

# Case Note

## *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order on the Request for the Indication of Provisional Measures) [2006] ICJ Rep 135*

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### Introduction

On 4 May 2006 Argentina, appearing before the International Court of Justice (the Court or ICJ) for the first time, claimed treaty violations committed by Uruguay and submitted a request for the indication of provisional measures. Argentina claimed that Uruguay's commissioning of two pulp mills on the River Uruguay posed significant pollution risks, harmful health effects, lost fishery resources for local inhabitants and serious consequences for its economic interests including tourism. Argentina challenged the adequacy of Uruguay's environmental impact assessments and sought an order suspending construction. Oral proceedings were held on 8 and 9 June 2006.<sup>1</sup> On 13 July 2006, the Court, by 14 votes to one,<sup>2</sup> found that the circumstances were not such as to require the orders sought.

### I. The Request for the Indication of Provisional Measures

#### A. Legal and Factual Context to the Dispute

The *Statute of the River Uruguay* ('the 1975 Statute') is a treaty signed in 1975 between Argentina and Uruguay concerning the River Uruguay as their common boundary.<sup>3</sup> Its Preamble proclaims the 'fraternal spirit' between these two states. Article 1 identifies the object and purpose as the joint regulation of a régime for river navigation, conserving, utilising and exploiting natural resources and avoiding river water pollution. Article 1 also establishes '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'. An Administrative

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1 See *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* ICJ Pleadings CR 2006/46, CR 2006/47 (8 June 2006) and CR 2006/48, CR 2006/49 (9 June 2006).

2 Mr Raúl Emilio Vinuesa and Mr Santiago Torres Bernárdez were appointed as ad hoc judges by Argentina and Uruguay, respectively, pursuant to the *Statute of the International Court of Justice* ('ICJ Statute'), art 31(3).

3 The *Statute of the River Uruguay* provided for a joint régime for river use. It was adopted in accordance with the *Treaty Defining the Boundary on the River Uruguay between Argentina and Uruguay*, opened for signature 7 April 1961, 635 UNTS 91, art 7 (entered into force 19 January 1966).

Commission of the River Uruguay (CARU in the Spanish acronym) is responsible for regulation and co-ordination.

Argentina asserts that articles 7 to 13 of the 1975 Statute envisage an obligatory procedure of prior notification and consultation through CARU for any party planning to carry out works liable to affect navigation, the river régime or water quality. It claims that in 2003 Uruguay unilaterally authorised a Spanish company (ENCE) to construct a pulp mill near the town of Fray Bentos (the 'Celulosa de M'Bopicuá' or 'CMB' plant) without complying with these prior obligations. Argentina maintains that Uruguay refused to follow the prescribed procedures notwithstanding repeated protests to Uruguay and CARU. In 2005 Uruguay subsequently authorised a Finnish company ('Oy Metsä-Botnia AB' or 'Botnia') to construct a second pulp mill (the 'Orion' mill) in the vicinity of the CMB plant. The CMB mill was expected to be commissioned in 2008 with the Orion mill commencing operations during 2007. Argentina also understood that Uruguay was in the process of authorising the construction of a third mill by the Stora Enso company on the Rio Negro, a tributary of the River Uruguay.

Argentina's application in the principal proceedings requests the ICJ to adjudge and declare:

- (1) that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that Statute refers, including:
  - (a) the obligation to take all necessary measures for the optimum and rational use of the River Uruguay;
  - (b) the obligation of prior notification to CARU and Argentina;
  - (c) the obligation to comply with the procedures prescribed under the 1975 Statute;
  - (d) the obligation to take all necessary measures to preserve the aquatic environment, prevent pollution, protect biodiversity and fisheries and prepare a full and objective environmental impact study;
  - (e) the obligation to co-operate in preventing pollution and protecting biodiversity and fisheries;
- (2) that, by its conduct, Uruguay has engaged its international responsibility to Argentina;
- (3) that Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and
- (4) that Uruguay shall make full reparation for the injury caused by its breach of these obligations.<sup>4</sup>

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4 On the basis of the *ICJ Statute*, art 36(1), Argentina invoked art 60 of the *Statute of the River Uruguay* permitting it to refer any dispute concerning the interpretation or application of that instrument to the ICJ where it cannot be settled by direct negotiations.

