

Pulp Mills
Student Materials

- Decided by the International Court of Justice in April 2010
- Key topics: environmental law (principles; water rules)

Learning Objectives

- Understand and apply:
 - the principles of prevention and the precautionary approach
 - the role of environmental impact assessments in preventing transboundary harm
- Analyze and evaluate:
 - How courts evaluate evidence of transboundary harm
 - why environmental disputes often hinge on procedural obligations, rather than substantive obligations

Background Information

The Uruguay River runs along the border between Argentina and Uruguay, affecting the economies of both states. In 1975, Argentina and Uruguay signed a treaty—called the Statute of the Uruguay River—that governs activities on the river. The Statute created an international organization called the *Comisión Administradora del Río Uruguay* (CARU, or “the Commission”) to monitor and create rules about water pollution in the Uruguay River.

The 1975 Statute included two important procedures for new building projects:

1. Each state had to inform CARU about new projects that might affect the river.
2. If CARU believed that the project might cause significant harm or if CARU was unable to determine whether the project might cause significant harm, then the state undertaking the project had to provide CARU and the other state with project details.

The 1975 Statute also included an important substantive obligation. Namely, it required that Argentina and Uruguay prevent pollution, which it defined as “the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects.”¹

In the early 2000s, two companies sought approval from Uruguay to build pulp mills along the Uruguay River. These companies planned to use water from the Uruguay River to convert wood into fiber board. Pulp mills divert a river’s water flow and sometimes release manufacturing byproducts (such as wood fibers) into rivers. Throughout the planning process, the two companies followed Uruguayan domestic law. They also notified CARU and Argentine officials about their plans. However, Uruguay did not formally inform or notify CARU and Argentina about the pulp mills until after it had issued permits called initial environmental authorizations.

Before either pulp mill was actually built and operating, Argentina sued Uruguay at the ICJ. Argentina argued that Uruguay violated the Statute’s procedures by granting initial environmental authorizations without first informing and notifying CARU and Argentina. Argentina also argued that the mills were likely to cause water pollution. While the case was being considered by the Court, plans for one of the pulp mills were cancelled. The other mill (the Orion mill) was built and began operating in late 2007. The Court issued its ruling in the case in April 2010. The Court thus assessed the environmental impact of the Orion mill based on limited (and often conflicting) evidence. The Court ultimately decided that while Uruguay broke its procedural obligations under the Statute, it did not break any substantive obligations.

Relevant Legal Texts

Statute of the Uruguay River (1975)²

Article 7

If one party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the regime of the river or the quality of its waters, it

¹ Article 40.

² The official treaty text was in Spanish. English translation of the Statute vary slightly. Here we include the translation used by the ICJ.

shall inform the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days 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 said Commission.

Such notification shall describe the main aspects of the work and ... any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the regime of the river or the quality of its waters.

Article 40

For the purposes of this Statute, pollution shall mean the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects.

Article 41

Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:

- (a) To protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies
- (b) Not to reduce in their respective legal systems:
 - (1) The technical requirements in force for preventing water pollution, and
 - (2) The severity of the penalties established for violations;
- (c) To inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems.

Majority Judgment

I. Procedural Obligations

The Court began by asking: did Uruguay break procedural obligations in the 1975 Statute? Recall that private companies informed CARU and Argentina about the mills. However, Uruguay did not officially inform CARU and Argentina about the mills until after it had issued permits called initial environmental authorizations. Article 7 requires notification and consultation about such projects. However, it does not say whether this process must occur before a state issues an initial environmental authorization.

The Court began by interpreting the obligation to “inform” in paragraph 1 of Article 7.

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” ... 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” ... In the view of the Court, the obligation to inform CARU allows for the initiation of co-operation between the parties which is necessary in order to fulfil the obligation of prevention ...

The Court observes that with regard to the River Uruguay, which constitutes a shared resource, “significant damage to the other party” ... may result from impairment of navigation, the regime of the river or the quality of its waters ... The Court notes that, in accordance with the terms of Article 7, first paragraph, the information which must be provided to CARU, at this initial stage of the procedure, has to enable it to determine swiftly and on a preliminary basis whether the plan might cause significant damage to the other party ...

The Court considers that the state planning activities referred to in Article 7 of the Statute is required to inform CARU as soon as it is in possession of a plan which is sufficiently developed to enable CARU to make the preliminary assessment ... of whether the proposed works might cause significant damage to the other party. At that stage, the information provided will not necessarily consist of a full assessment of the environmental impact of the project, which will

often require further time and resources, although, where more complete information is available, this should, of course, be transmitted to CARU to give it the best possible basis on which to make its preliminary assessment. In any event, the duty to inform CARU will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization ...

