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III.B.2 Sustainable Development, Environmental Impact Assessments and the Obligation to Consult: Pulp Mills on the River Uruguay

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1. *Background*

The dispute between Argentina and Uruguay arose out of the authorizations given by Uruguay in 2002 for the construction of a pulp mill (the CMB (ENCE) project), and in 2003 for the construction and commissioning of another (the Orion (Botnia) mill) both on the banks of the River Uruguay, a shared natural resource and the common border between these countries.

The boundary between the two States is defined by the bilateral Montevideo Treaty of 7 April 1961. According to Article 7 of this Treaty, the parties were to establish a "regime for the use of the river". The said regime was subsequently established through the signature of the Statute of the River Uruguay on 26 February 1975 (the 1975 Statute). The latter sets up the Administrative Commission of the River Uruguay (the CARU), which is responsible for the gathering and evaluation of information and notifications provided by the parties concerning any project on the river that may have an impact on it. The CARU also elaborates rules in many areas associated with the joint management of the river.

An attempt was made by the Presidents of the two States to resolve the dispute in May 2005 by creating a High-Level Technical Group (GTAN), which was supposed to accomplish its mission within a period of 180 days. In January 2006, Uruguay declared this negotiation process a failure. Argentina followed suit in February 2006.

In May 2006, Argentina instituted proceedings against Uruguay before the International Court of Justice concerning a breach of obligations under the 1975 Statute. According to the application, this breach arose out of the authorizations mentioned above with reference in particular to "the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river". As the CMB (ENCE) project was abandoned in September 2006, the Orion (Botnia) mill was the only plant concerned in the dispute.

Argentina submitted a request for the indication of provisional measures, asking the Court to suspend authorization and construction of the pulp mill. Another request for the indication of provisional measures had been introduced

by Uruguay, in order to remove protesters who were blockading bridges across the river. The Court rejected both requests, on 13 July 2006 and 23 January 2007 respectively, on the basis that there was no urgent need for such measures.

2. *Materials and Links*

- International Court of Justice, *Case Concerning Pulp Mills on the River Uruguay (Argentina/Uruguay), Judgment of 20 April 2010* (http://www.icj-cij.org/docket/files/135/15877.pdf);
- Joint dissenting opinion of Judges Al-Khasawneh and Simma (http://www.icj-cij.org/docket/files/135/15879.pdf);
- Separate opinion of Judge Keith (http://www.icj-cij.org/docket/files/135/15881.pdf);
- Declaration of Judge Skotnikov (http://www.icj-cij.org/docket/files/135/15883.pdf);
- Separate opinion of Judge Cançado Trindade (http://www.icj-cij.org/docket/files/135/15885.pdf);
- Declaration of Judge Yusuf (http://www.icj-cij.org/docket/files/135/15887.pdf);
- Separate opinion of Judge Greenwood (http://www.icj-cij.org/docket/files/135/15889.pdf);
- Separate opinion of Judge *ad hoc* Torres Bernárdez (http://www.icj-cij.org/docket/files/135/15891.pdf);
- Dissenting opinion of Judge *ad hoc* Vinuesa (http://www.icj-cij.org/docket/files/135/15893.pdf).

3. *Analysis*

Argentina claimed that Uruguay had breached the following obligations under the 1975 Statute: to take all necessary measures for the optimum and rational utilization of the river; to notify CARU and Argentina of any projects affecting the river; to comply with the procedures set out in Chapter II of the 1975 Statute (regarding works liable to affect the regime of the river or the quality of its waters); to take all necessary measures to preserve the environment, prevent pollution, and to protect biodiversity, including the preparation of a full and objective environmental impact study; and to cooperate in preventing pollution and protecting the environment and fisheries. Argentina requested that Uruguay

cease its wrongful conduct, comply with its obligations, re-establish "on the ground and in legal terms" the situation that existed previously, and make reparations for injury caused by its breach (paragraph 22 of the Judgment).

Uruguay argued that Argentina had failed to demonstrate "any harm, or risk of harm, to the river or its ecosystem resulting from Uruguay's alleged violations of its substantive obligations under the 1975 Statute that would be sufficient to warrant the dismantling of the plant". It also argued that dismantling the plant would have substantial consequences on Uruguay's economy in terms of lost jobs and revenue, and as such would be disproportionately onerous. Uruguay asked the Court to limit any remedy provided to a declaratory judgment, an order to take additional environmental protective measures found to be necessary to ensure that the plant conforms to the obligations of the 1975 Statute, a requirement to pay monetary compensation to Argentina where damage has occurred to the river and, finally, a declaration making clear that the Parties are obliged to ensure full respect for all the rights in dispute in the case, including Uruguay's right to continue operating the plant in conformity with the provisions of the 1975 Statute (paragraph 23).

