a question from Judge Tomka:

> "There is no clear-cut evidence, in my opinion, to link the channels with the degradation. But that does not mean to say that there is [no] degradation. What it does mean is that if Bolivia wishes to restore the wetlands, they really need to take care and take account of all the factors, particularly climate variability . . . we've seen from our satellite imagery, the seasonal change and the interannual change in wetland extent depending on a seasonal precipitation."[46]

29. Madam President, Members of the Court, the Court does not need to go deep into the areas of disagreement between the experts. But to the extent it does so, the evidence of Drs. Wheater and Peach is plainly to be preferred.

30. Madam President, Members of the Court, that concludes my submissions. I thank you for your attention and ask you to hand the floor to Dr. Klein Kranenberg.

The PRESIDENT: I thank Mr. Wordsworth for his statement. And I now invite the next speaker, Ms Johanna Klein Kranenberg, to take the floor. You have the floor, Madam.

Ms KLEIN KRANENBERG:

THE FACTS ABOUT THE ORIGIN AND CONTENT OF THE DISPUTE

1. Madam President, distinguished Members of the Court, it is an honour to appear before you again, on behalf of the Republic of Chile.

2. Last week, I showed you that the channels in Bolivia were executed by an English company, FCAB, pursuant to a licence granted by Bolivia in 1908, from which it followed that the channels, and the alleged "artificial flow", are not in any way attributable to Chile. From this, it also follows that any degradation of the Silala wetlands in Bolivia, if caused by those channels — which is by no means certain — cannot in any way be attributed to Chile.

3. Chile has confirmed, and Bolivia agrees, that it is entirely within Bolivia's sovereign powers to dismantle the channels and to restore the wetlands in its territory, in compliance with any

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[45] DHI, *Technical Analysis and Independent Validation Opinion of Supplementary Technical studies concerning the Silala Springs*, Dec. 2018, RB, Vol. 3, Ann. 23.4, p. 142.

[46] CR 2022/10, p. 54 (Wheater).

applicable obligations of Bolivia under the Ramsar Convention, and customary international law, through the best means it sees fit. This should not, and can no longer, be contested.

4. Today, I will limit myself to addressing two matters on which Bolivia's counsel has tried to create confusion: the first related to the origins and content of the dispute between Bolivia and Chile, suggesting that Chile is just meddling in Bolivia's domestic affairs; and the second related to the 2009 draft preliminary agreement which never entered into force, but which Bolivia seems to claim has relevance for the Court's decision.

I. The origins of the dispute between Bolivia and Chile on the nature of the Silala River

5. I will start with the origins and content of the dispute. As Mr. Wordsworth has just explained, Bolivia has tried to create the impression that there is no real dispute between both States as concerns the Silala River. Bolivia has also suggested that instead:

(i) there is a dispute between Bolivia and a private company, FCAB, under Bolivian domestic law, related to the termination in 1997 of the 1908 Bolivian concession[47];

(ii) that Chile recognized as much, in public statements of that same year[48];

(iii) but that nevertheless Chile has "put itself in the place"[49] of the FCAB, defending FCAB's interests and compelling Bolivia to maintain the channels in its territory[50];

(iv) so that finally, really, Chile can have no real complaints against Bolivia, because there are no current competing uses in its territory[51].

All this to suggest that Chile had no genuine interest in the Silala River when it engaged the Court. This version of the facts distorts reality and obliges me to set the record straight.

6. On 8 May 1996, responding to allegations in the Bolivian press on the supposed diversion of the waters of the Silala into Chile, the then Foreign Ministry of Bolivia issued an official press release, stating as follows:

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[47] CR 2022/7, p. 36, para. 10 (Forteau).

[48] CR 2022/7, pp. 37-38, para. 11 *(c)* (i), (ii) and (iii) (Forteau).

[49] CR 2022/7, p. 12, para. 15 (Calzadilla Sarmiento).

[50] CR 2022/7, p. 13, para. 19 (Calzadilla Sarmiento).

[51] CR 2022/7, p. 38, para. 11 *(c)* (iv) (Forteau).

> "Under instructions from the Honourable Minister of Foreign Affairs of the Republic, Dr. Antonio Araníbar Quiroga, the Chair of the National Commission of Sovereignty and Boundaries presented a technical report on the international nature of said river.
>
> The Silala is a river that has its origin in a spring at the foot of the hill of the same name, in Bolivian territory, after which it crosses into Chilean territory."[52]

This was, of course, entirely correct and represented Bolivia's official position at the time.

7. No doubt catering to local pressures, the Foreign Ministry also said, that it "will include this issue on the bilateral agenda, given that the waters of the Silala River have been used since more than a century by Chile and not by Bolivia, whereas the Bolivian State should be the beneficiary of the revenues of those waters"[53]. As you can see, even though Bolivia appeared to see at the time that the Silala was a shared watercourse, the idea that it had a right to compensation for the uses in Chile was already taking shape.

8. Two weeks later, on 20 May 1996, the same Bolivian Foreign Minister Araníbar visited the Silala, heading a delegation of diplomatic and parliamentary representatives and the Minister of Defence. He again made short shrift of the idea that the waters had been diverted through the channels into Chile, but insisted that the issue of compensation should be included in the bilateral agenda with Chile[54]. This shows that, in the mind of Bolivia, the compensation issue was not conceived as dependent on the status of the Silala as an international river, but rather as an inherent right, to benefit financially from the uses of the waters in Chile.

9. Interestingly, this supposed inherent right to benefit from the uses in Chile still has echoes in Bolivia's position as of last week, when it claimed that Chile's past use of all the waters should be taken into account to determine Bolivia's future entitlement to equitable and reasonable use[55]. This should alert the Court that, even though Bolivia now recognizes that the Silala River is an international watercourse, as far as concerns its naturally flowing waters, and would prefer the Court to declare the dispute brought by Chile moot[56], Chile needs a decision from the Court that confirms

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[52] Press release from the Ministry of Foreign Affairs of Bolivia, in *El Diario* (La Paz), 8 May 1996. MCh, Vol. 3, Ann. 45, p. 58.

[53] MCh, Vol. 3, Ann. 45, p. 60.

[54] *La Época* (La Paz), "Bolivia Asks Chile for Compensation for Collecting the Waters of the Silala River", 21 May 1996. MCh, Vol. 3, Ann. 70, p. 356.

[55] CR 2022/8, p. 41, para. 39 (Bundy).

