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Case Note

INTERNATIONAL COURT OF JUSTICE JUDGMENT ON THE PAPER MILL PERMIT DISPUTE BETWEEN ARGENTINA AND URUGUAY RECOGNIZES THE REQUIREMENT OF ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT

On 20 April 2010, the International Court of Justice (ICJ) made its judgment[1] public in a case that Argentina brought against Uruguay in 2006. Argentina contested Uruguay's decision to allow the construction of a highly polluting paper mill on the Uruguay River which borders the two countries without following proper consultative procedures. Argentina claimed that pollution from the mill in question would cause serious environmental damage and that it was being erected in breach of the 1975 Border Treaty on the Statute of the River Uruguay (the Statute).[2]

The ICJ ruled that the paper mill in question could remain in operation despite the fact that Uruguay violated the treaty when granting the permit for constructing the plant. The ICJ found that Uruguay had breached its obligation to inform Argentina of its plans to build pulp mills. But the ICJ decided also that Uruguay did not breach its substantive obligation to Argentina to protect the environment under the 1975 Treaty as the ICJ determined that Argentina had not clearly proved that the paper mill in question was causing harm to the river.

This case is only the second pure environmental dispute to be heard at the ICJ, the first being back in the 1990s.[3]

SOME FACTS AND ISSUES AT STAKE

This case illustrates the difficult and sensitive balance between environmental protection requirements and economic development objectives. The dispute started in 2005 when Uruguay authorized the Botnia Company of Finland to build a pulp mill on the banks of the Uruguay River. This important regional river runs for 1800 kilometres and has a basin of 339,000 square kilometres, an area bigger than California and double the size of Great Britain. The river drains about 210,000 square miles of farmland. The runoff is known to include chemicals from fertilizers along with heavy metals from factories. The polluting factories are known to be mostly on the Argentine side of the river. The pulp mills were sited in Uruguay chiefly because of the availability of wood pulp supplied by the conversion of Uruguay's original grasslands to industrial Eucalyptus forests, at the rate of about 1.5% of the total area of Uruguay between 1969 and 1999.[4] Scientists say that Argentina and Uruguay could have done more to reduce river pollution from other sources, despite their long political battle over the paper mill. It was also said that Uruguay relied on studies paid for by the paper company and accepted by the national environmental regulator DINAMA, which found that the plant's emissions had no measurable impact on the river. Regarding environmental concerns, a Greenpeace official once said that the disagreement between Argentina and Uruguay involved a lot of hypocrisy because there had not been a serious and ongoing evaluation of pollution in the Uruguay River, either in Uruguay or in Argentina.[5]

The project involved the construction of a US$1.2 billion cellulose factory at Fray Bentos, a town with a population of 23,000 people. The project is situated 25 kilometres from the Argentine town of Gualeguaychú, a popular tourist resort town of 80,000 residents on the Argentine side of the river. The project – the largest single foreign investment in Uruguay's history – was aimed to reinvigorate an area devastated by the collapse of its beef-processing industry. New mills were expected to generate around 8000 jobs and increase

[1] ICJ 20 April 2010, *Argentina v. Uruguay (Pulp Mills on the River Uruguay)* (not yet reported), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

[2] Treaty on the Statute of the River Uruguay (Salta, 26 February 1975), available at <http://untreaty.un.org/unts/60001_120000/10/4/00018191.pdf>.

[3] ICJ 25 September 1997, *Hungary v. Slovakia (Gabčíkovo-Nagymaros Case)*, [1997] ICJ Rep. 78, 37 ILM 162 (1998). In that case, the ICJ found that Hungary was not entitled to terminate a treaty based on grave environmental concerns, even though Czechoslovakia had begun major works to divert the Danube River in violation of that treaty.

[4] C.R. Payne, 'Pulp Mills on the River Uruguay: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law', 14:9 *ASIL Insights* (22 April 2010), available at <http://www.asil.org/files/insight100422pdf.pdf>.

[5] S. Hager, 'ICJ Decision on Uruguay/Argentina River Factory Case', *Impunity Watch* (21 April 2010) available at <http://impunitywatch.com/?p=10332>.

gross domestic product by 1.6%.[6] But on both sides of the Uruguay River, citizens became worried about dioxin, furan, and other pulp plant pollutants harming fish, birds, honeybees, and fruit crops.[7] Although Uruguay stood to benefit economically by the project, the Argentine people expected no economic benefit, but rather costs, as they feared harm to agriculture, fisheries, real estate, (eco)tourism and employment.

