

WATER POLLUTION SOME LEADING CASES BEFORE INTERNATIONAL COURTS AND ORGANS



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Preliminary remark: International awards and judgements on water-pollution related issues are relatively rare. In their book *Resolution of International Water Disputes*, Attila Tanzi and Cesare Pitea observe: “it may be recalled that international practice has traditionally shown preference for diplomatic means of settlement over adjudication and arbitration.”¹ They notably also refer to Friedrich Berber’s 1959 statement that “water disputes are generally agreed to constitute a classical example of disputes which cannot be satisfactorily solved by a judicial decision.”²

A. International Court of Justice

1. **Case *Gabčíkovo/Nagymaros Project (Hungaria v. Slovakia)***, Judgment of 25 November 1997, ICJ Rep (1997) p. 41

- **Note:** This case was the first water dispute to be referred to an international tribunal since *Lac Lenoux* and it resulted in the most widely discussed decision on international water law to date.
- **Applicable law:** public international law as set out at Art. 38(1) of the ICJ Statute and 1977 treaty between Hungary and Slovakia on the constructions of the dams
- **Factual background:** the dispute concerned a joint project consisting in the construction of dams over the river Danube. Hungary suspended then attempted to terminate the project (and the underlying Treaty) alleging great risks to its environment and to Budapest’s water supply. Slovakia’s unilateral alternative solution only involved Slovak territory but Hungary claimed that this operation was also having detrimental effects on its environment and access to the river’s water.
- **Decision:** while issues touched on significant questions of environmental law, the dispute was principally decided based on the law of treaties – interpreting the relevant Hungary-Slovakia Treaty.
 - The ICJ found that both Hungary’s unilateral suspension of the project and Slovakia’s unilateral solution were illegal because the 1977 treaty described the project as “single and indivisible.”
 - The ICJ rejected all the reasons Hungary gave for terminating the treaty such as a “state of emergency”, “impossibility of performing duties”, a “fundamental change of circumstances”, a “material breach of the treaty by Czechoslovakia” and the “development of new norms in international environmental law”;

¹ Resolution of International Water Disputes, PCA/Peace Palace Papers, 2003 at p. 260.

² Friedrich Berber, *Rivers in International Law* (London Institute of World Affairs and Stevens & Sons, Ltd. 1959) at p. 263.

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- Because both parties could assert their respective claims against one another, the value of which would be difficult to estimate, the Court directed them to renounce or cancel all financial claims or counterclaims;
- The ICJ and, to an event greater extent, J. Weeramantry in his separate opinion, acknowledged the relevance of the concept of sustainable development – understood as the need to reconcile economic development with the protection of the environment – but did not develop the matter as it did not deem it necessary to decide the dispute.
- The ICJ directed both parties to seek an agreement on the modalities of execution of the ruling while considering the treaty as being a joint investment project for (1) the production of energy, (2) the improvement of the navigability of the Danube, (3) flood control, (4) regulation of ice removal and (5) the protection of the natural environment.
- **Follow-up:** the judgment did not have substantial practical benefits. The project is still not completed as the controversy stemming from the construction of the dams continued, particularly in Hungary.

2. Case *Pulp Mills on the River Uruguay Case (Argentina v Uruguay)* – both the Decision on Provisional Measures of 13 July 2006 and the Judgment of 20 April 2010

- **Applicable law:** public international law as set out at Art. 38(1) of the ICJ Statute; 1975 Statute of the River Uruguay
- **Factual background:** dispute concerning the “the authorization, construction and future commissioning of two pulp mills on the River Uruguay”, with reference in particular “to the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river” construction of two pulp mills on the Uruguay River, which Argentina alleged the 1975 Statute of the River Uruguay.
- **Note:** First ICJ case involving a request to shut down or halt an industrial project.³
- **Decision on provisional measures:** ICJ denied Argentina’s request for provisional measures without prejudice on the merits, as Argentina had not proven that “the construction of the mills poses an imminent threat of irreparable damage to the aquatic environment of the River Uruguay or to the economic and social interest of the riparian inhabitants of the Argentine side of the river.”

