The Rhine Chlorides Arbitration Concerning the Auditing of Accounts (Netherlands - France) - Its contribution to international law

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Reference


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I. BACKGROUND TO THE DISPUTE

In Bonn, on 3 December 1976, the French Republic, the Kingdom of the Netherlands, the Grand Duchy of Luxembourg, the Federal Republic of Germany and the Swiss Confederation (hereafter referred to respectively as France, the Netherlands, Luxembourg, Germany and Switzerland) adopted the Convention on the Protection of the Rhine against Pollution by Chlorides. The objective of that Convention, which came into force for all the States parties on 5 January 1985, was to reduce the level of chloride ions in the Rhine, since these posed a risk of damage to the river environment. France, Germany and the Netherlands are the countries mainly responsible for the discharge of chlorides into the Rhine. France's contribution in terms of pollution, unlike that of the other two States, came from one single clearly identifiable source, the Alsace Potassium Mines. Because of this, the Convention imposed an obligation on France to reduce the discharge of chlorides coming from the Alsace mines, and imposed a cost-sharing formula for bearing the costs of implementation with 30% to be borne by Germany, 34% by the Netherlands and 6% by Switzerland. The objective of the Convention was to reduce discharges of chloride ions into the Rhine by at least 60 kilos per second.

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1 1404 UNITED NATIONS TREATY SERIES p. 59 (1985).
In the first stage, France was obliged to build a facility for injection into the subsoil of Alsace, the purpose of which was to receive 20 kilos per second of the chloride ions produced by the Alsace mines, which would otherwise have been discharged into the Rhine. In the second phase, France was obliged to make changes to the working methods of the Alsace Potassium Mines so as to reduce the discharges of chlorides by 40 kilos per second. However, this second requirement was revoked by an Additional Protocol to the Convention, adopted in 1991, which introduced a new system for reducing the pollution of the Rhine by chlorides. France had encountered severe problems in implementing the first phase of the work provided for in the Convention and as a result it had not fulfilled its commitment to carry out the improvement works that were to start no later than eighteen months after the Convention came into force, according to Article 2, point 2. These problems had given rise to several lawsuits in the French courts. 3

In order to overcome these obstacles, the parties to the Convention signed, in 1991, the Additional Protocol to the Convention of 3 December 1976 on the Protection of the Rhine against Pollution by Chlorides, which was intended to be implemented jointly with the 1976 Convention. 4 The Protocol entered into force for all the States parties on 1 November 1994. One of its provisions abrogated Articles 3 and 6 of the Convention dealing with the second phase of reduction of chloride discharges by France into the Rhine. Instead, the Protocol introduced a reduction target that was modulated according to the quantity of chloride actually measured in the waters of the Rhine. The Protocol provided, in particular, that in the event the chloride concentration at the German-Dutch border exceeded 200 mg per litre for a consecutive period of 24 hours, France was obliged to stock on land the residual salts produced by the Alsace Potassium Mines until such time as the level of chloride in the waters of the Rhine fell below the critical threshold. This regime was intended to operate until the planned reduction in 1998 in the level of activity of the Alsace Potassium Mines (see

3 Id.

4 RECUEIL OFFICIEL DU DROIT FÉDÉRAL SWITZERLAND p. 2277 (1994). [Translator’s note: The Additional Protocol was signed in three authentic texts, French, German and Dutch. The English translation of the Award that follows uses the English translation of the Additional Protocol published in the United Nations Treaty Series, 1994, p. 430, which employs the same expression, “actual expenditures”, for the two different expressions, “dépenses engagées” and “dépenses effectuées” appearing in the French text of point 4.2.1 of Annex III. As an informal aid to understanding, “dépenses engagées” might be taken to mean “expenditures incurred” and “dépenses effectuées” as “actual expenditures.”]
Annex I to the Protocol). Article 3 further provided that the Netherlands was to adopt, on its territory, measures to limit the amount of chlorides in the waters of the IJsselmeer into which the waters of the Rhine flow.

