Distinguished members of the Court,

Welcome to the International Court of Justice of the 5th UFRGS Model United Nations! You are about to get acquainted with the first part of our efforts to bring up two intriguing cases of international public law that we shall discuss: the Ahmadou Sadio Diallo case, concerning diplomatic protection, and the Pulp Mills on the River Uruguay case, concerning international environmental law.

But before you get to that, let us introduce ourselves. Joyce has been participating in UFRGSMUN since its very beginning, in 2003, when she was a delegate in the former United Nations Commission on Human Rights (UNCHR). She was then the Research-Assistant again in the UNCHR (2004), Director of the International Law Commission (2005) and Director of the General Assembly's Social, Cultural and Humanitarian Committee (2006). Besides being this year's ICJ President, Joyce is a third year Law student at UFRGS and a third year Communication School student with emphasis on Journalism at Pontifícia Universidade Católica do Rio Grande do Sul. She also works at a Non-Governmental Organization that engages on scientific, cultural, educational and environmental matters. Last, she would like to say that she is really interested in international law and in issues regarding the environment and that simulating the ICJ in UFRGSMUN 2007 is going to be just a lovely experience.

Carolina is in her fourth year of Law School at UFRGS and shows a great interest in all fields of international law. She has been a member of the Staff since the second edition of UFRGSMUN, acting as an Assistant-Director of the SPECPOL in 2004, a Director in 2005 at the SciTech, together with this edition's Secretary-General, Christian Perrone, and as Vice-President of the ICJ in 2006. Besides, she has
participated for three years in the Willem C. Vis Moot, an international commercial law competition held in Vienna, Austria, and coursed one semester in Law at Universidad Autónoma de Madrid, in Spain. This year, she joined the ICJ Staff again as the Vice-President and is looking forward to simulating the Court.

Kauê is a third-year Law student at UFRGS. In 2006, he had a last-minute participation in UFRGSMUN as a Judge on the ICJ, and had such an incredible experience that he decided to be part, once again, of the Court, but now as the Registrar. He is very excited about this year’s edition and truly hopes that each one of this year’s Judges will have the same delight and enrichment that last edition has brought to him.

Fernanda is currently in her third year at UFRGS Law School. She has participated in UFRGSMUN since her first year, as a delegate of the General Assembly's Social, Cultural and Humanitarian Committee (2005), then as an Assistant-Director of this same committee (2006), when she and Joyce worked together for the first time. Also, she has been to Temas (PUC-MG) in 2006 as an expert of the Sub-commission on the Promotion and Protection of Human Rights. She is very interested in international law and international commercial law, especially in Arbitration. She apologizes to the members of this Court for not being present at the conference, for she will be studying in France during UFRGSMUN. She is greatly pleased to be taking part in the ICJ 2007 and hopes that all participants will have an excellent experience simulating the main judicial organ of the UN.

We would like to give special thanks to our Secretary-General, Christian Perrone, and to William David de Souza for their contribution to our study guides.

We would like you to join our e-group at ici_ufrgsmun2007-subscribe@yahoogroups.com, so that we can get in touch while we wait for our conference, which will be held from October 30th to November 2nd. See you there!

Joyce Copstein Wainberg
President

Kauê Ávila Petry
Registrar

Carolina Paranhos Coelho
Vice President

Fernanda Sirotsky Scaletscky
Late President
INTRODUCTION

ICJ’s General Background

The International Court of Justice (ICJ) was established in June 1945, as the result of a long development of methods created with the intent of resolving pacifically international disputes.

This process started with the use of arbitral practice of commercial and navigational disputes, in the 18th Century, used primarily by the United States and England. Then, throughout the 19th Century, arbitration continued to be used and developed; to the extent that a Permanent Court of Arbitration was created to better address the concerns presented by the International Community.

But that proved not to be enough. It was important to create an organ with capacity to deal with legal questions, developing a strong approach to international law, something that could only be achieved with a permanently constituted tribunal. Then, in 1922, the Permanent Court of International Justice (PCIJ) started its works. The PCIJ has dealt with 29 contentious cases and given 27 advisory opinions up 1940, when it ceased to work with the rise of World War II. However, the idea of a permanent judicial body still remained, and in 1946 the PCIJ was dissolved with the objective of creating a brand new World Court. This objective came to reality with the publication of the Charter of the United Nations, that in its article 7 foreseen the creation of the International Court of Justice, finally elected on February 1946, and becoming the most important international law instance of our days.

The ICJ is located at the Peace Palace in The Hague (in Netherlands), and is composed of 15 judges, who are elected for a period of nine years. Each third of the Court is elected every three years, being the judges eligible for re-election. All parties of the Statute of the Court can propose candidates, and no party can have more than one national as judge of the Court. Once elected, the Judge is not a delegate to the national interests, but an independent and impartial magistrate, responsible only for the achievement of Justice.
The Statute of the Court also provides that a State party to a case has the right to have a judge on the Bench. If the composition of the Court doesn’t have a party’s national, the State may choose a judge *ad hoc* to participate in the judgement of a case, not necessarily holding the nationality of the State. It is important to emphasize that a judge *ad hoc* has the same compromise of independence and impartiality of elected Members. So, in fact, the Court can vary the number of judges in each case.

The Court has a dual jurisdiction: it decides legal disputes submitted by States (called the Contentious jurisdiction); and gives Advisory Opinions on legal questions, attending to requests of UN organs (Advisory jurisdiction).

Only States that have recognized the jurisdiction of the Court can apply and be part of contentious cases before it. The recognition can be effectuated in several manners, such as a special agreement between the States, known as a *compromis* (in the case of *ad hoc* recognition); previous recognition in a treaty and/or convention, under the optional clause; declaration of compulsory jurisdiction of the Court by the State involved (in a jurisdictional clause, making it binding); *forum prorogatum*; and even the Court can decide if it has or not jurisdiction in some cases. The decisions given by the Court in contentious cases have binding effect between the parties.

Advisory procedure, on the other hand, is requested by organs related to the UN, being the Court authorized to call upon States and international organizations to provide information over the subjects in question, in order to share their vision on the matter. Except in rare cases, the Advisory Opinion of the Court does not have binding effect, but this does not take away the authority and weight of the Court’s opinion, remaining an important contribution to the evolution of international law.

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1 The extension of the jurisdiction of a court by agreement of the parties in a case which would otherwise be outside the Court’s jurisdiction.
1. INTRODUCTION

Ahmadou Sadio Diallo was born on 3 January 1946, at Binani Misside de Solou Bombi, Galoual Prefecture, on the Republic of Guinea (hereinafter “Guinea”), son of Abdoulaye Diallo and Fatoumata Binta Diallo, both Guineans. In 1964, he moved to the Democratic Republic of the Congo (former Zaire, hereinafter “Congo”), where he lived for 32 years. During this time, he became a successful businessman, as the creator and owner of trade and containerized transport companies.

Between February 1996 and December 1998, Mr. Diallo requested diplomatic protection to his home country, referring to violations suffered in Congo. Such request was granted by Guinea, that on December 1998 initiated proceedings in the Court.

Guinea and Congo are members of the United Nations and have made declarations accepting the compulsory jurisdiction of the Court, on 11 November 1998 and on 8 February 1989, respectively. Hence, the Court has jurisdiction to entertain disputes concerning any matter of international law raised by one of these countries against the other.

2. STATEMENT OF THE ISSUE

Note from the Presidency – When researching on the Ahmadou Sadio Diallo case, you will notice that the International Court of Justice has delivered a judgment on the Democratic Republic of Congo’s preliminary objections on May 24th, 2007. However, for simulation purposes, and because the topics in our Model UN are prepared along the first half of the year, the mentioned decision is not to be taken into consideration in this edition of UFRGSMUN, during the ICJ simulation.
According to the “Application with a view to diplomatic protection”, filed by Guinea on 28 December 1998 against Congo, Mr. Diallo was “unjustly imprisoned for two months by the authorities of that State, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled from the country”\(^3\). This expulsion, alleges Guinea, happened as a result of Mr. Diallo’s attempts to recover substantial sums owed to him by the Congolese State and by oil companies established in its territory.

Mr. Diallo’s companies, Africom-Zaïre (hereinafter “Africom”), for trade, and Africacontainers-Zaïre (hereinafter “Africacontainers”), for containerized transport, established businesses with Congo for several years, especially with Gécamines, a State enterprise with a monopoly over mining, and with oil companies connected with that State, namely Zaire Shell, Zaire Mobil and Zaire Fina\(^4\). From these business dealings, Mr. Diallo’s firms were owed a large sum of money, which had not been payed. In order to obtain such sum, the businessman initiated proceedings in Congo’s justice against these companies.

