# Provincia de la Pampa *v.* Provincia de Mendoza

**Supreme Court, Buenos Aires, Argentina**
3 December 1987 (Caballero, Belluscio, Fayt, Petracchi, Bacqué JJ)

*Rivers – inter-provincial watercourses – original jurisdiction of the Supreme Court – dispute between Argentine provinces – principle of equitable utilisation – application to inter-provincial watercourses*

*Concept of a river basin – unity of a hydrological basin – whether recognised in international law – work of the International Law Commission*

*Pre-existing uses of river basin preventing regular flow of water to neighbouring province – whether watercourse to be considered inter-provincial*

*Application by analogy of international law principles and rules concerning shared natural resources – guidance provided by international jurisprudence and resolutions, ILC drafts, etc.*

*Principle of reasonable and equitable utilisation – whether preference to be given to existing efficient uses – obligation to negotiate on future uses of water – not equivalent to obligation to reach agreement – not conferring veto on either party*

SUMMARY *The facts* The Argentine Province of La Pampa brought suit against the Province of Mendoza, seeking a share of the inter-provincial waters of the Atuel River. Approximately 80 per cent of the Atuel River had been located in Mendoza, but over time the Atuel's waters had been wholly diverted within Mendoza for irrigation purposes, servicing the needs of a sizeable agricultural industry, so that there was no regular flow of water to La Pampa.

La Pampa argued that the diversion of water by Mendoza restricted the flow of the Atuel River downstream in La Pampa, in violation of Resolution 50/49 on Water and Electrical Energy. This Resolution, La Pampa maintained, required periodic releases of water by Mendoza to

La Pampa. La Pampa argued that it was entitled to water from the Atuel on the basis of the constitutionally recognised sovereign equality of Argentine provinces and by analogy from the principles of public international law. It further asserted that Mendoza had made irrational and inefficient use of the Atuel waters, neglecting the principles of good faith and good neighbourliness established under the Argentine Civil Code.

Mendoza responded that the reduced flow of the Atuel was a result of naturally occurring sedimentation. Since the Atuel no longer flowed into La Pampa, it was not, for legal purposes, an inter-provincial river and was subject to the exclusive jurisdiction of Mendoza. In the alternative, a 1941 Agreement with the National Government (the '1941 Agreement'), brought into effect by Law 12.650, authorised Mendoza to use the Atuel waters for provincial development. Mendoza argued that La Pampa became bound by the 1941 Agreement upon acquiring provincial status in 1951. Alternatively, the principle of equitable utilisation of international watercourses, enshrined in international law, supported Mendoza's position, since in accordance with that principle, pre-existing lawful uses take precedence over proposed future use.

*Held by the Supreme Court* (1) The Court has original jurisdiction over inter-provincial claims under Article 109 of the Constitution of Argentina.[1] Inter-provincial claims differ from civil cases, raising complex issues regarding the political relations between provinces.

(2) In resolving inter-provincial claims, the Court has ample discretion to determine the applicable law, which could include national and comparative constitutional law and, if analogy permits, federal common law and public international law.

(3) The Atuel hydrographic basin is, for legal purposes, inter-provincial. A finding as to the inter-provincial nature of the river has to take account of the fact that the discontinued flow of waters to La Pampa is attributed to the intensive use of the waters in Mendoza.

(4) As described in jurisprudence of the United States of America, land under federal authority is held 'in trust for future states', and federal disposal of public land must take account of the interests of future States.

(5) There is no evidence to support Mendoza's assertion that Argentina disposed of public land by virtue of the 1941 Agreement and

[1] Article 109 of the Constitution of Argentina of 1860 as amended provides:

> No province can declare or make war on another province. Their complaints must be submitted to and resolved by the Supreme Court of Justice . . .

**Law 12.650; in any event, the 1941 Agreement does not bind the Province of La Pampa.**

**(6) The principle of equitable use of shared watercourses is enshrined in international law and, in the view of many commentators, has become a rule of customary international law; its development may be traced through the work of international bodies, such as the International Law Commission, and international and comparative jurisprudence and agreements.**

**(7) Applying that principle (Fayt J dissenting), Mendoza is not using the Atuel waters inefficiently and La Pampa has failed to show that its proposed utilisation of the Atuel waters is more important than Mendoza's current use of those waters. The cost of the works required to irrigate land in La Pampa is disproportionate to the expected benefits. These factors are relevant to the assessment of the reasonable and equitable use of an inter-provincial watercourse.**

