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Research Article

Principles of International Water Law in Protection of Transboundary Watercourses: The Key Role of the Obligation Not to Cause Significant Harm

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Abstract

The management of the world 263 shared river basins is often problematic nowadays. The use of these transboundary rivers is dotted with strong tensions that threatening peace among the riparian States. To overcome this phenomenon, principles defining the rights and duties of States are enshrined in many bilateral or multilateral conventions, including the New York Convention on the Law of Non-Navigational Uses of International Watercourses. These principles include the obligation not to cause significant harm, enshrined in the text of the New York Convention of 1997 is one of its basic principles. This principle and its corollaries are currently considered as one of the cornerstones of international water law and figured prominently in several recent case law. This article aims to analyze the scope of the principle of the obligation not to cause significant and its harm through the New York framework Convention, and its key role in both protection, and peaceful management of transboundary rivers as confirmed by most recent decisions of the ICJ.

Keywords: Key role; Obligation not to cause significant harm; Principles of international Water Law; Protection and peaceful management; Transboundary watercourses

Methodology

The present study was conducted on the basis of data from the literature search, which consists of consulting the recent literature review in the field of international water law. The Libraries of the School of Law and the China Institute of Boundary and Ocean Studies (CIBOS) of Wuhan University have served as an ideal framework. The consultation of the websites including the websites of UINC (2014), UNICE (2018), UN (2018).) was also a major method. Three months of internship passed within the Niger Basin Authority (2016), under the supervision of the Legal Adviser, also allowed us to assess the important role of the principle not to cause significant harm in peaceful sharing of the Niger Basin River Basin. The guidance of my Co-Supervisor has been a significant contribution to this research.

Introduction

About half of the freshwater resources are contained in transboundary rivers, irrespective of groundwater S.C. Mc Caffey [1]**.** The fresh waters essential to the life of all living beings or even non-living beings (plants and others) are unequally distributed throughout the world. To this unequal distribution, is added the increasing scarcity of the resource, due in particular to its overexploitation or to climate change which, for some observers would constitute an explosive mixture, whose destabilizing effects begin to be felt in many regions, Eric Mottet Frederic Lasserre, et al. [2]. In the 21st century, the availability and possession of "Blue gold" could obviously become one of the major stakes for riparian states of transboundary basins that can lead to strong tensions or even open conflicts Bruno Hellendorff [3]. Some believe that fierce competition for access to fresh water may well become a source of tension or conflict in the future, Kofi Annan, et al. [4]. The mismanagement of shared waters such as unilateral acts (unilateral diversion or decrease of water), or the uncoordinated use of these

waters will undoubtedly lead to tensions between riparian states. These unilateral acts undermine cooperation around the basins, as was the case with Turkey, which is embarking on a controversial project to build 22 dams on Tigers and Euphrates rivers, leaving only 30% of water of the latter to Iraq, Jacques Sironneau [5]**.** This unreasonable storage of nearly a year of flow of the Tigris and the Euphrates done by Turkey, inevitably provokes indignation and tensions at its downstream neighbors, Syria and Iraq, where much of agriculture depends heavily waters of these great rivers, Jennifer Hattam,[1] et al. [6]. On the other side of Africa, the construction of the Pharaonic dam called "Renaissance" on the Nile by Ethiopia is a new source of tension between the Aval countries, including Egypt. To preserve the States from these water-related tensions and to promote Cross-border cooperation between them, the issue of Integrated Water Resources Management (IWRM) was raised at the United Nations Conference on Environment and Development held in 1992 at Johannesburg, South Africa. During this conference, chapter 28 of Agenda 21, which was adopted by more than 178 Governments, emphasized the need for transboundary water cooperation between states, through conclusion of Agreements to achieve integrated management of shared water resources (18.3, 18.4, 18.6-18.22, 18.10, 18.27 and 18.40), (ISDD, 2014). International water law has been built around customary principles of origin, and multilateral, regional and bilateral conventions governing the management of transboundary watercourses between two or more countries Eric Mottet and F. Lassere [2]. The New York Convention developed more adapted principles, including the obligation of not causing significant harm. This principle has been favored both in the drafting of the Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the New York Convention, with universal vocation, providing the normative bases necessary for the construction of a harmonized regime, Chazournes L. and Al, [7].This article will firstly analyze the conventional sources of the principle of not causing significant harm and its corollaries including the obligation of the environmental impact assessment, the regular exchange of data and information or the notification and consultation, (1), before proceeding to a depth analysis of international water law, which will be to highlight the contribution of the New York Convention and determine the place of the obligation not to cause significant damage in recent jurisprudence, including the decisions of the ICJ concerning the Cases of pulp mills (2010) will be deeply analyzed.

