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# The International Court of Justice's Judgement of 20 April 2010 in the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case

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## ABSTRACT

Despite some important and welcome contributions and clarifications, especially on the obligation of due diligence and environmental impact assessments, the judgment of the 20<sup>th</sup> of April 2010 does not live up to expectations. The International Court of Justice globally upholds a restrictive interpretation of the obligations to prevent environmental harm in a transboundary context. Its reasoning relies on an artificial distinction between procedural and substantive obligations, which prevents the award of any form of compensation other than satisfaction. Beyond the statements in favour of sustainable development, this case symbolises the international judge's difficulty to find the right balance between economic development on the one hand and environmental protection on the other.

On the 20<sup>th</sup> of April 2010, the International Court of Justice (ICJ) pronounced its ruling regarding the dispute opposing Argentina and Uruguay in the *Pulp Mills on the River Uruguay case*.<sup>1</sup> The dispute originates in the construction of two pulp mills on the left bank of the Uruguay River, near the Uruguayan city of Fray Bentos and opposite the Argentinian region of Gualaguaychú. The construction works of the first mill, referred to as CMB (ENCE),<sup>2</sup> started on 28 November 2005 but construction has never been achieved; the Spanish sponsors of the project announced they were definitely abandoning the project in September 2006. The second pulp mill, referred to as Orion (Botnia),<sup>3</sup> was for its part built a few kilometers downstream of the site planned for the CMB (ENCE) pulp mill. The project was launched in 2003 and the Orion (Botnia) mill has been functioning since 9 November 2007.

As emphasized by the ICJ in 2006,<sup>4</sup> this is the biggest foreign investment Uruguay has ever hosted; thus the stakes were quite high for Uruguay, concerning an economically

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<sup>1</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *ICJ Reports 2010*, p. 14.

<sup>2</sup> CMB stands for *Celulosas de M’Bopicuá S.A.*, and ENCE for *Empresa Nacional de Celulosas de España*.

<sup>3</sup> The Orion mill is undertaken by Botnia S.A. and Botnia Fray Bentos S.A., two Uruguayan companies created in 2003 especially for the purpose by the Finnish company Oy Metsä-Botnia AB.

<sup>4</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Request for the Indication of Provisional Measures, Order of 13 July 2006, *ICJ Reports 2006*, para. 48.

depressed area. From the very beginning, on the other bank of the river the project has stirred up vehement protests from the Argentinian authorities as well as from the population who feared a damaging pollution in a region which main economic activities are tourism, fishing and agriculture. Since December 2005, the bridges between the two countries have occasionally been blocked by gatherings of wrathful Argentinian citizens.

In this tensed context, several judicial and non-judicial procedures either at the domestic, regional or international level have been triggered, including procedures based on the social and environmental responsibility of enterprises.<sup>5</sup> The two States agreed in 2005 on the creation of a High-Level Technical Group, referred to as GTAN,<sup>6</sup> aiming at finding a negotiated solution. The King of Spain also offered a mediation. None of these initiatives resulted in reaching a settlement. On 4 May 2006, Argentina brought the dispute before the International Court of Justice, grounding the referral on Article 60, paragraph 1 of a bilateral treaty in force between the two countries: the Statute of the River Uruguay signed on 26 February 1975.<sup>7</sup> The 1975 Statute's object and purpose are to promote the "*optimum and rational utilization of the River Uruguay*" (Article 1) To this end, it frames the river's uses and provides for obligations of consultation, information and cooperation between the parties as well as the prevention of environmental harm.