³ ASIL Insight, Argentina-Uruguay Environmental Border Dispute Before the World Court (May 16, 2006), available at <http://www.asil.org/insights/2006/05/insights060516.html>.

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- Court observed that the use of the river should allow for sustainable development which takes account of “the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States” and reiterated this observation in its final judgment.
 - **Judgment:** the ICJ ruled that even though Uruguay breached procedural obligations under the applicable Treaty by failing to inform Argentina of the construction of the pulp mills, the Treaty did not bar the construction of the mills and because the mills did not pollute the river (thus breaching the substantive obligations of the Treaty) closing them would be unjustified.
 - Interestingly the court did rule that there was an obligation under general international law that states are required when planning activities which may cause cross border pollution to carry out an environmental impact assessment, the content of which must be determined by each State within its domestic legislation. The Court observed that an environmental impact assessment should include, at a minimum, “[a] description of practical alternatives” to the main proposed plan.
 - **Follow-up:** the conflict ended in 2010 with the establishment of a joint coordination of the activities in the river.
3. **Case *Constructions of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (ongoing) – Application of 22 December 2011**
- **Applicable law:** public international law as set out at Art. 38(1) of the ICJ Statute;
 - **Factual background:** In 2011, Costa Rica began constructing a road parallel to the San Juan River. The road is on Costa Rican territory. In its complaint, Nicaragua contends that the road has caused harmful environmental effects to Nicaraguan territory-specifically silting of the San Juan River, erosion of the River's banks, harm to the surrounding ecosystem and wetlands. Nicaragua further contends that Costa Rica breached its international obligations by infringing on Nicaragua's territorial integrity, damaging Nicaraguan territory, and violating general obligations in international law and relevant environmental conventions. Nicaragua requests restoration to the status quo ante, damages, and the production and presentation of an appropriate transboundary Environmental Impact Assessment.
 - **On-going case**

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B. United Nations Claims Commission

Note on the UNCC: the UNCC was a subsidiary organ of the UN Security Council set up in 1991 to process claims against Iraq resulting from its invasion and occupation of Kuwait. Compensation is payable to successful claimants from a special fund that receives a percentage from sales of Iraqi oil. The category “F4” encompasses claims before the UNCC relating to environmental matters. The UNCC’s decisions with respect to environmental claims far exceed in number and in value those issued by any other international body. Its “jurisprudence” would be the prime source of legal authority for a potential future International Environmental Court.

Applicable law: though formally not an international tribunal, under Art. 31 of the Rules of the UNCC the Commissioners had the mandate to apply, in addition to Security Council Res. 687 (1991), other relevant Security Council resolution, the criteria established by the UNCC Governing Council for particular categories of claims, “where necessary ... other relevant rules of international law.” Evidentiary requirements for compensation specified in article 35(3) of the Rules.

4. *Report and Recommendations made by the Panel of Commissioners Concerning the First Instalment of “F4” Claims, 2001, S/AC.26/2001/16*

- **Factual background:** Iran, Jordan, Kuwait, Saudi Arabia and Syria asked the Commission to award them amounts for monitoring and assessment claims related to damage to their waters. The following is summary only focuses on water-related claims, but claims were also filed as regards water-dependent fauna and flora (e.g. wetlands and marine resources).
 - Iran notably stated that Iraq’s detonation of oil wells in Kuwait resulted in the release of highly toxic pollutants which were deposited on parts of Iranian territory which contained one third of its freshwater resources. Iran thus sought compensation for a project to assess the extent of groundwater pollution that may have been caused by the deposit of pollutants from the oil fires; the project would also estimate costs of groundwater remediation.
 - Jordan alleged that groundwater extraction rates were increased in order to supply water to refugees and involuntary immigrants, resulting in over-extraction, saline intrusion into the aquifers and, eventually, degradation of water resources and water supply infrastructure, including pumping stations and piping. It also claimed that wastes from refugee camps and settlements for involuntary immigrants polluted the water supply. Accordingly it sought compensation for a project to assess such degradation.

