

Copyright statement

This presentation was prepared for use at the IBRU training workshop *Defining & Managing River Boundaries & International Rivers* held in Bangkok on 8-10 May 2024.

The content of the presentation is copyright © of the author. The presentation may be used by workshop participants for non-commercial training purposes, subject to acknowledgement of the author and the workshop at which the presentation was originally made. All other uses of the presentation must be approved in advance by the copyright holder.

Questions concerning use of this presentation should be directed in the first instance to:

Liz Buxton, External Relations & Marketing Manager, IBRU,
Department of Geography, Durham University DH1 3LE, UK

Tel: +44 191 334 1965 ♦ Fax: +44 191 334 1962 ♦ Email: e.a.buxton@durham.ac.uk

Thank you.



RESOLVING DISPUTES

Dr. Riley Denoon

IBRU: Defining and Managing River Boundaries and International Rivers, Professional Training
Workshop, Bangkok, Thailand, 8-10 May 2024

PRESENTATION

- Peaceful settlement of disputes
- Types of dispute resolution mechanisms
- The International Court of Justice
- Cases:
 - *The Pulp Mills Case*
 - *The Navigational and Related Rights Case*
 - *The Certain Activities Case*
 - *Dispute over the Status and Use of the Waters of the Silala*

PEACEFUL SETTLEMENT OF DISPUTES



COMPLIANCE WITH INT'L LAW

- **Voluntary** compliance:
 - Louis Henken: ***“Most states comply with most of their int’l legal obligations most of the time”***
- Encouraging compliance: technical and financial assistance, monitoring and reporting, sanctions (unilateral, via countermeasures, and collective, with Security Council authorization)

COMPLIANCE WITH INT'L LAW

- **Peaceful Settlement of Disputes:** Art. 2(3) of the UN Charter - obligation to settle disputes peacefully
 - “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

COMPLIANCE WITH INT'L LAW

- **Means of Dispute Settlement:** Art. 33 of the UN Charter
 - “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

PRELIMINARY ISSUES

- **Justiciability:**
 - **The presence of an existing legal dispute:** capable of solution by the application of the judicial process and susceptible of a decision upon the basis of law
 - Permanent Court of International Justice in the *Mavrommatis* case: 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.'



TYPES OF DISPUTE RESOLUTION MECHANISMS

PRIVATE REMEDIES

- Access to domestic courts and administrative bodies
 - More expeditious than diplomatic procedures
 - Keep disputes from becoming politicized
 - Doctrine of exhaustion of local remedies
 - Dispute avoidance
- UN Watercourses Convention Article 32: Non-discrimination
- Normal means of inter-state dispute resolution remain available

DISPUTE RESOLUTION UNDER THE UN WATERCOURSES CONVENTION

- Article 33 of the UN Watercourses Convention.
 - Paragraphs 3-9
 - Establishment of the fact-finding commission, (3) members, one of which is to be from a third country and serve as chair.
 - Parties will provide the information requested and allow access to their territory
 - Report and recommendations for resolution (good faith consideration but not binding)
 - Facts important to calculating equitable and reasonable utilization

DIPLOMATIC: DISPUTE RESOLUTION MECHANISMS

- Negotiation is a common diplomatic dispute resolution mechanism that is available to parties at all stages of a dispute or difference.
- Helps define the issues of a dispute through diplomatic means.
- Former special rapporteur to the ILC, Jens Evensen, observed in his first report, as many others have, that “[t]he obvious starting-point for the peaceful settlement of disputes” regarding international watercourses was good-faith negotiations and consultations.
- Parties to a dispute are not obliged to attempt to negotiate a settlement prior to recourse to judicial settlement under general international law.
- Generally good offices and Mediation are slightly more structured diplomatic mechanisms involving the participation of a third-party and may serve as a useful corollary to negotiations.

TECHNICAL: DISPUTE RESOLUTION MECHANISMS

- *“Many disputes turn essentially on disagreements over facts and their evaluation, rather than on questions of law.”*

--- John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* (Oxford University Press, 1999) at 91.

- Area of increasing technical and factual complexity – facts are often essential to resolving disputes on international watercourses
- Rules of the law of international watercourses are general and - may also make them difficult to apply with precision in some cases. Furthermore, the operation of many of the provisions depends upon certain key facts.

TECHNICAL: DISPUTE RESOLUTION MECHANISMS CONT.


- Inquiry, fact-finding, and conciliation are three examples of such mechanisms.
- Art. 33 UN Watercourses Convention incorporates a compulsory fact-finding provision as a central component of its dispute resolution framework. – consider in good faith the findings. (Controversial)
- Useful ‘Step’ between the diplomatic processes such as negotiation and mediation and the more adjudicative processes such as submitting a matter to an international court or arbitral tribunal.
- Use of expert bodies (ie. Permanent Indus Commission, IJC)

ADJUDICATIVE DISPUTE RESOLUTION MECHANISMS

- Adjudication will generally involve bringing a dispute before a third-party for a decision with legally binding effect.
- mechanism of 'last resort'
- an ad hoc process or through a standing body (arbitral tribunal like the Permanent Court of Arbitration in the Hague or court ICJ)
- ICJ and arbitral tribunals (ie. PCA) – parties consent to jurisdiction
- The ICJ, the 'principal judicial organ' of the United Nations, in particular has dealt with a significant number of disputes concerning international watercourses.