The Obligation Not to Cause Significant Harm

The principle of the obligation not to cause significant harm derives from the maxim: "Sic utere tuo ut alienum non laedas" (So use your own as not to harm another), which is a perfect fit with the principle of Equality of Sovereignty between States in General International Law. Indeed, the principle of not causing significant harm is generally recognized as a general principle of international law. This principle also presents aspects of the theory of limited sovereignty, Eckstein [8]. Some argue that water law practitioners must make the pollution issue a general duty of "Due diligence", that states have a duty to protect the rights of other states within the country Stephen CM, et al. [9].The rule of the obligation of not causing significant harm requires that no State bordering an international watershed should use the water resources of the watercourse on its territory in a manner to cause harm to other States in the same basin, their environment, their health or even the security of their populations. The principle is thus formulated in Article 7 of the United Nations Convention on International Watercourses as following: "1. When using an international watercourse on their territory, watercourse States shall take all appropriate measures to avoid causing significant harm to other watercourses States. 2. Where, however, significant harm is caused to another watercourse State, the States whose use caused that harm shall, in the absence of agreement concerning that use, take all appropriate measures, taking adequately consider the provisions of articles 5 and 6 and in consultation with the affected State, to eliminate or mitigate such damage and, if appropriate, discuss the question of compensation"[2]. This obligation requires both the establishment of adequate standards and measures for the prevention of damage, as well as vigilance vis-a-vis the activities are undertaken by both public and private operators Laurence Boisson, et al. [10] This principle undoubtedly dominates both the international law of water and of the environment (Rahaman, 2009)[3].

[1]https://www.equaltimes.org/la-turquie-poursuit-son-projet-de?lang=en#.XAze6FVKjIV

[2]Ibid. page 409

[3]Available at: https://www.inderscienceonline.com/loi/ijssoc

Several modern international legal instruments, inspired by the United Nations Framework Convention on Water, have enshrined this principle. It should first be noted that the principle was first proclaimed by the 1966 Helsinki Rules (Articles V, X, XI, XXIX) before being consecrated in the 1992 UN-ECE Convention (Articles 2.1, 2.3, 2.4, 3) and finally adopted by the New York Convention on the law of water. The principle is thus practically enshrined in all conventions and other agreements or international legal arrangements adopted nowadays in the context of the use of shared watercourses. This is the case of the 1995 Southern African Development Community (SADC) Protocol on Shared Watercourse Systems (Article 2), the 1995 Mekong River Basin Agreement (3.7 and 8), the revised Convention establishing ANB of October 29, 1987 (Article 4) and included in the Water Charter of the Niger Basin of 2008 (Article 5) which provides: "States Parties shall ensure that activities in their territory cannot cause harm to other States Parties in accordance with Article 4 of the Revised Convention Establishing the Niger Basin Authority." Moreover, it should be recalled that the principle is also accepted by several of the modern international conventions and declarations on the environment, notably the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment (Principles 21), Declaration adopted at the 1992 United Nations Conference on

Environment and Development (Principles 2,4,13,24)[4], or the 1992 Convention on Biological Diversity (Articles 3). It should also be remembered that special attention has been given to this principle by various judicial decisions such as that of the International Court of Justice in the case of the Pulp Mills on the Uruguay River between Argentina and Uruguay. (ICJ Reports 2010, para.197)[5]. The issue of the obligation not to cause significant harm was raised by the ICJ in its decisions of 25 September 1997 on the Gabcikovo-Nagymaros case (ICJ, 1997), and that of 2015 in the same case. It should be noted that the effectiveness of the obligation not to cause significant harm depends on the respect of certain principles such as environmental impact assessment as well as notification and consultation.

The Obligation of the Environmental Impact Assessment

The obligation not to cause significant harm is closely linked to the issue of environmental impact assessment. The latter is from elsewhere a prerequisite to first. The issue of environmental impact assessment of riparian watercourse projects occupies a prominent place in international environmental law and finds confirmation in several court decisions concerning cases disputes relating to the use of transboundary watercourses. It is enshrined in international conventions and raised in many decisions of the ICJ. Some authors like Tseming Yang, et al. [11] believe that an investigation conducted in 197 jurisdictions around the world has shown that the duty on environmental impact assessment has been almost universally adopted, according to this investigation, it has, therefore, become a globally accepted standard. Referring to Article 38 of the Statute of the International Court of Justice, which provides the sources of international law, it is listed the "General principles of law recognized by civilized nations". On the basis of this, and since the principle is universally recognized, it can be inferred that it must be classified in the category of "General principles of law recognized by civilized nations", provided for in Article 38 of the Statute of the ICJ, and considered as a source of international law. More than ever, a fundamental tool of international law for prevention, the principle is enshrined in several conventions but finds its most eloquent recognition in the Convention on Environmental Impact Assessment in a Transboundary Context, so called Espoo Convention of 1991, (FOEN Swiss, 2019). In the light of this conventional instrument, the term "Environmental Impact Assessment" refers to a national procedure designed to assess the likely impact of a proposed activity on the environment "(see Article 1)[6]. The Convention requires parties to carry out the prescribed environmental impact assessments, at least at the project stage of the proposed activity. To the extent required, Parties shall endeavor to apply the principles of environmental impact assessment to policies, plans, and programs (see Article 2). It should specify that the assessment in question must be undertaken before the initiative to undertake an activity that can have a significant harm transboundary impact, and the concerned public must be associated. The Environmental Impact Assessment is set out in the 1992 Rio Declaration on Environment and Development as follows: "An Environmental Impact Assessment, as a national instrument, must be undertaking in the case of planned activities that are likely to have significant adverse effects on the environment and depend on the decision of a competent national authority " (Principle 17).