In the months that followed the referral, the Court examined two requests for the indication of provisional measures. First on 13 July 2006, it dismissed an Argentinian request submitted at the same time than the main complaint, which asked for the suspension of the construction of Orion (Botnia).<sup>8</sup> Second, on 23 January 2007 the ICJ dismissed another request for the indication of provisional measures submitted by Uruguay, who wanted to obtain an emergency removal of the blockades that Argentinian opponents to the project had organized on the bridges and roads linking the two countries.<sup>9</sup> A few months before this request, Uruguay had already referred the matter of the blockades to the Mercosur arbitral tribunal. In an award of 6 September 2006, the latter had refused to command Argentina to remove the blockades but had stated that Argentina had failed to comply with its due diligence obligations.<sup>10</sup>

Regarding the substance of the case, Argentina alleged before the ICJ that Uruguay had breached the 1975 Statute by unilaterally authorizing the construction of two pulp mills and by allowing the commissioning of Orion (Botnia). According to Argentina, the construction and commission of such facilities would cause significant harm to the environment of the Uruguay River and its area of influence. Hadn't the Uruguayan National Directorate for the Environment (DINAMA)<sup>11</sup> itself described the pulp mills as "*projects presenting a risk of major negative environmental impact*", adding that "*the process envisaged by the CMB and Orion projects ... is inherently polluting*" and that "*90 per cent of fish production in the Argentina-Uruguay section of the river (over 4,500 tons per year) is located within the areas affected by the mills, which are also a breeding area for the river's migratory fish stocks*", not to mention the fact that the pulp mills would be very near from the surrounding towns?<sup>12</sup> Argentina requested the ICJ to find that these were "*internationally wrongful acts by which Uruguay engaged its responsibility,*" to impose that Uruguay "*re-*

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<sup>5</sup> M.-P. Lanfranchi, "L'affaire des usines de pâte à papier, un état des lieux", *L'Observateur des Nations Unies* (2010), 24, p. 38.

<sup>6</sup> For *Grupo Técnico de Alto Nivel*.

<sup>7</sup> *UNTS*, Vol. 1295, No. I-21425, p. 340.

<sup>8</sup> Order of 13 July 2006, *op. cit.*

<sup>9</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Request for the Indication of Provisional Measures, Order of 23 January 2007, *ICJ Reports* 2007.

<sup>10</sup> See M.-P. Lanfranchi, *op. cit.*

<sup>11</sup> For *Dirección Nacional de Medio Ambiente*.

<sup>12</sup> Order of 13 July 2006, *op. cit.*, para. 8.

establish on the ground and in legal terms the situation that existed before these internationally wrongful acts were committed” and to declare that Uruguay had to “pay compensation to the Argentine Republic for the damage caused...”<sup>13</sup> Such requests were opposed by Uruguay, who requested on the contrary the ICJ to proclaim the construction was lawful and declare “Uruguay’s right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute.”<sup>14</sup>

The judgment on the merits of the case was eagerly-awaited by both parties, whose relationships had been badly damaged by the dispute. However, the case raised expectations far beyond the parties as it is emblematic of sustainable development issues arising from the search for a balance between economic (industrial, agricultural, touristic...) development and the protection of shared natural resources (a shared boundary river.) From the stage of provisional measures, the Court said it was aware of the stakes and their importance, by stating that “account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States.”<sup>15</sup> In its 2010 judgment, the Court nevertheless reaches only an instable balance between these considerations. On the one hand, it considers that Uruguay did not comply with the procedural obligations incumbent upon it under Articles 7 to 12 of the 1975 Statute. On the other hand, it turns down all the allegations concerning the breach of substantive prevention obligations, and by way of compensation it only states that the declaration by the Court of the breach constitutes appropriate satisfaction. Such unsatisfactory result reflects the difficulties the Court faced in solving a dispute on the basis of pieces of evidence which were highly technical. The solutions it reached in this regard are quite traditional, not to say excessively cautious, as regards both the determination of the burden and content of proof.<sup>16</sup> The Court adopts a rather restrictive interpretation of the obligations to prevent environmental harm incumbent upon States. Grounding its reasoning on a strict distinction between procedural and substantive obligations (1), the Court comes to specify the scope of the obligation to prevent transboundary harm (2).

