“Paper Battle on the River Uruguay; The International Dispute Surrounding the Construction of Pulp Mills on the River Uruguay”

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Abstract

This Comment explores the legality of the Uruguayan government’s decision to approve the construction of two pulp mill plants on the River Uruguay, and examines the related litigation currently pending before the International Court of Justice, “ICJ”. A review of the international watercourse law regime assists in deciphering the parties’ substantive and procedural obligations under the 1975 Statute of the River Uruguay. The comment argues that Uruguay has fulfilled these obligations, while Argentina has not. The piece recommends that the ICJ resolve the dispute in favor of Uruguay, and adopt a more precise standard for determining when a state has complied with the no harm principle. A more precise standard will allow riparian nations to capitalize on their rights to use international watercourses without facing prolonged legal disputes with neighboring nations.
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I. Introduction

Organized groups of Argentine citizens have blockaded various routes leading to international bridges over the River Uruguay,\(^1\) thus stemming the flow of commercial trade and tourism to Uruguay.\(^2\) The blockades form part of a nation-wide protest against Uruguay,\(^3\) and its choice to approve the construction of


\(^2\) See id. ¶ 7 (claiming the blockades have caused severe economic losses to Uruguay, including lost trade, lost tourism, and lost jobs related to Uruguay’s summer tourism industry).

\(^3\) See Monte Reel, An Economic Boom in Uruguay Becomes a Bane to Argentina: Planned Paper Mills Bring Promise of Jobs, But Also Fears of Pollution, Wash. Post, Nov. 13, 2005, at A22 (describing the bitterness flowing between the two countries and stating that the province of Entre Ríos, Argentina had planned
two cellulose processing plants\textsuperscript{4} in the town of Fray Bentos, on the River Uruguay. Argentina fears the plants will pollute the
to shut off a pipeline that pumps natural gas to Uruguay in retaliation for constructing the plants).

http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/gui_pulp_WB/$FILE/pulp_PPAH.pdf (defining a pulp mill as a manufacturing facility that converts raw wood materials into pulp, which a paper mill can then use for fiber manufacture or for conversion into paper or cardboard).
Uruguay River, a common boundary and a natural resource shared by both countries.

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Despite Uruguay’s repeated protests, the Argentine government has not stopped its citizens from participating in the illegal blockades. Instead Argentine officials initiated proceedings against Uruguay in the International Court of Justice ("ICJ"), claiming that Uruguay breached its obligations under the 1975 Statute of the River Uruguay.  

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7 See Uruguay’s Request for Provisional Measures, supra note 1, ¶¶ 14-15 (documenting five individual Diplomatic Notes from Uruguay to Argentina requesting that it use police action to prevent or relieve future blockades as required under Argentina’s international treaty obligations, and under customary international law).

8 See id. ¶ 12 (discussing a regional trade organization’s conclusion that Argentina’s “policy of tolerance” and its “complaisant attitude” encouraged its citizens to form new blockades during late 2006).

9 See Order Denying Argentina’s Request for Provisional Measures, supra note 5, ¶ 1 (stating that Argentina filed an application in the registry of the International Court of Justice on May 4, 2006).

has not yet ruled on the merits of the case, the Argentine blockades continue to exert undue pressure on Uruguay to halt construction of the two plants.

This Comment explores the legality of the Uruguayan pulp mill projects under international watercourse law, and evaluates whether Uruguay has met its obligations not to use the Uruguay River in a manner that causes harm to another state. Part I presents a summary of the current international watercourse law conservation, utilization, and development of the river and establishing the Administrative Commission of the River Uruguay, (“CARU”).


See id. ¶¶ 35-36 (summarizing Uruguay’s assertion that Argentine citizens continue to block international bridges to “compel Uruguay to halt construction of the Fray Bentos Plant.”).
regime, followed by a brief discussion of a relevant ICJ case law examining trans-boundary pollution of an international waterway.\textsuperscript{13} Part I.B presents an overview of the 1975 Statute of the River Uruguay (“1975 Statute”) and its parties’ obligations.\textsuperscript{14} Further, Part I.C presents a brief account of Uruguay’s actions prior to approving the pulp mills and outlines the history of the pending ICJ litigation.\textsuperscript{15}

Part II argues that Uruguay has met its obligations to prevent polluting the Uruguay River, under both the existing international watercourse law regime and under the 1975 Statute.\textsuperscript{16} Part II.B and Part II.C also argues that Argentina has not met its obligations under the 1975 Statute, distinguishing this case from a previous ICJ case where the Court directed the parties to find an agreed solution within the text of the Statute.\textsuperscript{17}

Finally, Part III recommends that the ICJ find for Uruguay in the current pending litigation based on the applicable law and the lack of evidence Argentina has presented thus far to

\begin{itemize}
\item \textsuperscript{13} See discussion infra Part I.A
\item \textsuperscript{14} See discussion infra Part I.B
\item \textsuperscript{15} See discussion infra Part I.C
\item \textsuperscript{16} See discussion infra Part II.A
\item \textsuperscript{17} See discussion infra Parts II.B, II.C
\end{itemize}
prove the pulp mills’ potential to pollute.\textsuperscript{18} Further, Part III recommends that the ICJ establish more precise guidelines for determining whether a state has complied with the no-harm principle, with reference to the internationally accepted principles of environmental impact assessment and the application of best available technology.\textsuperscript{19}

\textbf{II. Background}

The international watercourse regime provides a number of principles to assist riparian states attempting when negotiating use of an international waterway.\textsuperscript{20} The ICJ has applied these principles in a number of cases to interpret the bilateral treaties between riparian states who have failed to reach an agreed interpretation themselves.\textsuperscript{21} These states must interpret their rights and obligations regarding use of their

\textsuperscript{18} See discussion infra Part III.A

\textsuperscript{19} See discussion infra Part III.B

\textsuperscript{20} See discussion infra Part I.A.1 (discussing the principles of international watercourse law).

\textsuperscript{21} See discussion infra Part I.A.2 (analyzing the ICJ’s resolution of relevant trans-boundary water disputes).
international waterway with reference to their bilateral treaties and the fundamental principles of the regime.\textsuperscript{22}

A. The International Watercourse Regime

International law relating to the use of shared natural resources provides states with a number of rules and principles requiring environmental protection of international rivers and the bordering riparian states.\textsuperscript{23} Traditionally, implementation of these principles largely depended on the voluntary concessions of states through treaties and other private legal measures.\textsuperscript{24} Bilateral treaties governing the use of international waterways with reference to their bilateral treaties and the fundamental principles of the regime.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{22} See discussion infra Parts I.B, I.C (outlining the text of the 1975 Statute and presenting an overview of the conflict between Argentina and Uruguay).
\item \textsuperscript{24} See Ian Brownlie, Principles of Public International Law 255 (5th ed., 1998) (asserting that the weak enforcement of international law principles left former colonial states with little authority over their own natural resources).
\end{itemize}
international waterways may contain dispute settlement clauses invoking the jurisdiction of the ICJ to settle prolonged disagreements between the signing countries.\textsuperscript{25} The ICJ has decided a number of cases under these circumstances,\textsuperscript{26} and has generally ordered states in dispute over the use of a shared natural resource to rely upon principles of international watercourse law to interpret their legal obligations and rights under existing bilateral treaties.\textsuperscript{27}

\textsuperscript{25} See Statute of the River Uruguay, supra note 10, art. XIV (outlining the conciliation procedures for resolving prolonged disputed between the parties arising from the river).

\textsuperscript{26} See e.g., Gabčikovo-Nagymaros (Hung. v. Slovk.), 1997 I.C.J. 7 (Feb. 5) (finding both parties breached their obligations under a 1977 bilateral treaty); Diversion of Water from Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70 (June 28) (interpreting and applying an 1836 Treaty between the parties to decide whether Belgium’s diversion of water from the Meuse River violated the Netherlands’ right of equal access to the river water).

\textsuperscript{27} See McIntyre, supra note 23, at 166 (proposing that the large body of multi-lateral and bilateral treaties invoking these principles, and subsequent ICJ cases applying these rules may
1. Applicable Principles of International Watercourse Law

States that share an international watercourse must follow several substantive\(^{28}\) and procedural\(^{29}\) obligations now considered generally recognized principles in the field of international watercourse law.\(^ {30}\) The wide international acceptance of these have “crystallized” into generally binding norms of customary international law).

