

Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep (20 April 2010)

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Introduction¹

On 4 May 2006, Argentina initiated proceedings against Uruguay in the International Court of Justice ('ICJ'). In its application, Argentina alleged that Uruguay had breached its obligations under the *Statute of the River Uruguay*,² a 1975 bilateral treaty (and other international law referred to by the statute), by authorising one pulp mill and constructing another on the River Uruguay, which serves as a boundary between Argentina and Uruguay.³ Argentina maintained that in authorising and constructing the pulp mills, Uruguay committed six principal breaches of international law including:

- i) the obligation to take all necessary measure of the optimum and rational utilisation of the river;
- ii) the obligation to provide prior notice of processes and activities associated with the mills;
- iii) the obligation to preserve the aquatic environment and its fisheries and biodiversity;
- iv) the obligation to prevent pollution;
- v) the obligation to prepare a full environmental impact study; and
- vi) the obligation to co-operate in the preservation of the environment and prevention of pollution.⁴

Argentina sought orders from the ICJ requiring Uruguay to cease its breaches and make full reparations.⁵

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¹ See also Cymie Payne, 'Pulp Mills on the River Uruguay: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law' 14 *American Society of International Law Insights* 9 (22 Apr 2010), accessed online at <<http://www.asil.org/insights100422.cfm>>; Panos Merkouris, 'Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay): Of Environmental Impact Assessments and "Phantom Experts"', *The Hague Justice Portal*, accessed online at <<http://www.haguejusticeportal.net/eCache/DEF/11/878.html>>.

² *Statute of the River Uruguay*, 1295 UNTS 340.

³ See *Treaty Concerning the Boundary Constituted by the River Uruguay* ('Boundary Treaty'), between Argentina and Uruguay, done at Montevideo, 7 April 1961, 635 UNTS 98. Article 7 of the Boundary Treaty calls for the 'establishment of a regime' governing the use of the River Uruguay. The regime was established by the 1975 Statute.

⁴ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgement) [2010] ICJ Rep, General List No. 135, 20 April 2010, para 22.

⁵ *Ibid*, para 23.

The ICJ distinguished Argentina's claims on the basis of procedural claims and substantive claims. It ruled that the Uruguayan procedural obligation to notify and consult with Argentina prior to the authorisation and constructions of the mills, arising under the 1975 Statute, had been breached.⁶ However, the ICJ held that allegations of substantive breach by Uruguay of the 1975 Statute had not been proved by Argentina.⁷ In terms of reparations, the ICJ was satisfied that a declaration of the existence of the breach by Uruguay was appropriate satisfaction given that mere procedural breaches were all that had occurred.⁸

While the Argentinean allegations were based on breaches of the 1975 Statute, the general international law background of the case led the ICJ to pronounce on the customary legal status of several norms at issue. Indeed, perhaps the most interesting aspect of the case (at least for international environmental lawyers), centres on the Court's contribution to the further elaboration of customary international environmental law. The ICJ confirmed that the preparation of a transboundary environmental impact assessment ('EIA') is required by custom, where a proposed activity poses a risk of significant environmental harm,⁹ even though the Court found that international law had little to say about the nature, scope and content of the EIA.¹⁰

Also notable was the discussion between the majority of the ICJ and judges filing dissents, separate opinions and declarations about the increasingly frequent problem of expert evidentiary proof in complex, technical environmental cases. As has been the practice in the instant case, experts provided technical evidence for the Court, not as witnesses subject to cross-examination under Article 51 of the ICJ Statute (and Articles 63-65 of the Rules of Court), but as counsel or advocates. All the judges that considered the issue thought it would have been better had this evidence come in through the testimony of expert witnesses. However, the majority declined to use Article 50 of the Statute (and Article 62 of the Rules) of the ICJ to allow non-party experts to assist it to resolve the dispute.

I. The Background to the Dispute

As noted, this dispute between Argentina and Uruguay revolved around the use of the River Uruguay by two Uruguayan pulp mills, a shared natural resource and common border. The first pulp mill was constructed along the river in 2005 by the Botnia SA and

⁶ Ibid, paras 67-168.

⁷ Ibid, paras 169-266.

⁸ Ibid, para 282.

⁹ Ibid, para 204.

