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Cour internationale de Justice

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International Court of Justice

THE HAGUE

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Audience publique

tenue le mercredi 23 septembre 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, vice-président,
faisant fonction de président

***en l'affaire relative à des* Usines de pâte à papier sur le fleuve Uruguay**
(Argentine c. Uruguay)

COMPTE RENDU

YEAR 2009

Public sitting

held on Wednesday 23 September 2009, at 10 a.m., at the Peace Palace,

Vice-President Tomka, Acting President, presiding,

***in the case concerning* Pulp Mills on the River Uruguay**
(Argentina *v.* Uruguay)

VERBATIM RECORD

Présents : M. Tomka, vice-président, faisant fonction de président en l'affaire
MM. Koroma
Al-Khasawneh
Buergenthal
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood, juges
MM. Torres Bernárdez
Vinuesa, juges *ad hoc*

Mme de Saint Phalle, greffier adjoint

Present:	Vice-President	Tomka, Acting President
	Judges	Koroma
		Al-Khasawneh
		Buergenthal
		Simma
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
	Judges *ad hoc*	Torres Bernárdez
		Vinuesa
	Deputy-Registrar	de Saint Phalle

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M. Esteban Lyons, directeur national du contrôle environnemental du secrétariat à l'environnement et au développement durable,

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The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open and I give the floor to Professor Alan Boyle. You have the floor, Sir.

Mr. BOYLE: Mr. President, Members of the Court, may I begin this morning by saying that Mr. Reichler will respond to Judge Bennouna's question tomorrow morning.

THE LAW ON POLLUTION PREVENTION, EIA, MONITORING, AND THE ECOLOGICAL BALANCE OF THE RIVER

1. This morning I propose to deal with some of the central legal issues that go the heart of Argentina's environmental case. First, I will address the key provisions of the 1975 Statute concerning pollution and protection of the river's ecological balance — that is, Articles 40, 41 and 36. I will argue that with respect to the Botnia plant, Uruguay is not in breach of any of those Articles and, in that context, I will also consider the role played by CARU water quality standards in the architecture of the Statute. Thereafter, I will set out Uruguay's arguments on environmental impact assessment and monitoring. Finally, I will say something about burden of proof and draw some conclusions. Professor McCaffrey will then follow me to the podium.

I. THERE HAS BEEN NO VIOLATION OF PROVISIONS OF THE 1975 STATUTE OF THE RIVER URUGUAY ON PREVENTION OF POLLUTION AND PROTECTION OF THE AQUATIC ENVIRONMENT

2. So, let me start with the environmental provisions of the Statute.

3. Argentina's principal legal claims are that Uruguay has violated Article 41 of the Statute on prevention of pollution[1], and Article 36 on the "ecological balance" of the river.

4. Both arguments are founded on a single factual premise: that discharges from the Botnia plant constitute pollution so harmful to the river's environment that they are prohibited by the 1975 Statute[2]. If, as I said on Monday (CR 2009/16), the plant does not "pollute" within the

[1]Argentina's claim also purports to be based on Articles 35 and 37. These arguments may be dismissed summarily. Article 35 provides that "[t]he Parties undertake to adopt the necessary measures to ensure that the management of the soil and woodland and the use of groundwater and the waters of the tributaries of the river do not cause changes which may significantly impair the régime of the river or the quality of the waters". However, Argentina does not make any arguments that are based on Uruguay's management of soil or woodlands. Nor has it made any allegations concerning the waters of tributaries. Article 37 provides that "[t]he Parties shall agree on rules governing fishing activities in the river with regard to the conservation and preservation of living resources". However, nothing in the Memorial states a claim based on "fishing activities".

[2]MA, paras. 5.20-5.53, 5.78-5.83.

meaning of the Statute, then there can be no substance to Argentina's arguments on Article 36, and Uruguay has plainly done all that it is required to do by Article 41.

A. Effluent from the Botnia plant has not caused pollution of the River Uruguay

5. So let me then turn to my first proposition, which is that effluent from the Botnia plant has not caused pollution of the River Uruguay. Article 40 of the Statute defines "pollution" in these terms: "For the purposes of this Statute, pollution shall mean the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects."

6. Two elements of this definition merit attention. First, it refers only to the "aquatic environment". It does not cover air pollution or odour that has no effect on the aquatic environment. Secondly, there must be "harmful effects" on the aquatic environment. Now, the CARU *Digest* defines "harmful effects" in the following terms. It says:

> "[A]ny alteration of the water quality that prevents or hinders any legitimate use of the water, that causes deleterious effects or harm to living resources, risks to human health, or a threat to water activities including fishing or reduction of recreational activities."[3]

As will be readily apparent to the Court from these texts, the introduction of substances into the river is not pollution per se, but it only becomes pollution when those substances start to cause any of the harms listed above. An obligation to prevent "pollution" is thus an obligation to prevent effluents or other substances from reaching a level or concentration that is likely to cause harm to the aquatic environment. That is the key point.