[56] CR 2022/7, p. 48, para. 35 (Forteau).

the application of the principle of reasonable and equitable use to *all* waters of the Silala, which does not consider any kind of right to compensation for past or future uses.

10. Coming back to the origins of the dispute, one week after the visit of Foreign Minister Araníbar to the Silala River, on 28 May 1996, Chilean Vice-Chancellor Mariano Fernández was quoted in the Bolivian press as saying — while reading from the 1908 Bolivian concession and apologizing for not being an expert in hydrology — that the matter of the concession was clearly for the Bolivian Government or the competent court in Bolivia to determine. He also said that "the issue of an eventual compensation for the centennial use of the waters — still studied by the Bolivian Foreign Ministry — is reduced to a negotiation with the current company that holds the alleged permit"[57], making clear that this was not a matter that concerned Chile or its relations with Bolivia.

11. One year later, on 14 May 1997, the 1908 Bolivian concession was terminated, officially because FCAB no longer was using the steam engines, for which the water had originally been granted[58]. I note in passing that, according to Professor Pellet, Bolivia had never been notified of the conversion of steam engines to diesels, probably to explain Bolivia's much-belated response to the change of uses of the waters of the Silala starting from the 1960s. Professor Pellet even suggested that Bolivia may not have been aware that steam engines were no longer the fashion, even though the railroad runs for approximately 700 km through Bolivian territory, was nationalized in Bolivia in the late 1960s, and has at different moments in time been operated in Bolivia, by Bolivia itself [59].

12. You can find the 1997 termination of the 1908 Bolivian concession under key 8 in your key documents folder that we handed out on the first day of the hearing. I call attention to the fact that the 1908 concession was not merely terminated, but that its adjudication was "reverse[d] and annul[led]", "rendering null and void the Public Deed No. 48/1908 of 28 October 1908", and that its registration was cancelled as if it had never existed, "notwithstanding the legal actions to procure compensation as deemed by Law"[60]. This must be the compensation to which Bolivia's Agent,

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[57] *El Diario* (La Paz), "The Silala 'is not a matter of discussion' for Chile", 28 May 1996. BCh, Vol. 2, Ann. 14, p. 232.

[58] Administrative resolution No. 71/97 by the Prefecture of the Department of Potosí, 14 May 1997. MCh, Vol. 3, Ann. 46, p. 62 (key document 8 in judges' folder).

[59] CR 2022/7, pp. 59-60, para. 25 (Pellet).

[60] MCh, Vol. 3, Ann. 46, p. 66 (key document 8 in judges' folder).

Ambassador Calzadilla, referred in his opening statement last Monday, which he said remains pending a solution until now[61].

13. Going back to 1997, after the termination of the 1908 concession, the Chilean Vice-Minister Mariano Fernández confirmed that the annulment of the concession did not give rise to a dispute between Bolivia and Chile about the waters of the Silala[62]. It is important to keep in mind that, up to then, Bolivia had never publicly stated that the Silala River is not a shared watercourse.

14. This position started to change in April 1999, when the Bolivian House of Deputies urged that the Bolivian Military Geographic Institute be instructed to "modify the maps in which the existence of an alleged river called Silala or Siloli is mistakenly portrayed, because in the area there are only water holes . . ., streams or springs that do not constitute a permanent watercourse", and they also considered it urgent to "instruct all divisions of the State to stop using the word 'river' when referring to the Silala springs, given that said confusion could bring serious problems to the national sovereignty"[63].

15. It was to these public statements that Chile responded by sending its first Note on the matter, on 20 May 1999[64]. Chile noted the erroneous statements made by the Members of Parliament and the Ministry of Foreign Affairs in relation to the Silala and affirmed its nature as an international and shared water resource.

16. To this, Bolivia responded by Note of 3 September 1999, from which I read extensively last week[65], and in which Bolivia made the point that the 1908 Bolivian concession was granted to a private company, and that "[i]t would be incomprehensible" for Chile to want to assume responsibility for any actions undertaken under that concession. However, in that same Note, Bolivia also, for the first time, referred to the "artificial works" that have "generat[ed] a system that lacks

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[61] CR 2022/7, p. 13, para. 18 (Calzadilla).

[62] *El Mercurio* (Santiago), "Clarification from the Chilean Chancellery: There is no conflict with Bolivia over the Silala River", 17 May 1997. CMB, Vol. 2, Ann. 15, p. 238.

[63] Bolivian House of Deputies, Bulletin No. 308, 27 Apr. 1999. MCh, Vol. 3, Ann. 47, p. 70.

[64] Note No. 474/71 from the General Consulate of Chile in La Paz to the Ministry of Foreign Affairs of Bolivia, 20 May 1999. MCh, Vol. 2, Ann. 26, p. 340.

[65] CR 2022/6, pp. 32-33, paras. 32-33 (Klein Kranenberg).

any characteristic of a river, let alone of an international river of a successive course", thus denying in terms the Silala River's international nature as a shared watercourse[66].

17. From then on, including in Chile's response by Note of 15 September 1999[67], the discussion between Bolivia and Chile centred on the nature of the Silala River as an international watercourse, leaving aside any issues related to the termination of the 1908 Bolivian concession, which both States agreed was a matter of Bolivian domestic law. Chile also only objected to the public tender process in Bolivia in the years 1999-2000, that adjudicated the waters of the Silala to the company DUCTEC, to the extent that the terms of that tender disregarded the shared nature of the Silala River[68].

18. At no point did Chile demand that Bolivia maintain the channels to the benefit of FCAB. As Professor Boisson de Chazournes already pointed out to you, last week on Wednesday[69] and as Mr. Wordsworth has recalled, a 2002 exchange of press releases cited by Bolivia's counsel in this regard, shows Bolivia threatening to cut off the flow of the Silala or, in the alternative, initiate legal actions against Chile[70], to which Chile responded by rejecting all measures that would obstruct the flow into Chile[71]. At no point did Bolivia express its intent to dismantle the channels, and clearly, Chile did not make any statements that could be interpreted as opposing such actions, which were not announced anyway.

19. Bolivia's counsel has also referred to Chile's Application to the Court in 2016 as effectively denying Bolivia's right to dismantle the drainage system and, therefore, as a response to the question that I posed last week, as to why Bolivia did not dismantle the channels after 1997[72]. That makes no sense. Chile's Application did not come until almost 20 years after the concession was terminated by Bolivia, following Bolivian threats to bring Chile before this Court, and anyway

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[66] Note No. GMI-656/99 from the Ministry of Foreign Affairs of Bolivia to the General Consulate of Chile in La Paz, 3 Sept. 1999. MCh, Vol. 2, Ann. 27 (key document 9 in judges' folder).

