



Equator Principles

Compliance Complaint

Regarding Proposed Pulp Paper Mill Investment in Fray Bentos Uruguay

From the Center for Human Rights and Environment (CEDHA) to ING of the Netherlands

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Re: Complaint regarding ING Loan Consideration to Botnia and/or ENCE for paper pulp mill production in Uruguay

Complaint Summary

The Center for Human Rights and Environment (CEDHA) denounces the violation of international human rights and international environmental law, violations to International Financial Corporation (IFC) Environmental and Social safeguard policy, violations of IFC disclosure policy, violations to national and regional laws in Uruguay and in South America, **violations to the Equator Principles** and other procedural violations (especially with respect to stakeholder consultation) regarding the design, preparations and construction of two paper pulp mill industries sponsored by Botnia (Finland) and ENCE (Spain) in Fray Bentos (Uruguay), on the River Uruguay, forming the natural waterway border between Argentina and Uruguay.

CEDHA, in representation of nearly 40,000 affected stakeholders, including local communities and civil society organizations in both Uruguay and Argentina, filed a complaint¹ in September of 2005 to the IFC's independent Compliance Advisory Ombudsman (CAO), and to the Inter-American Commission on Human Rights grounded on these violations. The CAO has received and admitted this complaint, and has since, and in a very short period, made two visits to the project sites, to interview stakeholders, review IFC policy and procedure compliance, and investigate the allegations made in the complaint against the IFC. In its Preliminary Assessment Report², released just a short time ago, the CAO expresses its serious concern for the rights and expected impacts on local stakeholders which were not properly consulted, and explicitly recognizes not only the deficient nature of the Environmental Impact Assessments (EIAs) as well as the "questionable" nature of IFC's due diligence in complying with policy, but also the legitimate and coherent position of the claimants in the case.

This **Equator Principles Compliance Complaint** presents to ING the accusations made in the complaint filed by CEDHA to the CAO, and identifies **corresponding violations to the Equator Principles** and informs ING of other legal and procedural actions that are underway and/or imminent against the government of Uruguay, against the IFC, and against sponsor-company representatives, and in the defense of affected stakeholders relative to violations of human rights and environmental law. The complaint denounces and draws attention to severe violations of local, regional and international laws, which are resulting in legal and procedural action not only before the CAO but before international tribunals (such as the Inter-American Commission on Human Rights and/or the International Court of Justice), as well as before local courts (in Uruguay, Argentina, Finland and Spain), and regional courts (such as the European Commission) to hold perpetrators and sponsors of these acts accountable to environmental and human rights obligations.

This complaint is submitted to ING citing ING's moral, ethical and professional obligation to uphold its commitments to the Equator Principles and ensure that as financiers ING is "promoting responsible environmental stewardship and socially responsible development".

The complaint also highlights the enormous risks with ING involvement in these projects in terms of legal process, public opposition, and mounting international advocacy against the types of unsustainable development promoted by the project sponsors.

The complaint requests ING to cease any and all consideration of financing to Botnia and/or Ence, initiating all and any necessary investigations, considerations and assessments of the violations presented, before any potential financial support to project sponsors is considered.

¹ For full complaint see: www.cao-ombudsman.org/html-english/complaint_cmb.htm

² for CAO report see: www.cao-ombudsman.org/html-english/complaint_cmb.htm

Background of Projects

The projects involve nearly US\$2 billion of foreign direct investment (FDI), the largest single FDI in Uruguayan history, and in the case of Botnia of Finland it is the largest foreign private investment ever of a Finish company abroad. The combined production of Botnia and ENCE would be the world's largest production of Kraft System paper pulp, utilizing Elemental Chlorine Free technology, technology which has been phased out in European operations by 2007 and is against both European Union and World Bank best practice policy.

The industries will produce 1.5 million tons of pulp, utilizing 4 million tons of wood per year. The plants are sited on the River Uruguay forming the natural waterway border between Argentina and Uruguay, in the town of Fray Bentos (Uruguay) and across from Gualeguaychú, a tourist driven region of Argentina. The plants are expected to employ 3000 workers during construction and 300 low-paying long-term wage workers in a region that is extremely rich in natural resources and heavily reliant on tourism and fisheries for local livelihoods.

The government of Uruguay has been fomenting eucalyptus tree plantation to feed into the European pulp paper industry for over a decade. Both project sponsors have been operating in Uruguay and in the industry in this context for a number of years, exporting trees for processing in Europe. Both companies had previously acquired land and constructed piers on the Uruguay River for receiving lumbered trees and producing wood chips for subsequent shipping to Europe. The decision to transfer processing technology from Europe to Uruguay coincides with tightening of European legislation and phasing out second-rate technology by 2007. This is a pitiful and unacceptable example of exporting contaminating industries to the global south.