7. Now, in order to make sense of Article 40, it is therefore necessary to make a judgment about what substances have potentially harmful effects and at what concentrations. That, Mr. President, Members of the Court, is where CARU standards become relevant. CARU is empowered by Article 56 of the Statute to draw up rules on prevention of pollution, among other matters. On that basis it has adopted water quality standards[4] — and I referred to those on Monday. Once the parties have agreed water quality standards in CARU, these standards serve to define what constitutes pollution for the purposes of Article 40. In respect of each substance for which CARU has established a standard, it can be presumed that water which meets that standard is

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[3]CARU *Digest*, Subject E 3, Title 1, Chap. 1, Sec. 2, Art. 1.5.c, CMU, Vol. IV, Ann. 60, p. 1.

[4]Standards are listed in CARU *Digest*, Subject E 3, Title 2, Chap. 4, CMU, Vol. IV, Ann. 60, pp. 7-13.

not polluted and that effluent discharges that do not cause this level to be exceeded *are not harmful to the aquatic environment*. If that were not the case —— if a State could be held responsible for "pollution" at levels which do not exceed the agreed standard — then, plainly, CARU standards would serve no useful purpose.

8. In Uruguay's submission, CARU water quality standards are the principal means by which the parties have given effect to the regulatory obligations imposed by Article 41 of the Statute. And Argentina agrees. It admits that the environmental rules contained in the relevant sections of the CARU *Digest* are — and I will quote from its Memorial — "l'expression directe de la volonté des parties et de leur interprétation des dispositions du Statut de 1975"[5]. In a 1990 diplomatic Note, Argentina stated that CARU standards set forth in Subject E 3 of the *Digest* — and I will quote again — "déterminent les principes normatifs essentiels pour prévenir la contamination des eaux du fleuve et définir les standards de qualité de ces eaux"[6].

9. Specifically, the purposes of the standards prescribed in Subject E 3 include the following:

— to protect and preserve the aquatic medium and its ecological equilibrium;

— to ensure any legitimate use of the water considering long-term needs and particularly human consumption needs; and

— to prevent any new form of pollution and to procure its reduction when the values of the standards adopted for the different legitimate uses of the waters are exceeded.

10. Two aspects of this wording deserve emphasis: first, the obligation of the parties is to prevent legitimate uses of the river from causing water quality standards to be exceeded. This confirms, in Uruguay's view, that CARU standards serve as the basis against which the obligation to prevent and reduce pollution in Article 41 is measured. And, as I explained on Monday, the EcoMetrix Report, DINAMA monitoring, and even Argentina's own scientific report all establish that effluents from the Botnia plant have neither resulted in any change in water quality nor caused any failure to meet CARU standards — and Argentina does not even allege that they have. For that reason, effluent discharged from the plant cannot be "pollution" within the terms of the Statute.

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[5]MA, para. 3.147 ("the direct expression of the desire of the two parties and their interpretation of the provisions of the 1975 Statute").

[6]MA, para. 3.148 ("determine the essential normative principles for preventing the pollution of the river's water and define the quality standards of those waters").

Even if Uruguay were wrong in interpreting Article 41 as an obligation of conduct — and that is a point I will come back to in a moment — rather than an obligation of result, it would matter little if there is in fact no prohibited pollution, which, of course, is precisely Uruguay's position.

11. Secondly, the wording of the *Digest* also shows that water which meets CARU water quality standards cannot be a threat to the long-term needs of the river as defined by Argentina and Uruguay jointly. That, quite simply, is why all of Argentina's arguments about environmental risk to the river must fail. CARU standards are designed — in the words of the *Digest* — to meet the "long-term needs" of river protection — the "long-term needs" of river protection. This necessarily means that they are intended by the parties to ensure sustainable use of the river and protection against long-term risks. In his speech yesterday (CR 2009/17) Professor McCaffrey drew attention to the importance of sustainable use of a watercourse in the 1997 United Nations Convention on International Watercourses and it did also in the 1975 Statute. The terms of the CARU *Digest* are entirely consistent with that important development in the contemporary law of international watercourses. They firmly contradict any suggestion that water quality standards are intended to serve only the short-term needs of the parties.

12. Argentina asserts that the River Uruguay is highly sensitive to nutrient discharges, particularly, nitrogen and phosphorus, causing algal blooms. The obvious answer to this is that the parties have already catered for any sensitivity through the water quality standards adopted by CARU or by the parties themselves in accordance with Articles 36 and 41 of the Statute. These standards are, after all, designed precisely for the River Uruguay — they do not represent some hypothetical norm applicable to all rivers. They fit the conditions of the River Uruguay as perceived by the parties. Argentina cannot have it both ways. If CARU standards are adequate, then they will protect the river and its ecosystem over the long term, however sensitive it may be, and the only important question then, is whether Uruguay has complied with them — which of course it has.

