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## The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay

**Owen McIntyre**

Faculty of Law, University College Cork, Ireland; o.mcintyre@ucc.ie

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**ABSTRACT:** The judgment of the International Court of Justice in the *Pulp Mills (Argentina v. Uruguay)* case makes a very important contribution to international law relating to shared international water resources and to international environmental law more generally. It does much to clarify the relationship between procedural and substantive rules of international environmental law. The Court linked interstate notification of new projects to the satisfaction of the customary due diligence obligation to prevent significant transboundary harm. It found that environmental impact assessment (EIA) is an essential requirement of customary international law in respect of activities having potential transboundary effects. The real significance of the judgment is that it held that the duty to notify, and the related duty to conduct an EIA taking account of transboundary impacts, exist in customary international law and thus apply to all states, not just those that have concluded international agreements containing such obligations. The Court confirmed that for shared international water resources, the principle of equitable and reasonable utilisation, universally accepted as the cardinal rule of international water law, is virtually synonymous with the concept of sustainable development, and suggests that considerations of environmental protection are absolutely integral to the equitable balancing of interests involved. The judgment makes it clear that the principle of equitable utilisation ought to be understood as a process, rather than a normatively determinative rule. This ought to help to address widespread confusion about the nature of the key rules and principles of international water resources law and its role in the resolution of water resources disputes and in environmental diplomacy more generally.

**KEYWORDS:** International water law, procedural rules, notification, transboundary environmental impact assessment, equitable and reasonable utilisation, sustainable development

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### BACKGROUND

The *Pulp Mills (Argentina v. Uruguay)* case concerned two pulp mills authorised to be constructed and operated on Uruguayan territory on the banks of the Uruguay river, an international river marking the boundary between Argentina and Uruguay. On 4 May 2006, Argentina initiated proceedings before the International Court of Justice (ICJ) against Uruguay, pursuant to Article 60(1) of the 1975 Statute of the River Uruguay,<sup>1</sup> alleging breach of the 1975 Statute arising out of "the authorization, construction and future commissioning of two pulp mills on the River Uruguay [and] the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river". The 1975 Statute sets out, further to the 1961 Treaty of Montevideo<sup>2</sup> delimiting the river boundary between Argentina and Uruguay, the "régime for the use of the river"<sup>3</sup> and seeks "to establish the joint machinery necessary for

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<sup>1</sup> 1295 UNTS No. I-21425, at 340, signed by Argentina and Uruguay at Salto, Uruguay, 26 February 1975, entered into force 18 September 1976. Article 60(1) provides: "Any dispute concerning the interpretation or application of the [1961] Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice".

<sup>2</sup> 635 UNTS No. 9074, at 98, signed by Argentina and Uruguay at Montevideo, Uruguay, 7 April 1961.

<sup>3</sup> 1961 Treaty, Article 7.

the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties".<sup>4</sup> Essentially, the 1975 Statute sets down some general substantive rules for the protection of the river and a number of procedural requirements for the notification of certain projects or activities, as well as establishing the *Comisión Administradora del Río Uruguay* (CARU), a joint river basin commission charged with facilitating bilateral communication and consultation between the riparian parties on matters impacting on their use of the river.

The first mill, planned by a local company, CMB, formed for the purpose by Spanish company ENCE, (the CMB [ENCE] project), was first proposed to Uruguay's National Directorate for the Environment (DINAMA) on 22 July 2002 when an environmental impact assessment was submitted. Though CARU was notified at around the same time, repeated requests from CARU to the Uruguayan authorities for further information were ignored. Uruguay proceeded to issue an initial environmental authorisation for the project on 9 October 2003, despite the fact that the documents requested by CARU were not transmitted until some weeks later on 27 October 2003. These documents might be considered fundamental to effective notification under international law and included copies of the environmental impact assessment submitted to DINAMA on 22 July 2002, of the DINAMA final assessment report dated 2 October 2003, and of the initial environmental authorisation issued on 9 October 2003. Argentina subsequently complained that the documents were not adequate for a technical appraisal of the project and expressed the view that Uruguay had failed to observe Article 7 of the 1975 Statute [on notification]. Eventually, on 7 November 2003, Uruguay provided Argentina with a copy of the entire file on the project, which Argentina forwarded to CARU on 23 February 2004, fully 19 months after the project was initially put forward to the Uruguayan authorities. Though Uruguay authorised preparatory construction work to commence in November 2005, CMB suspended work for 90 days in March 2006 at the request of Uruguay's President, and announced its intention to abandon the project altogether on 21 September 2006.

The second project, referred to as the Orion (Botnia) mill, has been built on the Uruguayan bank of the river by a local company backed by a Finnish investor and has been operational since 9 November 2007. It was first notified to the Uruguayan authorities in late 2003 with a formal application for an initial environmental authorisation submitted on 31 March 2004, and supplemented on 7 April 2004. Following meetings between CARU and Botnia in both late April and October 2004, CARU asked Botnia to provide further information on the project, to no avail. On 16 November 2004, CARU requested Uruguay to provide it with further information on the application for an initial environmental authorisation, again without success, though a CARU adviser did attend a public hearing on the project on 21 December 2004. On 11 February 2005, DINAMA adopted its environmental impact study of the project and recommended that the initial environmental authorisation for the construction of the mill and an adjacent port terminal be granted by the Ministry, which it duly granted on 14 February. Though Argentina subsequently questioned whether the granting of this authorisation amounted to a breach by Uruguay of its procedural obligations under the 1975 Statute, Uruguay granted further authorisations for clearance of the mill site and associated groundwork on 12 April 2005, for construction of both an adjacent port on 5 July 2005 and a chimney and concrete foundations on 22 August 2005. Further authorisations were granted as construction and industrial operations proceeded, with Uruguay usually giving subsequent notification of such authorisations to CARU. A High-Level Technical Group created by the Parties' Ministers for Foreign Affairs, pursuant to an agreement made by the States' Presidents, held 12 meetings between August 2005 and January 2006 but failed to make any progress in the resolution of the issues in dispute. In November 2006, the King of Spain was asked to attempt a reconciliation of the Parties, but this intervention did not result in a negotiated resolution of the dispute.

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<sup>4</sup> 1975 Statute, Article 1.

Therefore, the dispute concerned the interpretation and application of the 1975 Statute, chiefly whether Uruguay complied with its procedural obligations under the 1975 Statute in authorising the construction of the CMB (ENCE) mill and the construction and commission of the Orion (Botnia) mill, and whether Uruguay has complied with its substantive environmental obligations under the 1975 Statute since the commissioning of the Orion (Botnia) mill in November 2007.

## JUDGMENT

### Jurisdiction

While Uruguay accepted that the 1975 Statute's compromissory clause<sup>5</sup> extends to claims concerning any pollution or harm caused to the Uruguay river in violation of the 1975 statute, including the alleged impact of the operation of the Orion (Botnia) pulp mill on the quality of the waters of the river, it did not accept that Argentina's complaints concerning related air pollution, noise, visual and general nuisance, and impact on the tourism sector involve the interpretation or application of the 1975 Statute or, therefore, that the Court enjoyed jurisdiction over such matters. Argentina sought a broader understanding of the scope of the Court's jurisdiction under the 1975 Statute, contending that protection of the 'régime' of the river included the areas affected by it. Argentina based this purported 'ecosystems approach' (McIntyre, 2004) on the question of the Court's jurisdiction on Article 36 of the 1975 Statute,<sup>6</sup> but the Court could see no basis in this provision for extending its jurisdiction to cover Argentina's claims relating to noise, visual pollution or bad odours.<sup>7</sup> However, this finding should not necessarily be regarded as restrictive in terms of judicial recognition or understanding of the so-called 'ecosystems approach', as the Court goes to the trouble of making it clear that no evidence was submitted "as to any relationship between the alleged bad odours [or other air pollution] and the aquatic environment of the river",<sup>8</sup> thus suggesting that any such linkage could have brought these wider impacts within the scope of Article 36.