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- Kuwait estimated that 22.6 million cubic metres of oil-contaminated soil, covering approximately 49 square kilometres of the desert surface, still remained, and that this contamination could affect groundwater. It also alleged that two of its aquifers were polluted by the oil lakes and by the water used to fight the oil fires.
 - Saudi Arabia claimed that the massive amounts of oil released into the Persian Gulf polluted its beaches, intertidal areas, seabed, and coastal waters. It stated that additional marine and coastal pollution resulted from the oil fires in Kuwait.
 - Syria claimed that the oil fires resulted in an increased concentration of pollutants which affected its water.
- **Decisions as regards each Claimant State:**
 - Iran: the Panel assessed Iran's proposed methodology and found the project adequate in light of scientific literature on the movement of airborne pollution and their wet deposition. It noted that "although the probability of identifying incremental damage to the groundwater aquifers caused specifically by the deposition of pollutants from the oil fires is low, this cannot be ruled out completely" and awarded a sum of USD 371,656.
 - Jordan: the Panel found Jordan's proposed projects appropriate attempts to identify damage to Jordan's water resources that may have resulted from the presence of persons who departed from Iraq or Kuwait during the period 2 August 1990 to 2 March 1991" and noted that it they "may also provide useful information for selecting suitable remediation measures" and accepted all its claims. For example, it awarded a sum of USD 1,020,116 to assess degradation in quality, and reduction in quantity, of water resources in Jordan; USD 224,361 to assess groundwater pollution resulting from a surcharge of one of its wastewater treatment plants; as well as USD 210,874 to assess bacterial contamination of freshwater springs in Jordan's four major water extraction areas.
 - Kuwait: while the Panel found that Kuwait's proposed monitoring and assessment project was reasonable, it rejected its claim for compensation for two already completed studies of aquifer pollution because Kuwait it failed to produce any evidence (such as receipts) as regards the costs of the studies. It nonetheless notably awarded USD 441,523 for a new current groundwater quality assessment, USD 638,516 for a project to evaluate technologies for treating groundwater, USD 4,873,620 for a ten-year programme to monitor groundwater near oil wells that were damaged as a result of Iraq's invasion and occupation of Kuwait, and USD 10,484,98 to monitor and assess environmental damage caused by the oil lakes that were created as a result of Iraq's invasion and occupation of Kuwait, and to assess oil lake treatment technologies to abate harm and restore the environment.

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- Saudi Arabia: the Panel denied a claim for 52 million USD to assess damage to fisheries because it found several technical problems with the methodology. It did however award USD 12,793,477 for a project to evaluate technologies for the remediation of its marine and coastal environment areas from oil pollution resulting from Iraq's invasion and occupation of Kuwait and USD 2,840,824 for a project to evaluate remediation and restoration technologies for desert surface, vegetation and groundwater resources.
- Syria: Panel awarded USD 159,600 for a project to assess the pollution of surface water and groundwater in its territory that may have been caused by pollutants from the oil fires that resulted from Iraq's invasion and occupation of Kuwait.
- **Note:** In awarding substantial compensation for “monitoring and assessment claims”⁴ (i.e. in some cases, for the mere investigation of whether any damage was caused), the UNCC is highly unusual when compared to other international adjudicative institutions. This is essentially awarding costs before the finding on liability.