The reasoning of the Court is divided into two parts. It first analyzed the alleged breach of procedural obligations, leaving consideration of the substantive obligations to the second part of its judgment. The reason for this division in the reasoning of the Court stems from the fact that nowhere in the 1975 Statute is it written that "a party may fulfill its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones" (paragraph 78). It recognized a "functional link" between the two categories but held that this did not prevent the States parties from being required to abide by those obligations separately, and to assume responsibility for any the breach of either set (paragraph 79). Judges Al-Khasawneh, Simma and Vinuesa criticized such a separation in their respective dissenting opinions. In their opinion, where procedural obligations are essential to protect the environment, a finding of the violation of these obligations should also affect any conclusion as to the breach or otherwise of substantive obligations (paragraph 26 of the joint dissenting opinion of Judges Al-Khasawneh and Simma; paragraph 4 of dissenting opinion of Judge *ad hoc* Vinuesa).

With respect to the procedural obligations, the Court examined the alleged breaches on the part of Uruguay of, first, the obligation to inform CARU and, second, the obligation to notify Argentina about the two planned pulp mills. With regard to the former, the Court noted that it constituted "the first stage in the procedural mechanism as a whole which allows the two parties to achieve the object of the 1975 Statute, namely, the optimum and rational utilization of the

River Uruguay" (paragraph 94). According to Article 7 (1) of the 1975 Statute, the State that is initiating activity has to inform CARU in order to allow the Commission to determine whether the planned activity might cause significant damage to the other Party. The State intending to undertake certain activities is required to inform CARU as soon as it is in possession of a plan that is sufficiently developed to enable CARU to make a preliminary assessment (paragraph 105). For the Court, the obligation to inform CARU is linked to the fulfillment of the obligation of prevention (paragraph 102), according to which every State has the obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States. States must therefore use all the means at their disposal in order to avoid activities on their territory that cause significant damage to the environment of other States (paragraph 101).

The Court found that Uruguay did not transmit to CARU the information required by the 1975 Statute, despite being requested to do so by the Commission on several occasions (paragraph 106). Consequently, Uruguay, by not informing CARU of the planned works before the issuing of the initial environmental authorizations for each of the mills and for the port terminal adjacent to the Botnia mill, failed to comply with this first procedural obligation (paragraph 111).

With respect to the second procedural obligation, Article 7 (2) of the 1975 Statute prescribes that 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 Article 7 (3), this notification must describe the main aspects of the intended activities, 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 (paragraph 112). The obligation to notify "is intended to create the conditions for successful cooperation between the parties, enabling them to assess the plan's impact on the river and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause" (paragraph 113). Given the importance of the notification procedure, the Court concluded that it must take place before the State concerned decides on the environmental viability of proposed activity, in light of the required environmental impact assessment (paragraph 120).

The Court found in the present case that Uruguay had failed to notify Argentina through the CARU as required, only transmitting the necessary information after having issued the initial authorizations for the two mills (paragraph 121). As a consequence, the Court concluded that Uruguay had failed to comply with its obligation to notify the plans to Argentina through CARU.

After having analyzed the procedural obligations, the Court turned to the allegations concerning the breach of substantive obligations arising under the 1975 Statute.

As a preliminary issue, the Court addressed the burden of proof. Argentina argued that the precautionary approach of the 1975 Statute obligated Uruguay to bear the burden of proving that the Orion (Botnia) mill would not significantly damage the environment. The Court rejected this view and recalled that it is incumbent on a party asserting a fact to establish its existence (paragraph 162). This approach was criticized by Judges Al-Khasawneh and Simma. In their view, the Court erred in its reliance on the traditional rules of the burden of proof, by obliging Argentina to substantiate claims on issues that the Court could not fully comprehend without recourse to an expert assessment (paragraph 5 of the joint dissenting opinion of Judges Al-Khasawneh and Simma).

The first substantive obligation to be analyzed by the Court concerned the optimum and rational utilization of the river, set out in Article 1 of the 1975 Statute. According to Argentina, Uruguay breached this obligation by failing to coordinate with them on measures necessary to avoid ecological change and by failing to take the measures necessary to prevent pollution. This obligation is to be achieved by complying with the obligations prescribed by the 1975 Statute for the protection of the environment and the joint management of the shared resource. However, the Court stated that while this objective "informs the interpretation of the substantive obligations, it does not alone lay down specific rights and obligations for the parties" (paragraph 173). In order to meet this objective, a balance must be found "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" (paragraph 175).