In addition, Argentina sought to have Articles 1 and 41 of the 1975 Statute recognised as 'referral clauses',<sup>9</sup> by means of which the Parties' obligations under general international law and a number of multilateral conventions relating to protection of the environment would be incorporated into the Statute and, in this way, to have the issue of Uruguay's compliance with such additional international obligations brought within the jurisdiction of the Court under Article 60 of the Statute. Argentina argued that the 1975 Statute should be dynamically interpreted in the light of all 'relevant rules' applicable between the Parties, so that "the Statute's interpretation remains current and evolves in

<sup>5</sup> 1975 Statute, Article 60(1), *supra*, n. 1.

<sup>6</sup> Article 36 provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it".

<sup>7</sup> Judgment, para. 52.

<sup>8</sup> *Ibid.*

<sup>9</sup> Article 1 refers to the key purpose of the Statute as being

to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties (emphasis added),

while Article 41 provides that the parties undertake

(a) to protect and preserve the aquatic environment and, in particular, to prevent its pollution, *by preserving appropriate rules and [adopting appropriate (original Spanish translation)] measures in accordance* with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies;  
(b) not to reduce in their respective legal systems:

1. the technical requirements in force for preventing water pollution, and
2. the severity of the penalties established for violations;

(c) to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems (ICJ emphasis added).

accordance with changes in environmental standards".<sup>10</sup> In this context, Argentina invoked, as rules and principles of general international law, "the principles of equitable, reasonable and non-injurious use of international watercourses, the principles of sustainable development, prevention, precaution and the need to carry out an environmental impact assessment"<sup>11</sup> and, as relevant international agreements binding on the Parties, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1971 Ramsar Convention on Wetlands of International Importance, the 1992 United Nations Convention on Biological Diversity, and the 2001 Stockholm Convention on Persistent Organic Compounds.<sup>12</sup> It contended that these obligations were additional and supplemental to the obligations expressly arising under the 1975 Statute and should be observed when the Statute is being applied, except where more specific rules of the Statute derogate from them, in accordance with the doctrine of *lex specialis*. For its part, Uruguay agreed that the 1975 Statute ought to be interpreted in the light of general international law but maintained that the issue had no bearing on the case, as its interpretation of the Statute accorded with the various general principles of the law of international watercourses and of international environmental law, and that the conventional obligations invoked by Argentina were either irrelevant to the case or were ones with which its actions were fully compliant.

On the basis of a careful examination of the literal meaning of the authoritative Spanish text of Article 1, the Court concluded that the provision was never intended to make compliance with their obligations under other treaties one of the Parties' duties under the 1975 Statute.<sup>13</sup> Once again on the basis of the original Spanish text, the Court was unable to regard Article 41 as a 'referral clause' incorporating the Parties' obligations under international agreements and other norms per se, but rather as creating "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".<sup>14</sup> Therefore, it was beyond the scope of the compromissory clause, and thus of the Court's jurisdiction, to determine whether Uruguay had complied with its obligations thereunder.

Because the Court interpreted its jurisdiction under Article 60(1) quite restrictively as being solely to interpret and apply the normative provisions of the 1975 Statute of the River Uruguay, thus limiting consideration of other customary or conventional requirements which might be taken to exemplify established practice and standards in general international law, the significance of the judgment for the general development of international environmental law and international water resources law might be regarded as somewhat limited. However, this position would appear to be consistent with the Court's approach in its 1997 *Gabčíkovo-Nagymaros* judgment<sup>15</sup> where, despite finding that no new peremptory norms of environmental law had since emerged that would override the 1977 Treaty between the Parties in that case, it accepted that newly developed environmental norms were relevant for those provisions of that Treaty under which the Parties were to adopt, by agreement, measures for the protection of water quality, nature and fisheries<sup>16</sup> (Fitzmaurice, 1998; McIntyre, 1998; Okowa, 1998). Though such provisions required the adoption of common measures at the bilateral level, rather than the domestic rules and regulations envisaged under Article 41 in the present case, either might be characterised as 'evolving provisions', whose insertion into the relevant treaty might be taken as proof that the Parties "recognized the potential necessity to adapt" and that "the treaty is not static, and is open to adapt to emerging norms of international law".<sup>17</sup> The Court's understanding of Article 41 of the

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<sup>10</sup> Judgment, para. 55.

<sup>11</sup> Ibid.

<sup>12</sup> Judgment, para. 56.

<sup>13</sup> Judgment, para. 59.

<sup>14</sup> Judgment, para. 62.

<sup>15</sup> *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, (1997), ICJ Reports 7.

<sup>16</sup> *Gabčíkovo-Nagymaros* Judgment, *ibid.*, para. 104.

<sup>17</sup> *Gabčíkovo-Nagymaros* Judgment, *ibid.*, para. 112.

1975 Statute is analogous,<sup>18</sup> which is significant for the ongoing development and application of rules and standards under general international law as very many conventional instruments on shared waters (and other shared natural resources) contain such provisions, which should now be implemented so as to ensure the adoption of rules and standards consistent with the emerging, leading-edge norms of international environmental law. Therefore, the ongoing development and evolution of rules and principles of international environmental law and international water law are likely to continue to inform the interpretation of pre-existing water resources agreements. Consider, for example, Article 21 of the 1997 U.N. Watercourses Convention,<sup>19</sup> which would require States to "individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse" and, further, to "consult with a view to arriving at mutually agreeable measures and methods" including the setting of joint water-quality objectives and criteria, establishing techniques and practices to address pollution, and establishing lists of water polluting substances to be controlled.

### Procedural obligations

In respect of the alleged breach by Uruguay of the procedural obligations set out in the 1975 Statute, the Court accepted Argentina's contention that the procedural and substantive obligations contained therein are "inextricably linked",<sup>20</sup> stating that

it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and substantive obligations laid down in the 1975 Statute.<sup>21</sup>

However, despite this 'functional link', the Court was not prepared to accept their "indivisibility"<sup>22</sup> to the extent that a breach of the procedural obligations automatically entails a breach of the substantive obligations, and instead found that the States may be "required to answer for those obligations separately".<sup>23</sup> In support of this conclusion, the Court pointed out that "nowhere does the 1975 Statute indicate that a party may fulfil its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones".<sup>24</sup>

In addition, Argentina also contended that the procedural requirements laid down under the 1975 Statute, together comprising the obligations of informing, notifying and negotiating, "constitute an integrated and indivisible whole in which CARU, as an organization, plays an essential role".<sup>25</sup> It followed, according to Argentina, that Uruguay's initial failure to inform pursuant to Article 7 frustrated all the procedural requirements arising subsequently under Articles 7 to 12 and, further, that informal contacts which Argentina or CARU may have had with the companies behind the projects in question

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<sup>18</sup> The Court states, at Judgment, para. 62, that "[a]rticle 41(a) distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible ("*con adecuación*") with those guidelines and recommendations".

<sup>19</sup> (New York, 21 May 1997). (1997) 36 *ILM* 700. Not yet in force.

<sup>20</sup> Judgment, para. 68.

<sup>21</sup> Judgment, para. 77.

<sup>22</sup> Judgment, para. 72.

<sup>23</sup> Judgment, para. 79.

<sup>24</sup> Judgment, para. 78.

