

Pulp Mills Case: A Commentary

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I want to discuss the decision's significance for international environmental law and general international law. Not going to talk about merits of the case. Obviously as counsel for Uruguay I am very pleased indeed with the outcome, but my perspective today will simply be that of an academic with a longstanding interest in this area of law.

1. Significance of case

- Clearly the most important case on international environmental law decided by any international court so far. Actually addresses the merits and the substantive law. Not simply a case about a river treaty – Court's interpretation and application of the 1975 Statute of the River Uruguay very much influenced by its perception of general international law. Covers most of the issues dealt with by ILC in draft articles on prevention of transboundary harm – notification, co-operation, EIA, prevention and due diligence and reflects the ILC's view of the law, notwithstanding the lukewarm reception the ILC's draft articles on transboundary harm have so far received from states, although not from Uruguay or Argentina, which relied heavily on them.
- Also an important case on international watercourses insofar as it deals with relationship between equitable use, protection of the environment and sustainable development. Once again its approach is fully in line the ILC's work on this subject and with the 1997 UN Watercourses Convention.
- Worth noting the international economic law aspects – Finland-Uruguay BIT, MERCOSUR dimension of 2nd provisional measures case, IFC review process and appeal to ombudsman. The merits decision is of real importance to investors, to the states in which they invest, and to funding bodies such as the World Bank.
- Finally, yet another case about VC Article 31(3)(c) and interpretation by reference to “evolving international law”. The court does indeed read one contemporary concept into the treaty – EIA – and it accepts that measures taken to protect the river's flora, fauna and biodiversity must reflect the parties' international undertakings by virtue of the wording of Article 41. But it rejects Argentina's argument that other treaties are incorporated into the Statute or that various articles of the Statute serve as “referral clauses” to other treaties. In this respect the court is cautious but quite consistent with its earlier precedents. It is plainly

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reluctant to allow one treaty to serve as a jurisdictional basis for litigation under other treaties. To that extent it rejects the idea of forum shopping.

2. EIA

- EIA probably the most significant issue dealt with by the court. Until now, no international court has held unequivocally that EIA is obligatory in cases of significant transboundary risk or considered what a transboundary EIA requires.
- Neither state is a party to the 1991 Espoo Convention on Transboundary EIA, nor is there any reference to EIA in the 1975 Statute. Uruguayan law nevertheless required an EIA for a project of this kind and one was duly carried out. Accepting the arguments of both parties on this point, and in accordance with VC Art 31(3)(c), the court found that the Statute should be interpreted “in accordance with a practice, which in recent years has gained so much acceptance among states that it may now be taken as 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....” (para 204).
- This treats EIA as a distinct and freestanding transboundary obligation in international law – reflecting Principle 17 of Rio, the Espoo Convention, and Article 7 of the ILC draft articles on transboundary harm. Nevertheless, the court also endorsed the alternative view that EIA is a necessary element of the due diligence obligation. Either way, the Court has now confirmed that in appropriate circumstances an EIA must be carried out *prior to the implementation* of a project that is likely to cause significant transboundary harm. (para. 205)
- No surprise given the growing body of treaties that require a transboundary EIA, as well as the instances of state practice. No state faced with litigation will deny that there is an obligation in international law to carry out an EIA: what they will do is deny that the circumstances require one (no risk of transboundary harm) or argue instead that an EIA was carried out. Uruguay chose the latter option. Argentina responded by arguing that the EIA was inadequate: that alternative sites should have been assessed. The Court noted that neither the Espoo Convention nor the UNEP EIA guidelines required assessment of alternative sites, but it went on to find that Uruguay had in fact assessed other sites.
- An important question remains: would the Court ever review the adequacy of an EIA? It accepted Uruguay’s argument, based on the ILC commentary, that the scope and content of an EIA are not specified by general international law. It is thus for each party to determine on a case by case basis what is required “having regard to the nature and magnitude of the proposed development and its likely

adverse impact.” (para 205). This formulation and the finding on alternative sites appears to leave open the possibility of reviewing the adequacy of an EIA in appropriate cases, and it would not be unreasonable to conclude that the Court did so here but found nothing wrong with the EIA undertaken by Uruguay, apart from the failure to make timely notification to Argentina as required by the Statute.