\(^{28}\) See Black’s Law Dictionary 676 (2d Pocket Ed. 2001) (defining substantive law as, “the part of the law that creates defines, and regulates the rights, duties, and powers of the parties”).

\(^{29}\) See id. at 558 (defining procedural law as, “the rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves”).

\(^{30}\) See Stephen C. McCaffrey, The Law of International Watercourses: Non-Navigational Uses 397 (Oxford University Press, 2001) (commenting that international watercourse law does not always provide clear grounds for separating procedural from substantive obligations); McIntyre, supra note 19, at 159 (listing that substantive and procedural rules and principles presently cited in “declaratory and conventional instruments, judicial and arbitral practice, recorded State practice,
principles increases awareness of the environmental consequences of international watercourse usage.\textsuperscript{31}

\textbf{a. Substantive Principles of International Watercourse Law}

Scholars traditionally cite two substantive principles of international watercourse law.\textsuperscript{32} The first, equitable utilization, requires states to utilize an international codifications by intergovernmental agencies and learned associations, and academic commentary”).

\textsuperscript{31} See McIntyre, supra note 23, at 160 (noting that awareness of these environmental consequences also depends upon the existence of institutional machinery capable of clarifying and enforcing these principles). But see Rachel Katsenberg, Comment, Closing the Liability Gap in the International Trans-boundary Water Pollution Regime Using Domestic Law to Hold Polluters Accountable: A Case Study of Pakootas v. Teck Cominco Ltd., 7 Or. Rev. Int’l L. 322, 333 (2005) (arguing the principles of the international trans-boundary pollution regime do not provide sufficient remedies for individuals or states that are victims of trans-boundary pollution).

\textsuperscript{32} See McCaffrey, supra note 30, at 323 (stating that two substantive obligations currently exist, and noting a third emerging substantive obligation to protect international watercourses and their eco-systems).
watercourse in an equitable and reasonable manner.\textsuperscript{33} The second, the no-harm rule, directs states not to cause significant harm to other riparian states.\textsuperscript{34} The principle does not constitute an


\textsuperscript{34} See McCaffrey, supra note 30, at 346 (citing Article 7 of 1997 UN Convention on International Watercourses and arguing that the placement of the no-harm principle under the heading “general principles” implies it is a fundamental obligation); André Nollkaemper, The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint 24 (Martinus Nijhoff Publishers, 1993) (labeling the no-harm principle as key to the regime).
absolute prohibition of harm in all circumstances.\textsuperscript{35} Instead, the principle requires avoidance of harm in a way and to an extent that is reasonable under the circumstances.\textsuperscript{36} Compliance with the obligation depends upon the degree of due diligence a state has completed prior to executing a proposed use of the international watercourse.\textsuperscript{37} The application of best available technology\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{35} See McCaffrey, supra note 30, at 348 (arguing that the no-harm principle complements the equitable utilization principle, encouraging states to proscribe certain forms of serious harm).
\item \textsuperscript{36} See Convention on International Watercourses, supra note 29, art. 7 (describing the no-harm principle and defining significant harm as, “a real impairment of use, i.e. a detrimental impact of some consequence upon, for example, public health, industry, property, agriculture or the environment of the affected state”).
\item \textsuperscript{37} See McIntyre, supra note 23, at 170 (explaining the inter-relationship between the no-harm duty and other relevant rules and principles, and finding that compliance with the no-harm duty depends largely on compliance with the duty to co-operate).
\item \textsuperscript{38} See Nollkaemper, supra note 34, at 128 (citing the definition of best available technology from the 1992 Helsinki Convention, “the latest stage of development processes, facilities or
chiefly determines whether a state sufficiently fulfills the due diligence requirement.  

b. Procedural Principles of International Watercourse Law

In addition to the substantive obligations, commentators agree that a generally recognized procedural principle of international law obliges states to provide neighboring riparian states with prior notice of plans to exploit a shared natural watercourse. The 1997 UN Convention expressly requires that a notifying state conduct an environmental impact assessment. Some consider the adequacy of the environmental impact methods of operation which indicate the practical measures for limiting discharges, emissions and waste.

39 See id. at 129 (identifying the application of best available technology as the dominant standard for interpreting the due diligence test).

40 See e.g., id. at 165 (clarifying that the duty to transmit information exists when a state’s contemplated use poses a risk of harm to other riparian states).

41 See Convention on International Watercourses, supra note 33, art. 12 (qualifying the requirement to provide notice and an environmental impact assessment solely to planned measures capable of having significant adverse effects upon other watercourse states).
assessment\textsuperscript{42} as the determinative criterion when evaluating whether a state has complied with the no-harm and equitable use substantive principles.\textsuperscript{43} The UN Convention also obliges notifying states to allow notified states a six month period to study and evaluate the proposed measure and communicate their

\textsuperscript{42} See McIntyre, supra note 23, at 199 (noting that multi-lateral development banks contribute largely to the elaboration of sector specific guidelines for environmental impact assessments, contributing to the assessments’ increasing sophistication and enhanced ability to identify, understand, and communicate environmental concerns).

\textsuperscript{43} See id. at 200 (“If the due diligence requirement is the determinative criterion in determining breach of the obligation not to cause significant harm and, possibly, a key factor in determining the equity or inequity of a particular regime of utilization, failure to conduct an adequate environmental impact assessment is likely, prima facie, to indicate such a breach.”).
findings.\textsuperscript{44} Along with the duty to notify, international law recognizes a general duty to cooperate in good faith.\textsuperscript{45}

\textsuperscript{44} See Convention on International Watercourses, \textit{supra} note 33, art. 13 (granting a six month extension period upon a request from a notified state experiencing unique difficulty evaluating the assessment).

\textsuperscript{45} See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 26 [hereinafter Vienna Convention] (providing that “every treaty in force ... must be performed in good faith.”); Gabcikovo-Nagymaros (Hung. v. Slovk.), 1997 I.C.J. 7, ¶ 142 (Feb. 5) (directing the parties to resolve their dispute within the cooperative contest of the bi lateral treaty); Convention on International Watercourses, \textit{supra} note 29, arts. 8 (imposing an obligation for parties to consult “on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to obtain... adequate protection”); \textit{id.} art. 9 (directing watercourse states to “employ their best efforts to comply” with requests for more information from another state); \textit{id.} art. 13 (establishing a six month stay on construction of proposed works from the initial notification, allowing the notified party an opportunity to investigate and respond); \textit{Nollkaemper, supra} note 34, at 152-53, (exploring the dual possible interpretations of the duty to
2. Trans-boundary Water Disputes in the ICJ

The ICJ and its predecessor, the Permanent Court of International Justice, have heard four cases arising out of international watercourse disputes. Only one of these cases deals with trans-boundary pollution.47

cooperate, as either a narrow duty requiring cooperation in particular cases of trans-boundary harm or as a positive broad duty prescribing collaboration between states to modify their future behavior). But see United Nations Framework Convention on Climate Change, G.A. Res. 151/57, U.N. Doc. A/CONF.151/5/Rev.1 (1992) [hereinafter the Rio Declaration] specifically incorporating the principle of international law granting states sovereignty to exploit their own resources pursuant to their own environmental and developmental policies).

The **Gabcikovo-Nagymaros** case arose out of a dispute between Hungary and Czechoslovakia regarding their obligations under a bilateral treaty governing the creation of a large project on a boundary line and shared international waterway.\(^4^8\) Hungary stopped work on its portion of the project in 1989, citing environmental concerns.\(^4^9\) Having already completed vast portions

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\(^4^7\) See *Gabcikovo-Nagymaros Project*, 1997 I.C.J. ¶ 55 (determining that Hungary’s environmental concerns did not justify its breach of a bilateral treaty).

\(^4^8\) See *id.* ¶¶ 1-30 (relating the treaty’s provisions for the construction of two series of locks on either side of the common border).