[67] Note No. 017550 from the Ministry of Foreign Affairs of Chile to the Ministry of Foreign Affairs of Bolivia, 15 Sept. 1999. MCh, Vol. 2, Ann. 28 (key document 10 in judges' folder).

[68] Note No. 022314 from the Ministry of Foreign Affairs of Chile to the Ministry of Foreign Affairs of Bolivia, 3 Dec. 1999. MCh, Vol. 2, Ann. 30.2; Note No. 006738 from the Ministry of Foreign Affairs of Chile to the Ministry of Foreign Affairs of Bolivia, 27 Apr. 2000. MCh, Vol. 2, Ann. 31.

[69] CR 2022/9, p. 12, para. 11 (Boisson de Chazournes).

[70] Press release from the Ministry of Foreign Affairs of Bolivia, 26 Feb. 2002. MCh, Vol. 3, Ann. 49.

[71] Press release from the Ministry of Foreign Affairs of Chile, 4 Mar. 2002. MCh, Vol. 3, Ann. 60.

[72] CR 2022/8, p. 32, para. 10 (Bundy).

concerns the status of the Silala and related rights, not the existence of channels that were built upon a licence granted by Bolivia on its territory. My "rhetorical" question, as Mr. Bundy chose to call it, remains unanswered.

20. In short, as the true chronology shows:

(i) there is a dispute between Chile and Bolivia that originated in 1999 and that is unrelated to any matters that may exist between FCAB and Bolivia under Bolivian law;

(ii) from the start, this dispute concerned the status of the Silala as an international watercourse, which was denied by Bolivia and affirmed by Chile;

(iii) as of today, there is still a dispute between Chile and Bolivia on whether the Silala River *in its entirety* is subject to the rules of customary international law and whether Chile's current use is in accordance with the principle of reasonable and equitable utilization; and

(iv) the maintenance of the channels in Bolivia was never part of the dispute and was never requested by Chile.

II. The 2009 draft preliminary agreement that never entered into force

21. I will now turn to the 2009 draft preliminary agreement that never entered into force. It was notable last week that, in the absence of sound legal principles to base its arguments, Bolivia placed great reliance on various drafts of a 2009 preliminary agreement that was never agreed. The principal aim appears to have been to link these 2009 drafts to the nature of Bolivia's entitlement to the reasonable and equitable use of the Silala.

22. Mr. Bundy referred to the 2009 drafts as "an indication of what they [Bolivia and Chile] considered equitable and reasonable at the time"[73]. For his part, Professor Pellet referred to the 2009 drafts to say that Chile had agreed to pay compensation for the use of the waters of the Silala[74]. With respect, both Mr. Bundy and Professor Pellet are wrong.

23. First, various draft preliminary agreements were exchanged in 2009, but none of these were finalized and concluded[75], and none can be relied on by the Court. As the Court confirmed in

[73] CR 2022/8, p. 37, para. 27 (Bundy).

[74] CR 2022/7, p. 42, para. 18 *(c)* (i) (Pellet).

[75] CMB, para. 39.

the *Nuclear Tests* cases, referring back to the decision of the Permanent Court of International Justice in the *Chorzów* case, "the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement"[76].

24. Second, these drafts aimed at establishing an interim solution and were predicated on there being a disagreement as to the status of the Silala River. This is clear from Article 1 of the 13 November 2009 draft, which stated as follows:

> "This initial agreement establishes the framework to work together with a view to moving forward in the convergence of the different points of view that have emerged between Chile and Bolivia over the Silala waters, considering that:
>
> *(a)* To Bolivia, the Silala waters are of its complete property and come from dozens of springs located within its territory; and the existing abstraction and canalization works are responsible for giving rise to the current surface runoff;
>
> *(b)* To Chile, the Silala waters flow naturally across the border and constitute a successive international watercourse, to which the criteria on equitable and reasonable uses are to be applied, under International Law, situation in which Bolivia is an upstream State and Chile the downstream one."[77]

25. Chile has not changed its position since 2009. However, Bolivia, thanks to the studies it has undertaken during the present proceedings, has evolved in its understanding of the Silala River, and now recognizes that it is an international watercourse — save for the so-called "artificial flow", which it appears still somehow to exempt from the rules of customary international law, otherwise applicable to international watercourses. In this, it is obviously wrong, as Professor McCaffrey pointed out in his presentation of last Wednesday[78]. Even Bolivia itself has been reluctant to make the argument with any clarity, consistency or force. So now that the predicament that underpinned the 2009 negotiations is no longer in place, there is nothing in the draft agreement that could be of any relevance today, even if it were somehow permissible to take account of what States put into drafts that they never finalize or agree to be bound by.

26. Third, a key reason for the failure of the negotiations was Bolivia's demand for compensation for past uses of the Silala in Chile, the so-called "historic debt". This first surfaced at

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[76] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 270, para. 54 (citing *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 51).

[77] Initial Agreement [Silala or Siloli], Agreed Draft, Santiago, 13 Nov. 2009. CMB, Vol. 2, Ann. 9.

[78] CR 2022/9, pp. 20-23, paras. 14-21 (McCaffrey).

the Twenty-Second Meeting of the Bolivia-Chile Political Consultations Mechanism, in July 2010[79], and resulted in Bolivia's proposal to incorporate a reference to compensation for past use of the Silala waters in the 2009 draft preliminary agreement[80]. Contrary to what Professor Pellet suggested in his presentation last week, Chile has never agreed to pay for the waters of the Silala, and Bolivia's "historic debt" claim sounded the death knell of the negotiations. As you were told by Professor Boyle, Bolivia's claim for payment is extraneous to international law and international practice[81].

27. Madam President, Members of the Court. I have come to the end of my presentation and I thank you for your kind attention. Madam President, I ask if you would please give the floor to Professor Laurence Boisson de Chazournes. Thank you.

The PRESIDENT: I thank Ms Klein Kranenberg. And I shall now give the floor to Professor Laurence Boisson de Chazournes. You have the floor, Professor.

Mme BOISSON DE CHAZOURNES :

LE PRINCIPE DE L'UTILISATION ÉQUITABLE ET RAISONNABLE ET LES DROITS ET LES OBLIGATIONS LIÉS À CE PRINCIPE TROUVENT APPLICATION

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.