Project sponsors approached the IFC and the Multilateral Investment Guarantee Agency (MIGA) requesting approximately 20% of the nearly US\$2 billion in total project investment. The IFC have categorized the projects as Category A projects due to the environmental and social risk related to pulp paper production. The IFC received the applications favorably and were to present the projects to the World Bank Board of Directors in mid 2005, but growing concern over the quality of EIAs and deficiencies in stakeholder consultation processes resulted in strong opposition to the projects, largely from stakeholder communities in Argentina who were ignored in the consultation process and then proceeded to file the complaint to the CAO. This complaint, in addition to mounting diplomatic disputes between Argentina and Uruguay regarding these projects, led to the suspension of Board consideration until the CAO finishes its audit, and until concerns over the expected accumulative social and environmental impacts, as well as impacts to the local tourist industry in Argentina and in Uruguay, are thoroughly considered and mitigated.³

Summary of Complaint to the CAO - Violations of IFC Environmental and Social Policy

CEDHA's complaint, filed on behalf of nearly 40,000 stakeholders including the Environmental Citizen's Assembly of Gualeguaychu, as well as on behalf of civil society organizations in both Argentina and Uruguay, and in representation of the governor of the Argentine province of Entre Ríos, outlines the following violations of IFC Operational Policy, laws and procedures

- The violation of IFC operational policy, particularly with regards to:
 - IFC Operational Policy IOP7.50 *Projects on International Waterways*, including violations to paragraphs 3, 4, 5, 8 of this policy

³ For greater project details see the IFC project summary fact sheet for the ENCE project at www.ifc.org/ifcext/spiwebsite1.nsf/2bc34f011b50ff6e85256a550073ff1c/4208c72853e61df785257045006f993f?OpenDocument and Botnia www.ifc.org/ifcext/spiwebsite1.nsf/2bc34f011b50ff6e85256a550073ff1c/59329b838e724dcb85256fe900536c02?OpenDocument. See also www.cedha.org.ar/docs/press-kit-celulosa.doc

- IFC Operational Policy OP4.01 *Environmental Assessment*, including violations to paragraphs 2, 3, 4, 6, 7, 8a, 11, 12, 14, 15; Annex B paragraphs b, c, d, e, f, g of this policy
- IFC Disclosure Policy
- the violation of international, bilateral and national laws in the assessment, planning, and implementation of the projects;
- specific environmental, social and disclosure policy considerations for Category A projects;
- the failure to adopt the least environmentally damaging technology mandated by the World Bank *Pollution Prevention and Abatement Handbook (Pulp and Paper mills)*,
- the likely grave social, economic, and environmental harm that the projects will have on local residents in both Uruguay and Argentina

Violations to Equator Principles

ING, as a leader in upholding Equator Principles, has the moral, ethical, and professional obligation to “promote responsible environmental stewardship and socially responsible development” and has promised to finance projects that are “socially responsible and reflect sound environmental management practices”. Furthermore, ING recognizes the “significant benefits to ourselves, our customers and other stakeholders” and promises to “review carefully all proposals”. In this context, the independent control and report of the CAO offers critical independent and internal review information regarding the allegations made in this complaint, of environmental and social policy compliance which must be taken into account by ING in assessing project compliance both with IFC Environmental and Social Safeguards and with the Equator Principles.

These projects violate the following Equator Principles:

Violations to Equator Principle 1

1. We have categorised the risk of a project in accordance with internal guidelines based upon the environmental and social screening criteria of the IFC as described in the attachment to these Principles (Exhibit I).

The corresponding environmental and social screening and assessment criteria mandated by IFC categorization of the project as Category A, is clearly deficient, and several issues not addressed, as many of these criteria *have not* been contemplated in IFC procedures. This is substantiated in the CAO Preliminary Assessment Report which states that

- Feasible alternatives were not addressed
- EIA consultation was inadequate
- Cumulative impacts were not measured
- Relevant stakeholders were not identified or consulted

Violations to Equator Principle 2

2. For all Category A and Category B projects, the borrower has completed an Environmental Assessment (EA), the preparation of which is consistent with the outcome of our categorisation process and addresses to our satisfaction key environmental and social issues identified during the categorisation process.

The EIA is not consistent with the outcome of the Equator Principle’s categorization process and does not address the most sensitive social and environmental concerns expressed by stakeholders. The CAO report sustains this allegation indicating that

- The borrower has not sufficiently addressed cumulative environmental impacts and impacts to local livelihoods of affected stakeholders;
- Due diligence was not followed by the IFC in the handling and quality control of the EIAs and consultation process in the projects.

