The Permanent Court of International Justice, the International Court of Justice and international water law: versatility in consistency

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PART V

DISPUTE SETTLEMENT AND COMPLIANCE

17. The Permanent Court of International Justice, The International Court of Justice and international water law: versatility in consistency

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1. INTRODUCTION

The International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ), have played a significant role in the development and maturation of international water law. Disputes involving water have been a constant feature in the life of these courts. This contribution will reveal the variety of the cases brought before these judicial institutions. As will become evident, they reflect the many values of water, be they social, ecological, or economic. The various cases concern a range of issues from water quantity and quality, boundary issues, navigation, and can also be linked to economic and energy activities. They reveal the manner in which international law regulates water uses as well as the many forays it has made in the area of water protection and water management. At times, the contribution of these two jurisdictions has been forward looking in shaping and clarifying the content of principles and notions which have made their way into State practice and the case law of other courts and tribunals.¹

2. THE PERMANENT COURT OF INTERNATIONAL JUSTICE: INTERNATIONAL WATER LAW QUICKLY TAKES ITS PLACE ON THE WORLD STAGE

Very early on the PCIJ became an important forum for resolving water disputes. Through its various decisions, the PCIJ made a contribution to the clarification of some of the major principles applicable in this field, and particularly freedom of navigation. In others, it indicated that there was a responsibility incumbent upon riparian States to elaborate suitable agreements and frameworks of action.

¹ L. Boisson de Chazournes, Fresh Water in International Law 206–09 (Oxford University Press, 2013).
(a) Territorial Jurisdiction of the River Oder Commission

The first case brought before the PCIJ to deal with water issues concerned the principle of navigation. At stake was the identification of the sections of the River Oder to which the international regime established by the Treaty of Versailles was to apply, so as to allow for international navigation. It dealt with the scope of freedom of passage within the context of a specific watercourse. According to Articles 341 and 343 of the Treaty of Versailles, the Oder was placed under the administration of an International Commission composed of representatives of Poland, Prussia, Czechoslovakia, Great Britain, France, Denmark, and Sweden. The Commission had inter alia to define the sections of the river or its tributaries to which the international regime shall be applied.3

In the deliberations of the Commission, differences of opinion arose with respect to the extent of the jurisdiction of the Commission as well as the interpretation of Article 331 of the Versailles Treaty. That Article provides that the Oder ‘and all navigable parts thereof which naturally provide more than one State with access to the sea’ are ‘international’. The Polish government contended that two tributaries of the Oder (the Netze and the Wartha), located in Poland, provided only Poland with access to the sea and therefore did not fall within the terms of Article 331. On the other hand, the six other States of the International Commission maintained that the condition prescribed by Article 331 was fulfilled. In their view, the two tributaries were thus submitted to the jurisdiction of the International Commission.

The PCIJ was asked to determine whether the jurisdiction of the Commission extended to the tributaries of the Oder situated in Poland. In holding that the jurisdiction of the Commission extended to those tributaries, the Court stated that a solution ‘has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States’. Moreover, it held that this community of interest in a navigable river ‘becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others’.4

As will be seen, the PCIJ helped identify a concept, that of a community of interests, which has become a core principle of contemporary international water law.

(b) Diversion of Water from the Meuse

Another case brought to the PCIJ dealt with the use of the waters of the Meuse River by Belgium and the Netherlands. This river, although for a large part unsuitable for navigation, served as a water reservoir for several artificial canals used for the transportation of goods.5 Indeed, the Meuse River crosses one of the earliest and most highly industrialised areas of Europe. In order to meet their growing economic needs, Belgium and the Netherlands started the construction of a series of canals, fed by the waters of the Meuse, which would have allowed the expansion of commercial traffic.

In 1863, the two countries signed a treaty that regulated the withdrawal of water from the Meuse.6 Yet, during the 1920s, it became clear that other canals needed to be built and a larger supply of water to be drawn from the Meuse. In particular, the development of the coal-fields in the Dutch and Belgian Limburg called for an improvement in the waterway connections with the ports of the North Sea. Thus, given the building of new canals fed by the waters of the Meuse, the Netherlands and Belgium began competing over a limited amount of water drawn from this river. In this context, the Dutch government instituted proceedings against Belgium before the PCIJ.