¹⁰ Ibid, para 205. Judge Cançado Trindade, in his separate opinion, also found that the precautionary principle was now a 'general principle' of international environmental law. See Trindade separate opinion at paras 62-96 and 103-13.

Botnia Fray Bentos SA companies (the Botnia mill). In 2003 and 2005, Uruguay authorised another mill to be built by Celulosas de M'Bopicuá SA (the CMB mill), but this project was eventually abandoned in 2006. In May 2005, a High-Level Technical Group (GTAN) was created in order to try to resolve Argentina's objection to the construction of the mills, but by February 2006, both parties were of the view that GTAN negotiations had failed.

Parallel to GTAN, in order to avoid disputes involving the River Uruguay, the parties created the Administrative Commission of the River Uruguay ('CARU') in the 1975 Statute to superintend appropriate use and protection of the river. Articles 7-12 of the Statute provide a process for prior notification and consultation for activities that are likely to affect navigation or the water quality of the river. The notification and consultation process entails four distinct stages. Any party seeking to engage in an activity that might pose a significant risk to the river must first provide CARU with advance notice. If CARU determines that the activity does not entail significant risk, CARU will notify the other party, which has the right to object. If an objection is made, a 180 day negotiating period follows, during which time the parties are to make a good faith attempt to reach agreement on the resolution of the dispute. If at the end of the negotiating period the dispute remains unsettled, it is open to either party to invoke the compulsory jurisdiction of the ICJ under the compromissory clause in Article 60 of the 1975 Statute.

After repeated failures at a negotiated settlement, Argentina submitted the dispute to the ICJ on 4 May 2006. Both parties agreed that the ICJ had jurisdiction under Article 60 and stipulated that their negotiations had failed. Uruguay, however, took the position that the ICJ's jurisdiction was narrowly limited to exclusively claims arising under the 1975 Statute. The court agreed and, accordingly, declined to consider Argentinean allegations concerning pollution (air, noise, aesthetic) not directly affecting water quality of the River Uruguay.¹¹

Along with its application instituting proceedings, Argentina also submitted a request for the indication of provisional measures. On 13 July 2006, the Court found that the circumstances did not support an urgent need for such measures in order to prevent irreparable prejudice to the rights of Argentina.¹² A similar request for the indication for provisional measures was made by Uruguay on 29 November 2006, but was dismissed for the same reason.

¹¹ Above n 4, para 52.

¹² See Stephen Tully, 'Case Note – *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Provisional Measures) [2006] ICJ Rep 135' (2006) 13 *Australian International Law Journal* 281.

2. The Merits

A. Procedural Violations

I. Notification to CARU

The ICJ begins its analysis of the Argentinean claims of Uruguay's breach of notice obligations with a consideration of the underlying duty to prevent environmental harm. The ICJ explicitly highlights that the principle of prevention is a customary rule, having its origins in the due diligence that is required of a state in its territory 'not to allow knowingly its territory to be used for acts contrary to the rights of other states'.¹³ Accordingly, a state is required to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another state. The ICJ has previously emphasised that this obligation 'is now part of the corpus of international law relating to the environment'.¹⁴

For the ICJ, the obligation to notify CARU under the 1975 Statute is inextricably linked to the fulfilment of the duty to prevent environmental harm. The obligation to notify is a predicate to the ability of the parties to cooperate and engage in good faith negotiations and, in the ICJ's view, this is necessary to fulfil the obligation of prevention. The ICJ considered that a state is required to inform CARU as soon as it has received a development plan that is sufficiently detailed to enable CARU to make the preliminary assessment of whether the plan might cause significant damage to the other party. At that stage, the information provided need not be a full assessment of the environmental impact of the project. This will often require further time and resources. Of course, if more complete information is available it should be transmitted to CARU to give it the best possible basis on which to make its preliminary assessment. In any event, the duty to inform CARU will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorisation and before the granting of that authorisation.

The Court found that Uruguay did not transmit to CARU the information required by Article 7, paragraph 1, of the 1975 Statute, despite the requests made to it by the Commission to that effect on several occasions. The Court concluded that Uruguay, by not informing CARU of the planned works before the issuing of the initial environmental authorisations for each of the mills and for the port terminal adjacent to the Botnia mill, failed to comply with the obligation imposed on it by Article 7.

