
Inter-State Environmental Disputes, Provisional Measures and the International Court of Justice's Order in the *Case Concerning Pulp Mills on the River Uruguay*

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In the most recent inter-State dispute related to the use of shared natural resources, the International Court of Justice (ICJ) set the criteria for adopting provisional measures aimed at protecting environmental resources under the risk of imminent and irreparable damage.¹ In its order in the *Case Concerning Pulp Mills on the River Uruguay*, the ICJ refused indicating provisional measures in an ongoing

¹ Pulp Mills on the River Uruguay, (Argentina v. Uruguay), Request for the Indication of Provisional Measures, 2006 I.C.J. 135 (July 12) available at http://www.icj-cij.org/icjwww/idocket/iau/iau_orders/iau_order_provisional_measures_20060713.pdf [hereinafter *Pulp Mills ICJ Order*]. This paper deals with the above mentioned Order only. It does not assess the Order later issued by the ICJ. Press Release, International Court of Justice, Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Jan. 23, 2007) available at http://www.icj-cij.org/icjwww/ipresscom/ipress2007/ipresscom_2007-2_au_20070123.htm. The second Order, although associated with the ongoing dispute, does not refer to environmental issues, but to the adverse consequences suffered by Uruguay as a result of the alleged Argentine blockade of an international bridge over the River Uruguay. The Court reasoned that the circumstances were not such to warrant indication of provisional measures.

environmental dispute between Argentina and Uruguay.² The dispute stemmed from Uruguay's authorization of the construction of two pulp mills near the River Uruguay, which partially set the territorial boundaries of these two States,³ and the alleged adverse impact that such construction had on Argentina's rights and environment.⁴

The ICJ found that any prejudice or harm to Argentina as a result of the construction of the mills was not imminent and that any detriment could be restituted on the merits of the dispute.⁵ There was then no proof that the injury could not be rectified exclusively by implementing provisional measures suspending the mills' construction.⁶ Although there was proof of the projects' potentially negative environmental impact,⁷ the ICJ chose to defer to Uruguay's sovereign determination to authorize the projects at this stage in the proceedings.⁸

However, one of the most salient features of the *Pulp Mills* ICJ Order is related to the ongoing debate within the Court regarding the requisites that the Court should generally require to indicate provisional measures.⁹ The position adopted by a member of the Court could have some adverse environmental effects if applied strictly according to its terms. From an environmental point of view, the extant jurisprudence related to these measures—ratified by the *Pulp Mills* ICJ Order—should be preserved without alteration.

This paper is divided into six parts. The first presents the facts of the *Pulp Mills* dispute. The second part sets forth Argentina's claims and Uruguay's responses. The third part depicts the ICJ's findings and conclusions regarding Argentina's request for indicating provisional measures. The fourth part includes a commentary on the order. The fifth part describes the ongoing internal debate within the ICJ regarding the various requirements necessary to adopt provisional measures and explains the possible negative implications that a suggestion of one of the members of the Court would have if it were adopted by the Court and applied to environmental disputes. The sixth part concludes.

² *Id.*

³ See The World Factbook: Uruguay, UNITED STATES CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/cia/publications/factbook/print/uy.html> (last visited Jan. 4, 2007) (showing a rough map of Uruguay's political borders).

⁴ Summary 2006/2, Summary of the Order of 13 July 2006 Concerning Pulp Mills on the River Uruguay, INTERNATIONAL COURT OF JUSTICE, available at <http://www.icj-cij.org/icjwww/idocket/iau/iauframe.htm> [hereinafter *Summary Order*].

⁵ See *id.* ¶ 23 (describing the ICJ's finding that the possibility of irreparable environmental, economic, or social damage posed by construction of the mills was not imminent and that any damage that did result would be repairable via a future proceeding).

⁶ *Id.* ¶ 24.

⁷ See *id.* (recognizing that some environmental damage would result from construction of the mills but that such damage was correctible, though not through suspension of construction, and would be minimized through CARU's monitoring duty).

⁸ *Id.* ¶ 27.

⁹ See generally *id.* (offering summaries of the declaration of Judge Ranjeva, the separate concurring opinions of Justices Abraham and Bennouna, and the dissenting opinion of Judge Vinuesa).