Belgium and the Netherlands advanced parallel claims during the proceedings before the PCIJ. In brief, the Netherlands asked the Court to decide that the diversion works carried out by Belgium were in violation of the treaty concluded in 1863 between both countries. At the same time, the Belgian government, rejecting the Dutch claim, filed a counterclaim inviting the Court to find that the works performed by the Belgian government were in breach of the same treaty. Thus, both parties cited the same instrument as a source of rights and duties but differed in their interpretation of its scope.

The PCIJ, taking a rather restrictive approach, stated that the 1863 Treaty did not prevent parties from constructing, modifying or enlarging canals wholly situated in the national territory, provided that the diversion of water at the Maastricht intake and the volume of water discharged therewith were not affected.7 Thus, the Court confined its reasoning to issues related to the law of treaties. Its judgment gave priority to the principle of pacta sunt servanda, without taking into account the underlying reasons for the dispute, namely the commercial rivalry between Belgium and the Netherlands.8 In the view of the Court, the parties could build as many canals as they wanted, even if there existed a great deal of competition for a limited amount of water, provided the

9 Diversion of Water from the Meuse, supra note 6, at 26.
10 In this regard the Court stated, id. at 16:

From the history of the dispute given above, it will be seen that one of the difficulties in achieving a settlement of the differences between the two States has been the Belgian desire to obtain The Netherlands’ consent to the construction of a new canal connecting Antwerp and the Rhine, a point upon which one may infer that the Netherlands government has felt itself unable to accede to the wishes of the Belgian Government because of the commercial rivalry between Antwerp and Rotterdam. With this aspect of the question the Court is in no way concerned. Its task is limited to a decision on the legal points submitted to it as to whether [...] certain work constructed by the Belgian Government [...] infringe[s] on the Treaty of 1863 and [regarding] the Belgian counterclaim, as to whether [...] certain work constructed by The Netherlands Government [...] constitute[s] an infringement of the Treaty of 1863.
principles of the 1863 Treaty were maintained. However, in adopting this approach, the PCIJ was unable to settle the question concerning the amount of water the parties were entitled to draw from the Meuse. It fell to the parties to conduct negotiations on this issue. It was only some 50 years after the judgment had been rendered that the parties were finally able, through negotiations, to establish a legal regime that was satisfactory to both sides.11

(e) Jurisdiction of the European Commission of the Danube between Galatz and Braila12

In the Jurisdiction of the European Commission of the Danube between Galatz and Braila, the Court considered the principles of flag equality and freedom of navigation to confirm the European Danube Commission’s jurisdiction over any vessel movement in the concerned ports, while recognising the relevant States’ territorial authority to monitor and regulate non-moving vessels in these ports. In particular, this case concerned the determination by the PCIJ of the jurisdiction of the Commission over a Danube port area within Romanian territory. As such, the Court was asked to opine on the respective competences of the European Danube Commission. After having established that the "freedom of navigation ... must be assured by the European Commission on the whole river," and noting further that "the voyage of a vessel only ends when it takes its moorings in a port," the Court considered that: "The freedom of navigation which it is the duty of the European Commission to assure therefore covers not only shipping passing through a sector of the river corresponding to a port, but also shipping arriving in or leaving a port." It thereby laid down a principle largely reflected in international practice. This right of access to ports and their facilities covers various aspects such as the right to cast anchor, the use of the equipment needed for operations such as loading and unloading, and other port activities such as sealed storage and transshipment. Moreover, the prohibition on physical obstructions assumes that a watercourse remains in a state of navigability. This is to ensure ‘security of navigation’ by maintaining a navigable route. The prohibition may be understood in two ways. It can be either an obligation that the State discharges so that their activities do not impede navigation, or an obligation of maintenance and improvement of the navigable channel.

(d) Oscar Chinn Case15

In the Oscar Chinn Case between Great Britain and Belgium, the PCIJ considered whether the Belgian government subsidizing a Belgian company operating a river transport company on the Congo River violated any international obligations after a British national, who operated a competing river transport company, brought a complaint via diplomatic protection. The PCIJ ultimately decided that no such obligations had been breached.

Interestingly, the PCIJ also stated that freedom of navigation can entail the freedom to make use of port facilities, as well as to engage in commercial conduct related to the transportation industry. In this respect, it is important to note that the underlying concern shaping this freedom through both history and practice is the assurance of States’ economic interests. That said, it should also be noted that the PCIJ addressed proprietary rights in this case. In its decision the Court confirmed that sovereign efforts to respond to an international economic crisis by temporarily manipulating the tariff rates of State-owned shipping entities did not violate treaty obligations to afford ‘commercial equality’ to private competitors owned by foreign nationals.