¹³ *Corfu Channel (United Kingdom v Albania)*, Merits, Judgment [1949] ICJ Rep [22].

¹⁴ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 242 [29].

2. Notification to Argentina

Under the terms of Article 7, paragraph 2, of the 1975 Statute, if CARU decides that a plan might cause significant damage to the other party or if a decision cannot be reached in that regard, 'the party concerned shall notify the other party of this plan through the said Commission'. Under paragraph 3 of Article 7, the notification must describe 'the main aspects of the work' and 'any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the regime of the river or the quality of its waters'.

The obligation to notify is intended to create the conditions necessary for meaningful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate any adjustments needed to avoid potential damage that execution of the plan might cause. The obligation to notify is an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimise their effects. Because of its fundamental importance, the ICJ concluded that this notification must take place before the state concerned decides on the environmental viability of proposed activity, in light of the EIA of the activity.¹⁵

In the present case, the ICJ observed that the notification to Argentina did not take place through CARU and that Uruguay only transmitted those assessments to Argentina after having issued the initial environmental authorisations for the two mills in question. The ICJ concluded that Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7, paragraphs 2 and 3, of the 1975 Statute.

B. The Alleged Substantive Violations

After finding Uruguay had breached its procedural obligations, the ICJ turned to the allegations of breach of substantive obligations arising under the 1975 Statute. The ICJ said that the two categories of obligations 'complement one another perfectly',¹⁶ but concluded that the breach of a procedural obligation was not the same as a violation of substantive duties. Each requires separate consideration. The evidence and arguments in relation to the substantive violations were complex and technical. It is here that expert witnesses might have assisted the ICJ.

I. Obligation to Contribute to Optimum and Rational Utilisation

The 1975 Statute calls for the optimum and rational utilisation of the River. This is to be achieved through compliance with the obligations prescribed by the 1975 Statute for the

¹⁵ See generally the pioneering study prior notice and consultation by Fred Kirgis, which includes a chapter on international watercourses. Frederic L Kirgis, Jr., *Prior Consultation in International Law: a Study of State Practice* (University of Virginia Press, Charlottesville, 1983), chap 2.

¹⁶ Above n 4, para 77.

protection of the environment and the joint management of this shared resource. Optimum and rational utilisation is a cornerstone of the system of co-operation established in the 1975 Statute and the joint machinery set up to implement co-operation between the parties. While the objective of optimum and rational utilisation 'informs the interpretation of the substantive obligations, it does not alone lay down specific rights and obligations for the parties'.¹⁷ The ICJ held that the attainment of such an objective requires 'a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other'.¹⁸ Article 27 was found to embody the interconnectedness between equitable and reasonable utilisation of a shared resource and the balance between economic development, human health and environmental protection that epitomises sustainable development.

2. Obligations in Relation to Ecological Balance and Pollution Prevention

The ICJ ruled that the obligation set out in Article 36 of the 1975 Statute requires the Parties to adopt the specific conduct of coordinating necessary measures to avoid changing the ecological balance of the river through CARU. As this obligation is an obligation of conduct, both Parties are called upon to exercise due diligence in taking such measures.¹⁹ The ICJ stated that the purpose of Article 36 is to prevent any transboundary pollution liable to change the ecological balance of the river by coordinating, through CARU, the adoption of the necessary measures. Article 36 imposes an obligation on both states to take positive steps to avoid changes in the ecological balance. These steps consist not only in the adoption of a regulatory framework, as has been done by the Parties through CARU, but also in the observance as well as enforcement by both Parties of the measures adopted. Both Parties are required, under Article 36, to exercise due diligence in acting through the CARU for the necessary measures to preserve the ecological balance of the river.

This vigilance is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna and soil. The obligation to co-ordinate, through the CARU, the adoption of the necessary measures, as well as their enforcement and observance, assumes, in this context, a central role in the overall system of protection of the River Uruguay established by the 1975 Statute. It is therefore of crucial importance that the Parties respect this obligation. The ICJ found that Argentina had not convincingly demonstrated that Uruguay refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision.

¹⁷ Ibid, para 173.

¹⁸ Ibid, para 175.

¹⁹ Ibid, para 187.

