

COMMENTARY

Pulp Mills on the River Uruguay

(or not, as the case may be)

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1. APPLICATION AND REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

On 4 May 2006, Argentina filed an application for the indication of provisional measures against Uruguay for the alleged breach by Uruguay of obligations under the 1975 Statute of the River Uruguay (hereinafter the “1975 Statute”). The 1975 Statute was signed by Argentina and Uruguay and entered into force in 1976. In its Application, Argentina asserted that this breach has arisen from “the authorization, construction and future commissioning of two pulp mills on the River Uruguay”, with reference in particular “to the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river”. The 1975 Statute was adopted in accordance with Article 7 of the 1961 Treaty defining the boundary on the River Uruguay between Argentina and Uruguay, which provided for the establishment of a joint regime for the use of the river. The main purpose of the 1975 Statute was to create joint machinery necessary for the optimal and rational utilisation of the part of the River Uruguay that constitutes their common boundary. Moreover, it has environmental aims such as conservation, utilisation and development of other natural resources, the prevention of pollution and the liability resulting from damage inflicted as a result of pollution. The Statute provides for an “Administrative Commission of the River Uruguay” (the “CARU”), with regulatory and coordination functions. According to Argentina, the Statute provides for an obligatory procedure for prior notification and consultation through CARU for any Party planning to carry out works liable to affect navigation, the regime of the river or the quality of its waters.

Argentina objects against the unilateral authorisation by Uruguay of the Spanish company ENCE to construct a pulp mill – the “Celulosa de M’Bopicuá”

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(“CMB” project) – and claims that the notification and consultation procedure was breached, in spite of many protests submitted to the Government of Uruguay and to CARU. Argentina asserts that the situation was made worse in 2005 when the Finnish company Oy Metsä-Botnia AB (“Botnia”) was authorised to construct a second pulp mill, the “Orion mill”, in the vicinity of the CMB plant and by permitting Botnia in the same year to erect a port facility for the exclusive use of the Orion mill without following the proper procedures provided by the 1975 Statute. Argentina’s Application requests the Court to declare that briefly speaking Uruguay breached its obligations stemming from the 1975 Statute as well as other rules of international law regarding measures on the optimal and rational utilisation of the River Uruguay, regarding the obligation of prior notification to CARU and to Argentina, and in respect to the conservation of biodiversity and the prevention of pollution.

2. ARGUMENTS OF THE PARTIES AT THE HEARINGS

The hearings, took place on 8 and 9 June 2006. Argentina relied on its previous arguments and pleaded that Uruguay breached its obligation not to cause environmental pollution or consequential economic losses, for example to tourism, and authorised works against which Argentina has objections. It also asserted that such a project would represent “real and present damage” and “a serious risk of irreparable prejudice to the rights in issue”.

Uruguay stated that it did not dispute that Article 60 of the 1975 Statute constituted a *prima facie* basis for the jurisdiction of the Court but only as far as it related to the indication of provisional measures in relation to Argentina’s claims concerning the 1975 Statute. Uruguay argued that disputes such as those concerning tourism, urban and rural property values, etc., and those regarding other aspects of environmental protection in transboundary relations between the two States, fell outside the Court’s jurisdiction. It submitted that it had complied fully with the obligation of informing Argentina of the existence of the pulp mill projects and that it was the first time in 31 years that Argentina had claimed a procedural right under the Statute and decided to block Uruguay from initiating projects during the procedural stages. It also asserted that the dispute between Uruguay and Argentina over the pulp mills had in fact been settled by an agreement concluded in 2004, which stipulated that the CMB mill could be built according to the Uruguayan plan. According to that Agreement, Uruguay would provide Argentina with information regarding its specifications and operation and CARU would monitor the quality of the river water once the mill became operational in order to ensure compliance with the Statute. Moreover, according to Uruguay there is no current or imminent threat to any right of Argentina. Uruguay also assured the Court of its ongoing commitment to respect the provisions of the 1975 Statute.

3. THE COURT'S REASONING

The Court observed that in dealing with a request for provisional measures, it was not necessary to satisfy itself that it has jurisdiction on the merits of the case. However, it would not indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to constitute a basis on which the jurisdiction of the Court may be based. The Court observed that environmental concerns are taken by the Court very seriously as evidenced in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996) and in its Judgment in the *Case concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) (1997). Argentina, however, has not persuaded the Court that the construction of the mills presents a risk of irreparable damage to the environment, nor has it sufficiently demonstrated that the construction of the mills currently constitutes a threat of irreparable economic and social damage, or provided evidence suggesting that any pollution resulting from the commissioning of the mills would be of a nature to cause irreparable damage to the River Uruguay. The Court found, in view of the above, and the ongoing commitment of Uruguay to comply with the 1975 Statute, that the circumstances of the case are not such as to require the indication of a provisional measure ordering the suspension by Uruguay of the authorisation to construct the pulp mills or the suspension of the actual construction works.

4. SOME REMARKS ON THE CASE AND THE ORDER OF THE COURT

This is a very interesting case as it combines aspects of international water law and international environmental law with the requirements of sustainable development. In many ways the case is similar to the *Gabčíkovo-Nagymaros Project* where these aspects were also present.¹

In paragraph 80 of the Order, the Court noted that:

...the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development, whereas it is in particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development; whereas from this point of view, account must be taken of the need to safeguard the continued conservation of the river environment and of the rights of economic development of the riparian States;....

This case is a very good example of the practical application of the 1997 United Nations Convention on the Non-Navigational Uses of International Watercourses. This Convention contains both substantive rights (as to the equitable utilisation of international watercourses) and procedural rights (such as a right to be notified of planned measures) of States in relation to the utilisation of a common watercourse. This Convention also has provisions on the protection of the riparian environment,

¹ Malgosia Fitzmaurice, "General Principles Governing the Cooperation between States in Relation to Non-Navigational Uses of International Watercourses", 14 *Yearbook of International Environmental Law* (2003), pp. 3-47.

a major issue in this case. In the 1957 *Lake Lanoux Arbitration* (Spain v. France), similar substantive and procedural rights of States were discussed, as well as the extent of a State's unilateralism in adopting decisions, which may affect the other State. There is no doubt that when this case will have been decided on the merits it will enrich the growing body of international water law. But numerous other interesting questions are raised here (some of them are also discussed in the *Case Concerning the Gabčíkovo-Nagymaros Project*), such as issues regarding the joint management of the river, which, according to the Court, is the optimal manner in which the riparian States should administer a shared waterway. The case will also contribute to the development of general international law, as it considers the state of the law of shared natural resources and of the law of State responsibility.

However, one must agree with the decision of the Court not to indicate provisional measures at this moment in time, particularly in light of the fact that Argentina, in 31 years, has never claimed a procedural right under the 1975 Statute with which Uruguay expressed its readiness to comply in full.