The Oscar Chinn Case also illustrated that freedom of navigation, in some cases, can cover engagement in commercial activities related to the transportation industry. It can therefore serve as an extension of the freedom of trade and the Court in fact established a link between the freedom of trade and the freedom of navigation. While admitting that the two concepts were distinct, the judicial organ considered that the freedom of navigation, ‘implies, as far as the business side of maritime or fluvial transport is

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13 Id. at 65.

14 Id.

15 Id.

16 Id.


20 Id. at 85-6.
concerned, freedom of commerce also'. It added that, in the case at hand, the freedom of navigation should be seen 'from the special aspect of the commercial operations inherent in the conduct of the transport business'.

In summary, while on its face the case law of the PCIJ related to water appeared to be mainly concerned with freedom of navigation, the PCIJ can nevertheless be seen contextualizing, connecting and developing the latter principle. As such, we can see the principle of the freedom of navigation being considered alongside such concepts as community of interests or freedom of commerce. As will become evident, this practice of contextualizing, connecting and developing the various principles at stake in water disputes can also be noted in that approach of the International Court of Justice.

3. THE INTERNATIONAL COURT OF JUSTICE: PRIMUS INTER PARES

States have continued to bring cases dealing with water issues before the ICI. Although the number of international courts and tribunals has increased over the years, and water disputes have been brought before them, the PCIJ has not lost its attractiveness and has been instrumental in shaping and clarifying applicable rules and principles in this field.

(a) Case Concerning the Gabčíkovo-Nagymaros Project

Under the 1977 Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks (1977 Treaty), Hungary and Czechoslovakia (as it was before it was broken up into the Czech Republic and Slovakia in 1993) had agreed to construct and operate a system of locks, a dam, a reservoir, a hydroelectric power plant and flood controls along the Danube River. Subsequent to this treaty, both countries experienced significant changes to their internal political and economic systems, more especially at the end of the 1980s with the fall of the Berlin Wall and circumstances surrounding this event. In Hungary, a significant environmental lobby began to grow and oppose the planned works on the Danube. Following these events, Hungary stopped part of the works and ultimately sought to terminate the 1977 treaty. In 1992, Czechoslovakia began works to divert the Danube River into a power canal, controlling 80-90 per cent of its flow, under an alternative project (known as Variant C) which had been agreed between the two countries. Slovakia and Hungary decided to submit the dispute for resolution by the ICI.

When the Gabčíkovo-Nagymaros case came before the ICI, the Court, in addition to taking into account the 1977 Treaty, recognized emerging concepts and principles of international environmental law. For example, the Court made reference to the principle of equitable and reasonable share of the natural resources of an international watercourse. As for the application of contemporary environmental standards, the Court held that the Parties must take developments into account when implementing the concerned treaty provisions. Furthermore, the ICI took the opportunity to clarify its predecessor’s reference to the concept of a community of interests in the 1929 Oder case. In the Gabčíkovo-Nagymaros case, the Court noted:

... in 1929, the Permanent Court of International Justice, with regard to navigation in the River Oder, stated as follows: '[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others' (Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, Judgment, PCIJ Reports 1929, Series A, No. 23, 27).

Gabčíkovo-Nagymaros was in fact the first case before the ICI to be concerned with international environmental law in such a comprehensive manner, and in many ways the ICI clarified this field of law. It did so in relation to the uses of an international watercourse, the Danube, and highlighted the various principles and norms that could be connected. Interestingly, the Court clarified that a state of necessity which would suspend treaty obligations can only be temporary, although it did not rule out the possibility that a state of ecological necessity could exist. The unilateral action taken by Czechoslovakia to divert 80-90 per cent of the flow of the Danube was considered an internationally wrongful act that could not be justified on the ground of the exercise of a countermeasure, as it was not proportionate and would run against the equitable and reasonable share principle.

(b) Cases Concerning Boundary Delimitation and Water Issues

Traditionally, there are three methods that have been used to delimit territories having recourse to rivers or lakes. The oldest is that of coastal boundaries, identified by reference to the bank of each of the concerned States or the bank of only one of two adjacent States. A second method is that of 'successive watercourses', i.e., watercourses that, instead of dividing, pass through the territory of a number of States. The boundary drawn according to this method connects the respective terrestrial borders, generally through a straight line with reference points at the territorial boundaries. A more

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24 Id. at § 85.
25 Id. at § 104.
26 Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, supra note 2.
27 Gabčíkovo-Nagymaros, supra note 23, at § 85.
29 Gabčíkovo-Nagymaros, supra note 23, at § 85.