The steps to be taken under the Protocol were to be financed by Germany, France, the Netherlands and Switzerland based on a system of apportionment similar to the one in the Convention, with each country paying, respectively, 30%, 30%, 34% and 6%. Like the Convention, the Protocol provided that each State was to contribute to all the activities undertaken in order to combat the pollution of the Rhine by chlorides (Protocol, Article 4). In so doing, this system of joint responsibility departed from the “polluter pays” principle.

In addition, a maximum amount of 400 million French francs had been laid down for the measures to be taken on French territory for the period 1991-1998, with a spending limit of 32.37 million Dutch guilders for those taken by the Netherlands. These amounts were to cover the costs of storing the chlorides and their removal from storage, as well as the costs of investment. If the actual amounts spent exceeded the spending limits (which actually never happened), the Protocol provided that France and the Netherlands would both be released from all storage obligations.

Annex III to the 1991 Protocol dealt with the financial arrangements, concerning how the financing was to be paid for and calculated. In the event that the actual expenditures (“dépenses effectuées”) were less than the maximum spending limit laid down in Article 4 of the Protocol, it was provided that the accounts would be audited not later than 31 December 1998, to determine whether France or the Netherlands must repay the amount of the surplus.

The legal issue that gave rise to the dispute was a question about the interpretation of the 1991 Protocol. The Protocol provided that the dispute resolution provisions in the Convention were applicable to disputes arising out of the implementation or interpretation of the Protocol (Article 7.1 of the Protocol, which refers back to Article 13 of the Convention). When the parties' attempts to resolve the issue by direct negotiations failed, an arbitral tribunal was set up to resolve the dispute in question.

The dispute between France and the Netherlands concerned “the amount to be repaid by the French Republic to the Kingdom of the Netherlands under the final auditing of accounts which was to take place not later than December 1998.
as provided in paragraph 4.2.1. of Annex III to the Additional Protocol. The Arbitral Tribunal, composed of Judge Kooijmans, appointed by the Netherlands, Judge Guillaume, appointed by France, and Judge Skubiszewski, who was appointed by the other two arbitrators and assumed the functions of President, was set up in 2000. The International Bureau of the Permanent Court of Arbitration was appointed as Registry. The Tribunal rendered its Award on 12 March 2004.

II. THE ARBITRAL AWARD OF 12 MARCH 2004

Application of the principles and rules of treaty interpretation

The dispute concerned the interpretation of certain provisions of the 1991 Protocol and its Annexes. The Tribunal began by recalling the principles governing treaty interpretation in international law, relying on Articles 31 and 32 of the Vienna Convention on the Law of Treaties. As will be seen, the Tribunal paid particular attention in examining these two Articles, to the notions of the text of the treaty, good faith, and the object and purpose of the treaty, as well as the question of the relationship between Articles 31 and 32 of the Vienna Convention.

Articles 31 and 32 of the Vienna Convention were, according to the Tribunal, applicable to the present case, even though France was not a party to that Convention. The Tribunal emphasised that these were norms of a customary nature, basing itself on – and citing – the consistent and unchanged case law of the International Court of Justice (ICJ) and of other international courts and tribunals. It should be noted that France had argued in its Memorial that the rules of customary law on treaty interpretation might be somewhat different from those in the Vienna Convention. The Tribunal however found that France had not been specific on this point. The Tribunal took the view that Articles 31 and 32 of the Vienna Convention must be taken “as a faithful reflection of the current state of customary law”.

5 See Award, paras. 59–61.
6 See Award, para. 43.
7 Award, para. 77.
INTRODUCTION

According to the Tribunal, Article 31 of the Vienna Convention forms an integral whole, the elements of which "provide the basis for establishing the common will and intention of the parties by objective and rational means". The Tribunal referred to the commentary of the International Law Commission according to which Article 31 uses the term "rule" in the singular to signify that it is an integral whole. The Tribunal therefore considered that the notion of "text of the treaty" was not necessarily limited to the ordinary meaning of the terms, since that would amount to ignoring all reference to good faith, the context, and the object and purpose of the treaty. Moreover, the text of a treaty is one of the elements composing the notion of context for the purposes of interpretation.