<sup>25</sup> Judgment, para. 68.

could not substitute for formal notification through the Commission.<sup>26</sup> Uruguay had stressed that "the parties may agree, by mutual consent, to use different channels by employing other procedural arrangements in order to engage in co-operation". Having regard to the range and significance of the functions and responsibilities assigned to CARU under the 1975 Statute (including the "drawing up of rules in many areas associated with the joint management of the river"<sup>27</sup> and acting as "a conciliation body in any dispute which may arise between the parties",<sup>28</sup> as well as the fact that CARU is the key body for bilateral cooperation in all areas covered by the Statute, is endowed with legal personality in order to perform its functions, is to be provided with all the necessary resources, information and facilities essential to its operations, has a permanent existence of its own and a secretariat whose staff enjoy privileges and immunities, is empowered to establish subsidiary bodies<sup>29</sup>) the Court concluded that CARU was "far from being merely a transmission mechanism between the parties"<sup>30</sup> and "cannot be reduced to merely an optional mechanism available to the parties which each may use or not, as it pleases".<sup>31</sup> Referring to one of its own previous decisions on a comparable question,<sup>32</sup> the Court found that the information which had reached CARU via the companies concerned or from other non-governmental sources "cannot substitute for the obligation to inform laid down in Article 7, first paragraph, of the 1975 Statute", which is borne by the State Party to the Statute.<sup>33</sup>

In terms of when Uruguay should have informed of the project through CARU and the extent of the information that ought to have been provided, the Court agreed with Argentina's view that CARU should have been informed at a very early stage prior to the authorisation or implementation of the project and that "the content of the obligation to inform must be determined in the light of its objective", i.e. that of "allowing the Commission to 'determine on a preliminary basis', within a very short period of 30 days, whether the plan 'might cause significant damage to the other party'".<sup>34</sup> Relying in part on the due diligence requirements giving practical effect to the customary duty of prevention of transboundary harm,<sup>35</sup> the Court flatly rejected Uruguay's argument that "the requirement to inform ... cannot occur in the very early stages of planning, because there would not be sufficient information available to the Commission for it to determine whether or not the plan might cause significant damage to the other State" and that the point at which the requisite information would be available "may even be after the State concerned has granted an initial environmental authorization".<sup>36</sup> The Court also relied on the wording of the authoritative Spanish version of Article 7 of the 1975 Statute,<sup>37</sup> which distinguishes between a duty to "inform" CARU in order to permit a preliminary determination of whether the plan falls under the cooperation procedure<sup>38</sup> and, if so, a subsequent and more extensive duty to "notify" the other Party, including the technical data to enable it "to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters".<sup>39</sup> The Court therefore

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<sup>26</sup> Judgment, para. 82.

<sup>27</sup> Judgment, para. 92, referring to Article 56 of the 1975 Statute.

<sup>28</sup> *Ibid.*, referring to Article 58 of the 1975 Statute.

<sup>29</sup> See Judgment, paras. 85-93.

<sup>30</sup> Judgment, para. 87.

<sup>31</sup> Judgment, para. 91.

<sup>32</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, para. 150, where the Court found that information which came to Djibouti through the press could not be taken into account as a reason for refusing assistance under Article 17 of the Convention on Mutual Assistance in Criminal Matters between the two countries.

<sup>33</sup> Judgment, para. 110.

<sup>34</sup> Judgment, para. 99, citing Article 7 of the 1975 Statute.

<sup>35</sup> Judgment, paras. 101-102.

<sup>36</sup> Judgment, para. 100.

<sup>37</sup> Judgment, para. 104.

<sup>38</sup> Article 7, para. 1 of the 1975 Statute.

<sup>39</sup> Article 7, para. 3 of the 1975 Statute.

interpreted Article 7 as having required Uruguay "to inform CARU as soon as it is in possession of a plan which is sufficiently developed to enable CARU to make the preliminary assessment", even though "the information provided will not necessarily consist of a full assessment of the environmental impact of the project".<sup>40</sup> It also stated unequivocally that "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 authorization and before the granting of that authorization".<sup>41</sup> On a careful examination of the various communications between Uruguay and CARU, the Court had little difficulty in concluding that Uruguay, "by not informing CARU of the planned works before the issuing of the initial environmental authorizations ... has failed to comply with the obligation imposed on it by Article 7, first paragraph, of the 1975 Statute".<sup>42</sup>

Significantly, the Court recognised the central importance of environmental impact assessments in the context of Uruguay's later and more extensive obligation to notify Argentina of the plan under Article 7, second and third paragraphs, of the 1975 Statute<sup>43</sup> and, further, that this notification must take place prior to issuing the initial environmental authorisations.<sup>44</sup> The Court found that by issuing the initial environmental authorisations and the authorisations for construction prior to formal notification of Argentina, Uruguay had given priority to its own legislation over its procedural obligations under the 1975 Statute,<sup>45</sup> and has thus failed to comply with its conventional obligation to notify.<sup>46</sup>

Regarding a March 2004 'understanding' reached between the Foreign Ministers of both countries after the issuing of the initial environmental authorisation for the CMB (ENCE) plant, the Court accepted that it was "binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith" and, moreover, that the Parties "are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement".<sup>47</sup> However, the Court found that Uruguay had failed to comply with its undertaking under this 'understanding' to transmit certain information, and so the Court felt no need to explore further whether the 'understanding' purported to relieve Uruguay of its obligations under Article 7 or to apply also to the Orion (Botnia) mill.<sup>48</sup> In relation to the High-Level Technical Group (GTAN) established by the Foreign Ministers in May 2005 pursuant to an agreement reached between the Presidents of Argentina and Uruguay "for complementary studies and analysis, exchange of information and follow-up on the effects of the operation of cellulose plants",<sup>49</sup> the Court was similarly unprepared to allow the formal procedural and institutional machinery established under the 1975 Statute to be so easily bypassed. It found that, while the agreement to set up GTAN indeed created

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<sup>40</sup> Judgment, para. 105.

<sup>41</sup> Ibid.

<sup>42</sup> Judgment, para. 111.

<sup>43</sup> Judgment, para. 119, notes 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, ... 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.

<sup>44</sup> Judgment, para. 121. The Court notes, in Judgment, para. 120, that "this notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it".

<sup>45</sup> The Court pointed out, at Judgment, para. 121, that by doing so, Uruguay had "disregarded the well-established customary rule reflected in Article 27 of the Vienna Convention on the Law of Treaties, according to which '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'".

<sup>46</sup> Judgment, paras. 121-122.

<sup>47</sup> Judgment, para. 127.

<sup>48</sup> Judgment, para. 131.

<sup>49</sup> Press release issued jointly by the Foreign Ministries, 31 May 2005.

a negotiating body capable of enabling the Parties to pursue the same objective as that laid down in Article 12 of the 1975 Statute, [it] cannot be interpreted as expressing the agreement of the Parties to derogate from other procedural obligations laid down by the Statute.<sup>50</sup>

Citing Article 57 of the Vienna Convention on the Law of Treaties, concerning suspension of the operation of a treaty, and one of its own earlier decisions,<sup>51</sup> the Court reasoned that Argentina could only give up its procedural rights under the 1975 Statute, give up the possibility of invoking Uruguay's responsibility for any breach of those rights, or consent to suspending the operation of these conventional procedural provisions, by means of a "clear and unequivocal waiver", which it had not provided in the May 2005 agreement.<sup>52</sup> Neither could the agreement to set up GTAN, which referred to "the cellulose plants that are being constructed", be interpreted as an acceptance of their construction by Argentina.<sup>53</sup> Therefore, the Court found that Uruguay had failed to comply with the obligation to negotiate laid down by Article 12 of the 1975 Statute and that it was not entitled to authorise the construction of any integral part of the planned mills and port terminal for the duration of the consultation and negotiation period provided for in Articles 7 to 12,<sup>54</sup> as to do so would not be consistent with the requirement under international law for States to cooperate in good faith<sup>55</sup> and to conduct themselves so that negotiations are meaningful.<sup>56</sup>