\(^4^9\) See *id.* ¶ 40 (documenting the Hungarian government’s decision to halt the project due to a fear that the Danube water would become stagnant as a result of the project, thus impairing the quality of the groundwater and resulting in an ecological state of necessity).
of its commitment,\textsuperscript{50} Czechoslovakia chose to operate its portion of the project, thus damming the Danube at a point wholly inside its borders.\textsuperscript{51}

The Court held that both states had breached their obligations under the treaty.\textsuperscript{52} As to Hungary’s environmental concerns, the Court held: “the Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, grave, and imminent, peril existed in 1989 and that the measures taken by Hungary were the only possible response to it.”\textsuperscript{53} The Court then emphasized the duties of good

\textsuperscript{50} See id. ¶ 31 (comparing the substantially completed portion of the project on the Czechoslovakian side to the minimal progression on the Hungarian side).

\textsuperscript{51} See id. ¶ 78 (finding that Czechoslovakia’s decision to continue the project allowed it to appropriate between eighty and ninety percent of the waters of the Danube, constituting a violation of the equitable use principle).

\textsuperscript{52} See Gabcikovo-Nagymaros Project, 1997 I.C.J. ¶ 150 (concluding that each parties’ wrongful acts cancel out the other’s damages).

\textsuperscript{53} See id. ¶ 54 (holding that the environmental risks Hungary presented remained uncertain, and therefore could not meet the eminency requirement of the necessity defense).
faith and consultation in negotiations, directing the parties to
interpret the treaty in accordance with the principles of the
Vienna Convention on the Law of Treaties, ("Vienna
Convention").\textsuperscript{54} The Vienna Convention principles of treaty
interpretation instruct parties to taken into account the
context of a text,\textsuperscript{55} as well as any subsequent practice between
the parties,\textsuperscript{56} and any relevant rules of international law.

\textsuperscript{54} See id. ¶ 142 (instructing that the intent of the parties in
signing the treaty should prevail over its literal application).

\textsuperscript{55} See Vienna Convention, supra note 45, art. 31.2 (specifying
that parties deciphering the context of a treaty should look to
the preamble and annexes in addition to the text of the treaty).

\textsuperscript{56} See id. art. 31.3(b) (instructing that together with the
context, the parties should take into account any subsequent
practice in the application of the treaty, and any relevant
international law).
B. Argentina and Uruguay’s Rights and Obligations Under the 1975 Statute

Between 1968 and 1971, Argentina and Uruguay reached an agreement distinguishing concurrent and exclusive territorial jurisdictions over the river, and the 1975 Statute entered into force in December of 1982. Although the treaty defines the areas along the coasts of the river as subject to the exclusive jurisdiction of the riparian state, certain provisions apply to

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57 See Lilian Del Castillo LaBorde, Legal Regime of the Rio de la Plata, 36 Nat. Resources J. 251, 262, 269 (1996) (recounting the protracted discussions involved in negotiating the Statute, including periods of stagnation following international incidents that jeopardized the course of the proceedings).

58 See Statute of the River Uruguay, supra note 10, art. 1 (declaring that the treaty establishes joint machinery for the observance of the parties rights under both the terms of the Treaty and under other international agreements), preamble (emphasizing its inspiration of “fraternal spirit”).

59 See LaBorde, supra note 57, at 273-74 (“the agreement states the width, extension and characteristic of the coastal strip which may vary according to the zone.”).
the entire river. The parties should interpret the statute in accordance with the principles of the Vienna Convention.

1. **Chapter X: Pollution**

Under Articles 40 and 41, the parties agreed to preserve and protect the aquatic environment and to prevent pollution.

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60 **See Statute of the River Uruguay, supra note 10, arts. 3-13** (extending the freedom of navigation as well as the consultation and notification procedures for the construction of new works throughout both exclusive and concurrent jurisdictions of the river), art. XI (predicating the right to conduct research investigatory work within the exclusive jurisdiction of the other party upon prior notice and consultation).


62 **See Statute of the River Uruguay, supra note 10, art. 40** (defining pollution as, “direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects.”).
“by prescribing appropriate rules and measures in accordance with the applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies.” 63 Further, the parties agreed not to diminish technical standards or sanctions set forth in their respective legal systems. 64 In the event persons within their respective legal territories pollute in a manner that causes harm to the other party, 65 the culpable state agreed to accept responsibility under Article 51. 66 The harm must be sufficient to “affect the health of the population, the

63 See id. art. 41.
64 See id. art. 41 (obliging parties to notify one another of any legislation they plan to enact regarding river pollution).
65 See id. art. 42 (establishing that liability for pollution extends to both state and non-state actions committed within their respective jurisdictions).
66 See LaBorde, supra note 57, at 292 (asserting that the existence of damage, without further qualification, is sufficient grounds for generating liability).
environment, agricultural uses, fishing, flora, fauna, the coast, or any commercial or recreational use.”

2. The Administrative Commission of the Rio de la Plata

The 1975 Statute established the Administrative Commission of the Rio de La Plata (“CARU”). The statute charges CARU with the duty to perform a number of functions, including rulemaking

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67 See id. at 292 (analogizing the statute’s definition of harm to the guidelines established in other international treaties regarding trans-boundary watercourses).

68 See Statute of the River Uruguay, supra note 10, arts. 49-57 (identifying CARU as a legal entity consisting of an equal number of representatives from each party, and mandating that the organization function on a permanent basis with a Secretariat, and whatever subsidiary bodies it deems necessary).

69 See id. art. 56 (delegating to CARU the duty to create rules governing safety of navigation on the river and the use of the main channel, conservation and preservation of living resources, pilotage, prevention of pollution, and installation of pipelines and cables under the river or in the air).
and coordinating the flow of communications, consultations, information, and notifications between the parties.\textsuperscript{70}

Each state must communicate advance notice of activities related to river usage with CARU.\textsuperscript{71} If CARU decides the plan might cause damage to the other party,\textsuperscript{72} the notifying party must give notice to the other party through CARU,\textsuperscript{73} and allow 180 days

\textsuperscript{70} See \textit{id.} art. 50 (requiring the parties to provide to CARU any necessary resources and all the information and facilities essential to its operations).

\textsuperscript{71} See \textit{id.} art. 7 (granting CARU thirty days to decide whether the proposed work might cause significant damage to the other party).

\textsuperscript{72} See \textit{id.} (clarifying the same conditions apply should CARU not reach a decision regarding the proposed plan).

\textsuperscript{73} See Statute of the River Uruguay, \textit{supra} note 10, art. 7 (specifying that the notifying party must deliver notice through CARU rather than directly, and stating the notice “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 regime of the river or the quality of its waters.”).
for a response.\textsuperscript{74} Article 9 states, “If the notified party raises no objections or does not respond within the period established ... the other party may carry out or authorize the work planned.”\textsuperscript{75} In the event that the parties cannot reach a settlement through CARU within 120 days,\textsuperscript{76} the parties must attempt to solve the issue through direct negotiations.\textsuperscript{77} If direct negotiations fail, the statute directs either party to file a case with the ICJ.\textsuperscript{78}

\textsuperscript{74} See id. arts. 8, 11 (requiring the notice of objection to specify the problematic aspects of the work and support its conclusions and recommendations with technical reasons).

\textsuperscript{75} See id. art. 9 (neglecting to mention under what circumstances a Party may proceed with the planned work should the other Party raise objections).

\textsuperscript{76} See id. art. 12 (indicating that the parties may not seek a resolution through CARU until 180 days after the notified party delivers its response).

\textsuperscript{77} See id. art. 59 (requiring the parties to directly negotiate for a period of 120 days prior to filing a complaint with the ICJ).