Guinea affirms that, having the debtors failed with their payment obligations, Mr. Diallo obtained a favorable judgment in Congo, being rightful of an amount of US$ 13,106,704.39, plus US$ 50,000 damages. Attempting to enforce the judicial decision, a seizure order was sent against Zaire Shell’s bank accounts and properties. Wishing to have the seizure order discharged, Zaire Shell’s executives, in combination with Zaire Mobil and Zaire Fina\(^5\), who were aware that the judicial decision would become an unfavorable precedent for them, proposed to pay to the Congo’s Prime Minister, Mr. Kengo Wa Dondo, an amount equal to that awarded against Zaire Shell, “in return for which he would expel Mr. Diallo from the country”\(^6\). The seizure order was then discharged and, in 5 November 1995, Mr. Diallo was arrested. The media and certain non-governmental organizations of the country denounced the arrest and protested against it.


\(^5\) At this point of the dispute, Zaire Shell, Zaire Mobil Oil and Zaire Fina jointed would have to pay more than US$ 6,000,000,000 in arrears of debt to Mr. Diallo’s companies.

\(^6\) *Application Instituting Proceedings – Case Concerning Ahmadou Sadio Diallo*, p. 11.
The Congolese President, Mr. Mobutu, who was ill and in retreat during the course of happenings, ordered the immediate release of Mr. Diallo and the restitution of his possessions. Regardless of the presidential order, Mr. Kengo Wa Dongo determined the re-issuing of an expelling order and re-arrested Mr. Diallo for two more weeks before he was eventually expelled from Congo on 2 February 1996.

On 3 October 2002, Congo filed preliminary objections to the admissibility of Guinea’s application. The proceedings on the merits of the dispute were then suspended, and the Court started to proceed on the issues raised by Congo.

2.1 Guinea’s allegations

2.1.1 The beneficiary of Guinea’s diplomatic protection

One of the main issues on the present case concerns the nationality of the subject to be protected by Guinea. Mr. Diallo is a Guinean national, but his companies do not have the same status, for they were established in Congo. Guinea alleges that the country’s request “aims at the protection of its national, Mr. Diallo, in the plenitude of its qualities, as an individual and as a shareholder and single leader of the Congolese companies,”, and not the companies themselves.

As an individual, Mr. Diallo has suffered several violations of international law, namely, the principle that foreign nationals should be treated in accordance with a minimum standard of civilization, the obligation to respect the freedom and property of foreign nationals and the right of foreign nationals accused of an offence to a fair trial on adversarial principles by an impartial court. Guinea refers to the Chevreau case and the Costa Rica Packet case as precedents when affirming that “it is generally admitted

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8 “In the Chevreau case between France and the United Kingdom, Mr. Chevreau, a French citizen that resided in Perse, was arrested in 1918 by the British authorities because he had been caught examining ‘sensibles’ installations and, because of the papers found with him and of his former behavior, he was regarded as undesirable and perhaps an agent of the enemy. Imprisoned in Baghdad, he was off-set thereafter towards the Indies then towards Egypt. Following the complaints of the French Government, the Permanent Court of Arbitration was seized and decided that ‘the detention of Mr. Chevreau and his subsequent deportation took place in such circumstances that they justify a complaint in international law’, such as it requires a compensation” Mémoire de la République de Guinée, pp. 79-80.

9 “In the Costa Rica Packet case between the United Kingdom and the Netherlands (sentence of Martens, February 25, 1897), the responsibility of the Netherlands was recognized for having arbitrarily arrested Mr. Carpenter, captain of an English boat, even when, stated Martens, ‘all the produced documents and acts prove the lack of serious cause for the arrest of sir Carpenter’ and ‘the treatment inflicted to sir Carpenter in the prison of Macassar does not appear to be justified with regard of a civilized State’s subject who is in preventive detention’.” Mémoire de la République de Guinée, p. 80.
that diplomatic protection can be exercised by a State in the presence of arbitrary arrests of foreign nationals, followed by harmful treatment inflicted to the latter, or of expulsion under contrary conditions with the international law.”

Guinea holds that several principles and precedents of international law support that, as the unique shareholder and only manager of Africom and Africontainers, Mr. Diallo has been injured in his very own rights – that are distinct from the companies’ rights. The country begins by stating that it does not intend to protect the Congolese companies, but to obtain reparation for the violations of international law perpetrated by Congo against Mr. Diallo. According to Guinea, at this specific point lays the main difference between the present case and the Barcelona Traction case. Guinea quotes a passage of the cited case, which exactly sustains its arguments: “The situation is different if the act complained of is aimed at the direct rights of the shareholder as such”.

Guinea also sustains that a shareholder possesses a very own personality, from which arise his proper rights, neither of which are absorbed by or shall be confused with the company’s personality and rights. Thus, an event may cause damage both to the company and to its shareholders, but the rights violated in each case are distinct. “It is precisely the situation of the present case”, writes Guinea. “Mr. Diallo’s proper rights as a shareholder were doubly ignored by Congo both on a purely functional basis, i.e., in his capacity to exercise the shareholders rights recognized by the Congolese law system, and on a purely patrimonial basis, i.e., in the value of the possessed actions. In sum, the internationally illicit facts perpetrated by Congo relate both to Mr. Diallo’s

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10 Mémoire de la République de Guinée, p. 79.
11 The Court goes on: “It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder’s rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company”: Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 36 par. 47.
13 Guinea leans on professor Diez de Velasco: “We can indicate, for example, among the proper rights the deprivation of which can be the origin of an illicit act by a State, the fact of preventing the shareholder from taking part in the general assembly of the company or to exercise his voting rights there, the prohibition of a company to distribute its dividends to foreign shareholders because of such condition or the discriminatory imposition of taxes on the dividends of the actions possessed by foreign shareholders”. La protection diplomatique des personnes morales, R.C.A.D.I. 1974-I, vol. 141, p. 148, apud Mémoire de la République de Guinée, p. 81.
rights as a shareholder to intervene in the control or the management of the company and to his right of property”\textsuperscript{14}.

2.1.2 The previous exhaustion of local remedies

Conscious of its duty to prove that its national, Mr. Diallo, did respect the international law by previously exhausting internal remedies in Congo before requesting diplomatic protection to his homecountry, Guinea dedicates part of its explanation for this purpose. The State begins by analyzing the principle of previous exhaustion of local remedies: according to the Judge Armand-Ugon in his dissenting opinion in the Interhandel case, it is a principle which is not absolute and rigid and which “must receive easings in its application according to concrete cases. Certain situations or facts can authorize the Court to take action on a request, even if the recourses were not completely exhausted”\textsuperscript{15}. If the internal remedies appear to be inappropriate, ineffective, inefficacious or, \textit{a fortiori}, impossible to be exercised, it is estimated that the applicant is exempted from the duty to exhaust such recourses, considers Guinea. In Mr. Diallo’s case, there would have been a denial of justice that concerns the responsibility of the Congo\textsuperscript{16}.

2.2 Congo’s allegations

On its counter-memorial, filed on 3 October 2002, Congo raised two preliminary objections to the admissibility of Guinea’s Application. Congo alleges that Guinea’s Application is not admissible, on the grounds that 1) Guinea is not allowed to exercise diplomatic protection over the person of Mr. Diallo in substitution of the companies that he managed and 2) Mr. Diallo failed to exhaust Congo’s previous local remedies. Due to these facts, Congo requests the Court to “adjudge and declare the Application of the Republic of Guinea inadmissible”\textsuperscript{17}.

\textsuperscript{14} Mémoire de la République de Guinée, p. 91.
\textsuperscript{15} I.C.J., Rec. 1959, p. 87 apud Mémoire de la République de Guinée, p. 98.
\textsuperscript{16} Mémoire de la République de Guinée, p. 100.
\textsuperscript{17} Such request was presented in Congo’s final submissions, at the conclusion of the public hearings which were held from 27 November to 1 December 2006 on the preliminary objections raised by Congo regarding the admissibility of Guinea’s Application. Guinea, on the other hand, requested the Court to “reject the preliminary objections raised by the Congo, to declare its Application admissible and to fix time-limits for the further proceedings”. See ICJ Press Release 2006/41 from 1 December 2006. Available at: http://www.icj-cij.org/docket/index.php?pr=1885&p1=3&p2=1&case=103&p3=6. Last Access: 07 April 2007.
2.2.1 Guinea is not entitled to exercise diplomatic protection over the person of Mr. Diallo

According to Congo, the reason why Guinea would be barred to exercise diplomatic protection on Mr. Diallo is twofold: firstly, because Mr. Diallo’s managed companies are not of Guinean nationality; and secondly, due to the impossibility that Guinea exercises diplomatic protection over the person of a national shareholder because facts happened abroad.

