

# The Uruguay Paper Pulp Mill Dispute: Highlighting the Growing Importance of NGOs and Public Protest in the Enforcement of International Environmental Law

Michael K. Lee

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# LITIGATION UPDATE

## THE URUGUAY PAPER PULP MILL DISPUTE: HIGHLIGHTING THE GROWING IMPORTANCE OF NGOs AND PUBLIC PROTEST IN THE ENFORCEMENT OF INTERNATIONAL ENVIRONMENTAL LAW

by Michael K. Lee\*

### INTRODUCTION

For the past two years the governments and the affected peoples of Argentina and Uruguay have been in conflict over the potential environmental hazards that the construction of two mega paper pulp mills would bring to the Uruguay River and neighboring area. Pursuant to a jurisdiction provision in a treaty bearing on the matter, Argentina filed suit in the International Court of Justice (“ICJ”) to resolve the dispute and requested that the construction of the mills be enjoined until a decision was rendered.

On July 13, 2006, the ICJ denied Argentina’s request for provisional measures without prejudice to the decision on the merits.

Nonetheless, with construction on one mill abandoned and the other mill temporarily suspended, Argentina may get its way regardless of the outcome on the merits of the ICJ case because of heavy public protests, political pressure, and the tenacious public-interest litigation of a non-government organization (“NGO”) called Center for Human Rights and Environment (“CEDHA” by its Spanish acronym).

### LEGAL BRIEF: INTERNATIONAL COURT OF JUSTICE CASE

According to Argentina, Uruguay authorized the Spanish company ENCE to construct a pulp mill project near the city of Fray Bentos in October of 2003. In February of 2005, Uruguay sanctioned yet another paper pulp mill, this time to be operated by a Finnish company Oy Metsä-Botnia AB (“Botnia”), also near Fray Bentos. Argentina claims that both mills were authorized without complying with the procedure prescribed by the

1975 Statute of the River Uruguay. Argentina further argued that the two mills were being built in the “worst imaginable” place in terms of protection of the river, that there is “a very serious probability” of environmental damage, and that the damage would be “irreparable.”<sup>1</sup> Uruguay replied that the mills will apply the “highest and the most appropriate international standards of pollution control” and will meet its obligations under the 1975 Statute.<sup>2</sup>

On July 13, 2006, the ICJ denied Argentina’s request for provisional measures without prejudice on the merits. In its

decision, the Court focused on the fact that provisional measures may be granted only if Argentina can prove that “the construction of the mills poses an *imminent* threat of *irreparable* damage to the aquatic environment of the River Uruguay or to the economic and social interest of the riparian inhabitants of the Argentine side of the river,”<sup>3</sup> [emphasis added]. The Court then reasoned that Argentina did not persuade the Court that mere construction of the mills would cause imminent

or irreparable harm the environment. None of the prior ICJ cases involved a request to shut down or halt the construction of an industrial project.<sup>4</sup>

While a decision on the merits is scheduled to be rendered in August 2007 for the Botnia mill and June 2008 for the ENCE mill,<sup>5</sup> the combination of protests, roadblocks, diplomatic pressure, and legal action may make the decision on the merits moot.

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\* Michael K. Lee is an LLM candidate, 2006, at American University, Washington College of Law.

On September 21, 2006, ENCE's president, Juan Luis Arrigui, announced that construction would not continue, explaining that "there cannot be two [cellulose] plants in Fray Bentos."<sup>6</sup> Mr. Arrigui did add, however, that there are plans to move the plant to another part of Uruguay.<sup>7</sup> And, as for Botnia mill project, while the project is in more advanced stages and employs approximately 4,500 workers, the management decided to temporarily suspend construction "due to lack of guarantees... and until the conditions required for the development of this project are re-established."<sup>8</sup>

### PROTESTS, ROADBLOCKS, & POLITICS

Large-scale protests were essential in speeding diplomatic and litigation efforts surrounding the paper mills. On April 30, 2005, a protest rally of forty thousand participants, mostly residents of the Argentine city of Gualeguaychú, blocked the Libertador General San Martín Bridge, the main bridge between Gualeguaychú and Uruguayan city of Fray Bentos.<sup>9</sup> On February 3, 2006, members of an environmentalist group called Gualeguaychú Environmental Assembly led a long-term blockade of Route 136. On February 16, 2006, the Colón Environmental Assembly started a long term blockade of Route 135 and the bridge that links Colón (which lies approximately one hundred miles north of Gualeguaychú) to the Uruguayan city of Paysandú.<sup>10</sup> Nearly continuous road blocks persisted on Route 135 and 136 until May of 2006. On April 30, 2006, nearly 100,000 people participated in a protest on the Libertador General San Martín Bridge.<sup>11</sup> After nearly a four-month lull, large public protests stirred again on September 11, 2006 and September 25, 2006.<sup>13</sup>