Regarding the position of the Parties following the end of the negotiation period provided for in Article 12 of the 1975 Statute, the Court noted that nowhere is a "no construction clause", requiring the State initiating a project to refrain from proceeding until such time as the Court has ruled on the dispute, expressly laid down by the Statute, nor does it follow from its provisions. The Statute only provides for such an obligation to refrain from proceeding during the performance of the procedure laid down in Articles 7 to 12. In finding that Uruguay was not subject to any "no construction obligation", following the period of negotiation, the Court considered the fact that the 1975 Statute only gives it jurisdiction to settle any dispute concerning the Statute's interpretation or application, rather than "the role of deciding in the last resort whether or not to authorize the planned activities".<sup>57</sup> Therefore, the Court found that Uruguay's wrongful conduct, in breaching its procedural obligations to inform, notify and negotiate, did not extend beyond 3 February 2006, the date on which the Parties had determined that the negotiations undertaken within GTAN had failed.<sup>58</sup>

### Substantive obligations

As a preliminary substantive issue, the Court flatly rejected Argentina's contention that "the 1975 Statute adopts an approach in terms of precaution whereby 'the burden of proof will be placed on Uruguay for it to establish that the Orion (Botnia) mill will not cause significant damage to the environment'",<sup>59</sup> finding that, although a precautionary approach may be relevant in the interpretation and application of the Statute, under the well-established principle of *onus probandi incumbit actori* "it

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<sup>50</sup> Judgment, para. 140.

<sup>51</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, (1992) ICJ Reports, at 247, para. 13.

<sup>52</sup> Judgment, para. 141.

<sup>53</sup> Judgment, para. 142.

<sup>54</sup> Judgment, paras. 143-150.

<sup>55</sup> See Judgment, para. 145, where the Court refers to Article 26 of the Vienna Convention on the Law of Treaties and recalls its own dictum in the *Nuclear Tests* cases.

<sup>56</sup> See Judgment, para. 146, where the Court cites *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, (1969) ICJ Reports, at 47, para. 85.

<sup>57</sup> Judgment, para. 154.

<sup>58</sup> Judgment, para. 157.

<sup>59</sup> Judgment, para. 160.



is the duty of the party which asserts certain facts to establish the existence of such facts".<sup>60</sup> Also, in response to conflicting approaches advocated by the Parties to the dispute to the authority and reliability of the studies and reports submitted, in light of their concern about the independence of authors, the comprehensiveness and accuracy of data used, and the clarity and coherence of conclusions drawn, the Court declined to pronounce on any correct approach to take on such evidence, but assured the Parties that it would make its own determination of the facts on the basis of all the evidence placed before it. The Court was, however, critical of the practice whereby experts are presented at the hearings as counsel, saying

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 the Court, instead of being included as counsel in their respective delegations ... so that they may be submitted to questioning by the other Party as well as by the Court.<sup>61</sup>

As regards substantive violations, Argentina argued that "Uruguay had breached its obligations under Articles 1, 27, 35, 36 and 41(a) of the 1975 Statute and 'other obligations deriving from ... general, conventional and customary international law which are necessary for the application of the 1975 Statute'".<sup>62</sup> Examining Article 1, the Court noted that it sets out the purpose of the Statute, i.e. the "optimum and rational utilization" of the river and concluded that

As such, it informs the interpretation of the substantive obligations, but does not by itself lay down specific rights and obligations for the parties. Optimum and rational utilization is to be achieved through compliance with the obligations prescribed by the 1975 Statute for the protection of the environment and the joint management of this shared resource.<sup>63</sup>

The Court clearly linked the attainment of the goal of optimum and rational utilisation to the process of equitable balancing of the interests of the Parties inherent to the principle of equitable and reasonable utilisation, widely accepted as the cardinal rule of general international law applying to shared water resources, stating that

the attainment of optimum and rational utilization 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.<sup>64</sup>

In respect of Article 27, reaffirming the right of each Party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes, the Court emphasised the importance of the related procedural rules to the achievement of an equitable balancing of the interests of the Parties. It also made it abundantly clear that this provision, which appeared to be concerned primarily with economic uses of the shared waters, also requires consideration of environmental factors. The Court stated that Articles 7 to 12 of the 1975 Statute have to be observed by any Party wishing to exercise that right, and that "such utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account".<sup>65</sup>

Regarding the alleged breach of Article 35, requiring the management of the soil and woodland and the use of groundwater so as not to significantly impair the régime of the river or the quality of its waters, the Court found that Argentina had not provided any evidence to support its contention that

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<sup>60</sup> Judgment, para. 165.

<sup>61</sup> Judgment, para. 167.

<sup>62</sup> Judgment, para. 169.

<sup>63</sup> Judgment, para. 173.

<sup>64</sup> Judgment, para. 175.

<sup>65</sup> Ibid.

Uruguay's activities, particularly large-scale eucalyptus planting to supply the Orion (Botnia) mill, would have such impacts.<sup>66</sup> As regards the alleged breach of Article 36 of the 1975 Statute, requiring the Parties to coordinate measures to avoid changes in the ecological balance of the river, the Court found that this obligation fell on both States together to coordinate their steps through CARU, which they had in fact done by means of the promulgation of relevant standards by CARU.<sup>67</sup> In addition, it required the Parties to coordinate the enforcement and observance of such measures. While the Court stressed the "crucial importance" of the due diligence obligation set down under Article 36, it found that Argentina had not convincingly demonstrated Uruguay's refusal to engage in such coordination.<sup>68</sup>

The precise meaning and legal significance of Article 41 of the 1975 Statute, which corresponds broadly with Article 21 of the 1997 U.N. Watercourses Convention, was of central concern to the Court's deliberation on the substantive issues in this case.<sup>69</sup> The Court found that this obligation on the States to adopt rules and measures individually and within their domestic legal systems is quite distinct from, but complimentary to, the cooperative regulatory functions entrusted to CARU under the Statute,<sup>70</sup> and comprises a due diligence obligation as to the conduct of the States, rather than an absolute obligation as to result.<sup>71</sup> In other words, each Party is expected to adopt domestic rules and measures which correspond with applicable international agreements and technical requirements, rather than being expected to ensure in all circumstances complete protection of the aquatic environment and prevention of all aquatic pollution. In addition, the measures adopted by each Party must be appropriate to ensure compliance with the CARU water-quality standards. Therefore, the Court considered that "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" included the rules found in the 1975 Statute, the coordinated rules and technical standards adopted through CARU, and the regulations adopted by each Party within the limits prescribed by Article 41.<sup>72</sup>

It is of immense significance for the ongoing development of a coherent and practically applicable corpus of international environmental law that, in the context of this due diligence obligation to protect and preserve the aquatic environment set out under Article 41, the Court did not hesitate in finding that Uruguay was obliged to carry out an environmental impact assessment (EIA) of the mill projects. The Court stated emphatically that

in order for the Parties properly to comply with their obligations under Article 41(a) and (b) of the 1975 Statute, *they must, for the purposes of protecting and preserving the aquatic environment* with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment.<sup>73</sup>

Citing its own recent case law to the effect that treaty terms are, in some situations, capable of evolving so as to make allowance for developments in international law,<sup>74</sup> the Court held that the general obligation to protect and preserve under Article 41(a)

<sup>66</sup> Judgment, paras. 179-180.