DISPUTE AVOIDANCE AND SETTLEMENT

- Some of the numerous International courts and tribunals:
 - International Court of Justice (ICJ)
 - International Criminal Court (ICC)
 - Standing int'l arb. tribunals (e.g., PCA, ICSID)
 - Subject Matter Specific Bodies: (e.g.) Law of the Sea Tribunal (ITLOS) and WTO Dispute Settlement Mechanism
 - Regional dispute resolution bodies: (e.g.) Inter-American Court of Human Rights, The European Court of Human Rights or the International Joint Commission (IJC)
 - *Ad Hoc* bodies: (e.g.) International Criminal Tribunal for the former Yugoslavia (ICTY)
 - Etc.



THE INTERNATIONAL COURT OF JUSTICE (ICJ)

THE INTERNATIONAL COURT OF JUSTICE (ICJ)



International Court of Justice, International Court of Justice 60th Anniversary Press Pack, Public Domain, via Wikimedia Commons, The Peace Palace in The Hague, Netherlands, which is the Seat of the International Court of Justice, https://commons.wikimedia.org/wiki/File:International_Court_of_Justice.jpg (last accessed June 18, 2021).

JURISDICTION OF THE ICJ

- Article 36 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE
 - 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
 - 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
 - the interpretation of a treaty;
 - any question of international law;
 - the existence of any fact which, if established, would constitute a breach of an international obligation;
 - the nature or extent of the reparation to be made for the breach of an international obligation.

DISPUTE SETTLEMENT BEFORE THE ICJ

- The ICJ is increasingly being resorted to in cases involving shared fresh water (e.g.)
 - *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, 1997
 - *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 2009
 - *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 (cont.)
 - *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 2015 – joined with
 - *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, 2015
 - *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, 2022

DISPUTE SETTLEMENT BEFORE THE ICJ CONTINUED

- Note that all of these cases but one involve Latin American countries
- They could be brought because of the Pact of Bogota, to which nearly all Latin American countries are parties
- The Pact of Bogota contains an “ICJ clause” permitting any party to submit a dispute with another party to the ICJ
- Unfortunately, such clauses are not common in other regions of the world

ADVISORY PROCEEDINGS

- The ICJ has jurisdiction to render Advisory Opinions on questions referred to it by the General Assembly or other UN agency authorized by the General Assembly.
- This has allowed the Court to give opinions on matters that might not have come before it in contentious cases.
- 3 examples:
 - *Legality of the Threat or Use of Nuclear Weapons* (1995)
 - *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2003)
 - *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (2008)



THE PULP MILLS CASE

BACKGROUND

- The Uruguay River forms the boundary between Uruguay and Argentina (contiguous international watercourse).
- Statute of the River Uruguay, Argentina-Uruguay, Feb. 26, 1975, 1295 UNTS 340. (the “1975 Statute”)
 - Created the joint mechanism: the Administrative Commission of the River Uruguay (CARU).
- Two pulp mills were originally proposed to be built on the Uruguay side of the river:
 - the CMB (ENCE) mill, and
 - the Oy Metsä-Botnia AB “Orion” mill (commenced operation in 2007).
- Provisional Measures Order of July 13, 2006, the construction of the mills
 - Construction allowed but “Uruguay necessarily bears all risks” (Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay), Order of 13 July 2006, [2006] ICJ Rep 14, p.133, para. 78) (Pulp Mills order)
 - “cannot be deemed to create a fait accompli” (Pulp Mills order, p.133, para. 78)

FINDINGS

- Procedural Obligations
 - Found Uruguay had breached its procedural obligations to “inform, notify and negotiate.”
 - The important duty to notify of planned measures on an international watercourse is tied to the duty to prevent transboundary harm and the due diligence obligations of States within their own territory.
 - Joint mechanisms established by the parties to be a central component of the parties’ obligation to cooperate in-regards to transboundary water resources should not be sidestepped.
- Substantive Obligations
 - The ICJ held that Uruguay had not breached its substantive obligations under the 1975 Statute.
 - “the obligation to ‘preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures’ is an obligation to act with due diligence” (*Pulp Mills* case, p.79, para. 197)

FINDINGS

- EIAs
 - EIAs requiring continuous monitoring are a part of customary international law rooted in due diligence obligation Pulp Mills case, p.83, para. 204.
- ICJ
 - Discouraged the use of internal phantom experts/ “experts fantômes” and experts giving evidence as counsel. (*Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, [2010] ICJ Rep 108, p.111, para. 7 and 14.)