## **B. Jurisdictional Basis for the Indication of Provisional Measures**

Provisional measures are indicated where the provisions invoked by the applicant appear, *prima facie*, to afford a basis upon which the Court's jurisdiction might be established.<sup>5</sup> Argentina maintained that article 60 of the 1975 Statute constituted such a provision and that the two States, having followed articles seven to 11, had failed to agree on matters liable to affect the river regime, navigation or water quality. Uruguay accepted that article 60 established the Court's jurisdiction but only in relation to the rights Argentina was entitled to claim under the 1975 Statute, that is, any possible effects stemming directly from the mills that impaired river water quality. Any other claimed socio-economic impacts (including tourism, urban and rural property values, professional activities and unemployment levels) and other aspects of transboundary environmental protection were not covered *ratione materiae*. In any event, Argentina had failed to offer evidence relevant to those claims. Argentina maintained that the 1975 Statute encompassed not only river pollution but also pollution resulting from river use and the socio-economic consequences of commissioning the mills.

Argentina also submitted that previous dispute resolution procedures had failed, thereby satisfying an essential precondition to the ICJ exercising jurisdiction under Article 60.<sup>6</sup> Uruguay responded that the dispute had been settled under an oral bilateral agreement in 2004 to the effect that the mills could be built according to Uruguay's plans, Argentina would receive operational information and CARU would monitor river water quality for compliance with the 1975 Statute. Argentina retorted that the agreement was simply for Uruguay to transmit all information concerning CMB to CARU, which it had failed to do, and that CARU would commence monitoring water quality.

The Court concluded that it need not resolve these questions concerning the ambit of the 1975 Statute at this stage of proceedings, being satisfied that article 60 provided a basis upon which its jurisdiction could be established.<sup>7</sup>

## **C. Decision on the Indication of Provisional Measures**

The Court may indicate, if it considers that circumstances so require, any provisional measures that ought to be taken to preserve the respective rights of either party pending a final decision on the merits.<sup>8</sup> Its prior jurisprudence requires there to be an urgent need to prevent irreparable prejudice to the rights in dispute.<sup>9</sup>

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5 See, for example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Provisional Measures Order)* [2002] ICJ Rep 241 at [58].

6 A High-Level Technical Group (GTAN, in the Spanish acronym), established in 2005, had not produced any negotiated settlement after twelve meetings between August 2005 and January 2006.

7 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order on the Request for the Indication of Provisional Measures)* [2006] ICJ Rep 135 ('Order of 13 July 2006') at [59].

8 *ICJ Statute*, art 41(1); *Rules of Court*, adopted under the ICJ Statute, art 30, on 14 April 1978 (entered into force 1 July 1978).

9 The Court cited the case: *Passage through the Great Belt (Finland v Denmark) (Provisional Measures Order)* [1991] ICJ Rep 17 at [23] and *Certain Criminal Proceedings in France (Republic of the Congo v France) (Provisional Measures Order)* [2003] ICJ Rep 107 at [22].

Argentina requested the Court to indicate that, pending final judgment, Uruguay shall:

- (i) suspend all authorisations for constructing the CMB and Orion mills;
- (ii) take all necessary measures to suspend building work on the Orion mill;
- (iii) take all necessary measures to ensure that suspending construction on the CMB mill is prolonged beyond 28 June 2006;
- (iv) co-operate in good faith with Argentina to ensure the optimum and rational utilization of the River Uruguay in order to protect and preserve the aquatic environment and prevent pollution;
- (v) refrain from taking any further unilateral action concerning construction of the CMB and Orion mills which does not comply with the 1975 Statute and the rules of international law necessary for its interpretation and application;
- (vi) refrain from any other action which might aggravate or extend the dispute or render settlement more difficult.