13. If, alternatively, Argentina is really arguing that CARU water quality standards are not adequate to protect the river, then why did Argentina accept them in the first place and why has it not subsequently proposed that CARU should strengthen them? CARU water quality standards are the product of mutual agreement of the parties, and Professor McCaffrey will say more on that after

me. Argentina cannot assert that CARU standards are inadequate when they have its express consent and it had an equal role in developing. These standards can be changed by the parties, and they have been changed, as Professor McCaffrey pointed out yesterday. But if, for example, phosphorus is not regulated by CARU — and it is not — that is because the parties, including Argentina, have chosen not to regulate it.

14. So the essential point on Article 40 is that it cannot be interpreted or applied without reference to CARU standards.

B. Uruguay complied with Article 41

15. So we can now turn to Article 41, the principal provision on environmental protection.

16. Article 41, let me remind the Court, provides that the parties undertake, "[w]ithout prejudice to the functions assigned to the Commission in this respect", to

> "protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies"[7].

17. Now, as Uruguay pointed out in its Counter-Memorial, Article 41 creates an obligation of due diligence[8]. In this respect it indeed established a precedent which was subsequently followed in other watercourse treaties and adopted by the International Law Commission in the form of Articles 7 and 21 of what is now the United Nations Convention on International Watercourses[9]. The International Law Commission Commentary and learned commentators

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[7]Statute of the River Uruguay (hereinafter "1975 Statute"), Art. 41 *(a)*, 26 Feb. 1975, CMU, Vol. II, Ann. 4. Argentina does not have a separately cognizable claim under Art. 27 because that Article serves only to clarify that the provisions of Arts. 7 *et seq.* are applicable to industrial facilities.

[8]CMU, paras. 4.9-4.13 and 4.69-4.70; see also II *YILC*, 1994, Pt. 2, p. 103, para. (4) ("[t]he State may be responsible . . . for not enacting necessary legislation, for not enforcing its laws . . . or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it").

[9]Art. 7 of the United Nations Convention provides:

> "*Obligation not to cause significant harm*
>
> 1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.
> 2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation."

Art. 21 provides:

> "*Prevention, reduction and control of pollution*

generally agree on viewing Articles 7 and 21 of the United Nations Convention as obligations of due diligence, not of result[10]. Uruguay submits that Article 41 of the Statute should be read in the same way. If that is the case, then the Court is required to consider, firstly, what is meant by the phrase "prescribing appropriate rules and measures in accordance with applicable international agreements", and so on. And, secondly, it requires the Court to consider whether Uruguay has been duly diligent in approving the type of technology applied by the Botnia mill.

18. But let me just pause for a moment before I develop those two points. Uruguay does not accept Argentina's alternative argument that Article 41 creates an obligation of result, but let us assume *arguendo* that it does, then the relevant results — which must be the protection of the aquatic environment and the prevention of pollution — had, indeed, on the evidence in this case, been achieved. If, as argued earlier, Botnia effluents have not altered water quality or caused CARU water quality standards to be exceeded, then pollution as defined by the Statute has been prevented. And if, as also argued earlier, the object and purpose of CARU water quality standards is to ensure long-term protection of the aquatic environment, then to that extent, compliance with these standards should secure that result. In any event the evidence shows that there has been no damage to the aquatic environment resulting from Botnia's effluent discharges — even the algal

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1. For the purpose of this article, 'pollution of an international watercourse' means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.
2. Watercourse States shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.
3. Watercourse States shall, at the request of any of them, consult with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of an international watercourse, such as:

   (a) Setting joint water quality objectives and criteria;

   (b) Establishing techniques and practices to address pollution from point and non-point sources;

   (c) Establishing lists of substances the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored."

[10]See II *YILC*, 1994, Pt. 2, pp. 103 and 124; McCaffrey and Sinjela, 92 *AJIL*, 1998, 100; Bourne, 35 *CanYIL*, 1997, pp. 223-225. An explicit requirement to "exercise due diligence" in the ILC's 1994 draft of Art. 7 was altered to read "take all appropriate measures" in the 1997 Convention text, but no change in meaning results. The same phraseology is used in many other environmental treaties, including the 1992 United Nations ECE Transboundary Watercourses Convention, Art. 2 (1). Other variants include "all measures necessary". See Part 12 of the 1982 United Nations Convention on the Law of the Sea. Compare the ILC's 1991 draft Art. 7, which reads: "Watercourse states shall utilise an international watercourse in such a way as not to cause appreciable harm to other watercourse states."

bloom of 4 February, as we saw yesterday, could not have been caused by effluent from the Botnia mill.

19. So, let me come back then, to Article 41. I have only two simple propositions about Article 41:

— firstly, Uruguay has discharged its duty to regulate effluent discharges in accordance with water quality and discharge standards established by CARU or by the parties acting pursuant to Article 41; and

— secondly, that the Botnia plant's technology meets all the requirements of pollution prevention and environmental protection set out in the 1975 Statute, including the precautionary principle.