Violations to Equator Principle 3

3. In the context of the business of the project, as applicable, the EA report has addressed:

- a) assessment of the baseline environmental and social conditions*
- b) requirements under host country laws and regulations, applicable international treaties and agreements*
- c) sustainable development and use of renewable natural resources*
- d) protection of human health, cultural properties, and biodiversity, including endangered species and sensitive ecosystems*
- e) use of dangerous substances*
- f) major hazards*
- g) occupational health and safety*
- h) fire prevention and life safety*
- i) socioeconomic impacts*

...

- m) cumulative impacts of existing projects, the proposed project, and anticipated future projects*
- n) participation of affected parties in the design, review and implementation of the project*
- o) consideration of feasible environmentally and socially preferable alternatives*

...

q) pollution prevention and waste minimization, pollution controls (liquid effluents and air emissions) and solid and chemical waste management

Note: In each case, the EA will have addressed compliance with applicable host country laws, regulations and permits required by the project. Also, reference will have been made to the minimum standards applicable under the World Bank and IFC Pollution Prevention and Abatement Guidelines (Exhibit III) and, for projects located in low and middle income countries as defined by the World Bank Development Indicators Database, the EA will have further taken into account the then applicable IFC Safeguard Policies (Exhibit II). In each case, the EA will have addressed, to our satisfaction, the project's overall compliance with (or justified deviations from) the respective above-referenced Guidelines and Safeguard Policies.

CAO has identified many deficiencies within the EA reports, and found that many subjects are not properly addressed. In reference to the above, they are:

- 3(a) baseline assessment of environment and social conditions are inadequate;
- 3(b) inadequate communication in compliance with the Rio Uruguay Treaty;
- 3(c) project technology, pollutants, the forestry industry are not sustainable;
- 3(d) human health is at risk from carcinogens and toxins discharged by the plants;
- 3(e) the risk of dangerous substances used and produced on site to operate facilities;
- 3(f) major hazards exist from the use of dangerous substances and the discharge of contaminants, also subterranean aquifers are at risk of contamination;
- 3(g) doubts exist over current OH&S standards management plans are non-existent;
- 3(h) emergency response procedures are non-existent;
- 3(i) tourism, fisheries and overall economy will be adversely affected by pollutants;
- 3(m) during the EA process cumulative impacts were not taken into account (by the same consultant producing reports for two companies constructing large scale pulp-paper mills at the same time on the same stretch of river);
- 3(n) stakeholder parties were not identified by EA, consultation was inadequate with little stakeholder input into design, review and implementation of the project;

- 3(o) feasible environmentally and socially preferable alternatives were not considered;
- 3(q) second-tier technology will be used, so pollution and waste will not be minimized;
- EA has not complied with laws and regulations required by the project;
- Exhibit II refers to the *IFC International Waterways OP* of which paragraphs 3, 4, 5 and 8 has been violated, and;
- Exhibit III refers to the *World Bank Guidelines on Pulp and Paper Mills*, of which the best practice guidelines have been violated by using second-tier technology.

Violations to Equator Principle 4

4. For all Category A projects, and as considered appropriate for Category B projects, the borrower or third party expert has prepared an Environmental Management Plan (EMP) which draws on the conclusions of the EA. The EMP has addressed mitigation, action plans, monitoring, management of risk and schedules.

The borrowers have not prepared an Environmental Management Plan (EMP), and thus have not addressed issues concerning mitigation, action plans, monitoring, management of risk and schedules. Even if they were to do so, the EMP would be based on EA conclusions produced by a process non-compliant with IFC Safeguards and the Equator Principles.

Violations to Equator Principle 5

5. For all Category A projects and, as considered appropriate for Category B projects, we are satisfied that the borrower or third party expert has consulted, in a structured and culturally appropriate way, with project affected groups, including indigenous peoples and local NGOs. The EA, or a summary thereof, has been made available to the public for a reasonable minimum period in local language and in a culturally appropriate manner. The EA and the EMP will take account of such consultations, and for Category A Projects, will be subject to independent expert review.

During the EA process, no consultation occurred between the proponents and directly affected community and particularly Argentine stakeholders, as well as deficient and inadequate consultation with Uruguayan stakeholders. The same IFC appointed consultant, now devoid of legitimacy due to faults in the EIAs was used to conduct the individual EAs of both Botnia and ENCE, and did not take into account cumulative impacts. In addition, the EAs were not subject to independent expert review as suggested by IFC policy. Currently a cumulative impact assessment (CIS) is being conducted by the same illegitimate and discredited consulting group, while an ill-devised stakeholder engagement is generating great resistance and concern amongst local stakeholders.