Argentina argued that mill construction had already caused significant damage and would be commissioned before the Court rendered a final judgment. It argued that, when there is a reasonable risk of damage in such circumstances, the requirement of urgency merges with that of serious risk of irreparable prejudice to the rights at issue. Uruguay in reply noted that the Orion and CMB mills were not yet operational and moreover subject to further permit conditions imposed by its National Directorate for the Environment (DINAMA, in the Spanish acronym). Even if mill operation might lead to river contamination, the gravity of the alleged peril was insufficiently certain or immediate.

The Court found that any threatened pollution was not imminent because the mills were not expected to be operational before 2007.<sup>10</sup> Judge ad hoc Vinuesa in dissent concluded that the requirement of urgency had been demonstrated since construction and operation of the Orion mill would occur prior to a decision on the merits and Uruguay had not provided assurances to the Court otherwise.<sup>11</sup>

In terms of irreparable prejudice, Argentina contended that the site chosen was the 'worst imaginable' in terms of protecting the river.<sup>12</sup> Transboundary environmental damage was also 'a very serious probability'.<sup>13</sup> Mill construction was already having serious negative effects upon regional economic activities. Argentina moreover submitted that Uruguay's unilateral acts prejudiced the Court's judicial functions in so far as the ICJ occupied a central dispute settlement role under the 1975 Statute. Uruguay replied that existing and forthcoming environmental impact assessments, national regulatory controls and strict licensing conditions guaranteed that harm would not be caused to the River Uruguay or Argentina. The Uruguay mills moreover employed more

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10 *Order of 13 July 2006* at [75].

11 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order on the Request for the Indication of Provisional Measures)* [2006] ICJ Rep 135, Dissenting Opinion of Judge ad hoc Vinuesa at [4].

12 *Order of 13 July 2006* at [35].

13 *Order of 13 July 2006* at [35].

efficient and less polluting technology than Argentine ones and indeed several Argentine officials had reputedly acknowledged a lack of risk of harm.

The Court concluded that these circumstances were not such as to require the indication of provisional measures ordering the suspension by Uruguay of authorisation or construction of the mills.<sup>14</sup> The ICJ was not persuaded by the available evidence that the rights claimed by Argentina would be incapable of protection. In its view, the evidentiary record did not demonstrate either that mill construction or Uruguay's decision to authorise construction posed an imminent threat of irreparable environmental damage to the River Uruguay or socio-economic damage to Riparian inhabitants. Nor had Argentina provided evidence suggesting that any pollution resulting from their commissioning would be of such a character as to cause irreparable damage to the River Uruguay. Furthermore, it was CARU's function to ensure river water quality by regulating and minimising pollution.

Judge ad hoc Vinuesa in dissent criticised the majority for failing to explicitly evaluate the evidentiary material.<sup>15</sup> CARU's participation in the process of assessing environmental impacts, part of the 'joint machinery necessary for the optimum and rational utilization of the River Uruguay' under Article One of the 1975 Statute, constituted 'the essential legal and binding guarantee' for properly implementing the precautionary principle, 'a rule of law within general international law as it stands today'.<sup>16</sup> Argentina had demonstrated reasonable uncertainty on the probable negative environmental effects and Uruguay had acknowledged the absence of any final environmental impact assessment concerning mill operation. The authorisation and construction of the mills were intended to have a direct effect, that is, their final implementation and operation, and accordingly were not neutral or innocent steps.

The Court did not consider that there were grounds for indicating the remaining provisional measures requested by Argentina, noting simply that the parties were required to fulfill their international legal obligations.<sup>17</sup> This included implementing in good faith the consultation and co-operation procedures provided by the 1975 Statute, with CARU constituting the envisaged forum, and refraining from actions that might render dispute resolution more difficult. The Court took note of Uruguay's unilateral commitment to fully comply with the 1975 Statute and its application, to respect the environment and human rights, to conduct itself in a co-operative and transparent manner and in particular its offer to conduct continuous joint monitoring with Argentina.<sup>18</sup>

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14 *Order of 13 July 2006* at [73]–[77].

15 Indeed, the Court declined to authorise production of an Argentine video and excluded Uruguayan documents from its case file.

16 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order on the Request for the Indication of Provisional Measures)* [2006] ICJ Rep 135. Dissenting Opinion of Judge ad hoc Vinuesa at [5].