[4]Ibid. page 424.

[5]Decision available at: http://www.icj-cij.org/files/case-related/135/135-20100420-JUD-01-00-EN.pdf (accessed May 1, 2018)

[6]Text available at https://www.unece.org/fr/env/eia/eia_f.html

Although the 1992 Helsinki Convention does not specifically address environmental impact assessment, it nevertheless addresses the issue of environmental impact, recommending that States take all appropriate measures to prevent environmental impact, control and reduce any transboundary impact and ensure the protection of the environment (Articles 1,2,3,4,5,6 and 7). The environmental impact study is not specifically provided for in the Convention New York, but the protection of the environment has been summed up in the question of the obligation not to cause significant harm, (see Article 7). Measures relating to the protection and preservation of ecosystems and the marine environment are also provided for in Articles 20 and 23. It should also be noted that the question of environmental impact assessment is often mentioned by the parties and analyzed by ICJ in several cases before this international court. This was the case in the case of the Gabcìkovo-Nagymaros Project, between Hungary and Slovakia (ICJ 1997). This dispute concerns in substance, both the need to study the environmental impact of the dam project on the Danube River, but also the reality of the study of the impact of the "Variant C" topics were also discussed in the Pulp Mills Case, between Argentina and Uruguay, (ICJ, 2010), and Joined Cases Costa Rica and Nicaragua (ICJ, 2015). These last two cases will be carefully studied eventually in this article.

Notification and Consultation

The principle of the duty of consultation and notification confers the right to any shared watercourse state to receive advance notice, consultation and negotiations from any other riparian state of the same watercourse the whose intended use of the watercourse may seriously affect its rights or interests. As the principle of not cause significant harm, the duty to consultation and notification is often admitted by conventions and other treaties and international agreements, including the New York Convention on the Law of non-navigational Uses the of International Watercourses for, L. Boisson [7]. However, like the principle of fair and reasonable use, this principle has been hotly debated since the negotiation process of the New Convention on international watercourses of 1997. Upstream countries such as Ethiopia and Rwanda (Concerning the Nile) and Turkey (concerning the Tigris and Euphrates Rivers) are fiercely opposed to this principle Birnie and Boyle [12], Frederic Lassere [13]. These countries consider

that the obligation not to cause significant harm and its corollaries (notification and consultation) give more benefits to downstream countries, as far as negotiations with these countries are concerned and compensation in the event of occurrence of significant harm, (CIHEAM, 2015). These principles are set out in many international conventions, treaties or agreements. The duty of consultation and notification is listed to Principles 18 and 19 of the Rio Declaration on Environment and Development of 1992. Indeed, the principle 19 of the Rio Declaration provides: "States must give sufficient notice to States likely to be affected and to provide them with all relevant information on activities that may have serious adverse transboundary effects on the environment and to consult with those States promptly and in good faith ".

The consultation which involves the regular exchange of data and information is provided for in Article 9 of the 1997 New York Water Convention; as for the notification, it is devoted to article 11 to 19, L Boisson [7]. These two principles are also enshrined in several agreements signed as part of the management of shared watercourses such as, The Treaty of 1960 on the waters of the Indus River in Articles VII [2], VIII; the 1995 SADC Protocol for River Systems, Articles 2.9, 2.10, Inga M. Jacobs [14] the 1995 Mekong River Agreement (Articles 5, 10, 11, 24), the 2008 Water Charter of the Niger River Basin (Articles 20, 21, 22 and 23); the 2011 Water Charter of the Lake Chad Basin (Article 43). In terms of case law, it is interesting to note that the duty to notify and consult has been widely raised in the pulp mill business between Argentina and Uruguay, (ICJ, 2010), and Costa Rica and Nicaragua (ICJ, 2015). In both cases, the parties, as well as the court, has addressed the issue of procedural obligations, including notification and consultation.