5. *Report and Recommendations made by the Panel of Commissioners Concerning the Second Instalment of “F4” Claims, 2002, S/AC.26/2002/26*

- **Factual background:** Saudi Arabia and Germany sought compensation for expenses incurred related to water damage resulting from Iraq's invasion and occupation of Kuwait. The following is summary only focuses on water-related claims, but claims were also filed as regards water-dependent fauna and flora (e.g. wetlands and marine resources).
 - Saudi Arabia sought compensation for expenses incurred to contribute to the co-ordinated measures to protect a desalination plant from the oil spills in the Persian Gulf and for the measures taken contribute to the co-ordinated measures to protect sea-water intakes for the desalination plants and the sea-water cooling system in the desalination plant from the oil spills.
 - Germany sought compensation for expenses incurred by the Ministry of Environment of Lower Saxony and five other German public entities for activities undertaken as part of the international effort to respond to the oil spills in the Persian Gulf resulting from Iraq's invasion and occupation of Kuwait.

⁴ As allowed by para. 35(c) of UNCC Governing Council decision 7.

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- **Decisions as regards each Claimant State:**
 - Saudi Arabia: the Panel found that the measures to protect the desalination plant were in response to environmental damage or threat of environmental damage that directly resulted from Iraq's invasion and occupation of Kuwait. The Panel also found that, with one exception, the activities undertaken by Saudi Arabia were appropriate and constituted abatement and prevention of environmental damage. It awarded USD 271,413 and USD 1,089,796 for two distinct sets of measures.
 - Germany: the Panel was convinced that the activities were undertaken reasonably to respond to the oil spills and awarded USD 12,324.

6. *Report and Recommendations made by the Panel of Commissioners Concerning the Third Instalment of "F4" Claims, 2003, S/AC.26/2003/31*

- **Factual background:** Kuwait sought compensation in the amount of USD 185,167,546 for the expense of future measures to remediate two freshwater aquifers allegedly contaminated as a result of Iraq's invasion and occupation of Kuwait. This amount represents an increase in the original amount claimed, reflecting an amendment requested by Kuwait on the basis of new information obtained from its monitoring and assessment projects.
- **Decision:** In the view of the Panel, restoration of water quality in the aquifers was an appropriate objective, and the remediation measures proposed by Kuwait were reasonable, subject to some modifications based on alternative approaches. It awarded USD 41,531,463.

7. *Report and Recommendations made by the Panel of Commissioners Concerning the Fourth Instalment of "F4" Claims, Part I and Part II, 2004, S/AC.26/2004/17*

- **Factual background:** Iran, Jordan and Syria sought compensation for expenses incurred related to water damage resulting from Iraq's invasion and occupation of Kuwait. Much of the alleged damage was assessed with funds from the assessment and monitoring awards of 2001. The following is summary only focuses on water-related claims, but claims were also filed as regards water-dependent fauna and flora (e.g. wetlands and marine resources).
 - Iran sought compensation in the amount of USD 527,904,400 for expenses of future remediation measures to minimize groundwater contamination alleged to have resulted from the oil well fires in Kuwait.

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- Jordan sought compensation in the amount of USD 42,714,792 for expenses of future measures to clean and restore a freshwater aquifer that was allegedly contaminated, as well as USD 797,487 for expenses of future measures to clean and restore the four springs that it alleges have been contaminated, all as a result of Iraq's invasion and occupation of Kuwait. Also, it sought compensation in the amount of USD 43,487,516 for expenses of future measures to remediate contamination of groundwater and irrigation water from the a Wastewater Treatment Plant.
 - Syria alleged that its groundwater and surface water was affected by pollutants from the oil well fires in Kuwait. According to Syria, the contamination affected the quality of water used for agricultural, industrial and drinking purposes. It sought USD 890,868,597 for expenses of measures to clean and restore contaminated drinking water wells, and USD 664,142,539 for expenses measures to clean and restore surface water.
- **Decisions as regards each Claimant State:**
 - Iran: claim was rejected due to insufficient evidence. The data provided indicated only a tenuous link between the oil well fires in Kuwait and any contamination of groundwater in Iran.
 - Jordan: all claims were rejected due to insufficient evidence. The data did not demonstrate a causal link between the increase in salinity and the presence of refugees from Iraq and Kuwait. Nor did the data reveal sufficient information showing that refugees actually settled in the catchment areas of the springs, or demonstrate any specific trends showing that damage at any of the five springs was attributable to the presence of refugees. Finally, data failed to establish that the presence of the refugees resulted in the contamination of its water resources from the wastewater treatment plant.
 - Syria: claims were rejected due to inconclusive data. In particular, as regards the wells, the scarcity of pre-invasion data made it difficult to assess the full significance of the post-invasion data. On the basis of the limited data available, the Panel considered that the amount of nitrate and sulphate that could have reached the groundwater (through a combination of wet deposition, dry deposition and infiltrating rainwater) would have been minimal. Syria had also failed to establish that contamination from the oil well fires in Kuwait caused damage to its surface water resources.