17 *Order of 13 July 2006* at [82]–[84].

18 Judge ad hoc Vinuesa considered that the Court should have indicated alternative provisional measures, including temporarily suspending mill construction until Uruguay notified the Court of conformity with the *1975 Statute* and a measure liable to be set aside in the event of non-compliance by Argentina.

## 2. Issues and Implications

The opening proceedings in the *Case concerning Pulp Mills on the River Uruguay* is of wider interest for the manner of classifying the character of the dispute, interpreting a treaty that establishes a boundary river regime, assessing the adequacy of environmental impact assessments and the nature of the remedial measures sought in a request for provisional measures in the circumstances of the case.

### A. Characterising the Dispute

For the majority of the Court, the proceedings highlighted, on the one hand, the importance of ensuring environmental protection over shared natural resources, namely, the continued conservation of the river environment, while, on the other, allowing for sustainable economic development by Riparian States.<sup>19</sup> It noted the parties' mutual reliance on the water quality of the River Uruguay and recognised Argentina's environmental protection concerns.<sup>20</sup> The Court recalled earlier dicta identifying a State's obligation to ensure that economic development activities within its jurisdiction and control could not be pursued without due consideration for environmental protection, including the environment of other States.<sup>21</sup>

Judge ad hoc Vinuesa in dissent considered that neither party had addressed the dispute in this way. Such a confrontation did not exist 'even in abstract terms'.<sup>22</sup> For example, human rights arguments were also deployed: Argentina sought to ensure that Riparian populations could live in a healthy environment, which Uruguay countered with reference to the individual right to work and the collective right to sustainable development. The true character of the dispute is more amorphous than the simple dialectic posited by the Court. The 1975 Statute establishes joint machinery for river use and conservation and creates a 'comprehensive and progressive régime' requiring inter-State co-operation for activities affecting the river environment.<sup>23</sup> An underlying issue is whether a State's procedural obligations of good faith, co-operation and information exchange for the purposes of ensuring substantive compliance with environmental protection obligations can render implementation of its industrial development programmes conditional upon the prior consent of a neighbour. The majority skirted this question, fragmenting Argentina's request into one part relating to suspending mill construction and the other into measures conducive to inter-State co-operation.<sup>24</sup>

19 *Order of 13 July 2006* at [80]. For a similar position, see Her Excellency Judge Rosalyn Higgins, 'Speech by Her Excellency Judge Rosalyn Higgins, President of the International Court of Justice' (Speech delivered at the 58th Session of the International Law Commission, Geneva, 25 July 2006).

20 *Order of 13 July 2006* at [72].

21 *The Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 225 at [29] and *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 at [140]. The tension is also reflected in, for example, Principle 2 of the *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (Vol. I), Annex I (1992).

22 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order on the Request for the Indication of Provisional Measures)* [2006] ICJ Rep 135, Dissenting Opinion of Judge ad hoc Vinuesa at [2].

23 *Order of 13 July 2006* at [81].

24 *Order of 13 July 2006* at [68].

Without evidence demonstrating irreparable environmental damage, the Court needed only to remind the States of their international legal obligations generally. Declining the request to indicate provisional measures precluded an opportunity to clarify a duty not to impede the economic development of other States.

More subtle again is the foreign investment dimension, having implications for pulp mill financing and sustainable timber harvesting. The initial proceedings have already been noted in the context of investment treaty arbitration to which Argentina, the applicant in this case, is a party with foreign investors.<sup>25</sup> On one view, Uruguay, a developing country, is imposing contemporary European standards concerning environmental impact assessments upon foreign investors. On another, ENCE and Botnia as European companies already meet those benchmarks and it is Uruguay who must demonstrate regulatory adherence. Pulp mill financing from the private sector as well as the International Finance Corporation had been previously suspended pending favourable social and environmental impact assessments. Thus, again suspending construction pending further analysis may render certain capital investments uneconomic with a delayed decision on the merits affecting investment risk. Indeed, during 2007 one company relocated its plant outside the proximity of the River Uruguay. Economic development, and the deterrent effect of international litigation upon foreign investors, is a primary concern for both States. Even if oral and written submissions painted a broader foreign investment landscape for the Court,<sup>26</sup> there is no indication in the provisional measures order that the motivations of each litigant were too closely scrutinised when declining judicial intervention. With both States espousing environmental compliance and the 1975 Statute confined to activities liable to affect navigation, the joint régime and water quality along the River Uruguay, the Court could only respond within that framework.