20. Now, let us look at each of these.

C. Uruguay has discharged its duty to regulate effluent discharges in accordance with water quality and discharge standards established by CARU or by the parties acting pursuant to that Article

21. With the exception of nonylphenols, Argentina does not argue that Uruguay has failed to implement its obligation to adopt regulations pursuant to Article 41. And, as the Court will no doubt recall, Uruguay's Decree 253/79 on the regulation of water quality sets maximum discharge limits and water quality standards for various pollutants, including phosphorus[11]. The permits granted to the Botnia plant require it to comply with all of these regulations[12]. And of course, the monitoring reports we looked at on Monday confirm that discharges of effluent from the plant are well below the required levels[13].

22. Further discussion of nonylphenols is probably academic at this stage. But let me just note that Argentina does not regulate them. CARU does not regulate them. The POPs Convention

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[11]CMU, paras. 4.19 and 4.39.

[12]CMU, para. 4.33.

[13]Third EcoMetrix Report, Mar. 2009, para. 3.3.3. Uruguay's Submission of New Documents, Ann. S7, p. 34; DINAMA, Sixth Month Report on the Botnia Emission Conrol and Environmental Performance Plan: Nov. 2008-May 2009, July 2009, (hereinafter "DINAMA July 2009 Botnia Performance Report"), pp. 5, table 2: 9, graphic 6; 14 table 4; 17, graphic 21; and 18, table 5. Original Spanish version available via link entitled "Informe Emisiones Semestre Nov. 2008-May 2009" at http://www.mvotma.gub.uy/dinama/index.php?option=com_docman&Itemid=312. Translation submitted to the Court on 14 Sep. 2009. See also DINAMA Report for the First Year of Operation of the Botnia Plant and the Environmental Quality of the Area of Influence, May 2009 (hereinafter "DINAMA First Year Botnia Performance Report"), p. 3 and App. IV, p. 30, Uruguay's Submission of New Documents, Ann. S2.

does not regulate them. It is difficult to see that there can be any basis for saying that Uruguay is in breach of Article 41 with respect to nonylphenols.

23. Uruguay's commitment to protect the Uruguay river is reflected in its legal system, including its Constitution[14]. The details of Uruguayan environmental law were explained to the Court at length in 2006. They are set out again in the Counter-Memorial, and I will not bore you by repeating them here. The IFC's technical experts concluded that "the permit setting process used by DINAMA is practical and rigorous"[15]. Again, I will not repeat the details here, save to note one point, that industrial plants — including the Botnia plant — must renew their permits every three years[16]. The renewal process includes revision and updating of the project's environmental management plans and approvals with respect to emissions, including effluent discharges[17]. And, at each renewal, DINAMA has the power, if necessary, to impose further safeguards. It may even, if necessary, suspend allegedly dangerous activities while the appropriate investigations are undertaken[18].

24. So, I think, Mr. President, Members of the Court, it will probably be clear now that Uruguay has done all that could reasonably be required of it by Article 41 to "prescribe appropriate rules and measures" and to implement CARU water quality standards. It has done so to a far higher standard than Argentina. So there is no breach of Article 41 in that respect.

D. The plant's technology meets all the pollution prevention and environmental protection requirements of the 1975 Statute, and the precautionary principle

25. But what about the technology that is used in the mill? Is it good enough to protect and preserve the aquatic environment as required by Article 41? Throughout these proceedings Uruguay has sought to reassure Argentina and the Court that the Botnia pulp mill represents modern, state-of-the-art technology employed in other technologically advanced developed States. As the record amply demonstrates, the Botnia plant is comparable to other modern mills

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[14]See 1967 Constitution of Uruguay, Art. 47, CMU, Vol. II, Ann. 5.

[15]Final CIS, Ann. A, p. A6.7, CMU, Vol. VIII, Ann. 174.

[16]Decree No. 349/005, Environmental Impact Assessment Regulation revision, Art. 23, 21 Sep. 2005, CMU, Vol. II, Ann. 24.

[17]*Ibid.*, Art. 24, para. 2.

[18]*Ibid.*, Art. 24, para. 2.

worldwide[19]. As you have heard, this technology virtually eliminates the risk of pollution and environmental damage.

26. The choice of this advanced technology is a remarkable one for a small developing country to make. And Uruguay is pleased that Argentina shares its view that sub-standard industrial technology is not appropriate for countries at their level of development. What divides them is thus not any difference over law or policy, but simply over whether the Botnia plant meets the best available techniques (BAT) standard. Uruguay has no doubt that it does, for reasons already elaborated yesterday.

