# The Conflict Between Argentina and Uruguay Concerning the Installation and Commissioning of Pulp Mills Before the International Court of Justice and MERCOSUR

*Daniel Pavón Piscitello**/Gabriel Eugenio Andrés****

## Abstract

In Latin America, Argentina and Uruguay are currently involved in a complex conflict of unparalleled antecedents caused by the installation and possible commissioning of two industrial cellulose plants of European capitals on the River Uruguay. Several factors contributed to the development of the conflict into two different but interrelated disputes: a dispute involving international and environmental law, being subject to the jurisdiction of the International Court of Justice; and a dispute concerning integration law, being recently resolved by the Dispute Settlement System of MERCOSUR. It will be argued in this article that having to resort to an external jurisdictional body as a means of resolving the environmental dispute was not only a consequence of the complexity of the conflict and development of the events, but also, and most remarkably, the natural outcome of the low level of integration reached by MERCOSUR on this subject matter.

## I. Introduction

In Latin America, one of the most important bilateral conflicts arisen in the last decades between two countries of the southern part of the continent has reached a critical point in the past few months.

In fact, the conflict between the neighbouring countries: the Argentine Republic (hereinafter "Argentina") and the Eastern Republic of Uruguay (hereinafter "Uruguay"), as a consequence of the establishment of two industrial cellulose plants of European capitals on the Uruguayan bank of the River Uruguay (an international river and natural border between both countries); in addition to the environmental damage that might be caused in the region due to the setting up and operation of the above mentioned plants, has created significant diplomatic frictions and a

* Professor of International Law (Catholic University of Córdoba, Argentina) and founding partner of A&P Consultants on International Legal Affairs.

** Professor of International Law (Catholic University of Córdoba, Argentina) and founding partner of A&P Consultants on International Legal Affairs.

Closing date of the article 02.10.2006.

lengthy situation of tension between these two countries, which are known to have a traditional and solid relation of friendship and to some extent a common history[1].

The above mentioned situation of tension has had a profound effect and has already shown its consequences in the region and in the subcontinent, given that both countries are full and founding members (state parties) of the most important regional integration scheme at present in Latin America, namely: the Southern Common Market (hereinafter "MERCOSUR", in its Spanish Acronym)[2].

As the process of direct diplomatic negotiations between both countries failed to find a common solution to the situation, the same international conflict began to diverge into two different but closely related disputes, both with respect to the claim of the parties and subject matter of the conflict as well as with regard to the competent jurisdictional bodies and the applicable legal order[3].

As a result, the parties to the conflict resorted to different mechanisms of dispute settlement, including international jurisdictional bodies: a) on the one hand, the International Court of Justice (at the instance of Argentina, invoking the violation of international law in force and a consequent environmental damage to the region); b) on the other hand, the Ad Hoc Arbitral Tribunal of MERCOSUR within the framework of MERCOSUR's Dispute Settlement System (at the instance of Uruguay, alleging the breach of the regional block's integration law, regarding the infringement of the free circulation principle). Both international tribunals have already pronounced their first judgements, which will be the subject of analysis in the present article. A brief reference to other dispute settlement procedures attempted by the parties will be made as well.

Given the breadth and complexity of the conflict, as well as the fact that no definitive solution to the disputes has been reached by the time this article was written, the present writing aims at providing a brief general legal analysis of a conflict

[1] After the emancipation process from the Spanish Kingdom in the first decades of the 19th century, Argentina and Uruguay made up for a few years the so called "Provincias Unidas del Río de la Plata", before they became independent and constituted two sovereign States (the independency process in Argentina started in 1810 and finished in 1853, while the process Uruguay started in 1811 concluded in 1830).

[2] As an integration process, MERCOSUR initiated formally in 1991 with the adoption of the Treaty of Asunción (i.e. the Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay). Originally, Argentina, Brazil, Paraguay and Uruguay made up MERCOSUR as full and founding members; later joined Bolivia, Chile, Ecuador, Colombia, Peru and Venezuela as associate members. Venezuela is currently in the final stage of becoming in a new member state of the regional block, by virtue of the "Protocolo de Adhesión de la República Bolivariana de Venezuela al MERCOSUR" concluded on 4 July 2006 (however, it is to note that the process of deposit of the corresponding instruments of ratification is currently under way). For further information on the present evolution of MERCOSUR with emphasis on private international and process law, see Samtleben, IPRax 2005.

[3] It is important to note that, in this article the terms "conflict" and "dispute" are not considered to be synonyms and they are not used in an interchangeable manner, as it is understood that they describe two different phenomena. Indeed, for the purposes of this article conflict is used in broad terms, as comprising any state of tension or hostility between the parties; while dispute is attributed a more specific meaning, thus describing a specific disagreement related to a matter of law or fact in which the assertion or claim of one party is met with refusal, counter-claim or denial by the other party.

which is mostly appealing from the legal science standpoint (especially, when considering the connection and interrelation between traditional international law, integration law and the respective mechanisms of dispute settlement).

Finally, by the analysis of the present case this article seeks to show that, to the extent regional integration schemes do not reach a certain level of development (in the style of the European model), whether because of lack of political commitment of their members or structural deficiencies, resort to external decision making mechanisms in case of conflicts arisen between their members becomes inevitable. With that purpose, this article draws a brief (but necessary) comparison between the legal system of the European Union (hereinafter "EU") and the legal order of MERCOSUR, specifically when analysing the dispute arising within the framework of this last integration process.

## II. The Context of the Conflict

Argentina and Uruguay share much more than a common border and history; the same language, religion and similar idiosyncrasy, but most remarkably, there are strong social, cultural and economic ties between the people of both countries. Consequently, relations between Argentina and Uruguay have proven to be highly amicable and have cultivated a climate of cooperation between their governments. Participation in regional and sub regional forums, such as the Organization of American States and MERCOSUR, has contributed to enhancing these harmonious links.

Given such facts, a serious bilateral conflict seemed highly unlikely. In fact, critical sources of potential tensions, such as the settlement of the international border, had been overcome. Indeed, several treaties which definitely delimited the boundary line on the two natural borders shared by Argentina and Uruguay (i.e. the River Uruguay and the Río de la Plata River) were concluded, including the bilateral treaty which draws up the boundary line on the shared part of the River Uruguay (i.e. the so called "1961 Treaty"). In this context, Argentina and Uruguay signed the Statute of the River Uruguay[4] in 1975 (hereinafter "the 1975 Statute"), with a view to establishing the joint machinery necessary for the optimum and rational utilization of the River Uruguay[5]. Thus, by this legal instrument Argentina and Uruguay agreed upon the regulation of a wide range of issues regarding the use of the river, such as navigation and works, port facilities, use of water, use of the bed and subsoil, natural resources, pollution, and law enforcement, among other questions. Besides the substantive regulation, the 1975 Statute established an administrative commission comprised of an equal number of representatives of each party, in order to provide the common management of the river: the Adminis-

[4] Entered into force in 1976.

[5] 1975 Statute, Article 1.

trative Commission of the Uruguay River[6] (hereinafter "CARU", in its Spanish acronym). Dispute settlement machinery was also set forth by this legal instrument to address any dispute which may arise between the Parties concerning the interpretation or application of the 1961 Treaty or the 1975 Statute[7].

However, tension between the countries arose in the past three years when Uruguay, as a result of a policy promoting forestry industry which has been persistently carried out since the 1980s[8], authorized the Spanish company "Empresa Nacional de Celulosa de España"[9] (hereinafter "ENCE") and the Finnish "Oy-Metsä-Botnia AB"[10] (hereinafter "BOTNIA") to build two industrial cellulose production plants[11] (hereinafter "pulp mills", "plants" or "projects") on the right bank of the River Uruguay, more precisely in the vicinity of the Uruguayan town of Fray Bentos and opposite the Argentinean city of Gualeguaychú[12]. The above mentioned authorizations were granted in 2003 and 2005, respectively, based on previous technical reports issued by the National Department for the Environment (DINAMA, in its Spanish acronym) of the Ministry of Housing, Territory Management and Environment of Uruguay. Therefore, according to the Uruguayan government, all environmental obligations and standards (both national and international) required by the case were met[13]. The strong economic and social impact that the plants will have on Uruguay needs to be emphasized. Involving around US$ 1500 million, both projects represent the major foreign direct investment in Uruguay's history[14]. The company BOTNIA was also authorized to build a port terminal on the river solely intended for the company's activities.

