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# IS THE INTERNATIONAL COURT OF JUSTICE THE RIGHT FORUM FOR TRANSBOUNDARY WATER POLLUTION DISPUTES?

by Kate Halloran\*

Clean water is essential to human development and sustainability, yet fragmented management of transboundary waters puts this valuable resource at risk.<sup>1</sup> A recent controversy between the governments of Argentina and Uruguay over the construction of two pulp mills on the River Uruguay<sup>2</sup> illustrates the tension in sustainable development between promoting economic prosperity and protecting the environment.

On May 4, 2006, the Argentine government instituted proceedings with the International Court of Justice (“ICJ”) against the government of Uruguay for allegedly violating a 1975 treaty that imposes obligations on the two nations to curb pollution in the river that forms their border.<sup>3</sup> Argentina contends the discharge of chemicals from the pulp mills will adversely affect the river and communities settled along the river’s banks,<sup>4</sup> an assertion which Uruguay denies.<sup>5</sup> Argentine citizens protested by blockading a bridge over the river, effectively disrupting tourist and commercial activity in Uruguay,<sup>6</sup> which Uruguay insists has resulted in serious economic damage.<sup>7</sup>

The ICJ is currently deliberating *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*,<sup>8</sup> but its actions thus far invite doubts about the ICJ’s efficacy in adjudicating transboundary water pollution disputes. One concern is the reluctance of the ICJ to utilize provisional measures, a form of injunctive relief. The ICJ denied requests from Argentina and Uruguay to suspend construction of the pulp mills and end blockading of the bridge, respectively.<sup>9</sup> Between 1946 and 1994, the ICJ employed provisional measures in approximately half of the cases where one or more parties requested such intervention.<sup>10</sup> *Pulp Mills on the River Uruguay* is the first case since 2003 to even request provisional measures.<sup>11</sup> The record indicates that the ICJ resists wielding this powerful tool unless the requesting party can prove imminent and irreparable harm to their interests, opting instead to appeal to the good faith of the parties not to cause injury until the case has been formally decided.<sup>12</sup> Thus, even though the ICJ could have issued provisional measures within six months of Argentina filing its complaint, both Argentina’s environmental interest and Uruguay’s economic interest in the River Uruguay have gone unchecked for over three years.

Further, even if the ICJ exhibited willingness to issue provisional measures, its capacity to enforce such measures is uncertain. While Article 94 of the United Nations Charter allows recourse to the Security Council when a party ignores a final judgment of the ICJ, no such similar proceedings exist for provisional measures.<sup>13</sup> A party could decline to abide by provisional measures asserted against it without penalty.

The extensive transboundary water dispute history between the United States and Canada provides an example of an alternative to the ICJ. The Boundary Waters Treaty of 1909<sup>14</sup> established the International Joint Commission (“Commission”) to prevent disputes regarding the use of boundary waters.<sup>15</sup> The Commission is independent in nature and comprised of officials and permanent employees from both countries.<sup>16</sup> Its responsibilities include: “(1) quasi-judicial determinations; (2) investigative and advisory assignments; and (3) arbitrations.”<sup>17</sup> The Commission first encountered transboundary water pollution concerns in 1912, when it was asked to recommend a plan for preventing and remedying pollution in shared U.S.-Canadian waters.<sup>18</sup> The Commission also played a central role in a contentious dispute between the United States and Canada over transboundary air pollution that spawned the famous Trail Smelter arbitration in 1941.<sup>19</sup> More recently, in 1990, it adopted a policy of zero discharge and virtual elimination of toxic substances.<sup>20</sup>

The longevity and effectiveness of the Commission are the result of a firm commitment to pollution abatement and an inclusive approach to addressing transboundary water pollution disputes, which encourages public participation and consensus-driven initiatives.<sup>21</sup> A transboundary water pollution dispute cannot be settled without the participation of officials from both countries.<sup>22</sup> Moreover, projects that may affect U.S.-Canada boundary water require approval of the Commission, which is tasked with balancing divergent interests fairly.<sup>23</sup>