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21 Id. at 83.
22 Id.
complex approach is that of tracing the boundaries among contiguous riparian States. Obviously, States have full discretion in deciding how to fix a boundary; they may, for instance, agree on a certain geographical point of reference or on given coordinates. Otherwise, the common boundary can be fixed either according to the geographical thalweg\(^{31}\) or the median line between the two banks.\(^{32}\)

The ICJ has adjudicated a number of cases involving water and boundary issues. In the Mali/Burkina Faso decision,\(^{33}\) the Court appears to have utilized the so-called median line method of delimitation in order to partition the Mare de Soum and the Mare d’In Abeo according to the *uit possidei* principle. It explicitly did so for the Mare de Soum, having recourse to the maximum area of the pool in order to trace the median line. It seems that the same method was adopted for the Mare d’In Abeo.\(^{34}\) As was observed, an equal partition on the surface does not guarantee an equitable distribution of the fresh water resources.\(^{35}\) In his Separate Opinion, Judge ad hoc Georges Abi-Saab, while accepting the conclusions of the Chamber on the limits of the *uit possidei* principle, called for a more generous application of *infra legem* equity in the interpretation and application of law. His argument relied on the need to take account of the basic needs of populations, especially given that the issue at stake was the delimitation of ‘pools’ in a desert area where access to water has a crucial importance.\(^{36}\)

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\(^{31}\) This word of German origin refers to the lowest points along the length of a river bed or valley. Several meanings have been given to this term in State practice: (i) lowest points along the entire length of a stream bed defining its deepest channel; (ii) the principal channel used by navigators to go down a river; (iii) the median line of a channel. The latter of these meanings is the more recent and that used most broadly. See *Dictionnaire de droit international public*, at 1082.

\(^{32}\) The median line is defined as the line that is at every point equidistant from the nearest points of the coastal baselines; a simplified version adopts a sequence of determined points identified through the equidistance principle and then put together by means of straight lines.


\(^{35}\) Case Concerning the Frontier Dispute (Mali v. Burk. Faso), supra note 33, at ¶ 150.

\(^{36}\) See, id., per Judge ad hoc Georges Abi-Saab (Separate Opinion), at ¶ 17, which provides: The Judgment has chosen a line coinciding with that of the maps, which do not in themselves constitute a legal title or rest upon any such genuine title […] This is admittedly one possible legal solution within the degree of freedom obtaining in the circumstances of the case; and that is why I consider it legally acceptable. But it is not the only solution which would have been legislatively possible, nor in my opinion the best. I would have preferred another: one which, while respecting the points of reference (and it is not by chance that both are watering places), would have been more deeply impregnated with considerations of equity *infra legem* in the interpretation and application of the law, given that the reason concerned is a nomadic one, subject to drought, so that access to water is vital.

In the *Kasikili/Sedudu Island* case,\(^{37}\) the Court considered the depth, width, flow and navigability of a disputed channel in order to clarify the ambiguity in the operative delimitation treaty. The decision offers an example of how rivers can be taken as a point of reference in territorial delimitation through the thalweg method. In the case, the Court had been asked to determine the boundary between Namibia and Botswana, including the status of the island of Kasikili/Sedudu, on the basis of the applicable treaty and principles of international law. To accomplish this task and thereby find the appropriate line of division between the two litigants, the Court resorted to the thalweg:

21. [...] As far as the region covered by the present case is concerned, this provision locates the dividing line between the spheres of influence of the contracting parties in the ‘main channel’ of the River Chobe; however, neither this, nor any other provision of the Treaty, furnishes criteria enabling the ‘main channel’ to be identified. It must also be noted that the English version refers to the ‘centre’ of the main channel, while the German version uses the term ‘thalweg’ of that channel (*Thalweg des Hauptlaufes*).