---

[6] Ibid., Articles 49 to 57.

[7] Ibid., Articles 58 to 60.

[8] Since the 1980s about 800000 hectares of eucalyptus have been planted in Uruguay for their use in the cellulose pulp industry.

[9] Resolution 342/03, issued by the Ministry of Housing, Territory Management and Environmental Impact of Uruguay, 9 October 2003.

[10] Resolution 63/2005, issued by the Ministry of Housing, Territory Management and Environmental Impact of Uruguay, 15 February 2005.

[11] The project led by the Spanish company ENCE is known as "Celulosa de M'Bopicuá" (hereinafter "CMB") and the project carried out by the Finnish company BOTNIA is usually referred to as "Orion". Construction works of both plants are under way and it is estimated that, while works of BOTNIA's plant have reached 50 %-60 % of the project, progress of ENCE's plant is inferior.

[12] While the city of Gualeguaychú has a population of about 90000 inhabitants, Fray Bentos has 23000 inhabitants.

[13] In this respect, a diplomatic note addressed by the Ministry of Foreign Affairs of Uruguay to the Argentinean authorities (Note 05/2003, 27 October 2003) expressed the following: "Environmental protection being a key concern to the Uruguayan state, the technical substantiation of the prior environmental authorization involved a lengthy process of exhaustive studies and analysis, with active participation of civil society; it can therefore be concluded that all necessary precautions have been taken."

[14] It is estimated that once in service, the pulp mills will have an impact of $ 350 million per year in the Uruguayan economy, representing an increase of about 2 % in Uruguay's gross domestic product (GDP). Besides, the impact on employment is expected to represent an increase of about 1 % of the total workforce. It is also expected that, with a production of 1 million tons of cellulose per year, the Orion plant will double the production of the CMB plant (i.e. 500000 tons of cellulose per year), thus

The Argentine government objected to the decision of the Uruguayan authorities, as it rendered the above mentioned authorizations to have been taken unilaterally by Uruguay and in breach of the prior information and consultations obligation set forth by Article 7 of the 1975 Statute[15] and principles of general international law. The Argentine authorities were particularly concerned about the negative environmental effects that the pulp mills might have on the quality of the waters of the Uruguay River and its area of influence[16]. The reaction of the Argentine administration was especially motivated by strong environmental concerns raised by individuals living on the left side of the Uruguay River (particularly in the city of Gualeguaychú), as well as by environmental organizations. Civil society on the opposite side of the building sites was highly concerned regarding the harmful effects that pollution might have on human and animal health and on quality of life, as well as the negative economic consequences arising from possible devaluations of real estate prices and loss of profits in the tourist and fishing industries.

Opposition of civil society in Argentina, organized in the form of "environmental assemblies", translated into active mobilization expressing their discontent to the installation of the pulp mills. Thus, by the end of 2005 and early 2006, several border crossings between Argentina and Uruguay were blockaded and circulation was strongly restricted, causing serious damage to the Uruguayan economy[17] (which depends substantially on the commercial relations and tourism with its neighbour country). Despite the continuous diplomatic protests raised by Uruguay, the Argentinean government remained passive (although it did not promote the blockades either) since it never took direct measures to restore free circulation. Uruguay complained against the blockades of the international border crossings in several opportunities and in multiple forums, as it will be discussed later in this article.

As it may be appreciated from this brief summary of the facts, the very origin of the conflict between Argentina and Uruguay, namely the Uruguayan authorization to build the pulp mills on the River Uruguay and the port terminal, developed

becoming the biggest cellulose industrial plant in the world and Finnland's most important private sector investment overseas.

[15] Article 7 of the 1975 Statute reads as follows: "If one Party plans to … carry out any other works which are liable to affect navigation, the régime of the river or the quality of the waters, it shall notify 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, where appropriate, how it is to be carried out and shall include any other technical data that will enable the notified Party to assess the probable impact of such works on navigation, the régime of the river or the quality of the waters."

[16] For further information, see the note addressed by the Embassy of Argentina in Montevideo to the Ministry of Foreign Affairs of Uruguay (Note MREU 226/03, 27 October 2003); see also Case *Concerning Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*) (Application Instituting Proceedings filed by Argentina in the Registry of the Court) 4 May 2006, ICJ, paras. 2, 24 and 25.

[17] According to estimations of the Uruguayan government, blockades of the border crossings with Argentina caused to Uruguay economic losses amounting to US$ 400 millions.

into two international disputes of different nature. Basically, each party centres the discussions on different issues, which involve legal sources of various kinds. On the one hand, there is an international dispute governed by traditional international law, consisting on the alleged violation by Uruguay of the 1975 Statute and relevant international environmental obligations. On the other hand, there is a dispute in the field of integration law, particularly MERCOSUR law, due to the alleged breach by Argentina of the obligation to ensure the free movement of goods and services between members of MERCOSUR within its sovereign territory. It is noteworthy, however, that both disputes are essentially and intrinsically intertwined, as they share a common origin and the same factual context.

The existence of two disputes involving issues and sources of law of different kinds, in addition to the particular strategy chosen by each party, has had profound consequences on the means of dispute settlement available to and preferred by the parties. Therefore, Argentina, focusing on the 1975 Statute and environmental dispute, has constantly regarded the issue as a "bilateral" question between Argentina and Uruguay, thus subject to bilateral negotiations or to the International Court of Justice (hereinafter "ICJ" or "the Court"). In contrast, Uruguay has always tried to "regionalize" the integration and trade dispute, involving MERCOSUR and even the OAS in the conflict.

## III. The Dispute Before the Court

### 1. Direct Negotiations

The dispute involving the alleged breach of the 1975 Statute and related international environmental law by Uruguay has been subject to various negotiation rounds. However, the parties have been unable to reach an agreement on the subject matter and find a negotiated solution to the dispute. CARU, as the competent forum for holding consultations, exchanging information and for submitting notifications in all related issues concerning the management and use of the Uruguay River[18], following Uruguay's commission of the company ENCE in October 2003, received a request from the Argentine delegation demanding the Uruguayan representatives to comply with the prior information and consultations procedure provided by the 1975 Statute[19]. However, due to the silent position which Uruguay held, discussions within CARU stalled, the body suspended its meetings and a first governmental high level negotiation attempt was tried in early 2004. In March 2004 the Uruguayan Minister for Foreign Affairs agreed to provide the information required by Argentina for establishing an environmental impact of ENCE's plant. In addition, the Ministers for Foreign Affairs of both countries decided that in the meantime CARU (which resumed its meetings) would draft a monitoring scheme

[18] 1975 Statute, Articles 7, 56(k) and 58.

[19] Ibid., Articles 7 to 13.

for the environmental quality of the Uruguay River in case the cellulose plants were to be built. Remarkably, each government has a different interpretation regarding the outcome of this negotiation process. In other words, while Argentina argues that the agreement did not refer to the setting up of the CMB plant, but only to Uruguay's commitment to provide information on the project and to the monitoring of the quality of the waters by CARU[20], Uruguay is of the view that the agreement settled the dispute[21].

In May 2005 both states established the High Level Bilateral Technical Group ("GTAN", in its Spanish acronym). GTAN was ascribed with the task to carry out complementary studies and analysis, information exchange and provide a follow-up to the possible consequences that the operation of the plants might have on the ecosystem of the Uruguay River, upon which a non-binding report within the period of up to one hundred and eighty days should be issued. Although GTAN worked under the supervision of both countries' Ministries of Foreign Affairs, it was essentially a technical body comprised of governmental and academic experts. Disagreement between the parties within GTAN arose as soon as it started its work. Indeed, the Argentine experts were particularly interested in the grounds on which the Uruguayan government based its choice for the current site of the plants[22], as well as in the reasons for not analysing technological alternatives in the production process[23]. According to the Argentine delegation, Uruguay never gave a satisfactory answer to these questions[24]. As differences between the parties proved to be irreconcilable, a common report could not be agreed, but each delegation submitted an individual report expressing its own conclusions[25], and Argen-

[20] Case *Concerning Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*) (Provisional Measures) 2006, ICJ, para. 51.