Findings of the CAO – The CAO Preliminary Assessment Report

The *CAO Preliminary Assessment Report*⁴ lends validity to a great number of CEDHA's complaint and transmits to the IFC the same concerns expressed by local community stakeholder groups both in Uruguay and in Argentina. The report states that:

- the Environmental Impact Assessments (EIA) did not adequately identify people potentially affected,
- cumulative impacts were not considered,
- stakeholder consultation was inadequate,

⁴ www.cao-ombudsman.org/html-english/complaint_cmb.htm

- the IFC's due diligence and appraisal process were questionable, and permitting procedures for projects on international waterways were not followed

The CAO has, based on the evidence gathered during its two site visits, and based on growing allegations and concerns in these projects, not only decided to move to a full audit of these projects, but has also extended its audit to cover operations of MIGA, which is planning to provide guarantee loans to these projects.

The role played by the CAO in the control and evaluation of IFC and project sponsor compliance with social and environmental safeguard policy serves as a legitimate and independent expert reference for third party actors to understand how IFC projects comply or fail to comply with mandatory environmental and social protection policy. The CAO has provided legitimate and conclusive documentation proving evidence and opinion on substantive violations of the Equator Principles as well as to IFC policy by these projects.

Reactions of the IFC and Current State of the Projects

In response to CAO investigations, the IFC has had to recognize shortfalls, deficiencies and omissions of project design and implementation with respect to social and environmental safeguard policies. As a first response to these shortfalls the IFC has launched an ad-hoc Cumulative Impact Study (CIS) to assess the combined impacts of the projects which was not taken into consideration in the original Environmental Impact Assessments (EIAs), however, there is still widespread doubt amongst stakeholders due to the IFC's unwillingness to publicly share the design of the CIS. A new stakeholder consultation process is also currently underway, to consult affected communities, especially in Argentina, which have been ignored to date by the EIAs in the original consultation process. Also of great concern from Uruguayan stakeholders are recent denunciations from stakeholders opposing the industries of harassment and threats from unidentified sources.

Regarding the new stakeholder consultation, the consulting group hired by IFC to carry out consultations, Consensus Building Institute, has received pointed criticism due to its failure to layout consultation rules, nor has the IFC provided sufficient information to stakeholders as to how this consultation will feed into the decision process to finance the industries or not, and if they are financed, under what conditions. This new consultation process and methodology, which has only recently been launched is generating continued and mounting concerns amongst stakeholders, which have vested trust and faith in the CAO process, to steer this conflict into resolution. While most of the concerned stakeholders have publicly expressed their interest in participating in the consultation process, due to IFC's and project sponsor actions, they are questioning the legitimacy and transparency of the consultation process.

Clearly a deep divide exists between stakeholders and the IFC, the Uruguayan government and project sponsors. Many questions remain un-answered and un-responded by the project sponsors and by the IFC. Among these, questions about cumulative sector regional impacts of massive pulp production, citing alternative questions (which were also mandated but NOT addressed in the original EIAs), questions on production technology, and impacts on the local businesses and livelihoods of the communities in the regional economy.

Legal and other Access to Justice Actions at alternative forums

Numerous other legal recourse mechanisms are being considered or have been already utilized by stakeholders to seek redress. These include local and international legal recourse mechanisms. The projects are rapidly gaining the attention of global civil society defending human rights and enforcing environmental protection in the defense of victims affected by these projects. The case

has resulted in an unprecedented submission to an international human rights tribunal before the Inter-American Commission on Human Rights, which is also drawing close attention, public scrutiny and global concern.

Some of alternative recourse mechanisms that have already been triggered include:

Inter-American Commission on Human Rights (IACHR)

CEDHA, on behalf of the nearly 40,000 stakeholders, has lodged a submission before the Inter-American Commission on Human Rights (IACHR) denouncing violations of the following human rights, which are occurring, and will occur as a result of the advancements of these projects and the production paper pulp in the region:

- Articles 1(1), 2, 4, 5, 19, 25, 26 of the *American Convention on Human Rights*⁵
- Articles 1, 10, 11 of the *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights "Protocol of San Salvador"*⁶
- Articles I, VII, XI of the *American Declaration of Rights and Duties of Man*⁷

The IACHR received the complaint filed by CEDHA on behalf of local stakeholders, and has elevated requests to the Uruguayan Government, initiating the investigation process in the case. It is important to mention that this is the first time an IFC-sponsored project is entering into an international human rights tribunal, adding publicity and significant global legal implications for this case.