### **1) A watertight distinction between procedural and substantive obligations**

The judgment of 20 April 2010 rests on a *summa divisio* between procedural and substantive obligations summoned for the purpose in hand. Although it is apparently simple, such distinction does not stand up to analysis: first because the frontier between the two categories of obligation is ill-defined; second because the results they lead to are hardly satisfactory. According to the Court, the process of authorization, construction and commission of the pulp mill must be analyzed under the angle of the procedural obligations of information, notification and cooperation provided for by Articles 7 to 12 of the 1975 Statute. After the pulp mill’s commissioning, the question is on the contrary to determine whether Uruguay has complied with its substantive obligations to prevent harm.<sup>17</sup> Such a distinction somewhat flickers. The allocation of the different obligations toward one or the other category on a chronological basis proves to be artificial, since procedural obligations and substantive obligations are not called for to operate successively. Some of the obligations considered as substantive by the Court should on the contrary be applied *before* the commissioning of the pulp mill, for example the obligation to conduct an environmental impact assessment (EIA). The EIA proper is an obligatory stage of the procedure and is indeed quite generally described

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<sup>13</sup> Judgment of 20 April 2010, *op. cit.*, para. 24.

<sup>14</sup> *Ibid.*, para. 23.

<sup>15</sup> Order of 13 July 2006, *op. cit.*, para. 80.

<sup>16</sup> On these issues see Y. Kerbrat, S. Maljean-Dubois, *op. cit.*, pp. 39-75.

<sup>17</sup> Judgment, *op. cit.*, para. 46.

as a procedural obligation. It is thus unsurprising that the Court has trouble sorting out which category it belongs to and therefore treats it under both angles. Likewise, the obligation to coordinate through the CARU<sup>18</sup> (Joint Commission of the River Uruguay) the measures that will allow avoiding any change in the ecological balance (Article 36 of the 1975 Statute) is considered to be a substantive obligation because it is applicable after the pulp mill's commissioning, whereas it is as much, not to say more, a procedural obligation.

In fact, procedural and substantive obligations are interdependent and inextricably intertwined: compliance with obligations to prevent environmental harm – which the Court sees as substantive obligations – is inseparable from compliance with procedural requirements. Because compliance with procedural obligations is the only way to prevent environmental harm, procedural obligations are as important, if not more, than substantive obligations. For example, Article 41 of the 1975 Statute, under which “*the parties undertake: ... to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and [adopting appropriate] measures*”, is obviously linked to procedural obligations.<sup>19</sup> The latter are even the very core of the prevention obligation. As Judges Al-Khasawneh and Simma point out in their Joint dissenting opinion, whereas substantive obligations are characterized by their “*extreme elasticity and generality*,”<sup>20</sup> procedural obligations are strict and specific. The Court itself sees a link between the procedural obligations of Articles 7 to 12 and Article 27 on the “*right of each party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes*”, which the Court considers to be a substantive provision. Although the Court admits that they are interconnected it does not draw any consequence from the fact procedural obligations have been breached.<sup>21</sup> And yet, by breaching its procedural obligations, haven't Uruguay also breached some substantive obligations? The other way around, could compliance with its procedural obligations have led Uruguay to revise its decision to build the pulp mill, or to reconsider its location or the technology used?

Being ill-defined and non-operational, this distinction entails questionable consequences.<sup>22</sup> In the Court's opinion – and contrary to the position of Argentina who had itself based its argumentation on this procedural/substantive distinction – non-compliance with procedural obligations is independent from compliance or non-compliance with substantive obligations.<sup>23</sup> The Court recognizes that there is a “*functional link*” between the two categories of obligations because of their common purpose: the prevention of environmental harm.<sup>24</sup> It however considers that this link “*does not prevent the States parties from being required to answer for those obligations separately, according to their specific content, and to assume, if necessary, the responsibility resulting from the breach of them, according to the circumstances.*”<sup>25</sup> It follows very concretely that non-compliance with procedural obligations is an ‘instant’ internationally wrongful act; only its effects can be seen as continuous. Therefore the Court cannot order the termination of the continuous wrongful act formed by the fact that the Orion pulp mill keeps on functioning. The Court indeed concludes that “*its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina. As Uruguay's breaches of the procedural obligations occurred in the past and have come to an end, there is no cause*

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<sup>18</sup> For *Comisión Administradora del Río Uruguay*.

<sup>19</sup> On this, see the Separate opinion of Judge Greenwood, para. 5

<sup>20</sup> Joint dissenting opinion of Judges Al-Khasawneh and Simma, para. 26.