2. Le Chili et la Bolivie conviennent tous deux que le Silala est un cours d'eau international mais la Bolivie soutient encore qu'une partie des eaux du Silala seraient des eaux artificielles bénéficiant d'un régime juridique particulier, ce que le Chili conteste vivement[82].

3. S'agissant des principes applicables aux cours d'eau internationaux, les deux Etats s'accordent pour considérer qu'ils incluent : l'utilisation équitable et raisonnable[83], l'obligation de coopération[84], l'obligation de prendre toutes les mesures appropriées pour prévenir et limiter la

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[79] Minutes of the Twenty-Second Meeting of the Bolivia-Chile Political Consultations Mechanism, 14 July 2010. MCh, Vol. 2, Ann. 24.

[80] Minutes of the First Part of the VIII Meeting of the Bolivia-Chile Working Group on the Silala Issue, Oct. 2010 (unsigned). CMB, Vol. 2, Ann. 10.

[81] CR 2022/9, pp. 27-30, paras. 15-22 (Boyle).

[82] CR 2022/9, p. 19-20, par. 13 (McCaffrey).

[83] CR 2022/7, p. 56-57, par. 17 (Pellet).

[84] CR 2022/7, p. 64, par. 38 (Pellet).

pollution[85], le devoir d'échanger des renseignements et celui de notification et consultation préalable en matière de mesures projetées[86], de même que l'obligation de conduire une étude d'impact sur l'environnement[87].

4. D'autres éléments d'accord entre le Chili et la Bolivie doivent être soulignés. Ainsi en est-il du caractère limité des ressources en eau, de la nécessité d'une gestion durable de celles-ci et de l'importance de protéger l'environnement[88]. Dans cette perspective, le Chili se félicite de l'annonce faite par la Bolivie d'avoir décidé de procéder à la revitalisation des *bofedales* classés comme «zone humide d'importance internationale» aux termes de la convention de 1971 relative aux zones humides d'importance internationale (aussi dénommée convention Ramsar)[89]. Le Chili est également partie à cette convention et compte seize sites classés «d'importance internationale»[90].

5. Comme M. McCaffrey l'a rappelé, l'affirmation selon laquelle le Silala «cannot be described purely as a *natural* international watercourse»[91] n'a aucune conséquence en droit international[92]. Le droit international coutumier s'applique à *toutes* les eaux du Silala, et cela même si la Bolivie use de contorsions verbales pour ne pas le reconnaître[93].

6. Les dissensions entre le Chili et la Bolivie portent notamment sur l'interprétation et l'application du principe de l'utilisation équitable et raisonnable et les obligations liées à ce principe~~,~~ en matière d'échange de renseignements et de notification préalable. Le Chili démontrera dans un premier temps que le principe de l'utilisation équitable et raisonnable peut et doit trouver application dans le présent différend (I). Le Chili soulignera ensuite les liens entre ce principe et d'autres obligations du droit relatif aux cours d'eau internationaux et rappellera leurs conditions d'application (II).

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[85] CR 2022/7, p. 66, par. 45-46 (Pellet) ; CR 2022/8, p. 11, par. 4-5 (Bundy).

[86] CR 2022/7, p. 64, par. 38-40 (Pellet) ; CR 2022/8, p. 11-12, par. 7, p. 18, par. 31 (Bundy).

[87] CR 2022/8, p. 18, par. 32 (Bundy).

[88] CR 2022/7, p. 59, par. 25 (Pellet).

[89] CR 2022/7, p. 61-62, par. 30 (Pellet).

[90] Voir le site de la convention de Ramsar : https://www.ramsar.org/wetland/chile.

[91] CR 2022/7, p. 18, par. 3 (Eckstein). Voir aussi p. 53-54, par. 10 (Pellet).

[92] CR 2022/6, p. 39-40, par. 19 (McCaffrey).

[93] CR 2002/8, p. 41, par. 41 (Bundy).

I. Le principe de l'utilisation équitable et raisonnable trouve application dans le présent différend

7. Les utilisations des eaux du Silala remontent au début du XX[e] siècle. La Bolivie n'a jamais contesté les utilisations conduites par le Chili et a elle-même utilisé ces eaux au cours du XX[e] siècle en octroyant une concession à la FCAB[94]. La Bolivie continue néanmoins d'affirmer que le Chili nierait «Bolivia's corresponding right to an equitable and reasonable use of the waters»[95] et réclamerait «l'immutabilité des situations existantes»[96]. La Bolivie soutient également que le droit à une utilisation équitable et raisonnable «is a one-way street only for the benefit of Chile» et que le Chili aurait «a permanent acquired right»[97]. En outre, pour la Bolivie, la demande du Chili de reconnaître que ses utilisations présentes sont conformes au principe de l'utilisation équitable et raisonnable équivaudrait à la reconnaissance d'«un *statu quo*»[98]. Le Chili n'a jamais eu de telles revendications. La demande du Chili que les utilisations présentes des eaux du Silala soient reconnues conformes au principe de l'utilisation équitable et raisonnable ne préjuge en rien des utilisations futures des eaux du Silala par la Bolivie. La demande du Chili se fonde sur la reconnaissance de son droit à une utilisation équitable et raisonnable des eaux du Silala et le Chili a très clairement dit que la Bolivie bénéficie également de ce droit[99].

8. Au contraire de ce que la Bolivie prétend, le Chili n'ignore pas le «Bolivia's right to use of the waters of the Silala»[100]. A plusieurs reprises, le Chili a souligné l'application du principe de la communauté d'intérêts et de droits, lequel prend appui sur «la parfaite égalité de tous les Etats riverains dans l'usage de tout le parcours du fleuve et l'exclusion de tout privilège d'un riverain quelconque par rapport aux autres»[101]. Tant le Chili que la Bolivie ont droit à une utilisation équitable et raisonnable des eaux du Silala.

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[94] CR 2002/6, p. 48-49, par. 15-16 (Boisson de Chazournes).

[95] CR 2022/8, p. 31, par. 8 (Bundy).

[96] CR 2022/7, p. 58, par. 23 (Pellet).

[97] CR 2022/7, p. 12, par. 14 (Calzadilla Sarmiento).

[98] CR 2022/7, p. 57, par. 19 (Pellet).

[99] CR 2002/6, p. 50, par. 21 (Boisson de Chazournes).