27. But Uruguay's preference for the best available technology and operational techniques is important for two reasons. Firstly, it should demonstrate once again that Uruguay has complied with its obligation to take measures necessary to "ensure that activities within their jurisdiction and control respect the environment of other States", to quote from the *Nuclear Weapons* Advisory Opinion (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29)[20].

28. My earlier submissions will have demonstrated to the Court that the Botnia mill complies with applicable pollution discharge regulations. Its effluents have not violated water quality standards, they have not caused significant harm to the river. A mill designed, built and operated to the highest standards may not be the only way to achieve these outcomes, but it certainly helps.

29. Secondly, the choice of technology shows that Uruguay has adopted a precautionary and preventive approach to pollution control that is fully in accordance with contemporary standards and that promotes sustainable development. Uruguay accepts that the precautionary principle or approach has potential relevance to the management of activities where there is significant scientific uncertainty, and a risk of serious or irreversible damage, in accordance with Principle 15 of the Rio Declaration, and Principle 15 has been incorporated into Uruguayan law, and DINAMA must give effect to it when performing its regulatory duties[21].

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[19]Exponent Report, p. xii., RU, Vol. IV, Ann. R83.

[20]1992 Rio Declaration on Environment and Development, Principle 2.

[21]Law 17.283 of 2000 follows Rio Principle 15.

30. Agenda 21 of the 1992 Rio Conference set out certain priorities in this respect. Most relevantly, it endorsed environmentally sound management, giving priority to waste reduction[22]. Modern environmental agreements, such as the 1996 London Dumping Convention, the 1989 Basel Convention on Transboundary Movement of Hazardous Wastes, and the 2001 Convention on Persistent Organic Pollutants (POPs), all reflect this philosophy[23]. In general, these treaties have adopted a precautionary approach. *Inter alia* they seek to eliminate the most harmful chemicals from production and use, and they encourage use of cleaner production technology to reduce the generation of toxic and hazardous waste.

31. Now as you heard yesterday, tertiary treatment would increase the generation of waste from Botnia. The technology currently used in the Botnia mill thus responds to contemporary concerns about hazardous wastes emitted by other pulp mills. It reflects a precautionary approach to the minimization of effluents. The most obvious way to measure waste minimization is by looking at environmental efficiency — i.e., at how much effluent is generated for each tonne of pulp produced. By this measure the Botnia plant is highly efficient. In most cases the quantity of waste generated per tonne of pulp is well below expected amounts, and the reports all demonstrate that in the record[24].

32. Moreover, as the IFC's consultants point out, the most hazardous substances that *might* come from a pulp mill, such as dioxins and furans, have largely been eliminated by the elimination of chlorine bleaching[25]. And as for nonylphenols, as the Court is now aware from Dr. Torres's affidavit[26], Botnia does not use these compounds for any purpose, whether as cleaning fluid or in any other way. Any nonylphenols discharged by the mill must come *from* the river water that it uses.

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[22]1992 UNCED, Agenda 21, Chaps. 19 and 20.

[23]See, for example, 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, 1996 London Dumping Convention, 2001 Convention on Persistent Organic Pollutants.

[24]Third EcoMetrix Report, Mar. 2009, paras. 3.3 and 3.7 (table 3.4), Uruguay's Submission of New Documents, Ann. S7, pp. 3.2-3.5 and 3.7; DINAMA First Year Botnia Performance Report, May 2009, *op. cit.*, p. 3 and App. IV, p. 30, Uruguay's Submission of New Documents, Ann. S7; DINAMA, July 2009, Botnia Performance Report, *op. cit.*, p. 18 (table 5).

[25]Third EcoMetrix Report, 2008, para. 3.3.6. Uruguay's Submission of New Documents, Ann. S7, p. 3.5.

[26]Uruguay's Comments on New Documents Submitted by Argentina, 15 July 2009, Ann. C24.

33. So I think it is probably unnecessary for me to amplify these already cogent conclusions. After nearly two years of operation, a review of monitoring data by DINAMA on behalf of Uruguay and by independent experts on behalf of the IFC, it is clear that the predictions made by DINAMA, and endorsed by the IFC, were correct. The Botnia pulp mill represents best available technology. Its waste reduction and management techniques fully implement the precautionary approach endorsed by the Rio Conference and adopted in contemporary waste management treaties.

34. Mr. President, Members of the Court, that, I hope, essentially disposes of Argentina's arguments on Article 41, and we can now move on to consider Article 36 and the ecological balance of the river.

E. Through CARU the parties have co-ordinated measures to prevent any alteration of the ecological balance as required by Article 36

35. Article 36 provides that the "Parties shall co-ordinate, *through the Commission,* [which means CARU], the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the area affected by it". Now, with respect to this Article, I have only one simple proposition for the Court: that the parties have indeed co-ordinated the pertinent measures through CARU as required. If those measures are inadequate to prevent any change in the ecological balance, then it remains the responsibility and prerogative of the parties acting jointly to co-operate in negotiating more appropriate measures through CARU.