2.2.1.1 Mr. Diallo’s managed companies are of Congolese nationality

In accordance with Congo’s counter-arguments, the main object of Guinea’s Application is to obtain reparation for the damages caused in two companies, namely, Africom-Zaïre and Africontainers-Zaïre, that were managed by Mr. Diallo. Congo contends that these two companies are of Congolese nationality and that such fact has never been contested by Guinea. Therefore, Guinea would not possess the “quality to act”\(^\text{18}\) by means of diplomatic protection, following that the country’s Application should be primarily dismissed.

2.2.1.2 Guinea is not entitled to exercise diplomatic protection over the person of a national shareholder

Moreover, according to Congo, the rationale behind the Barcelona Traction case\(^\text{19}\), raised by the Applicant, has many similarities with the contention between itself and Guinea. In Barcelona Traction, the Kingdom of Belgium (hereinafter “Belgium”) attempted to protect shareholders of Belgian nationality that had invested in the Barcelona Traction Light and Power Company Limited (hereinafter “Barcelona Traction”), which had its place of business in the Kingdom of Spain (hereinafter “Spain”) and that was incorporated in Canada, where the company maintained its head office. Belgium contended that the Barcelona Traction had adjudicated bankruptcy in Spain as a result of acts contrary to international law committed towards the company


\(^{19}\) For details on the case see <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=1a&case=50&code=bt2&p3=4>
by organs of the Spanish State. These allegations were not accepted by the Court, which dismissed the country’s allegations, positioning itself in favor of the exception raised by Spain, which was based on the lack of *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain.

In *Barcelona Traction*, the Court has recognized the possibility of the shareholder’s national State of exercising diplomatic protection in very strict cases, namely those where “the act complained of is aimed at the direct rights of the shareholder as such”\(^{20}\). Congo sustains, however, that the circumstance that the manager of the companies, Mr. Diallo, have seen its interests touched by the measures taken by Congo’s government is not of the nature to become the Application receivable. According to Congo, the extensive conception that Guinea holds of the “direct rights of the shareholders as such” provokes confusion between the company’s personality and its capital and that of the shareholder. Therefore, Guinea cannot claim that it had its rights violated and, consequently, cannot usefully invoque considerations of equity disregarding the existing positive law, which the Court is charged to follow according to its Statute.

### 2.2.2 The non exhaustion of previous local remedies

Subsidiarily, if the Court would understand that Guinea is entitled to conceive diplomatic protection to the companies or its shareholder, Congo submits that the Applicant must satisfy another classic *dictum* of the Court\(^{21}\), which would be the exhaustion of internal remedies. Congo sustains that neither Mr. Diallo, nor their managed companies have exhausted previous local remedies before Congolese courts.

According to Congo, the means of access to Congolese justice (and previous to Zaire judicial apparatus) effectively met requirements in order to preserve the company’s, as well as Mr. Diallo’s rights, since the means of appeal were available to public and private companies as a whole. Congo intends to prove its contention by providing the Court with well succeeded cases of access to justice by using examples of different companies. It is also stated that Congolese legislation and elements of recent

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\(^{21}\) *Exceptions Préliminaires Présentées par la République Démocratique du Congo*, p. 109.
practice demonstrate the possibility **in concreto** to demand the responsibility of the Congolese State. Congo alleges that Guinea does not make proof of its allegations that the justice apparatus of the Congolese State is unavailable or inaccessible. It also submits that the absence of Mr. Diallo of the Congolese territory is not an obstacle to pursue justice procedures, as judiciary appeals do not require the physical presence of the person interested in the territory of the competent forum. Considering these grounds, Congo submits the dismissal of Guinea’s Application.

### 2.3 Diplomatic Protection Law

As a general rule, individuals are not subjects of international law and, therefore, do not act in its framework. In this sense, it is said that “aliens may have rights under international law as human beings, but they have no remedies under international law (…) except through the intervention of their national State”\(^{22}\). Hence, diplomatic protection is the available mechanism to a person who suffers an international violation, through which his or her state arrogates the complaint to itself. In other words: “If nationals are subjected to injury or loss by an agency for which another state is responsible in law, then, (…) the state of the persons harmed may present a claim on the international plane”\(^{23}\). The injury may be either to the person or to the property of the national, or to both of them\(^{24}\).

The institute of diplomatic protection is connected to an individual’s nationality\(^{25}\), but it is not a duty of the nation – to endorse or not a personal claim is within the discretion of the State. Therefore, citizens abroad do not have, by international law, the right to demand protection from their Home State, although they

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\(^{25}\) “A normal and important function of nationality is to establish the legal interest of a state when nationals, and legal persons with a sufficient connection with the state, receive injury or loss at the hands of another state”. BROWNLIE, p. 459.
might have such a right granted by municipal law. There is precedent of the Court on this sense. Nowadays, though, there is some support to the view that there is, in fact, some obligation of the State to protect its nationals abroad, when serious human rights violations are in stake. By endorsing the claim, the State converts itself on victim of the injury. According to the traditional view on the matter, the objecting State acts for its own rights – the “rights to ensure, in the person of its subjects, respect for the rules of international law”, although the complaint is always based on the original request, presented by the individual. Regarding this, BROWNLIE stresses that “[t]he subject-matter of the claim is the individual and his property: the claim is that of the state”.

Diplomatic protection must be exercised lawfully and peacefully, leading to the invocation of the legal responsibility of another State. It is essentially remedial, invoked with the purpose of correcting a wrongful act committed to a national. That is one of the reasons why it is said that diplomatic protection only applies when all local remedies to solve the situation have failed.

The matter of diplomatic protection is present on international instruments, decisions and doctrine and is, at this moment, subject of an International Law

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27 “… within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress … The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case”. *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 4 at p. 44.

28 ZIEK, p. 212. Critics of this traditional view argue that it is inappropriate to substitute individual rights by those of the state, when the latter is, in reality, acting as an agent of the former, sponsoring his rights. ILC’s Ex-Special Rapporteur, Mr. Mohamed Bennouna, believes that the idea of the state enforcing its own rights is an “obsoleto fiction” and asserts that the institute of diplomatic protection in fact represents the recognition, in the international plane, of the individuals’ human rights (ZIEK, p. 213). On the other hand, the present Rapporteur of ILC’s drafting committee on diplomatic protection, C. John R. Dugard, does not discard the traditional view, which is confirmed by draft article 3 of the project: “The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to Article 4, the State of nationality has a discretion in the exercise of this right”. *Draft Articles on Diplomatic Protection*, Draft Article 3.

29 BROWNLIE..., p. 459.

Commission’s (ILC hereinafter) codification project, its status being of soft law. Nevertheless, international custom and general principles of law do establish some requisites for the exercise of this institute, which are effective and continuous nationality and previous exhaustion of local remedies.

2.3.1 Effective and continuous nationality

As BROWNLIE states, the principle of diplomatic protection “rests primarily on the existence of the nationality of the claimant state attaching to the individual or corporation concerned both at the time of the alleged breach of duty and the time when the claim is presented”. On this sense, HENKIN writes that

[i]n so far as nationality is identified with citizenship, a State invoking nationality (...) is in effect asserting that links of citizenship warrant – indeed require – it to represent the individual vis-à-vis other States, especially in a system of States in which individuals cannot effectively represent themselves.

In the present case, the controversy does not lay in Mr. Diallo’s nationality, but in his companies’, Africom-Zaïre and Africontainers-Zaïre. The right to the exercise diplomatic protection in respect of corporations and their shareholders is, in fact, a complex issue. As states HENKIN,

[i]t is the application of ‘nationality’ to companies that has sometimes produced particularly troubling consequences. (...) For a company, the term [nationality] states a conclusion, that the company has links to the state that it – and other states – deem sufficient to support diplomatic protection (...). The links sufficient for that relationship are more varied and flexible than for individual nationality.

BROWNLIE adds that “[o]n the plane of international law and relations a great many treaty provisions define ‘nationals’ to include corporations (with functions of private law) for various purposes”. Nonetheless, a corporation’s nationality is not something easily identifiable, for there is no certainty as to the criteria for determining a genuine connection between a company and a state.