[21] *Pulp Mills* Case (Provisional Measures) 2006, ICJ, para. 43.

[22] The Argentine government is especially interested in convincing the Uruguayan authorities to relocate the site of the plants, arguing that the projects are placed in front of a populated area in Argentina.

[23] The industrial process proposed by the companies ENCE and BOTNIA is the so called "Kraft Process". Argentina argues that this process is highly polluting and that there are other more environmentally friendly processes.

[24] Particularly critical for Uruguay was the Argentinean request to consider the relocation of the plants. Indeed, the Uruguayan delegation expressed from the beginning that the choosing of the site of the plants was "already a fact" and a "sovereign decision of Uruguay", and as such, out of the competence of GTAN. The Uruguayan delegation to GTAN also disagreed as regards the Argentinean criticism to the Kraft Process.

[25] Basically, the Argentine delegation to GTAN stated that by unilaterally authorizing the construction of the plants, Uruguay breached its obligations under the 1975 Statute and general international law. In addition, the report expressed the Argentinean concerns as regards the site of the plants, and criticized the environmental impact studies carried out by the companies ENCE and BOTNIA as being superficial, incomplete, unclear, confusing, providing with mistaken and contradicting information, and reaching therefore to doubtful conclusions. On the other hand, the Uruguayan delegation denied the existence of a dispute between the parties and the negotiations nature of GTAN as it was understood by Argentina, stated that the location of the plants was a sovereign decision of Uruguay and assured that all requested information had been submitted. For further information, refer to the report of the Argentine Delegation to GTAN, available at <http://www.mrecic.gov.ar/portal/

tina paved the way for referring the dispute to the ICJ. Thus, the Argentine government formally notified the administration in Montevideo that it considered that a dispute had arisen between both countries in connection with the interpretation and application of the 1975 Statute; that the GTAN had been holding direct negotiations and that consequently the legal requirement set forth by the 1975 Statute vindicating the ICJ jurisdiction was fulfilled[26]. However, Uruguay formally rejected the Argentinean position, arguing the inexistence of a dispute and that GTAN had not been established as a negotiations forum, but as a strictly technical and consultations body.

Despite the setback suffered by the GTAN process, an agreed solution to the dispute seemed to be possible in March 2006, when a meeting of the Heads of State of Argentina and Uruguay opened another round of direct negotiations. Indeed, both Presidents agreed to request the companies ENCE and BOTNIA, as a goodwill gesture, to postpone building works temporally, while asking the environmental assemblies in Argentina to momentarily cease the blockades of the border crossings. This agreement fulfilled the interests of both parties, as on the one hand, suspension of the construction of the plants was regarded by the Argentine government a *sine qua non* condition for any direct negotiations process, and on the other hand, Uruguay was eager to ensure the free circulation of goods and services with Argentina. Based on this joint decision of the Presidents, a declaration was adopted by both countries' Ministers for Foreign Affairs. The document, which was supposed to be signed by the Presidents on a Summit Meeting to be held shortly, provided for the constitution of a commission comprised of six experts (three appointed by each party) of national and international prestige in the field of environmental protection. The panel, intended to be an enquiry commission, was ascribed with the task of submitting a non-binding cumulative environmental impact report to both governments within a period of up to forty five days[27]. It was decided that the report would also comprise the indication of the measures necessary for preventing the negative consequences that the cumulative environmental impact might have on health and welfare of the population living on both sides of the River Uruguay, among other technical and safety issues. Most importantly, the conclusions and recommendations of the panel were deemed to be the basis for an agreed solution to the dispute that would be discussed at a new Summit Meeting to be held soon after the submission of the report. However, the company BOTNIA

---

novedades/informe.pdf>; and to the report of the Uruguayan Delegation to GTAN, available at <http://www.presidencia.gub.uy/_WEB/noticias/2006/01/delegacionuruguaya.pdf#search='gtan%20informe%20uruguay'>.

[26] Article 12 of the 1975 Statute requires the parties to attempt direct negotiations during a period of one hundred and eighty days before being either party entitled to instituting proceedings before the ICJ, in case there is disagreement concerning the effects that any work or programme of operations may have on navigation, the régime of the river or the quality of the waters.

[27] It is to note that the Argentine President initially proposed to his Uruguayan counterpart to suspend works for a period of up to ninety days. However, the Argentine government agreed to reduce the above mentioned period to up to forty five days.

announced that it would suspend civil engineering works for ten days only, and, as Argentina regarded this time period not enough for conducting the cumulative environmental impact study, the Summit Meeting for establishing the enquiry commission never took place and negotiations collapsed. Thus, building works of the pulp mill plants and blockades of the border crossings in Argentina continued[28].

## 2. The Decision of the Court (Provisional Measures)

As the collapse of the last round of negotiations made it impossible to put the enquiry commission into practice, little negotiating room seemed to be left to the parties. Consequently, the disputes entered into a new stage where third party intervention seemed to be required. Accordingly, basing the jurisdiction of the Court on Article 60 of the 1975 Statute[29] and considering the direct negotiations stage completed, in May 2006 Argentina brought the dispute concerning the 1975 Statute and related environmental law before the ICJ and requested the Court to take provisional measures. Argentina alleged that by "the authorization, construction and future commissioning"[30] of the above mentioned pulp mills Uruguay was in breach of the obligations incumbent upon it under the 1975 Statute and other rules of international law to which that legal instrument refers[31], expressing its concern over the effects that such activities may have on the quality of the waters of the Uruguay River and on the areas affected by the river[32]. Specifically, Argentina complained that by its conduct, Uruguay infringed the optimum and rational utilization of the River Uruguay[33], the prior information and consultations procedure (alleging that the above mentioned authorizations had been taken unilaterally by Uruguay)[34], as well as environmental commitments undertaken under the 1975 Statute and applicable international agreements, in particular "the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study"[35]. Although the

[28] It is to note, however, that blockades of border crossings in Argentina were lifted in May 2006, when the government instituted proceedings against Uruguay before the ICJ, thus complying with a demand of the environmental assemblies.

[29] Article 60 of the 1975 Statute reads as follows: "Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either Party to the International Court of Justice." As previously explained, Argentina was of the view that the direct negotiations requirement had been fulfilled by the work of GTAN.

[30] *Pulp Mills* Case (Application Instituting Proceedings) 2006, ICJ, para. 2.

[31] Ibid., paras. 2 and 25.

[32] Ibid., para. 2.

[33] I.e., the general purpose of the 1975 Statute embodied in Article 1of the said instrument.

[34] I.e., 1975 Statute, Articles 7 to 13.

[35] *Pulp Mills* Case (Application Instituting Proceedings) 2006, ICJ, para. 25(1). See Article 41(a) of the 1975 Statute.

1975 Statute does not provide a full detailed set of obligations in the field of environmental protection[36], it does require the observance of relevant international environmental legislation, as it imposes on the parties the commitment to "protect and preserve the aquatic environment on the parties 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"[37] [emphasis added]. As a result of the allegedly unlawful conducts attributed to Uruguay, it was claimed before the Court that Uruguay engaged its international responsibility to Argentina[38]. In this context, besides the interest of Argentina in obtaining full reparation for the injury that may be caused by the supposedly unlawful conducts attributed to Uruguay, Argentina's main interest focuses on ensuring that Uruguay will cease its allegedly wrongful acts and will comply in future with the obligations incumbent upon it under the 1975 Statute and relevant rules of international law to which that instrument refers[39]. In other words, besides the issue of reparation, Argentina is aiming for the most part at preventing the transboundary damage that the pulp mills may have in its territory, by way of the decision of the Court banning the construction and operation of the plants, or demanding the relocation of the site of the projects or the adoption of more environmentally friendly industrial processes.

Although the Memorial and Counter-Memorial had not been submitted to the Court by the time this article was written[40], some inferences on each party's legal arguments on the merits of the dispute may be drawn from the public hearings on the Argentine request for the indication of provisional measures[41]. In the proceedings on the interim measures Argentina argued that the 1975 Statute imposed on the parties two interwoven categories of obligations, which in turn and in the present case, created for Argentina rights of the same nature towards Uruguay, namely: obligations (and its corresponding rights) of a substantive character and those of a procedural nature[42]. On the one hand, Argentina claimed to be entitled

[36] The 1975 Statute embodies general rules governing the use of water, the resources of the bed and subsoil, the conservation, utilization and development of other natural resources and pollution.