Uruguay felt the economic impact of the roadblocks. As early as December 26, 2005, the Uruguayan Chancellor publicly announced that the blockades were a violation of the Mercosur Trade Agreement and brought a formal complaint against Argentina on August 9, 2006 to the Ad Hoc Tribunal created through Mercosur.<sup>14</sup> Uruguay requested an award of U.S. \$400 million for Argentina's failure to remove citizen roadblocks, but on September 7, 2006, the Ad Hoc Tribunal rejected Uruguay's claim because it found Argentina acted in good faith to dissuade road blocks.<sup>15</sup>

The protest soon moved politicians into action and escalated diplomatic efforts. From May of 2005, the governor of Entre Rios, the province in which the proposed mills are to be located, stated his support for the protesters. In July of 2005, Argentine Chancellor Rafael Biela traveled to Gualeguaychú to meet with residents there. Despite these efforts, the matter escalated and on January 25, 2006, Jorge Busti, governor of Entre Rios, and Nestor Kichner, president of Argentina, announced that Argentina would be filing an ICJ complaint, which would be filed March 4, 2006.<sup>16</sup>

### CEDHA'S PUBLIC-INTEREST LITIGATION

While the effectiveness of the public protests, roadblocks, and diplomacy should not be underestimated, the NGOs, particularly CEDHA were just as critical to the campaign against the pulp mills in Uruguay. Founded in 1999, CEDHA has a permanent staff of just ten persons. However, its founder Romina Picolotti not only served as the legal advisor to the Gualeguaychú Citizens' Assembly<sup>17</sup> but lead CEDHA on a tenacious cutting-edge public-interest litigation campaign against the paper pulp mills.<sup>18</sup>

A large measure of the nearly two billion in financing was to come from the World Bank Group and through its members, the International Finance Corporation ("IFC") and the Multilateral Investment Guarantee Agency ("MIGA").<sup>19</sup> CEDHA petitioned the Compliance Advisor Ombudsman ("CAO"), the organization responsible for compliance review of IFC/MIGA, and the CAO agreed to conduct a "compliance audit" of the IFC's studies.<sup>20</sup> Eventually, the IFC decided to conduct another Cumulative Impact Study ("CIS") in June of 2006 an act which tacitly acknowledges the deficiency of prior studies.<sup>21</sup> At present, the

IFC is still processing the loan requests for the mills with a decision scheduled for October 2006,<sup>22</sup> making the mill owners nervous.<sup>23</sup>

Concurrently, CEDHA also launched a campaign against the co-financiers of the mills by filing what CEDHA calls "Equator Principles Compliance Complaints." The Equator Principles are a voluntary initiative promoted worldwide by the IFC.<sup>24</sup> By adopting the Principles, financial institutions undertake

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to finance only those projects whose environmental and social risk comply with the criteria.<sup>25</sup> These Principles, however, are not legally binding restraints on financial institutions, rather they are a species of "soft law" that is prevalent in the area of international environmental law. Soft law is based on international diplomacy, customs, and principles such as those espoused in the 1992 Rio Declaration. It is dependent on moral suasion or fear of diplomatic retribution rather than legal action. Because governments and corporations dislike negative publicity, one soft law stratagem favored by activists is the so-called "name and shame game." For instance, CEDHA used the Equator Principles to send detailed and technical complaint letters that read like a civil complaints to finance companies ING Group of the Netherlands and BBVA of Spain. Subsequently, the ING Group sent a letter to CEDHA on April 12, 2006, stating that it would withdraw its finance consideration of the mills.<sup>26</sup> Similarly, CEDHA also filed a series of Organization of Economic Co-operation and Development ("OECD") specific instance complaints against corporations Finnvera, Nordea, and Botnia — companies that

would build and operate the mills — for alleged violation of OECD Guidelines for Multinational Enterprises.<sup>27</sup>

## CONCLUSION

When discussing the enforcement of international environmental laws, the World Bank notes that “NGOs often play the role of self-appointed ‘watchdogs’ over national governments, and can thus help in the enforcement of international law through political means or public-interest litigation, to ensure that governments maintain their environmental commitments. The individual in the international arena also deserves mention. With the increasing emphasis on public participation and provi-

sion of access to environmental information in international discourse, the individual’s role in ensuring international environmental compliance is becoming increasingly relevant.”<sup>28</sup> The muted tones and the technical language used by that World Bank makes one wonder to what extent the statements are, in fact, true. The enforcement of law is quintessentially a state function. However, recent events highlighted in the Uruguay paper pulp mills dispute point to the growing importance of NGOs and individual participants in the enforcement and, possibly, the creation of customary international environmental law.



