ICJ makes ruling on environmental protection - Pulp Mills on the River Uruguay (Argentina v Uruguay)

The International Court of Justice (the "ICJ"), the principal juridical organ of the United Nations, handed down an important judgment that clarifies the relevant standards for a breach of environmental obligations. The judgment will be of interest to states and corporate bodies alike when reviewing compliance.

The ICJ held that Uruguay breached its procedural obligations under a bilateral treaty to co-operate with Argentina and the Administrative Commission of the River Uruguay ("CARU") during its plans to build two pulp mills on the River Uruguay. However, Argentina did not win the second and more significant limb of its case, which was the allegation that Uruguay breached its substantive obligations to protect the environment. This case allowed the ICJ to develop its jurisprudence on international environmental law and trans-boundary watercourses. It is also particularly noteworthy given that it is one of the first large international cases in which the judgment was given live internet coverage, following in the footsteps of the Abyei arbitration.

Background

In October 2003, the Uruguayan government granted permission to the Spanish Company, ENCE, to build a pulp mill in Fray Bentos, on the River Uruguay. Botnia, a Finnish company, then also received environmental authorisation to build a mill in February 2005. The River Uruguay forms a border between Argentina and Uruguay and its use is regulated by the Statute of the Uruguay River, a bilateral treaty entered into by the two countries in 1975 (the "Statute").

Argentina brought a complaint before the ICJ on 4 May 2006, alleging that the Uruguayan government had violated the Statute. Argentina initially sought a provisional measures order from the ICJ, suspending construction of the pulp mills, although this was dismissed. Argentina's principal claims were:

- that Uruguay had not complied with the notification and consultation procedure set out in the Statute by authorising the construction of two pulp mills without the prior consent of Argentina; and

- that the mills would have an environmental impact on the river and surrounding areas, in particular that they would breach Uruguay's obligation under the Statute to preserve the aquatic environment of the river, by failing to protect biodiversity and fisheries.

Argentina consequently sought compensation, an end to construction, and a guarantee of compliance with the Statute in the future.

Uruguay argued that its only obligations had been to inform Argentina, which it
had done, albeit after its decision. Furthermore, the technology used would avoid polluting the river, as state-of-the-art waste cleansing equipment, which had been adopted by both the US and the EU as the best available technology, was going to be used. This position was supported by an independent World Bank study.

**Procedural obligations**

The ICJ held that Uruguay breached its procedural obligations by not informing CARU of its plans to construct the mills before it issued its environmental authorisations. Although Uruguay did notify Argentina, this communication did not take place through CARU and this was only after the Uruguayan government had issued its authorisations. The ICJ held that Uruguay "disregarded the whole of the co-operation mechanisms provided for in Article 7 to 12 of the… Statute". In terms of remedy, it considered that the declaration by the ICJ of this breach constituted appropriate satisfaction.

**Environmental obligations**

Argentina claimed that Uruguay had breached four different substantive obligations in relation to the environmental well-being of the river. These were:

1. to contribute to the optimum and rational utilisation of the river;
2. to ensure that the management of the soil and woodland did not impair the quality of the waters;
3. to co-ordinate measures to avoid changes in the ecological balance; and
4. to prevent pollution and preserve the aquatic environment.

However, the ICJ did not uphold any of these claims. With regard to the fourth claim, it held that Argentina had not established that the concentration of the discharges of the Botnia mill exceeded the limits set out in the Statute. In order to assess the environmental standards by which to assess the claim, it applied not only the wording of the Statute, but also the digest adopted by CARU, and the domestic regulations adopted by each party in relation to the Statute.

In a significant section of the judgment, the ICJ noted that the obligation to undertake an environmental impact assessment where there is a risk that the proposed activity may have a significant adverse impact in a trans-boundary context, has gained so much acceptance among States that it may now be considered "a requirement under general international law". Interestingly, in the circumstances of the case, it did not find that this included a legal obligation to consult the affected populations, although it noted that the consultation had in fact taken place.

In summary, the ICJ held that:

"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 … [Botnia] mill have had deleterious effect or caused harm to living resources or to the quality of the water or ecological balance of the river since it started its operations in November 2007".

**Conclusion**

The ICJ considered that "its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina". Argentina may not however be entirely satisfied with the judgment given that the ICJ did not feel able, in the absence of any finding of breach of the substantive obligations of the Statute, to uphold any claim for compensation. Furthermore, the ICJ failed to see any special circumstances requiring guarantees from the Uruguayan government to refrain from contravening the Statute.
Although assessing obligations under a specific Statute, the judgment provides guidance to any entity whose business potentially has a cross-boundary environmental impact, as to the requirement for impact assessments and the way in which environmental standards are assessed in the event of a dispute. National courts and international tribunals will no doubt look to the jurisprudence of the ICJ in this regard.

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