The second substantive obligation concerned ecological balance. Argentina argued that Uruguay had violated Article 36 of the 1975 Statute, which places the Parties under an obligation to coordinate through CARU in respect of ensuring that the measures necessary to avoid altering the ecological balance of the river are in place. According to this obligation, both States have to take positive steps to avoid changes in the ecological balance. These steps include not only the adoption of a regulatory framework, but also the observance as well as enforcement by both Parties of the measures adopted (paragraph 185). Both Parties are required, under Article 36, to exercise due diligence in acting through CARU in establishing and enforcing the necessary measures to preserve the ecological balance of the river (paragraph 187). Argentina did not succeed in demonstrating that Uruguay had refused to engage in such coordination.

Argentina also claimed that Uruguay, "by allowing the discharge of additional nutriments into a river that is eutrophic and suffers from reverse flow and stagnation", had violated the obligation to prevent pollution under Article 41 of the 1975 Statute. Uruguay responded that the plant complied with applicable laws and regulations and that it met the best-available-technology standards. According to Article 41, the Parties have 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" in order to protect and preserve the aquatic environment and to prevent pollution (paragraph 195). The Court adjudged that the question of Uruguay's alleged breach of its obligation to prevent pollution should be measured against the 1975 Statute, the positions and rules coordinated with Argentina through CARU, and the regulations adopted by each party (paragraph 200).

The Court then addressed the practice of conducting environmental impact assessments (EIA). It held that, given that it "has gained so much acceptance among States [...] it may now be considered a requirement under general international law to undertake an environmental impact assessment 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" (paragraph 204). Defined by the Espoo Convention as "a procedure for evaluating the likely impact of a proposed activity on the environment" (1991 Convention on Environmental Impact Assessment in a Transboundary Context, Article 1(vi)), an EIA aims to inform national decision-makers about possible risks to the environment when deciding whether to authorize an activity. As required by Uruguayan law for this kind of project, EIAs were conducted. More precisely, one EIA was conducted by Botnia, the company that owned the plant, as well as two by consultants acting for the International Finance Corporation, which funded the construction. According to Argentina, however, these assessments did not satisfy international standards with regard to the choice of the location of the plant and public consultation. The Court found yet the EIAs to be satisfactory on these two points.

Another aspect of the obligation to prevent pollution and protect and preserve the aquatic environment concerned the technology to be used by the mills. According to Argentina, Uruguay must make sure that the pulp mills use the best available technology in order to comply with its obligations. Argentina claimed that Uruguay had failed to take all measures to prevent pollution by not requiring the mill to employ the best available techniques. The Court agreed with this requirement but found no evidence to support the allegation of violation in this case (paragraph 228).

The Court finally assessed the impact of the discharges on the quality of the water of the river. It found that there is "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 Orion (Botnia) mill [...] have caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations" (paragraph 265).

The Court also stated that, under the 1975 Statute, both parties have an obligation to continue their co-operation through CARU, to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting the environment (paragraph 266).

The Court criticized the way both parties had used experts. According to the Statute and the Rules of the Court, the parties and the Court may examine expert testimony. However, both parties to this case chose to present their experts as counsel. They were not subject to questioning either by the Court or the other party. The Court considered that "those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court" (paragraph 167).

4. *Issues: Environmental Impact Assessment and Consultation of Affected Populations*

One of the main outcomes of the Pulp Mills case is the recognition, for the first time, of a customary international law requirement to conduct transboundary EIAs in order to protect and preserve the environment. The Court noted that even though there was no explicit reference to such a requirement in the 1975 Statute, the Parties were obliged to conduct an EIA in order to properly comply with their obligations under Article 41(a) and (b) of the Statute. In all likelihood, persuaded by the consensus on the part of both parties as regards the need for an EIA, the Court employed an evolutionary interpretation of the treaty based on the fact that "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the term 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" (paragraph 204). According to the Court, the conduct of an EIA is to be understood as one element of the general obligation of due diligence in the prevention and control of transboundary harm (paragraph 204).

The process to be followed for carrying out an EIA cannot be found in any international instruments. In practice, this process can take many forms

depending on the specifics of the proposed activity. It would normally take place before authorization is granted, but it can also happen in several stages. In some complex projects implying a long period of time between initial authorization and operation, it may be necessary to conduct numerous EIAs or to review the initial EIA before the commencement of operations. The Court gave two important points of guidance on the process to be followed: the EIA must be conducted prior to the implementation of a project and, thereafter, continuous monitoring of the environmental effects must be undertaken (paragraph 205).

The Court observed, however, that neither the 1975 Statute nor general international law specify the scope and the content of the required EIA, and leaving each State to determine such content in its domestic legislation or in the authorization of the project, "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" (paragraph 205). As noted by Alan Boyle, two important points can be extracted from this statement. First, the Court made clear that an EIA does not need to be required specifically by law but can be also required as part of the authorization process. There are means to make sure that an EIA is carried out even in this absence of formal legal requirements. Second, there is an obligation to take into account "the nature and magnitude of the proposed development and its likely adverse impact on the environment" while processing the EIA. Even if the Court left the "specific content" of each EIA for the State to determine, there is now a "minimum" imposed by international law. If national law does not ensure that an assessment of the possible effects on people, property and the environment of other States likely to be affected is carried out, a breach of an international obligation will follow.