[37] 1975 Statute, Article 41(a).

[38] *Pulp Mills* Case (Application Instituting Proceedings) 2006, ICJ, para. 25(2). It is worth noting that the allegedly international liability of Uruguay does not arise only from the general rules of customary international law in the field of state responsibility, but also from the 1975 Statute. Thus, Article 42 of the said instrument, which sets out the responsibility of the parties derived from pollution, reads as follows: "Each Party shall be liable to the other for damage inflicted as a result of pollution caused by its own activities or by those carried out in its territory by individuals or legal entities."

[39] *Pulp Mills* Case (Application Instituting Proceedings) 2006, ICJ, para. 25(3).

[40] The Court has recently fixed 15 January 2007 as the time-limit for filling the Memorial by Argentina and 20 July 2007 as the time-limit for the filling of the Counter-Memorial by Uruguay.

[41] However, it is to recall that the decision of the Court on provisional measures does not prejudge the merits of the case and that, consequently, the right of the parties to submit arguments on the subject matter of the dispute in later proceedings remains unaffected.

[42] *Pulp Mills* Case (Provisional Measures) 2006, ICJ, para. 32.

under Article 41(a) of the 1975 Statute to the following rights of a substantive character: "first, 'the right that Uruguay shall prevent pollution' and, second, 'the right to ensure that Uruguay prescribes measures in accordance with applicable international standards'."[43] Uruguay's substantive commitments included the "obligation not to cause environmental pollution or consequential economic losses, for example to tourism"[44]. In this respect, Argentina contended that neither of these obligations had been observed by Uruguay[45], and argued in particular that "the site chosen for the two plants was 'the worst imaginable in terms of protection of the river and the transboundary environment'"[46] and that "economic damage was, at the least, 'a very serious probability' and would be irreparable"[47]. Argentina also emphasized the economic and social damage allegedly derived from the projects, contending that "the construction of the mills '[was] already having serious negative effects on tourism and other economic activities in the region'"[48], like the fishing industry and the real estate market. On the other hand, Argentina asserted that Articles 7 to 13 conferred it with the following rights of a procedural character: "first, the right to be notified by Uruguay before works begin; secondly, to express views that are to be taken into account in the design of a proposed project; and, thirdly, to have th[e] Court resolve any differences before construction takes place"[49]. Of key significance in Argentina's legal position was the view that the prior information and consultation procedure set forth by the above mentioned provisions imposed on each party "a 'no construction' obligation"[50], thus conferring a kind of "veto right"[51] when either party plans to carry out works which are liable to affect navigation, the river régime or the quality of the waters. Following, Argentina concluded that Uruguay's authorization of the pulp mills was in breach of the procedural obligations derived from the 1975 Statute.

For its part, Uruguay rejected many arguments of law and fact held by Argentina. First and foremost, Uruguay affirmed before the Court that it had fully complied with the 1975 Statute[52] and that "the breaches of the Statute of which Uruguay [was] accused 'prima facie lack[ed] substance'"[53]. In reference to the substantive obligations derived from the 1975 Statute, Uruguay contended that "the 1975

[43] Ibid., para. 33.
[44] Ibid., para. 33.
[45] Ibid., para. 33.
[46] Ibid., para. 35.
[47] Ibid., para. 35.
[48] Ibid., para. 35.
[49] Ibid., para. 34.
[50] Ibid., para. 34.
[51] In this respect, Argentina maintained that "Uruguay had the obligation … to ensure that no works are carried out until either Argentina has expressed no objections, or Argentina fails to respond to Uruguay's notification, or the Court had indicated the positive conditions under which Uruguay may proceed to carry out works", *Pulp Mills* Case (Provisional Measures) 2006, ICJ, para. 34.
[52] *Pulp Mills* Case (Provisional Measures) 2006, ICJ, para. 41.
[53] Ibid., para. 43.

Statute did not require the parties to prevent all pollution of the river, but only 'to take appropriate measures to prevent pollution of the river from reaching prohibited levels'"[54] [emphasis added]. In any case, Uruguay asserted that the obligations under Article 41(a) of the 1975 Statute had been met, as the "highest and most appropriate international standards of pollution control"[55] would be applied[56] and the environmental impact assessments carried out by DINAMA concluded that the projects posed "no risk of significant harm to Argentina, or the quality or environment of the river"[57]. In respect of the obligations of a procedural character, Uruguay contested the existence of a "right of veto" conferred to the parties by Articles 7 et seq. of the 1975 Statute over the implementation of industrial projects on the river[58]. In contrast, Uruguay interpreted those provisions as imposing on Argentina and Uruguay the obligation to "engage in a full and good-faith exchange of information"[59]. Finally, Uruguay stated that it had fully met the "good-faith exchange of information" obligation and that even an agreement with Argentina settling the dispute had been concluded[60].

As mentioned above, Argentina also submitted to the Court a request for the indication of provisional measures, pursuant to Article 40 of the Statute of the Court and to Article 73 of the Rules of the Court, with a view to preserve the substantive and procedural rights which it claimed to be entitled to, pursuant to the 1975 Statute and other rules of international law necessary for its interpretation and application[61]. In this respect, Argentina's main request to the Court was that, pending the final judgement in the case, Uruguay should suspend the authorizations for the construction of the plants and should take all necessary measures to suspend building works[62]. Supporting its request, Argentina contended that the requirements established by the jurisprudence of the Court for the indication of provisional measures had been met[63], as its rights were "'under immediate threat of se-

[54] Ibid., para. 54.

[55] Ibid., para. 43.

[56] Uruguay supported its position on the argument that the pulp mills "would abide by the standards imposed by 'the latest European Union 1999 International Pollution Prevention and Control (IPPC) recommendations, with which compliance is required by all pulp plants in Europe by 2007'" (*Pulp Mills* Case (Provisional Measures) 2006, ICJ, para. 45).

[57] *Pulp Mills* Case (Provisional Measures) 2006, ICJ, para. 53.

[58] Ibid., para. 43.

[59] Ibid., para. 43.

[60] Ibid., para. 43. By this, Uruguay was referring to the above mentioned agreement concluded in March 2004 between its Minister for Foreign Affairs and the Argentine counterpart. However, there are strong differences between the parties as regards the scope of the agreement and the consequences on the dispute.

[61] *Pulp Mills* Case (Provisional Measures) 2006, ICJ, para. 14.

[62] Ibid., para. 14.

[63] Argentina maintained that previous ICJ case law established the following conditions for the indication of provisional measures: the existence of a serious risk of irreparable prejudice or damage, and urgency. If further observed that "when there is a reasonable risk that the damage cited may occur before delivery of judgment on the merits, the requirement of urgency broadly merges with the condi-

rious and irreparable prejudice'"[64] and that there was "urgency" "in the sense that action prejudicial to [its rights] [was] likely to be taken before a final decision [was] given"[65]. Indeed, in Argentina's view, if provisional measures were not to be taken, the choice of the site for the location of the plants would become a *fait accompli* and the information and consultations obligation derived from the 1975 Statute would be purely illusory and theoretical; it stressed that the plants would become operational before the Court would be able to render a final judgment on the merits and that suspension of the building works was necessary for avoiding the aggravation of the social and economic damage[66]. For its part, Uruguay rejected the request for the indication of provisional measures, arguing basically that it had fully complied with the obligations derived from the 1975 Statute[67] and that suspension of building works would irreparably damage its "sovereign right to implement sustainable economic development projects in its own territory"[68]; it was also claimed that the conditions set by previous jurisprudence for the indication of provisional measures had not been met, as "there was no current or imminent threat to any right of Argentina"[69].