<sup>21</sup> Dissenting opinion of Judge *ad hoc* Vinuesa, para. 6.

<sup>22</sup> Joint dissenting opinion of Judges Al-Khasawneh and Simma, para. 26.

<sup>23</sup> Judgment, *op. cit.*, para. 68.

<sup>24</sup> *Ibid.*, para. 79.

<sup>25</sup> *Ibidem*.

to order their cessation.”<sup>26</sup> Considering that some of the obligations the Court describes as substantive – such as the obligation to “undertake to adopt the necessary measures to ensure that the management of the soil and woodland and the use of groundwater and the waters of the tributaries of the river do not cause changes which may significantly impair the régime of the river or the quality of its waters” (Article 35 of the 1975 Statute) – are continuous obligations, if the Court had found they had been breached it should have ordered the cessation of the wrongful act, *i.e.* that the Orion pulp mill is put out of commission awaiting new data or the application of new technologies less harmful to the environment.

The artificial watertightness between procedural and substantive obligations that the Court maintains also guides the choice of compensation means. It leads the Court to deny Argentina any material compensation. Since “*the procedural obligations under the 1975 Statute did not entail any ensuing prohibition on Uruguay’s building of the Orion (Botnia) mill, failing consent by Argentina, after the expiration of the period for negotiation*” and “*the operation of the Orion (Botnia) mill has not resulted in the breach of substantive obligations laid down in 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>27</sup> Having ruled out the *restitutio in integrum*, the Court refuses “*for the same reasons*” the claim of Argentina regarding an economic compensation for alleged injuries suffered in various economic sectors, specifically tourism and agriculture.<sup>28</sup>

Thus, the distorted interpretation of the 1975 Statute the Court gives has serious consequences. In the end, it looks like the Court had determined in advance the result it wanted to reach – to not question, for economic reasons, the huge investment that the construction of the pulp mill in Uruguay is – and then determined the course of reasoning that led to the desired result. Such result also spares the Court to find itself in a delicate position. In July 2006, it had indeed decided that a provisional suspension of the construction works was not necessary.<sup>29</sup> Reminding its *Passage through the Great Belt* decision to refuse to order provisional measures, the Court had only mentioned at that time that its decision on the merits could *in fine* result in Uruguay having to decommission the facilities.<sup>30</sup>

## **2) The scope of obligations to prevent harm in a transboundary context**

The Court upholds a narrow conception of its role which leads it to consider that Uruguay was not prevented to build the pulp mills awaiting a decision on the merits (2.1.). It then asserts or re-asserts some fundamental principles related to cooperation and prevention of harm in a transboundary context (2.2). Finally, though the Court finds that Uruguay has breached its procedural obligations (2.3) it does not find that Uruguay has breached substantive obligations (2.4).

### **2.1. The scope of Article 12 of the Statute: Right to have a say or right of veto?**

Articles 7 to 12 of the 1975 Statute define the different stages of a quite detailed and specific procedure. If one of the parties “*plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters,*”<sup>31</sup> it has to inform the joint

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<sup>26</sup> *Ibid.*, para. 269.

<sup>27</sup> *Ibid.*, para. 275.

<sup>28</sup> *Ibid.*, para. 276.

<sup>29</sup> Order of 13 July 2006, *op. cit.*

<sup>30</sup> *Ibid.*, paras. 70-71.

<sup>31</sup> Article 7 of the 1975 Statute.