Recently, additional evidence was gathered and verified by CAO staff during the CAO site visit, consisting of threats and harassment by unidentified individuals who are taking secret photos of Uruguayan advocates against the mills, as well as of gun shot fire and damage to the vehicles of such advocates by unknown sources. This evidence was submitted to the human rights tribunal in the case.

International Court of Justice

This case first gained international and diplomatic attention when Argentina threatened Uruguay that it would file a complaint to the International Court of Justice in the Hague (the dispute resolution mechanism established by the Rio Uruguay Treaty for violations of the treaty), if adequate social and environmental assessments of impacts to Argentine stakeholders were not considered (as mandated by the treaty), and if Uruguay did not seek explicit approval of the projects by Argentina.

This course of action is still being considered by the Argentine government, and local organizations are also considering triggering such action through filing claims in Argentine courts to obligate the Argentine government to present such action.

European and Foreign National Courts

⁵ Art. 1 – Obligation to Respect Rights; Art.2 – Obligation to Adopt Internal Measures; Art. 4 – Right to Life; Art. 5 – Right to Physical Integrity; Article 19 – Rights of the Child; Art.25 – Right to Judicial Protection; Art. 26 – Progressive Realization of Economic, Social and Cultural Rights.

⁶ Art. 1 – Obligation to Adopt Measures, Art. 10 – Right to Health, and Art. 11 – Right to a Healthy Environment

⁷ Art. I – Right to Life, Liberty and Security of Person; Art. VII – Right to Protection of Mothers and Children; Art. XI – Right to Preservation of Health and Well Being

Legal action is also being studied and prepared against the company sponsors before national court systems in Finland and in Spain, as well as actions before the European Commission.

The Role of the Equator Banks and of ING in Promoting Sustainable Development

As an Equator Bank, ING is committed to promote responsible environmental stewardship and socially responsible development and has promised its clients, its customers and society that ING will not provide loans directly to projects where the borrower will not, or is unable to comply with its environmental and social policies and processes.

By financing these projects, ING would be investing in projects facing mounting uncertainty, international concern, and placing its reputation and investments in immense financial risk. These projects have resulted in massive local protests in both Argentina and Uruguay and caused never-before-seen diplomatic tensions between otherwise amicable neighboring countries.

It is fundamental that ING take the findings, conclusions and recommendations of the CAO very seriously and that ING take full responsibility to ensure that any eventual financing to these project sponsors follows a full policy compliance review process, ensuring the respect for human rights, sustainable development and the environmental and social protection policies enshrined in the Equator Principles.

As cited in the Banking on Responsibility Report,⁸ a corporate publication summarizing Equator Principle dimensions, Equator Banks should initiate internal screening processes, and rely on expert technical advice, such as that given by the CAO to inform themselves on project circumstances. Internal audits of compliance are critical to compliance control and stakeholder conformity with Equator Bank commitment to the principles. Compliance should include compliance with stipulated national, transnational and international environmental social protection laws and treaties, and the agreed environmental and social guidelines and policies applicable to the IFC Safeguard Policies and the World Bank. Finally, the documents states the importance of developing independent bodies to investigate alleged breaches of human rights, environmental standards and complaints relating to projects.

CEDHA Requests to ING

CEDHA and stakeholders requests that ING:

1. Suspend previous, and cease all present and future consideration of financing of these projects until the projects prove to comply with ALL IFC environmental and social safeguard policy, with the Equator Principles as well as with international human rights and environmental law;
2. Initiate any and all internal investigations into the allegations made in this Compliance Complaint and be informed of and consider evidence presented in claims made on these projects to the CAO and to other international and local tribunals based on issues relevant to the Equator Principles;
3. Adhere to CAO recommendations regarding these projects and utilize the CAO Report to inform and guide its own investigation on these projects in terms of compliance with the Equator Principles;

⁸ Banking on Responsibility. By Freshfields Bruckhaus Deringer. July 2005. This publication summarized consultations with numerous Equator Banks, non-Equator Banks, project sponsors, NGOs, socially responsible investment funds, law firms, accountancy firms, engineering and environmental consultants, trade associations, public bodies, and multilateral and bilateral lenders.

4. Publicly inform clients, customers, stakeholders and the general public on its position with respect to the suspension of financing, or any consideration of financing these projects and the grounds for doing so (or not);
5. Assess and inform itself of project compliance with the Equator Principles and only proceed to provide finance should it be perfectly clear that environmental and social impacts have been properly addressed and mitigated.

CEDHA is available to meet with ING staff and management to provide you with any and all relevant information and evidence that ING may need to bring clarity to any of the issues presented in this and other legal and/or procedural complaints brought against these projects and/or project sponsors.

Respectfully,

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