After hearing both parties' arguments, the Court concluded that "the circumstances of the case [were] not such as to require the indication of a provisional measure ordering the suspension by Uruguay of the authorization to construct the pulp mills or the suspension of the actual construction work"[70]. The Court's reasoning was basically twofold. On the one hand, the Court left the analysis of the alleged breach by Uruguay of the procedural rights derived from the 1975 Statute to the merits, since it considered that, if proven in later proceedings that Uruguay did not comply with the obligations in question, any such violation might be perfectly remedied at the merits stage[71]. On the other hand, the Court found that it was not persuaded that neither the authorizations were at issue, nor that the construction and commissioning of the pulp mills posed an imminent threat of irreparable damage to the aquatic environment of the River Uruguay or to the economic and social interests of the inhabitants on the Argentinean side of the river[72]. With regard to the commissioning of the plants, it emphasized that "in any case, the threat of any pollution [was] not imminent as the mills [were] not expected to be

tion [of the] existence of a serious risk of irreparable prejudice to the rights in issue" (*Pulp Mills* Case (Provisional Measures) 2006, ICJ, para. 37).

[64] *Pulp Mills* Case (Provisional Measures) 2006, ICJ, para. 35.

[65] Ibid., para. 37.

[66] Ibid., paras. 37 and 38.

[67] Ibid., para. 43.

[68] Ibid., para. 48.

[69] Ibid., para. 44. For further information on this argument, see *Pulp Mills* Case (Provisional Measures) 2006, ICJ, 44 to 47.

[70] *Pulp Mills* Case (Provisional Measures) 2006, ICJ, para. 79. The decision was taken by a majority of 14 votes to 1.

[71] *Pulp Mills* Case (Provisional Measures) 2006, ICJ, para. 70.

[72] Ibid., paras. 73, 74 and 75.

operational before August 2007 (Orion) and June 2008 (CMB)"[73]. However, the Court made its view clear that "in proceeding with the authorization and construction of the mills, Uruguay necessarily beared all risks relating to any finding on the merits that the Court might later make … [and] that their construction at the current site cannot be deemed to create a *fait accompli* because … 'if it is established that the construction 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'"[74]. This statement is consistent with the interim nature of the proceedings on provisional measures and the fact that the decision denying the suspension of construction works does not prejudge the merits of the dispute and the Argentine rights and arguments on the subject matter. The Court finally reminded Argentina and Uruguay their obligation to comply with their international undertakings, to implement in good faith the information and consultations procedure provided by the 1975 Statue and encouraged them "to refrain from any actions which might render more difficult the resolution of the present dispute"[75]. In this regard, the decision emphasized the commitment undertaken by Uruguay before the Court to comply in full with the 1975 Statute[76]. This last part of the decision may have profound consequences on the future development of the dispute, particularly if Uruguay would have the intention to authorize ENCE, BOTNIA or any other company to carry out new works on the River Uruguay liable to affect navigation, the régime of the river or the quality of the waters. Indeed, it seems to be most difficult for the Uruguayan government to authorize new works on the River Uruguay without giving prior notice to Argentina through the appropriate means set by the 1975 Statute, thus in breach of its commitment undertaken in an express manner before the Court.

In sum, although the decision of the Court in respect of the request for the indication of provisional measures clearly favoured Uruguay (as it did not provide for the suspension of building works pending final judgement), it left the rights of parties on the merits unaffected and it seems to have contributed to preventing the worsening of the dispute.

## IV. The Dispute Before MERCOSUR

As explained before, blockades of the international roads in Argentina on the way to Uruguay by individuals and environmental organizations as a means of protest and pressure against the installation of the pulp mills in question (infringing the freedom of circulation between both countries and causing economical damage to Uruguay) led Uruguay to raise the dispute within the framework of the

[73] Ibid., para. 75.
[74] Ibid., para. 78.
[75] Ibid., para. 82.
[76] Ibid., para. 83.

regional integration scheme, making specific use of the Dispute Settlement System of MERCOSUR[77]. In this way, Uruguay emphasized one of the aspects or dimensions of the conflict, namely: the breach by Argentina of the regional integration rules or MERCOSUR law, specifically the freedom of movement principle.

It should be noted that neither Argentina nor Uruguay attempted to resort to MERCOSUR's tribunals for dealing with the other aspect or dimension of the conflict, i.e. the case concerning the alleged breach of the 1975 Statute and related environmental issues. This was due to the fact that, unlike the legal system of the EU (which provides for an environmental policy of broad development[78]), the legal framework of MERCOSUR in the field of environmental protection is insufficient, being restricted to providing solely for framework legislation, and as such broad and imprecise. In this regard, the Framework Agreement on Environment of MERCOSUR should stand out[79].

Considering the above explanation and the context of this dispute, it may be argued that the parties, particularly Argentina, may have been entitled in resorting to the Dispute Settlement System of MERCOSUR, alleging that MERCOSUR law on environment had been breached. However, it has to be emphasized that the feasibility of reaching a final resolution on the environmental dispute by this method may have been very little, given the limited development that MERCOSUR's legislation has reached on this subject matter due to the exiguous degree of integration on environmental questions. This argument serves to highlight that in cases where integration processes do not reach an adequate level of development, like the case herein, the need to resort to external jurisdictional bodies becomes inevitable when bilateral negotiations fail.

Notwithstanding the above mentioned statements, it may be affirmed that, if the ICJ would conclude on its decision on the merits that, by authorizing the installa-

[77] The Dispute Settlement System of MERCOSUR is currently governed by the Olivos Protocol (hereinafter "OP") adopted on 18 February 2002 and in force since 10 February 2004, read in light of its Rules of Procedure (hereinafter "ROP") adopted on 15 December 2003 (MERCOSUR/CMC/DEC. N° 37/03). The above mentioned Dispute Settlement System provides the following means of dispute resolution: first, direct negotiations between the parties of the dispute; second, and if needed, the optional intervention of the Common Market Group (if agreed by the parties or required by a third state); and, finally, proceedings before the tribunals of MERCOSUR, whether Ad Hoc Tribunals (hereinafter "AHT") or the Permanent Tribunal of Review (hereinafter "PTR"). On the other hand, Uruguay attempted to resort to a political instance of dispute resolution within MERCOSUR, namely: the Council of the Common Market (which is a political body); however, Argentina, in exercise of MERCOSUR's Pro Témpore Presidency, refused. For further information on MERCOSUR's Dispute Settlement System, see S c h m i d t , EuZW 2005, 139, 140 et seq.

[78] The European Environmental Policy is founded on Articles 2 and 6 and in Title XIX (Articles 174 to 176) of the European Community Treaty (ECT) (primary law), and has been developed by a rich set of rules of secondary law. For further information on this issue, see the official web site of the EU, available at <www.europa.eu>.

[79] This agreement was adopted on 21 June 2001 (MERCOSUR/CMC/DEC. N° 2/01) and entered into force on 27 June 2004. The Additional Protocol to the Framework Agreement on Environment of MERCOSUR in the Field of Cooperation and Assistance in Case of Environmental Emergencies should be also noted, adopted on 7 July 2004 (MERCOSUR/CMC/DEC. N° 14/04), not in force yet.

tion of the pulp mills in question, Uruguay had breached the 1975 Statute and applicable environmental legislation, Uruguay may also be regarded to be in contravention of the environmental law of MERCOSUR, to be more precise the Framework Agreement on Environment of MERCOSUR. Indeed, this legal instrument refers in an express manner to the international treaties and other international agreements on environment to which its members may be parties, laying down on the states parties the obligation to cooperate with a view to ensure the observance of their provisions[80].

## 1. The Arbitral Award

Invoking the provisions of the Olivos Protocol (hereinafter "OP") and raising a formal complaint, Uruguay requested on 3 July 2006 the composition and intervention of the Ad Hoc Arbitral Tribunal of MERCOSUR (hereinafter "AHT" or "Tribunal")[81]. Once the Tribunal had been set up and the legal proceedings had been fulfilled, the AHT passed its arbitral award on 6 September 2006 (hereinafter "the award" or "the arbitral award"). The award on the subject matter raised by Uruguay was approved unanimously[82].

Uruguay claimed before the AHT that blockades of the roads leading to the international bridges to Uruguay[83] carried out in Argentine territory by individuals in protest against the construction of the pulp mills on the River Uruguay and the absence of the Argentine authorities in adopting appropriate measures to end those blockades, caused significant economic damage to Uruguay and to the economic players of the country (particularly to the international trade, tourist and transport sectors). It further added that the blockades were inconsistent with MERCOSUR law, which provides for the free movement of goods, services and factors of production between member states, through the elimination of tariff barriers and

[80] Framework Agreement on Environment of MERCOSUR, Articles 1 and 5.