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31 International rules that are not legally binding, that actually represent a moral obligation, are known as soft law. They are opposed to what is called hard law and constitute a secondary source of international law, performing the main role of setting aims for future political actions in the international relations field. SOARES, Guido Fernando Silva, A proteção internacional do meio ambiente. Barueri: Ed. Manole, 2003, pp. 90-91.
32 BROWNLIE..., p. 389.
34 BROWNLIE..., p. 408.
35 BROWNLIE..., p. 408.
36 BROWNLIE..., p. 464.
recognizes the place of incorporation and the territory of the registered office as criteria for attributing diplomatic protection to a corporate entity, and not the citizenship of its shareholders. These criteria have been confirmed “by long practice and by numerous international instruments”\textsuperscript{37}. However,

\begin{quote}
[In addition to the State by whose laws a company was created or in which it is registered, States have claimed, and other States have recognized, other bases as sufficient for the purpose indicated. Whether such other bases are deemed elements of ‘nationality’, or analogous or equivalent to nationality, States have found sufficient links for the State in which a company has its principal place of management; or in which a company has a significant office or carries on significant business, or for a State whose nationals substantially own the shares of the company. (…) In the end, the focus is on links between company and State rather than on a concept of ‘nationality’\textsuperscript{38}.
\end{quote}

In addition to that, BROWNLIE contends that “[t]here is considerable authority for the view that shareholders must rely upon the diplomatic protection available in favour of the corporation in which they have invested”\textsuperscript{39}. The exercise of diplomatic protection from the state of the shareholders’ nationality may be admitted in specific situations. When judging the \textit{Barcelona Traction} case (Belgium vs. Spain), the Court has considered that “the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations”, for “[t]he danger would be all the greater inasmuch the shares of companies whose activity is international are widely scattered and frequently change hands”; moreover, it was understood that “[i]f the company is harmed, this indirectly causes prejudice to the shareholders; but in such a case what is affected is a simple interest and not the \textit{rights} of the shareholders”. However, the Court also mentioned that “the shareholder has an independent basis for protection if the act complained of is aimed at the direct rights of the shareholder as such, for example, the right to any dividend” \textsuperscript{40}. BROWNLIE endorses this understanding\textsuperscript{41}.

Another remarkable point in the matter is a proposition for which there has been some support in the sources of international law: protection may be exercised where the

\begin{footnotes}
\item[37] ICJ Reports (1970) apud BROWNLIE…, p. 466.
\item[38] HENKIN, pp. 39-40.
\item[39] BROWNLIE..., p. 468.
\item[40] Apud BROWNLIE…., pp. 469-470.
\item[41] The author states that “[t]he shareholders may receive diplomatic protection from the state of their nationality in certain situations, namely when the act of the respondent state affects the shareholder’s legal rights (for example, the right to receive dividends) as such”. BRONWLIE…. p. 468.
\end{footnotes}
corporation has the nationality of the very state responsible for the acts complained of. Such a proposition is somewhat controversial. It is supported, on one hand, “primarily on the basis that in such a case no claim on behalf of the company would be possible on the international plane since the company had local nationality”; on the other hand, it is considered “anomalous ‘since it ignores the traditional rule that a State is not guilty of a breach of international law for injuring one of its own nationals’.”Although it has found acceptance among some judges of the Barcelona Traction case, the Court ended up dismissing it. “It is arbitrary to allow the shareholders to emerge from the carapace of the corporation in this situation but not in others”, writes BROWNLIE. “If one accepts the general considerations of policy advanced by the Court then this alleged exception to the rule is disqualified.

2.3.2 Previous exhaustion of local remedies

“A claim will not be admissible on the international plane unless the individual alien or corporation concerned has exhausted the legal remedies available to him in the state which is alleged to be the author of injury”. This means that, before requesting diplomatic protection to the state of nationality, one must exhaust all grounds of appealing in the violating country’s law system.

There are, though, some conditions in which the rule can be applied – set both by international practice and the ILC’s project. It is particularly relevant, in the present case, the one according to which the exhaustion of local remedies requirement can only be invoked “when effective remedies are available in the national system”, that is, when the person who suffered the damage is able to access local justice in the violating country. The internal judicial system needs to be not only available for the injured

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42 Opinion supported by Judges Fitzmaurice, Tanaka, and Jessup on the Barcelona Traction Case. BROWNLIE..., P. 471.
43 Judge Jessup apud BROWNLIE..., p. 471.
44 BROWNLIE..., p. 470-471.
45 BROWNLIE..., p. 473. The author comments that “[t]his is a rule which is justified by practical and political considerations and not by any logical necessity deriving from international law as a whole. The more persuasive practical considerations advanced are the greater suitability and convenience of national courts as forums for the claims of individuals and corporations, the need to avoid the multiplication of small claims on the level of diplomatic protection, the manner in which aliens by residence and business activity have associated themselves with the local jurisdiction, and the utility of a procedure which may lead to classification of the facts and liquidation of the damages”.
46 BROWNLIE..., p. 475.
person – and as accessible as it is to the state’s citizens – but also effective. As writes OPPENHEIM,

the failure to exhaust the ‘local remedies’ will not constitute a bar to a claim if it is clearly established that, in the circumstances of the case, an appeal to a higher municipal authority would have had no effect, for instance, when the supreme judicial tribunal is under the control of the executive organ whose acts are the subject-matter of the complaint, or when the decision complained of has been given in pursuance of an unambiguous municipal enactment with the result that there is no likelihood of a higher tribunal reversing the decision or awarding compensation or, as a rule, when the injury to the alien is the result of an act of the government as such 47.

3. SUBMISSIONS

The Democratic Republic of Congo asks this Court to adjudge and declare that the request of the Republic of Guinea is inadmissible,

1) because the Republic of Guinea does not have quality to exercise diplomatic protection in the present jurisdiction, its request aiming essentially at obtaining repair for damages that result from the alleged violation of rights of companies which do not have its nationality;

2º) due to the fact that in any event, neither the companies concerned nor Mr. Diallo have exhausted the grounds for appeal intern available and effective which existed in Zaire, then in Democratic Republic of Congo 48.

The Republic of Guinea asks this Court to:

1. Reject the preliminary exceptions raised by the Democratic Republic of Congo, and

2. To declare the request of the Republic of admissible Guinea 49.

4. REFERENCES

4.1 Books and Articles


48 Exceptions Préliminaires Présentées par la République Démocratique du Congo, p. 145.
4.2 International Cases


__________________. Exceptions Préaliminaires Présentées par la République Démocratique du Congo, 2002.


4.3 International Treaties and Conventions
The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States or of areas beyond national control is now part of the corpus of international law relating to the environment.  

1. INTRODUCTION

The River Uruguay is located in South America and passes through the territories of three states, namely, the Federative Republic of Brazil, the Argentine Republic (hereinafter “Argentina”) and the Eastern Republic of Uruguay (hereinafter “Uruguay”). The river’s area is of approximately 339,000 km², rising on the Serra Geral, in Brazil, and flowing into the River La Plata.  According to Article 33, paragraph 7 of the United Nations Convention on the Non-Navigational Uses of International Watercourses, the States sharing the basin of an international river have a special duty and responsibility to prevent any activity, whether within or outside the basin, that might cause harm to them or to their dependent interests.  Consequently, the protection of the River Uruguay is of the utmost importance for the three countries sharing it.  

Regarding the pulp industry, over the last 50 years the Uruguay River has been a site for pulp mills and associated industries.  


By virtue of the 1961 Montevideo Treaty, Argentina and Uruguay signed the Statute of the River Uruguay (hereinafter “Statute”) on 26 February 1975 to establish mechanisms for the rational use of the part of the River shared by them, as well as to determine boundaries of the river to each country. Moreover, the Statute had the objective of obligating the parties to protect the river against pollution and the damages caused by it. The Statute also created the Administrative Commission of the River Uruguay (hereinafter “CARU”, in its Spanish acronym), which is composed by delegates from both Parties and develops functions of regulation and coordination. This commission had the duty of monitoring the projects which could cause harm to the River’s waters.

The 1975 Statute determines the mechanisms for the rational use of the River’s waters, since it regulates “the conservation, navigation, utilization and exploitation of natural resources and the prevention of pollution”.

2. STATEMENT OF THE ISSUE

Argentina brought up to the International Court of Justice, on 4 May 2006, a dispute between itself and Uruguay, alleging several breaches of Uruguay’s obligations established in the Statute. In its Application, Argentina refers to the construction of two pulp mills by private companies, unilaterally authorized by Uruguay in 2003 and 2005, without the foreseen notification to CARU. Argentina also claimed that the mills would have negative effects on the quality of the River’s waters, as well as on the river’s areas of influence. Argentina bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on the first paragraph of Article 60 of the 1975 Statute, which provides that “[a]ny dispute concerning the interpretation or application of the treaty and the Statute that cannot be settled by direct negotiations may be submitted by either Party to the International Court of Justice”.