It was here, according to the Tribunal, that one of the main divergences was to be found between the arguments of the parties to the dispute: they accorded different degrees of importance to the components of the general rule of interpretation. For the Netherlands the ordinary meaning of the terms was decisive, while for France account must also be taken of other elements such as good faith, the context, and the object and purpose of the treaty. The Tribunal seems to have come down in favour of the French point of view. It laid particular emphasis on the "fundamental role of good faith and how it dominates ... interpretation".

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8 Award, para. 62. Article 31 of the Vienna Convention on the Law of Treaties reads as follows:
"Article 31: General rule of interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

9 Award, para. 64. See II ILC YEARBOOK p. 239 (1966).

10 It added, obiter dicta: "not only in treaty interpretation". Award, para. 65.
As to the relationship between the principles and rules of Articles 31 and 32 of the Vienna Convention, here too there were divergences between the parties. In particular, the Netherlands contended that it was only possible to have recourse to Article 32 if Article 31 left the meaning ambiguous or obscure or led to an unreasonable result. France, on the other hand, maintained that Article 32 could “not be dissociated from the general rules of interpretation”\(^\text{11}\). Basing itself on decisions of the Permanent Court of International Justice and the International Court of Justice as well as those of other arbitral tribunals, the Tribunal accepted that, in cases where Article 31 led to a clear result, recourse could still be had to Article 32. The Tribunal therefore considered that even if, in the present case, it was not necessary to have recourse to the means of interpretation laid down in Article 32, there was nothing to prevent it referring to them in order to corroborate the conclusions that resulted from applying Article 31.\(^\text{12}\) Subsequently, though, the Tribunal added that recourse to Article 32 was not merely a power, but actually a duty, when it stated that “[n]onetheless, the Tribunal considers that it must, in this case, do what is required under Article 32 of the Vienna Convention”.\(^\text{13}\) The Tribunal did not make clear what the source of this duty was, though it appeared to accept that Article 31 had not produced a result that was unreasonable or absurd, because, having interpreted the Protocol in the light of that Article, it concluded that “the calculation for the final auditing must be based on the amount of 61.5 (1988) French francs per ton”,\(^\text{14}\) an outcome that

\(^{11}\) Award, para. 68. Article 32 of the Vienna Convention on the Law of Treaties reads as follows:

“Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

\(^{12}\) “The Tribunal notes that Article 32 does not restrict the use of supplementary means of interpretation only to those cases where the result of applying the provisions of Article 31 would be ambiguous, obscure or manifestly absurd or unreasonable. Recourse may in fact be had to these means in order to ‘confirm the meaning resulting from the application of Article 31’. This is in line with several judgments of the International Court of Justice.” (Award, para. 70). Again: “According to Article 32, recourse can be had to supplementary means of interpretation [...]” (Award, para. 73).


\(^{14}\) Award, para. 105.
was then confirmed by having recourse to the means of interpretation laid down in Article 32 of the Vienna Convention. Thus the very fact that the Tribunal decided to look at the preparatory works and the circumstances surrounding the signature of the Protocol is itself somewhat ambiguous.

Before turning to the preparatory works, the Tribunal considered how the rules of treaty interpretation should be applied, having regard especially to Article 4 of the Protocol and Annex III thereto. These provided for a mechanism that the two parties interpreted very differently. Article 4 of the Protocol provided that the parties must bear the costs of the measures taken both on French territory – the maximum spending limit for which was fixed at 400 million French francs – and on Dutch territory – the maximum spending limit for which was 32.37 million Dutch guilders – according to the fixed quotas (30% for France and Germany, 34% for the Netherlands and 6% for Switzerland). Germany, the Netherlands and Switzerland were required to make annual prefinancing payments to France, so that it could pay the costs of storage of the chlorides and of their removal from storage. If the spending limit was not exceeded – which in practice it never was – Annex III to the Protocol provided that the difference between the amount received and the amount actually expended year after year by France must be carried forward to the following year, and that a final auditing of the accounts must be performed at the end of the period envisaged, in other words not later than 31 December 1998, in accordance with point 4.2.1. of Annex III.