I. THE FACTS OF THE *PULP MILLS* DISPUTE.

The River Uruguay establishes part of the border between Argentina and Uruguay.¹⁰ Due to this circumstance, both States signed the Statute of the River Uruguay, which came into force on September 18, 1976.¹¹ The purpose of this treaty was “to establish the joint machinery necessary for the optimum and rational utilization” of that part of the river which is shared by the two States.¹² The Statute governed, among other activities, “the conservation, utilization and development of other natural resources” and set forth obligations as to “the prevention of pollution and liability resulting from damage inflicted as a result of pollution.”¹³ The Statute also created the Administrative Commission of the River Uruguay (CARU), charged with the function of serving as a regulating and coordinating body, among other responsibilities.¹⁴

In October 2003, Uruguay authorized the Spanish company ENCE to build a pulp mill (the CMB project) in the area of the city of Fray Bentos.¹⁵ In February 2005, Uruguay issued a second authorization favoring the Finnish company Oy Metsa-Botnia AB (Botnia) to construct another pulp mill (the Orion mill) near the CMB project and to build a port for the exclusive use of the Orion mill.¹⁶ The construction of the mills was the highest foreign investment project in the history of Uruguay, with a significant employment and economic impact for the country.¹⁷

Argentina complained about “the amount of effluent which these mills are expected to discharge into the River Uruguay, the proximity to major urban populations centres ... (and) the inadequacy of the measures proposed for the prevention and reduction of the potential impact of liquid effluent, gas emissions and solid waste.”¹⁸ According to Argentina, even the National Directorate for the Environment of the Uruguay Government (DINAMA) regarded the projects as presenting “a risk of major negative environmental impact,” that “the process envisaged by the CMB and Orion projects ... is inherently polluting” and that “90 per cent of fish production in the Argentina – Uruguay section of the River (over 4.500 tonnes per year) is located within the areas affected by the mills.”¹⁹

¹⁰ See The World Factbook: Uruguay, *supra* note 3 (displaying a map showing that the River Uruguay establishes part of the border between Argentina and Uruguay).

¹¹ *Pulp Mills ICJ Order*, *supra* note 1 ¶ 1.

¹² *Id.* ¶ 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* ¶ 5.

¹⁶ *Id.* ¶ 6.

¹⁷ See *Pulp Mills ICJ Order*, *supra* note 1 ¶ 48 (indicating that Uruguay argued suspending construction of the mills would cause substantial economic loss, that provisional measures sought by Argentina would irreparably prejudice Uruguay’s sovereign right to implement sustainable economic development projects in its own territory, and that construction of the mills would have an economic impact of more than \$350 million per year).

¹⁸ *Id.* ¶ 8 (quoting Argentina’s argument in its application).

¹⁹ *Id.*

II. ARGENTINA'S CLAIMS AND URUGUAY'S RESPONSES.

For Argentina, Articles 7–13 of the Statute of the River Uruguay established an obligatory procedure for “prior notification and consultation through CARU for any party planning to carry out works liable to affect navigation, the regime of river or quality of its waters.”²⁰ Argentina was of the view that the Statute established two obligations: (i) an obligation not to authorize any construction before prior notification to and consultation within CARU, and (ii) an obligation not to cause environmental damages to the river.²¹ Given that Uruguay had not followed this procedure and that CARU had not approved the construction of the mills, Uruguay violated the Statute. Specifically, Argentina claimed that Uruguay breached the following obligations provided for in the treaty:

- (a) The obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay;
- (b) The obligation of prior notification to CARU and Argentina;
- (c) The obligation to comply with the procedures prescribed in Chapter II of the 1975 Statute;
- (d) The obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study; and
- (e) The obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries.²²

In its request for provisional measures, Argentina asked for the immediate suspension of all permits to construct the mills and the suspension of the construction work on the Orion mill.²³ As grounds for the request, Argentina sustained that there was a serious environmental risk, because the construction of the mills was under way²⁴ and would be completed before the ICJ handed down its ruling.²⁵ Also, Argentina maintained that the provisional measures were necessary in order to prevent the environmental damage to Argentina, because no other mechanism would repair the damages suffered by the State.²⁶

Uruguay responded that the Statute of the River Uruguay did not confer a veto right to any party over an industrial development project, and that the only right

²⁰ *Id.* ¶ 4.

