

INTERNATIONAL COURT OF JUSTICE

**THE RIVER COMMISSION AND SUSTAINABLE DEVELOPMENT
OF SHARED WATER RESOURCES
JUDGMENT OF 20.4.2010. PULP MILLS ON THE RIVER URUGUAY
(ARGENTINA C. URUGUAY)**

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In 2009 and 2010 the International Court of Justice dealt with the river problems of Latin America. Firstly a dispute involving Costa Rica against Nicaragua, concerning commerce navigation on the San Juan River, was resolved. The Court's judgment was rather conservative because it merely analysed a bilateral treaty of 1858 and failed to take into account the changes in customary general international river law which were achieved during the following century. This was the situation when banks of the river belonged to Nicaragua and Costa Rica and both States enjoyed navigation rights for commercial purposes. The situation however is more progressive than as regards the Oder river, where navigation on the whole river was not regulated by the treaty of the three bank countries. The second case resolved by the International Court of Justice dealt with pulp mills on the river Uruguay ending a dispute between Argentina v. Uruguay.

The legal grounds for utilization of the River Uruguay are contained in a bilateral treaty concluded between Argentina and Uruguay on 7.4.1961 as a boundary treaty which laid down the grounds for creating the regime

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for river use that was finalized in the Statute of the River Uruguay signed by Argentina and Uruguay at Salto on 26.2.1972. This represents the most modern solution for governing river utilization because the Statute regulates navigation and non-navigational uses of the river and establishes a river commission responsible for all forms of river utilization. The river commission is called the Administrative Commission of the River Uruguay and is generally known in the abbreviated form as CARU from the Spanish acronym for Comisión Administradora del Río Uruguay.

The Statute requires its signatory States “a) to protect and preserve the environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies; b) not to reduce in their respective legal systems: 1. the technical requirements in force for preventing water pollution, and 2. the severity of the penalties established for violations; c) to inform one another of any rules which they plan to proscribe with regard to water pollution in order to establish equivalent rules in their respective legal systems”. The functions and structure of the commission are laid down in Articles 7–12 of the Statute. These impose a procedural obligation on the parties to notify the Commission of any planned construction of new channels, modification or alteration of existing channels or the carrying out of other works which are liable to affect navigation, the regime of the river or the quality of its waters if such works might cause damage to the other party. A maximum period of 30 days was specified for the giving of such notice. The Commission transfers information concerning the main aspects of the work and all relevant technical data. The notified party has 180 days to respond and, in the absence of any objections, the other party may carry out the planned work. The other party is entitled to inspect the works so as to ascertain their conformity with the previously submitted plan. In the event that the notified party objects to the planned works, such objection shall be notified within the period of 180 days. Article 12 stipulates that if the parties fail to reach agreement within 180 days the case shall be brought before the International Court of Justice for resolution of the problem.

In evaluating the role of the Commission, the International Court of Justice in its judgment of 20.4.2010 stated that the CARU plays

a central role in the 1975 Statute and that the parties may not depart from that framework unilaterally.

Information concerning the Orian (Botnia) works was notified to Argentina on 27.10. and 7.11.2003, whereas the initial environmental authorization had already been issued on 9.10.2003. In consequence the Uruguayan legislation issued in relation to these works was in contravention of the procedural obligations derived from the 1975 Statute.

The Court quoted Article 27 of the Vienna Convention on the Law of Treaties which stipulates that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. The understanding of 2.3.2004 between the foreign ministers of Argentina and Uruguay did not have the effect of exempting Uruguay from its duty to comply with the procedural obligations laid down by the 1975 Statute because the information required to be sent by Uruguay to the CARU was not in fact transmitted and, subsequently, information concerning the planned works dealt only with measures relating to the monitoring and control of the environmental quality of river waters in the areas of the pulp mills and was, accordingly, insufficient in the light of Article 7 of the 1975 Statute.

According to the ICJ, Uruguay had disregarded the whole mechanism of cooperation stipulated in Articles 7 to 12 of the 1975 Statute. However this did not mean that Article 9 prohibited any construction because those articles deal only with procedural matters.