\textsuperscript{78} See id. art. 60 (designating the ICJ as the appropriate forum for dispute settlement).
C. History of the Pulp Mill Dispute

Argentina filed suit in the ICJ, citing the Court’s jurisdiction pursuant to Article 60 of the 1975 Statute.\footnote{See discussion infra Part I.C.2 (presenting an overview of the ICJ litigation).} The claim alleges that Uruguay breached its obligations to give notice and abstain from harming the river.\footnote{See id.} Uruguay has responded with documentation relating the steps taken prior to authorizing the plants, including undertaking a number of environmental impact assessments and implementing strict legislation to regulate the plants’ operation.\footnote{See discussion infra Parts I.C.1, I.C.2 (discussing the procedure Uruguay followed prior to authorizing the pulp mills).}

1. Uruguay’s Authorization of the Pulp Mills

In July of 2002, representatives of the first pulp mill project, the ENCE project,\footnote{See Order Denying Argentina’s Request for Indication of Provisional Measures, supra note 5, ¶ 5 (paraphrasing Argentina’s claims that in October of 2003 the Government of Uruguay authorized the Spanish Company ENCE to construct a pulp mill, a project known as Celulosa de M’Bopicuá). See also ENCE, http://www.ence.es (last visited Apr. 12, 2007) (describing ENCE} supplied CARU with technical
information regarding the plant’s construction and future operations.  

After Uruguay granted permission for construction of the plant in July of 2003, Argentine officials expressed concern. Uruguay maintains that in March of 2004, high level Argentine officials agreed to the construction of the pulp mills as an Iberian and American integral wood transforming forest company that focuses on environmentally sustainable business practices).


84 See id. (noting that on July 23, 2003, Uruguay granted ENCE environmental authorization, allowing ENCE to begin preparatory construction).

85 See id. (stating that Argentina officials expressed their disagreement over the Uruguayan environmental authorization during the course of a CARU meeting in October of 2003).
as planned,\textsuperscript{86} provided that Uruguay supply Argentina with technical information regarding their construction, and that CARU monitor the quality of the river once the plants reached operational status.\textsuperscript{87}

In April of 2004, representatives of the Botnia Mill met with CARU officials, and provided technical information regarding their plan to construct a second plant.\textsuperscript{88} Seven months later, CARU devised and adopted a plan for monitoring the

\textsuperscript{86}See id. (identifying the Argentine Minister of Foreign Affairs as the government agent who orchestrated the negotiation for Argentina).

\textsuperscript{87}See id. ¶ 22 (recounting the Argentine President’s reference to the 2004 agreement in a State of the Nation speech).

\textsuperscript{88}See id. ¶ 18 (noting that representatives from the Botnia plant again met and provided information to CARU officials in June, and in addition, hosted a CARU delegation trip to Finland to see existing Botnia plants, and to discuss environmental protection measures with Finnish government agencies). See also Botnia, http://www.botnia.com/en/ (last visited Apr. 12, 2007) (documenting the chronology of the plant’s construction and highlighting the Finnish company’s devotion to manufacturing ecologically sustainable pulp from timber).
environmental quality of the river in the areas surrounding the plants’ construction sites.89

Argentina now denies that it acknowledged Uruguay’s right to construct the plants under the 2004 agreement.90 Further, Argentina refuses to intervene in its citizens’ blockades of key arteries of trade and travel between the two countries.91 On May

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89 See id. ¶ 19 (stating that the President of CARU commented that the plan’s focus on adopting monitoring and control procedures for the pulp mills provided a working solution in accordance with the 2004 agreement).


91 See Uruguay’s Request for Provisional Measures, supra note 1 ¶ 3 (claiming that the blockades have forced Uruguay to forgo hundreds of millions of dollars in trade and tourism revenue).
4, 2006, Argentina instituted proceedings in the ICJ against Uruguay for allegedly breaching the 1975 Statute.\footnote{See Order Denying Argentina’s Request for Provisional Measures, supra note 5, ¶ 54 (basing jurisdiction of the ICJ on the dispute resolution mechanism of the 1975 Statute).}

2. ICJ Proceedings in \textbf{Pulp Mills on the River Uruguay}

Argentina claims that Uruguay granted authorization of the mills unilaterally,\footnote{See \textit{id.} ¶ 33 (describing Argentina’s assertion that Article 9 of the 1975 Statute establishes a no construction obligation unless Uruguay accepts its proposals for changes to the projects).} in violation of the notification and authorization procedures required under the 1975 Statute.\footnote{See \textit{id.} ¶¶ 4-5 (referring to Article 7 through 13 of the 1975 Statute).} The Uruguayan government refutes Argentina’s interpretation of a veto power,\footnote{See \textit{Oral Pleadings of Uruguay: Afternoon Session, supra note 75, ¶ 21, (“Uruguay firmly believes that the Statute gives no right of Veto to either party over the implementation by the other party of its industrial development projects, where the latter has complied in good faith with its obligations regarding}} and insists that it has discharged its obligations.
under the Treaty to disclose all necessary technical details regarding the project.  

Argentina further argues that environmental damage to the River is, “a very serious probability.” Uruguay claims the plants pose a minimal environmental risk due to the requirement that the plants apply the best available technology. Uruguay also cites a series of positive environmental impact

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a full exchange of information under the Procedures established by the statute or agreed between the parties”).

96 See Order Denying Argentina’s Request for Provisional Measures, supra note 5, ¶ 53 (arguing that the minutes of CARU verify that Uruguay submitted ample information regarding the projects as required under the 1975 Statute).

97 See id. ¶ 8 (recounting Argentina’s concern that ninety percent of fish production in the Uruguay River occurs within the projected radius of run-off from the plants).

98 See Uruguay’s Request for Provisional Measures, supra note 1, ¶ 19 (emphasizing that the Botnia plant will “employ state of the art process technologies,” and perform at world class levels, and comply with CARU’s water quality standards).
assessments, including an independent expert panel review conducted by the World Bank agencies supporting the projects.

Both Argentina and Uruguay requested for the indication of provisional measures. The Court subsequently denied both

99 See Order Denying Argentina’s Request for Provisional Measures, supra note 5, ¶ 45 (discussing the guarantee that the pulp mills will not harm the river); International Finance Corporation, Expert Panel’s Report on the Final Cumulative Impact Study for the Uruguayan Pulp Mills (2006), http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_PulpMills_ExpertsReport_Oct06 (concluding that the plants not only met Uruguay’s emissions regulations, the World Bank guidelines, and the European Union standards, but also will use Best Available Techniques (“BAT”) in the making of wood pulp as defined by the European Union’s Directive on Integrated Pollution Prevention and Control).

100 See Uruguay’s Request for Provisional Measures, supra note 1, ¶ 19 (noting that Argentina approved the independent experts and their terms of reference prior to the initiation of the study).

101 See id. ¶ 28 (requesting provisional measures ordering Argentina to take all reasonable measures to the end the international blockades); Order Denying Argentina’s Request for Provisional Measures, supra note 5, ¶¶ 12-14 (outlining
requests\textsuperscript{103} without ruling on the merits of the claim or interpreting each states’ obligations and rights under the 1975 Statute.\textsuperscript{104}

Argentina’s request for provisional measures to enjoin construction of the pulp mills).\n
\textsuperscript{102} See Statute of the International Court of Justice art. 73-78, June 26, 1945, 33 U.N.T.S. 993 (describing the procedural process for the request and adjudication of a provisional measure, appropriate if a party considers that the rights which form the subject of its application are in immediate danger).

\textsuperscript{103} See Order Denying Argentina’s Request for Provisional Measures, supra note 5, ¶¶ 74-75 (holding that Argentina did not present sufficient evidence to demonstrate that pollution resulting from the operation of the mills would cause irreparable harm); Order Denying Uruguay’s Request for Provisional Measures, supra note 11, ¶¶ 40-42 (finding the application of provisional measures to prevent the blockades unnecessary in light of the significant progress in construction of the Botnia plant during the relevant period).

\textsuperscript{104} See Order Denying Argentina’s Request for Provisional Measures, supra note 5, ¶ 85 (reaffirming that the denial of provisional measures does not affect the Court’s jurisdiction to deal with the merits of the case).
III. Analysis

The international watercourse regime supports Uruguay’s interpretation of the 1975 Statute, and the documentation Uruguay provided regarding the procedure undertaken prior to authorizing the pulp mills demonstrates that it acted in compliance with the statute. However, Argentina’s actions violate the principles of international watercourse law and further constitute a breach of the 1975 statute. According to past decisions of the ICJ, Argentina cannot rely upon the state of necessity defense to excuse its breach.