Analysis of The Law of the Non-Navigational Uses

The process of codification and development of international water law has gained new momentum since the ILA drafted the document known as the "Helsinki Rules" during the 52nd Conference. held in August 1966 in Helsinki, (Rahaman, 2009). Even if the provisions of XII to XX are concerned with the question of navigation, it is important to note that the Helsinki rules are mainly dedicated to the uses of transboundary watercourses for purposes other than navigation. On the basis of this document, the United Nations General Assembly instructed the ILC to draft the main texts governing the uses of transboundary watercourses for non-navigable purposes. Thus, after 21 years of intense work, the International Law Commission has been able to develop the text of the New York Convention on the Law of the Non-Navigational Uses of International Watercourses. This convention adopted on May 21, 1997 Cécile lacheret, et al. [8], codifying the principles relating to the use and sharing of transboundary watercourses, contained in the Helsinki rules, is currently the backbone of the international law of the courts. of international water. It sets out fundamental principles related to water sharing, but also procedural principles, guiding states towards cooperation and protection of the environment, including the principle of the obligation not to cause significant harm, Flavia Rocha Loures, et al. [15]. The notification and the consultation in case of occurrence of damages or the negotiation in case of compensation. Before the adoption of the Convention, most of agreements are often dominated by power relations through which, the rules governing the use of water were dictated powerful states Marion Veber, et al. [16].

Since its entry into force in 2014, through the basic principles that it lays down, the convention attempts to conciliate the very imbalanced power relations in the practice of interstate relations in terms of transboundary water sharing, in order to avoid unilateral actions on shared watercourses and spare the states from conflict relating to the resource sharing Lasserre Frédéric, et al.[17] Some authors, such as Boisson de Chazournes, et al. [7], believe that the principles and rules enshrined in the convention provide a basis for regional or watershed-specific regimes. In this regard, we note: Revised 2000 SADC Protocol Jacobs [14]; the 2002 Senegal River Water Charter; the Lake Chad Water Charter of 2012 (CBLT, 2012) Cooperative Framework Agreement for the Nile of 2010, (Mohammed Abseno, 2013). This is the same observation at the level of States that have not signed the Convention, such as China, having nevertheless concluded Agreements concerning the sharing of watercourses with its neighbors on the basis of the Convention, particularly with Kazakhstan (2001 and 2011), with Russia in 2008, Lu Zhian, et al. [18] including provisions enshrined in the convention. Other authors such as Lasserre Frederic and Yenny Vega Cardenas, et al. [17] add that from the elaboration of his draft article, to the confirmation of its principles (the obligation not to cause significant harm) in the judgment of the ICJ of 25 September 1997 in the case of the Gabcìkovo-Nagymaros Project (Hungary v Slovakia), passing by its adoption on 21 May 1997, the Convention has influenced the creation or reorganization of basin institutions since 1992, as embody the Table below.

Years	Titles
1992	Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention, Economic Commission for Europe.
1993	Interstates Commission for Water Coordination (ICWC) of Central Asia, centered around the Aral Sea.
1995	Mekong River Commission - takes over from the former Mekong Commission.

1995	Organization of the Amazon Cooperation Treaty (OACT).
1998	Revival of institutional cooperation within the Niger Basin Authority (ABN) at the Abuja summit (Auclair and Lasserre 2013).
1999	Beginning of negotiations between the Nile Basin States under the Nile Basin Initiative (NBI).
1999	International Commission of the Congo-Oubangui-Sangha Basin (ICCSB).
2000	1Revised Protocol on Shared Watercourses de la Southern African Development Community (SADC)[7].
2000	The Orange-Senqu River Commission (Orange-Senqu River Commission, ORASECOM) comprises Lesotho, South Africa, Botswana and Namibia.

Table: Summarizes the institutional constructions or reorganizations initiated since 1992. **Source**: https://cqegheiulaval.com/lentree-en-vigueur-de-la-convention-de-new-york-sur-lutilisation-des-cours-deau-internationaux-et-son-impact-sur-la-gouvernance-des-bassins-internationaux/

The Obligation Not to Cause Significant Harm in States Practice

The principle of the obligation not to cause significant harm is considered a double-playing principle, both to prevent States from causing environmental damage, and also to protect the interests of a State vis-à-vis the activities of another riparian State. This principle is clearly stated in Article 7 of the New York Convention. It must be remembered that the application of the principle in the practice of States become a serious problem between upstream States and downstream States. This issue has since been raised in discussions on the draft text of the Convention and concerned the wording of Article 7 and its relationship to Articles 5 and 6 on "Fair and reasonable use" Marion Veber, et al. [16]. Each according to his interests, upstream countries like Turkey proposed an outright deletion of Article 7 on the obligation not to cause significant harm, saying it, as only beneficial to the countries in Downstream. Concerning, Egypt admits Article 7 but nevertheless proposes that it subordinate to Articles 5 and 6 Lasserre Frédéric, et al. [17]. Despite the fact that the Convention finally provides for an integrated reading of these principles in order to reconcile positions and allow States to reach an agreement on the use of an international watercourse, Laurence Boisson [7] in practice some Upstream States engage in unilateral actions without taking into account the prejudice that they might cause to downstream neighboring States. Frédéric Lasserre and Annabelle Boutet, (2019) states that "It is in reality the downstream states which consider that they enjoy" historic rights "Which forbid the prohibition of causing damage under Article 7, which may endorse form of status quo; while states such as Ethiopia, for example, are likely to invoke the notion of fair use of Articles 5 and 6, with the possibility of calling into question a de facto partition ".The implementation of large-scale projects with significant impacts for downstream riparian countries is often carried out by upstream countries, of which it is important to underline some cases. The most illustrative examples are known in Middle East where the Arab States proceeded with the diversion of High Jourdain waters, causing enormous damage to Israel. This is also the case in Turkey with the construction of large dams on the Tigris and Euphrates, totally ignoring their impact on downstream riparian states such as Syria and Iraq (Lasserre, 2013). Same scenario on the Nile, with the construction of the dam of the renaissance (biggest dam of Africa) by Ethiopia, in spite of the potential negative consequence on the water security of Egypt. This circumstance has fueled intense tension between Ethiopia and Egypt, which is almost 100% dependent on the Nile for its water supply. These situations demonstrate that the obligation not to cause significant harm does not constitute a panacea for the respect of the interests of a riparian State and the protection of the environment against the harmful activities of a State. If some states react in retaliation to the non-respect of the conventional principle of the obligation not to cause harm by their neighbors (case of Israel and Palestine for the war of 6 days), (Al-shabaka, 2017), Others states opted for a pacific solution, by submitting the dispute to the ICJ. In this section, we will analyze case law in the Pulp Mills Case, which opposed Argentina to Uruguay, (ICJ, 2010).