Another economic (development) dimension of this project concerned its multilateral financial engineering.[8] On 21 November 2006, the boards of directors of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) approved a US$170 million investment by the IFC and a guarantee of up to US$350 million from MIGA for construction of the pulp mill. Non-governmental organizations (NGOs) and community groups (the Argentine NGO Centro de Derechos Humanos y Ambiente (CEDHA) in particular) objected to the project financing. It was argued that the IFC and MIGA were violating their voluntary commitments under the Equator Principles.[9] As this resulted in one lender pulling out of the project, CEDHA was allowed to submit a formal complaint to the IFC through its compliance procedure. CEDHA also filed a complaint against Uruguay with the Inter-American Commission on Human Rights and initiated lawsuits in Argentina and Uruguay. These NGO actions however did not result in successful outcomes for those groups.

CHRONOLOGY OF DEVELOPMENTS AND STEPS IN THE DISPUTE[10]

In 2003, Uruguay authorized the Spanish firm Ence to build a paper plant on the Uruguay River. The Argentine government said it was monitoring the plan.

In February 2005, Uruguay authorized Metsa-Botnia to build another plant near the planned Ence plant. In September 2005 CEDHA submitted its first complaint to the Compliance Advisor Ombudsman (CAO) of the IFC. As noted by CEDHA:

> IFC, which collected and guided information about the projects' social and environmental compliance, had to send Botnia back to the drawing board several times, following an unfavorable verdict from its Compliance Advisory Ombudsman (the CAO) who found the project seriously violated the IFC's procedural norms and safeguards.[11]

In December 2005, Argentine environmentalists in the town of Gualeguaychú began sporadic blockades of an international bridge across the river, to protest the construction of the plant. In the same month, a World Bank preliminary report declared that emissions from the plant would be safe. The project was then the subject of a number of meetings between the countries' foreign ministers and a High-Level Technical Group in 2005 and 2006.[12]

As early as January 2006, Argentina announced its intention to file proceedings against Uruguay before the ICJ. This happened amidst rising tensions between the two riparian States and demands from local residents and activists to halt the project. In March 2006, the paper companies suspended construction work and protesters lifted a highway blockade as the Presidents of both countries announced that negotiations would be held. However as these talks failed, enraged Argentine

[6] The Argentine non-governmental organization Centro de Derechos Humanos y Ambiente states that Botnia operates in an entirely tax free zone, exports all of its production for European and Asian consumption, and employs only 300 people. See Centro de Derechos Humanos y Ambiente, *ICJ Rules on Pulp Mill Case: World Bank's IFC, Nordea, Calyon and Finnvera Complicit in Violations of International Law*' (CEDHA, 20 April 2010), available at <http://www.cedha.org.ar/en/more_information/icj-rules.php>.

[7] 'A Paper Settlement: A Ruling by the International Court of Justice Should End a Nasty Dispute', *The Economist* (22 April 2010). See also P.H.F. Bekker, 'Argentina-Uruguay Environmental Border Dispute Before the World Court', 10:11 *ASIL Insights* (16 May 2006), available at <http://www.asil.org/insights_2006.cfm>, who states '. . . the project consists of two greenfield eucalyptus Kraft pulp mills using Elemental Chlorine Free (ECF) technology to produce air-dried pulp (ADP). ADP is the primary raw material for the production of paper and paper-related products. In contrast to the Totally Chlorine Free (TCF) bleaching process, ECF technology results in the emission of dioxins through the use of chlorine dioxide. The plants will produce a combined total of about 1.4 million tons of pulp annually'. See also L. Egan, 'Argentina, Uruguay Split over Planned Pulp Mills', *Washington Post* (14 August 2005), at A16. Regarding the negative impact of Eucalyptus cultivation in Uruguay, see K. Donovan, 'A Beneficial Uruguayan Pulp Mill: Pulp Fiction?', *Council on Hemispheric Affairs* (30 January 2007), available at <http://www.coha.org/a-beneficialuruguayan-paper-mill-pulp-fiction/>.