A. Uruguay Acted in Compliance with the 1975 Uruguay River Statute

Uruguay’s actions prior to approving the pulp mills comply with both the substantive and procedural obligations required under the 1975 Statute. Although Uruguay and Argentina disagree over the procedural requirements of the Statute, the

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105 See discussion infra Part II.A
106 See discussion infra Part II.B
107 See discussion infra Part II.C
108 See Order Denying Argentina’s Request for Provisional Measures, supra note 5, ¶¶ 34, 43 (presenting the countries’ opposing views of Articles 9 and 12 of the 1975 Statute).
principles of the Vienna Convention\textsuperscript{109} and of international watercourse law\textsuperscript{110} support Uruguay’s interpretation of the statute. Further, Argentina lacks sufficient evidence to prove that future pollution from the plants will infringe on its right to equitable use of the River under the 1975 Statute.\textsuperscript{111} Relevant ICJ cases indicate that the Court does not find a country in breach of the no-harm and equitable use provisions of a bilateral treaty unless the complainant demonstrates a strong risk of pollution to the shared natural resource.\textsuperscript{112}

1. Uruguay Complied with the Duty to Cooperate and the Duty to Give Notice under the 1975 Statute.

Both parties agree that Articles 7 through 13 of the 1975 Statute required Uruguay to notify CARU of its plans to allow

\textsuperscript{109} See Vienna Convention, supra note 45 (declaring the customary international law of treatise).

\textsuperscript{110} See discussion supra Part I.A.1 (discussing the substantive and procedural obligations in the field of international watercourse law).

\textsuperscript{111} See discussion infra Part II.A.3.

\textsuperscript{112} See discussion supra Part I.A.2 (discussing the requirements of the necessity defense, an excuse for the breach of a bilateral treaty).
construction of the pulp mills. The notice must describe the main aspects of the work and its construction plans, and allow a waiting period of 180 days for CARU to recommend alterations to the plan. In its filings before the ICJ, Uruguay attests that Argentina received a “substantial amount of information through a variety of machinery and channels.” Although Argentina vehemently rejects that Uruguay gave due notice, Uruguay’s pleadings cite specific dates and times in which it

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113 See Order Denying Argentina’s Request for Provisional Measures, supra note 5, ¶¶ 34, 43 (discussing the parties’ joint view that the 1975 Statute imposes the obligation to exchange full information in good faith).
114 See supra note 64 and accompanying text.
115 See Statute of the River Uruguay, supra note 10, art. 8 (establishing a timeline for CARU to respond with suggested changes to the plan and establishing the dispute mechanism procedure).
116 See Order Denying Argentina’s Request for Provisional Measures, supra note 5, ¶ 53, (arguing that the minutes of CARU verify that Uruguay submitted ample information regarding the projects as required under the 1975 Statute).
117 See Oral Pleadings of Argentina: Morning Session, supra note 90, and accompanying text.
notified CARU of both the ENCE and Botnia mills. The pleadings demonstrate that Uruguay’s cooperation exceeded simple notification, and instead consisted of months of collaboration between Uruguayan, Argentine, and CARU officials. Uruguay emphasizes the chronological order of the events leading to its authorization to construct the plants, and highlights that it did not grant permission for the construction of either plant until a period of at least six months after giving notice to CARU. The six month period falls well within the required

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118 See supra notes 83-88 and accompanying text.

119 See Oral Pleadings of Uruguay: Afternoon Session, supra note 82, ¶ 16 (describing a period of fifteen months following CARU’s initial notification in which time Uruguay held a public hearing in which commission officials participated, and submitted a report to CARU as a whole).

120 See id. ¶¶ 18, 20 (claiming that the ENCE plant did not receive approval until October 10, 2003 although CARU received notice on July 8, 2002, and that the Botnia plant did not receive approval until February 5, 2005 although CARU received notice on April 29, 2004).
waiting period for consultation with CARU required under the 1975 Statute.\textsuperscript{121}

The fact that Uruguay’s actions comply with the standards of cooperation embodied in the international watercourse law further bolsters the claim that Uruguay acted in compliance with the 1975 Statute.\textsuperscript{122} Uruguay acted within the broad good faith requirements imposed under Articles 8, 9, and 13 of the 1997 UN Convention.\textsuperscript{123} Uruguay’s consultation with CARU demonstrated cooperation “on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to obtain... adequate protection.”\textsuperscript{124} Uruguay also demonstrated a willingness

\begin{footnotesize}
\begin{enumerate}
\item[121] See \textit{supra} notes 73, 76 and accompanying text (discussing the notice timelines under the 1975 statute).
\item[122] See \textit{generally} McIntyre, \textit{supra} note 23, at 166 (arguing that the ICJ must apply well established rules and criteria of international law even though the provisions of the treaty developed from mere contractual rules).
\item[123] See \textit{supra} note 45 and accompanying text (identifying the various sources citing the procedural obligation to act in good faith).
\item[124] See \textit{id.} (discussing watercourse states’ general obligation to cooperate).
\end{enumerate}
\end{footnotesize}
to “employ its best efforts to comply”\textsuperscript{125} with Argentina’s request for data and information that was not readily available.\textsuperscript{126} Further, the chronological timeline of Uruguay’s approval also demonstrates compliance with the six month waiting period after notification required under Article 13 of the 1997 UN Convention.\textsuperscript{127}

Uruguay’s arguments regarding exchange of information and cooperation with Argentina and CARU support a conclusion that it complied with the procedural obligations of the 1975 Statute, under Uruguay’s interpretation of the statute.

\textsuperscript{125} See id. (conditioning the notifying states obligation to comply with requests for additional information upon the requesting state’s payment of the reasonable costs of collecting and processing the data).

\textsuperscript{126} See Oral Pleadings of Uruguay: Afternoon Session, supra note 87, ¶ 16 (discussing the Uruguayan delegation’s compliance with requests for additional information including arranging international travel for CARU officials).

\textsuperscript{127} See Convention on International Watercourses, supra note 44 (declaring that unless otherwise agreed, watercourse states shall allow the notified states a period of six months to evaluate the possible effects of the planned measures).
2. International Law Supports Uruguay’s Interpretation of Articles 9 and 12 of the 1975 Statute

Although Argentina claims that the duty to cooperate under the 1975 Statute includes a veto power,128 the Vienna Convention principles of treaty interpretation do not support this claim.129 Argentina contends that under Articles 9 and 12 of the 1975 Statute, each party has an obligation to ensure that no work occurs until either, 1) the other party expresses no objections; 2) the other country fails to respond to notice of the works; or 3) the ICJ indicates conditions under which the work may proceed.130 Although Uruguay does not deny that it authorized

128 See Order Denying Argentina’s Request for Provisional Measures, supra note 92 and accompanying text (stating Argentina’s interpretation that the statute contains a no construction obligation).

129 See Vienna Convention, supra notes 55-56 and accompanying text (discussing various principles of treaty interpretation under customary international law).

130 See Order Denying Argentina’s Request for Provisional Measures, supra note 92 and accompanying text (describing Argentina’s assertion that Article 9 of the 1975 Statute establishes a no construction obligation unless Argentina agrees that its proposals for changes to the project have been taken into account).
construction of the projects without Argentina’s express permission, it argues that express permission is not required under the 1975 Statute. 131

As Uruguay asserts, the text of the statute132 does not address whether a party may proceed with its contested project, in the absence of an express agreement with the other Party.133 Given the lack of clarity in the textual agreement and the resulting conflicting interpretations, the parties should apply the subsequent practice principle from the Vienna Convention to

131 See Oral Pleadings of Uruguay: afternoon session, supra note 82, ¶ 21, (relating Uruguay’s argument that the statute gives no right of Veto to either party, where the party proposing the industrial development plan has complied in good faith with its obligations under the procedures established by the statute).

132 See Statute of the River Uruguay, supra note 75 (noting that the Statute only discusses situations where the notified party either does not respond to the proposal, or raises no objections).