river commission, the CARU. The CARU determines on a preliminary basis whether the plan might cause significant damage to the other party. If the Commission finds this to be the case or if a decision cannot be reached in that regard, the party concerned shall notify the other party of the plan through the CARU. The notified party can object, ask for further information or suggest changes. If parties cannot reach an agreement within 180 days, Article 12 provides that the dispute settlement clause of Article 60 – which enables “*either Party to submit to the Court any dispute concerning the interpretation or application of the Statute which cannot be settled by direct negotiations*” – shall apply. The purpose of this notification and consultation procedure is to support cooperation between parties; each one of them in the end has a ‘right to have a say’ on the projects the other party might have regarding the river. Can this right to have a say that Article 12 bestows be considered to amount to a right of veto? Nothing points in this direction. Article 12 however enables the parties to ask the judge to settle a potential dispute in this respect. As Judges Al-Khasawneh and Simma assert, this opportunity could have radically changed the role of the Court.<sup>32</sup> The latter could indeed have been considered to be involved in the procedure in such a way that Uruguay would have been forbidden to authorize the pulp mills’ construction until the Court reached a decision. Such an interpretation of Article 12 would have been in line with the spirit of the procedure established by Article 7 to 12 which, according to Alain Pellet, follow an “*orderly bilateralism desired by the Parties in the Statute*”, as opposed to the “*anarchical unilateralism now being defended by Uruguay*.”<sup>33</sup> It would above all have ensured that Article 12 could display its full effect, since it considers referring to the Court for other reasons than those mentioned in Article 60. The Court did not follow this line of reasoning and its position is criticized with reason by several judges.<sup>34</sup>

## ***2.2. Cooperation and prevention: Customary and treaty-based obligations***

Since the Court is referred to on the basis of the dispute settlement clause of the 1975 Statute and the Statute’s provisions are rather detailed, the ICJ does not refer much to customary law. Therefore, observers can hardly draw lessons beyond the case-specific, much to the regret of Judge Cançado Trindade.<sup>35</sup> The Court nevertheless reasserts or asserts on several occasions the customary nature of certain obligations and in the end clarifies their content and scope along the lines of its previous case law. Reference to customary law is justified by the rule of treaty interpretation codified in Article 31, paragraph 3, c) of the 1961 Vienna Convention, from which it follows that treaties must be interpreted “*in the light of principles governing the law of international watercourses and principles of international law ensuring protection of the environment*.”<sup>36</sup> It also expresses to some extent the will of the Court to contribute to the development of international law.

### *2.2.1. The importance of procedural obligations in the management of shared natural resources*

The Court rightly emphasizes the importance of procedural obligations and cooperation in the management of shared natural resources. It points out that “*These obligations are all the more vital when a shared resource is at issue, as in the case of the River Uruguay, which can only be protected through close and continuous co-operation*

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<sup>32</sup> Joint dissenting opinion of Judges Al-Khasawneh and Simma, para. 25.

<sup>33</sup> Speech of Alain Pellet, CR 2009/20, 28 September 2009 (translation), p. 3.

<sup>34</sup> Judgment, *op. cit.*, para. 154; Declaration of Judge Skotnikov, para. 3.

<sup>35</sup> See the Separate opinion of Judge Cançado Trindade.

<sup>36</sup> Judgment, *op. cit.*, para. 55. See also para. 64.

*between the riparian States.*<sup>37</sup> The cooperation obligation is inferred from the 1975 Statute: it is treaty-based. The phrase of the Court is however very broad and allows to consider going beyond, toward a customary character.<sup>38</sup> The Court states that the CARU created by the 1975 Statute is the masterpiece of the scheme.<sup>39</sup> In line with its order on provisional measures,<sup>40</sup> it underlines the critical role that joint river commissions play in the sharing of information and more broadly in cooperation. According to the Court, the CARU really is an international organization: "*far from being merely a transmission mechanism between the parties, CARU has a permanent existence of its own.*"<sup>41</sup> Such an approach perpetuates the negotiation framework since "*neither of them may depart from that framework unilaterally.*"<sup>42</sup>

### 2.2.2. *The customary nature of the obligation to prevent transboundary environmental harm*

The Court reminds that "*the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 22.) A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation 'is now part of the corpus of international law relating to the environment'*"<sup>43</sup> The Court here refers to the expression used in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*<sup>44</sup> and repeated in its 1997 *Gabčíkovo-Nagymaros* judgment.<sup>45</sup> The phrase is inspired by Principle 21 of the 1972 Stockholm Declaration.<sup>46</sup> The scope of this obligation had however remained vague in 1996 and 1997, probably voluntarily, because of an ambiguous phrasing: "*is now part of the corpus of international law relating to the environment.*" It is henceforth clearly established as a customary obligation. On the merits, this obligation is clearer as well. From then on, "*A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.*"<sup>47</sup> It no longer refers to a distant monitoring but, in line with the principle this obligation stems from, it commands to do "*diligence*" and "*use all the means at [the State's] disposal.*" However, whereas States had to respect the environment of other States in 1997, in 2010 they mustn't cause any "*significant damage*" to the environment. First, the positive obligation – to respect the environment – becomes an obligation to refrain – from causing harm. Second, the Court creates a threshold where none existed. States can thus cause harm provided that it is not significant; the treaty-based obligation Article 7 of the 1975 Statute provides for – "*... a party shall notify the Commission, which shall determine ... whether the plan might cause*