36. Argentina argued that Article 36 prohibits "any change in the ecological balance". If, for the sake of argument, there were any merit in this rather bold interpretation, then the obvious response is that there cannot be a breach of Article 36 when Uruguay has complied with everything required of it by the currently applicable CARU regulations on protection of the ecological balance set out in Subjects E 3 and E 4 of the CARU *Digest*. Argentina has not alleged any non-compliance with these regulations.

37. But the even more obvious response is that the terms of Article 36 do not correspond to the obligation asserted by Argentina. The ordinary meaning of the text, read in context and in the

light of its object and purpose, contradicts Argentina's interpretation[27]. Article 36 envisages action by both parties — the "co-ordination" of measures of environmental protection. By its very nature this is an obligation to be fulfilled jointly. Argentina has not identified what more could be expected of Uruguay under Article 36 — Uruguay has co-operated in adopting the necessary rules through CARU, they are in the *Digest*, as explained earlier. Moreover, it is Argentina that has been refusing to participate in the joint monitoring programmes previously agreed — and I will come back to that later. These monitoring programmes would have enabled both parties to co-ordinate further measures to protect the ecological balance under Article 36 if necessary.

38. The central role of CARU in maintaining the ecological balance of the river is reinforced by Article 56, which requires CARU to adopt binding "rules governing" the "conservation and preservation of living resources"[28]. As with the prevention of pollution, therefore, the parties' substantive obligations under Article 36 are given specific content in regulations adopted by CARU, in Subjects E 3 and E 4 of the *Digest*[29]. Indeed, Subject E 3 expressly states that one of its "purposes" is to protect and preserve the "ecological balance" of the river. Argentina accepted in a 1995 diplomatic Note that Subject E 4 of the *Digest* "détermine les règles pour rendre possible la conservation, l'utilisation et la préservation des ressources vivantes dans le tronçon du fleuve Uruguay partagé"[30]. Argentina and Uruguay are thus in agreement that CARU has enacted rules that implement the substantive obligations of Article 36.

39. Nor are the current CARU *Digest* rules self-evidently inadequate for the purpose of protecting the ecological balance: as the Court has already heard, neither the Argentine nor the Uruguayan fishery experts have found any evidence of harmful impacts on fish stocks or marine life caused by effluents from the Botnia plant, and that is all in the record. The evidence in the record also shows that the Botnia plant has not caused algal blooms. But if there *were* evidence of such harm in either case, then the obvious solution would be for Argentina to propose that CARU

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[27]1969 Vienna Convention on the Law of Treaties, Art. 31.

[28]1975 Statute, Art. 56 *(a)* (2), CMU, Vol. II, Ann. 4.

[29]CARU *Digest*, Subjects E 3 and E 4, CMU, Vol. IV, Anns. 60-62.

[30]MA, para. 3.149 ("determines the rules for ensuring the conservation, use and preservation of the living resources in the shared section of the Uruguay river").

make the necessary revisions to the *Digest*. And to date, as the Court has already heard, no such proposals have emanated from Argentina. I submit there has been no breach of Article 36.

40. So the Court will by now be rather fully aware of the extensive measures that Uruguay has taken to regulate and control the risk of pollution from the Botnia plant, to protect water quality and the aquatic ecosystem, and to secure compliance with applicable national, CARU, and international standards. Let us then look at other ways in which Uruguay has dealt with scientific uncertainty. First and most obviously, it carried out a thorough and comprehensive environmental assessment of the likely risks, as required by international law. Secondly, in so far as there may remain uncertainties about long-term impacts of the Botnia plant, Uruguay submits that they are best addressed by means of the comprehensive monitoring programme it has put in place. And I will briefly now deal with each of these points.

II. THE PLANT HAS BEEN SUBJECT TO AN EIA THAT MEETS ALL THE REQUIREMENTS OF URUGUAYAN LAW AND INTERNATIONAL LAW WITH REGARD TO TRANSBOUNDARY RISK

41. So let us start with environmental impact assessment. Environmental impact assessment, or EIA, is "a procedure for evaluating the likely impact of a proposed activity on the environment"[31]. Uruguay accepts, of course, that in accordance with international practice, an EIA of the Botnia plant was necessary. And it has consistently argued that the EIA that it carried out on the Botnia plant meets all of the requirements of international law with regard to possible transboundary harm.

42. Argentina nevertheless persists in the wholly fallacious argument that the Botnia EIA was not completed prior to authorization of construction. On the record this is simply not so. The initial environmental authorization, which did *not* approve commencement of construction or operation, was granted on 14 February 2005 — some 11 months *after* Botnia submitted its initial EIA on 31 March 2004, and three months after Botnia provided the final additional report requested by DINAMA on 12 November 2004[32]. For the sake of clarity, that is the date on which they submitted the information. To sustain its argument on timing, therefore, Argentina relies instead on the claim that the EIA was inadequate, that it cannot be rectified by later assessments

[31]See 1991 Convention on Environmental Impact Assessment in a Transboundary Context, Art. 1 (vi).