[81] Uruguay requested Argentina to enter into direct negotiations (Articles 4 and 5 of the OP) on 22 February 2006, alleging the violation of the freedom of circulation as provided by MERCOSUR law. Argentina replied that it was not obstructing the freedom in question. As negotiations failed to settle the dispute during the legal terms (namely, fifteen days or otherwise agreed by the parties), and in view of the lack of consensus for resorting to the optional intervention of the Common Market Group (Articles 6, 7 and 8 of the OP), Uruguay referred the dispute to the Ad Hoc Arbitral Procedure (Articles 9 and 16 of the OP).

[82] "Award of the Ad Hoc Arbitral Tribunal established to resolve the dispute between Uruguay and Argentina regarding the 'Failure of the Republic of Argentina to adopt appropriate measures to prevent and/or eliminate impediments in Argentine territory to free access to the routes to the international bridges General San Martín and General Artigas'." The award is available at the official web site of the Ministry of Foreign Affairs of Uruguay, available at <http://www.mrree.gub.uy/mrree/home.htm>. The Tribunal was composed by Luis Martí Mingarro (Spain) -President-, Enrique Carlos Barreira (Argentina) and José María Gamio (Uruguay).

[83] Although with temporary suspensions, the most important blockades went on from the middle of December 2005 until the middle of May 2006. Arbitral award, paras. 17, 90 to 92 and 134, among others.

measures of equivalent effect ("of any kind") which may impede or restrict reciprocal trade in a unilateral manner[84].

As a consequence, Uruguay alleged that the breach of the law in force fell on the Argentine state, as it failed to adopt appropriate, reasonable and efficient measures to avoid the above mentioned situation[85]. Therefore, Uruguay requested the AHT to[86]: a) Declare that Argentina had infringed its obligations derived from MERCOSUR law, particularly the rules related to free circulation (Articles 1 and 5 of the Treaty of Asunción – Treaty Establishing MERCOSUR –; Articles 1, 2 and 10(2) of the Annex I to the Treaty of Asunción; Articles II, III and IV of the Montevideo Protocol on Trade in Services)[87], as well as obligations derived from principles and provisions of international law applicable to the subject matter, as it is alleged that Argentina failed to adopt appropriate measures to prevent and/or eliminate impediments to free circulation; b) Order Argentina to adopt appropriate measures aiming at preventing and/or eliminating further impediments to free circulation with a view to ensure such freedom.

Argentina based its defence against the Uruguayan claim on several arguments. Among others, the following arguments should be emphasized: On the one hand, that the request lacked of substance, since the blockades had ceased by the date the complaint had been filed; on the other hand, that the issue of the case was abstract, as the measures requested were to be taken by Argentina in the future, without giving any specification as regards their type and content[88]. Argentina further argued that the blockades of the roads did not cause any damage, neither to Uruguay nor to the economic actors of the country[89], and that the Argentine government was of the view that the demonstrations represented the exercise of a legitimate right, and therefore these measures had the understanding of the government (although it never encouraged the blockades and always tried to dissuade them)[90]. Argentina maintained that there had been a clash of rights, namely: the right of freedom of expression, assembly and protest, on the one hand; and the right of freedom of movement of goods on the other. It further added that, according to

[84] Arbitral award, paras. 16 to 29.

[85] Ibid., paras. 30 to 32.

[86] Ibid., paras. 33 and 71.

[87] Article 1 of the Treaty of Asunción (hereinafter "TA") embodies the principle of free circulation, providing that the Common Market shall involve "[t]he free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures". This principle is reinforced in broad terms by the rest of the rules invoked by Uruguay. The most important MERCOSUR treaties and regulations adopted until 1999 have been published in German by Max-Planck-Institut für ausländisches und internationales Privatrecht, Rechtsquellen des Mercosur, Teilbände I+II, 2000. All treaties, regulations and arbitral awards are available at the MERCOSUR official web site, available at <www.mercosur.org.uy>. Besides, it is to note the similarity between MERCOSUR and EU law in this subject matter (particularly, Article 1 of the TA and Articles 28 and 29 of the ECT).

[88] Arbitral award, paras. 36 and 72.

[89] Ibid., paras. 41 and 42.

[90] Ibid., paras. 43, 61 and 72, among others.

Argentinean domestic law, the Human Rights of the kind cited in the first place had a higher legal status than and pre-eminence over the other one, thus justifying the restriction of the rights embodied by an integration treaty; in view of Argentina, acting the opposite way would have represented an unacceptable repression according to Argentinean public law[91]. Besides that, the due conduct in respect to free circulation of goods and services refers exclusively to governmental measures, and therefore, state responsibility does not extend to the conduct of individuals[92]. Consequently, Argentina concluded that dissuasion was the only legitimate option left to its government[93].

In view of the above mentioned arguments, Argentina requested the AHT to declare[94]: a) that the dispute lacked of substance and became abstract; b) that it was not possible to restrict lawfully a Human Right safeguarded by law (namely, the right of freedom of expression) with a view to ensure another protected right that had no Human Right status (in the case herein, the right to the free movement of goods and services); c) that in any case the blockades of the roads had represented a total impediment to the free movement of goods and services between both countries; d) that the Argentine government did not adopt any measure that breached its obligations derived from MERCOSUR law related to the principle of free circulation of goods and services or from principles and provisions of international law applicable in the subject matter; e) that the Argentine government had acted with the purpose of dissuading its citizens from using the blockades as a means of protest, and that it had implemented the means necessary to ease the free circulation of goods and services when blockades took place.

Based on the positions and arguments of the parties, the arbitral award pronounced by the AHT decided the following: a) that the "absence of the due diligence" that Argentina "should have adopted to prevent, imposing order or, where appropriate, remove the blockades of the roads … [that link the two countries, carried out by individuals on the Argentine bank of the River Uruguay] is not consistent with the commitment undertaken by the states parties to the treaty establishing MERCOSUR to guarantee free circulation of goods and services between the territories of their respective countries"[95]. b) That it was not legally proper for the AHT to adopt or promote decisions on future conducts[96].

The reasoning of the AHT started by confirming that free circulation of goods and services constitutes a basic principle of MERCOSUR and established that blockades of the roads implied an objective restriction to free circulation[97]. After

[91] Ibid., paras. 44, 51 to 53 and 72.

[92] Ibid., paras. 46, 47 and 56 to 57.

[93] Ibid., paras. 54, 58 and 72.

[94] Ibid., paras. 72.

[95] Ibid., part IV (Decision), second point (own translation).

[96] Ibid., part IV (Decision), third point.

[97] Arbitral award, paras. 102 to 115 and 161. In paragraph 161 the AHT expressed that such restriction did not only cause distortions in trade of Uruguay with Argentina, but also with other coun-

which, the Tribunal concluded that a state incurs a responsibility because of its own act when it fails to perform its "due conduct", emerged in the present case from the commitment to ensure the freedom of movement within the integrated space, as it did not act with the necessary diligence in preventing or removing by appropriate means acts of individuals that may cause damage to other states[98]. Thus, the Tribunal decided the issue in favour of Uruguay.

After finding that the dispute had not become abstract, as it considered that the conduct alleged to be inconsistent with MERCOSUR law may resume (in particular, the "permissive attitude exteriorized" by Argentina, notwithstanding the request made by Uruguay to re-establish the communication routes)[99], it based the decision on the following legal terms:

With reference to the above mentioned point a) of the decision, i.e. the failure of Argentina to adopt its due diligences aimed at preventing, imposing order or, where appropriate, removing blockades of the roads linking the two countries carried out by individuals, as well as the inconsistency of this conduct with the commitments undertaken by states parties to MERCOSUR to guarantee free movement of goods and services between their territories, the AHT expressed the following conclusions (which became the central point of its reasoning):

The fact that obstruction of the international communication roads had been carried out by individuals did not excuse Argentina from "being responsible for its own acts, to the extent that it failed to comply with the duty to adopt the appropriate measures for preventing or removing the acts that individuals under its jurisdiction may cause damage to another member state of MERCOSUR, in breach of the rules set by its establishing treaty"[100]. The "due conduct" placed on Argentina derived "from the commitment to guarantee and maintain free movement of goods and services within MERCOSUR and had an implicit obligation to apply the means necessary for reaching such objective"[101].