## Endnotes: Litigation Update

<sup>1</sup> INTERNATIONAL COURT OF JUSTICE, SUMMARY OF THE ORDER OF 13 JULY 2006: PULP MILLS ON THE RIVER URUGUAY (ARGENTINA V. URUGUAY) 4, available at <http://www.icj-cij.org/icjwww/idocket/iau/iauframe.htm> (last visited Sept. 25, 2006).

<sup>2</sup> INTERNATIONAL COURT OF JUSTICE, *id.* at 5.

<sup>3</sup> INTERNATIONAL COURT OF JUSTICE, *id.* at 8.

<sup>4</sup> ASIL Insight, *Argentina-Uruguay Environmental Border Dispute Before the World Court* (May 16, 2006), available at <http://www.asil.org/insights/2006/05/insights060516.html> (last visited Sept. 26, 2006).

<sup>5</sup> INTERNATIONAL COURT OF JUSTICE, *supra* note 1, at 4.

<sup>6</sup> Press Conference by Luis Arregui, Office of the President of Uruguay, ENCE Stays; Plant Relocation Studies, available at [http://www.presidencia.gub.uy/\\_web/noticias/2006/09/2006092109.htm](http://www.presidencia.gub.uy/_web/noticias/2006/09/2006092109.htm) (last visited Oct. 25, 2006) [hereinafter ENCE Stays]; see also CEDHA, *ENCA Announce Withdraw from Conflictual [sic] Paper Mill Investment in Fray Bentos, Uruguay* (Sept. 21, 2006), [http://www.cedha.org.ar/en/more\\_information/ence-withdrawal-papermill.php](http://www.cedha.org.ar/en/more_information/ence-withdrawal-papermill.php) (last visited Sept. 28, 2006).

<sup>7</sup> ENCE Stays, *id.*

<sup>8</sup> *Botina Announces it Will Suspend Works*, LA NACION, Mar. 22, 2006, [http://www.lanacion.com.ar/politica/nota.asp?nota\\_id=792196](http://www.lanacion.com.ar/politica/nota.asp?nota_id=792196) (last visited Oct. 29, 2006); Botina, *Uruguay Project Overview*, <http://www.metsabotnia.com/en/default.asp?path=204;212;1364;1385&voucher=39FA6816-4ADF-4744-A754-8721A19E2DE9> (last visited Oct. 29, 2006).

<sup>9</sup> See Center for Human Rights and Environment, *Argentina and Bank Track, Holland, Botnia and ENCE Pulp Paper Mills Uruguay*, <http://www.cedha.org.ar/docs/press-kit-celulosa.doc> (last visited Oct. 25, 2006).

<sup>10</sup> *The Environmentalist Redouble Their Pressure and Block Two Roads to Uruguay*, Clarin, (Feb. 16, 2006) <http://www.clarin.com/diario/2006/02/16/um/m-01143037.htm> (last visited Oct. 25, 2006).

<sup>11</sup> CEDHA, *100,000 Peacefully March on Uruguayan Paper Mills* (April 30, 2006), [http://www.cedha.org.ar/en/more\\_information/100000-march-uruguay.php](http://www.cedha.org.ar/en/more_information/100000-march-uruguay.php) (last visited Sept. 27, 2006).

<sup>12</sup> CEDHA, *Stakeholder Communities Increase Pressure and Plan New Marches to Oppose Uruguayan Paper Mills* (Sept. 11, 2006), [http://www.cedha.org.ar/en/more\\_information/stakeholder-communities-oppose-pulp-mills.php](http://www.cedha.org.ar/en/more_information/stakeholder-communities-oppose-pulp-mills.php) (last visited Sept. 27, 2006).