International Case Law

International case law on the protection of the environment in general and in particular on the obligation not to cause significant harm and all its corollaries (environmental impact assessment, notification and consultation, and negotiation) is marked by the recent decisions of the ICJ in the Pulp Mills Case, between Argentina & Uruguay, (ICJ, 2010), and the Joined Cases between Costa Rica & Nicaragua (ICJ, 2015). We will study the first case, while stating that our objective is not to interpret the decision of the ICJ, but rather to analyze the scope of the obligation not to cause significant harm in these two judgments. To do this we will first identify the purpose of the case, then specify the claims of the parties, and finally analyze the position of the court this case.

Case of Pulp Mills On the River Uruguay (Argentina V. Uruguay) (ICJ, 2010)

Facts and Object of the Dispute

The dispute between Argentina and Uruguay concerns the exploitation of the Uruguay River, forming a natural boundary between Brazil and Argentina, and between Argentina and Uruguay, on a distance of 500 km. The management of the river has been the subject of a treaty between Argentina and Uruguay, not only relating to the demarcation of the border between the two States, but also laying the groundwork for the use and common management of the river waters".[8]

[8]See "Memorial of the Argentine Republic", supra note 3 at para. 3.7.

This treaty relating to the status of the Uruguay River, concluded on 26 February 1975 between the two States, establishes the community of interests and also provides for obligations such as the principle of optimum rational use of the river, the obligation to protect and preserve the river, aquatic environment, as well as the international responsibility of the parties for damage resulting from pollution caused by their own activities or by activities carried out on their territories by natural or legal persons.[9] However, the Agreement does recognize the right of the parties to explore and exploit the resources of the riverbed and subsoil in the area under its jurisdiction, subject to causing material injury to the other party.[10] This statute serving as the "River use code" imposes on both parties the obligation not to cause significant harm. For the proper management of the river's waters, without prejudice to the environment, the Statute provides for the creation of a management body called "Commission Administradora Del Rio Uruguay(CARU)"[11], with regulatory, administrative and technical powers. It should be recalled that in the context of the obligation of cooperation, the 1975 Statute imposes on one party that plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the regime of the river or the quality of its waters, it shall notify the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days whether the plan might cause significant damage to the other Party, (see Article 7.1 of the Statute). Furthermore, it appears from the provisions of paragraph 2 that if this occurs, the party shall notify the project it to the other party through CARU. The crux of the dispute between the two States was based on two decisions of the Uruguayan State, for the construction of two cellulose factories, namely the "Cellulose Project of M'Bopicua" or CMB and Project "Orion Project") on the left flank of the Uruguay River, not far from the town of Fray Bentos, near Gualeguay Chu (Argentina region), without notifying this work to CAFU. It is important to note that between the construction of the first pulp mill and the second by Uruguay, Argentina has repeatedly tried to create a framework of mutual understanding for a friendly settlement of the dispute but Uruguay has always opted for unilateralism, in flagrant violation of international cooperation enshrined in the statute of 26 February 1975. Thus, Argentina has decided to refer the matter to the ICJ for judicial settlement of the dispute on the basis of Article 60 of the Treaty and Article 12 of the Statute, which authorizes the parties to bring the matter before the ICJ in the event of any dispute that could not be settled by direct negotiation. Indeed, Argentina introduced an application to the ICJ dated May 4, 2006, for a judicial settlement of the dispute.