Article 2 of the 1975 Statute aims to reconcile the varied interests of riparian States in a trans-boundary context and, in particular, the use of a shared natural resource and to strike a balance between the use of waters and the protection of the river consistent with the objective of sustainable development. The Court decided that Parties are under an obligation to co-ordinate their activities with the aims of the general system of protection of the River Uruguay established by the 1975 Statute.

The location of the Fray Bentos pulp mills was consulted between June and November 2005 in 80 meetings conducted under the auspices of the Consensus Building Institute, a non-profit organization specializing in the facilitation of dialogue, mediation, and negotiation, which was contracted by the International Finance Corporation, acting on behalf of the investors.

These facts led the ICJ to conclude that the Eastern Republic of Uruguay had breached its procedural obligations under Articles 7 to

12 of the 1975 Statute of the River Uruguay and, consequently, that the fact of revealing such breach constituted appropriate satisfaction. This decision was supported by a solid majority of judges, since only *ad hoc* judge S. Torres Bernandez was against its adoption.

The judgment in the dispute between Argentina and Uruguay in the pulp mills case represents the second instance in which the ICJ has dealt with the environmental protection of a river. The first case concerned the Gabčíkovo-Nagymaros Project (Hungary/Slovakia). In the pulp mills case, the ICJ confronted evidence provided by the parties in order to resolve the substantive charges of Argentina in this matter. The Tribunal came to the conclusion that the standards of oxygen in the river were deteriorated by the functioning of the Benton pulp mill. The negative opinion on the influence of the installation on the river was reached by the Court in the context of an algae bloom which had occurred without any influence being attributable to the Benton pulp mills. The same conclusion was achieved as regards phenolic substances, since there was insufficient evidence to attribute the alleged increase in concentration levels of phenolic substances in the river to the operations of the Orion (Botnia) mill. The Court concluded that the presented evidence did not substantiate the claims made by Argentina as regards the presence of nonylphenolsin in the river environment, allegedly resulting from the functioning of the pulp mills. The same conclusion was arrived at as regards dioxins and furans. The Court also admitted that the record failed to indicate any clear relationship between discharges from the Botnia pulp mills and the malformation of rotifers or dioxin found in sábalo fish, or the loss of fat by clams in the Uruguay river. In conclusion, the ICJ decided that there was no evidence that Uruguay had failed to show the requisite degree of diligence, nor that the discharges from the Botnia mill had deleterious effects or had caused harm to living resources and to the quality of the water and ecological balance of the river. It is important to note that the Court was of the opinion that there exist continuing obligations as regards the monitoring and functioning of the CARU. These arguments underpinned the decision that the Eastern Republic of Uruguay had not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay. Eleven judges voted in favour of the decision, with three votes against.

The ICJ's judgment in the Botnia pulp mills case was characterized in the dissenting Opinion of judges Al-Khasawneh and Simma as "one of the

most exceptionally fact-intensive cases the Court has been entrusted to resolve”¹. They suggested that, under Article 50 of the Statute, the ICJ should appoint its own experts from the very start of a dispute. The case was considered to involve a complex scientific dispute.

Incidentally, the ICJ stressed the connections between the dispute and the principle of sustainable development. However, the Court did not utilize the opportunity to hand down a judgment containing detailed discussion of the principles of environmental protection, nor to contribute to the theory and practice of international environmental law. Such an approach was, however, to be found in the separate opinion of judge Cançado Trindade, who focused on principles of environmental law such as the principle of prevention, the precautionary principle and the principle of justice to future generations. In his opinion such an approach was legitimate since both parties to the dispute had argued on the basis of general principles of environmental law. However one must remember that, in accordance with Article 38 of the Statute of ICJ, the Court can base its judgment on general principles of law only when the matter is not regulated by treaty or custom. Since this case involved the interpretation of a treaty, general principles of law were used solely in order to identify the axiological values underpinning the Statute of the River Uruguay.

A comparison of the manner in which disputes on maritime matters and environmental disputes are resolved leads to the conclusion that, in the future, the latter should be resolved by a special tribunal similar to the International Tribunal of the Sea specializing in environmental disputes, with the International Court of Justice remaining merely a Court of last resort. Furthermore, there should also be an obligation to refer certain environmental disputes to arbitral tribunals.

¹ Joint dissenting opinion, p. 3.