[100] CR 2022/7, p. 12, par. 14 (Calzadilla Sarmiento).

[101] *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 56, par. 85. *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 105, par. 281.

9. Le Chili ne veut pas créer d'obstacle à l'utilisation future des eaux du Silala par la Bolivie. Le Chili a bien indiqué lors des audiences du 1er avril 2022 qu'il «ne cherche pas à empêcher le développement et l'utilisation future des eaux du Silala par la Bolivie»[102], comme il l'avait déjà indiqué à plusieurs reprises dans ses écritures[103]. Cela reste donc un mystère pour le Chili que la Bolivie ait encore des doutes, à moins que cette attitude ne soit que pure stratégie contentieuse…

10. Madame la présidente, Mesdames et Messieurs les juges, le Chili demande que son droit à une utilisation équitable et raisonnable des eaux du Silala soit reconnu. Contrairement à ce que la Bolivie affirme, cette reconnaissance ne se fonde pas sur «l'équation rigide : «utilisation équitable = *statu quo*»»[104] ni sur la revendication d'«un droit acquis à conserver le bénéfice du flot du Silala dont il profite à l'heure actuelle»[105]. Ces affirmations tronquent la position du Chili. La Bolivie a d'ailleurs elle-même reconnu qu'elle «pren[d] acte» que le Chili a indiqué qu'il «ne demande pas à la Cour de préjuger ce que pourrait être une utilisation équitable et raisonnable du Silala à l'avenir, ni, en aucune manière, de figer l'exploitation et l'utilisation futures des eaux du Silala par l'un ou l'autre Etat»[106].

11. Pour conclure, la reconnaissance de la conformité des utilisations présentes des eaux du Silala au principe de l'utilisation équitable et raisonnable permettra d'assurer sécurité juridique et prévisibilité dans les relations entre la Bolivie et le Chili. Elle vise à empêcher que la Bolivie ne change encore une fois de position sur le droit applicable aux cours d'eau internationaux et à ce cours d'eau international en particulier.

12. En outre, au cours de ses plaidoiries, la Bolivie a tenu à réaffirmer qu'elle «bénéficie d'une compétence … pour utiliser les eaux du Silala et en réglementer l'usage»[107]. Le Chili n'a jamais mis en doute un tel droit souverain de la Bolivie. Cependant, cette compétence souveraine de la Bolivie doit s'exercer en application du droit international coutumier, en prenant notamment en compte le principe de l'utilisation équitable et raisonnable et les obligations d'échanger des renseignements et

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[102] CR 2022/6, p. 48, par. 14 (Boisson de Chazournes).

[103] Voir, par exemple, RCh, par. 1.15 ; MCh, par. 6.5.

[104] CR 2022/7, p. 57, par. 19 (Pellet).

[105] CR 2022/7, p. 70, par. 57 2) (Pellet). Voir aussi CR 2022/7, p. 50, par. 40 *b)* (Forteau).

[106] CR 2022/7, p. 50, par. 40 *c)* (Forteau).

[107] CR 2022/7, p. 55, par. 14 (Pellet).

de notification préalable. Ce n'est pas une condition posée par le Chili, il ne s'agit que du respect de la règle de droit.

13. La Bolivie tente également de réduire le poids du principe de l'utilisation équitable et raisonnable dans le présent différend en soulignant ses aspects généraux et en arguant que le Chili n'aurait pas expliqué son application concrète. Selon la Bolivie, le principe de l'utilisation équitable et raisonnable ne serait qu'une «directive très générale destinée à orienter le comportement des Parties sans leur imposer d'obligations de résultat précises»[108].

14. Le caractère général du principe de l'utilisation équitable et raisonnable tel qu'invoqué par la Bolivie ne réduit en rien sa pertinence dans la présente instance. Dans un différend bilatéral relatif aux utilisations d'un cours d'eau, l'affaire relative au *Projet Gabčíkovo-Nagymaros*, votre juridiction n'a pas hésité à appliquer le principe de l'utilisation équitable et raisonnable dans les relations entre les deux parties au différend[109]. Dans le cadre de ce différend, votre juridiction a appliqué ce principe en relation à des utilisations présentes, de même qu'en relation à des utilisations futures. Au contraire de ce que la Bolivie affirme, ce principe doit donc trouver application dans le cas présent.

15. L'affaire relative à des *Usines de pâte à papier sur le fleuve Uruguay* montre que le principe de l'utilisation équitable et raisonnable permet «un développement durable qui tienne compte «de la nécessité de garantir la protection continue de l'environnement du fleuve ainsi que le droit au développement économique des Etats riverains»»[110]. C'est dans cette perspective que les relations entre le Chili et la Bolivie doivent pouvoir se construire, en conformité avec le droit international.

II. Les droits et obligations liés au principe de l'utilisation équitable et raisonnable trouvent application dans le présent différend

16. L'application du principe de l'utilisation équitable et raisonnable va de pair avec celle d'autres principes, tels ceux relatifs à l'échange d'informations, la notification préalable et la conduite d'une évaluation de l'impact sur l'environnement.

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[108] CR 2022/7, p. 57, par. 17 (Pellet).

[109] *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 56, par. 85, et p. 80, par. 147.

[110] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 48, par. 75.

17. La Bolivie présente les demandes du Chili en matière d'échange d'informations et notification préalable comme des «demande[s] excessive[s]» qui ne trouveraient pas de justification dans le droit applicable[111]. Il a aussi été prétendu que les utilisations projetées des eaux du Silala par la Bolivie ne feraient surgir aucun risque de dommage significatif transfrontière pour le Chili et que ces activités «do not require an environmental impact assessment to be prepared, or notification or consultation with other States»[112].

18. L'affirmation de la Bolivie selon laquelle le Chili «cannot point to a single instance in which Bolivia would have interfered with Chile's use of those waters or caused the slightest transboundary harm to Chil***e***»[113] ne peut pas être utilisée par la Bolivie comme exutoire pour justifier son non-respect de ses obligations en matière d'échange d'informations et de notification préalable. Le fait que la Bolivie aurait respecté l'obligation de ne pas causer de dommage significatif ne signifie pas que la Bolivie a respecté *ipso facto* les principes relatifs à l'échange d'informations, à la notification préalable et à la conduite d'une évaluation de l'impact sur l'environnement.