Uruguay did not transmit to CARU the information required by Article 7, first paragraph, [about the] mills, despite the requests made to it by the Commission to that effect on several occasions ... Consequently, Uruguay issued the initial environmental authorizations ... without complying with the procedure laid down in Article 7, first paragraph. Uruguay therefore came to a decision on the environmental impact of the projects without involving CARU ...

Uruguay maintains that CARU was made aware of the plans for the mills by representatives of [the mills] before the initial environmental authorizations were issued. Argentina, for its part, considers that these so-called private dealings, whatever form they may have taken, do not constitute performance of the obligation imposed on the parties by Article 7, first paragraph.

The Court considers that the information on the plans for the mills which reached CARU via the companies concerned or from other non-governmental sources cannot substitute for the obligation to inform laid down in Article 7, first paragraph, of the 1975 Statute, which is borne by the party planning to construct the works ...

Consequently, the Court concludes from the above that Uruguay, by not informing CARU of the planned works before the issuing of the initial environmental authorizations ... has failed to comply with the obligation imposed on it by Article 7, first paragraph, of the 1975 Statute.

The Court then considered the obligation to “notify” in paragraphs 2—3 of Article 7.

In the opinion of the Court, the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan’s impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause ...

The obligation to notify is therefore an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects.

The parties agree on the need for a full environmental impact assessment in order to assess any significant damage which might be caused by a plan.

Uruguay takes the view that such assessments were carried out in accordance with its legislation ... Uruguay maintains that it was not required to transmit the environmental impact assessments to Argentina before issuing the initial environmental authorizations to the companies, these authorizations having been adopted on the basis of its legislation on the subject ... Argentina considers that the initial environmental authorizations should not have been granted to the companies before it had received the complete environmental impact assessments ...

The Court notes that the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause significant transboundary harm to another state must be notified by the party concerned to the other party, through CARU, pursuant to Article 7, second and third paragraphs, of the 1975 Statute. This notification is intended to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts ...

The Court observes that this notification must take place before the state concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it.

In the present case, the Court observes that the notification to Argentina of the environmental impact assessments for the [two] mills did not take place through CARU, and that Uruguay only transmitted those assessments to Argentina after having issued the initial environmental authorizations for the two mills in question ... Uruguay gave priority to its own legislation over its procedural obligations under the 1975 Statute ...

The Court concludes from the above that Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7, second and third paragraphs, of the 1975 Statute.

II. Substantive Obligations

The Court then asked whether Uruguay had violated substantive obligations under the 1975 Statute. This portion of the ruling focused on the Orion mill, which was the only completed project.

The Court began by addressing the burden of proof in the case: who needed to prove that the substantive obligations were violated? The Court argued that despite the precautionary approach in international environmental law, Argentina must prove its allegations against Uruguay.

Argentina contends that the 1975 Statute adopts an approach in terms of precaution whereby “the burden of proof will be placed on Uruguay for it to establish that the Orion ... mill will not cause significant damage to the environment” ... Uruguay, on the other hand, asserts that the burden of proof is on Argentina ..., in accordance with the Court’s long-standing case law ... Uruguay also strongly contests Argentina’s argument that the precautionary approach of the 1975 Statute would imply a reversal of the burden of proof, in the absence of an explicit treaty provision prescribing it ...

To begin with, the Court considers that ... it is the duty of the party which asserts certain facts to establish the existence of such facts ...

While a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof ...

The Court then considered Article 41, which creates an obligation to prevent pollution. This portion of the ruling is quite complex because the Court had to rule on scientific evidence about pollution from the Orion mill. The Court began this section of the ruling by discussing its general interpretation of Article 41. It argued that Article 41 imposes two requirements. First, states must pass domestic laws and regulations that match the standards negotiated within CARU. These standards are published in an official document called the CARU Digest. Second, states must enforce these domestic laws.

Argentina claims that by allowing the discharge of additional nutrients into a river that is eutrophic and suffers from reverse flow and stagnation, Uruguay violated the obligation to prevent pollution, as it failed to prescribe appropriate measures in relation to the Orion ... mill ...

It maintains that the 1975 Statute prohibits any pollution which is prejudicial to the protection and preservation of the aquatic environment or which alters the ecological balance of the river. Argentina further argues that the obligation to prevent pollution of the river is an obligation of result ...

Uruguay contends that the obligation laid down in Article 41(a) of the 1975 Statute to “prevent ... pollution” does not involve a prohibition on all discharges into the river. It is only those that exceed the standards jointly agreed by the parties within CARU in accordance with their international obligations, and that therefore have harmful effects, which can be characterized as “pollution” under Article 40 of the 1975 Statute. Uruguay also maintains that Article 41 creates an obligation of conduct, and not of result, but that it actually matters little since Uruguay has complied with its duty to prevent pollution by requiring the plant to meet best available technology (“BAT”) standards ...