Turning to the alleged breach by Uruguay of the obligation to prevent pollution in the 1975 Statute, Article 41 obliges the Parties to adopt legal rules and measures ‘in accordance with applicable international agreements’ and ‘in keeping, where relevant, with the guidelines and recommendations of international technical bodies’, for the purposes of protecting and preserving the aquatic environment and of preventing pollution.²⁰ Article 41(a) treats applicable international agreements differently from guidelines and recommendations of international technical bodies. Applicable agreements are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the state have to comply with them. Guidelines and recommendations, however, are not formally binding and, to the extent they are relevant, only need to be taken into account by the state so that the domestic rules and regulations and the measures it adopts are compatible with those guidelines and recommendations.

Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay. Under Article 41(b) the existing requirements for preventing water pollution and the severity of the penalties are not to be reduced. The ICJ ultimately found that there was no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Botnia mill had caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007. As a result, on the basis of the evidence submitted to it, the ICJ concluded that Uruguay has not breached its obligations under Article 41.²¹

3. Environmental Impact Assessment

Importantly, and for the first time, the ICJ has explicitly held that transboundary EIA is a requirement of customary international law.²² The ICJ noted that in order for the Parties properly to comply with their obligations under Article 41 (a) and (b) of the 1975 Statute, they must carry out an environmental impact assessment. The purpose of the assessment is to protect and preserve the aquatic environment against activities that may cause significant transboundary harm.

Adopting an evolutionary interpretive approach often seen in connection with human rights instruments,²³ the ICJ observed that the 1975 Statute should be interpreted in an

²⁰ Ibid, paras 195-6.

²¹ Ibid, para 265.

²² Ibid, paras 203-19.

²³ See e.g. *Loizidou v Turkey*, 40/1993/435/514 (23 February 1995), para 71. See also the Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 (1 October 1999), at 115. See also concurring opinion of AA Cançado in the same matter, para 10.

evolving manner, noting its observation in the case concerning the *Dispute Regarding Navigational and Related Rights*:

... there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.²⁴

The ICJ went on:

In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among states that it may now be considered a requirement under general international law to undertake an EIA where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an EIA on the potential effects of such works.

The ICJ commented, however, that general international law does not specify the scope and content of an environmental impact assessment. It pointed out that Argentina's reliance on the 1991 *Convention on Environmental Impact Assessment in a Transboundary Context* was misplaced because neither Argentina nor Uruguay are parties to the treaty. It also noted that the other instrument to which Argentina referred, the 1987 *United Nations Environment Programme's Goals and Principles of Environmental Impact Assessment*, is not legally normative in a binding sense.

As a result, the ICJ, somewhat disappointingly, stated that it is for each state to determine in its domestic legislation or in the authorisation process for the project, the specific content of the EIA required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The potential for inconsistency and varying levels of rigor in EIAs required under the ICJ's ruling is apparent.

The ICJ did, however, rule that an EIA must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment must be undertaken. This is an improvement by international law over a deficiency in project post-

²⁴ *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment) [2009] ICJ Rep, para 64.

approval monitoring requirements in many municipal legal systems and hopefully will lead to the use of monitoring to verify past predictions, allow for adaptive management, and provide fodder for future decisions.²⁵

Regarding the question of whether Uruguay failed to exercise due diligence in conducting the EIA, particularly with respect to the choice of the location of the plant, the ICJ noted that in 2003 four locations were considered. On this basis, the ICJ was not convinced by Argentina's argument that an assessment of possible sites was not carried out prior to the determination of the final site.

4. Consultation of the Affected Populations

In another disappointing finding, the ICJ expressed the view that the parties had no international legal obligation to consult the populations affected by the approval and construction of the mills. However, the ICJ added that this was based on 'the instruments invoked by Argentina'. In fact, Argentina failed to argue any human rights obligation to consult or to otherwise emphasise this obligation as part of the duty of prevention. Further limiting the impact of the ICJ's statement, it also found that such a consultation by Uruguay did indeed take place in this case.²⁶

5. Best Available Technology Considerations

The ICJ observed that the obligation to prevent pollution and protect and preserve the aquatic environment of the River Uruguay, laid down in Article 41 (a), and the exercise of due diligence implied in it, entails a careful consideration of the technology to be used by the mills. Argentina maintained that to comply with its obligations, Uruguay must require through local law that the pulp mills use the best available technology ('BAT'). The ICJ appeared to be in agreement. However, it found that 'there is no evidence to support the claim of Argentina that the Botnia mill is not BAT-compliant in terms of the discharges of effluent for each ton of pulp produced'.²⁷

6. The Continuing Obligation of Monitoring

As noted above, the ICJ held that the obligations of the parties include continuous monitoring the quality of the waters of the river and of assessing the impact of the operation of the Botnia mill on the aquatic environment:

... both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the

²⁵ See generally Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press, Cambridge, 2008), 153-5.

