



INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands

Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928

Website: www.icj-cij.org

Press Release

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Pulp Mills on the River Uruguay (Argentina v. Uruguay)

The Court finds that Uruguay has breached its procedural obligations to co-operate with Argentina and the Administrative Commission of the River Uruguay (CARU) during the development of plans for the CMB (ENCE) and Orion (Botnia) pulp mills

The Court declares that Uruguay has not breached its substantive obligations for the protection of the environment provided for by the Statute of the River Uruguay by authorizing the construction and commissioning of the Orion (Botnia) mill

THE HAGUE, 20 April 2010. The International Court of Justice (ICJ), principal judicial organ of the United Nations, today delivered its Judgment in the case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay).

In its Judgment, which is final, without appeal and binding on the Parties, the Court,

- (1) finds, by thirteen votes to one, that the Eastern Republic of Uruguay has breached its procedural obligations under Articles 7 to 12 of the 1975 Statute of the River Uruguay and that the declaration by the Court of this breach constitutes appropriate satisfaction;
- (2) finds, by eleven votes to three, that the Eastern Republic of Uruguay has not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay;
- (3) rejects, unanimously, all other submissions by the Parties.

Reasoning of the Court

The Court recalls that the dispute between the Parties concerns the planned construction, authorized by Uruguay, of the CMB (ENCE) pulp mill, and the construction and commissioning, also authorized by Uruguay, of the Orion (Botnia) pulp mill, on the River Uruguay.

1. The scope of the Court's jurisdiction

The Court notes that the Parties are in agreement that its jurisdiction is based on Article 36, paragraph 1, of the Statute of the Court, and on Article 60, paragraph 1, of the 1975 Statute of the River Uruguay (hereinafter the "1975 Statute"). The Court is of the view that the claims advanced

by Argentina concerning noise and visual pollution, and those concerning “bad odours” produced by the Orion (Botnia) mill, do not fall within its jurisdiction because they do not relate to “the interpretation or application” of the 1975 Statute, within the meaning of Article 60 of that instrument (para. 52). The Court further observes that Article 41 (a), 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” (para. 62). The Court concludes 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 has no jurisdiction to rule whether Uruguay has complied with its obligations thereunder (para. 63). Finally, the Court points out that, in interpreting the terms of the 1975 Statute, it will have recourse to the customary rules on treaty interpretation as reflected in Article 31 of the Vienna Convention on the Law of Treaties (para. 65).

2. The alleged breach of procedural obligations

(a) The links between the procedural obligations and the substantive obligations

The Court notes 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 co-operation, which originates in the procedural obligations and the substantive obligations under the Statute. The Court observes that, while the link between those two categories of obligations is functional, it “does not prevent the States parties from being required to answer for those obligations separately, according to their specific content, and to assume, if necessary, the responsibility resulting from the breach of them, according to the circumstances” (paras. 71-79).

(b) The procedural obligations and their interrelation

The Court considers that “the procedural obligations of informing, notifying and negotiating constitute an appropriate means, accepted by the Parties, of achieving the objective which they set themselves in Article 1 of the 1975 Statute” (para. 81).

The Court notes that the obligation to inform, provided for in Article 7, first paragraph, of the 1975 Statute, “involves the State which is initiating the planned activity informing CARU thereof, so that the latter can determine ‘on a preliminary basis’ and within a maximum period of 30 days whether the plan might cause significant damage to the other party”. It observes that the information which must be provided to CARU at this stage has to enable it to “decid[e] whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute”, not to “pronounc[e] on its actual impact on the river and the quality of its waters” (para. 104). The Court is of the view that 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” (para. 105). It observes that, in the present case, “Uruguay did not transmit to CARU the information required by Article 7, first paragraph, in respect of the CMB (ENCE) and Orion (Botnia) mills, despite the requests made to it by the Commission to that effect on several occasions”. The initial environmental authorizations were therefore, in the view of the Court, issued by Uruguay to the CMB (ENCE) mill on 9 October 2003 and to the Orion (Botnia) mill on 14 February 2005 without complying with the procedure laid down in Article 7, first paragraph. The Court further notes that

“on 12 April 2005 Uruguay granted an authorization to Botnia for the first phase of the construction of the Orion (Botnia) mill and, on 5 July 2005, an authorization to

construct a port terminal for its exclusive use and to utilize the river bed for industrial purposes, without informing CARU of these projects in advance” (para. 107).

The Court concludes from the above that

“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 Orion (Botnia) mill, has failed to comply with the obligation imposed on it by Article 7, first paragraph, of the 1975 Statute” (para. 111).

The Court notes that, under the terms of Article 7, second paragraph, of the 1975 Statute, if CARU decides that the 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”. It adds that, under the terms of Article 7, third paragraph, of the 1975 Statute, 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 régime of the river or the quality of its waters”. It observes 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, pursuant to Article 7, second and third paragraphs, of the 1975 Statute” (para. 119).

The Court notes that this notification must take place before the State concerned decides on the environmental viability of the plan. It observes that, in the present case,

“the notification to Argentina of the environmental impact assessments for the CMB (ENCE) and Orion (Botnia) mills 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” (para. 121).