²¹ *See id.* ¶ 65 (stating that Argentina claimed that the 1975 Statutes imposed an obligation on Uruguay not to allow construction before the Statutes were met, and also an obligation that Uruguay not harm the environment, the economy, or society).

²² *Id.* ¶ 11.1(a)-(e) (quoting Argentina's conclusion in its application).

²³ *Pulp Mills ICJ Order, supra* note 1 ¶ 20. The construction of the CMB mill had been suspended by the Spanish company ENCE for 90 days at the time Argentina requested provisional measures. *See id.* ¶ 10 (stating that while construction on the CMB mill had been suspended for 90 days as of March 28 2006, construction of the Orion mill continued unabated and that plans for construction of a third mill were underway).

²⁴ *Id.* ¶ 37.

²⁵ *Id.* ¶ 19 (noting that operations will start for Orion in August 2007 and for CMB in June 2008).

²⁶ *Id.* ¶ 18-19 (stating that continued construction of the mills deprived Argentina of its right to an objective environmental assessment of the mills, and urging that immediate measures be taken).

established by the Statute was the good faith exchange of information between parties.²⁷ As for the claims of risk to the environment, Uruguay stated that the risk did not exist, because the two mills were required to comply with recognized international standards, embodied in the most recent European recommendation for pollution prevention.²⁸ On the other hand, the environmental risk Argentina claimed as existing was associated with the operation of the mills and not with their construction.²⁹

Uruguay also contested the assertion that the termination of the construction of the mills would generate a *fait accompli* in the sense that any damage suffered by Argentina would be irreparable, because Uruguay would assume the risk of dismantling the mills were they found to violate Argentina's rights.³⁰

III. THE FINDINGS AND CONCLUSION OF THE *PULP MILLS* ICJ ORDER

The ICJ reiterated its previous statements in which it highlighted the importance the environment has in today's world and in public international law. The Court reasoned:

The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.³¹

Despite this reiteration of its environmental concern, the ICJ nevertheless rejected Argentina's request for indication of provisional measures.³²

Before presenting a summary of this decision, it is prudent to recall that Article 41.1 of the Statute of the ICJ provides that "the Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."³³ In addition, Article 73 of the Rules of the ICJ set forth that "a written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made," provided that the request "specify the reasons therefor, the possible consequences if

²⁷ *Id.* ¶ 43.

²⁸ *Id.* ¶ 45. Argentina contested this argument on the ground that Uruguay had authorized emissions in CMB which were 12 times higher than the average level authorized in Canada for similar projects. *Id.* ¶ 51.

²⁹ Pulp Mills ICJ Order, *supra* note 1 ¶ 47.

³⁰ *Id.* ¶ 47.

³¹ *Id.* ¶ 72 (quoting Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 241, 241-242, para. 29 (July 8); *see also* Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 78, 78, para. 140 (Feb 5).

³² *Id.* ¶ 76-77.

³³ Statute of the International Court of Justice art. 41(1), 1945 I.C.J. Acts & Docs 41(1) *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_III.

it is not granted, and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party.”³⁴ The ICJ reads these provisions as imposing two conditions in order for the Court to indicate provisional measures: first, the damage must be imminent; second, it must be irreparable if it takes place.³⁵ Neither of these requirements was met in this case on the bases of the proofs adduced by Argentina.³⁶

In effect, the Court held that any potential damage to the aquatic environment of the Uruguay River was not imminent, because the mills were to start operations in 2007 (Orion) and 2008 (CMB).³⁷ The ICJ saw no proof of irreparable damage to the River Uruguay as a direct consequence of the commissioning of the construction of the mills.³⁸ The *Ad-Hoc* Judge chosen by Argentina, Judge Raul Emilio Vinuesa, dissented with this conclusion. According to Judge Vinuesa, the requirement of proof of urgency to implement provisional measures was met by Argentina because the country submitted that the mills would begin operating well before the ICJ rendered its judgment.³⁹ Concerning the risk of irreparable damages, Judge Vinuesa stressed:

The existence of a reasonable uncertainty as to a risk of irreparable harm to the river environment has been recognized by Uruguay when, at the hearings on provisional measures, it affirmed that there was no final environmental assessment in relation to the operation of the mills and that no authorization had yet been issued for the construction of the CMB plant.⁴⁰

The majority disagreed, however, finding that any damage to the river could well be repaired eventually by an ICJ order of suspending or modifying the operation of the mills or by dismantling them. Therefore, the completion of the construction did not then create a *fait accompli*.⁴¹

³⁴ International Court of Justice, Rules of Court art. 73(1)-(2) (1978); available at http://www.icj-cij.org/ijwww/ibasicdocuments/ibasictext/ibasicrulesofcourt_20050929.htm.