## **B. The Ambit of the 1975 Statute**

The proceedings entailed familiar issues of treaty interpretation within the four corners of the 1975 Statute, including ostensible deference to the *pacta sunt servanda* principle. However, the parties differed on the application and scope of the rights and obligations established under that instrument.<sup>27</sup> The 1975 Statute is a boundary river régime envisaging a mix of co-operative procedures between Riparian States and substantive rights and obligations concerning navigation, shared natural resource use, conservation,

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25 *Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (CMS Gas Transmission Company v Argentine Republic)* (2006) ICSID ARB/01/8 at [49].

26 On the question whether ICJ decisions suggest the adoption of a particular posture concerning commercial interests, see Marius Emberland, 'The International Court of Justice and Companies: Is It Possible to Discern A 'Structural Bias' at the Court Regarding Private Economic Enterprise?' (2007) 9 *International Community Law Review* 187 at 187.

27 Reference was also made to the *Convention on the Law of the Non-Navigational Uses of International Watercourses*, GA Res 51/229, 51st sess, 99th plen mtg (1997) (not yet in force); the *Stockholm Convention on Persistent Organic Pollutants*, opened for signature 22 May 2001, 40 I.L.M. 532 (entered into force 17 May 2004); the *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)* ITLOS 10 (2003); and the *MOX Plant Arbitration (Ireland v United Kingdom)* PCA (2003).

water quality, fisheries and preventing pollution. CARU exercises regulatory, executive, administrative, technical and conciliatory functions in the implementation of that treaty. Parties are required to provide CARU with the necessary resources to fulfill its managerial functions with the Statute's procedural mechanisms constituting 'a very important part' of the régime.<sup>28</sup>

The interacting procedural and substantive obligations are particularly noteworthy. Procedural obligations asserted by Argentina include the right to be fully informed and consulted, notification prior to mill construction and having its views taken into account. In its view, the 1975 Statute established a 'no construction' obligation requiring Uruguay to ensure that construction did not take place without Argentina's consent or, lacking such agreement, until dispute settlement had occurred. Uruguay contended that the 1975 Statute did not give either State a 'right of veto' but was limited to fully and in good-faith exchanging information. In its view, Argentina had never previously asserted any procedural rights, did not deny receiving information and a parallel oral agreement between their respective Foreign Ministers authorised mill construction.

Unsurprisingly, the Court left these questions unresolved at this phase of the proceedings. It was not convinced that, if the 1975 Statute did contemplate a 'no construction' obligation, any consequential violations that Uruguay might have committed would not be capable of being remedied at the merits stage.<sup>29</sup> Similarly, any procedural violations could be remedied with a decision on the merits.<sup>30</sup>

Any suspicion that the Court did not clarify its preferred interpretation of the 1975 Statute, fixated upon the question whether provisional measures should be indicated, ought not be discounted. The Separate Opinions of the Court observed that the parties had engaged in a full-scale debate likely to be retold during the merits phase. The ICJ has necessarily conducted a preliminary review of the existence and scope of the claimed rights and obligations when assessing the provisional measures request, a point made by Judge Abraham.<sup>31</sup> The Court does not appear to be sympathetic to an asserted 'no construction' obligation arising from the text of the 1975 Statute and has simply deferred making a finding on one of Argentina's principal claims until the completion of the merits phase. However, as observed by Judge Bennouna, it has examined the *prima facie* existence of the rights and obligations at issue and should have made explicit whether it was obliged to do so.<sup>32</sup>

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28 *Order of 13 July 2006* at [81].

29 *Order of 13 July 2006* at [71].

30 *Order of 13 July 2006* at [70].

31 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order on the Indication of Provisional Measures)* [2006] ICJ Rep 135, Separate Opinion of Judge Abraham at [6]–[8].