- There is one human rights aspect to the case, although it was not argued or decided in those terms – public consultation. The Court found that there had in fact been public consultation, but it nevertheless went on to hold in categorical terms that “no legal obligation to consult the affected populations arises for the parties from the instruments invoked by Argentina.” (para 216). This goes beyond what Uruguay had argued, and it seems right only if confined literally to the instruments invoked by Argentina – the Espoo Convention and the UNEP Principles. Properly argued there should have been no difficulty persuading the court of the general principle that public consultation is a necessary element of the EIA process. For me this is the only surprise in the entire judgment.

3. Prevention

- The decision cites *Corfu Channel* and *Nuclear Weapons* and reaffirms that “A State is thus obliged to use all of 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” (para 101). In this respect it again reflects the draft articles of the ILC. This is not surprising: it fully accords with the precedents and the leading textbook writers.
- The court also confirms explicitly that the obligation is one of due diligence: an obligation of conduct rather than one of result. It specifically rejects Argentina’s argument to the contrary. (para 187). What does the exercise of due diligence entail?
 - “adoption of appropriate rules and measures” (para 197)
 - “a certain level of vigilance in their enforcement”
 - “the exercise of administrative control applicable to public and private operators”
 - “careful consideration of the technology to be used” (para 223)
 - EIA and notification
- Again none of this is surprising, or new, or controversial. It conforms closely to the precedents – including *Trail Smelter*, and the ILC draft articles.

4. Procedure

- Court upholds Argentina’s argument that Uruguay failed to notify CARU and communicate EIA before authorising construction work. Parties have a duty to cooperate in good faith. Procedural rules part of

principle of prevention and obligation of due diligence. Violation of the Statute's express provisions on notification. Several judges give separate opinions in effect dissenting on this finding, which could have gone either way.

- Court nevertheless rejects Argentina's argument that construction of the plant is therefore illegal and that it should be pulled down. No obligation under Statute not to build once consultation period has passed. Finding of breach of procedure deemed sufficient satisfaction: "no cause to order cessation" of the mill.
- Court essentially following ILC view in Watercourses Convention and draft Articles on Prevention. Breach of procedure does not make what follows illegal. Is this right? Depends on circumstances. Analogous to distinction between mandatory and directory requirements in public law – can be forced to comply, but failure to do so doesn't necessarily invalidate all that follows.
- Any other conclusion would allow one side to block all development pending agreement or judicial resolution of the dispute. Could take years. Pragmatic outcome.

5. Equitable use and sustainable development

- The Court recognises that each party is entitled to make equitable and reasonable use of the shared river for economic and commercial activities in accordance with Articles 1 and 27 of the Statute. This is fully in keeping with long accepted law on shared watercourses.
- More importantly, the Court locates the right of equitable use within the larger framework of sustainable development. It notes that Article 27 embodies [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.*" (177). It stresses the obligation of each party to protect the river environment and its flora and fauna, and to take the necessary measures required by the treaty.
- This formulation reflects the UN Watercourses Convention and the more modern river treaties. As in *Gabcikovo* the court has made an important contribution to modernising the law of international watercourses in accordance with the UN Convention – a treaty that has few parties and is not in force but which has very quickly come to represent contemporary customary law on the subject.

6. Evidence and scientific expertise

- Most controversial aspect of the case – should court have appointed experts to advise on the scientific evidence (Simma & Al Khasawneh

dissent) or is court quite competent to decide on the adequacy of the evidence. Both views tenable.

- Who could possibly disagree that court-appointed experts would be preferable method of fact-finding than allowing parties own experts to convey their views as counsel, not subject to cross-X? If court's criticism of parties for following that precedent reflects a change of practice then this is welcome and sensible.
- Problem here not the credibility of the parties' experts as such. In fact Argentina's did a good job on paper – largely vindicating Uruguay. Real problem for Argentina was proving its case – not nearly strong enough, and Uruguay's was very strong. Tend to agree with Keith and Greenwood that the decision was straightforward and unnecessary for court to appoint experts. Seems unlikely that appointing experts would have altered the outcome.

7. Conclusions

- An excellent judgment that comes to sensible conclusions on all the important legal issues and the will no doubt stand as the most significant precedent in international environmental law since *Trail Smelter*.
- Shows that the court can handle scientific evidence competently and fairly. No basis for criticising its ability to deal with environmental cases, but it may be a challenge for court to move to a system where parties' own experts are subject to cross-examination.
- No doubt there are in theory better ways of handling a dispute of this kind, but that ignores the particular political context and the problematic relations between a very large and significant country and a very small and insignificant one trying to restore its economy and defend its most important foreign investment while maintaining the integrity of its environmental record. Court has handled the politics very skilfully – both sides can be and are well pleased.