³⁵ See generally *Summary Order*, *supra* note 4 (stating that the power of provisional measures “is to be exercised only if there is an urgent need to prevent irreparable prejudice to the rights that are the subject of the dispute before the Court has had an opportunity to render its decision”).

³⁶ *Id.* (finding “nothing in the record to demonstrate that the actual decision by Uruguay to authorize 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 interests of the riparian inhabitants on the Argentine side of the river”).

³⁷ See *Pulp Mills ICJ Order*, *supra* note 1 ¶ 75 (stating that “the threat of any pollution is not imminent as the mills are not expected to be operational before August 2007 (Orion) and June 2008 (CMB).”).

³⁸ See *id.* (stating “Argentina has not provided evidence at present that suggests that any pollution resulting from the commissioning of the mills would be of a character to cause irreparable damage to the River Uruguay.”).

³⁹ *Pulp Mills on the River Uruguay*, (Argentina v. Uruguay), Request for the Indication of Provisional Measures, 2006 I.C.J. 135 (July 12) (dissenting opinion of *Ad Hoc* Judge Vinuesa); available at http://www.icj-cij.org/ijwww/cdoocket/cau/cau_orders/iau_order_opinion_dissenting_vinuesa_20060713.pdf.

⁴⁰ *Id.* at 5.

⁴¹ See *Pulp Mills ICJ Order*, *supra* note 1, ¶ 78 (indicating Uruguay bears the risk of continuing with the construction of the mills because if the court finds that the construction violates legal rights, the construction can not continue; in other words, the construction does not become irreversible once it has

IV. COMMENTARY

It is important to emphasize concerns regarding the risks that operation of the mills posed for the aquatic environment of the River Uruguay. The Uruguayan environmental body criticized the projects for their “major negative environmental impact,”⁴² and an independent report commissioned by the International Finance Corporation reached a similar conclusion.⁴³ However, the *Pulp Mills* ICJ Order could also be seen as a good example of judicial prudence and deference to Respondent States’ sovereignty, without impairing the need to protect trans-boundary environmental concerns.

Regarding deference to Respondents’ sovereignty, the ICJ reaffirmed the strict standards that damages or threats thereof have to meet in order for the Court to intervene by indicating provisional measures. Imminence and irreparability of the environmental damages or threats thereof are difficult standards to satisfy, because their proof goes well beyond the mere demonstration of the existence of the risk of damages or of their occurrence. In essence, mere threats to the environment are not sufficient to trigger provisional measures, because the threats must be of such a degree the damage is about to materialize and only an indication of provisional measures can prevent such an event from happening. To prove that the sequence of events will almost certainly lead to such a result is a complex endeavor. However, the hurdles do not end there for claimant states. The claimant state must also demonstrate that resulting damages, or those nearly certain to result, are irreparable.⁴⁴

Although the ICJ reaffirmed its past jurisprudence regarding the strict standard required for indication of provisional measures, this denial does not signify disregard for the environmental risks to the River Uruguay.⁴⁵ The *Pulp Mills* ICJ Order did not leave environmental risks unaddressed because where the parties specifically empowered CARU, a bilateral body, to mediate pollution claims generated by the operation of the mills.⁴⁶ Pursuant to a 2004 agreement between Argentina and Uruguay, both States expressly empowered CARU with the duty to monitor the water quality of the Uruguay River.⁴⁷ The importance of the environmental protection role of CARU was later reinforced when Uruguay, before the IJC, insisted it would fully comply with the procedural requirements of the Statute of the River, as noted by the Court in its Order:

begun).

⁴² See *id.* at 3, ¶ 8 (noting that the National Directorate for the Environment of the Uruguayan Government classified the pulp mills projects as presenting a risk of a major negative environmental impact).

⁴³ See *id.* at 13, ¶ 51 (noting that reports commissioned by the International Finance Corporation concluded that there were many outstanding and serious environmental issues with the Pulp Mills projects).