32 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order on the Indication of Provisional Measures)* [2006] ICJ Rep 135, Separate Opinion of Judge Bennouna at [11].



### C. The Adequacy of Environmental Impact Assessments

*The Case concerning Pulp Mills on the River Uruguay* scrutinises the contemporary international legal requirements for environmental impact assessments (EIAs).<sup>33</sup> Argentina claimed that Uruguay's authorisation for the projects was given without proper consideration of environmental impacts and identified deficiencies in the EIAs. In its view, the Hatfield Report, an independent study in 2006 commissioned by the International Finance Corporation, to which both ENCE and Botnia had applied for financing, had identified outstanding environmental concerns. DINAMA had also classified the projects as posing a risk of major negative environmental impacts and inherently polluting. The choice of site, technology adopted and methods proposed for treating liquid effluent, solid waste and gas emissions would significantly affect water quality.

Uruguay contended that the 1975 Statute did not require the parties to prevent all forms of pollution but rather to adopt appropriate measures to prevent river pollution from reaching prohibited levels. It claimed to apply the highest and most appropriate international pollution control standards. The International Finance Corporation had concluded that the plants were 'environmentally responsible' and would comply with the best available techniques.<sup>34</sup> They would moreover reflect the European Union's 1999 International Pollution Prevention and Control recommendations as required for all European pulp plants. DINAMA had also demonstrated a willingness to require operational adjustments when EIAs warranted improvement.

That contemporary developments projects are contingent upon first satisfying an EIA is uncontroversial. However, the prospect of an international court or tribunal such as the ICJ setting aside an EIA, formulated in good faith on the basis of available scientific and technical evidence, is unclear.<sup>35</sup> More intriguingly, the International Finance Corporation and the Multilateral Investment Guarantee Agency consider that the Botnia plant was consistent with the World Bank's environmental policies and procedures.<sup>36</sup> While the operation and construction of the two pulp mills, depending upon one's view of the evidence, are not absolved of environmental concerns, it remains to be seen whether, as stated in Argentina's application to the Court, Uruguay has prepared a 'full and objective' environmental impact study as required by the 1975 Statute 'and the other rules of international law to which that Statute refers'. A provisional measures order may have little practical effect upon the information disclosure, transparency requirements or public participation provisions of an EIA but the prospect of judicial review per se could elevate these essential procedural qualities.

33 See, for example, Principle 19, *Rio Declaration on Environment and Development*, above n21; International Law Commission, *Commentary to Draft Articles on the Prevention of Transboundary Harm* (2001) ILC Report at 388.

34 *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Order on the Request for the Indication of Provisional Measures) ICJ Pleadings CR 2006/47 (8 June 2006) at [37].

35 Alan Boyle, 'The Environmental Jurisprudence of the International Tribunal for the Law of the Sea' (2007) 22 *International Journal of Marine & Coastal Law* 369 at 377.

36 Pieter Bekker, 'Double Interim Relief Denial in Argentina-Uruguay Pulp Mill Dispute before the World Court' (2007) 11(2) *American Society of International Law Insight* <<http://www.asil.org/insights/2007/02/insights070214.html>> accessed on 2 March 2008.

## D. The Appropriate Remedy

Both States disputed whether suspending mill construction was an appropriate remedy. Argentina maintained that suspension was physically possible at this initial stage and reasonable in the circumstances. Subsequent dismantling could not restore its right to protect the riverine environment and procedural obligations owed by Uruguay under the 1975 Statute would become 'illusory' and 'purely theoretical'.<sup>37</sup> Nor could the harmful socio-economic consequences of continued construction 'simply be made good by means of financial compensation or some other material provision'.<sup>38</sup> Most importantly, Argentina would be deprived of its right to an EIA because Uruguay's unilateral choice of site for the plants establishes an irreversible 'fait accompli'.<sup>39</sup>

Uruguay maintained that suspending construction would irreparably damage its right under the 1975 Statute to implement sustainable economic development projects within its own territory. The pulp mills were the largest foreign investment in its history, estimated to have an economic impact of \$350 million or two percent of gross domestic product per year. Economic loss to the companies and shareholders would jeopardise the projects. Suspending construction would also prejudice its right to proceed with construction pending the Court's final judgment.