24. The Court notes that various definitions of the term ‘thalweg’ are found in treaties delimiting boundaries and that the concepts of the thalweg of a watercourse and the centre of a watercourse are not equivalent. The word ‘thalweg’ has variously been taken to mean ‘the most suitable channel for navigation’ on the river, the line ‘determined by the line of deepest soundings’, or ‘the median line of the main channel followed by boatsmen travelling downstream’. Treaties or conventions which define boundaries in watercourses nowadays usually refer to the thalweg as the boundary when the watercourse is navigable and to the median line between the two banks when it is not, although it cannot be said that practice has been fully consistent.\(^{38}\)

In the *Case Concerning Kasikili/Sedudu Island*, the Court did not simply identify the boundary around Kasikili/Sedudu, but rather concerned itself with safeguarding the traditional activities of the local population, such as fishing, by reminding the parties of their commitment to cooperate.\(^{39}\)

In *Cameroon v. Nigeria*,\(^{40}\) the Court similarly and meticulously defined boundaries that had been outlined in colonial treaty form. Brought in 1994 by Cameroon, this case was concerned initially with the Bakassi Peninsula and the maritime boundary between Cameroon and Nigeria. Latterly, Cameroon also asked the Court to determine the boundary between the two countries from Lake Chad to the sea. Nigeria subsequently objected to the Court’s jurisdiction. After what it claimed were armed incidents on the border, Cameroon asked the Court to indicate provisional measures. Ultimately, the Court decided that the border in the Lake Chad area was defined by the Thomson-Marchand Declaration of 1929–30 while the land border from Lake Chad to the sea was defined by the Thomson-Marchand Declaration and Anglo-German Agreements from the first half of the 20th century, and the border across the Bakassi Peninsula by...
the Anglo-German Agreement of 1913. The Court decided that sovereignty over the Bakassi Peninsula rested with Cameroon. Following the decision of the Court in the Nigeria/Cameroon case, an agreement was negotiated between the two parties with the assistance of then-Secretary General Kofi Annan. The agreement that was reached also makes provision for human needs, including fishing rights, for Nigerians nationals living in the Bakassi Peninsula.

The Benin/Niger case also dealt with the delimitation of borders. This time the boundaries concerned were across the Rivers Niger and Mekrou, and the Court was further tasked with attributing the sovereignty of islands in the Niger River. Niger had contended that the border should have been drawn at the halfway point on the bridges, not least because the two States had funded certain bridges over the River Niger equally. This argument was rejected by the Court, which held that the border on the bridges exists at the same point as on the river. The Court had determined the border between the countries running along the river as following the course of the deepest soundings in the channel of the river. Moreover, it awarded Benin sovereignty over some of the islands and Niger sovereignty over the other contested islands. For the River Mekrou, the Court found that the boundary between the two countries followed the median line of the river.

In deciding this case, the Court referred to the principle of uti possidetis and sought to determine the boundary that was agreed between the two countries at the time of independence. However, neither of the Parties was successful in showing that their claims had support in regulatory or administrative acts of the colonial period. As a result, the Court resorted to the effectivités theory to determine the effective exercise of authority over the territory during the colonial period. In so doing, it determined that there did exist a modus vivendi between the pre-existing colonial territories, both in respect of the boundary along the river, which it found ran along the navigable channel of the river, and authority over the islands.

As for the boundary along the course of the River Mekrou, the Court concluded that the boundary between the two countries followed the median line of the river, despite Niger arguing that its claim to the boundary along the river had legal title in an agreement of 1907. However, having recourse to the principle of uti possidetis, the Court considered that legal instruments from 1927 showed the boundary followed the course of the river along the median line. Subsequently, the Court noted that it was unnecessary to look for any effectivités in order to apply the uti possidetis principle, since effectivités can only be of interest in a case in order to complete or make good doubtful or absent legal titles, but can never prevail over titles with which they are at variance.

In the Frontier Dispute (Burkina Faso/Niger), the ICIJ decided the contested parts of the border between Burkina Faso and Niger using astronomical markers and river bends. The Court relied on the principle of the intangibility of boundaries inherited from the colonial period, agreements between the parties and certain historical instruments. For the first contested part of the border, since an Arrêté of 1927 had been interpreted by colonial administration officials as referring to a straight line between astronomical markers, the ICIJ concluded that this must also constitute the border today. As for the second contested part between one of the astronomical markers and the River Sirba, the Court noted that the border could not be determined from the Arrêté and thus concluded that it could not rely upon effectivités any further. Instead, the Court referred to a 1960 Institut géographique national (IGN) de France map. However, for the third part of the border, the Court did return to the Arrêté and also used the median line of the River Sirba to determine the border where the Arrêté was not sufficient to do so. For the final most southerly part of the border, the ICIJ could deduce the border from the Arrêté itself and conclude that a straight line must be used for the frontier between different markers. As for this last part of the delimitation, the Court noted that the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other.