⁴⁴ See *id.* at 16 (indicating the ICJ could order provisional measures to prevent “irreparable prejudice” to the rights of the parties).

⁴⁵ *Id.* at 18 (“[T]he Court recognizes the concerns expressed by Argentina for the need to protect its natural environment and, in particular, the quality of the water of the River Uruguay.”).

⁴⁶ See *id.* at 20 (advising the parties of the availability of CARU as forum for revolving disputes).

⁴⁷ See *id.* at 11, 13, ¶¶ 43, 50 (indicating agreement that CARU would monitor the water quality of the river to ensure compliance with the statute).

[I]n concluding its second round of oral observations, Uruguay expressly reiterated its ‘intention to comply in full with the 1975 Statute of the River Uruguay and its application’ and repeated ‘as a concrete expression of that intention ... its offer of conducting continuous joint monitoring with the Argentine Republic’ regarding the environmental consequences of the mills’ future operations...⁴⁸

Thus, CARU should have a pivotal role in the preservation of the water quality of the River Uruguay once the pulp mills start their operation.

It was a sound decision of the Court not to intervene, given that CARU exists to prevent damages to the river as a result of the mills’ operation, and nothing in the record suggests CARU would act contrary to its renewed mandate.⁴⁹ Thus, at the time, the intervention of the ICJ looked unnecessary to protect the aquatic environment of the river.

The second reason that explains why the *Pulp Mills* ICJ Order addressed the worries about the natural resources of the river is that, despite the ICJ’s deference to the parties’ own choice to solve the environmental concerns of the dispute, the Court also reaffirmed its character of instrument of last resort to deal with such concerns by stating that the denial contained in the *Pulp Mills* Order “leaves unaffected the right of Argentina to submit in the future a fresh request for the indication of provisional measures under Article 75, paragraph 3, of the Rules of Court, based on new facts.”⁵⁰ One could interpret this statement as meaning that if, once the pulp mills begin their operation, CARU fails to carry out its functions regarding the monitoring of the water quality of the River Uruguay in order to prevent its deterioration; the ICJ would see things differently in the face of serious environmental damage or threat thereof.

In sum, the *Pulp Mills* ICJ Order is based on three pillars:

- (i) A strict criterion to indicate provisional measures aimed at protecting trans-boundary environmental risks.
- (ii) Deference to the disputants’ decision to assign a bilateral body a main role in protecting the environment of the River Uruguay.
- (iii) Recognition of the ICJ as mechanism of last resort in the event of CARU’s failure to protect the river.

For these reasons, the *Pulp Mills* ICJ Order is a wise decision. The Court respected the Respondent’s sovereignty while ensuring that the Claimant’s environmental concerns were not without protection.

⁴⁸ *Id.* at 15, ¶ 56.

⁴⁹ Negotiations through another bilateral mechanism, the High-Level Technical Group, carried out during six months, between August 2005 and January 2006, failed to solve the controversy. *Id.* at 3, ¶ 9. However, the failure of bilateral negotiation does not affect the assumption that CARU should be an important actor for environmental protection from the beginning of the operation of the mills because both parties agreed on such express duty for CARU once the projects start their operation. *See id.* at 18 (noting CARU held the duty for monitoring the water quality in the River Uruguay).

⁵⁰ *Id.* at ¶ 86.

IV. THE ENVIRONMENT AND THE DEBATE WITHIN THE ICJ CONCERNING THE
GENERAL REQUIREMENTS TO INDICATE PROVISIONAL MEASURES

Although it is not a dividing issue within the Court, in his separate opinion in the *Pulp Mills* Order, Judge Ronny Abraham put forward a thesis concerning the general requirements for the indication of provisional measures pursuant to Article 41 of the Statute of the ICJ⁵¹ that makes such an indication even more difficult in all types of situations, not excepting those concerning trans-boundary environmental disputes. The ICJ-established jurisprudence as to provisional measures, Judge Abraham shows, focuses only on the imminence and irreparability of damages over the rights of the Claimant State. There is no analysis regarding the legal bases of the Claimant's rights argued to be at imminent and irreparable risk.⁵² However, for Judge Abraham, the indication of provisional measures interferes with the Respondent's sovereignty and should be made on the basis of the recognition that there are legal grounds supporting the imposition of the obligation on the given Respondent.⁵³ He says:

In my view it is unthinkable that the Court may compel a State to act in a certain way if there is no reason to consider that the prescribed action corresponds to a legal obligation imposed on this State ... or that the Court may order a State not to carry out a certain

⁵¹ See Judge Abraham's concurring opinion, available at <http://www.icj-cij.org/icjwww/idocket/iau/iauframe.htm> (hereinafter Judge Abraham's concurring opinion) (arguing that an injunction should not be issued without the Court having first satisfied itself that there is at least an appearance of merit in the applicant's argument).