133 See Oral Pleadings of Uruguay: Afternoon Session, supra note 82, ¶ 11 (arguing that the only alternative appears to place the parties in an impractical position of waiting for years until the ICJ settles the dispute).
discover the true agreements between the parties.\textsuperscript{134} Since neither party has previously asserted veto rights over the projects of the other since the enactment of the 1975 statute,\textsuperscript{135} the 2004 agreement constitutes the only subsequent history on the subject. The agreement demonstrates that both parties at that time agreed that the Statute did not contain such a veto provision.\textsuperscript{136}

The Vienna Convention also directs the parties to consider relevant rules of international law applicable in relations

\textsuperscript{134} See Vienna Convention, supra note 45, art. 31.3(b) (stating that the context for interpreting a treaty, in addition to its text, shall consist of subsequent practice between the parties which establishes the manner in which the Parties interpret the agreement).

\textsuperscript{135} See Oral Pleadings of Uruguay: Afternoon Session, supra note 82, ¶ 11 (arguing that neither Argentina nor Uruguay have asserted a veto right in the thirty plus years since the statute’s enactment).

\textsuperscript{136} See id. ¶ 17 (discussing the 2004 oral agreement and President Nestor Kirchner’s reference to the agreement in his 2004 State of the Union address).
between the parties. A customary principle of international law protects state sovereignty over natural resources, affording each state the right to use its own resources pursuant to its own development plan. If the 1975 Statute authorized Argentina to block Uruguay’s use of its own natural resource, the statute would violate Uruguay’s right to sovereign control of its portion of the River Uruguay, thereby authorizing Argentina to violate Uruguay’s rights under other international

137 See Vienna Convention, supra note 45, art. 31.2 (highlighting the importance of reading all parts of the document including the preamble).

138 See Rio Declaration, supra note 45, preamble (noting that the Charter of the United Nations codified the principle of that state’s have a sovereign right to exploit their natural resources).

139 See id. (recognizing new concepts of equitable and sustainable development that rely on international cooperation to assure environment protection, yet reaffirming the traditional principle of sovereignty over natural resources).

140 See Delimitation and Marking Protocol, supra note 6, (establishing a maritime boundary between Argentina and Uruguay and indicating that all the areas along the coast fall under the exclusive jurisdiction of the states).
agreements. However, Article 1 of the 1975 Statute expressly
denies either party such a right.\footnote{See Statute of the River Uruguay, supra note 10, art. 1 (stating that the parties’ obligations under the treaty supplement the parties’ obligations under international law).} Since Argentina’s
interpretation of the statute contradicts the wording of the
Statute and the Vienna Convention principles of interpretation,
the statute cannot require the additional procedural
requirements Argentina proposes.

3. Uruguay Has Complied With the No-harm Principle as Required under International Watercourse Law and the 1975 Statue

In addition to complying with the procedural requirements
of the 1975 Statute and of international watercourse law,
Uruguay has complied with the substantive requirements as
well.\footnote{See discussion supra Part I.A.1.a (elaborating on Uruguay’s
substantive obligations under international watercourse law).} The strict legislation that Uruguay implemented
requiring the plants to use the Best Available Techniques,\footnote{See Uruguay’s Request for Provisional Measures, supra note 97 (discussing Uruguay’s requirement that the pulp mills apply the best available technology).}
coupled with undertaking numerous environmental impact
assessments indicating that the plants will have minimal effects
on the surrounding ecology of the River Uruguay, demonstrate that Uruguay has conducted sufficient due diligence and thereby has fulfilled the no-harm obligation. Further, the minimal effects predicted by these assessments do not rise to the level of appreciable harm that constitute a violation of the no-harm principle under customary international watercourse law nor under the 1975 Statute.

By implementing strict technology requirements for the plants, as well as conducting environmental impact assessments, the Uruguayan government also met the due diligence requirements

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144 See Uruguay’s Request for Provisional Measures, supra note 98, ¶ 19 (recounting the results of various environmental impact assessments conducted by the World Bank Group).

145 See supra notes 35-39 and accompanying text (clarifying the relationship between the no-harm duty and the fulfillment of sufficient due diligence).

146 See Convention on International Watercourses, supra note 36 and accompanying text (discussing the requirements of the no-harm principle under international law).

147 See supra notes 62, 66 and accompanying text (identifying the various articles of the 1975 Statute embodying the substantive no-harm and equitable use principles).
under Article 7 of the 1997 UN Convention.\footnote{See Convention on International Watercourses, supra note 36 (discussing Article 7 of the Convention on International Watercourses).} This article required states to “take all appropriate measures to prevent the causing of significant harm to other watercourse States.”\footnote{See id. (stating a portion of text from the Convention on International Watercourses).} However, no clear agreement exists on what actions constitute appropriate measures, or significant harm.\footnote{See supra notes 36-39 (expounding on the meaning of the no-harm principle in international watercourse law).}

The Uruguayan government’s requirement that both pulp mills perform at world class levels,\footnote{See Uruguay’s Request for Provisional Measures, supra notes 97-98 (discussing Uruguay’s strict legislation regarding operation of the pulp mills).} use the Best Available Technology, and undergo regular and continuous testing and inspection,\footnote{See id. (recounting that the legislation ensures the plants’ will meet the standard CARU proposed).} demonstrate that Uruguay has taken appropriate measures to assure that the level of pollution the plants could potentially generate remains below the significant harm
threshold.\textsuperscript{153} In addition, the environmental impact assessments conducted by the World Bank Group concluded that the pulp mills will not result in appreciable harm to the environment of the Uruguay River.\textsuperscript{154} The experts employed by international organizations, such as those involved in the World Bank Group’s study, deserve deference considering their role among the core authority involved in developing the international standards for environmental impact assessments.\textsuperscript{155}

Uruguay’s legal requirements and environmental impact assessments also comply with the due diligence requirement under

\textsuperscript{153} See Order Denying Argentina’s Request for Provisional Measures, \textsuperscript{supra} note 5, ¶ 45 (noting that the strict requirements impose standards requiring the use of technology far more modern, and more efficient, and less polluting, than may similar mills operating in Argentina).

\textsuperscript{154} See Uruguay’s Request for Provisional Measures, \textsuperscript{supra} note 98 and accompanying text (discussing the International Finance Corporation’s expert report).

\textsuperscript{155} See McIntyre, \textsuperscript{supra} note 23, at 200 (exploring the role of international organizations in the development of the no-harm principle, and discussing the rising prevalence of Environmental Impact Assessments in measuring the harm to shared resources).
Chapter X of the 1975 Statute.\textsuperscript{156} Although similar to Article 7 of the UN Convention,\textsuperscript{157} the statute does not define precise standards for the prevention of harm.\textsuperscript{158} A party will incur liability however for producing sufficient pollution to “affect the health of the population, the environment, agricultural uses, fishing, flora, fauna, the coast, or any commercial or recreational use.”\textsuperscript{159} The threshold level of pollution remains

\textsuperscript{156} See Statute of the River Uruguay, supra note 10, arts. 40, 41 (defining the responsibilities incumbent upon each Party to prevent “the direct or indirect introduction into the aquatic environment of substances or energy which have harmful effects.”).


\textsuperscript{158} See Statute of the River Uruguay, supra note 10, at Art.40, 41 (describing the obligation to prevent harm through the prescription of appropriate rules and measures that are in compliance with the guidelines and international recommendations of international technical bodies).

\textsuperscript{159} See LaBorde, supra note 57, at 292 (discussing the obligation under the 1975 statute requiring each Party to accept responsibility for harm they cause to the River).
unclear from statute’s definition, further no subsequent practice exists to illuminate the statute since no event triggering the rule has yet transpired. Absent subsequent practice, the Vienna Convention next directs parties to apply relevant customary principles of international law. If the parties interpret the 1975 statute to embody the no-harm principle under international watercourse law, then Uruguay’s due diligence efforts should fulfill the no-harm requirement of the statute and international watercourse law.

B. Argentina’s Policy of Tolerance Toward the Blockades Violates its Obligations under the 1975 Statute.

The Argentine government’s policy of tolerance toward the international blockades violates the duty to cooperate and its

\[160\] See Oral Pleadings of Uruguay: Afternoon Session, supra note 135 (discussing the historical practice between the parties).

\[161\] See Vienna Convention, supra notes 54-55 and accompanying text (explaining the internationally recognized method of treaty interpretation).

\[162\] See Uruguay Request for Provisional Measures, supra note 8 and accompanying text (describing Argentina’s permissive attitude toward the blockades).
accompanying duty to negotiate in good faith. The protestors expressly aim to apply financial pressure to the Uruguayan government to halt construction of the mills. The Argentine government’s policy thus seeks to resolve the dispute through extra-judicial means in violation of the dispute settlement mechanism of the 1975 Statute.