Claims of The Parties

The case thus brought before the Court, the plaintiff (Argentina) asks the court to note the non-respect of the prior consultation process under Chapter II of the Statute, the violation of the obligation to a complete and objective study of the Orion plant's transboundary impact on the environment of the Uruguay River and its zones of influence, the violation of the obligation to take all necessary measures for the rational and optimal use the Uruguay River, the violation of the obligation not to cause any appreciable harm to the river regime or the quality of its waters, the violation of the obligation to take all necessary measures to preserve the aquatic environment and to prevent pollution, and finally the violation of the obligation to protect biodiversity and fisheries resources. [12]In summary, Argentina asked the court to determine whether, through this conduct, the Republic of Uruguay derogated from the procedural and substantive obligations incumbent upon it in accordance with the 1975 Statute. At the same time, the Applicant requested the cessation of unlawful conduct, reparation of damages by the reinstatement of the status quo ante and by the guarantee of non-repetition of unlawfulness and, where appropriate, compensation for these various damages. It is necessary to recall that after an Argentine request to the court to stop the construction of the plants, Uruguay on its side Uruguay, was fighting for the court to order the dismantling of roadblocks built by Argentinian ecologists to block traffic on the international bridges between the two countries, in protest against the establishment of celluloses plants.

The Decision of the Court

In accordance with Argentina's request, the court ruled on the alleged violations of the procedural and substantive obligations of the 1975 Statute.

[9]See Treaty of Salto, supra note 9, art 41 and 42

[10]Ibid, article 30

[11]Administrative Commission of the Uruguay River

[12]See "Memorial of the Argentine Republic", at pp. 351-352. Available on <http

http://www.icj-cij.org/docket/files/135/15430.pdf>

Violation of Procedural Obligations

The ICJ notes Uruguay's breach of the information obligation under Article 7 of the 1975 Statute. It places this violation in two ways: lack of prior information from CARU and notification of assessing the environmental impact of the major projects (2).

Violation of Information Obligation

Lack of prior information of the CRAU: On this point, it should first be noted that both parties agree on the need for the consultation and prior information process. However, the parties make parallel arguments as to the content of the information obligation and the timing of its realization. Thus, Argentina submits that CARU must necessarily be first seized and informed of any project that may cause material injury to the other party[13]. In its reply, Uruguay claims that, in the light of Article 12 of the Staff Regulations, referral to CARU is optional and not mandatory, therefore the parties may derogate from it and directly initiate the negotiation process. [14]In this regard, the Court refers to its decision on the case concerning the Corfu Channel between the UK & Albania,

saying first that the information obligation involves the beginning of the process of cooperation between the parties, adding that this obligation has a close link with the rules of good neighborliness, it then constitute: "The obligation, for any State, not to allow its territory to be used for acts contrary to the rights of other States"[15] , which according to the court, implies vigilance and prevention, presenting a fundamental character. The Court adds that CARU plays the role of an international organization with an international personality which cannot be "reduced to a simple optional mechanism made available to the parties that each of them could use as it pleases". Accordingly, based on the provisions of Article 7 of the 1975 Statute, unsurprisingly, the court affirmed that CARU must necessarily be informed of any project included in the provisions of this provision, in order to determine promptly and summarily if the project is likely to cause significant harm to the other party.[16]

Absence to Notify the Environmental Impact Assessment of Uruguayan Projects:

As with the case of prior information, the position of the court on this point is also clear. The court retains without any surprise that there has been a breach of the duty of notification, the notification was not made through CARU or sent to Argentina before the initial environmental authorization. [17]The court then argues that it is intended to create the conditions for a fruitful cooperation between the parties by allowing, on the basis of as complete information as possible, to assess the impact of the project on the river and, if there is take place, to negotiate the necessary adjustments to prevent the possible damages that it could cause. [18]Regarding the Environmental Impact Assessment, the Court recognizes that the environmental impact of projects should be assessed in accordance with international law by stating that "it can now be considered that it exists under general international law", an obligation to carry out an environmental impact assessment where the proposed industrial activity is likely to have a significant detrimental impact in a transboundary context, and in particular on a shared resource. [19]The court thus adopts the same position as in the case of the Gabcikovo-Nagymaros Project if in the case. If in this case some believe that the formula used by the court to justify the basis of the study of the impact on the environment has a customary character, in the case of paper pulp mills, the decision of the court derives its foundation from international law including the New York Convention of 1997, or the 1991 Convention on Environmental Impact Assessment in a Transboundary context.

[13]See Pulp Mills, supra note 1, para.98

[14]See Pulp Mills on the Uruguay River (Argentina v. Uruguay), "Lawrence's Argument

Martin "(September 15, 2009) para. 13 and 50. Available at http://www.icj-cij.org/docket/files/135/15513.pdf

[15]See Corfu Detroit case (United Kingdom v. Albania) [1949] C.I.J. 4 [Corfu Detroit], page 22

[16]See Pulp Mills, supra note 1, para 104

[17]See Pulp mills, supra note 1 para. 121-122.

[18]Ibid. para. 113.