53 The Montevideo Treaty entered into force in 19 February 1966 and is the basis for the 1975 Statute.
54 The Statute entered into force on 18 September 1976.
56 Application Instituting Proceedings Case Concerning the Pulp Mills on the River Uruguay, § 9 and § 13.
57 Statute of the River Uruguay, article 60.
Argentina claims that the notification and consultation procedure\textsuperscript{58} was breached with Uruguay’s unilateral authorization for the Spanish company ENCE to construct a pulp mill – the Celulosa de M’Bopicuá (“CMB project”), – in the River, despite the many protests submitted to the Government of Uruguay and to CARU. Argentina goes on alleging that the situation has become worse since 2005, when a Finnish company, Oy Metsä-Botnia AB (“Botnia”), was authorized to construct a second pulp mill, the Orion mill, next to the CMB project. The authorization also allowed Botnia to raise a port facility for the exclusive use of the Orion mill, without following the proper procedure provided in the Statute. The Applicant claims that the mills will “damage the environment of the River Uruguay and its area of influence”\textsuperscript{59}, affecting over 300,000 residents, who are concerned with the “significant risks of pollution of the river, deterioration of biodiversity, harmful effects on health and damage to fisheries resources”, and the “extremely serious consequences for tourism and other economic interests”\textsuperscript{60}.

After many discussions in various levels, on 31 May 2005, Argentina and Uruguay created a High-Level Technical Group (GTAN) in order to solve their dispute. However, according to Argentina, in spite of their meetings held during August 2005 and January 2006, a solution for the dispute was not able to be reached.

On 4 May 2006\textsuperscript{61}, along with filing its application, Argentina also requested the Court to indicate provisional measures, alleging that the non-stop construction of the plants would “aggravate their harmful economic and social impact”. The applicant stated that the consequences of these activities would be “such that they could not simply be made good by means of financial compensation or some other material provision” and that the works in the mills, before a final solution in the matter is rendered by the ICJ, would “seriously and irreversibly compromise the conservation of the environment of the River Uruguay and its area of influence, as well as the rights of Argentina and of the inhabitants of the neighbouring areas under its jurisdiction”\textsuperscript{62}.

\textsuperscript{58} Which are obligations present in the Statute.
\textsuperscript{59} Application Instituting Proceedings Case Concerning the Pulp Mills on the River Uruguay, § 15.
\textsuperscript{61} This was made after almost a year from the institution of the GTAN.
The content of the provisional measures requested by Argentina to the Court was to require Uruguay to “suspend immediately all authorizations for construction of the mills in question, to take all necessary measures to stop work on the mills, to co-operate in good faith with Argentina in order to ensure the optimum and rational utilization of the River Uruguay; to refrain from taking any further unilateral action with respect to the construction of the mills which does not comply with the 1975 Statute and to refrain from any other action which might aggravate or extend the dispute which is the subject-matter of the present proceedings or render its settlement more difficult”.

On 8 and 9 June 2006, the ICJ held public hearings on the provisional measures requested by Argentina. Almost one month latter, on 13 July 2006, the ICJ denied the Argentinean request for provisional measures, stating that

there is (…) nothing in the record to demonstrate that the very decision by Uruguay to authorize 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 interests of the riparian inhabitants on the Argentine side of the river.

On that same decision, the ICJ noted that

the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development; (…) it is in particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development; (…) from this point of view account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States.

After this initial phase, the ICJ fixed the time-limit for the filling of a Memorial by Argentina (15 January 2007) and for the filling of a Counter-Memorial by Uruguay (20 July 2007).

Later that year, on 21 November 2006, the World Bank agreed to provide up to US$520 millions in loans and insurance for the Orion mill project, through the International Finance Corp (IFC) and the Multilateral Investment Guarantee Agency.


64 The International Court of Justice. Order of 13 July 2006 – Request for the Indication of Provisional Measures, § 73.

65 Order of 13 July 2006 – Request for the Indication of Provisional Measures, § 80.

66 “The International Finance Corporation, the private sector arm of the World Bank Group, is the largest multilateral provider of financing for private enterprise in developing countries. IFC finances private sector investments, mobilizes capital in international financial markets, facilitates trade, helps clients improve social and
The IFC considered that the project “complied with the bank’s environmental and social guidelines, after an independent study concluded the project was unlikely to cause long-term harm to the environment”. Argentina opposed the decision, and, on that same day, the country’s Foreign Ministry reaffirmed the Government’s disagreement with it, saying the project would have “grave environmental implications”.

On 29 November 2006, a new rise on the conflict took place. This time, it was Uruguay that requested provisional measures to the ICJ, stating that “since 20 November 2006, organized groups of Argentine citizens have blocked a vital international bridge over the Uruguay river, shutting off commercial and tourist travel from Argentina to Uruguay” and depriving Uruguay from millions of dollars that would come from those important activities. The country also pointed out that “[t]he stated purpose of the blockade is to compel Uruguay to accede to Argentina’s demand that it permanently end construction of the Botnia cellulose plant that is the subject of this litigation, and to prevent the plant from ever coming into operation.” Uruguay goes on affirming that

evironmental sustainability, and provides technical assistance and advice to businesses and governments. From its founding in 1956 through FY06, IFC has committed more than $56 billion of its own funds for private sector investments in the developing world and mobilized an additional $25 billion in syndications for 3,531 companies in 140 developing countries. With the support of funding from donors, it has also provided more than $1 billion in technical assistance and advisory services”. International Finance Corporation Press Release: World Bank Group will seek Approval for Orion Pulp Mill in Uruguay, October 17, 2006. Available at: http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=F76F15A5FE7735918525722D0058F472. Last accessed: 02 September 2007.

“MIGA was created in 1988 as a member of the World Bank Group to promote foreign direct investment into emerging economies to support economic growth, reduce poverty, and improve people’s lives. MIGA fulfills this mandate by offering political risk insurance (guarantees) to investors and lenders (covering expropriation, breach of contract, currency transfer restriction, and war and civil disturbance). MIGA also mediates investment disputes and provides technical assistance to promote investment opportunities in developing countries. Since its inception, MIGA has issued nearly 850 guarantees for projects in 95 developing countries, totaling more than $16 billion in coverage. MIGA’s gross exposure stands at $5.2 billion”. International Finance Corporation Press Release: IFC and MIGA Board Approves Orion Pulp Mill in Uruguay: 2,500 Jobs to be Created, No Environmental Harm, November 21, 2006. Available at: http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=F76F15A5FE7735918525722D0058F472. Last accessed: 02 September 2007.


69 REUTERS. World Bank to fund controversial Uruguay pulp mill.


Argentina is internationally responsible for the blockade, “its allowance of them [the protesters], its acquiescence in them, and its failure to act against them is manifest”.  

The hearings on the provisional measures occurred on 18 December 2006. Argentina alleged that the Court had no jurisdiction on the provisional measures requested by Uruguay, since they were not related with the content of the 1975 Statute and with the content of the Application brought by Argentina. The Court, on 23 January 2007, concluded that it had prima facie jurisdiction to deal with such merits and that in the present case there was not an imminent risk of irreparable prejudice to the rights of Uruguay. It therefore considered that the blockades themselves did not justify the indication of the provisional measures requested by Uruguay.

Currently, after the Order upon the Request of Provisional Measures of July 2006, there is no impediment to the continuity of the construction and eventual operation of the Botnia plant, although at Uruguay’s own risks. Also in the Order of January 2007, the reasoning of the Court was that there was not “an imminent risk of irreparable prejudice to the rights” of the parties which would require in the present state to set provisional measures as stated in Article 41 of the Statute of the Court.

Meanwhile, the parties have asked King Juan Carlos I of Spain to help facilitate dialogue between them. An envoy, Juan Antonio Yáñez Barnuevo, was sent by the King to act as a “facilitator”, and a partial solution involving the transference of the ENCE mill from Fray Bentos to the river’s delta has emerged during the mediation. However, the negotiation went back after two rounds of negotiations when the Botnia mill started to be discussed, because of declarations given by the Argentinean’s Head of State. The discussion then returned to the dispute settled under the ICJ jurisdiction.


**2.1 Allegations of the Argentine Republic**

In Argentina’s Application, the country alleges several breaches perpetrated by Uruguay of its obligations established in the Statute and the disrespect of other several rules of international law referred in the document. Among them are the lack of measures to preserve the River’s water from pollution, as well as to protection of its biodiversity, the absence of notification of the construction of the mills and the breach of the obligations established under Chapter II of the Statute.

**2.1.1 The lack of measures to preserve water from pollution and the protection of its biodiversity**

Argentina argues that its rights under the 1975 Statute arise in relation to two categories of obligations: “obligations of result that are of a substantive character, and obligations of conduct that have a procedural character”\(^{78}\). In respect of the first set of obligations, the country, based on Article 41 (a) of the Statute, alleges that Uruguay has at least two other distinct duties, which would be to prevent pollution and to ensure to prescribe rules and measures “in accordance with applicable international standards”.\(^{79}\) Despite having these obligations, according to Argentina, Uruguay did not respect any. The applicant further asserts that the substantive obligations under the Statute include “Uruguay’s obligation not to cause environmental pollution or consequential economic losses, for example to tourism”.\(^{80}\)

Argentina notes that the National Directorate for the Environment of the Uruguayan Government (hereinafter “DINAMA”, in the Spanish acronym) has classified the pulp mills “as projects presenting a risk of major negative environmental impact”. Moreover, affirms Argentina, “the process envisaged by the CMB and Orion projects (...) is inherently polluting”, and “90 per cent of fish production in the Argentina-Uruguay section of the river (over 4,500 tons per year) is located within the


\(^{79}\) The Statute’s Article 41, (a), provides that the Parties undertake to “protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies”.