The Court concludes from the above that “Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7, second and third paragraphs, of the 1975 Statute” (para. 122).

(c) Whether the Parties agreed to derogate from the procedural obligations set out in the 1975 Statute

The Court is of the opinion that the “‘understanding’ [reached by the Foreign Ministers on] 2 March 2004 would have had the effect of relieving Uruguay of its obligations under Article 7 of the 1975 Statute, if that was the purpose of the ‘understanding’, only if Uruguay had complied with the terms of the ‘understanding’”. However, in the view of the Court, it did not do so. The Court concludes that “the ‘understanding’ cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations laid down by the 1975 Statute” (para. 131). The Court further observes that the agreement of 31 May 2005 setting up the High-Level Technical Group (the “GTAN”), while indeed creating a negotiating body with the objective of enabling the negotiations provided for in Article 12 of the 1975 Statute to take place, “cannot be interpreted as expressing the agreement of the Parties to derogate from other procedural obligations laid down by the Statute” (para. 140). The Court therefore finds that Uruguay was not entitled, for the duration of the period of consultation and negotiation provided for in Articles 7 to 12 of the 1975 Statute, either to authorize the construction of or to construct the planned mills and the port terminal (para. 143). The Court concludes that “by authorizing the construction of the mills and the port terminal at Fray Bentos before the expiration of the period of negotiation, Uruguay failed to comply with the obligation to negotiate laid down by Article 12 of the Statute”.

Uruguay therefore, in the view of the Court, “disregarded the whole of the co-operation mechanism provided for in Articles 7 to 12 of the 1975 Statute” (para. 149).

(d) Uruguay’s obligations following the end of the negotiation period

The Court recalls that, should the Parties fail to reach an agreement within 180 days, Article 12 of the 1975 Statute refers them to the procedure provided for by Article 60, according to which either party may submit the dispute to the Court. It notes that “the ‘no construction obligation’, said to be borne by Uruguay between the end of the negotiation period and the decision of the Court, is not expressly laid down by the 1975 Statute and does not follow from its provisions”; Article 9 only provides for such an obligation during the performance of the procedure laid down in Articles 7 to 12 of the Statute. The Court concludes from this “that Uruguay did not bear any ‘no construction obligation’ after the negotiation period provided for in Article 12 expired on 3 February 2006, the Parties having determined at that date that the negotiations undertaken within the GTAN had failed”. Consequently, “the wrongful conduct of Uruguay could not extend beyond that period” (para. 157).

3. Substantive obligations

After addressing issues concerning the burden of proof and expert evidence (see paras. 160 to 168), the Court examines the alleged violations of substantive obligations under the 1975 Statute.

(a) The obligation to contribute to the optimum and rational utilization of the river (Article 1 of the 1975 Statute)

The Court notes that Article 1 of the 1975 Statute “informs the interpretation of the substantive obligations, but does not by itself lay down specific rights and obligations for the parties”. It states that that the objective of optimum and rational utilization must be pursued by the Parties and by CARU and through the adoption of regulations by the Commission and of rules and measures by the Parties (para. 173). The Court is of the view 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” (para. 175). It adds that the need to ensure this balance is reflected in various provisions of the 1975 Statute establishing rights and obligations for the Parties, such as Articles 27, 36 and 41. The Court concludes from this that it will assess “the conduct of Uruguay in authorizing the construction and operation of the Orion (Botnia) mill in the light of those provisions of the 1975 Statute, and the rights and obligations prescribed therein” (para. 175).

(b) The obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters (Article 35 of the 1975 Statute)

The Court is of the opinion that Argentina has not established its contention that Uruguay’s decision to carry out major eucalyptus planting operations, to supply the raw material for the Orion (Botnia) mill, has an impact not only on management of the soil and Uruguayan woodland, but also on the quality of the waters of the river (para. 180).

(c) The obligation to co-ordinate measures to avoid changes in the ecological balance (Article 36 of the 1975 Statute)

The Court considers that the obligation laid down in Article 36 requires the Parties to adopt the specific conduct of co-ordinating the necessary measures through CARU to avoid changes to the ecological balance. As this obligation is an obligation of conduct, both Parties are called upon to exercise due diligence in taking such measures (para. 187). The Court is of the view that “Argentina has not convincingly demonstrated that Uruguay has refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision” (para. 189).

(d) The obligation to prevent pollution and preserve the aquatic environment (Article 41 of the 1975 Statute)

The Court observes that Article 41 obliges the Parties to adopt, within their respective legal systems, 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 (paras. 195-196). It notes that this obligation requires the Parties to act with due diligence in respect of all activities which take place under their jurisdiction and control (para. 197). The Court notes that “the scope of the obligation to prevent pollution must be determined in light of the definition of pollution given in Article 40 of the 1975 Statute”. Article 40 defines pollution as “the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects”. In the view of the Court, the rules by which any allegations of breach are to be measured and, more specifically, by which the existence of “harmful effects” is to be determined, are to be found in

“the 1975 Statute, in the co-ordinated position of the Parties established through CARU (as the introductory phrases to Article 41 and Article 56 of the Statute contemplate) and in the regulations adopted by each Party within the limits prescribed by the 1975 Statute (as paragraphs a), b) and c) of Article 41 contemplate)” (para. 200).