⁵² Judge Abraham points out,

"According to the most accepted view, perhaps the majoritarian doctrine, when the Court is called on to decide on a request to indicate provisional measures pursuant to Article 41 of the Statute, it should abstain from examining whether the party is entitled to the rights it is claiming and whose protection it is requesting. The Court ought to restrict itself to discovering if, under the circumstances of the case, the claimed rights, whose real existence can be only determined at the end of the procedure, are susceptible to suffering an irreparable damage, absent the measures aimed at their provisional protection. In other terms, the Court should assume that the rights are not under discussion and ask itself only whether, on the basis of assuming that it will recognize their existence, such rights are under the risk of being affected in such a way that the final award would be deprived of its efficacy."

Translated from the original French, *Id.* at ¶ 4, by the author. The original opinion reads as follows:

"Selon une opinion courante, et peut-être majoritaire en doctrine, la Cour, lorsqu'elle est appelée à statuer sur une demande tendant à ce qu'elle indique des mesures conservatoires sur le fondement de l'article 41 du Statut, devrait s'abstenir – et s'abstiendrait effectivement – d'examiner, si peut que ce soit, le bien-fondé des prétentions de la partie qui sollicite de telles mesures ... quant aux droits qu'elle affirme posséder, et pour la protection desquels elle sollicite les mesures en question. Elle devrait se borner – et se bornerait effectivement – à rechercher si, dans les circonstances de la cause, les droits revendiqués et dont seule l'issue de la procédure principale permettra d'établir s'ils existent effectivement ou non, sont susceptibles de subir un dommage irréparable, à défaut des mesures tendant à leur protection provisoire, dans l'attente de la décision finale. En d'autres termes, la Cour devrait faire comme si les droits revendiqués existaient bel et bien, et se demander seulement si, à supposer qu'elle en reconnaisse finalement l'existence dans son arrêt sur le fond, ils risquent de se trouver atteintes entre-temps dans des conditions telles que l'arrêt serait privé, au moins en partie, de son efficacité."

⁵³ *Id.* ¶ 6.

action, to suspend it or to interrupt it, if there are no grounds to believe that the said action is or would be regarded as illicit.⁵⁴

For these reasons, Judge Abraham suggests a more stringent test to indicate provisional measures. This test would contain three requirements:

- (i) The existence of the alleged violated right must be demonstrated plausibly.
- (ii) It is reasonable to expect that the Respondent's behaviour could or threatens to produce an imminent harm on such right.
- (iii) Under the circumstances of the case, it is imperative to adopt protective measures in order to prevent such right from suffering an irreparable damage.⁵⁵

For Judge Abraham, these requirements should be cumulative, so the absence of one of them would permit the Court to terminate its evaluation of the other requirements.⁵⁶ From a strict environmental perspective, Judge Abraham's first requirement could produce the worrisome consequence that, at least in abstract terms, in proceedings where there was proof of the imminence and irreparability of trans-boundary environmental damage provisional measures would not be indicated. This would be so if the Court found that the Claimant State did not plausibly prove the violation of the right by the Respondent State in its request.⁵⁷ Consequently, trans-boundary environmental damage or threats that would merit the indication of provisional measures under the current jurisprudence may not meet the standard imposed by Judge Abraham.