**(8) Mendoza is entitled to maintain its existing consumption of Atuel waters, provided it does not irrigate more than 75,671 hectares of land and provided it does not prejudice La Pampa's right to share in future uses of the inter-provincial watercourse.**

**(9) Future uses of the Atuel must be negotiated in good faith and with good neighbourliness with a view to reaching an agreement that provides for a reasonable and equitable share of the waters.**

**The Application was dismissed and allowed in part.**

**The following are extracts from the text of the judgment of the Court:**

[**2512**] 27. That, discounting the defence of the respondent, the inter- provincial character of the hydrographic basin of the Atuel must be recognised. The only point to be made here concerns the requirement that a river be perennial in order to qualify, from a legal point of view, as such. 'No use – Mendoza said – that intrinsically has to be continuous, can be made and ensured if there is no continuous availability of water'; but this statement, unobjectionable as a matter of abstract reasoning, omits the circumstance that the interruption or discontinuity of the arrival of waters to La Pampa is due to the intensity of use for consumption operated in its [Mendoza's] territory, as has been shown in the evidence analysed in the above paragraphs.

. . .

[**2527**] 52. That, from the foregoing, one can confirm that the historical experience of the United States reveals that the full competence of the national legislator allowed it to dispose, in order to comply with the purpose of the settlement and development of the territories, over the land foreseen for this aim. For this reason, public lands could be ceded, without any restriction, to private individuals or continue to be affected [**2528**] by the federal government even after the creation of the new States in

order to comply with these objectives (for example, to create indigenous or ecological reserves). On the contrary, resources such as the bed of inland waterways, considered public routes and, thus, subject to general use and enjoyment, could be the object of provision or concession only if this was in the interest of the future State, subject, then, to dependence on the national authority. This outcome was compatible with the nature of temporary administration, exercised, as continuously maintained in the case law, 'in trust for the future states' (152 US 1 and others) and with the nature of certain natural resources that in our legal order typify property in the public domain.

53. That it remains to be resolved whether the disposition of the waters of the River Atuel, property in the public domain notwithstanding its status as a non-navigable waterway, put forward by the national government in its capacity, at the time, as title holder, is opposable to La Pampa, as argued by Mendoza. That is, it is necessary to prove whether this disposition respects the objectives which justified the creation of the territory and which federal government legislation had to consider (Article 67 paragraph 14 of the Constitution) such as that raised in the parliamentary debate, referred to in recitals 33, 34 and 35 and maintained by the more authoritative doctrine, and whether it was shown through an unequivocal demonstration of intent required by the case law of the United States Supreme Court. It is clear that this position of the respondent cannot be reconciled with another [position] also developed during its response to the claim, according to which the government of the nation is responsible for the political decision to develop Southern Mendoza, and although it could not be challenged in the framework of Article 67 paragraph 16 of the Constitution, it is not clear how this could prevent the claim of the applicant.

54. That neither the parliamentary debates on Law 12.650, nor the contract between the federal government and Mendoza, in any way supports the interpretation of the respondent, taking into account that, as will be seen below, none of them contains any reference to the inter-jurisdictional nature of [**2529**] the river or any expression, however vague, that at that moment the national government had ruled, through these acts, over a resource within its public domain.

Moreover this authority was required, as Deputy Cárcano stated, to stimulate progress and growth in prosperity in the region, 'the only way of ensuring their interest for the present and the future'. This attitude is, incidentally, compatible with the unquestioned doctrine of the United States Supreme Court that the territorial authority is exercised, as was already said, 'in trust for the future states' (recitals 33 to 35 and 52 of this ruling). To infer from this, of particular relevance for the decision on this point, a categorically stated intention of the federal government, as claimed by the respondent, is unacceptable.

. . .

[**2565**] . . .

127. That the principle of equitable utilisation is also enshrined in international law, where it is considered a necessary doctrine to solve conflicts of this nature, to the extent that, for many authors, it has become a rule of customary law. It is thus

appropriate to study its scope of application in this area to which both parties have made reference as an alternative source for the settlement of this dispute.

128. That different theories have been used for this purpose. Julio A. Barberis recalls in his works on shared natural resources how the extreme positions of the Harmon doctrine, with which the United States intended to legitimise the use of the Rio Grande against the claim of the Mexican government, or absolute territorial integrity, have given place to other less strict notions, such as equitable utilisation or 'limited sovereignty' on which the growing need for efficient hydroelectric use or the development of irrigation systems is based ( Julio A. Barberis, *Los recursos naturales compartidos entre estados y el derecho internacional*, Editorial Tecnos, Madrid, 1979).