The Court thus partly based its choice of boundary delimitation method on a consideration of the riparian populations’ access to water resources and human needs.

(c) Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (2009)

The Costa Rica v. Nicaragua dispute is particularly interesting for the prominence of economic and trade aspects that underlie maritime boundary disputes. In its judgment, the Court had to interpret Costa Rica’s right of navigation for the purposes of commerce along the states’ San Juan River border. As the latter runs along the shore of the river, Nicaragua has sovereignty over the river itself.

The Court adopted an evolutionary interpretation of the term ‘commerce’, considering that:

It is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is of continuing duration, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.

Hence, the Court deduced that:

The terms by which the extent of Costa Rica’s right of free navigation has been defined, including in particular the term ‘comercio’, must be understood to have the meaning they

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42 Case Concerning the Frontier Dispute (Benin/Niger), Judgment, 2005 I.C.J. Rep. 90 (July 12).
43 Id. at ¶ 143.
45 Id. at ¶ 101.
bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning.\textsuperscript{47}

This evolutionary reading of the term enabled the Court to hold that the right of free navigation recognized in Costa Rica applied not just to the transportation of goods that give rise to acts of commerce, but also to the transportation of people where this is carried out for financial gain.\textsuperscript{48} As such, the freedom of navigation covers various forms of private navigation with commercial ends.\textsuperscript{49} By contrast, vessels charged with the exercise of public order or public service, with no object of financial gain, fall outside the remit.\textsuperscript{50} In this latter case, the principle of territoriality prevails.

On the question of the extent of the regulatory power of Nicaragua, the Court was asked to rule on the fees for issuing clearance certificates. It considered that one cannot dispute the sovereign right of Nicaragua 'to inspect vessels in the river for safety, environmental and law enforcement reasons';\textsuperscript{51} however, this right does not extend to 'the provision of any service to boat operators'.\textsuperscript{52} Consequently, the Court concluded that for 'Costa Rican vessels exercising freedom of navigation on the river, the payment must be seen as unlawful'.\textsuperscript{53}

In this decision, the ICJ also underscored that customary fishing rights can be defined as rights that result from a long and uncontested practice of fishing activity by inhabitants who live around shared watercourses. The Court, however, considered that this right could not extend to the practice of fishing from boats on the river.\textsuperscript{54}

(d) **Pulp Mills on the River Uruguay (Argentina v. Uruguay)**\textsuperscript{55}

The Court's ruling in the *Pulp Mills* case reinforces the importance of riparian neighbours' obligations of consultation and cooperation to their mutual objective of optimal use of shared waters.\textsuperscript{56} This dispute, which the Court described as emphasizing 'the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development',\textsuperscript{57} arose from an allegation by Argentina that Uruguay's authorization of a pulp plant construction on the River Uruguay breached procedural obligations under the 1975 Statute of the River Uruguay, and involved risks of environmental degradation. This Statute required the State Parties to achieve the optimum and rational utilization of their shared river by, inter alia, meeting obligations to inform, notify and negotiate. Because Uruguay did not inform the States' joint

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\textsuperscript{47} Id. at ¶ 70.
\textsuperscript{48} Id. at ¶ 71.
\textsuperscript{49} Id. at ¶ 72-3.
\textsuperscript{50} Id. at ¶ 83.
\textsuperscript{51} Id. at ¶ 123.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at ¶ 141 and 143.
\textsuperscript{56} Id.
\textsuperscript{57} Pulp Mills on the River Uruguay, Provisional Measures, Order, 2006 I.C.J. Rep. 113 (July 13).