\(^{80}\) *ICJ Order of 13 July 2006*, § 33.
areas affected by the mills, which are also a breeding area for the river’s migratory fish stocks”. The applicant goes on, manifesting its concern regarding “the amount of effluent which these mills are expected to discharge into the River Uruguay”, the proximity to “major urban population centers” and “the inadequacy of the measures proposed for the prevention and reduction of the potential impact of liquid effluent, gas emissions and solid waste”.  

Argentina argues that Uruguay has lacked with its obligations to take all necessary measures for the optimum and rational use of the River Uruguay and to preserve the aquatic biodiversity. Additionally, Argentina claims that Uruguay has not prevented pollution neither accomplished with its obligation to protect biodiversity and fisheries, including the obligation to prepare a full, objective study on environmental impact.

2.1.2 The absence of notification

In accordance to Article 7, caput, of the 1975 Statute,

If one party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters, it shall notify the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days whether the plan might cause significant damage to the other Party.

Argentina alleges that Uruguay has breached its responsibility described above by authorizing the construction of the mills without previously notifying CARU and Argentina of its intent. CARU could be able to prevent an eventual environmental damage that these constructions could cause in the area.

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81 ICJ Order of 13 July 2006, § 8.
82 ICJ Order of 13 July 2006, § 8.
83 The referred Commission is the binational Administrative Commission of the River Uruguay (hereinafter CARU), created by the Statute’s Chapter III and integrated by members of both States.
84 Statute, article 7. The article goes on: “If the Commission finds this to be the case or if a decision cannot be reached in that regard, the Party concerned shall notify the other Party of the plan through the said Commission. Such notification shall describe the main aspects of the work and, where appropriate, how it is to be carried out and shall include any other technical data that will enable the notified Party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters”. For further understanding, see the whole Chapter II of the Statute.
2.1.3 The breach of the obligations established under the Chapter II of the 1975 Statute

In its Application, Argentina claims that Uruguay has also disrespected the procedures laid down in Chapter II of the Statute. The mentioned Chapter is related to the safety of the water and the navigation procedures on the river, as specified by Articles 3 and 4 of the Statute.

Argentina argues that Uruguay's actions are a clear violation of Article 6 of the Statute, which provides as follows: “(...) each Party shall, within its jurisdiction, permit the competent services of the other Party to carry out the respective tasks, following notification through the Commission”. The Commission mentioned in the Article is CARU.

Argentina adds that, in the moment Uruguay signed the deal with the Spanish company ENCE, unilaterally allowing it to build the pulp mill on the Uruguay river, it has deliberately breached the article 7 of the Statute, authorizing a construction that modifies in a great way the regime of the river, without notifying the Commission.

Although Uruguay alleges having provided the necessary documents to assure that the construction of the pulp mills would not cause any effects in the environment, these documents are far from enough to assure that the River will not be negatively affected by the mills, asserts Argentina. In its application, the country also affirms, based on Articles 9 and 12 of the Statute, that Uruguay had the obligation to assure that the works of construction and functioning of the mills would not begin until there were none objections, or that the work terms were decided by the Court. Argentina affirms that Uruguay did not successfully accomplish these procedures, which were mandatory, not optional, to Uruguay. Article 9 also emphasizes that no works should be undertaken in this initial phase of the proceedings regarding the work on the River.

The applicant sustains that Uruguay’s actions can result in irreparable damages, as the country has chosen the worst possible site to install the plants, in terms of environmental effects. Argentina also mentions economic and social damage – that would be impossible to assess – and further contends that the construction of the mills will impair the many economic activities of the region, such as tourism, that would experiment a suspension of investments, as well as a decline in real estate transactions.

86 Article 3 – The parties shall afford each other the necessary assistance so as to provide the best possible facilities and safety for navigation.
Article 4 – The parties shall agree on provisions governing the safety on the river and the use of the main channel.
Moreover, Argentina expresses concern about the rapid progress of the construction, that would maybe cause serious damage even before the Court delivers a decision on the case.

2.2 Allegations of the Eastern Republic of Uruguay

At the public hearings held by the Court on 8 and 9 June 2006, Uruguay observed that it did not object that Article 60 of the Statute constituted a prima facie basis for the jurisdiction of the Court on the present case; however, the country noted that this provision establishes jurisdiction only in relation to the claims concerning matters covered by the Statute and affirmed that “any dispute relating to the possible effects of the mills other than those relating to any impairment of the quality of the river waters or indeed other than those stemming directly from such impairment by cause and effect, is clearly not covered _ratione materiae_ by the compromissory clause in Article 60 of the Statute.”\(^87\) As examples of matters not covered by the document, Uruguay cited those regarding “tourism, urban and rural property values, professional activities, unemployment levels, etc”,\(^88\) and also other aspects of environmental protection in transboundary relations between the Parties.

Uruguay also stated that it had “fully complied with the 1975 Statute of the River Uruguay throughout the period in which this case has developed”\(^89\), affirming that Argentina’s request was unfounded. The country presented its arguments regarding Argentina’s submissions.

2.2.1 Uruguay took all measures required to preserve water from pollution and the protection of its biodiversity

Uruguay affirms that, in “applying both the highest and the most appropriate international standards of pollution control to these two mills”, it had “met its obligations under Article 41 of the Statute”. The country explains that the so far undertaken evaluations on the environmental impact of the construction and operation of the Orion and CMB mills, as well as the regulatory controls and strict licensing conditions imposed by its internal law, guarantee that no harm would be caused to the

\(^{87}\) ICJ Order of 13 July 2006, § 42.

\(^{88}\) ICJ Order of 13 July 2006, § 42.

\(^{89}\) ICJ Order of 13 July 2006, § 41.
River Uruguay or to Argentina\textsuperscript{90}. Also, according to Uruguay’s Minister for Foreign Affairs, Reinaldo Gargano, the mills projects are in accordance with European Union standards, settled in the 1999 International Pollution Prevention and Control directive\textsuperscript{91}, whose recommendations must be followed by all pulp plants in Europe.

Moreover, Uruguay observes that the lack of risk to the quality and environment of River Uruguay and Argentina has been acknowledged by several Argentine officials, its representatives on CARU among them. Uruguay also points out that the two mills benefit from a far more modern and efficient and less polluting technology than many pulp mills that operate in Argentina.

As to the Argentine’s observations regarding the pulp mills classification by DINAMA\textsuperscript{92}, Uruguay noted, at the public hearings held on 2006, that the Orion and CMB mills would not operate before 2007 and 2008, respectively, and that several conditions would still be fulfilled until then, including the issue of permits by the aforementioned organ. Also, according to the Uruguayan Ministry of Foreign Affairs, after a meticulous exam process, undertook in accordance with national and international rules, DINAMA has indeed concluded that the pulp projects will not affect the quality of River Uruguay’s waters\textsuperscript{93}.

\textbf{2.2.2 The absence of notification}

Uruguay sustains that it did take measures regarding the supply of information, which were “fully supported by the CARU minutes”; moreover, according to Uruguay, “Argentina [did] not deny obtaining from Uruguay a substantial amount of information through a variety of machinery and channels”\textsuperscript{94}.

The Uruguayan Ministry of Foreign Affairs sustains that the aforementioned DINAMA’s conclusion would be enough to exempt the country of notification to

\textsuperscript{90} ICJ Order of 13 July 2006, § 43 and § 45.


\textsuperscript{92} See previous item 2.1.1, \textit{The lack of measures to preserve water from pollution and the protection of its biodiversity}, on page 6.


\textsuperscript{94} ICJ Order of 13 July 2006, § 53.
CARU; nevertheless, according to the referred Ministry, the subject has indeed been introduced to the Commission, and there was even an agreement among the Parties in that framework, regarding the monitoring of the waters and the effects that the pulp mills could cause on these waters. The Ministry affirms that such a monitoring has been and is still made, and that a binational High Level Technical Group (GTAN, in the Spanish acronym) has been configured with the purpose of analyzing all the information concerning both the characteristic manufacturing process of the mills and the their eventual effects on the environment. “Consequently, everything that the Argentine Republic now claims has already been considered totally valid by its authorities, from the treatment that the subject had in the Administrative Commission of the River Uruguay and the subsequent facts”, adds the Ministry. 95

2.3. Legal Thesis Involved in the Merits

The case placed before the Court is concerned with the law of treaties – the interpretation of treaties and of their obligations – together with certain points of international environmental law and State responsibility.