[8] The private investors include Nordea (a Swedish private bank), Calyon (French Credit Lyonnais) and Finnvera (the Finnish State-owned Export Credit Agency). The Dutch bank, ING, decided to pull US$480 million in financing following a verdict by the IFC's Compliance Advisory Ombudsman, which agreed with the local community on alleged violations of the IFC's Social and Environmental Safeguards. See Centro de Derechos Humanos y Ambiente, n. 6 above.

[9] Ibid. The Equator Principles aim to improve social and environmental impacts of project financing, but as this case seems to illustrate, their strength and real impact is linked to the role of NGOs in their implementation. See F. Amalric, *The Equator Principles: A Step Towards Sustainability?*, CCRS Working Paper, No 01/05 (University of Zurich, January 2005), 20, available at <http://www.humanrights.ch/home/upload/pdf/050726_equatorprinciples_uniZH2005.pdf>.

[10] This description is based on information available on several websites, see, *inter alia*, C. Hornos and P. Simao, 'Chronology – Argentine, Uruguay Dispute Pulp Mill', *Reuters* (20 April 2010), available at <http://www.reuters.com/article/idUSN209920420100420?type=marketsNews>; and D. Taillant, *Paper Pulp Mills Uruguay* (CEDHA, undated), available at <http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/more_information.php>.

[11] See Centro de Derechos Humanos y Ambiente, n. 6 above.

[12] See *Argentina v. Uruguay*, n. 1 above, para. 40.

environmentalists in Gualeguaychú blocked several bridges between the two countries in April 2006. This caused cargo and tourist traffic to make a 60-mile detour and economic harm to Uruguay. After months of unsuccessful negotiation with Uruguay, on 4 May 2006, Argentina submitted its dispute to the ICJ along with a request for provisional measures. Argentina claimed two substantive rights: (1) Uruguay had to prevent pollution and also to prescribe pollution control measures in accordance with international standards; and (2) suspending the construction of pulp mills was necessary to preserve Argentina's rights because the potential damage as a result of mill operations (harm to public health and the river environment) could not be compensated by financial means. In its application, Argentina claimed that Uruguay, by unilaterally authorizing the construction of paper mills, had violated the Treaty on the Statute of the River Uruguay.[13] This treaty between Argentina and Uruguay was concluded in 1975 to establish 'the joint machinery necessary for the optimum and rational utilization of the River Uruguay'.[14]

Soon after the oral proceedings on the provisional measures in June 2006, the ICJ decided in its Order of 13 July 2006 that provisional measures were not required under the circumstances and rejected Argentina's petition to block construction of the plants.[15] The ICJ stated that it was not convinced that procedural breaches or continued construction of such mills would lead to any harm that could not be reversed later if Argentina prevailed on the merits. The ICJ also reminded both parties of their obligations under international law and the Treaty on the Statute of the River Uruguay to consult, cooperate, and refrain from making resolution of the dispute more difficult.[16] It further reminded Uruguay of its offer to conduct joint monitoring with Argentina.

On 6 September 2006, the Mercosur *ad hoc* arbitration tribunal did not require Argentina to put an end to the bridge blockades, as requested by Uruguay. Uruguay had initiated a complaint under the procedures of the Mercosur common market.[17] However this tribunal – an *ad hoc* assembly formed by three arbiters (one Argentine, one Uruguayan and one Spanish) –found these blockades were not compatible with Argentina's Mercosur obligations to guarantee free circulation of goods and services.[18] The Mercosur panel acknowledged that a State can only be partially responsible for the actions of its protesting citizens, and that a commitment to non-violent government action is to be supported and respected. The panel concluded that too much inaction on the part of the State can be seen as tacit support for the protestors and therefore a violation of its commitment to open commerce. But the panel did not require Argentina to ensure blockade cessation, stating that it had no reason to believe that Argentina had 'wrongful intent'.[19]

As a result, Uruguay decided to ask the ICJ for provisional measures to lift the blockades. Also in September 2006, as a result of continuous pressure from environmentalists, Spain's Ence withdrew its plans, and its planned plant was relocated in 2006 to a location mutually agreed on by both Uruguay and Argentina. In October 2006, the World Bank reported that the plants met environmental standards, and in November the IFC granted US$370 million to Botnia's 'Orion' project.