During the period at issue in this dispute, the quantities of chloride actually stored by France remained within the spending limits laid down, which meant that France had an obligation to refund the surplus payments to the other parties. Neither party disputed this point. What was in issue was the method to be used in calculating the overpayments that the French Republic was to reimburse to the Netherlands. According to the Netherlands, the amounts actually spent ("dépenses effectuées") by France were to be calculated by multiplying the number of tons of chloride stored and removed from storage by 61.5 French francs (at 1988 values), plus the investment costs, in accordance with point 1.2.6. of Annex III of the Protocol. According to France, the fixed rate amount of 61.5 French francs per ton was to be used only in calculating the spending limits for the period 1991-1998. At the time of the final auditing of the accounts, bearing

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15 See point 1.2.6 of Annex III to the Protocol.
in mind that the actual costs of storing the chlorides and removing them from storage had been much higher because of the small quantities stored, the calculation had to be based on actual costs. Put another way, according to France, the total amount must be calculated by using two distinct mechanisms: the one that applied to the provisional auditing of the accounts, based on the fixed rate of 61.5 French francs per ton and covering the period 1991-1998, and the other, applicable to the final auditing, which was based on actual expenditures. The results produced by using each of the proposed methods differed substantially: according to the Netherlands, France would have to pay back approximately 100 million French francs, while the amount calculated by France was only about half as much.

The problem hinged on the fact that the parties did not agree on the meaning to be given to the word “comparaison” [comparison] that appears in point 4.2.1 of Annex III to the Protocol. Point 4.2.1 provided for a comparison to be made for the purposes of the final auditing of the accounts between, on the one hand, the expenses incurred (“dépenses engagées”), and on the other the spending limits laid down in point 2 of Annex III. For France, the term “comparaison” was to be distinguished from the term “différence” as used in point 3.2.3 of Annex III, which referred to the difference between the costs of actual storage and the spending limit laid down for the year in question. In the view of France, this was evidence of the fact that Annex III envisaged two distinct processes for calculating the costs. For the Netherlands, on the contrary, the term “différence” referred only to the situation where the actual storage costs were less than the spending limit set for the year in question. This meant, according to the Netherlands, that if that comparison showed that the actual expenditures of France were below the amount fixed by the Protocol, then France was under an obligation to refund the surplus (i.e., the “différence”).

The Tribunal took the view that the term “comparaison”, according to the ordinary meaning of the word in French, was synonymous with a mathematical difference (“différence mathématique”), since it referred to two amounts that could be expressed in figures. “Without subscribing to the view of the Netherlands”, the Tribunal concluded, “France has not shown that the parties intended to invest the term ‘comparaison’ with a particular meaning that referred back to a method that spoke of actual costs”.

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16 See Award, para. 47.
17 See Award, para. 35.
18 Award, para. 91.
INTRODUCTION

As to the notions of “dépenses engagées” and “dépenses effectuées”, the Tribunal considered these to be synonymous, corresponding to expenditures “made” or “carried out”. Mindful of the principle of effectiveness in international law, the Tribunal found that it was impossible to distinguish between “dépenses engagées” and “dépenses effectuées”. It noted, moreover, that the expression “dépenses effectuées” appeared not only in point 4.2.1 of Annex III, but also in point 1.2.6 thereof. In that latter point it was clearly stated that the “dépenses effectuées” for each year were to be calculated “at a rate of 61.5 French francs (1988 French francs adjusted for inflation) per ton stored” (and not, therefore, by taking their actual amount), and adding to this, for the first year, a sum of 40 million French francs for investment expenses. France for its part contended that the expression “dépenses effectuées” did not bear the same meaning in points 1.2.6 and 4.2.1, because they operate in different contexts, which confirmed once again the need to have two different types of calculations for the final auditing.19