2.3.1. Treaty Interpretation

One of the main issues before the Court is the fulfillment by the Uruguay of all its obligations regarding the 1975 Statute. Most of the Argentinean claim is based on Uruguay not having followed a proper procedure of notification and consultation stated in the Statute, and this is contended on the grounds of treaty interpretation.

2.3.1.1. The Three Schools of Thought96

The “intention of the parties” school has the aim of giving effect to real intension of the parties, or what some scholars tend to say the “presumed intension”97 of the parties. This has the difficulty of relying on ideas of the parties that are not easy to

95 Demanda Argentina contra Uruguay, ante la Corte Internacional de Justicia.
97 As an example we may quote: BROWNIE. Principles of International Law…p.602 e HARRIS. International Law…p. 832.
be understood and sometimes they did not by any means wanted what the Court has seen as their intentions.\textsuperscript{98}

The “ordinary meaning”\textsuperscript{99} school, on its hand, seeks to support the interpretation in the plain idea shown by the text, therefore, submitted to the “contemporaniety” of the language.\textsuperscript{100} The difficulties presented are related with the subjectivity of the analysis on the terms, to know what is indeed the ordinary meaning.\textsuperscript{101}

And finally, the “teleological” school establishes first what is the purpose of the text and interpretes in accordance with its purpose, and, as stated by Professor Harris, has an aspect of judicial legislation, amounting sometimes in true amending of the instrument, since the text ends up having an “existence of its own” away from the will of the parties involved.\textsuperscript{102}

\begin{flushright}
\textbf{2.3.1.2. The Rules from the 1969 Vienna Convention on the Law of Treaties}\textsuperscript{103}
\end{flushright}

In its Articles 31 and 32,\textsuperscript{104} the Vienna Convention deals with the interpretation of treaties. The Convention did not chose an specific school of though, but rather “gave a cautious qualification o the textual approach by permitting recourse to the further means of interpretation”.\textsuperscript{105} The wording of the articles are:

\begin{quote}
\textit{“Article 31}
\textit{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:
\begin{itemize}
\item[(a)] any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
\item[(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.
\end{itemize}
3.There shall be taken into account, together with the context:
\begin{itemize}
\item[(a)] any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
\item[(b)] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
\end{itemize}
\end{quote}

\textsuperscript{98} HARRIS. \textit{International Law}…p. 833.
\textsuperscript{99} Among other international cases, this approach can be seen in the Advisory Opinion from the Permanent Court of International Justice (PCIJ) on the Polish Postal Service in Danzig (1925) Ser. B, p. 37.
\textsuperscript{100} BRQWNLIE. \textit{Principles of International Law}…p.604.
\textsuperscript{101} HARRIS. \textit{International Law}…p. 833.
\textsuperscript{102} HARRIS. \textit{International Law}…p. 833.
\textsuperscript{103} Most of the rules settle in this convention are seem as declarations of of already existing costumery law, or having formed costumary law. This is the case of the rules of interpretation in the conventions, for a supporting scholar opinion see: HARRIS. \textit{International Law}…836.
\textsuperscript{104} Article 33 was not included, since there is no claim related to the language of the treaty, subject that this article deals with.
\textsuperscript{105} BRQWNLIE. \textit{Principles of International Law}…p.607.
(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.

**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.”

2.3.1.3. Other Principles of Interpretation

The “effective interpretation principle” states that “a treaty should be interpreted to give effect to its object and purpose”, even if it is not explicitly in the words of the text. In the ICJ Advisory Opinion on the Interpretation of Peace Treaties the Court did not apply this principle, however, as a principle of “institutional effectiveness” the ICJ applied it in many cases such as the Reparations and the Certain Expenses Cases.

The “restrictive interpretation principle” states that any limitation in sovereignty should be interpreted restrictively, in a way to limit the sovereignty minimally.

2.3.2. International Environmental Law

2.3.1 The Beginning of a Legal Framework

During a relatively short existence, the law and politics of environment have known a development pace without precedent. Most importantly, environment protection has suffered a turning point after the Stockholm Conference on the Human

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107 The different scholars state many principles, we will deal only with two which are of more widely known knowledge and application. For a historical and more extensive view on principles of interpretation see: VATTEL, E. *The Law of Nations*. Philadelphia: T.& J.W. Johnson, 2005.

108 This principle routes from the antient principle that there are no empty words in the law, therefore, they should be interpreted in order to be effective.

109 This principle suffers great opposition, however, as stated by professor Brownlie, in cases regulatig territorial limits and boundaries it may operate.

Environment of 1972. After a series of international environmental catastrophes\textsuperscript{111}, which certainly influenced the international community, the conference marked the beginning of a new approach in law, which has become less concerned with competition for the same resources and more with the cooperative management and preservation of those resources, along with the prevention of abuse and accidents\textsuperscript{112}. Indeed, exploitation of the environment has been superseded by caring for the environment.\textsuperscript{113}

Shortly after Stockholm, the United Nations General Assembly (UNGA) has approved a resolution that reinforced Principle 21 of the Stockholm Conference, where it emphasized that “in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction.”\textsuperscript{114} Along with this standard, the principles of prior notice, environmental impact assessment and consultation help to prevent conflicts from arising in case of transboundary pollution, by providing the affected State with substantive information regarding the activities of the “polluter” State, in order to a better solution be reached between them\textsuperscript{115}. These principles are linked in a systematic way\textsuperscript{116} in the *Montreal Rules of International Law Applicable to Transfrontier Pollution*\textsuperscript{117}, adopted by the International Law Association in 1982.\textsuperscript{118}

\textsuperscript{111} Among those environmental catastrophes there was a mercury leaking in Japan, the sinking of the oil tanker Torrey Canyon in 18 March 1967, which massively polluted the oceans, and the death of fish in the Great Lakes of North America.


\textsuperscript{113} HÖHMANN …, p. 5.

\textsuperscript{114} United Nations Resolution A/Res/2995 (XXVII) of 19 January 1973


\textsuperscript{117} Article 7 of the Montreal Rules regulates prior notice:

1. States planning to carry out activities which might entail a significant risk of transfrontier pollution shall give early notice to States likely to be affected. In particular, they shall on their own initiative or upon request of the potentially affected States, communicate such pertinent information as will permit the recipient to make an assessment of the probable effects of the planned activities.

2. In order to appraise whether a planned activity implies a significant risk of transfrontier pollution, States should make environmental assessments before carrying out such activities.

Article 8 of the Montreal Rules regulates consultations:

1. Upon request of a potentially affected State, the State furnishing the information should enter into consultations on transfrontier pollution problems connected with the planned activities and pursue such consultations in good faith and over a reasonable period of time.

2. States are under an obligation to enter into consultations whenever transfrontier pollution problems arise in connection with the equitable utilization of a shared natural resource as envisaged in Art. 5.

\textsuperscript{118} The International Law Association (ILA) was founded in Brussels in 1873 for "the study, clarification and development of international law, both public and private, and the furtherance of international
Under the UN system, one greatly significant document for an ecologically oriented international environmental law is the *Draft Principles of Conduct in the Field of Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by two or more States*¹¹⁹ (hereinafter “Draft Principles”), which was approved by the United Nations Environment Program (UNEP) in 1978. The Draft Principles calls upon the States to follow its guidelines and recommendations during the formulation of bilateral and multilateral agreements. Despite the non-adoption by the UNGA, the importance of the Draft Principles in terms of customary law arises from the comprehensive confirmation of its principles through UNEP declarations and through a number of different agreements.¹²⁰

### 2.3.2 Damages and Liability in International Environmental Law

The responsibility for environmental harm is extremely complex and controversial when it regards customary international law. A useful distinction separates international “responsibility” from international “liability”: the first arises from unlawful acts while the latter encompasses both lawful and unlawful activities.¹²¹ Some authors substitute the idea of responsibility to apply the theory of risk liability in environmental protection, affirming that the State in whose territory the source of pollution is located is in any case liable and must pay compensation simply as a result of the occurrence of significant transnational environmental harm.¹²² In sharp contrast to the mentioned view, a considerable part of scholarly works sustain that reparation for responsibility only arises from the breach of a specific international obligation and therefore for a wrongful act.¹²³ On that basis, it must be determined whether there is an international commitment to the environmental sector concerned.