[32]CMU, paras. 4.117-4.133.

carried out by the IFC, and that the whole EIA process, therefore, must be disregarded as defective from the outset. Mr. President, Members of the Court, this not only lacks a legal basis; it defies common sense.

43. Principle 17 of the Rio Declaration provides that an EIA "shall be undertaken for proposed activities that are *likely* to have a *significant adverse impact* on the environment and are subject to a decision of a competent national authority"[33]. You will find similar technology in the Biological Diversity Convention[34], and UNEP's Goals and Principles on EIA also refer to "activities that are *likely* to *significantly* affect the environment"[35]. Principle 5 of the UNEP guidelines goes on to say that "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance".

44. Now the Botnia pulp mill at Fray Bentos has been the subject of a demanding EIA process funded by the World Bank. All elements of the project were subjected to a national EIA overseen by DINAMA[36]. They were then assessed not once but twice in an international EIA process — the cumulative impact assessment — and the final cumulative impact assessment, was carried out for the International Finance Corporation by the Canadian consultants EcoMetrix[37].

45. Both the Botnia EIA and the final cumulative impact statement assessed the potential environmental impact of the plant and found that it was minimal. Not even significant. In that respect they have been proved right: it cannot be said with any credibility that the whole EIA process failed to demonstrate an acceptable environmental impact. The same can be said about the performance of the plant itself: the final CIS assessment was sound and is supported as the Court heard on Monday by the evidence of the third EcoMetrix Report and DINAMA's monitoring.

46. Uruguayan law requires the rigorous assessment of potential environmental impacts. It is consistent with international standards to that extent. Before major projects like the Botnia plant can obtain an authorization[38], extensive information must be submitted to DINAMA, including an

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[33] 1992 Rio Declaration, Principle 17; emphasis added.

[34] 1992 Convention on Biological Diversity, Art. 14 (1) *(a)* ("significant adverse effects").

[35] 1987 UNEP Goals and Principles of EIA, Principle 1.

[36] DINAMA, EIA Report for the Botnia Plant, 14 Feb. 2005, CMU, Vol. II, Ann. 20.

[37] IFC, Cumulative Impact Study, Sep. 2006, CMU, Vol. VIII, Anns. 173-177.

[38] Decree No. 435/994, Environmental Impact Assessment Regulation (hereinafter "Decree No. 435/994"), Art. 1, 21 Sep. 1994, CMU, Vol. II, Ann. 9.

EIA. Full details of what an EIA must contain under Uruguayan law are set out in the Counter-Memorial, and I will not go into the details here, except to remind you that, *inter alia*, they require assessment of the "receiving environment" and "sensitive or risk areas", "water, soil, landscape", "fauna, flora, [and] aquatic biota", and the "anthropogenic environment"[39]. The EIA must make an "objective comparison between conditions prior to and after execution of the project"[40], it must identify mitigation measures to reduce the environmental impact and include a "[m]onitoring, control and auditing plan"[41].

47. Argentina alleged last week that Uruguay had not acted with all due diligence in assessing the risks posed by the plant. But when viewed against the totality of the documentation, it can be seen that the suitability of the Fray Bentos site was comprehensively assessed. The possible transboundary impact of the plant[42], the river's flow characteristics, including reverse flow[43], air pollution[44], water quality[45], biodiversity[46], and the occurrence of algal blooms[47], to name only some of the issues, have all been subject to review by Botnia, by DINAMA, and by expert consultants on behalf of the IFC. This process sets a high standard. For the Court to find that an EIA of this kind is nevertheless inadequate would create a precedent with very burdensome implications for future development in all States, including Argentina. It would also directly contradict the considered view of the International Finance Corporation and challenge the evidential basis on which that international organization approved the plant.

48. The IFC's technical experts analysed Uruguay's environmental protection régime and concluded that "the permit setting process used by DINAMA is practical and rigorous"[48]. The EIA was extensive and contained a great wealth of technical information and environmental data[49]. It

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[39] *Ibid.*, Art. 12, para. I.

[40] *Ibid.*, Arts. 4, 10 and 11.

[41] *Ibid.*, Art. 12, para. IV.

[42] DINAMA, Botnia EIA Report, paras. 4.1 and 4.2, CMU, Vol. II, Ann. 20.

[43] *Ibid.*, para. 3.2, CMU, Vol. II, Ann. 20.

[44] *Ibid.*, paras. 4.2 and 6.2, CMU, Vol. II, Ann. 20.

[45] *Ibid.*, paras. 3.2, 4.1 and 6.1, CMU, Vol. II, Ann. 20.

[46] *Ibid.*, paras. 3.5 and 6.6, CMU, Vol. II, Ann. 20.