The AHT refuted the main arguments held by Argentina in its defence in relation with this issue:

I. The AHT reminded Argentina that, complying with the obligation to preserve free circulation (which is an international obligation emerged from the treaty establishing MERCOSUR) conditional on domestic law was inadmissible, as it was in breach of the 1969 Vienna Convention on the Law of the Treaties (hereinafter "VCLT"). Indeed, the VCLT embodies in an express manner the principle that states may not evade compliance with their international commitments invoking

---

tries (both members and non-members of MERCOSUR) which Uruguay trades through the communication routes subject to obstruction.

[98] Arbitral award, paras. 116 to 123.

[99] Ibid., paras. 76 to 81 and 172. In paragraph 172 the Tribunal expressed that "the repeated and continuous character of the attitude of understanding of the responding party constitutes a standard of behaviour before the problem that leaves the possibility to expect that it may be repeated in the future if the same or similar circumstances occur" (own translation).

[100] Arbitral award, paras. 116, 123, 147 and 175, among others (own translation).

[101] Ibid., paras. 118 and 176, among others (own translation).

provisions of their internal law (VCLT, Article 27)[102]. It is worth pointing out that, according to MERCOSUR law, the VCLT constitutes a source of law to be applied by the tribunals of MERCOSUR in deciding disputes[103].

II. The AHT observed that respect for Human Rights, especially rights concerning freedom of expression and association, are not absolute, notwithstanding the protection they might enjoy under the Argentine Constitution. Indeed, the Constitution of Argentina includes in its legal text certain international treaties on Human Rights in an express manner. The AHT understood that it is legitimate to restrict these rights "when they may affect legal rights of other people, exceeding the limit set by reason and affecting or disturbing rights of other members of society"[104], in the case herein, the right of free movement of goods and services.

III. The AHT affirmed that restriction of movement and the subsequent restriction of free economic circulation within the integrated space may be tolerated if the precautions necessary for mitigating the inconveniences that may result therein have been adopted, in order to ensure that the restrictions may not imply too significant a sacrifice of other prominent interests[105]. The Tribunal was of the view that this had not been the case, as proven by the intensity and length of the blockades of the roads. It further added that the "due conduct" expected from Argentina required effective measures, so as to achieve the requested outcome in compliance with the international commitments[106].

Without prejudice to these conclusions, the AHT was of the view that no discriminatory intent aimed at causing damage to trade with Uruguay could be observed on the part of Argentina and the Argentine government in the present case[107]. It further expressed that it was not convinced that the Argentine government had promoted or encouraged the measures adopted by the individuals with a view to impede free circulation as provided by the regional law[108].

IV. The AHT affirmed that the sovereign right of every state to have its own government has in contrast the duty of "due diligence" in preventing acts of individuals under its jurisdiction. This duty, which is imposed by international law,

[102] Ibid., paras. 124 to 129 and 177.

[103] Article 34(1) of the OP provides that the sources of law to be applied in settling disputes in MERCOSUR are the following ones: the primary law of MERCOSUR (i.e. the Treaty of Asunción, the Ouro Preto Protocol, and protocols and agreements adopted within the framework of the Treaty of Asunción), secondary law (i.e. decisions of the Council of the Common Market, resolutions of the Common Market Group and directives of the MERCOSUR Trade Commission), as well as principles and rules of international law applicable on the subject matter.

[104] Arbitral award, paras. 138, 139 and 178 (own translation). What is more, the AHT even cited international treaties that are part of the Argentine Constitution (in virtue of Article 75(22) of that legal text) in support of its conclusion.

[105] Arbitral award, paras. 133, 134, 148, 149 and 179.

[106] Ibid., paras. 118, 146 and 182, among others.

[107] This conclusion, among other reasons, served the AHT to maintain that the European case law cited by Uruguay (i.e. Case C-265/95, 9 December 1997, "*European Commission against the Republic of France*"), was not assimilable to the present case, arbitral award, paras. 151.

[108] Arbitral award, paras. 142, 180 and 181, among others.

requires to achieve certain outcomes regardless of the internal choice of the means to be applied with that purpose[109]. The Tribunal declared that sovereign states are also liable for the behaviour of any of their organs in view of the infringement of the international obligations[110].

V. The AHT made clear that blockades of the roads carried out by individuals, as well as the permissive attitude shown by the Argentine government in this regard caused undeniable inconveniences to the economic players and affected bilateral trade[111]. Although it had not been required by Uruguay, the AHT declared that, according to MERCOSUR's legal system, proof of the fact that a national measure was in breach of regional law does not entail anything else than the obligation of the non-complying state to conform to what is required by law. In such case, MERCOSUR rules do not oblige "the party in breach to repair the eventual damage caused by its unlawful measure"[112].

VI. In light of the jurisprudence of other MERCOSUR Ad Hoc Tribunals and specifically the interpretative criteria set out by the Permanent Tribunal of Review in its first arbitral award[113], the AHT interpreted the legal rules in view of the integration law (i.e. MERCOSUR law) and affirmed that recognizing the blockades of the roads as lawful "would imply to remove the Treaty of Asunción of an essential part of its *raison d'être*"[114]. Thus, the AHT recognized that free circulation constitutes a basic principle of MERCOSUR.

Regarding the above mentioned point b) of the decision, the AHT rejected the request of Uruguay to adopt a decision in relation to the conduct Argentina should observe in the future, concluding that it was not proper for the Tribunal to adopt such a decision. The AHT based this conclusion on the fact that such a decision would entail the assumption of legislative functions[115]. Following, the AHT asserted that laying down clear rules to be observed by the countries "will determine

[109] Ibid., paras. 118, 143, 153 and 185, among others (own translation).

[110] Ibid., paras. 156 and 187.

[111] Ibid., paras. 111, 112, 134 and 183, among others.

[112] Ibid., paras. 162 to 165, 188 and 189 (own translation). Unlike the EU legal system (Article 228 of the ECT), the legal régime of MERCOSUR only provides for the adoption of compensatory measures in cases where the decision pronounced in the arbitral award had not been observed (Articles 31 and 32 of the OP).

[113] Arbitral award Nº 1/2006, 13 January 2006. For further information see Piscitello/Schmidt, Der EuGH als Vorbild: Erste Entscheidung des ständigen Mercosur-Gerichts, EuZW 2006, 301-304.

[114] Arbitral award, paras. 154, 155 and 186 (own translation). In paragraph 154 the AHT expressed that in legal proceedings all values involved in the case must be considered, including the confidence on an effective public order guaranteeing the effectiveness of commitments assumed by states parties to MERCOSUR. In paragraphs 155 and 186 the AHT affirmed that encouraging the repetition of acts such as the blockades of the roads would contribute to create a state of an unforeseeable nature and legal insecurity, which would be counterproductive for the future development of MERCOSUR.

[115] Arbitral award, paras. 168 and 191.

with clarity the limits between what is permitted and prohibited, so that a repeat of this kind of dispute is not to be expected"[116].

## V. The Conflict In Other Scenarios

### 1. The Conflict Before the Multilateral Financial Bodies

With a view to prevent temporarily the installation and commissioning of the pulp mills, Argentina took various steps before the international financial bodies related with the projects[117], particularly the International Finance Corporation (hereinafter "IFC")[118], as this institution has been requested by the companies ENCE and BOTNIA to provide for financial assistance to their projects[119].

As a consequence of Argentina's strategy, this international body has decided to deepen the technical studies of the plants in order to determine exactly the possible cumulative environmental impact that the installation and commissioning of the pulp mills might cause in the region[120]. Furthermore, the IFC resolved not to take any decision regarding the requested financing until the additional studies are concluded. That is to say, the decision on the grant of the funding is suspended (projects "pending of approval") and it seems to be subjected to the results of the new Environmental Impact Study (hereinafter "EIS")[121].

---

[116] Ibid., paras. 169 and 192 (own translation).