The latter theories start with the objective recognition that there is an ongoing physical dependency between neighbouring riparian States (or States within an international [**2566**] watercourse system, as they are known in the framework of the ILC (the UN International Law Commission)), as already maintained in the resolution of the Institute of International Law at its Madrid meeting in 1911, which is itself recognised in international case law. In the *Case concerning the River Oder* – to which the Applicant refers in his claim – the Permanent Court of International Justice stated that between States there is 'a community of interests' that becomes 'the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others' (PCIJ Ser. A/B, No. 23, p. 27).

The Court appears to assume that the international watercourse is a shared natural resource. And, as a former President of the International Court of Justice wrote: 'Despite the fact that this progressive principle was invoked by the Court *de lege lata* only with regard to navigation, its fundamental concepts of equality of rights and community of interests are applicable to all uses of international watercourses' (E. Jiménez de Aréchaga, *El derecho internacional contemporáneo*, Ed. Tecnos, Madrid, 1980, p. 230).

Similarly, Judge Oliver Wendell Holmes, when giving reasons for the opinion of the Supreme Court of the United States in *New Jersey* v. *New York*, 283 US 336 (1931), stated: 'A river is something more than a convenience: it is a treasure. It offers an indispensable element for life that must be rationed between those that have powers over it. New York has the physical power of cutting all the water within its jurisdiction. However, it is obvious that the use of this power harming the interests of the downstream states cannot be accepted. On the other hand, it can also not be allowed that New Jersey requests New York to renounce to its power in an absolute way, in order to receive without any reduction all the water of the river. Both states have real and considerable interests in the river, interests that must be reconciled in the best possible manner. The different traditions and practices in [**2567**] different places of the country can lead to different results, but it is always necessary to make an effort to obtain an equitable distribution, without using sophistic arguments for its formulation' (*New Jersey* v. *New York*, 283 US 336 (1931)).

The subsequent agreement on the River Delaware basin between the basin States and the federal government confirmed a valuable principle: 'c) the hydro resources of the basin are functionally related and uses of these resources are interdependent . . . (cited in the Third Report on the Law of the Non-Navigational Uses of International Watercourses, by Mr Stephen C. McCaffrey, Special Rapporteur of the ILC, paras. 16 and 17, A/CN. 4/406, 30 March 1987).

129. That, at the same time as these developments, which were reflected in judicial pronouncements, in international declarations and conventions, an idea of singular importance was adopted: that of the hydrographic basin, characterised by all the surface waters and groundwaters flowing to a common river mouth, an idea which was enshrined in Article II of the Helsinki Rules on the Uses of International Watercourses, adopted by the International Law Association in 1966.

This criterion started to prevail with regard to industrial uses and agricultural appropriations of rivers, and the notion of unity acquired legal relevance, with a functional sense, because it corresponds to human realities. It was used by the Court of Arbitration in the case of *Lake Lanoux*, between France and Spain, where, as concerns what is of interest to this case, it was said: 'The Tribunal does not overlook the reality, from the point of view of physical geography, of each river basin, which constitutes, as the Spanish Memorial (at p. 53) maintains, 'a unit'. But this observation does not authorise the absolute consequences that the Spanish argument would draw from it. The unity of a basin is sanctioned at the juridical level only to the extent that it corresponds to human realities. The water which by nature constitutes a fungible item may be the object of a restitution which does not change its qualities in regard to human needs. A diversion with restitution, such as that envisaged by the French project, does not [**2568**] change a state of affairs organised in accordance with the requirements of social life' (cited by Barberis, above, pp. 24–5; Reports of International Arbitral Awards, vol. 12, pp. 285–317).

130. That, having regard to these considerations, a decisive, fundamental principle of the regime of international watercourses has to be invoked: that of equitable utilisation, which translates into the right of states to a reasonable and equitable participation in the use and benefits of the waters of international watercourses.

This criterion is defined by its flexibility and the advantages that result from it. Therefore it is appropriate to the diversity of the systems of international watercourses, each having different characteristics, in physical as well as in human terms.

It has been a basis for numerous international conventions, many of them recent, and it has been the criterion that has prevailed in agreements to which our country is a party and declarations that reflect its [Argentina's] legal position.