²⁶ Above n 4, paras 215-9.

²⁷ Ibid, paras 220-8.

1975 Statute, including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the . . . [Botnia] mill on the aquatic environment.²⁸

The ICJ concluded that under the 1975 Statute, '[t]he Parties have a legal obligation . . . to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilisation of the river, while protecting its environment'.²⁹

3. Evidentiary Issues

Two matters bear comment here. The first issue concerns rules governing the admission of evidence before the ICJ. During the provisional measures phase of the case, Argentina proffered video evidence for production at the hearing. Uruguay objected, but the grounds for objection were not set out by the ICJ. Moreover, the ICJ summarily ruled that it would not allow the video to be produced at the hearing on the provisional measures. It failed to cite its Statute, Rules or other authority to support its ruling.³⁰ A better course might have been for the ICJ to have provided reasons why the video evidence was inadmissible. Argentina might then have been able to cure any defects and future litigants before the ICJ would be better able to meet the evidentiary expectations of the CJ. This seems particularly important in a legal system with little or no formal rules of evidence.³¹

Second, and more importantly, is the issue of admission of complex expert evidence. Both Argentina and Uruguay placed a copious amount of scientific and technical evidence in the form of reports before the ICJ. Some of these reports were prepared by experts who, instead of giving expert evidence, appeared before the ICJ and spoke to them in the capacity of counsel for the parties. This method of presentation deprives the other party of the ability to test the evidence through cross-examination and the ability of the ICJ to question the expert as an expert. The majority of the ICJ highlighted this defect in the judgement³² and it will be interesting to see if in future cases the ICJ requires individuals that it considers experts to testify as witnesses rather than appear as counsel.

Related to this second point is what some judges in dissent and filing declarations or separate opinions considered a missed opportunity by the ICJ to use Article 50 of the 1975

²⁸ Above n 4, para 266.

²⁹ Ibid, para 266.

³⁰ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Order on the Request for the Indication of Provisional Measures [2006] ICJ Rep 135 (2006), paras 25-6.

³¹ See generally Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law, London, 2009).

³² Above n 4, para 167.

Statute.³³ As noted at the outset, Article 50 allows the ICJ to utilise outside expert evidence in complex and difficult cases, instead of relying exclusively on the evidence presented by the parties. These judges believed that the decision-making process in the instant case would have been enhanced by assistance gleaned from consulting experts of the ICJ's choosing.

Conclusion

Pulp Mills is the latest environmental case to find its way before the ICJ. Picking up on the discussion about complexity, evidence and expert witnesses, one wonders if it might not be apropos for the ICJ to begin holding elections again for the Chamber for Environmental Matters (discontinued in 2006). Although the decision to use the Environmental Chamber rests with the parties, a habitual use could see the ICJ develop specialist environmental expertise essential to justly resolving cases like *Pulp Mills* involving difficult balancing between the environment, human health and economic development.

In terms of *Pulp Mills* contribution to the development of international environmental law, it is now certain that transboundary EIA is part and parcel of general international law. It is true that deficiencies remain in connection with the nature, scope and content of the EIA (including public consultation). However, states planning projects that pose risks of significant transboundary environmental harm (or threaten shared natural resources) shoulder a significant obligation of due diligence to ensure the environment or resources are protected from harm.

³³ See joint dissenting opinion of Judges Al-Khasawneh and Simma, paras 2-17; separate opinion of Judge Kenneth Keith, paras 2-15; separate opinion of Judge Cançado Trindade, paras 148-51; declaration of Judge Yusuf, paras 1-14; separate of opinion of Judge Greenwood, paras 27-8; dissenting opinion of Judge Vinuesa *ad hoc*, paras 92-7.