[19]Ibid.Para.204

Violations of Obligations of Consultation and Negotiation

First, recall that following the allegations of Argentina made against Uruguay as to the construction of the plants during the negotiations, He argues that no absolute prohibition of construction has been planned during this period negotiation. He also argues that the blocking of his right to lead an industrial project must not in any way exceed this period of negotiations. Following these claims of both parties, the court first decided on the question of the illegality of the constructions during this decisive period, but also, used the opportunity to clarify its position concerning the scope of the obligation to consult and negotiate

The Illegal Nature of Constructions Made During The Negotiation Period

Commenting on this aspect, the Court first stated that: "As long as takes place the cooperation mechanism between the parties to prevent significant damage to the detriment of one of them, the State of origin of the planned activity is obliged not to authorize its construction and a fortiori not to proceed with it, [20]Through this declaration made in the light of Article 9 of the 1975 Statute, the Court reminds the parties that negotiations must be conducted with good faith, a sacrosanct principle of international law (see also Article 17 (2) of the New York Convention on the Law of the Non-Navigational Uses of International Watercourses).Indeed, in the light of Article 17 (2) of the New York Convention, good faith negotiations are synonymous with constructive consultations conducted in a cooperative spirit and in good faith, and this requirement is not satisfied. as soon as a state acts in a dilatory manner by delaying or blocking the negotiation process. In this case both countries have shown a serene willingness to negotiate through the establishment of GTAN " a negotiating body even allow them to pursue the same objective as that provided for in Article 12 of 1975 Statute "[21], which aims to allow the parties to negotiate for a period 180 days from the communication of the party notified that a project is likely to affect water quality and the river regime. However, following the reasoning of the Court, this negotiating framework does not exempt the parties from their procedural obligations enshrined in the Statute, and even the 2 March 2004 Agreement does not allow Uruguay to evade its obligations under Article 7 status 1975. The Court concludes that "This" Arrangement "cannot be said to have had the effect of exempting Uruguay from compliance with the procedural obligations of the 1975 Statute" (See para. 131). The court considers that the infringement of the duty to negotiate, however, was recognized only when construction of the mills and the port terminal was decided during these negotiations.[22]

The court examines the extent of the duty to negotiate in good faith: Argentina's argument that the State of origin of a project would persist in wrongfulness if it undertook construction despite objections from the notified party and without awaiting the decision of the International Court of Justice, has not been successful in court.[23]It notes that "the so-called" non-construction obligation ", which would weigh on Uruguay between the end of the bargaining period and the Court's decision, is not expressly provided for in the 1975 statute and does not derive from more of its provisions. The court specifies that Article 9 provides for this obligation only during the implementation of the procedure provided for in Articles 7 to 12 of the Staff Regulations. The Court concludes that "no" non-construction obligation "was imposed on Uruguay after the negotiation period provided for in Article 12 had expired, i.e. on 3 February, the Parties having noted at that date the failure of the negotiations undertaken within the framework of the GRAN "Therefore," the unlawful behavior of Uruguay could not extend beyond this date ".

Analysis of The Conformity of Uruguay's Conduct with Substantive Obligations

After having dealt with questions relating to breaches of procedural obligations, the Court of Justice analyzes the alleged breaches of the substantive obligations enshrined in the 1975 Statute. On this point, we are interested in questions relating to environmental damage, reviewed by the court. The court addresses these issues from three perspectives: (a) The obligation to ensure the protection of the regime or the quality of the river's waters; (b) the obligation to maintain the ecological balance; (c) The duty to protect and preserve the aquatic environment.

[20]See Pulp Mills, supra note 1 para. 204.

[21]See Pulp Mills, supra note 1 para. 140.

[22]Ibid. para. 143 and 149.

[23]"Reply of the Argentine Republic", supra note 29 at p. 140, para. 1.171, "Advocacy of

Philippe Sands "(September 15, 2009), para. 19. Available on <Http://www.icj- cij.org/docket/files/135/15467.pdf>.

The Obligation to Ensure the Protection of the Regime or The Quality of the River's Waters

According to the provisions of Article 35 of the 1975 Statute, the parties: "to make the necessary measures to ensure that the management of soil and forests, the use of groundwater and that of the tributaries of the river. On this basis, Argentina points out that Uruguay's decision to proceed with broad eucalyptus plantations in order to supply the raw material to the Orion plant (Botnia) has implications not only for management of Uruguay's soils and forests, but also for the quality of the waters of the river.[24] On this point, the Court finds that Argentina has failed to substantiate its claim that Uruguay's decision to proceed with large eucalyptus plantations to provide the raw material for Orion plant (Botnia) would have implications not only for the management of Uruguay's soils and forests but also for the quality of the river's waters.[25]