For the Tribunal, the question that arose was whether the apportionment formula mentioned in Article 4 of the Protocol referred to the actual costs or the lump sum costs laid down in point 1.2.6 of the Annex, as this was not clear from Article 4 of the Protocol.20 In other words, Article 4 did not clearly state whether the calculation for the final auditing of accounts was to be based on the lump sum amount of 61.5 French francs per ton of chlorides, or rather made on the basis of actual costs. Article 4 refers back to the payment arrangements in Annex III, and this proved to be decisive: point 1.2.6 of Annex III allowed for the view that the auditing of accounts must be done on the basis of the fixed amount stipulated by the parties beforehand, of 61.5 French francs per ton of chlorides stored and removed from storage. From there onwards, Article 4 of the Protocol did no more than to allocate the sums so calculated to each of the States parties according to their different percentages.

Turning to examine the object and purpose of the treaty, the Tribunal noted that there was a difference between the definitions given by the two parties of the object and purpose of the Protocol: while the Netherlands laid emphasis on improving the quality of the waters of the Rhine and the supply of drinking water from it,21 France underlined the principle of solidarity among the States

19 Award, para. 92.
20 Award, para. 94.
21 See Award, para. 36.
bordering the Rhine, the sources of pollution of which were many and not confined to French territory.22 The Netherlands did not dispute that solidarity was a feature of the Protocol, as could clearly be seen from some of the documents drawn up prior to the signing of the Protocol (in particular, the “Dutch Draft Proposal for the subsequent implementation of the Convention on the Protection of the Rhine against Pollution by Chlorides” of 14 July 1989).23 In the view of the Tribunal, there was a “community of interests” among the parties to the Protocol, leading to a “community of law”, in which solidarity among the States bordering the river was undoubtedly a key factor. The Tribunal however emphasised that identifying the exact object and purpose of the treaty was not conclusive for the purposes of auditing the accounts, for one thing because both interpretations seemed to be perfectly compatible with the object and purpose of the treaty.24 The Tribunal did not expound at length on the documents presented by each party in order to show that there was “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”, within the meaning of Article 31 3 b) of the Vienna Convention: none of the documents produced had a bearing on the issue of the final auditing of accounts.25 The Tribunal moreover lost no time in dealing with the “polluter pays” principle, which the Netherlands had invoked. The Netherlands referred to this principle26 as a “relev ant rule of international law applicable in the relations between the parties”, within the meaning of Article 31 3 c) of the Vienna Convention. The Netherlands itself recognised that the 1991 Protocol derogated from that principle, and the Tribunal emphasised this, while taking the view that the “polluter pays” principle is not part of general international law.27 The Tribunal rejected this principle for the purposes of interpreting point 4.2.1 of Annex III to the Protocol.

In the light of the above considerations, the Tribunal concluded that the calculation for the auditing of accounts was to be done on the basis of the fixed amount of 61.5 French francs per ton (at 1988 values). Before turning to the actual calculation of the amount owed by France to the Netherlands, the Tribunal examined a series of documents, drawing upon the criteria for interpretation in Article 32 of the Vienna Convention. These were various documents cover-

22 See Award, para. 44.
23 Doc. DELch 17/89. See Award, para. 96.
24 Award, paras. 97 and 98.
25 Award, paras. 99 et seq.
26 See especially para. 36 of the Award.
27 Award, para. 103.
The Tribunal agreed with France in the view that both fixed and variable elements had been used in calculating the amount of 61.5 French francs per ton. It added, however, that the parties had not taken account of any variations that might—and in fact did—occur in the quantities to be stored. The amount of 61.5 French francs per ton had been elaborated independently of those quantities. The Tribunal noted that the main concern of the parties, as it appeared from the documents it had reviewed, had been to ensure that the quantities to be stored and the expenditures to be made did not, as a result of the reduction in the coefficient of flow of the Rhine, exceed the ceilings laid down in the treaty. It had not occurred to them—and thus they had made no provision for the eventuality that did in fact arise—that the coefficient of flow would increase, reducing the amounts stored to the point that their forecasts were completely upset. The Tribunal concluded that the documents arising out of discussions held prior to the adoption of the Protocol did not permit any other conclusion than that arrived at by applying the rules laid down in Article 31 of the Vienna Convention.29