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<sup>37</sup> *Ibid.*, para. 81.

<sup>38</sup> See along the same line Resolution 3129 (XXVIII) of the United Nations General Assembly, "Cooperation in the field of the environment concerning natural resources shared by two or more States", 13 December 1973, para. 2.

<sup>39</sup> Judgment, *op. cit.*, para. 93.

<sup>40</sup> Order of 13 July 2006, *op. cit.*, para. 81.

<sup>41</sup> Judgment, *op. cit.*, para. 87.

<sup>42</sup> *Ibid.*, para. 90. See also the critic of Judge Torres Bernardez in his Separate opinion, para. 11.

<sup>43</sup> *Ibid.*, para. 101.

<sup>44</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, para. 29.

<sup>45</sup> *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, *ICJ Reports 1997*, para. 53.

<sup>46</sup> Declaration of the United Nations Conference on the Human Environment, 16 June 1972. See also Principle 2 of the Rio Declaration on Environment and Development, 13 June 1992, A/CONF.151/26.

<sup>47</sup> Judgment, *op. cit.*, para. 101.

*significant damage to the other party*<sup>48</sup> – and the customary obligation are mixed. This notion of ‘significant damage’ remains to be clarified. It is difficult to say whether the Court truly meant a seriousness threshold – one can think of the “serious” damage in the *Trail Smelter* case<sup>49</sup> – or a “significant” damage in the sense that it is measurable. In any case, by referring to the *Corfu Channel* case and to the notion of due diligence, the Court is probably trying to better define the consequences of this principle in the procedural field, including beyond the case-specific.

The Court then goes back over the principle of prevention when it analyzes Uruguay’s compliance with its substantive obligations. It states 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>50</sup> which stems from the 1975 Statute, and mentions the “*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>51</sup> In this manner, the Court indicates that a twofold balance must be reached: on the one hand, a balance between the rights and needs of the parties and; on the other hand, a balance between the different uses of the river and the protection of the environment. It indeed emphasizes at the very end of the judgment that “*the Parties have established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment*.”<sup>52</sup>

From this prevention obligation, the Court furthermore infers positive obligations incumbent upon the parties.<sup>53</sup> As in the *Gabčíkovo-Nagymaros* case, the Court reminds that “*in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage*”<sup>54</sup> It also endeavors to give a full effect to the scientific ‘ecological balance’ concept and specifies that “*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>55</sup> Likewise, regarding the obligation to prevent pollution and to preserve the aquatic environment (Article 41 of the 1975 Statute), the Court interprets the Statute as subjecting the parties to a positive obligation – once again an obligation of means – which is rather heavy.<sup>56</sup> Since then the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) has built on these contributions of the ICJ and has deepened them.<sup>57</sup>

### 2.2.3. *The recognition of the customary nature of the obligation to conduct EIAs*

The Court very clearly recognizes the customary nature of the obligation “*to undertake an environmental impact assessment where there is a risk that the proposed*

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<sup>48</sup> Emphasize added.

<sup>49</sup> *Trail Smelter (United States of America v. Canada)*, Arbitral Award, 11 March 1941, 3 UN Rep. Int’l Arb. Awards 1941, p. 1905.

<sup>50</sup> Judgment, *op. cit.*, para. 75. See also para. 174.

<sup>51</sup> *Ibid.*, para. 177.

<sup>52</sup> *Ibid.*, para. 281.

<sup>53</sup> *Ibid.*, para. 185.

<sup>54</sup> *Ibidem. Gabčíkovo-Nagymaros judgement, op. cit.*, para. 140.