Another important aspect concerns the threshold that determines whether an EIA is necessary. The level of this threshold may be determined taking into account two different sets of factors, which relate to the potential for, and the potential gravity of, pollution. Most of the international instruments that make provision for EIAs call for a low threshold in terms of potential for pollution. In other words, an EIA would be required even if pollution is possible or likely to be caused as a result of the proposed activity. The Rio Declaration, for example, calls for an EIA wherever the "proposed activities [...] are likely to have a significant adverse impact on the environment" (Principle 17 of the Rio Declaration). The UN Convention on the Law of the Sea also requires merely "reasonable grounds for believing that planned activities [...] may cause substantial pollution of or significant harmful changes to the marine environment" (Article 206 of the 1982 UN Convention on the Law of the Sea). In this case, the Court adopted a similar approach by stating that an EIA is

necessary "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" (paragraph 204).

This judgment, a "landmark for international environmental law", is somewhat diluted by the fact that the Court failed to recognize the existence of an obligation of public consultation. As noted by C. R. Payne, the direct impact of such recognition would have been to provide any project opponents with a means of establishing in advance that a proposed riparian economic development project would have harmful effects. The Court expressed the view that the parties had no international legal obligation to consult the populations affected by the approval and construction of the mills (paragraph 216). However, it nevertheless specified that this view was based on the instruments invoked by Argentina. In order to demonstrate the existence of such an obligation, Argentina had invoked Article 2(6) and 3(8) of the Espoo Convention, Principles 7 and 8 of the UNEP Goals and Principles and Article 13 of the International Law Commission 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (paragraph 215). The Court rightly considered that the Espoo Convention did not impose any obligation in the present case, as neither State was a party to it; however, its reasons for rejecting the relevance of the other two instruments deserve further consideration.. As noted by Owen McIntyre, the Court appeared in the same judgment (paragraph 210) to consider the UNEP instrument relevant in rejecting the existence of a binding legal requirement to consider alternatives to the planned project in the conduct of an EIA. MacIntyre further argued that the decision of the Court to reject the relevance of the ILC Draft Articles was confusing, given the role of the ILC in the codification and progressive development of international law. The position of the Court must, however be understood in light of the fact that, in the present case, a consultation by Uruguay did take place. A formal recognition by the Court that such a crucial procedural obligation – already imposed by various international law instruments – exists as a matter of general international law is thus most probably for another day.

5. *Further Reading*

a. D.K. ANTON, "Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment) [2010]", 17 *Australian International Law Journal* 213 (2010);

b. A. BOYLE, "Developments in International Law of EIA and their Relation to the Espoo Convention", 20 *Review of European Community & International Environmental Law* 3 (2011);

c. Y. KERBRAT, S. MALJEAN-DUBOIS, "La Cour internationale de Justice face aux enjeux de protection de l'environnement: Réflexions critiques sur l'arrêt du 20 avril 2010, Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)", 1 *Revue Générale de Droit International Public* 39 (2011);
d. O. MCINTYRE, "The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay", 4 *Water Alternatives* 2 (2011);
e. P. MERKOURIS, "Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay): Of Environmental Impact Assessments and 'Phantom Experts'", The Hague Justice Portal (www.haguejusticeportal.net/eCache/DEF/11/878.html);
f. C.R. PAYNE, "Pulp Mills on the River Uruguay (Argentina v. Uruguay)", 105 *American Journal of International Law* 94 (2011);
g. C.R. PAYNE, "Environmental Impact Assessment as a Duty under International Law: The International Court of Justice Judgment on Pulp Mills on the River Uruguay", 3 *European Journal of Risk Regulation* 317 (2010);
h. V. RICHARD, E. TRUILHE-MARENGO, "La coopération sur un fleuve partagé, l'anticipation des risques environnementaux et la CIJ: un pas en avant, deux pas en arrière?", 28 *Bulletin du Droit de l'Environnement Industriel* 17 (2010);
i. S. SALINAS ALCEGA, M. ESTEBAN PINTO, "El Pretor a la búsqueda del Derecho: la oportunidad perdida por la Corte Internacional de Justicia de contribuir al desarrollo del Derecho de los cursos de agua internacionales (Sentencia en el asunto de las plantas de pasta de papel en el rio Uruguay de 20 de abril de 2010)", 1 *Revista Aranzadi de Derecho Ambiental* 19 (2011).