**Calculation of the amount to be repaid by France to the Netherlands**

It only remained to calculate the amounts owed by France to the Netherlands as reimbursement of the overpaid surplus. Chapter VI of the Award30 is entirely devoted to the calculation method to be used in auditing the accounts. This is a highly technical section of a kind rarely found in international arbitral awards, the more so because the arbitrators were not directly assisted by financial experts. That said, in an award that sets out to clarify the method to be used in a

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28 See Award, paras. 106–129.
29 Award, paras. 129 and 131.
30 Corresponding to paras. 133 to 143 of the Award.
The methods put forward by both parties were markedly different, being motivated by guiding principles that were totally opposed. As has been seen above, the Netherlands’ method consisted of calculating the final accounts on the basis of the lump sum of 61.5 French francs per ton, while the method advocated by France required the actual costs of the operations of storage and removal from storage of the chlorides to be taken into account as well. The Tribunal challenged the method of the Netherlands, held to be “incomplete, if not erroneous”, \(^{31}\) because it took no account of the fact that the expenditures had to be calculated in French francs at 1988 values, while the payments had to be calculated in French francs at current values. The calculation could therefore not be performed merely by reference to the lump sum amount of 61.5 francs, but also necessarily depended on a number of other factors. \(^{32}\) Thus, while the method put forward by the Netherlands was rejected, the French method was not adopted either.

The Tribunal began by calculating the amount overpaid, and then the interest, broken down into interest accrued up to 31 December 1998 and interest after that date. For both types of calculation the Tribunal decided to proceed year by year, since the total interest payable was the sum of the interest calculated on each annual overpayment. \(^{33}\) In order to calculate the overpayment, according to the Tribunal it was necessary to calculate the amount of the actual expenditures of France, deduct the amount representing the 34% contribution of the Netherlands, and finally compare those amounts with the amounts the Netherlands had in fact paid. As for operating costs, the Tribunal applied the method of multiplying the tons stored each year by France by 61.5 francs, which gave a total – adding together the results for each year from 1991 to 1998 – of approximately 73 million francs. Then, under point 1.2.6 of Annex III to the Protocol, for the year 1991/1992, it was necessary to add fixed investment costs of 40 million (1988) francs which, when the franc was revalued at 1991/1992 rates, gave an amount of some 32.5 million francs for 1991/1992, with a further 13 million approximately for 1993. The amount actually paid by the Netherlands was 135.7 million French francs. The difference between the annual pay-

\(^{31}\) Award, para. 135.

\(^{32}\) Id.

\(^{33}\) Award, para. 136.
ment made by the Netherlands and 34% of the French amount gave the level of
the excess amount France had received, which came to approximately 95.4 mil­
lion French francs.\textsuperscript{34}

Having determined the overpayment, the Tribunal proceeded to calculate the
interest. Interest up to 31 December 1998 had to be calculated according to
point 3.2.3 of Annex III to the Protocol which provided that: “In the event that
the actual storage costs calculated in this way are below the limit initially set for
the year concerned (point 2.1.1), the difference (plus 11/12 of the yearly interest
on this amount at the annual long-term interest rate on national loans) shall be
carried over to the following year, thereby raising the spending limit for the
following year accordingly”. The total balance carried forward, according to
the Tribunal’s calculations, was 117.1 million francs and the interest capitalised
21.7 million francs. As to the interest due after 31 December 1998, including all
costs of storage and removal from storage, this came to 11.7 million French
francs.\textsuperscript{35}