In this sense, one may cite the Buenos Aires Act on Water Basins, signed with Bolivia on 12 July 1971, and the Santiago Act on Water Basins, signed with Chile on 26 June 1971: these agree on a fundamental rule according to which '. . . use of river and lake waters will always be equitable and reasonable', and to the mutual recognition of '. . . the right to use the waters [of their common lakes and] of [**2569**] international rivers flowing from one State to another, according to their needs and

always without causing undue harm to the other [party].' (The reference to lakes is only included in the agreement with Chile.)

However, the application of the principle can hardly be derived from the individual behaviour of just one of the states within the system, since there are no general rules automatically applicable to the different watercourses and to the various questions that can be raised with regard to them.

In this way, the determination of what is 'equitable and reasonable' use requires one to value the series of circumstances relating to each case, which cannot be done by way of an absolute categorical definition. Any determination must be based on a number of general principles.

One of the first attempts to formulate these principles was made in the meeting of the International Law Association in Dubrovnik, Yugoslavia, in 1956. There, relevance was attributed to: 1) the right of each State to a reasonable use of the waters; 2) the extent to which each State was dependent on the resource in question; 3) the comparative benefits that, socially and economically, each of them obtains; 4) any pre-existing agreements in force; and 5) the previous use of the resource.

And there, the valuable criterion of prior consultation in the case of new works that could affect the use of international watercourses by another State was also anticipated.

Simultaneously, in the above-mentioned Helsinki Rules, after stating in Article IV the basic criteria according to which '. . . each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin' (ILA, Report of the Fifty-second Conference, Helsinki, 1966, London, 1967, p. 486), Article V lays down 'the relevant factors in each particular case', in order to determine what constitutes a reasonable and equitable share. These factors are: a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State; b) the hydrology of the basin, including in particular the contribution of water [**2570**] by each basin State; c) the climate affecting the basin; d) the past utilisation of the waters of the basin, including in particular existing utilisation; e) the economic and social needs of each basin State; f) the population dependent on the waters of the basin in each basin State; g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State; h) the availability of other resources; i) the avoidance of unnecessary waste in the utilisation of waters of the basin; j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses and the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State: 'The weight to be given to each factor – according to paragraph 3) – is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.'

131. That the above-mentioned Second Report on the Law of Watercourses of 19 March 1987, by Special Rapporteur Stephen C. McCaffrey (A/CN. 4/339), sets out

the following factors to be taken into account for the same purpose: a) geographical, hydrographic, hydrological and climatic factors, together with other circumstances relating to the watercourse; b) the special needs of interested watercourse States in its use compared to the needs of other watercourse States; c) the achievement of a reasonable and equitable balance between the relevant rights and obligations of the watercourse States; d) the contribution of water to the international watercourse by each interested watercourse State compared to the contribution of other watercourse States; e) utilisation and conservation of the international watercourse by each interested State; f) other uses of the waters of an international watercourse by the State concerned compared with the other uses of watercourse States, including the efficiency of these uses; g) cooperation with other watercourse States in projects or programmes to obtain optimal use, protection and control of [**2571**] the watercourse and its water, taking into account efficiency and considering the costs of alternative projects; h) pollution by a watercourse State or States of the international watercourse in general or as a result of specific uses, if applicable; i) any other interference or adverse effect, if applicable, of the uses, rights or interests of other watercourse States, including, but not limited to, adverse effects on existing uses of the waters of international watercourses by these States and its consequences for the protection and control measures adopted by other watercourse States; j) the availability of alternative water resources for the interested State and other watercourse States; k) the form and degree of cooperation established between the interested watercourse States and other watercourse States in programmes and projects relating to the waters of the international watercourse to achieve optimal use, reasonable organisation and protection and control.

As can easily be seen, the Helsinki Rules set out above and the proposals in the framework of the International Law Commission contain general principles reflected in practice which have generally met with the agreement of States . . .

The referenced principle of 'equitable distribution' determines, pursuant to the invoked Helsinki Rules (article VII), that: 'A basin State may not be denied the present reasonable use of the waters of an international drainage basin to reserve for a co-basin State a future use of such waters.' And also (article VIII), that: 'An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use.'

In reality, this right to an 'equitable and reasonable participation' makes it unnecessary for prior use to give a State priority, as an inalienable right. The existing uses must not become a definitive obstacle hindering the economic development of riparian States whose use of [the watercourse] is delayed. They must aspire to new and beneficial uses, exercising their own right, even if the new use interferes with a past use. It must be considered that they exercise their own right if the new use is adjusted to respect fair distribution and the previous use of another State exceeded its corresponding share (E. Jiménez de Aréchaga, above, p. 233).

132. That in any case, harmonisation of respective rights to an equitable distribution requires cooperation in good faith by the watercourse States, in order to be effectively achieved.