<sup>55</sup> Judgment, *op. cit.*, para. 188.

<sup>56</sup> *Ibid.*, para. 223.

<sup>57</sup> See ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion in Case no. 17, 1<sup>st</sup> February 2011; see also ITLOS, *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion in Case no. 21, 2 April 2015.

*industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.*<sup>58</sup> Such an obligation wasn't provided for by the 1975 Statute, probably because it is a bit old and the tool has been developed over the 1970's. Supported in this by the agreement of the parties on the existence of an obligation to conduct an EIA – consistently with the Statute read as a whole – the Court interprets the Statute in an evolutive manner by referring again to general international law.<sup>59</sup> It denies making any judicial development: quoting its judgment in the *Dispute Regarding Navigational and Related Rights* case, the Court considers that the parties' will was to give some of the 1975 Statute's provisions "*a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law*"<sup>60</sup>. The ICJ rightly infers such obligation to conduct impact assessments from a "*practice, which in recent years has gained so much acceptance among States*" but also from "*due diligence, and the duty of vigilance and prevention which it implies*,"<sup>61</sup> although it does not specify whether it is a customary obligation or an obligation stemming from Article 41 of the 1975 Statute. It is in any case this connection with due diligence that makes the Court say that "*if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works*" then it will not be considered to have exercised due diligence. Moreover, EIA does not play a role before the authorization of a project only. The Courts indeed adds that once the project is commissioned, a continuous monitoring of the project's impacts must be implemented throughout the whole life-cycle of the project.<sup>62</sup>

### ***2.3. Uruguay's non-compliance with its procedural obligations***

Regarding non-compliance with the procedural obligations of information and notification, the Court is severe *vis a vis* Uruguay: it finds that Uruguay did not comply with the whole of the cooperation mechanism provided for by Article 7 to 12 of the 1975 Statute.<sup>63</sup> By requiring that the EIA be passed on together with the notification, the Court's interpretation of the Statute leads it even further than the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context,<sup>64</sup> which does not include the impact assessment in the documents that must be passed on.<sup>65</sup> It is all the easier for the Court to sentence Uruguay for its non-compliance with its procedural obligations than it does not entail any consequence in terms of compensation. It would have been very different if the Court had also found Uruguay non-compliant with substantive obligations.

### ***2.4. Uruguay's compliance with its substantive obligations***

Equitable and reasonable use of a shared natural resource, balance between the rights and needs of the parties, need to combine economic development with environmental protection, "*real community of interests and rights*,"<sup>66</sup> positive obligations of States,

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<sup>58</sup> Judgment, *op. cit.*, para. 204.

<sup>59</sup> *Ibidem*.

<sup>60</sup> *Ibidem*; *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, *ICJ Reports 2009*, para. 64.

<sup>61</sup> Judgment, *op. cit.*, para. 204.

<sup>62</sup> *Ibid.*, para. 205.

<sup>63</sup> *Ibid.*, para. 149.

<sup>64</sup> Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991, *UNTS*, vol. 1989, p. 309.

<sup>65</sup> Article 3 of the Espoo Convention.

<sup>66</sup> Judgment, *op. cit.*, para. 281.

customary obligation to conduct an EIA... The Court has taken a number of steps forward. Beyond these statements of principle the Court however finds that Uruguay did not breach its obligations on the merits. It adopts a strict position on its jurisdiction and rejects Argentina's allegations one after the other. Dismissals are sometimes based on a restrictive interpretation of substantive obligations, sometimes on the lack of sufficient evidence. This restrictive approach applies for example to EIA. The Court only goes part of the way when it recognizes as customary the obligation to conduct an EIA. The parties indeed agreed on the requirement to conduct an EIA but opposed on the form and content of it.