<sup>67</sup> Judgment, para. 184, referring, in particular, to the ecological standards found in Sections E3 and E4 of the CARU Digest.

<sup>68</sup> Judgment, paras. 188-189.

<sup>69</sup> Article 41(a) places a general obligation on the Parties "to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies". Article 41(b) and (c) require that the Parties not reduce their technical requirements or penalties for violation and that they inform one another of any rules which they plan to introduce.

<sup>70</sup> Under Article 56.

<sup>71</sup> Judgment, para. 195-197.

<sup>72</sup> Judgment, para. 200.

<sup>73</sup> Judgment, para. 204 (emphasis added).

<sup>74</sup> Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009, para. 64.

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 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. 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 régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.<sup>75</sup>

However, the Court did not identify any minimum core components required under general international law for such an assessment to be considered adequate. Though the 1991 Espoo Convention does set down certain essential elements of a transboundary EIA,<sup>76</sup> the Court pointed out that the disputing States are not parties to this instrument and, further, that Principle 5 of the 1987 UNEP Goals and Principles of Environmental Impact Assessment, which are relevant as technical guidelines, merely provide that the "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance".<sup>77</sup> Therefore, the specific content of an EIA "is for each State to determine in its domestic legislation or in the authorization process for the project".<sup>78</sup> However, the Court was quite unequivocal in its finding that "an environmental impact assessment must be conducted prior to the implementation of a project".<sup>79</sup>

In the specific context of this particular dispute, the Court found it necessary to consider two aspects of the conduct of the EIA in order to assess its adequacy. Firstly, in relation to Argentina's claim that the EIA contained no analysis of alternatives to the ecologically sensitive site selected for the Orion (Botnia) mill, the Court found, largely on the basis of the International Finance Corporation's 2006 Final Cumulative Impact Study, that alternative sites had in fact been studied,<sup>80</sup> and also that the location chosen was suitable, as the mill's effluent discharges had not exceeded the limits set down in the CARU water-quality standards, which were assumed to "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".<sup>81</sup> Secondly, as regards Argentina's contention that the EIA failed, in breach of the requirements of international law, to consult the populations likely to be affected by the project, the Court took the view that "no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina"<sup>82</sup> and, anyway, that "Uruguay did undertake activities aimed at consulting the affected populations, both on the Argentine and the Uruguayan sides of the river".<sup>83</sup>

Another key substantive question arising in respect of the obligations set down in Article 41 of the 1975 Statute concerns the adequacy of the production technology employed in the Orion (Botnia) mill. Argentina argued that, under Article 5(d) of the 2001 Stockholm Convention on Persistent Organic

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<sup>75</sup> Judgment, para. 204 (emphasis added).

<sup>76</sup> 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context, 1989 UNTS 309. This United Nations Economic Commission for Europe (UNECE) Convention entered into force in 1997 and requires the Parties to carry out an environmental impact assessment of projects likely to have significant adverse transboundary impacts and to notify and consult each other in respect of all such projects. An amendment to the Convention was adopted in Sophia in 2001 which, once in force, will open the Convention to accession by UN Member States that are not members of the UNECE. Appendix II of the Espoo Convention sets out the minimum information which should be contained in the environmental impact assessment documentation including, for example, a description of reasonable alternatives (locational or technological) and a description of the mitigation measures needed to keep adverse environmental impacts to a minimum.

<sup>77</sup> Adopted by the UNEP Governing Council at its 14<sup>th</sup> Session, 14/25 Dec. 1987 (UNEP/WG.152/4 Annex (1987)).

<sup>78</sup> Judgment, para. 205.

<sup>79</sup> Ibid.

<sup>80</sup> Judgment, para. 210.

<sup>81</sup> Judgment, para. 214.

<sup>82</sup> Judgment, para. 216.

<sup>83</sup> Judgment, para. 217.

Pollutants (POPs),<sup>84</sup> which it claimed was applicable by virtue of the 'referral clause' in Article 41(a), Uruguay was obliged to require the use of "best available techniques" (BAT). Specifically, Argentina contended that Uruguay failed to do so due to the absence of any tertiary treatment of effluent and the lack of an empty emergency basin to contain effluent spills. Without accepting the applicability of the POPs Convention, the Court found no evidence that the mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced.<sup>85</sup> In so doing, it took account of the lack of evidence to suggest that the mill was not in compliance with the standards required under the 1975 Statute, the CARU Digest, or the applicable regulations of the Parties, as well as the fact that the process employed by the mill is the most widely applied production method globally, according to the European Commission's December 2001 *Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry*.

The final substantive matter to be addressed by the Court arising under the Article 41 duty "to protect and preserve the aquatic environment" concerned the actual impact of discharges from the mill on the quality of the waters of the river, specifically in terms of dissolved oxygen, total phosphorus, phenolic substances, nonylphenols and nonylphenol ethoxylates, and dioxins and furans, and in terms of the effects of discharges on biodiversity. In finding that Argentina's allegations of non-compliance both in respect of the chemical substances and parameters listed above and in terms of biodiversity impacts remained unproven,<sup>86</sup> the Court examined the evidence in some detail, suggesting that "countries planning projects that may affect shared natural resources will be held to a high standard of due diligence to protect those resources from harm" (Payne, 2010). Regarding Argentina's claim that the Orion (Botnia) mill has caused air pollution, the Court did not find any clear evidence that airborne emissions have introduced harmful effects into the aquatic environment, thereby bringing them within the scope of Article 41 and the jurisdiction of the Court.<sup>87</sup>

## Outcomes

The Court, therefore, arrived at a finding of non-compliance by Uruguay with its procedural obligations under the 1975 Statute, but found

no conclusive evidence 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 ... Consequently, ... that Uruguay has not breached its obligations under Article 41.<sup>88</sup>

Significantly, despite Argentina's argument that "the procedural obligations and substantive obligations laid down in the 1975 Statute are closely related and cannot be severed from one another for the purposes of reparation", and its request that the mill be dismantled on the basis that "*restitutio in integrum* is the primary form of reparation for internationally wrongful acts" under international law,<sup>89</sup> the Court considered that

its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina ... [a]s 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.<sup>90</sup>

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<sup>84</sup> 22 May 2001, available at <http://chm.pops.int/Convention/tabid/54/language/en-GB/Default.aspx>

<sup>85</sup> Judgment, para. 225.

<sup>86</sup> Judgment, paras. 238-262.

<sup>87</sup> Judgment, para. 264.

<sup>88</sup> Judgment, para. 265.

<sup>89</sup> Judgment, para. 270.

<sup>90</sup> Judgment, para. 269.