19. Non contente de mettre ces obligations de côté, la Bolivie voudrait en modifier le contenu. Le Chili relève la position pour le moins ambiguë de la Bolivie qui d'un côté reconnaît la valeur coutumière de l'obligation générale de coopérer, reflétée dans l'article 8 de la convention des Nations Unies de 1997[114], et de l'autre nie l'application des principes codifiés aux articles 11 et 12 de cette même convention. Ces articles sont pourtant des concrétisations de l'obligation générale de coopérer. Comment la Bolivie peut-elle respecter son obligation générale de coopérer sans fournir la moindre information sur ses utilisations des eaux du Silala ?

20. Votre juridiction a reconnu que «c'est en coopérant que les Etats concernés peuvent gérer en commun les risques de dommages à l'environnement qui pourraient être générés par les projets initiés par l'un ou l'autre d'entre eux, de manière à prévenir les dommages en question»[115]. L'absence de réponse par la Bolivie aux demandes d'informations du Chili ne constitue pas une expression de

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[111] CR 2022/7, p. 68, par. 52 (Pellet).

[112] CR 2022/8, p. 18, par. 32 (Bundy).

[113] CR 2022/7, p. 12, par. 12 (Calzadilla Sarmiento). Voir aussi CR 2022/7, p. 70, par. 57 3) (Pellet) ; CR 2022/8, p. 11-12, par. 7, p. 15, par. 21, p. 16-17, par. 25 (Bundy).

[114] CR 2022/7, p. 64, par. 38 (Pellet).

[115] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 49, par. 77.

volonté de coopérer par la Bolivie et met en échec les obligations en matière d'échange d'informations et de notification.

21. La Bolivie allègue en outre, non sans une certaine malice, que le Chili aurait attribué une valeur coutumière à toutes les dispositions de la convention de 1997 et ne distinguerait pas les obligations contenues dans les articles 11 et 12 de la convention[116]. Pourtant les pièces écrites du Chili établissent cette distinction avec beaucoup de clarté[117].

22. Permettez-moi de donner quelques indications sur le contenu de ces deux articles. La Commission du droit international a précisé à propos de l'article 11 que l'obligation de fournir des renseignements sur les mesures projetées vise à informer les Etats d'un cours d'eau international «des effets positifs aussi bien que négatifs que pourraient avoir les mesures projetées»[118]. La Commission ajoute qu'un tel échange d'informations «évite les problèmes immanquablement liés à toute *évaluation unilatérale* de la nature exacte de ces effets»[119]. L'article 11 de la convention énonce bien une obligation générale pour les Etats riverains à communiquer les uns avec les autres. La Bolivie refuse toutefois d'accepter cette obligation sous le couvert que «the activities in question are insignificant» et que «[t]here was absolutely no risk of significant harm or any harm»[120]. Or, la mise en œuvre de l'obligation d'échanger des informations concernant les mesures projetées n'est pas liée à un risque de dommage. C'est une application de l'obligation générale de coopérer ainsi que du devoir de *due diligence* en matière de protection de l'environnement.

23. S'agissant de l'article 12 de la convention des Nations Unies de 1997, remarquons d'emblée que son libellé est différent de celui de l'article 7 de la convention portant sur l'obligation de ne pas causer un dommage significatif. Comme la Commission du droit international l'indique, «[l]e seuil qu'établit ce critère [de l'article 12] est censé être inférieur aux «dommages significatifs» visés à l'article 7. Un «effet négatif significatif» peut donc ne pas atteindre le niveau de «dommage

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[116] CR 2022/7, p. 51-52, par. 3, et p. 64, par. 39 (Pellet).

[117] MCh, par. 5.27-5.28.

[118] 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, par. 3 du commentaire de l'art. 11.

[119] *Ibid*. (Les italiques sont de moi.)

[120] CR 2022/8, p. 18, par. 32 (Bundy).

significatif» au sens de l'article 7.»[121] La Commission précise que «le dommage significatif» n'est pas le critère voulu pour déclencher l'article 12 de la convention. Et la Commission d'ajouter que le critère des «effets négatifs significatifs», prévu à l'article 12, permet à l'Etat qui projette des mesures d'éviter d'admettre qu'une mesure projetée risque de causer un «dommage significatif» au sens de l'article 7[122].

24. Dans le contexte de la présente instance, la Bolivie répète à l'envi que le Chili n'a démontré aucun dommage qu'elle aurait causé aux eaux du Silala, car ses activités autour du fleuve Silala seraient «very few and extremely modest»[123] et que «none of Bolivia's very limited activities have ever given rise to a risk of transboundary harm»[124]. Cependant, comme nous venons de le voir, au titre du droit international coutumier, le fait que la Bolivie n'ait pas causé de dommage significatif ou un risque de dommage significatif au Chili ne la dispense pas de ses obligations en matière d'échange d'informations et de notification sur les mesures projetées. La Bolivie ne peut pas évaluer unilatéralement les risques de projets d'utilisation des eaux et n'échanger aucune information avec le Chili à leur propos. Il est d'ailleurs à remarquer que la Bolivie a reconnu — au moins une fois — son devoir de transmettre des informations et celui de notifier, cela en réponse à une note du Chili relative au poste militaire du Silala et à la construction des dix maisons[125].

25. Les obligations en matière d'échange d'informations et de notification préalable permettent de prévenir des dommages. Au contraire de ce que la Bolivie affirme, le Chili ne considère pas le principe de prévention comme «a one-way street [obligation]»[126]. Tant la Bolivie que le Chili sont liés par l'obligation de *due diligence* requise en vertu du droit international général. L'importance de cette obligation a été soulignée par votre Cour[127]. La Cour a notamment insisté sur

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[121] 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, par. 2 du commentaire de l'art. 12.

[122] *Ibid*., p. 118.

[123] CR 2022/7, p. 16, par. 31 (Calzadilla Sarmiento).

[124] CR 2022/8, p. 16, par. 21 (Calzadilla Sarmiento).

[125] Note diplomatique du 24 mars 2017. MCh, vol. 2, annexe 39.2. CR 2022/6, p. 53 par. 29 (Boisson de Chazournes).

[126] CR 2022/8, p. 17-18, par. 29 (Bundy).

[127] Voir, par exemple, *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* et *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015 (II)*, p. 706-707, par. 104 ; *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 55-56, par. 101.

«la vigilance et la prévention» qui découlent de l'obligation de *due diligence* en raison du «caractère souvent irréversible des dommages causés à l'environnement»[128]. L'échange d'informations et la notification donnent corps à l'obligation de *due diligence*.