By its Order of 23 January 2007, the ICJ rejected Uruguay's petition to force Argentina to end the roadblocks.[20] Uruguay's request was denied by the ICJ on the grounds that the construction of the plant was progressing significantly, and there was no imminent risk that Uruguay's rights might be irreparably harmed.[21] In July 2007, talks mediated by Spain's king also did not generate a resolution to the conflict. On 13 November 2007, the IFC released reports from two independent external consultants that indicated that Botnia's Orion pulp mill was ready to operate in accordance with IFC's environmental and social requirements and international best available technology (BAT) standards. The IFC also provided an updated Environmental and Social Action Plan (ESAP), reflecting the status of Botnia's compliance with the issues to be addressed as a condition of the IFC financing of the project. The reports and updated ESAP confirmed that the Orion pulp mill would generate major economic benefits for Uruguay and would not cause harm to the environment. Soon after the Botnia plant started up in November 2007, strong smells from the plant provoked complaints. So it was hardly surprising that the newly elected Argentine President Cristina Fernandez complained of the Botnia plant during her swearing-in speech in December 2007.

[13] See Treaty on the Statute of the River Uruguay, n. 2 above.
[14] Ibid., Article 1.
[15] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, [2006] ICJ Rep. 113.
[16] Treaty on the Statute of the River Uruguay, n. 2 above, Article 7.
[17] Treaty between Argentina, Brazil, Paraguay, Uruguay. Establishing a Common Market [Mercado Comun del Sur or Mercosur] (Asuncion, 26 March 1991). The signing of the Olivos Protocol (Olivos, 18 February 2002) (entered into force on 1 January 2004) made the creation of arbitration and review tribunals possible.
[18] Decision of the Mercosur *Ad Hoc* Arbitral Tribunal (*Uruguay v. Argentina*) (6 September 2006).
[19] C. Granger, 'The Role of International Tribunals in Natural Resource Disputes in Latin America', 28 *Ecology Law Quarterly* (2008), 1342.
[20] During the following years environmentalists and community groups in Gualeguaychu, Argentina, maintained almost a permanent blockade of a bridge between Uruguay and Argentina.
[21] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, at 3.

On 19 March 2009, the IFC publicly released an environmental monitoring report for Botnia's Orion pulp mill covering the first full calendar year (2008) of the mill's operation since its start.[22] On 5 August, the Environmental Civic Assembly of Gualeguaychú, an Argentine community group, submitted a second complaint to the IFC Compliance Advisor /Ombudsman (CAO) alleging that environmental monitoring of the now-operational pulp mill was inadequate, and that it was causing odours, air emissions, water pollution, impacts to community health and trans-boundary issues. After an assessment by the Ombudsman that included a review of the status of the case 'in other international fora', the CAO released its appraisal on 15 March 2010 and determined that the IFC had taken the necessary steps, and there were no grounds for further auditing or other action.[23]

Before the ICJ case, on 15 July 2009, each of the parties, as provided for in the agreement between them and with the authorization of the ICJ, submitted comments on the new documents produced by the other party. Public hearings in the case were held between 14 September and 2 October 2009.

On 19 April 2010, the day before the ICJ ruling, the IFC released its latest environmental monitoring report for UPM's Orion pulp mill[24] covering the second full calendar year (2009) of the mill's operation.[25] It confirmed that the mill was performing to the air and water quality standards projected in the Cumulative Impact Study and Environmental Impact Assessment, as required by IFC, and within the limits established by the environmental permits issued by DINAMA.

SOME FEATURES AND ELEMENTS OF THE ICJ'S RULING

Summarized Findings by the ICJ By 13 votes to one, the ICJ found that Uruguay had breached its procedural obligations under Articles 7–12 of the 1975 Statute of the River Uruguay and that the declaration by the Court of this breach constituted appropriate satisfaction. By 11 votes to three, the Court further found that Uruguay had not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay. The ICJ unanimously rejected all other submissions by the parties.

In its judgment, the ICJ considered:

> that its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina. As Uruguay's breaches of the procedural obligations occurred in the past and have come to an end, there is no cause to order their cessation.[26]

At paragraph 273, the Court referred to its decision in the *Gabčíkovo-Nagymaros Project (Hungary/ Slovakia)* case[27] and recalled also Articles 34–37 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts.[28] Indeed, given the content of its Order of 13 July 2006 declaring that provisional measures were unnecessary and allowing the further construction of the pulp mills, the ICJ had limited the potential impact of its future judgment. However, it had not limited itself completely as Article 37 allows for satisfaction in cases where the injury cannot be remediated by restitution or compensation.[29] In their dissenting opinion Judges Al-Khasawneh and Simma rejected this *ex post* approach as they stated that:

> in essence, under Article 12, the Court is not relegated to the function of adjudging *ex post facto* whether a breach has happened and what remedies constitute appropriate reparation for a claimed breach, but instead, is co-opted by the Parties to assist them from an early stage in the planning process. The perspective of Article 12 is decisively forward-looking, as under it, the Court is to step in, *before* a project

[22] The report stated that the mill was performing to the air and water quality standards projected in the Cumulative Impact Study and Environmental Impact Assessment, as required by the IFC, and well within the limits established by the environmental permits issued by the Uruguayan regulator, DINAMA. See DINAMA, *Environmental Performance Review. 2008 Monitoring Year* (DINAMA, March 2009).

[23] For information regarding the complaint, see CAO, *Uruguay / Orion-02/Gualeguaychú-Argentina* (15 March 2010), available at <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=152>.

[24] In December 2009, Metsa-Botnia sold its Uruguay pulp plant and forestry operations to UPM-Kymmene. See UPM-The Biofore Company, *UPM 2009 Annual Report* (UPM-The Biofore Company, 2010), at 10, available at <http://www.upm.com/downloads/compinfo/UPM_AR_09_en_full_online.pdf >.

[25] The assessment of operating performance was again prepared by EcoMetrix Incorporated, an independent environmental consulting firm. See EcoMetrix, *Environmental Performance Review: 2008 Monitoring Year* (April 2010), available at <http://www.ifc.org/ifcext/disclosure.nsf/content/Uruguay_Pulp_Mills>. The report does not contain any new findings but confirms that the mill is performing to the air and water quality standards projected in the Cumulative Impact Study and Environmental Impact Assessment, as required by IFC, and within the limits established by the environmental permits issued by the Uruguayan regulator, DINAMA.

[26] See *Argentina v. Uruguay*, n. 1 above, para. 269.

[27] See *Gabčíkovo-Nagymaros Case*, n. 3 above, para. 152.

[28] Draft Articles on Responsibility of States for Internationally Wrongful Acts, found in *Report of the International Law Commission on the Work of Its Fifty-Third Session* (UN Doc. A/56/10, 2001), available at <http://www.un.org/law/ilc>.

[29] Ibid., Article 37 clarifies what is to be understood as 'Satisfaction': '1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State'.

is realized, where there is disagreement on whether there are potentially detrimental effects to the environment.[30]

Treaty-Boundary Issues For the most part, the ICJ decision relies on the 1975 Treaty on the Statute of the River Uruguay. On 26 February 1975, Argentina and Uruguay signed the Statute of the River Uruguay entering into force on 18 September 1976. The 1975 Statute's purpose is to govern all activity involving natural resources along the river. Accordingly, the 1975 Statute also established the Administrative Commission of the River Uruguay (CARU)[31] to regulate and coordinate the works of any party affecting the river. Under Article 60 of the 1975 Statute, any dispute not settled through negotiation may be submitted by either party to the ICJ. Argentina's claims concerning noise and visual pollution, and those concerning 'bad odours' produced by the Botnia mill, do not fall within the ICJ's jurisdiction because they do not relate to 'the interpretation or application' of the 1975 Statute, within the meaning of Article 60 of that instrument.[32]

The ICJ did not interpret other multilateral environmental agreements, despite an effort by Argentina to bring them in. The ICJ observed that Article 41(a) of the Statute, the purpose of which is to protect and preserve the aquatic environment through the enactment of rules and the adoption of appropriate measures by each of the parties in accordance with applicable international agreements, '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 [these] . . . agreements'.[33] The ICJ concluded that the multilateral conventions relied on by Argentina do not fall within the scope of Article 60 of the 1975 Statute and that therefore it had no jurisdiction to rule whether Uruguay had complied with its obligations thereunder.[34]

Procedural and Substantial Obligations Including Sustainable Development and Environmental Impact Assessments The ICJ noted that the object and purpose of the 1975 Statute, set forth in Article 1 of that instrument, is for the parties to achieve 'the optimum and rational utilization of the River Uruguay' by means of the 'joint machinery' for cooperation, which originates in the procedural obligations and the substantive obligations under the Statute. In this respect, the Court had already observed in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of 'the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States'.[35] In its final judgment, the ICJ referred to the *Gabčikovo-Nagymaros* case, where the Court, after recalling that '[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development', added that '[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty'.[36] The concept of sustainable development was not further elaborated in the *Gabčikovo-Nagymaros* case. In the *Pulp Mills* case, the Court also restricted its position in a rather repetitive way. It stated that:

> [r]egarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development . . . it is the opinion of the Court that Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.[37]

The ICJ noted that the obligation to inform, provided for in Article 7 of the 1975 Statute, involves the State which is initiating the planned activity to inform CARU thereof. This information has to enable CARU to decide whether or not the plan falls under the cooperation procedure laid down by the 1975 Statute, but not to pronounce on its actual impact on the river and the quality of its waters.[38] The obligation to inform must 'become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization'.[39]

The ICJ observed that 'the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause significant transboundary harm to another State must be notified by the party concerned to the other party, through CARU. Such notification is intended to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts (Article 8 of the 1975 Statute).[40] This notification must take place before

[30] See *Argentina v. Uruguay*, n. 1 above, para. 21.
[31] See *The River Uruguay Executive Commission – Comisión Administradora del Rio Uruguay* (CARU, undated), at 38, available at <http://www.caru.org.uy/publicaciones/The-River-Uruguay-executive-commission-Uruguay-Paysandu.pdf >.
[32] See *Argentina v. Uruguay*, n. 1 above, para. 52.
[33] Ibid., para. 62.
[34] Ibid., para. 63.
[35] See Provisional Measures, n. 15 above, para. 80.
[36] See *Gabčíkovo-Nagymaros Case*, n. 3 above, paras 140–141.
[37] See *Argentina v. Uruguay*, n. 1 above, para. 177.
[38] Ibid., para. 104.
[39] Ibid., para. 105.
[40] Ibid., para. 119.

the State concerned decides on the environmental viability of the plan. The ICJ observed that, in the present case, 'the notification to Argentina of the environmental impact assessments did not take place through CARU, and that Uruguay only transmitted those assessments to Argentina after having issued the initial environmental authorizations for the two mills in question.[41] So Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7 of the 1975 Statute. Argentina also put arguments forward based on the precautionary principle and reversal of the burden of proof. In this regard, the Court opined 'that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof'.[42]

The ICJ's judgment dealt with issues regarding environmental impact assessment (EIA) in paragraphs 203–219. The ICJ noted that for the purposes of complying with their obligations under Article 41 of the 1975 Statute and under general international law, the parties are obliged, when planning activities which may be liable to cause transboundary harm, to carry out an EIA. The ICJ recognized EIA as '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'.[43] It found that the requirement to undertake an EIA is linked to a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular on a shared resource. It found that there is a requirement to apply an EIA as:

> 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 environmental impact assessment on the potential effects of such works.[44]

So the ICJ not only affirmed States' international environmental obligations but also found that their conduct may incur responsibility when failing to conduct due diligence in their environmental impact assessment, even when, as in this case, the pulp mill was built by a private corporation, but authorized by a public authority.[45] It seems as if the ICJ wanted to recognize Uruguay's reference to the International Law Commission's 2001 draft Articles on Prevention of Transboundary Harm from Hazardous Activities (PTHHA),[46] as Article 7 of the PTHHA Articles on the assessment of risk states that:

> Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.

The approach of the ILC emphasizes the procedural duty of prevention and elements of conduct that – where appropriate – States are expected to take (including authorization for certain activities, risk assessment, information to the public, emergency preparedness and notification to, and consultation with, other States).[47]

The ICJ stated that not only the 1975 Statute but also general international law does not specify the scope and content of an EIA. On the one hand, the ICJ seems to ignore the existence of the United Nations Economic Commission for Europe (UNECE) Espoo Convention on EIA in a Transboundary Context, but, on the other hand, it acknowledged the fact that both involved States are not parties to this Espoo Convention,[48]. From this formalistic point of view it is interesting that the ICJ found that the content of an EIA must be determined by each State within its domestic legislation or in the authorization process for the planned activity.[49] This reflects also the balanced judgment in this sensitive case as the ICJ avoided dictating strict requirements that might infringe on national sovereignty. But the ICJ was also clear that an EIA must be conducted prior to the implementation of a project. Furthermore, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment has to be undertaken. The judgment elaborates two specific EIA issues. Regarding the assessment of the location of the project, the ICJ recalls that Principle 4(c) of the 1987 Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme stipulates that an EIA should include, at a minimum, 'a description of practical alternatives, as appropriate'.[50] Concerning consultation with affected populations, a basic requirement in the Espoo Convention and the UNECE Aarhus Convention on Access to Information, Public