Having regard to its own earlier statements on the need to avoid disproportion in ordering reparation and on when satisfaction or compensation might represent a more appropriate form of reparation than restitution, the Court found that

As Uruguay was not barred from proceeding with the construction and operation of the Orion (Botnia) mill after the expiration of the period for negotiation and as it breached no substantive obligation under the 1975 Statute, ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations.<sup>91</sup>

Likewise, the Court could not uphold Argentina's claim for compensation in respect of alleged economic injury in the absence of any breach by Uruguay of its substantive obligations.<sup>92</sup> Neither would the Court, in the absence of any special circumstance in the case, grant Argentina's request for an order requiring Uruguay to provide guarantees that it will in future refrain from hindering application of the Statute, in particular the consultation procedure, as it felt that Uruguay's good faith must be presumed.<sup>93</sup> The Court also refused Uruguay's request, even if it were to prove admissible, for judicial confirmation of its "right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute", as it regarded this request to be "without practical significance" in the absence of any breach of substantial obligations.<sup>94</sup> The Court also stressed that the States' obligation to cooperate with each other imposed under 1975 Statute "encompasses ongoing monitoring of an industrial facility, such as the Orion (Botnia) mill".<sup>95</sup>

## ANALYSIS

### Link between procedural and substantive obligations

In acknowledging the 'functional link' between procedural and substantive obligations intended to ensure the equitable and sustainable management of a shared natural resource, the Court went some way towards clarifying the respective roles of the interrelated hierarchy of substantive and procedural rules commonly found in treaty regimes and, by implication, in general international law. While the well-established principle of equitable and reasonable utilisation, and the closely related duty of prevention of transboundary harm, sit atop this hierarchy, the generality of the former and the due diligence nature of the obligations contained in the latter require that they must be made normatively operational by means of a number of procedural requirements, including the duty to notify, the duty to consult and negotiate, and the duty to exchange information, obligations commonly grouped together under the duty to cooperate. The Court notes that "the two categories of obligations mentioned above complement one another perfectly, enabling the parties to achieve the object of the Statute which they set themselves in Article 1", (i.e. "the optimum and rational utilization of the River Uruguay") and, further, that

whereas the substantive obligations are frequently worded in broad terms, the procedural obligations are narrower and more specific, so as to facilitate the implementation of the 1975 Statute through a process of continuous consultation between the parties concerned.<sup>96</sup>

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<sup>91</sup> Judgment, para. 275.

<sup>92</sup> Judgment, para. 276.

<sup>93</sup> Judgment, para. 278.

<sup>94</sup> Judgment, para. 280.

<sup>95</sup> Judgment, para. 281.

<sup>96</sup> Judgment, para. 77.

The Court recognised the central significance of cooperative machinery, including procedural requirements and institutional arrangements such as CARU, for both the principle of equitable and reasonable utilization,<sup>97</sup> which it once again linked to the concept of sustainable development,<sup>98</sup> and the duty to prevent transboundary damage.<sup>99</sup> Indeed, this 'proceduralisation' of international water law might be regarded as indicative of the growing maturity of this body of rules.

However, by allowing for compliance with these related categories of obligations to be examined separately, the Court acknowledges that procedural and substantive requirements might become decoupled, as in the present case where clear breach of procedural rules was found not in fact to have resulted in transboundary harm or any inequitable or unreasonable interference with Argentina's interests in utilising the resources of the Uruguay river. In such a case the responsibility of the State in breach of its procedural obligations will arise without breach of its substantive obligations. Conversely, where a State initiating a project with the potential to cause transboundary harm discharges all its procedural obligations in respect of that project but harm nevertheless occurs, that State will have met the procedural elements of the due diligence standard of conduct required for compliance with its substantive obligations. It will only remain, for the purposes of establishing the responsibility of that State, to examine whether it met the purely substantive elements, such as the adoption and enforcement of appropriate domestic legal controls. Full compliance with the applicable procedural obligations will, therefore, go some way towards establishing that a State has complied with its substantive obligations. The Court's finding of a breach of procedure but no finding of a breach of due diligence standards required under substantive rules<sup>100</sup> suggests that procedural rules are of twofold significance, as States must first ensure compliance with procedural obligations per se even where no actual harm occurs but, secondly, where harm does occur, breach of procedural rules will constitute a key element in establishing a failure to meet the due diligence standards required under the customary duty to prevent significant transboundary harm. Therefore, compliance with procedural requirements is a central element of due diligence for the purposes of satisfying substantive duties.

By stressing the role of CARU in almost all aspects of the implementation of the substantive provisions of the 1975 Statute including, in addition to its procedural functions under Articles 7-12, that of rule-making in respect of conservation and preservation of living resources, pollution prevention and monitoring, and the coordination of actions of the Parties, the Court has emphasised equitable and reasonable utilisation as an interstate process rather than a clear normative rule which dictates a particular outcome.<sup>101</sup> Such judicial clarification is welcome in respect of this normatively vague, flexible and commonly misunderstood international obligation. Indeed, in its concluding paragraph, the Court also pointed out that "the Parties have a long-standing and effective tradition of co-operation and co-ordination through CARU", by means of which they "have established a real *community of interests* and rights in the management of the River Uruguay and in the protection of its environment",<sup>102</sup> thus linking the so-called 'community of interests' approach, inherent to equitable and reasonable utilisation, to the duty to cooperate (McIntyre, 2007). Clearly, this has significant implications for international water law generally, beyond the interpretation and application of the 1975 Statute of the Uruguay river.

Consistent with the significance attributed to procedural rules, the Court would appear to have emphasised the role of institutional arrangements, without which it is very difficult to ensure effective procedural cooperation. It stressed, in particular, the authority of formally instituted international organisations, such as river basin organisations (RBOs) like CARU, "governed by the 'principle of

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<sup>97</sup> Judgment, para. 75-76.

<sup>98</sup> See *Gabčíkovo-Nagymaros Case*, *supra*, n. 15, Judgment, para. 140 and Separate Opinion of Vice-President Weeramantry, Part A.

<sup>99</sup> Judgment, para. 77.

<sup>100</sup> Judgment, para. 265.

<sup>101</sup> Judgment, para. 176.

<sup>102</sup> Judgment, para. 281 (emphasis added).

speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them".<sup>103</sup> The Court took account of a number of features of CARU to determine that it "plays a central role in the 1975 Statute and cannot be reduced to merely an optional mechanism available to the parties".<sup>104</sup> These included the fact that it is endowed with legal personality, that the parties have undertaken to provide it with the necessary resources, that it has a permanent existence of its own, that it exercises rights and bears duties, that it has a secretariat whose staff enjoy privileges and immunities, and the scale and diversity of the functions assigned to it under the Statute.<sup>105</sup> Indeed, the list of features and functions examined by the Court could be taken as guidance on how effective cooperative institutional machinery for shared waters should be established<sup>106</sup> (Dombrowsky, 2007).

The Court was not prepared to accept that the ad hoc arrangements for negotiation provided under the agreement to set up GTAN could "be interpreted as expressing the agreement of the parties to derogate from other procedural obligations laid down by the Statute".<sup>107</sup> Thus, the Court was not prepared to allow formally established institutional arrangements to be easily circumvented. In addition, the Court very clearly linked the functioning of cooperative institutions to the effective fulfilment of substantive obligations. It stated that the overall objective of optimum and rational utilisation "must also be ensured through CARU, which constitutes 'the joint machinery' necessary for its achievement"<sup>108</sup> and, further, that " [i]n addition to its [procedural] role in that context, the functions of CARU relate to almost all aspects of the implementation of the substantive provisions of the 1975 Statute".<sup>109</sup> This understanding of the significance of joint institutions for cooperation corresponds with that of such commentators as Thomas Franck, who observes that "sophist principles", such as that of equitable and reasonable utilisation, "usually require an effective, credible, institutionalized, and legitimate interpreter of the rule's meaning in various instances" (Franck, 1995).

### **Equitable and reasonable utilisation and sustainable development**

The Court has also effectively confirmed, or even raised, the significance of environmental considerations within this balancing process, both by stressing the substantive environmental functions of CARU and by emphasising the link between the principle of equitable and reasonable utilisation and the goal of sustainable development. In its consideration of the normative implications of Article 27 of the 1975 Statute, which reaffirms the right of each Party to use the waters of the river within its jurisdiction for domestic, sanitary, industrial and agricultural purposes, the Court took the view 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.<sup>110</sup>

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<sup>103</sup> Judgment, para. 89.

<sup>104</sup> Judgment, para. 91.

<sup>105</sup> Judgment, paras. 87-93.

<sup>106</sup> For a list of the possible functions of joint water institutions, see Article 9(2) of the 1992 UNECE Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, (1992) 31 *ILM* 1312.

<sup>107</sup> Judgment, para. 140.