26. Tel est aussi le cas de la conduite d'une étude d'impact sur l'environnement[129]. La nature, l'ampleur et le contexte d'un projet doivent être pris en compte[130]. Le contexte écologique d'un projet est bien l'une des considérations à prendre en considération en matière d'étude d'impact sur l'environnement.

27. Madame la présidente, Mesdames et Messieurs les juges, les conditions d'aridité particulières dans la région des eaux du Silala devraient conduire les Parties à mettre en œuvre les obligations auxquelles le Chili et la Bolivie sont tenus. La Bolivie tente pourtant de réduire l'importance et le contenu du droit international coutumier. En rappelant le rôle du droit international général en matière de gestion et protection des cours d'eau internationaux, votre juridiction permettra d'assurer l'égalité de droits entre Etats riverains et contribuera à asseoir stabilité et prévisibilité.

28. La position de la Bolivie selon laquelle le droit international coutumier applicable aux cours d'eau internationaux ne serait qu'un «maillage assez lâche de[s] règles … communes»[131] met en danger la sécurité juridique des relations entre les Etats riverains. Nombre de cours d'eau internationaux ne sont pas réglementés par des traités ou ne le sont que de manière partielle. Dans ces situations, les principes de droit coutumier jouent très certainement un rôle important dans la gestion et la protection des cours d'eau internationaux ainsi que votre Cour l'a indiqué à de nombreuses reprises.

29. Mesdames et Messieurs les juges, je vous remercie de votre attention et vous prie, Madame la présidente, de donner la parole à Mme Ximena Fuentes Torrijo, agente de la République du Chili.

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[128] *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 78, par. 140.

[129] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 83, par. 204.

[130] *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* et *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015 (II)*, p. 707, par. 104.

[131] CR 2022/7, p. 54, par. 12 (Pellet).

The PRESIDENT: I thank Professor Boisson de Chazournes for her statement. I shall now give the floor to the Agent of Chile, H.E. Ms Ximena Fuentes Torrijo. You have the floor, Your Excellency.

Ms FUENTES TORRIJO:

CLOSING STATEMENT BY THE AGENT OF CHILE

I. The issues in dispute

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. It is plain that, in response to Chile's claims, Bolivia has tried to muddy the waters in this case. That may seem consistent with the subject-matter of the dispute, but it is still nothing more than a classic defensive strategy. The dispute concerns the legal status of the waters of the Silala River system, the right of Chile to the equitable and reasonable utilization of this shared watercourse, as well as the substantive and procedural obligations involved with planned measures and activities that may affect the waters of the Silala or Chile's utilization of this international watercourse. Bolivia has no coherent legal answer to the issues raised.

2. Bolivia claimed that the Silala was not an international watercourse. After having abandoned its original position, Bolivia asserted exclusive sovereign rights over a portion of the waters of the Silala, seeking to exclude the alleged 11 to 33 per cent of the so-called "artificial flow" from the scope of application of the rule of equitable and reasonable utilization. It is now in full retreat from that position, maintaining the broad outlines of its defences and counter-claims, but with the interior legal argument abandoned.

3. As to the right of Bolivia to the equitable and reasonable use of the waters of the Silala River system, this Chile has never put into question.

II. The Silala River dispute requires a decision by the Court

4. As explained by my colleagues, the dispute that divides the Parties and that the Court has been called to decide, has developed since the end of the 1990s up to now. Yet, Mr. Forteau has

described Chile's decision to go to the Court as premature[132]. He downplayed Chile's reasons to come before the Court, pointing to the fact that Chile has continued to receive the waters of the Silala[133]. Mr. Forteau also asserted that Chile has put too much weight on declarations of the authorities of Bolivia regarding the status of the waters of the Silala that were merely political in nature, devoid of any legal effects[134]. And he also made the remarkable statement that these "premature" proceedings, as he describes them, might pose a risk to aggravate the tensions between the two States[135].

5. The fact that Chile has come before the Court in search of a decision that resolves a dispute with its neighbour, Bolivia, cannot conceivably be seen as hostile or unfriendly. In this connection, I recall that General Assembly resolution 3283 (XXIX) on peaceful settlement of international disputes clearly states that "recourse to peaceful settlement of international disputes shall in no way constitute an unfriendly act between States"[136].

6. Madam President, Members of the Court, Chile has come before the Court because it has proven to be impossible to bring an end to the dispute through an agreed settlement. This is not the first time that Chile and Bolivia have had contradictory views on the utilization of international watercourses. In the specific context of Chile-Bolivian relations, this kind of dispute has a demonstrated potential for aggravation and, therefore, a judgment by the International Court of Justice should be welcomed, not avoided or minimized, as Bolivia seems to desire.

7. To take an example that is not before the Court, there is another long-standing dispute between Chile and Bolivia over the Lauca River, where Chile is the upstream and Bolivia the downstream State. The Lauca is another shared watercourse as to which both Chile and Bolivia have the right to its equitable and reasonable use. However, in 1962 Bolivia claimed that Chile was prevented from using the Lauca's waters without Bolivia's prior authorization. As Chile proceeded with its plans to use a portion of the waters of the Lauca River, in April 1962 Bolivia broke diplomatic relations with Chile and asked for an urgent meeting of the Organization of American States Council,

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[132] CR 2022/7, pp. 40-41, paras. 17-18, p. 44, para. 21 (Forteau).

[133] CR 2022/7, p. 39, para. 15 (Forteau).

[134] CR 2022/7, p. 40, para. 17 (Forteau).

[135] CR 2022/7, pp. 43-44, para. 19 (Forteau).

[136] UN General Assembly resolution 3283 (XXIX), 12 Dec. 1974, UN doc. A/RES/3283 (XXIX).

charging Chile with an act of aggression against its territorial integrity that, in its view, threatened the maintenance of peace in the American continent and triggered the application of Article VI of the Inter-American Treaty of Reciprocal Assistance[137]. Diplomatic relations between Chile and Bolivia have not been restored since then, except for a short period between 1975 and 1978. With respect, it appears infinitely preferable that the resolution of at least the dispute over the Silala River be achieved through peaceful settlement before this Court, as it now will be.