As already expressed by the Special Rapporteur, Stephen C. McCaffrey, in the above-mentioned Third Report on the Law of Non-Navigational Uses of International Watercourses (A/CN4/406, 30 March 1987, paragraph 23): 'Good-faith cooperation between States regarding the utilisation [**2573**] of an international watercourse is an essential basis for the operation of other procedural rules and, ultimately, to achieve and preserve the distribution of the uses and benefits of the watercourse.' This obligation of cooperation had already been expressed by the Court of Arbitration in the *Lake Lanoux* case, when it was stated that: 'States are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements: there would thus appear to be an obligation to accept in good faith all communications and contracts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements.'

This was also stated by the International Court of Justice in the *North Sea Continental Shelf* cases (*Federal Republic of Germany* v. *Netherlands* and *Federal Republic of Germany* v. *Denmark*, ICJ *Reports*, 1969, ruling of 20 February 1969), where it underlined the need to resolve controversies by cooperating in good faith in negotiations and decided that: '. . . delimitation [of the continental shelf] is to be effected by agreement in accordance with equitable principles, and taking into account all the relevant circumstances . . .' .

In this case, the ICJ in its ruling laid out 'in the course of the negotiations, the factors to be taken into account' (paragraph 101, p. 53).

Simultaneously, in the *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland – Merits*) ICJ Reports, 1974, ruling of 25 July 1974, the Court spoke of '. . . [the] obligation to take account of the rights of other States and the needs of conservation' (paragraph 71) and called on the parties '. . . to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other . . . thus bringing about an equitable [**2574**] apportionment of the fishing resources based on the facts of the particular situation . . .' (paragraph 78).

133. That this need for cooperation between states with regard to the exploitation of shared natural resources was firmly established in, among other international instruments, the Charter of the Economic Rights and Obligations of States (Resolution 3281 (XXIX) of the General Assembly, of 12 December 1974), whose article 3 establishes that: 'In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.'

Very rightly it has been considered that '. . . the formulation of this provision clearly includes international watercourses' (S. Schwebel, ILC Special Rapporteur, First Report on the Law of the Non-Navigational Uses of International Watercourses, Yearbook of the International Law Commission, 1979, Vol. II, first part, p. 175, doc. A/CN. 4/320, para. 112).

This necessity is expressed in other international instruments of a general character (for example, those emanating from the United Nations Conference on Water, celebrated in Mar de Plata in 1967), and also of a regional character.

The Council of Europe promulgated the European Water Charter (1967) in which it is declared: 'Water has no boundaries. It is a common resource that requires international cooperation' (Principle XII). And also that: 'The fact has to be taken into account that, at the boundaries of a basin, all use of surface and underground waters is interdependent and it is advisable that its administration should also be so' (Principle XI, paragraph 2).

Also, the Inter-American Economic and Social Council in its Resolution on the Regulation and Economic Use of Water Basins and Watercourses in Latin America declared that: 'regulation and improved use of waterways, basins and hydrographical accidents that . . . define part of the common heritage [**2575**] of the [member] countries will contribute to accelerated integration in Latin America and a multiplication of potential development capacities in these countries . . .' (Res. 24-4/66).

Our country, in its international relations, has recognised the principle of cooperation in the area of international watercourses. In this sense, the Treaty of the River Plate Basin, signed by the foreign ministers of the Plate Basin in Brasilia on 23 April 1961, and the subsequent Act of Asunción on the Utilisation of International Rivers, signed by the foreign ministers of the same countries at their Fourth Meeting (1 to 3 June 1971), reflect, among other acts, this spirit of cooperation.

The natural unity of each international watercourse system should determine the unity of objectives that each State of the system should show with 'good faith' and 'good neighbourliness'.

Inherent in this legal concept is the need and obligation of each State of the system to cooperate in the utilisation and participation of an international watercourse in a reasonable and equitable manner.

134. That this cooperation has to be achieved through negotiations that, for each individual case, detail the equitable and reasonable participation to which each State has a right and, if appropriate, determines the adequate mechanisms or procedures for the administration and management of the watercourse.

This negotiation has to reflect good faith and should not be a mere formality.

As maintained by the Permanent Court of International Justice in the case of *Railway Traffic between Lithuania and Poland*, this obligation to negotiate consists of the obligation: '. . . not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements . . . But an obligation to negotiate does not imply an obligation to reach an agreement . . .' (PCIJ, Ser. A/B, No. 42, 1931, p. 116).