Two issues were particularly debated. First, methodologically speaking should the assessment have considered different possible construction sites, given the receiving capacity of the river at the location of the mill? Second, should the populations likely to be affected – meaning both the Argentinian and Uruguayan riparian populations – be consulted during the assessment, and were they? On these issues the Court is quite disappointing. It considers that neither the 1975 Statute nor general international law specify “*the scope and content of an [EIA].*” Consequently, “*it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.*”<sup>67</sup> The only requirement the Court lays down is that the assessment must be performed before the implementation of the project, a requirement which is more than minimalistic because it belongs to the very principle of an impact assessment. In addition, the Court “*is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina.*”<sup>68</sup> Again, the approach the Court adopts is more than minimalistic, since it is supposed to look for the applicable law, if need be beyond the law invoked by the parties.<sup>69</sup>

Couldn't the Court push a little bit further its reasoning and first, state that in general international law there is, in the specific setting of transboundary harm, an obligation to consult the populations likely to be affected and second, confirm that different potential construction sites should in this case have been studied?

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Thinking of the future, at the end of its judgment, in an *obiter dictum* that sounds like a warning, the Court emphasizes that the 1975 Statute “*places the Parties under a duty to co-operate with each other*” and that “*This obligation to co-operate encompasses ongoing monitoring of an industrial facility, such as the Orion (Botnia) mill.*”<sup>70</sup> Given the badly damaged relationships between the parties, one could fear that they wouldn't be able to agree and that the muddled situation that followed the 1997 *Gabčíkovo-Nagymaros* judgment would repeat: a few months after the judgment was issued, Slovakia had requested a complementary judgment on the grounds that it hadn't managed to reach an agreement with Hungary on the means to execute it. The case is still pending and has trouble reaching a solution.

Regarding the *Pulp mills* case, the parties showed a will to turn the page during the first months. The two Heads of State reached an agreement in July 2010, which provides for the establishment of a joint committee composed of two Argentinian scientists and two Uruguayan scientists, entrusted with assessing the environmental impact of the Orion mill.<sup>71</sup>

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<sup>67</sup> *Ibid.*, para. 205.

<sup>68</sup> *Ibid.*, para. 216.

<sup>69</sup> Article 38, paragraph 1 of the Statute of the ICJ: “*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it...*”

<sup>70</sup> *Ibid.*, para. 281. See also the Separate opinion of Judge Greenwood.

<sup>71</sup> Notice of Agence France Presse, 28 July 2010.

In this respect, Argentina has obtained the right to have a say that it had been asking for from the beginning. Soon after the scientists began their monitoring mission in early October 2010<sup>72</sup> however, the release of an alarming report on the air pollution allegedly emitted by the pulp mill – written under the auspices of the Argentinian Ministry of the Environment – sparked off a new crisis. This issue seems to be outside of the scope of the monitoring the parties agreed on; likewise, it was considered to be outside of the remit of the ICJ.<sup>73</sup> These renewed tensions have shown that opposition remains strong on the Argentinian side. Groupings of protesters have even declared that the fight will go on until Botnia leaves the river Uruguay's basin.<sup>74</sup> In 2013, tensions reached a new level due to a unilateral Uruguayan decision to considerably increase the pulp mill's production. Argentina threatened to refer the matter to the Court again.<sup>75</sup> Uruguay denied planning the construction of another pulp mill. Tension has temporarily dropped but the battle might not be over.

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<sup>72</sup> “Científicos argentinos y uruguayos realizan el primer control en la pastera”, *La Nación*, 6 October 2010.

<sup>73</sup> “Cruce con Uruguay por un informe sobre contaminación”, *Clarín*, 14 October 2010.

<sup>74</sup> “*La lutte se poursuivra jusqu'à ce que Botnia parte du Bassin du fleuve Uruguay*”: N. Naamane, “Uruguay vs Argentine: L'affaire Botnia ou la guerre du papier”, *Le Petit Hergé*, 27 septembre 2010, [<http://www.petitherge.com/article-uruguay-vs-argentine-l-affaire-botnia-ou-la-guerre-du-papier-57767045.html>], last visited 29 May 2015.

<sup>75</sup> “Argentina threatens legal action over UPM pulp mill”, AFP, 3 October 2013. See also “Uruguay's first lady praises Cristina Fernandez and blast opposition”, 29 August 2013, [<http://en.mercopress.com/2013/08/29/uruguay-s-first-lady-praises-cristina-fernandez-and-blast-opposition>], last visited 29 May 2015.