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8. *Report and Recommendations made by the Panel of Commissioners Concerning the Fifth Instalment of “F4” Claims*, 2005, S/AC.26/2005/10

- **Factual background:** Iran, Jordan and Kuwait sought compensation for expenses incurred related to water damage resulting from Iraq’s invasion and occupation of Kuwait. The following is summary only focuses on water-related claims, but claims were also filed as regards water-dependent fauna and flora (e.g. wetlands and marine resources).
 - Iran sought compensation in the amount of USD 1,056,000 for expenses of proposed measures to collect and analyse samples from springs, wells, qanats and rivers that have been damaged by contamination from the oil well fires in Kuwait. It also sought USD 1,642,109 for expenses incurred in expanding and improving water and sanitation facilities and services at existing refugee camps and in constructing water and sanitation facilities and providing related services at new camps.
 - Jordan sought a total compensation for in the amount of USD 1,771,413,994 for water related issues. It sought USD 1,465,565,462 for the salinization and depletion of its groundwater resources. It also sought USD 126,282,666 for expenditure on water infrastructure projects that it was obliged to undertake as a result of the influx of refugees into its territory. Additionally, it requested USD 134,661,668 for the loss suffered by its population because it was deprived of the full use of water due to strict rationing of municipal water, a rationing due to the increase in its population. Finally, it sought USD 11,365,977 for the loss of use of groundwater resources in five springs due to microbiological contamination as a result of the presence of refugees and USD 33,538,221 for loss resulting from the increased production of wastewater due to the increase in its population as a result of the influx of refugees.
 - Kuwait sought compensation in the amount of USD 159,883,100 for the loss of use of groundwater resources during the period when these resources could not be used because of contamination resulting from Iraq’s invasion and occupation.
- **Decisions as regards each Claimant State:**
 - Iran: analysis claim was rejected due to insufficient evidence to enable the Panel to determine the nature and purpose of the proposed monitoring programme, the appropriateness of the methods to be used or the reasonableness of the costs to be incurred. As regards water for refugees, the Panel found that it was reasonable and prudent for Iran to provide safe drinking water and sanitation facilities to the refugees in order to prevent the spread of communicable diseases and awarded USD 1,149,611.

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- Jordan: all but one claims were rejected. As regards groundwater salinity, Jordan failed to meet the evidentiary requirements for compensation. As regards depletion caused by refugees, the Panel found Jordan's estimations appropriate and but awarded USD 1,344,661. As regards the claim for expenditure on water infrastructure, Jordan failed to establish that the increase in expenditure on water infrastructure was due to the presence of the refugees who entered Jordan as a result of Iraq's invasion and occupation of Kuwait. The Panel also concluded that the evidence did not demonstrate that Jordan's population was deprived of water as a result of the presence of the refugees, that Jordan failed to establish that the presence of the refugees resulted in loss of use of groundwater resources due to contamination of springs or that the presence of the refugees resulted in contamination of water produced from the wastewater treatment claims.
- Kuwait: claim rejected. Kuwait had not provided sufficient evidence to establish loss of groundwater production at the two main aquifers at issue.

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