In view of the central role of this provision in the dispute between the parties in the present case and their profound differences as to its interpretation and application, the Court will make a few remarks of a general character on the normative content of Article 41 before addressing the specific arguments of the parties. First, in the view of the Court, Article 41 makes a clear distinction between regulatory functions entrusted to CARU ... and the obligation it imposes on the parties to adopt rules and measures individually to “protect and preserve the aquatic environment and, in particular, to prevent its pollution”. Thus, the obligation assumed by the parties under Article 41 ... is to adopt appropriate rules and measures within the framework of their respective domestic legal systems to protect and preserve the aquatic environment and to prevent pollution. This conclusion is supported by the wording of paragraphs (b) and (c) of Article 41, which refer to the need not to reduce the technical requirements and severity of the penalties already in force in the respective legislation of the parties as well as the need to inform each other of the rules to be promulgated so as to establish equivalent rules in their legal systems.

Secondly, it is the opinion of the Court that a simple reading of the text of Article 41 indicates that it is the rules and measures that are to be prescribed by the parties in their respective legal systems which must be “in accordance with applicable international agreements” and “in keeping, where relevant, with the guidelines and recommendations of international technical bodies”.

Thirdly, the obligation to “preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures” is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction ...

Finally, the scope of the obligation to prevent pollution must be determined in light of the definition of pollution given in Article 40 of the 1975 Statute ...

The [CARU] Digest expresses the will of the parties and their interpretation of the provisions of the 1975 Statute. Article 41 ... lays down broad obligations agreed to by the parties to regulate and limit their use of the river and to protect its environment. These broad obligations are given more specific content through the co-ordinated rule-making action of CARU ... CARU standards concern mainly water quality. The CARU Digest sets only general limits on certain discharges or effluents from industrial plants such as: “hydrocarbons”, “sedimentable solids”, and “oils and greases”. As the Digest makes explicit, those matters are left to each party to regulate. The Digest provides that, as regards effluents within its jurisdiction, each party shall take the appropriate “corrective measures” in order to assure compliance with water quality standards ... Uruguay has taken that action in its [domestic regulations] ... and in relation to the Orion ... mill ...

The Court then applied its general interpretation of Article 41 to the specific facts of the case. It began by examining Uruguay’s environmental impact assessment.

The Court will now turn to the relationship between the need for an environmental impact assessment, where the planned activity is liable to cause harm to a shared resource and transboundary harm, and the obligations of the parties under Article 41 ... The parties agree on the necessity of conducting an environmental impact assessment ... The parties disagree, however, with regard to the scope and content of the environmental impact assessment that Uruguay should have carried out with respect to the Orion [mill] ...

It is the opinion of the Court that in order for the parties properly to comply with their obligations under Article 41 ..., they must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment ...

In this sense, the obligation to protect and preserve, under Article 41(a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among states that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment ... Consequently, it is the view of the Court that 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. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken ...

The Court then examined the implications of Article 41 for the kind of technology used in Uruguay's Orion mill.

Argentina maintains that Uruguay has failed to take all measures to prevent pollution by not requiring the mill to employ the "best available techniques" ... Uruguay asserts that the Orion ... mill is, by virtue of the technology employed there, one of the best pulp mills in the world,

applying best available techniques and complying with European Union standards, among others, in the area ...

To begin with, the Court observes that the obligation to prevent pollution and protect and preserve the aquatic environment of the River Uruguay, laid down in Article 41(a), and the exercise of due diligence implied in it, entail a careful consideration of the technology to be used by the industrial plant to be established, particularly in a sector such as pulp manufacturing, which often involves the use or production of substances which have an impact on the environment ...

The Court finds that, from the point of view of the technology employed, and based on the documents submitted to it by the parties ... there is no evidence to support the claim of Argentina that the Orion ... mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced. This finding is supported by the fact that, as shown below, no clear evidence has been presented by Argentina establishing that the Orion ... mill is not in compliance with the 1975 Statute, the CARU Digest and applicable regulations of the parties ...

Finally, the Court considered the scientific evidence about the impact of the Orion mill on the Uruguay River. The Court argued that this evidence did not provide adequate proof that the mill had caused environmental harm, particularly since much of the evidence consisted of simulations of likely future harm from the mill, rather than evidence of actual past harm. The Court concluded by writing:

There is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion ... mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations ... Consequently, on the basis of the evidence submitted to it, the Court concludes that Uruguay has not breached its obligations under Article 41.