1. Argentina’s Actions Violates the Duty to Negotiate in Good Faith

Argentina’s inflexibility toward resolving the dispute violates the 1975 Statute’s express requirement that the parties cooperate with one another in the event either party exercises

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163 See supra note 45 and accompanying text (outlining the procedural duties incumbent upon riparian states under international law).

164 See Uruguay’s Request for Provisional Measures, supra note 1, ¶ 24 (arguing that the blockades are expressly aimed at forcing Uruguay to terminate the Botnia project prior to the ICJ’s ruling on the merits of the case).

165 See Statute of the River Uruguay, supra note 78 and accompanying text (identifying articles of the 1975 statute that obligate parties to file a complaint with the ICJ if they are unable to reach a result after negotiating with CARU or directly).
its rights with regard to any violation of pollution laws.\textsuperscript{166} It further violates the preamble of the statute, which states that both parties entered into the treaty inspired, and "motivated by the fraternal spirit."\textsuperscript{167}

The ICJ has asserted that a bilateral treaty clause directing parties to negotiate, places parties, under an obligation to conduct themselves so that the negotiations are meaningful.\textsuperscript{168} The Court further clarifies that a party insisting upon its own position cannot engage in meaningful negotiations.\textsuperscript{169} Article 26 of the Vienna Convention further supports the proposition that obligation to negotiate in the 1975 Statute requires the parties to compromise, and to apply

\begin{quote}
\textsuperscript{166} See id., supra note 10, art. 43 (discussing the parties liability for the others’ damages due to river pollution emitted in their jurisdictions).
\textsuperscript{167} See id. preamble (identifying the parties to the treaty and describing the spirit of the agreement).
\textsuperscript{168} See Gabcikovo-Nagymaros (Hung. v. Slovk.), 1997 I.C.J. 7, ¶ 142 (Feb. 5) (instructing the parties to apply the Vienna Convention principles on treaty interpretation when negotiating).
\textsuperscript{169} See id.
\end{quote}
treaty obligations in a reasonable way and in such a manner that the parties can realize the purpose of the treaty.\textsuperscript{170}

Argentina’s actions do not demonstrate its willingness to compromise. Argentina has not proposed specific alterations to the pulp mills’ construction plans that would render the plants acceptable to them.\textsuperscript{171} Rather, Argentina has rigidly demanded that Uruguay deny construction of the pulp mills all together.\textsuperscript{172} However the duty to cooperate rejects such an absolute position.\textsuperscript{173} Argentina’s position further violates the Vienna Convention by disregarding the underlying purpose of the

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\textsuperscript{170} See Vienna Convention, supra note 56 (discussing the Vienna Convention’s emphasis on the intent of the parties).
\textsuperscript{171} See supra note 96 and accompanying text (stating that Argentina expressed concerns over the potentially harmful effects of the plants, but made no mention of potential changes to the pulp mills).
\textsuperscript{172} See Order Denying Argentina’s Request for Provisional Measures, supra note 5, (rejecting Argentina’s request for a complete injunction against the construction of the pulp mills).
\textsuperscript{173} See Vienna Convention, supra note 45, art. 26 (implying that parties must demonstrate flexibility so that both parties can realize the objectives of the treaty).
treaty,174 “to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay.”175 The statute’s inclusion of the phrase “joint machinery,” combined with the reference to “fraternal spirit,” in the statute’s chapeau,176 create the inference that one party cannot dictate the terms by which the other may make use of their access to the River. Argentina’s unyielding position throughout the negotiation process constitutes a violation of the 1975 Statute.

2. Argentina’s Actions Violate the Dispute Resolution Mechanism of the 1975 Statute.

Aside from failing to negotiate in good faith, Argentina also violates the 1975 Statute through a policy of tolerance toward the blockades.177 The policy violates its obligation under the Statute to allow the ICJ to resolve the dispute. Chapter XV

174 See id. art. 31.2 (instructing parties to consider the context of a treaty, to decipher and apply the intent of the agreement rather than a plain literal reading of the text).
175 See Statute of the River Uruguay, supra note 58 (discussing the preamble to the 1975 Statute).
176 See id., supra note 10, preamble (describing the spirit that inspired the parties to sign the treaty).
177 See Uruguay’s Request for Provisional Measures, supra note 90 and accompanying text (documenting the financial costs to Uruguay resulting from the blockades).
of the 1975 Statute directs the parties to submit to the ICJ any dispute concerning interpretation or application which the parties cannot resolve through direct negotiations. 178 Neither party objects to the jurisdiction of the ICJ to resolve this dispute since direct negotiations have failed to reach a satisfactory conclusion. 179 Despite having submitted the issue to the ICJ, 180 Argentina continues to undermine the Court’s authority to resolve the issue by allowing the citizen blockades.

Argentine citizens have periodically maintained blockades of critical routes of international travel to Uruguay throughout the dispute. 181 By interrupting Uruguay’s flow of commercial and

178 See Statute of the River Uruguay, supra note 10, art. 59 (specifying the ICJ as the dispute resolution mechanism in the event the parties cannot come to an agreement through direct diplomatic negotiations).

179 See Order Denying Argentina’s Request for Provisional Measures, supra note 92 and accompanying text (stating the basis of the ICJ’s jurisdiction, and both parties assent to the resolution of the issue through the ICJ).

180 See id. (stating that Argentina filed suit in the ICJ on May 4, 2006).

181 See Uruguay’s Request for Provisional Measures, supra note 8.
tourist travel throughout the lucrative summer season, the Argentine citizens hope to create an extreme threat to Uruguay’s economy and development. The citizens aim to force Uruguay to capitulate and halt construction of the pulp mill. Although the citizen’s strong arm tactics could resolve the dispute, the method directly violates the obligation under the statute to allow the ICJ to resolve the dispute.

The Argentine government’s refusal to comply with Uruguay’s repeated requests that Argentine police officials prevent the

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182 See id.

183 See Gualeguaychú Again Blocks the Route for Nearly Four Hours: The Assembly Demands that Uruguay Relocate the Paper Mills, La Nacion, Nov. 13, 2006 (including a statement from protestors spokesman asserting, “Uruguay expects much from tourism this year, so we are going to have to blockade... for the Uruguayans to react and analyze what is most to their advantage: Argentine tourism or the pulp mills.”).

184 See Uruguay’s Request for Provisional Measures, supra note 90 (discussing the grave financial losses Uruguay has incurred thus far).
blockades\textsuperscript{185} also appears to violate the obligation to negotiate in good faith.\textsuperscript{186} Strong-arm tactics, whether financially or militarily imposed, risk a breach of international peace and therefore seem diametrically opposed to a bilateral statute between parties motivated by a “fraternal spirit.”\textsuperscript{187} Argentina’s failure to compromise during negotiations with Uruguay, combined with its tolerance toward the Argentine citizenry’s attempts to reach extra-judicial solutions to the dispute, constitute clear violations of its obligations under the 1975 Statute.

C. Argentina’s Fear of Environmental Damage Does Not Justify its Breach of the 1975 Statute According to Past ICJ Decisions

The evidence Argentina has presented thus far in the ICJ litigation regarding the plants’ potential for pollution does not meet the requirements for a state of necessity defense, and therefore does not justify Argentina’s breach of the 1975 Statute.

\textsuperscript{185} See Uruguay’s Request for Provisional Measures, supra note 1, ¶ 16 (describing Argentina’s written response to Uruguay’s diplomatic note of November 1, 2006).

\textsuperscript{186} See supra note 45 and accompanying text (defining the duty to negotiate in good faith and seemingly prohibiting the use of financial pressure or other extra-judicial methods for settling disputes over use of the River).