The Obligation to Maintain the Ecological Balance

Argentina asks the court to find a violation by Uruguay to Article 36 of the 1975 Statute, which requires the parties the obligation to coordinate, through CARU, measures to avoid modification the ecological balance of the river. [26]Argentina also contends that the discharges from the Orion plant (Botnia) have altered this balance, for example through the 4 February 2009 algae bloom, which, in its view, constitutes irrefutable proof of such a change, and also the release of toxins which would be the cause of the malformations observed in rotifers whose photographs were presented to the Court. It considers that in other words, Uruguayan behavior constitutes a flagrant violation of one with an obligation to protect and preserve the environment. In its reply, Uruguay submits that the plant fully satisfies CARU's requirements concerning the ecological balance of the river, and concludes that it did not act contrary to Article 36 of the 1975 Statute. On this point, the Court released its position by recalling that the obligation contained in Article 36 requires is an obligation of conduct, and considered as such, both parties should exercise due diligence ("due diligence") in taking such measures (paragraph 187). Moreover, the Court considers that "Argentina has not convincingly demonstrated that Uruguay has refused to participate in the Article 36 coordination efforts, in violation of it" (para.189). The Court concludes that, in the light of the foregoing, Argentina has not convincingly demonstrated that Uruguay has refused to participate in the Article 36 coordination efforts, in violation thereof.

The Duty to Protect and Preserve the Aquatic Environment

The Uruguayan has authorized the release of additional nutrients into the river that, according to Argentina, is experiencing eutrophication, reversal of current and stagnation. Argentina thus accuses Uruguay of violating its obligation to prevent pollution by failing to take appropriate measures concerning the activities of the Orion plant (Botnia) and complying with the international agreements in question. environment, including the Convention on Biological Diversity and the Ramsar Convention. The court first observes that under Article 41 of the 1975 Statute the parties are obliged to adopt, within their respective legal systems, norms and measures "In accordance with the agreements". applicable "And," where appropriate, consistent with the guidelines and recommendations of international technical bodies ", for the purpose of protecting and preserving the aquatic environment and preventing its pollution (see paragraphs 195-196). The Court notes that "The scope of the obligation to prevent pollution must be determined in the light of the definition of pollution given in Article 40 of the 1975 Statute". It then states that this obligation requires the Parties to exercise due diligence with respect to all activities that take place under their jurisdiction and control (see paragraph 197).

indeed, the court observes that Uruguay, for its part, has "The obligation to continue monitoring and monitoring the operation of the plant in accordance with Article 41 of the Statute and to ensure that Botnia complies with Uruguayan internal regulations and the standards set by the Commission". The Court considers that, in order to properly fulfill its obligations under Article 41 (a) and (b) of the 1975 Statute, the Parties are required, for the purpose of protecting and preserving the aquatic environment. when considering activities that may cause transboundary harm, carry out an environmental impact assessment.

[24]See "Memorial of the Argentine Republic", supra note 3 at 203-24; Pulp Mills on the Uruguay River (Argentina v. Uruguay), "Pleadings of Mr. Philippe Sands" (September 17, 2009), p. 12-22, Available at <http://www.icjcij.org/docket/files/135/15499.pdf>.

[25]See Pulp Mills, supra note 3 para.180.

[26]See "Memorial of the Argentine Republic", supra note 3 at 203-24; Pulp Mills on the Uruguay River (Argentina v. Uruguay), "Pleadings of Mr. Philippe Sands" (September 17, 2009), p. 12-22, Available at <http://www.icjcij.org/docket/files/135/15499.pdf>.

It concludes that under the 1975 Statute "the Parties are legally bound to continue their cooperation through CARU and to enable CARU to develop the necessary means to promote the equitable use of the river. by protecting the aquatic environment "(see paragraph 266).

Conclusion

The principle of fair and reasonable use seems to be widely recognized in terms of the peaceful use of international watercourses. This principle has often dominated the disputes in terms of sharing of transboundary rivers, as was the case of the Gabcìkovo-Nagymaros case, having opposed Hungary to Slovakia (ICJ, 1997). It should be noted that since 2010, the principle of not causing significant harm has been increasingly raised in disputes over the uses of shared watercourses and nowadays dominates the decisions of the C IJ.

This principle, considered as the backbone of watercourse protection in international water law, along with other related principles such as prior notification, consultation or environmental impact assessment, are re-emerging in recent decisions of the ICJ, such as the Pulp Mills Case between Argentina and Uruguay (ICJ,2010) and the Costa Rica and Nicaragua Joined Cases (ICJ, 2015). The New York Framework Convention did not establish expressly a hierarchy between the principles of the right to water. This silence is one of the criticisms brought against the New York Convention by some specialists in the field such as Sylvie Pacquerot (2011), or Frédéric Lasserre and Annabelle Boutet, (2019) who stress that the obligation to fair and reasonable use and the duty not to cause significant harm is to divide Downstream and Upstream States. It's clear that international environmental law tends to attach more importance to the obligation to prevent the activities of one State from causing significant harm in the territory of another State, including the field of water resources. Some authors like Abdoulaye Moussa (2012) believe that in the face of the silence of the Water Convention of 1997 as regards the primacy of one principle over the other, it is the States involved in a dispute or, where appropriate, the judicial bodies (ICJ) which tend to fill the gaps in the New York Convention by establishing on a case-by-case basis the right balance or primacy between these two principles. Recent case law shows the preponderance of the obligation not to cause significant harm and other related obligations in peaceful use of shared waters over other principles.

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