In the face of imminent and irreparable environmental damage, there is no need to increase the scope of Respondents' sovereignty, as Judge Abraham suggests, by further tightening the already strict conditions to indicate provisional measures. In effect, refusing to adopt these measures under such circumstances would cause irreparable environmental damage to materialize. On the contrary, if the ICJ followed its traditional jurisprudence and indicated provisional measures that were subsequently lifted in the final ruling because the given Claimant did not prove the

⁵⁴ *Id.* Translated by the author from the original;

“[I]l est à mes yeux impensable que la Cour impose à un Etat d'agir d'une certaine manière s'il n'y a pas quelque raison d'estimer que l'action prescrite correspond à une obligation juridique incombant à cet Etat ..., ou qu'elle ordonne à un Etat de s'abstenir d'une action, de la suspendre ou de l'interrompre, s'il n'y a pas quelque raison de croire que la dite action est, ou serait, entachée d'illicite.” *Id.*

⁵⁵ *See id.* ¶ 11 (explaining that the Court cannot prescribe such a measure without having conducted some minimum degree of review as to the existence of the rights claimed by the applicant, and without therefore taking a look at the merits of the dispute).

⁵⁶ *See id.* ¶ 12 (arguing that it is unthinkable that such an injunction could be issued without the Court having first satisfied itself that there is at least an appearance of merit in the applicant's argument).

⁵⁷ Judge Abraham himself states that there could be different standards to determine “plausibility,” without recommending that any of them be embraced. He mentions two. First, the *fomus boni juris* standard, used in European Community law, according to which claimants must prove with a certain degree of certitude that they are entitled to the right alleged to be infringed by the given respondent. (*See id.* ¶ 10). The second is the *non mali juris* standard, by virtue of which claimants would have to show that they are not manifestly entitled to the right whose protection they invoke. (*See id.*)

violation of international obligations, the effect over Respondents' sovereignty would not be as critical or irreparable, because the restriction on sovereignty would be temporary and would be removed after the ICJ ruling.

In other words, with the exception of extreme situations not associated with controversies arising out of the use of a shared natural resource, States' sovereignty does not suffer irreparable damage, while the environment does. Thus, legal doctrines as to provisional measures that have to deal with disputes involving such values should avoid leaning considerably towards one of them, as is the case with Judge Abraham's proposal, which broadens States' sovereignty even more by increasing the requirements for the adoption of provisional measures limiting it.

The same cannot be said of the ICJ's existing jurisprudence. This jurisprudence achieves a proper balance of the stakes at issue, because it simultaneously protects defendants' sovereignty by imposing strict conditions for the indication of provisional measures that restrict such sovereignty, while at the same time affording an important degree of protection to Claimants' environment by preventing the occurrence of those imminent and irreparable damages to it. This jurisprudence could not be regarded as leaning excessively towards the environment, because given that the jurisprudence refuses to sanction those damages that are not imminent or irreparable, it embodies nothing akin to zero tolerance to trans-boundary environmental damages. It restricts the indication of provisional measures only to those that possess the above two characteristics.

V. CONCLUSION

The *Pulp Mills* ICJ Order is a sound exercise of international adjudication. The Court decided not to interfere with Uruguay's decision to authorize the construction of the mills, because the environmental risks were associated mostly with their operation and because there was a bilateral body, CARU, in charge of monitoring and correcting the pollution of the River Uruguay. Both parties agreed that CARU would play a key and effective role in carrying out its functions. Despite this refusal, the *Pulp Mills* ICJ Order did not signify an impairment of the protection of the trans-boundary environmental interests at stake, because the ICJ made clear that, pursuant to Article 71.3 of the Rules of the Court, it retained the possibility of indicating provisional measures on the basis of new facts. This statement could be interpreted as sending a signal to the parties, and in particular Uruguay, that the ineffectiveness of CARU in monitoring and controlling pollution of the River Uruguay once the mills were in operation would be evaluated differently if provisional measures were requested again by Argentina. In the end, the ICJ took steps to enhance the protection of the environment during the operational phase of the mills, while respecting Uruguay's decision to carry out their construction and achieve the economic and social benefits associated with them.

Finally, it is important to highlight that the ICJ's existing requirements for the indication of provisional measures strikes an appropriate balance between Respondents' sovereignty and Claimants' environmental concerns for the risk of immediate and irreparable damages, because the requirements do not—in abstract—considerably lean towards one or the other of those interests. On the contrary, Judge Abraham's suggestion for the inclusion of a new requirement for the indication of

such measures; namely, the demonstration of the plausibility of the Claimant's right alleged to be infringed might have the effect of deferring to great degree to the Respondent's sovereignty and to prevent the indication of provisional measures even in the face of sufficient proofs of immediate and irreparable trans-boundary environmental damages. For this reason, and from an environmental point of view, the extant jurisprudence should be preferred and preserved.