Uruguay tantalised the Court with the suggestion that it bore the risk of ultimately dismantling the mills following a decision on the merits. The ICJ seized this opportunity,<sup>40</sup> citing authority to the effect that 'if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded a priori of a judicial finding that such works must not be continued or must be modified or dismantled'.<sup>41</sup> In its view, Argentina had not demonstrated that suspension as a provisional measure would be capable of reversing or repairing the claimed socio-economic consequences attributed to construction.<sup>42</sup>

The ICJ, when ruling on a provisional measures request, typically refrains from assessing the merits of the dispute. However, several Members of the Court queried this accepted orthodoxy, particularly if subsequently dismantling the mills may not effect 'full restoration'<sup>43</sup> in environmental terms or respect rights of prior consultation. Although the Court reserved its right to do so, an order to discontinue industrial projects would be an unprecedented outcome. Furthermore, were it to contemplate a remedial order for Uruguay to dismantle the mills at the merits phase, the Court may feel 'bound' by its

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37 *Order of 13 July 2006* at [38] & [66].

38 *Order of 13 July 2006* at [17].

39 'The construction of the Wall and its associated regime create a 'fait accompli'...that could well become permanent': *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at [121].

40 *Order of 13 July 2006* at [78].

41 *Passage through the Great Belt (Finland v Denmark) (Provisional Measures Order of 29 July 1991)*, [1991] ICJ Rep 17 at [31]. Judge ad hoc Vinuesa criticised reliance upon this authority because Denmark had assured the Court that construction work on the East Channel Bridge, claimed to infringe Finland's right of passage, would not be executed prior to a decision on the merits.

42 *Order of 13 July 2006* at [74].

43 Compare *The Fisheries Jurisdiction Cases (United Kingdom & Federal Republic of Germany v Iceland)*, (*Interim Protection Order of 17 August 1972*) [1972] ICJ Rep 30 at [23].

provisional measures order refusing a lesser step of suspension in favour of that same State. Judge Ranjeva declared that the Court, rather than simply assessing the provisional measures request, ought to explicitly analyse it against the orders sought in the principal application.<sup>44</sup> The Court will accordingly monitor with interest the environmental protection measures subsequently adopted by Uruguay and the degree of inter-State co-operation demonstrated through CARU. However, its reluctance to order provisional measures in these circumstances, explicable by reference to evidentiary considerations and the burden of proof, will disappoint some commentators and invite comparisons with its relatively greater resolve in other provisional measures cases. The failure to satisfy the prerequisites of urgency and irreparable prejudice in this case moreover appears to harden a threshold for judicial intervention in future claims of irremediable environmental harm.

### 3. Postscript

The Order of 13 July 2006 left unaffected the right of each party to submit a fresh request for the indication of provisional measures ‘based on new facts’.<sup>45</sup> On 29 November 2006, after Argentine citizens blockaded the Fray Bentos bridge, Uruguay became the first respondent State in sixty one years to request provisional measures. It sought an order that Argentina ‘shall take all reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States.’<sup>46</sup> In short, the ICJ rejected this request, once again by 14 votes to one, not being persuaded in the circumstances that the Argentine roadblocks risk irreparably prejudicing the rights Uruguay claimed under the 1975 Statute.<sup>47</sup> Finally, based upon new developments in the case since Argentina filed its memorial, the number of points disputed and the need to submit new technical documents, the Court fixed 29 January 2008 and 29 July 2008 as the respective time-limits for the filing of Argentina’s reply and Uruguay’s rejoinder.<sup>48</sup>

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44 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order on the Request for the Indication of Provisional Measures)* [2006] ICJ Rep 135, Declaration of Judge Ranjeva at [3].

45 *Order of 13 July 2006* at [85]–[86].

46 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order on the Request for the Indication of Provisional Measures)* [2007] ICJ Rep 135 at [13].

47 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order on the Request for the Indication of Provisional Measures)* [2007] ICJ Rep 135 at [41].

48 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order on the Fixing of Time Limits)* [2007] ICJ Rep 135.