[117] Both the CMB and the Orion projects are financed by private funds of investment. However, some of the investment funds have taken away their support to the pulp mills.

[118] The IFC is the private sector arm of the World Bank (hereinafter "WB").

[119] The company ENCE requested US$ 200 million from the IFC with the purpose of financing part of its project. BOTNIA requested the same amount with the same purpose.

[120] In this matter, it is worth mentioning the following document of the IFC: "IFC Action Plan based on Findings of Independent Expert Panel", 9 May 2006. This IFC's document refers to the last technical report prepared by a panel of independent experts conformed with the purpose of analyzing the arguments raised by the interested parties on the Cumulative Impact Study of the plants, and shows the results of the mentioned report, namely: a) The need to collect additional information and carry out additional analysis, in order to determine the environmental impact of the projects in a precise manner; b) The report also provides technical recommendations in order to improve the environmental performance of the plants. In response to the report, the IFC and the companies ENCE and BOTNIA agreed on a plan of action, which includes carrying out additional analysis and the collection of new information as regards the following issues: applicable technologies; selection of the plants' site; water quality and aquatic resources of the River Uruguay; air quality; tourism, forest plantations; and environmental management/monitoring plans and emergency response. Finally, the document expresses that the new Environmental Impact Study "The final CIS will be an essential factor in the World Bank Group's decision making process of determining whether to submit the projects to the Board of Directors for approval". For further information, see the official web site of the IFC, available at <http://www.ifc.org/ifcext/lac.nsf/content/Uruguay_Pulp_Mills>.

[121] By the time this article was written, the EIS was in preparation. According to sources of the IFC, it is expected that the EIS will be concluded and submitted in October 2006. For further information, the official web site of the IFC, available at <http://www.ifc.org/ifcext/lac.nsf/content/Uruguay_Pulp_Mills>.

Apart from the technical studies, the IFC has expressed its institutional concern for the solution of the conflict between Argentina and Uruguay. In other words, the WB group would be willing to grant the financial support to the pulp mills once the international conflict (which has already involved the intervention of two international jurisdictional bodies – being one of them, part of the United Nations system –) would be solved.

Concluding this topic, it may be stated that, both the new EIS and a final decision of the ICJ (issues which are closely linked), will be determinant factors to obtain the financial support, necessary for the installation and commissioning of the pulp mills (whatever the financial body might be).

## 2. The Conflict Before the Organization of American States

Recognising the opportunity, Uruguay requested the "good offices" of the Organization of American States (hereinafter "OAS") in the conflict, specifically in the dispute concerning the alleged breach of the right of free circulation by Argentina[122]. The Uruguayan petition was based on the principles set by the most important regional organization in the American continent, in particular the purpose of "prevent[ing] possible causes of difficulties and … ensur[ing] the pacific settlement of disputes that may arise among the Member States"[123]. Uruguay invoked the infringement of Article 22 of the American Convention on Human Rights ("Pact of San José, Costa Rica"), which embodies the freedom of movement right.

The OAS replied that the regional organization might possibly mediate in the bilateral conflict but only on request of both member states. This has not occurred, as Argentina has not asked for the intervention of the OAS[124].

## 3. The Conflict Before the American System for the Protection of Human Rights (the Inter-American Commission of Human Rights)

The highest local authorities of the Argentine territory that would apparently be most affected by the installation and commissioning of the pulp mills (namely, the governor and vice governor of the Province of Entre Ríos) acting in their capacity, presented a petition against Uruguay to the Inter-American Commission of Human Rights (hereinafter "ICHR")[125], which is the main body for the promotion

[122] Note addressed by the President of Uruguay to the OAS Secretary General, 22 February 2006.

[123] Charter of the Organization of American States, Article 2(c).

[124] Ibid., Articles 24 to 27.

[125] Petition presented to the ICHR on 19 September 2005.

and protection of Human Rights in the American Continent[126]. The petition was specifically referred to the dispute concerning the possible breach of environmental law by Uruguay. In fact, the petitioners invoked the violation of various rights embodied in the American Convention on Human Rights ("Pact of San José, Costa Rica")[127].

The ICHR opened the case and requested Uruguay to provide information on the environmental impact caused by the pulp mills.

## VI. Conclusions and Prospects of the Conflict

As seen in this article, the conflict between Argentina and Uruguay developed into two concrete disputes with subject matters of different kind and governed by two different categories of legal systems, namely: traditional international law (to be more precise, the 1975 Statute and applicable international environmental law) and integration law (more accurately, MERCOSUR rules). It was also argued that having to resort to an external jurisdictional body as a means for settling the 1975 Statute and environmental dispute was not only a consequence of the complexity of the conflict and development of the events, but also, and most remarkably, the natural outcome of the low level of integration reached by MERCOSUR on this subject matter.

With regard to the prospects of the dispute currently before the ICJ (i.e. the 1975 Statute and environmental dispute), new events unfolding by the time this article was written may induce a scenario favourable for restarting direct negotiations with a view to find an agreed solution. Indeed, by the middle of September 2006, the Spanish company ENCE announced publicly and formally its decision to

[126] The ICHR is the highest body in the American Continent to which individuals are entitled to resort in case of violations of Human Rights embodied in the American Convention and/or the American Declaration on Human Rights. Thus, the American system for the protection of Human Rights differs from the European System of Human Rights (the Council of Europe), which grants individuals immediate access to the European Court of Human Rights. For further information on this issue, see the American Convention on Human Rights, Articles 33 to 51.

[127] It was contended that Uruguay was in violation of the following rights and obligations embodied in the American Convention on Human Rights: the right to life (Article 4); the right to human treatment (Article 5); the rights of the child (Article 19); the right of progressive development of economic, social and cultural rights (Article 26); the obligation to respect the rights and freedoms recognized in this instrument (Article 1); and the commitment to adopt such legislative or other measures as may be necessary to give effect to those rights and freedoms (Article 2). In addition, it was alleged that Uruguay was in violation of the following rights and obligations embodied in the American Declaration of the Rights and Duties of Man: the right to life, liberty and personal security (Article I); the right to protection for mothers and children (Article VII); and the right to the preservation of health and to well-being. Finally, it was claimed that Uruguay was in violation of the following rights and obligations recognized in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the "Protocol of San Salvador"): the obligation to adopt the necessary measures for the purpose of achieving the full observance of the rights recognized in this instrument (Article 1); the right to health (Article 10); and the right to a healthy environment (Article 11).

abandon the current location of the CMB project and to evaluate relocation to another area in Uruguay. According to the official statement, such decision was based on the fact that the closeness of the CMB project to the Orion plant[128] turned the project to be "industrially unviable". However, it is said unofficially that the decision of the company may have been influenced by the pressure exerted by the Argentine government, the uncertainty of the financial assistance from the IFC while the dispute remains unsettled and the tense situation caused by being involved in an international conflict between two sovereign states. Besides, the decision of the IFC to grant (or not) ENCE and BOTNIA with financial assistance for the projects seems to be also a factor of key importance for the development of the dispute. However, the influence of both ENCE's and the IFC's decisions to bring a resolution of the dispute remains still to be seen, as clashing interests of the parties of various kinds (political, economic, environmental, social, commercial, etc.) and the dynamic nature of the events have shown in a number of instances that the resolution of the dispute is a highly complex task. In this context, unless the parties are capable of reconciling their interests with a view of finding a way out of the current stagnation in the negotiations, a decision of the Court on the alleged breach of international law in force would be the determinant factor for providing a definitive solution to this international dispute.

Regarding the dispute before MERCOSUR and in light of what has been expressed about this issue, the arbitral award that the Ad Hoc Tribunal of MERCOSUR pronounced on one of the disputes derived from the conflict (namely, the alleged breach of MERCOSUR law, specifically the free movement of goods and services within the integration scheme) constitutes a final decision binding to the parties. The arbitral award passed by the AHT, based on current MERCOSUR law interpreted in light of the purposes of the integration process, emphasized the significance of ensuring free circulation within MERCOSUR and highlighted in an express manner that measures undermining this freedom (in the case herein, blockades of international roads) are in breach of the commitments assumed by member states of this regional integration scheme.

[128] The CMB project is about 4 km away from the Orion plant.