[41] Ibid., para. 121.
[42] Ibid., para. 164.
[43] Ibid., para. 204
[44] Ibid., para. 204.
[45] Sun Kim, 'Environmental Impact Assessments as a Requirement under General International Law: Pulp Mills on the River Uruguay case, Argentina v. Uruguay', *RightRespect* (4 May 2010), available at <http://www.rightrespect.com/2010/05/04/environmental-impact-assessment-is-a-requirement-under-general-international-law-pulp-mills-on-the-river-uruguay-case-argentina-v-uruguay/>.
[46] Report of the International Law Commission on the Work of its Fifty-Third Session, *Official Records of the General Assembly, Fifty-Sixth Session, Supplement* (Document A/56/10, 2001), at 157, available at <http://untreaty.un.org/ilc/reports/2001/2001report.htm>.
[47] T. Scovazzi, 'State Responsibility for Environmental Harm', 12 *Yearbook of International Environmental Law* (2001), 50.
[48] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991).
[49] See *Argentina v. Uruguay*, n. 1 above, para. 105.
[50] Ibid., para. 210.

Participation in Decision-Making and Access to Justice in Environmental Matters,[51] the ICJ revealed no ambition at all. Given the non-party status of both involved States in relationship to the Espoo Convention, the ICJ simply did not see any legal obligation arising.

This case, as well as the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case, illustrate the huge involvement of experts who produced a variety of (scientific) reports on behalf of each party. Aimed at providing factual clarity, the positioning of these non-legal experts however led to rather unclear effects. In paragraph 167, the ICJ interestingly stated:

> . . . Regarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. The Court indeed 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.

This opinion of the Court was not shared by all judges as Judges Al-Khasawneh and Simma delivered a joint dissenting opinion which contained an elaborated critique of the Court's approach on assessing and weighing the complex technical evidence as presented by the parties in this case. Both judges found the Court's approach passive and suggested several alternatives in their dissenting opinion.[52] Furthermore they stated that:

> the Court has an unfortunate history of persisting, when faced with sophisticated scientific and technical evidence in support of the legal claims made by States before it, in resolving these issues purely through the application of its traditional legal techniques; and it has come under considerable criticism in this regard.[53]

It added that:

> The present dispute has been a wasted opportunity for the Court, in its 'unfettered discretion' to do so . . . to avail itself of the procedures in Article 50 of its Statute and Article 67 of its Rules, and establish itself as a careful, systematic court which can be entrusted with complex scientific evidence, upon which the law (or breach thereof) by a party can be established.[54]

CONCLUSION

This ICJ judgment clearly recognizes the importance and value of EIAs in international environmental law, both as a procedural and substantial environmental policy tool. This recognition might strengthen the use of EIAs in a transboundary context and as such increase general public knowledge about the Espoo Convention (and its Protocol on Strategic Environmental Assessment),[55] notwithstanding the Court's rejection of Argentina's reference to this convention. The fact that the possible application of this convention was raised during this case gave it an exposure which may increase the awareness about this convention and its implementation. By linking EIAs to due diligence requirements, the ICJ has given a clear signal about the potential impact of EIAs, which incorporates a basic interrelated trinity: information, consultation and participation. The history of this case cannot be ignored. The continuous efforts of non-State actors have played a major role in the consecutive legal steps. At first sight this judgment has not brought the environmental and human rights activists a victory. Based on delicate balanced reasoning, the ICJ has safeguarded the continued operation of the pulp mill in Uruguay. Also, the ICJ's vision on sustainable development has not really been further developed in the judgment: Argentina has been rewarded some moral gains but the reasoning of the ICJ in this case is not thoroughly convincing. In that sense this judgment offers no breakthrough or radical improvements for the implementation of international environmental law but rather provides simply guidance for further diplomatic efforts in cases of problematic transboundary impacts. But even for that kind of work, the Espoo Convention and its Protocol already offer inspiring provisions.

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[51] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998).
[52] See *Argentina v. Uruguay*, n. 1 above, paras 6–8.
[53] Ibid., para. 12.
[54] Ibid., para. 17.
[55] Protocol on Strategic Environmental Assessment to the Espoo Convention (Kiev, 21 May 2003).