The Court notes 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 environmental impact assessment, the content of which must be determined by each State within its domestic legislation or in the authorization process for the planned activity (paras. 204-205). The Court observes that an environmental impact assessment should include, at a minimum, “[a] description of practical alternatives”. However, it is not convinced by Argentina’s argument that “an assessment of possible sites was not carried out prior to the determination of the final site” (para. 210) of the Orion (Botnia) mill. The Court further observes that “any decision on the actual location of such a plant along the River Uruguay should take into account the capacity of the waters of the river to receive, dilute and disperse discharges of effluent from a plant of this nature and scale” (para. 211). It is the Court’s view that “in establishing its water quality standards in accordance with Articles 36 and 56 of the 1975 Statute, CARU must have taken into account the receiving capacity and sensitivity of the waters of the river, including in the areas of the river adjacent to Fray Bentos”. The Court is therefore of the opinion that “in so far as it is not established that the discharges of effluent of the Orion (Botnia) mill have exceeded the limits set by those standards, in terms of the level of concentrations, [it] finds itself unable to conclude that Uruguay has violated its obligations under the 1975 Statute” (para. 214). The Court further considers that “no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina” (para. 216). In any case, it finds that such a consultation by Uruguay did indeed take place (para. 219).

The Court further observes 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, entail a careful consideration of the technology to be used by the industrial plant to be established” (para. 223).

It considers, on the basis of the documents submitted to it by the Parties, that “there is no evidence to support the claim of Argentina that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced” (para. 225). Following a detailed examination of the Parties’ arguments, the Court ultimately finds 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 had deleterious effects or 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”.

Consequently, on the basis of the evidence submitted to it, “the Court concludes that Uruguay has not breached its obligations under Article 41” (para. 265).

The Court adds that

“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 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 Orion (Botnia) mill on the aquatic environment”.

It notes that Uruguay, for its part, “has the obligation to continue monitoring the operation of the plant in accordance with Article 41 of the Statute and to ensure compliance by Botnia with Uruguayan domestic regulations as well as the standards set by CARU”. It concludes 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 utilization of the river, while protecting its environment” (para. 266).

4. The claims made by the Parties in their final submissions

The Court considers that “its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina” (para. 269). It is the Court’s view that ordering the dismantling of the Orion (Botnia) mill would not constitute an appropriate remedy for the breach of procedural obligations, since Uruguay was not barred from proceeding with the construction and operation of the mill after the expiration of the period for negotiation and since it breached no substantive obligation under the 1975 Statute (para. 275). The Court is likewise unable, for the same reasons, to uphold Argentina’s claim in respect of compensation for alleged injuries suffered in various economic sectors, specifically tourism and agriculture. Furthermore, the Court fails to see any special circumstances in the present case requiring the ordering of adequate guarantees that Uruguay will refrain in future from preventing the 1975 Statute from being applied (paras. 277-278). The Court further finds that Uruguay’s request for confirmation of its right “to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute” “is without any practical significance, since Argentina’s claims in relation to breaches by Uruguay of its substantive obligations and to the dismantling of the Orion (Botnia) mill have been rejected” (para. 280). Lastly, the Court points out that “the 1975 Statute places the Parties under a duty to co-operate with each other, on the terms therein set out, to ensure

the achievement of its object and purpose”, this obligation to co-operate encompassing ongoing monitoring of an industrial facility, such as the Orion (Botnia) mill (para. 281).

Composition of the Court

The Court was composed as follows: Vice-President Tomka, Acting President; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judges ad hoc Torres Bernárdez, Vinuesa; Registrar Couvreur.

Judges Al-Khasawneh and Simma append a joint dissenting opinion to the Judgment of the Court; Judge Keith appends a separate opinion to the Judgment of the Court; Judge Skotnikov appends a declaration to the Judgment of the Court; Judge Cançado Trindade appends a separate opinion to the Judgment of the Court; Judge Yusuf appends a declaration to the Judgment of the Court; Judge Greenwood appends a separate opinion to the Judgment of the Court; Judge ad hoc Torres Bernárdez appends a separate opinion to the Judgment of the Court; Judge ad hoc Vinuesa appends a dissenting opinion to the Judgment of the Court.

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A summary of the Judgment appears in the document “Summary No. 2010/1”. This press release, the summary, and the full text of the Judgment can be found on the Court’s website (www.icj-cij.org) under the “Cases” heading.

Information Department:

Mr. Andrey Poskakukhin, First Secretary of the Court, Head of Department (+31 (0)70 302 2336)

Mr. Boris Heim, Information Officer (+31 (0)70 302 2337)

Ms Joanne Moore, Associate Information Officer (+31 (0)70 302 2394)

Ms Barbara Dalsbaek, Administrative Assistant (+31 (0)70 302 2396)