The Tribunal took the view that the amount of the excess payments made to
France, which France was therefore bound to repay to the Netherlands, came to
128.8 million French francs, in other words the total balance at 31 December
1998 (117.1 million) plus the interest due after 31 December 1998 (11.7 mil­
lion). The Tribunal stated that the cost overruns attributable to the rise in the
price of removals from storage after 1998 must be deducted from that amount,
but it found that it was not possible to assess the amount of those overruns. The
Tribunal therefore encouraged the parties to make this assessment themselves,
and invited them to set aside a sum to finance these overruns, estimated to be 10
million French francs (which would be adjusted later when determined by the
parties). Taking this final consideration into account, France was obliged to
repay the Netherlands the sum of 118.9 million French francs, and to set aside
the sum of 10 million French francs for payment of interest due after 31 Decem­
ber 1998 (the latter amount was not to bear interest).\textsuperscript{36}

\textsuperscript{34} Award, para. 137.
\textsuperscript{35} Award, paras. 138 ff.
\textsuperscript{36} Award, para. 143.
III. THE DECLARATION OF JUDGE G. GUILLAUME

The decision was accompanied by a Declaration of Judge Guillaume. According to him, "[t]he fundamental difficulty of this case arises from the fact that the forecasts made in 1989 about the coefficient of flow of the Rhine turned out to be completely wrong". In fact, the quantity of chlorides to be stored never exceeded 20% of the quantity used as a yardstick for calculation during the negotiation of the Protocol. This prompted Judge Guillaume to consider that France would not have agreed to a lump sum of 61.5 francs had it known that the coefficient of flow of the Rhine would turn out so different from what was forecast at the time. Since this was an essential basis of France's consent, "[t]he question then becomes whether this is a fundamental change of circumstances such as to permit the Tribunal of its own motion to invoke the 'rebus sic stantibus' clause". To do this, Judge Guillaume referred to Article 62 of the Vienna Convention, the customary law nature of which is well settled. That Article gives rise to an obligation on the parties to negotiate in cases where the rebus sic stantibus clause applies, and, if this fails, it offers them the possibility of withdrawing from the Convention or suspending its implementation. He emphasised that review of the agreement by a court or an arbitrator was possible only if the parties had provided for this, which in the present case they had not. In Judge Guillaume's opinion, this explained why the Tribunal had chosen "an unreasonable solution that should have been reviewed in the light of the new circumstances by good faith negotiations between the Parties". He regretted that the good neighbourly relations that existed had not enabled such negotiations to take place, but hoped that the parties to any future dispute would negotiate in order to reach a reasonable solution.

IV. CONCLUSIONS

Several aspects of the principles of treaty interpretation came into play here. They allowed the Tribunal to emphasise how the interest and the will of the parties can be discerned from the treaty provisions themselves, bearing in mind the fact that Article 31 of the Vienna Convention on the Law of Treaties forms one integral whole.

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37 See p. 85.
38 Id.
39 See p. 87.
INTRODUCTION

This highly technical case also highlighted the economic aspects of environmental protection and of the management of international watercourses. The issue of cost allocation is key to the various regimes set up to combat pollution, limit the harmful effects of a given substance or activity, or to protect a particular area. It demonstrates the difficulty of constructing international regimes for the conservation and management of natural resources, and at the same time the complexity of the regimes to be set.

As the basis for cooperation and solidarity between States bordering the river, the Tribunal relied on the principle of community of interest and of law applicable to an international watercourse, thus further confirming the status accorded it in the case law, and giving it a new application to questions of water quality and environmental protection of an international watercourse.

With its intricate accounting, the Award gives a very specific answer to the question that triggered the dispute between the parties, even though the forces of nature had defeated the intentions of the parties to the Protocol, unravelling the specific forecasts they had made in it. This dispute might well serve as a lesson to States to make greater allowance for measures that enable their regimes to be adapted to accommodate nature’s unpredictability.

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