<sup>13</sup> CEDHA, *Residents Take to Bridge Again Against Uruguayan Papermills, Botnia Ignores Resistance* (Sept. 25, 2006), [http://www.cedha.org.ar/en/more\\_information/residents-take-bridge-papermills.php](http://www.cedha.org.ar/en/more_information/residents-take-bridge-papermills.php) (last visited Sept. 28, 2006).

<sup>14</sup> *The Issue of Blocked Roads Reaches the Court*, LA NACION <https://www.lanacion.com> [registration required].

<sup>15</sup> CEDHA, *MERCOSUR Tribunal Recognizes Gualaguaychu Assembly Legitimacy in Struggle Against Paper Mill Investments* (Sept. 7, 2006), [http://www.cedha.org.ar/en/more\\_information/mercosur-recognizes-legitimacy.php](http://www.cedha.org.ar/en/more_information/mercosur-recognizes-legitimacy.php) (last visited Sept. 27, 2006).

<sup>16</sup> CEDHA, *Argentina to Send Uruguayan Papermill Case to the Hague* (Jan. 26, 2006), [http://www.cedha.org.ar/en/more\\_information/argentina\\_to\\_send\\_uruguayan\\_papermill\\_case\\_to\\_the\\_hague.php](http://www.cedha.org.ar/en/more_information/argentina_to_send_uruguayan_papermill_case_to_the_hague.php) (last visited Sept. 28, 2006).

<sup>17</sup> Greenaccord.org, *Environment, Diplomacy, Science, and Art — The Conflict for the Uruguay River Paper Mills* (Apr. 8, 2006), <http://www.greenaccord.org/portale/articolo.asp?id=197> (last visited Oct. 05, 2006).

<sup>18</sup> See generally The Center for Human Rights and Environment website, <http://www.cedha.org.ar/en/> (last visited Sept. 27, 2006).

<sup>19</sup> CEDHA, *The CAO Ombudsman (CAO) Triggers Audit of Uruguayan Paper Mill Projects and Expands Investigation to Proceedings of MIGA* (Nov. 9, 2005), [http://www.cedha.org.ar/en/more\\_information/compliance-audit-ifcmiga.php](http://www.cedha.org.ar/en/more_information/compliance-audit-ifcmiga.php) (last visited Sept. 27, 2006).

<sup>20</sup> See generally The Center for Human Rights and Environment website, *supra* note 18; see also [http://www.cedha.org.ar/en/initiatives/paper\\_pulp\\_mills/](http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/) (last visited Sept. 29, 2006).

<sup>21</sup> See generally Compliance Advisor Ombudsman (“CAO”) website, [www.cao-ombudsman.org](http://www.cao-ombudsman.org) (last visited Sept. 27, 2006).

<sup>22</sup> Alertnet.org, *Uruguay Pulp Mill Impact Study Due in Weeks — IFC* (Sept. 18, 2006), <http://www.alertnet.org/thenews/newsdesk/SGB000080.htm> (last visited Sept. 28, 2006).

<sup>23</sup> See generally INTERNATIONAL FINANCE CORPORATION, SUMMARY OF PROJECT INFORMATION (SPI), <http://www.ifc.org/ifcext/spiwebsite1.nsf/2bc34f011b50ff6e85256a550073ff1c/4208c72853e61df785257045006f993f?opendocument> (last visited Sept. 27, 2006).

<sup>24</sup> See generally Equator-Principles.com website, <http://www.equator-principles.com/principles.shtml> (last visited Sept. 29, 2006).

<sup>25</sup> See generally Equator-Principles.com, *id.*

<sup>26</sup> CEDHA, *ING Group of Netherlands Pulls Out of Controversial Papermill while World Bank Postpones Loans Following Critical Review of Environmental Impact Studies* (Apr. 12, 2006), [http://www.cedha.org.ar/en/more\\_information/ing-postpones-loans.php](http://www.cedha.org.ar/en/more_information/ing-postpones-loans.php) (last visited Oct. 5, 2006).

<sup>27</sup> See generally The Center for Human Rights and Environment website, *supra* note 18 <http://www.cedha.org.ar/en/> (last visited Sept. 27, 2006); see also [http://www.cedha.org.ar/en/initiatives/paper\\_pulp\\_mills/](http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/), *supra* note 20.

<sup>28</sup> THE WORLD BANK GROUP, INTERNATIONAL ENVIRONMENTAL LAW: CONCEPTS AND ISSUES, [http://www4.worldbank.org/legal/legen\\_iel.html](http://www4.worldbank.org/legal/legen_iel.html) (last visited Sept. 26, 2006).