The Commission, of course, is not flawless. However, if the 1975 River Uruguay treaty included a similar entity to address transboundary water pollution disputes, the *Pulp Mills on the River Uruguay* case may never have progressed to the ICJ. The Commission benefits from a strong framework, dedication of the governments directly affected by transboundary water pollution disputes, and a system of regulation that is flexible yet efficient.<sup>24</sup> Where the ICJ attempts enforcement of practically unenforceable international law, the Commission encourages transparency and compliance. Regardless of the outcome of *Pulp Mills on the River Uruguay*, the international community must develop other methods of resolving transboundary water pollution disputes before economic development and water quality suffer irrevocably.

**Endnotes:** Is the International Court of Justice the Right Forum for Transboundary Water Pollution Disputes? *continued on page 85*

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## ENDNOTES: IS THE INTERNATIONAL COURT OF JUSTICE THE RIGHT FORUM FOR TRANSBOUNDARY WATER POLLUTION DISPUTES? *continued from page 39*

<sup>1</sup> U.N. Educ., Scientific, & Cultural Org. [UNESCO], World Water Assessment Programme, *The United Nations World Water Development Report 3: Water in a Changing World*, 150, U.N. Doc. R551.46/49 WAT, (2009).

<sup>2</sup> See Pulp Mills on the River Uruguay (Arg. v. Uru.) (Arg. Application Instituting Proceedings) (Submitted May 4, 2006), 3, *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=0>.

<sup>3</sup> See *id.* at 5-7.

<sup>4</sup> See *id.* at 11, 17.

<sup>5</sup> See Pulp Mills on the River Uruguay (Arg. v. Uru.) (Uruguay Request for Provisional Measures) (Submitted November 30, 2006), 2-3, *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=7>.

<sup>6</sup> See *id.* at 4.

<sup>7</sup> See *id.*

<sup>8</sup> Press Release, International Court of Justice, Pulp Mills on the River Uruguay (Argentina v. Uruguay): Conclusion of the public hearings: Court begins its deliberations, U.N. Doc. 2009/28 (Oct. 2, 2009), *available at* <http://www.icj-cij.org/docket/files/135/15507.pdf>.

<sup>9</sup> Pulp Mills on the River Uruguay (Arg. v. Uru.) (Requests for the Indication of Provisional Measures) (Order of July 13, 2006), 21, *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=3>; Pulp Mills on the River Uruguay (Request for Indication of Provisional Measures) (Order of January 23, 2007), 14, *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=3>.

<sup>10</sup> See Pieter H.F. Bekker, *Argentina-Uruguay Environmental Border Dispute Before the World Court*, 10 ASIL INSIGHTS (2006), ¶ 11, *available at* [http://www.asil.org/insights060516.cfm#\\_edn10](http://www.asil.org/insights060516.cfm#_edn10).

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> U.N. Charter art. 94, para. 2.

<sup>14</sup> Boundary Waters Treaty, Jan. 11, 1909, U.S.-U.K., 36 Stat. 2448 (U.K. entered treaty on behalf of Canada).

<sup>15</sup> See *id.* art. 7-8.

<sup>16</sup> See James G. Chandler & Michael J. Veshcler, *The Great Lakes-St. Lawrence River Basin from an IJC Perspective*, 18 CAN.-U.S. L.J. 262 (1992).

<sup>17</sup> See *id.* at 263.

<sup>18</sup> See *id.* at 272.

<sup>19</sup> See Noah Hall, *Bilateral Breakdown: U.S.-Canada Pollution Disputes*, 21 NAT. RES. & ENV'T 18, 19-20 (Summer 2006) (explaining how the Trail Smelter case over sulfur dioxide emissions from a plant in Canada has become a prime example of resolving transboundary disputes in international environmental law).

<sup>20</sup> See Chandler, *supra* note 16 at 278.

<sup>21</sup> See *id.* at 281.

<sup>22</sup> See *id.* at 264.

<sup>23</sup> See *id.* at 263-64.

<sup>24</sup> See *id.* at 281-82.