8. Indeed, Chile and Bolivia share more than 16 watercourses and a number of transboundary aquifers. Each of these transboundary shared water resources is located in the extremely arid Atacama Desert — sometimes Chile is the downstream State and sometimes Bolivia. While it may be obvious that Chile and Bolivia should co-operate with regard to their shared water resources, unfortunately co-operation has not been easy. Indeed, it is very difficult to talk about shared water resources, when one of the parties, as is the case with Bolivia, has contended that, as the upstream State, it is entitled to exclusive sovereign rights over some or all of the waters of the Silala River, and as the downstream State, claims a right of veto over upstream uses of the Lauca River.

9. Taking into consideration the difficult reality of Chile-Bolivia relations, it is regrettable that Bolivia does not appreciate the importance of a declaratory judgment from the Court, that would resolve this dispute regarding the status of the Silala as an international watercourse, and the rights and obligations that follow therefrom. When interpreting its Judgment No. 7 in the *Factory at Chorzów* case, the Permanent Court of International Justice emphasized the role of a declaratory judgment in the resolution of international disputes, by stating that "[its] intention . . . is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned"[138].

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[137] Letter sent by Bolivia to the President of the Council of the Organization of American States, dated 14 Apr. 1962, in *Denuncia de Bolivia ante la O.E.A sobre el Río Lauca*, Ministerio de Relaciones Exteriores y Culto, La Paz, Bolivia, available at https://repositorio.umsa.bo.

[138] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20; see also: I. Brownlie, "Remedies in the International Court of Justice", in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, Cambridge: CUP, 1996, p. 564; C. Gray, "Remedies", in *The Oxford Handbook of International Adjudication* (1 Dec. 2013), p. 876.

10. And, of course, it is clear that the Parties have been unable to resolve the Silala River dispute without the Court's assistance, even if, during the course of these proceedings Chile made a last attempt to reach an agreed settlement with Bolivia.

III. The 2019 Chilean proposal to settle the dispute (draft agreement of 2019)

11. As to this, during my opening speech in these oral hearings, I noted that in June 2019 Chile proposed the terms of a settlement, but it received no reply from Bolivia[139].

12. Nonetheless, and we consider it important that the Court appreciate this, the 2019 Chilean proposal was nothing if not very balanced and reasonable. It reflected the fact that, during these proceedings, Bolivia had largely conceded that the Silala is an international watercourse and had abandoned the so-called "historic debt" claim. Moreover, it had been agreed that all the waters of the Silala, whether as groundwater or as surface water, flow down the gradient to Chile.

13. By letter addressed to the Registrar dated 5 April 2022, Chile asked the Court permission to submit the text of the 2019 Chilean proposal. In accordance with Article 56 of the Rules of Court, and having received the consent of Bolivia, the Court granted such permission.

14. The terms of the proposal that Chile submitted for the consideration of Bolivia were the following:

— To begin with, the preamble states that:

> "[B]oth Parties recognize that the Silala is an international watercourse shared between Bolivia and Chile, which waters, both subsurface and surface, are governed by customary international law, and in particular by the rule according to which both riparian States are entitled to an equitable and reasonable utilization of its waters and the obligation to prevent the causing of significant harm to other riparian States". (This is the second paragraph of the preamble.)

— Accordingly, paragraph 2 states that: "Both Bolivia and Chile are entitled to the equitable and reasonable use of the waters of the Silala River system in accordance with customary international law."

— On its part, paragraph 3 states that: "Chile's current use of the waters of the Silala River is in accordance with the principle of equitable and reasonable utilization."

— Then, paragraph 4 *(b)* refers to Bolivia's prospective uses in the following terms:

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[139] CR 2022/6, p. 23, para. 26 (Fuentes Torrijo).

> "If in the future Bolivia plans to initiate new uses of the waters of the Silala River, these shall be assessed in order to prevent any significant harm to Chile and, together with other relevant factors, Chile's existing uses of these waters within its territory should be taken into account. Likewise, the Parties shall comply with the obligation to exchange information and to consult with the other Party, as well as with the obligation of cooperation between both States."

All that is entirely consistent with the customary principles reflected in the 1997 United Nations Convention.

— Finally, paragraph 5 of the proposed agreement refers to the channelization in Bolivian territory, and it reads:

> "Bolivia has sovereignty over the channels and drainage mechanisms in the Silala that are located in its territory and has the right to decide regarding its maintenance, insofar as in the exercise of its sovereignty it complies with its international obligations regarding the Silala River system as an international watercourse. In particular, Bolivia will inform and consult with Chile regarding any planned measures for the dismantling of the channels and drainage mechanisms and/or the restoration of the wetlands in its territory and shall take all the necessary measures to prevent any significant harm to Chile in the execution of those works."

15. I also ask the Court to read, in due course, the letter accompanying the proposed agreement to see if that was in any way unreasonable, as was being suggested last week. Of course, it was not. And the key point for now, as the Court knows, is that Bolivia never responded. So, there has inevitably been this hearing and, inevitably, the Court must now determine all the issues in dispute.

16. The dispute is now before the Court and a judgment is necessary to resolve the dispute between the Parties about the status and use of the waters of the Silala River. Chile welcomes the judgment of the Court.

IV. Final submissions

17. With this I conclude the second round of oral pleadings by the Republic of Chile. In accordance with Article 60, paragraph 2, of the Rules of Court, I will now read the final submissions of the Republic of Chile, the signed text of which I have submitted to the Court:

> "Chile requests the Court to adjudge and declare that:
>
> (a) The 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;
>
> (b) Chile is entitled to the equitable and reasonable utilization of the waters of the Silala River system in accordance with customary international law;

(c) Under the standard of equitable and reasonable utilization, Chile is entitled to its current use of the waters of the Silala River;

(d) Bolivia has an obligation to take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from its activities in the vicinity of the Silala River;

(e) Bolivia has an obligation to cooperate and to provide Chile with timely notification of planned measures which may have an adverse effect on shared water resources, to exchange data and information and to conduct where appropriate an environmental impact assessment, in order to enable Chile to evaluate the possible effects of such planned measures. Obligations that Bolivia has breached so far as concerns its obligation to notify and consult Chile with respect to activities that may affect the waters of the Silala River or the utilization thereof by Chile."

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 in relation to its own claims. Your statement brings to an end Chile's second round of oral argument on its own claims. I recall that on Wednesday 13 April 2022, between 3 p.m. and 6 p.m., Bolivia will present its second round of oral argument, including counter-claims, and that on Thursday 14 April 2022, between 3 p.m. and 4 p.m., Chile will present its reply to the counter-claims of Bolivia.

The sitting is adjourned.

The Court rose at 4.45 p.m.

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