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\textsuperscript{58} Pulp Mills on the River Uruguay, Judgment, supra note 55, at ¶ 149.
\textsuperscript{59} Id. at ¶ 204.
\textsuperscript{60} Id. at ¶ 208.
\textsuperscript{61} Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road Along the San Juan River (Nicaragua v. Costa Rica)
occupation of Costa Rican territory that threatened protected rainforests and environmentally sensitive wetlands. In the other dispute, Nicaragua contended that Costa Rica had unilaterally undertaken its own construction projects by building a road close to the San Juan River, which Nicaragua argued could threaten the shared ecosystem of wetlands along the San Juan de Nicaragua River. These cases were joined on 17 April 2013. On 16 December 2015, the IJC delivered its judgment in these cases and found that Costa Rica had breached its obligation to perform an environmental impact assessment in its construction of the road concerned, although it had not violated any other substantive obligations. Highlighting the significant environmental risks, the Court said: "because of the planned location of the road along the San Juan River, any harm caused by the road to the surrounding environment could easily affect the river, and therefore Nicaragua’s territory." Assessing the evidence before it, the Court estimated that:

The location of the road in such close proximity to the river and the fact that it would often be built on slopes, risked increasing the discharge of sediment into the river. Another relevant factor in assessing the likelihood of sedimentation due to erosion from the road is that almost a quarter of the road was to be built in areas that were previously forested. The possibility of natural disasters in the area caused by adverse events such as hurricanes, tropical storms and earthquakes, which would increase the risk of sediment erosion, must equally be taken into consideration.

Moreover, the Court took into consideration the proximity of the planned road protected environmental sites:

The road would pass through a wetland of international importance in Costa Rican territory and be located in close proximity to another protected wetland – the Refugio de Vida Silvestre Río San Juan – situated in Nicaraguan territory. The presence of Ramsar protected sites heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive. The principal harm that could arise was the possible large deposition of sediment from the road, with resulting risks to the ecology and water quality of the river, as well as morphological changes.

The Court also found that Costa Rica has sovereignty over the concerned area. In this respect, the Court made reference to an 1858 Treaty of Limits, in which the boundary was agreed between the two States, and an 1888 arbitral award by US President Grover Cleveland, which affirmed what had been agreed in the Treaty, as well as another award by a national demarcation commission in 1896. The Court clarified that any effectivité had very limited application given the previous agreements between the two States.

Further, the Court held that Nicaragua had breached Costa Rica’s territorial sovereignty by its excavation work and by establishing a military presence on Costa Rican territory. According to the Court, Costa Rica also had rights of navigation over the waters as a result of the provisions of the 1858 Treaty, which had put the boundary between the countries on the ‘right bank of the … river’ and gave Costa Rica ‘a perpetual right of free navigation’. Further still, the Court stated that the provisional measures previously indicated had been breached by Nicaragua because it had proceeded to excavate and establish a military presence in the disputed area contrary to the order of the Court which had ordered the parties to avoid aggravating or extending the dispute.

While Costa Rica claimed that Nicaragua's activities were in breach of certain international environmental law obligations, the Court dismissed these claims. For example, although the IJC reiterated the requirement to conduct an environmental impact assessment where there is a significant risk of transboundary harm from an industrial activity, it noted here that Nicaragua had conducted a preliminary assessment and was right to conclude there was not the magnitude of risk to warrant a full environmental impact assessment. Similarly, Nicaragua had not breached its obligation to notify and consult with Costa Rica. However, Nicaragua also claimed that the 1888 Arbitral Award of President Cleveland allowing dredging at the expense of environmental damage was lex specialis to international environmental law obligations but the Court did not answer this question.

(f) Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)

In June 2016, the IJC was seized with a dispute between Chile and Bolivia concerning the status and use of the waters of the Silala. In these proceedings, Chile argued that the Silala aquifer and river system is an international watercourse. While Bolivia had acknowledged that the Silala had been an international watercourse ever since the early 20th century, it recently claimed the waters as exclusively Bolivian. In referring the case to the Court, Chile requested that it determine the Silala is an international watercourse. With that status, various obligations and standards flow from international law, such as the equitable and reasonable utilization standard.

65 Id.
66 Id.
67 Id. at ¶ 76.
68 Id. at ¶ 93.
69 Id. at ¶ 76.
70 Id. at ¶ 127.
4. CONCLUSION

Disputes involving water have been a cornerstone of both the PCIJ and the ICJ's workload. As a result, these courts have played a central role in the shaping of international law related to water. Not only have these jurisdictions gradually clarified the legal contours of important notions and principles, such as community of interests and environmental harm, they have also been consistent in their approach to disputes, such as those related to freedom of navigation and boundary delimitations.

The variety of disputes that reach the ICJ in this area is remarkable and the way in which the Court has drawn on different principles to deal with this variety is a testament to its utility and versatility as a mechanism for settling disputes, particularly when it finds itself in uncharted waters!