\textsuperscript{187} See Statute of the River Uruguay, supra note 58 (describing the fraternal spirit of the treaty).
Statute according to ICJ precedence.\textsuperscript{188} Argentina cannot meet the ICJ’s criteria for a state of necessity defense since it cannot prove that an imminent peril existed during the time of the breach, and further cannot prove that the measures taken in breach of the statute constituted the only possible response to the peril.\textsuperscript{189}

Argentina, like Hungary in the Bacikovo-Nagymaros Project, has presented evidence regarding the potential for pollution in the future and claims this potential constitutes a grave risk to the ecological balance of the River.\textsuperscript{190} Though the Court

\begin{footnotesize}
\textsuperscript{188} See Gabcikovo-Nagymaros (Hung v. Slovk.), 1997 I.C.J. 7 (Feb. 5) ¶ 54 (holding that Hungary did not meet the criteria for the state of necessity defense and thus could not rely on the defense to excuse its breach of a bilateral treaty).

\textsuperscript{189} See id. ¶ 54 (providing the requirements of the necessity defense).

\textsuperscript{190} Compare Order Denying Argentina’s Request for Provisional Measures, supra note 97 (discussing Argentina’s concern that the mills will cause irreparable damage to the river’s ecology), with Gabcikovo-Nagymaros (Hung v. Slovk.), 1997 I.C.J. ¶ 40 (describing Hungary’s decision to halt its obligations under its bilateral treaty due to concerns regarding potential future effects on the river’s ecological state).
\end{footnotesize}
emphasizes great respect for the environment,\textsuperscript{191} the defense requires parties prove not only the gravity, but also the immediacy of the peril constituting the state of necessity.\textsuperscript{192} Further, Argentina, like Hungary, cannot concretely prove that the proposed works will inevitably pollute the shared watercourse.\textsuperscript{193} The strict environmental requirements Uruguay has imposed on the plants,\textsuperscript{194} coupled with numerous environmental

\textsuperscript{191} See Gabcikovo-Nagymaros, 1997 I.C.J. ¶ 53 (reaffirming the no-harm obligation under international watercourse law).
\textsuperscript{192} See id. ¶ 54 (highlighting that the peril need not consist of actual, material damage to meet the criteria for the defense, however the peril must go far beyond the concept of a possibility, and must present a sense of proximity or imminence).
\textsuperscript{193} See Order Denying Argentina’s Request for Provisional Measures, supra note 97, ¶ 8 (presenting Argentina’s assertion that plants potential to pose an environmental threat constitutes, a “very serious probability,” while not predicting the likelihood that the threats could come to fruition).
\textsuperscript{194} See Uruguay’s Request for Provisional Measures, supra note 98, ¶ 19 (describing the world-class technology Uruguay required the pulp mills to apply).
impact studies that project minimal pollution, leave Argentina’s claims of future peril even more uncertain.

Even if the ICJ were to find for Argentina on the issue of grave and imminent peril, Argentina cannot prove that its violations of the duty to cooperate in good faith and the duty to resolve disputes through the ICJ constituted the only responses to the peril. Argentina failed to propose alterations to the construction plans for the pulp mills, or to prevent the blockades to allow the ICJ to adjudicate the dispute, however either option constituted a viable response to the feared peril. Since Argentina cannot meet either element

195 See supra note 99 (expounding upon the conclusions of the International Finance Corporations’ expert panel).

196 See Gabcikovo-Nagymaros, 1997 I.C.J. ¶ 54 (accentuating the second requirement of the necessity defense requiring that the breaching state had no alternative course of action to avoid the peril).

197 See Oral Pleadings of Uruguay: Afternoon Session, supra note 84, ¶ 16 (analyzing Argentina’s complaints).

198 See Uruguay’s Request for Provisional Measures, supra notes 7-8, ¶¶ 12, 14-15 (discussing Argentina’s choice to ignore Uruguay’s diplomatic notes requesting assistance in the ending the blockades).
of the theory of necessity defense according to ICJ jurisprudence, Argentina cannot excuse its breach of the 1975 Statute.

IV. RECOMMENDATIONS

The international community should expect a legal system that preserves and protects states’ rights to equal use of international watercourses as agreed to under bilateral treaties and customary international law. The legal framework cannot allow states such as Argentina to creatively interpret treaty obligations and principles of international watercourse law to strong arm the domestic policies of weaker, neighboring riparian states. To prevent states from abusing the system the international community must clarify the substantive principles of international watercourse law, and enforce the obligation of the duty to negotiate in good faith. A ruling from the ICJ in favor of Uruguay in the Pulp Mill dispute could buttress this objective.

A. The ICJ Should Resolve the Pulp Mill Dispute in Favor of Uruguay Rather than Remand the Case to the Two Parties for Resolution upon Further Negotiation.

The Court should find that Uruguay has met its obligations under the 1975 Statute and under international watercourse law and allow construction of the pulp mills to continue rather than remand the dispute to the countries for further negotiations. Although the Court stated in the Bacikovo-Nagymaros case that
the parties themselves should find an agreed solution to their trans-boundary water dispute,199 the Court cannot apply the same solution to the dispute in this case. Unlike the Bacikovo-Nagymaros dispute, where both parties violated the subject treaty and thus cancelled out each other’s transgressions,200 here only Argentina has breached its obligations under the bilateral treaty and international watercourse law. To remand the case to the parties for resolution irrespective of Argentina’s transgression would unfairly ignore Uruguay’s conscientious effort to comply with the 1975 Statute. Rather than ignoring Uruguay’s efforts, the Court should recognize compliance and reward its efforts as an example to other riparian states that could potentially become embroiled in future trans-boundary watercourse disputes.

Further, Argentina’s violation of the provision to negotiate in good faith should caution the Court regarding the wisdom of relying on future negotiations to resolve the dispute. Simply remanding the dispute for further negotiation despite

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199 See Gabcikovo-Nagymaros (Hung v. Slovk.), 1997 I.C.J. 7 (Feb. 5) ¶ 142.

200 See id. ¶ 150 (holding that resumed cooperation toward the use of the international waterway would wipe out the consequences of both parties wrongful acts).
Argentina’s proven inability to negotiate lawfully establishes a weak solution, and could cause other States to question whether the Court doubts its power to enforce a ruling in support of Uruguay. Such doubts could undermine the credibility of the ICJ, and could generate reluctance among states to rely upon the ICJ for the resolution of future trans-boundary disputes.

B. The ICJ Should Hold that a Positive Environmental Impact Assessment Coupled with the Application of Best Available Technology Creates a Rebuttable Presumption that the Proposed Project Complies with the No-harm Principle.

Bilateral treaties governing the use of a shared natural resource that leave the due diligence and no-harm principles undefined, such as the 1975 Statute, provide little guidance for states attempting to negotiate an acceptable level of appreciable harm to their shared watercourse. Although these states could use a financial boost from development projects, they may become discouraged by the possibility of protracted diplomatic consultations, litigation before the ICJ, and retaliation from neighboring riparian states. The ICJ should alleviate these concerns, and announce the following default position: where a bilateral treaty does not objectively define the no-harm principle, the court will conclude that a state has dispersed of the obligation where the proposed project has

\[ \text{See supra notes 62-67 and accompanying text (discussing the anti-pollution provisions of the 1975 Statute).} \]
passed environmental impact assessments conducted in accordance with internationally accepted standards, and where the proposed project requires the application of best available technology.

The default rule would provide specific criteria for those states planning the construction of a future project, and could prevent years of delay due to protests and feuds over the projects potential for pollution. The rule would also encourage states to negotiate treaties in greater detail, so that parties wishing to enact a stricter standard against appreciable harm capture their agreements in writing.

V. CONCLUSION

Argentina reasonably expects that the health of its population, environment, flora, fauna, and coastal region, will not suffer a significant, detrimental impact due to Uruguay’s use of the river. The 1975 Statute also secures Argentina’s right to expect notification, in the event Uruguay decides to change its use of the river. However Argentina cannot expect a veto power over Uruguay’s plans for development just because they involve use of the river where neither international watercourse law nor the 1975 Statute support such a veto power. The stability of the international watercourse regime depends on states’ willingness to comply with bilateral treaty obligations. Where a state such as Uruguay has complied with its obligations, the ICJ should recognize its right to economic development.