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¹²³ PISCILLO-MAZZESCHI... p.23.
International case law does not offer arguments in favor of objective responsibility or of liability without a wrongful act on the protection of the environment and offers instead various arguments favoring responsibility for a wrongful act and for lack of due diligence\textsuperscript{124}. One significant example is the \textit{Corfu Channel Case}\textsuperscript{125} under the \textbf{ICJ}\textsuperscript{126}. In that occasion, the Court decided that Albania’s responsibility with Great Britain mainly arose from the obligation of every State “not to allow knowingly its territory to be used for acts contrary to the rights of other States”\textsuperscript{127}. As to the exact nature of Albania’s responsibility for a wrongful act, the decision should be interpreted as a breach on an objective standard of due diligence\textsuperscript{128}.

On the other hand, different cases demonstrate that there is not objective responsibility or liability without a wrongful act for environmental harm. Reflection of this situation was the \textit{Chernobyl} accident: absent any reliable proof of the Soviet government’s negligence, many States refrained from taking international action against the USSR for the purpose of compensation\textsuperscript{129}.

Finally, and most importantly, there are cases which affirm a State’s responsibility for a wrongful act owing to lack of due diligence in preventing environmental harm. In the \textit{Sandoz Corp Case}, Germany accused Switzerland of negligently omitting itself to obligate the pharmaceutical company Sandoz Corp to take safety measures in order to refrain pollution on the Rhine river\textsuperscript{130}.

\subsection*{2.3.3 The Mold of the Precautionary Principle}

Another important feature of the pulp mills issue lies on the precautionary principle. First developed in Germany, the precautionary principle determines that potentially dangerous emissions and pollution must be prevented, even if damage cannot

\begin{footnotesize}
\begin{enumerate}
\item PISCILLO-MAZZESCHI..., p.28 \textit{et. sec.}
\item Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), 1949, ICJ (Judgement of 9 April 1949). \textit{See also}: Trailer Smelter Arbitration (USA v. Canada), 1941, where the Arbitral Tribunal decided that “no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein...”. In VICUÑA..., p. 129.
\item See \textit{also} Nuclear Test Cases I (Australia vs. France), where the ICJ decided that there are customary obligations concerning the environment, whose breach creates responsibility in case of a wrongful act.
\item Corfu Channel case, \textit{Op. cit.}
\item PISCILLO-MAZZESCHI..., p. 28 \textit{et. Sec.}
\item PISCILLO-MAZZESCHI..., p. 28 \textit{et. Sec.}
\end{enumerate}
\end{footnotesize}
be proven\textsuperscript{131}. The principle is employed internationally in instruments such as in the \textit{Rio Declaration} of 1992, which states the following:

Principle 15
In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Furthermore, the \textit{UN Framework Convention on Climate Change} and the \textit{Convention of Biological Diversity} both contain the precautionary principle.

Recently driving the European Communities (EC)\textsuperscript{132}, the also known as “better safe than sorry” philosophy has compelled European regulators to take action against chemicals even when their dangers remain largely uncertain. Under the programme called REACH, companies inside the EC territory would have to register basic scientific data for about 30,000 compounds. Those chemicals would be subject to bans unless there is proof that they can be used safely or that the benefits outweigh the risks. According to the Los Angeles Times, testing would cost industries $3.7 billion to $6.8 billion\textsuperscript{133}.

Despite its wide acceptance in international environmental law instruments\textsuperscript{134}, the precautionary principle was not considered applicable in a concrete case held under the World Trade Organization (WTO). In 1996, the United States of America (hereinafter “USA”), followed by Canada, challenged the EC before the WTO Dispute

\textsuperscript{131} HOHMANN…, p. 10.

\textsuperscript{132} There is one explicit reference to the precautionary principle in the environment title of the EC Treaty (more specifically, in Article174). However, the principle does not apply only to the environment. At the judgement on the validity of the Commission's 1998 decision banning the exportation of beef from the United Kingdom to reduce the risk of BSE transmission (cases C-157/96 and C-180/96), the Court held: "Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent." This decision was cited at the Communication of the Commission on the Precautionary Principle of 2000. Available at: http://ec.europa.eu/environment/docum/20001_en.htm. Last accessed: 28 August 2007.


\textsuperscript{134} The first recognition of the precautionary principle was in the World Charter for Nature, adopted by the UNGA in 1982. It was subsequently incorporated into various international conventions on the protection of the environment.
Settlement Body (hereinafter “DSB”) due to the EC Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action, which prohibited the importation and sale of meat and meat products treated with a set of any of six growth-promoting hormones. The EC justified the directives contending that the presence of the banned hormones in food may present grave risks to human health. According to the DBS, the EC directives were inconsistent with the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter “SPS Agreement”). Notably in this case, the WTO denied the employment of the precautionary principle.

2.4. Legal Precedents of the ICJ: The Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)

In the Gabčíkovo-Nagymaros case, Slovakia and Hungary asked the Court to decide “whether the Republic of Hungary was entitled to suspend and subsequently abandon”136 their common project in the River Danube; “whether the Czech and Slovak Federal Republic [Slovakia today] was entitled to proceed (…) with the ‘provisional solution’”;137 and “what [were] the legal effects of the notification (…) of the termination of the Treaty [bilateral treaty made between the two countries in order to construct a bypass in the Danube River] by the Republic of Hungary”.138

Hungary and Slovakia (Czechoslovakia at the time) settled in 1977 a bilateral agreement to build a series of locks in the Danube River in order produce energy and improve the navigational capacity of the river, among others. In 1989, due to a series of ecological political pressures, Hungary decided to suspend and, later on, abandon the project. After several frustrated negotiations, Slovakia turned to a unilateral solution, doing what was called “Variant C”, which would change the course of the river. In May 1992, before the “Variant C” became operational, Hungary sent a note of termination of the Bilateral Treaty.

137 Special Agreement Gabcikovo Nagymaros Case. Article 2 (b).
138 Special Agreement Gabcikovo Nagymaros Case. Article 2 (c).
Hungary based its plea before the Court, among other arguments, on the improvement in environmental international law, and in environmental knowledge. The Court dismissed the claim that the suspension and further abandonment had been made in the case of ecological state of necessity.

Regarding the termination of the treaty, Hungary supported the lawfulness of the termination on five grounds: “[i] the existence of a state of necessity; [ii] the impossibility of performance of the Treaty; [iii] the occurrence of a fundamental change of circumstances; [iv] the material breach of the Treaty by Czechoslovakia; and, finally, [v] the development of new norms of international environmental law.”

The most important were the second and the fifth. The impossibility to perform was based on the fact that the object of the treaty had disappeared, due to ecological constraints, created by the new environmental knowledge and environmental law. The Court set aside this argument first because it was not a ground for termination of the treaty, but only for the exclusion the wrongfulness from the responsibility for non-performance of an obligation; and second, because the treaty in articles 15, 19 and 20 made it possible for the parties to harmonize environmental constraints and economical imperative; therefore, there could not have been an impossibility to perform.

As for the development in environmental international law, notwithstanding the statement of the Court in this matter, mentioning the emergence of new peremptory norms (jus cogens) in this field of law, the Court felt that it has not required to further pronounce, since none of the parties have contended about the emergence of a norm of such a nature.

Therefore, the Court in the Gabcikovo Nagymaros case relied much more in the principles of the Law of Treaties than in environmental international law, turning this into an opportunity for the Court pronounce itself on the subject and advance this branch of law.

3. SUBMISSIONS

140 This was based on Article 61 of the 1969 Vienna Convention on the Law of Treaties.
141 Case Concerning the Gabcikovo Nagymaros Project. § 112.
The **Argentine Republic** asks this Court to adjudge and declare that:

a) by permitting the construction of two pulp mills on the River Uruguay, and refusing to stop the construction process, the Eastern Republic of Uruguay has violated procedural obligations imposed to the country by the chapter 2 of the 1975 Statute, as well as violated substantive obligations regarding the safe utilization of the river, the preservation of the river’s water and biodiversity from pollution, and the economic use of the river;

b) that the acts perpetrated by the Eastern Republic of Uruguay engaged its international responsibility to Argentina and that it shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it;

c) as a consequence for the injury caused by its breach of the obligations incumbent upon the country, the Eastern Republic of Uruguay shall make full reparation to the applicant.\(^{143}\)

The **Eastern Republic of Uruguay** asks this Court to adjudge and declare that:

a) by fulfilling all the requirements and procedures established by the 1975 Statute, the country has not breached any obligation on the international framework;

b) that the pulp mills construction and operation are in accordance to the highest international law standards regarding environmental protection; and, therefore, that the pulp mills do not constitute a threat to the quality of the River’s waters and the areas affected by it;

c) as a consequence, Uruguay has no responsibility towards Argentina, and no obligation to make reparations to the applicant;

d) finally, as the procedimental rules have all been met, there is no impediment for the continuance of the construction process and the operation of the pulp mills.

\(^{143}\) *Application Instituting Proceedings Case Concerning the Pulp Mills on the River Uruguay*, §. 25.
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