THE NAVIGATIONAL AND RELATED RIGHTS CASE

BACKGROUND

- This case involved the San Juan River, which forms part of the boundary between Costa Rica, on the south, and Nicaragua, on the north.
- But unusually, the border follows the right, or Costa Rican, bank of the river.
- Thus, the river is entirely within Nicaraguan territory.
- A treaty concluded in 1858 between Costa Rica and Nicaragua confirmed the location of the boundary along the right bank of the San Juan River.
- But the treaty gave Costa Rica the right of free navigation on the river “*con objetos de comercio.*”

THE COURT'S HOLDING

- It held, *inter alia*, that Costa Rica has the right of navigation on the San Juan “for purposes of commerce,” including the transport of passengers and tourists; but
- Costa Rica does not have the right, contrary to its claims, to navigate on the river with vessels carrying out police functions, or for the purposes of the exchange of personnel of the police border posts and of the re-supply of these posts.
- Evolutionary interpretation of treaties: in finding that “*con objetos de comercio*” should be interpreted to mean “for purposes of commerce (and not “with articles of commerce,” Nicaragua’s preferred interpretation), the Court explained:
 - Where the parties used generic terms in a treaty, having necessarily been aware that the meaning of those terms was likely to evolve over time, they “must be presumed, as a general rule, to have intended those terms to have an evolving meaning.”
 - This is especially true where the treaty is of unlimited or long duration (para. 66)
 - Here, the term “*comercio*” is a generic term, and the 1858 treaty was entered into for an unlimited duration.



THE *CERTAIN ACTIVITIES* CASE

BACKGROUND

- Joined to *The Case concerning the Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica) (the Road case)* on the 17th of April 2013.
- Brought by Costa Rica against Nicaragua (Nov 18, 2010)
- Boundary dispute: Nicaragua had dredged several small channels (*caños*) in the area of the San Juan River delta believing them to be the boundary between the two countries. Costa Rica maintained that the channels were not the boundary river but were wholly within Costa Rican territory.

JUDGMENTS ON THE MERITS

- Merits: “Cost Rica has sovereignty over the ‘disputed territory;’ that Nicaragua is obligated to compensated Costa Rica for damage caused by Nicaragua’s activities on Costa Rican territory.” (McCaffrey, p.237)
- Case’s principle contribution to the law in the field is the discussion of “compensable harm, the valuation of environmental harm, and the extent to which a state may be compensated for the loss of environmental services.” (McCaffrey, p.237)
- Screening: “[A] State’s obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment. The obligation in question rests on the State pursuing the activity.” Case concerning Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Case concerning Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica), [2015] ICJ Rep 665 at para 153. (emphasis added)

COMPENSATION FOR ENVIRONMENTAL HARM

- 1st case for the ICJ adjudicating a “claim for compensation for environmental damage” (The Certain Activities, Compensation case, p.28, para.41)
 - “[I]t is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage. The Parties also agree on this point.” (The Certain Activities, Compensation case, p.28, para.41)
- “[T]he absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage[.]” (The Certain Activities, Compensation case, p.26, para.35)(McCaffrey, p.238)
- “The Court considered it appropriate to approach valuation on the basis of the ecosystem as a whole by adopting an overall assessment rather than attributing values to individual categories of environmental goods and services.” (McCaffrey, p. 241)
- Emphasis was placed on damage to wetlands (The Certain Activities, Compensation case, p.37, para.80)



DISPUTE OVER THE STATUS AND USE OF THE WATERS OF THE SILALA

FACTS

- Dispute over the international character of the Silala Waters between Chile and Bolivia.
- Chile sought a declaration from the court that the Silala was an “international watercourse whose use by Chile and Bolivia is governed by international law” and that they were entitled to an equitable use of its waters.*
- “Watercourse”, “Artificially enhanced flow” - earth channels of up to 60 cm deep and 1 m wide.
- “The Silala River has its source in the territory of Bolivia. It originates from groundwater springs in the Southern (Orientales) and Northern (Cajones) wetlands [bofedales], located in the Potosí Department of Bolivia, approximately 0.5 to 3 kilometres north-east of the common boundary”. *Silala Waters Dispute (Chile v. Bolivia)*, p. 614, para. 28.
- Arid region bordering the Atacama Desert
- Both surface and groundwater following a natural gradient sloping from Bolivia to Chile

FINDINGS

- “There is no doubt that the Silala is an international watercourse and, as such, subject in its entirety to customary international law, as both Parties now agree”. *Silala Waters Dispute (Chile v. Bolivia)*, p. 614, para. 94.
- “The Court considers that modifications that increase the surface flow of a watercourse have no bearing on its characterization as an inter-national watercourse”. *Silala Waters Dispute (Chile v. Bolivia)*, p. 614, para. 94.
- Findings on duty to notify and consult
 - Art. 11 & 12 of the UN Watercourses Convention
 - “[E]ach riparian State is required, under customary international law, to notify and consult the other riparian State with regard to any planned activity that poses a risk of significant harm to that State”. *Silala Waters Dispute (Chile v. Bolivia)*, p. 614, para. 117.
- Court found that the parties were in agreement and that no dispute existed



THANK YOU

ANY QUESTIONS CAN BE DIRECTED TO DR. RILEY DENOON

rdenoon@gmail.com