<sup>108</sup> Judgment, para. 173. See also, Judgment, para. 75.

<sup>109</sup> Judgment, para. 176.

<sup>110</sup> Judgment, para. 177.

This statement echoes the Court's first reference to the "concept of sustainable development" in the *Gabčíkovo-Nagymaros* case<sup>111</sup> and the dicta of Vice-President Weeramantry in his Separate Opinion in *Gabčíkovo-Nagymaros*, where he considered sustainable development "to be more than a mere concept, but as a principle with normative value ... fundamental to the determination of the competing interests" in that case.<sup>112</sup> Numerous commentators, in trying to reconcile this reliance on the concept of sustainable development with the core principle of international water resources law, suggest that the principle of equitable and reasonable utilisation 'operationalises' the notion of sustainable development in the specific context of shared freshwater resources (Kroes, 1997; Wouters and Rieu-Clarke, 2001; McIntyre, 2007). Indeed, the Court would appear to have emphatically confirmed this position in the present case by stating 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".<sup>113</sup> Thus the Court has made it quite clear that the requirements of equitable and reasonable utilisation correspond to those of sustainable development, including all of the far-reaching norms and standards relating to environmental and ecosystems protection attributed to the latter. It has left no room for doubt as to the central significance of procedural rules of cooperation for equitable and reasonable utilisation and, by extension, sustainable development. The Court found, in relation to the right of each Party to use the waters of the river under Article 27, that the procedural obligations arising from Articles 7 to 12 of the 1975 Statute have to be observed by any Party wishing to exercise that right, and that "such utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account".<sup>114</sup>

The Court lent support to the customary status of the precautionary principle through its willingness to infer precaution into an instrument which pre-dates the emergence, in the late-1980s and early 1990s, of the precautionary principle in the discourse of international environmental law. Consistent with common understanding of the precautionary principle, the Court rejected Argentina's radical contention that it implies a reversal of the burden of proof, but accepted that "a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute".<sup>115</sup> Similarly, it would appear to have supported the so-called 'ecosystems approach' to environmental protection, itself a largely precautionary device, by placing marked emphasis on ecological protection. The Court stated, for example, that

[t]his vigilance and protection 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.<sup>116</sup>

This statement builds upon the Court's emphasis in the *Gabčíkovo* case on the "often irreversible character of damage to the environment" and "awareness of the vulnerability of the environment".<sup>117</sup>

<sup>111</sup> In *Gabčíkovo-Nagymaros* Judgment, *supra*, n. 15, para. 140, the Court states in the context of another dispute over the use and environmental protection of the shared waters of an international river that "[t]his need to reconcile economic development with the protection of the environment is aptly expressed in the concept of sustainable development".

<sup>112</sup> Separate Opinion of Vice-President Weeramantry, *ibid.*, at 1.

<sup>113</sup> Judgment, para. 177.

<sup>114</sup> *Ibid.*

<sup>115</sup> Judgment, para. 164.

<sup>116</sup> Judgment, para. 188.

<sup>117</sup> *Gabčíkovo-Nagymaros* Case, *supra*, n. 15, Judgment, para. 112.



### **Due diligence and the duty of prevention of transboundary harm**

The Judgment does much to clarify the nature and extent of the due diligence requirements imposed upon a State under the customary duty of prevention of transboundary harm. The Court placed very considerable emphasis on one particular aspect of due diligence, i.e. the requirement to inform a neighbouring State as soon as possible of a project or activity with potential transboundary effects.<sup>118</sup> The Court examined the requirements of the customary rule of prevention in order to better understand the precise content of the conventional arrangements under the 1975 Statute<sup>119</sup> and found that, essentially, a State must inform "as soon as it is in possession of a plan which is sufficiently developed to permit a preliminary assessment" or "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".<sup>120</sup> Though this finding was based on the original and authoritative Spanish text of Article 7<sup>121</sup> and though there was no finding of a breach of due diligence requirements in this case due to the absence of transboundary damage,<sup>122</sup> the implications are obvious. Clearly, it is only by notifying States likely to be affected by a planned project or activity that the State of origin can hope to become fully informed of its potential consequences, and it is now well established that due diligence requires "reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them" (International Law Commission, 2001; Barnidge, 2006). It would appear, therefore, that in order to ensure the meaningful and effective application of international environmental rules to planned or new projects or activities, States should understand the duty to notify as comprising two stages: initial notification as soon as a plan is received; and subsequent detailed notification on the basis of an EIA study.

The Court usefully elaborated upon another aspect of the due diligence requirements of the duty of prevention in its discussion of the requirement for "good faith" (Liguori, 2010) in the conduct of the negotiations provided for under Article 12 of the 1975 Statute.<sup>123</sup> The Court found that by authorising and implementing the planned activity without waiting for the negotiations to be brought to a conclusion, Uruguay had failed in its "obligation so to conduct themselves that the negotiations are meaningful".<sup>124</sup> While emphasising that "an obligation to negotiate does not imply an obligation to reach an agreement",<sup>125</sup> the Court found that Uruguay had thus breached the requirement to perform its procedural obligations in good faith, thereby helping to elaborate upon the nature of the procedural obligations ubiquitous in conventional arrangements and required under customary international law.

### **The customary requirement for transboundary EIA**

By far the most significant aspect of this judgment for the development of international water law, and of international environmental law generally, is its finding that EIA is absolutely essential for effective notification of neighbouring States, as required under international law, in respect of planned activities or projects which might cause transboundary harm.<sup>126</sup> Consistent with its understanding of the interrelated role of procedural and substantive obligations in this area, the Court also found that States must conduct an EIA in order to satisfy the due diligence requirements of the duty of prevention.

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<sup>118</sup> Judgment, paras. 101-105.

<sup>119</sup> Judgment, para. 101.

<sup>120</sup> Judgment, para. 105.

<sup>121</sup> Judgment, para. 81.

<sup>122</sup> See, for example, Judgment, para. 265.

<sup>123</sup> See, Judgment, paras. 139 et seq.

<sup>124</sup> Judgment, paras. 145-149.

<sup>125</sup> Judgment, para. 150.

<sup>126</sup> Judgment, paras. 119-121.

Indeed, the Court described the obligation to conduct an EIA as a "requirement under general international law"<sup>127</sup> and stated it in such a way as to leave no room for doubt that it relates generally to the duty of prevention of significant transboundary harm under customary international law, as endorsed in countless instruments, including the Article 7 of the UN Watercourses Convention and Rio Principle 2 (McIntyre, 2007). More specifically, the Court has expressly identified the undertaking of an EIA as a non-negotiable due diligence requirement arising under the duty of prevention.<sup>128</sup> Therefore, the Court has now confirmed what many commentators had long suspected (Dupuy, 1991; McIntyre, 2007), i.e. that the transboundary aspects of the EIA study process play an absolutely pivotal role in facilitating realisation of many of the procedural rights and duties arising under the rubric of the duty to cooperate in good faith, including the duty to notify, consult and, if necessary, enter into negotiations with States likely to be affected. These procedural cooperative duties are in turn central to the requirements of due diligence arising under the general customary duty to prevent transboundary harm. Helpfully, the Court has also made clear the origins of the obligation to conduct a transboundary EIA, basing it on the duty of prevention rather than the 'non-discrimination' principle (Knox, 2002), under which it would be unlawful for the State proposing a project or activity to study and seek to avoid adverse impacts for its own citizens while ignoring such impacts for citizens for neighbouring States. Of course, it also links the requirement for EIA indirectly to the principle of equitable and reasonable utilisation.<sup>129</sup>

However, it is somewhat disappointing that, while finding that an EIA is absolutely essential for effective notification, the Court was not prepared to specify the minimum scope and content of the assessment required under international law, finding instead that "it is for each State to determine in its domestic legislation ... the specific content of the environmental impact assessment required in each case".<sup>130</sup> There is surely a risk that this might deprive the new customary requirement of much of its useful effect. The Court noted that "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",<sup>131</sup> and one might have assumed that the real value of EIA is that it provides an almost universally accepted framework methodology for studying and communicating precisely those aspects of a planned project or activity which are likely to prove contentious and necessary for effective decision making.

Though the Espoo Convention was clearly not applicable as between the States in this dispute, the Court could easily have treated it as providing an international benchmark for transboundary EIA, especially considering its status as an international instrument specifically addressed to this issue and the inclusion of Appendix II, setting out in some detail the minimum information to be included in transboundary EIA documentation.<sup>132</sup> The eight categories of information listed in Appendix II are less likely to be contentious as they are the product of a process of intense multilateral negotiation and are likely to benefit from ongoing clarification by virtue of the practice of States party to the Convention. It

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<sup>127</sup> Judgment, para. 204.

<sup>128</sup> Judgment, paras. 204 and 121.

<sup>129</sup> Judgment, para. 177 links procedural obligations generally, of which EIA is a key component, to the principle of equitable and reasonable utilisation, stating: "such utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account".

<sup>130</sup> Judgment, para. 205.

<sup>131</sup> Judgment, para. 119. In addition, Article 7, third paragraph, of the 1975 Statute stipulates that "[s]uch notification shall describe the main aspects of the work and, where appropriate, how it is to be carried out and shall include 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".

<sup>132</sup> These include: a description of the proposed activity and its purpose; a description of reasonable alternatives; a description of the environment likely to be affected; a description of the potential environmental impact and its significance; a description of mitigation measures; an indication of the methodology and data used; an indication of gaps in knowledge and uncertainties; an outline for monitoring and management programmes; and a non-technical summary.

is all the more confusing as one must assume that the thresholds established under Appendix I of the Espoo Convention for activities requiring transboundary EIA would be considered relevant, particularly as they include large dams and reservoirs, large-scale groundwater abstraction and, appropriately in the present case, "[p]ulp and paper manufacturing of 200 air-dried metric tonnes or more per day". Indeed, Article 3(2) of the Convention even provides some guidance on what might be involved in the initial or preliminary notification recognised as necessary by the Court.<sup>133</sup>

Even more disappointing and confusing is the Court's finding that "no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina"<sup>134</sup> In addition to Articles 2(6) and 3(8) of the Espoo Convention, to which neither State is a Party, Argentina also invoked Principles 7 and 8 of the UNEP Goals and Principles and Article 13 of the International Law Commission's (ILC) 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. Confusingly, the Court earlier appeared to consider the former UNEP instrument relevant in rejecting the existence of a binding legal requirement to consider alternatives in the conduct of an EIA.<sup>135</sup> The Commentary to Article 13 of the ILC Draft Articles makes it quite clear that, in addition to the provision of information to the public, it would require States "to ascertain the view of the public" likely to be affected, as "[w]ithout that second step, the purpose of the article would be defeated". Taking into account the ILC's role in the 'codification' and 'progressive development' of international law, and its clear bias towards the former role (Hafner and Pearson, 2000), the latter instrument should have proven highly persuasive to the Court as regards the legal basis of a requirement for public consultation within a customary process of transboundary EIA. Curiously, in the context of its discussion of the required scope and content of an EIA, the Court stated, quite firmly, that "once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken".<sup>136</sup> This requirement would appear to build upon Vice-President Weeramantry's statements in *Gabčíkovo-Nagymaros* regarding the need for continuous EIA, but it is disappointing that the Court did not feel able to endorse certain of the better established and almost universally accepted facets of an adequate EIA. Therefore, it is not at all clear why the generality and broad acceptance of the practice of EIA, which establishes it as a requirement under general international law, should not also inform the minimum content of an EIA necessary to ensure that the process can effectively perform its key role under customary international environmental law. In the absence of such guidance from the Court, the content of the transboundary aspects of an EIA will often be dictated by the safeguard policies of multilateral development banks and other international financial institutions involved in funding projects with the potential to cause transboundary harm, thus cementing the well-established role of such institutions as informal agents for compliance with international environmental law.<sup>137</sup>

<sup>133</sup> Article 3(2) of the Espoo Convention provides that:

Notification shall contain, inter alia:

- a) Information on the proposed activity, including any available information on its possible transboundary impact;
- b) The nature of the possible decision; and
- c) An indication of a reasonable time within which a response ... is required, taking into account the nature of the proposed activity.

Article 3(2) further provides that the notification may include the information set out in Article 3(5), which includes:

- a) Relevant information regarding the environmental impact assessment procedure, including an indication of the time schedule for transmittal of comments; and
- b) Relevant information on the proposed activity and its possible significant adverse transboundary impact.

<sup>134</sup> Judgment, para. 216.

<sup>135</sup> Judgment, para. 210.

<sup>136</sup> Judgment, para. 205.

<sup>137</sup> See Judgment, para. 210, where the Court cites the IFC's Final Cumulative Impact Study as evidence of the study of alternatives, and para. 218, where it cites consultants contracted by the IFC as evidence of public consultation.

It is also quite curious that the Court made no mention whatsoever of the 1997 UN Watercourses Convention in the course of its Judgment. It would have been helpful as regards the coherent development of customary international law on shared freshwater resources if the Court could have clarified beyond any doubt that the newly confirmed customary requirement for transboundary EIA was also inherent to the detailed procedural requirements set out under the Convention. Despite the Court's findings in respect of its narrow jurisdictional remit in this case, due to the absence of referral clauses in the 1975 Statute, a more detailed examination of the practice of States, on which its conclusions on EIA were based, would have allowed it to refer to the Convention and take this rare opportunity to pronounce on the customary status of many of its provisions and, more importantly, to elaborate on their practical application.

## CONCLUSION

This extensive and carefully considered judgment, handed down by the world's most respected and authoritative international judicial body, does much to shed light on the nature, structure and practical application of the rules of international water resources law. First of all, it clarifies the nature of the relationship between the procedural and informational requirements which are routinely included in international water resources agreements and can be considered part of generally applicable customary international law as elements of the general duty to cooperate, and the key substantive rules of international water law, i. e. the principle of equitable and reasonable utilisation and the duty to prevent significant transboundary harm. It is now abundantly clear that such procedural obligations are absolutely central to the former principle, which must be regarded as a participative process rather than as a clear and definitive rule of law which can determine the equitable and reasonable allocation of waters or their use. It is equally clear that compliance with the key procedural and informational requirements, though required in its own right, also comprises a key element in satisfying the due diligence requirements of the duty of prevention.

Further, recognising the central unifying role of the procedural mechanism of EIA in ensuring adequate notification and the possibility of meaningful consultation and negotiation, the Court has for the first time confirmed that EIA taking account of transboundary impacts is now a generally applicable requirement of customary international law. In addition, the Court has reaffirmed the overlap between the principle of equitable and reasonable utilisation, the universally acknowledged primary rule of international water resources law, and the general objective of sustainable development. This ought to remove any remaining doubts as to the centrality of environmental concerns to the process of equitable balancing of interests, which lies at the heart of the former principle, and as to the relevance and applicability of the rich corpus of rules, principles and mechanisms of international environmental law, which have evolved in recent years.

By recognising the potential role of emerging norms of international environmental law in informing the interpretation of pre-existing water resources agreements, the Court has allowed for the complex and multilayered morass of rules of international water law to continue to evolve in order to meet the many grave challenges it will be called upon to address in the coming years.

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