[47] *Ibid.*, para. 6.1, CMU, Vol. II, Ann. 20.

[48] Final CIS, Ann. A, *op. cit.*, p. A6.7, CMU, Vol. VIII, Ann. 174.

[49] CMU, paras. 4.117-4.139.

was as complete as possible and necessary at the time. In Uruguay's submission such an EIA fully meets the standards required by current international law[50].

49. And that it did so is also demonstrated if we look at what the International Law Commission believed a transboundary EIA should contain. Based on its assessment of State practice, the International Law Commission's 2001 Articles on Prevention of Transboundary Harm require only that an EIA should include an evaluation of the possible impact on persons, property and the environment of other States, but otherwise, and this is reflected in the discussion in the Commission, they deliberately chose to leave the detailed content for individual States to determine[51]. Uruguay has indisputably conducted an EIA that meets the requirements envisaged by the International Law Commission[52].

Mr. President, I will skip the next paragraph. It will be deleted.

50. Argentina's insistence that all aspects of an EIA must be completed before Botnia has even acquired the necessary land, before notifying CARU, and long before authorization of construction or operation of the plant, not only has no legal basis, but is also illogical and unrealistic. As Uruguay pointed out in the Counter-Memorial, this approach would leave no room for taking into account any representations made by Argentina or for subsequently revisiting any aspect of the project at a later stage[53]. Argentina's reading elevates form over substance. It would turn the whole EIA process into a mechanistic event that has little to do with protecting the environment or the quality of the decision-making process. That is not what the precautionary approach endorsed in Principle 15 of the Rio Declaration envisages.

51. Mr. President, Members of the Court, Argentina made one additional argument last week with regard to EIA: they said that there was inadequate provision for public participation in the process. Uruguay does not accept the legal basis for this argument in the form advanced by Argentina, but assuming for the purposes of argument that a requirement of transboundary public participation can be read into the Statute and into Principle 17 of the Rio Declaration, then it has in

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[50]CMU, paras. 4.88-139; RU, paras. 5.28-88.

[51]Art. 7 and Commentary in ILC Report , 2001, 405, paras. (7) and (8).

[52]CMU, paras. 4.107-4.144.

[53]CMU, para. 4.95.

fact been complied with by Uruguay. As required by Uruguayan law, the EIA process undertaken by DINAMA included consultation with the public likely to be affected[54]. Inhabitants of Fray Bentos and nearby regions of Uruguay and Argentina participated, including representatives from Argentine towns in Entre Rios province[55] — and that is in the record. All of these representations were taken into account by DINAMA when deciding whether to approve the DINAMA/Botnia EIA and recommend the grant of an initial environmental authorization[56]. Indeed, the matters raised at these hearings are extensively referred to in the authorization itself[57].

52. It is clear on this evidence that the participation by the potentially affected public in Argentina was provided for and did, in fact, take place. Even if Article 2 of the 1991 United Nations ECE Convention on Environmental Impact Assessment were applicable in this case — which of course it is not: it is a European Convention —, it would require Uruguay to do no more than it had already done. That Convention only provides for "an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures"[58]. Mr. President, Uruguay submits that it provided an opportunity for the public affected.

53. While it is true that the degree of public consultation was criticized by the IFC ombudswoman in a preliminary ruling[59], the basis for her findings was that the IFC's own standards had not been complied with, not that there had been any breach of international law or of Uruguayan law. The IFC had the option of requiring a supplemental public consultation[60]. It *did* order a revision of the assessment of the cumulative impact study (CIS), and that revision was duly

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[54]Decree No. 435/994, Environmental Impact Assessment Regulation, 21 Sep. 1994, CMU, Vol. II, Ann. 9. Decree No. 349/005, Environmental Impact Assessment Regulation revision, 21 Sep. 2005, CMU, Vol. II, Ann. 24. MVOTMA Initial Environmental Authorisation for the Botnia Plant, paras. XI-XIII, 14 Feb. 2005, CMU, Vol. II, Ann. 21.

[55]DINAMA, Botnia EIA Report, para. 1, CMU, Vol. II, Ann. 20.

[56]Information supplied to the Inter-American Commission on Human Rights, request No. 3.

[57]MVOTMA Initial Environmental Authorisation for the Botnia Plant, para. XIII, 14 Feb. 2005, CMU, Vol. II, Ann. 21.

[58]Art. 2 (6).

[59]IFC/MIGA, Office of the Compliance Advisor/Ombudsman, Preliminary Assessment Report, Nov. 2005.

[60]World Bank, Operational policy 4.01 on Environmental Assessment, para. 13.

carried out by EcoMetrix[61]. So that concludes all that I have to say on environmental impact assessment.

III. THE MONITORING SYSTEM CURRENTLY IN PLACE MEETS ALL THE REQUIREMENTS OF THE STATUTE AND GENERAL INTERNATIONAL LAW

54. Now let me move rapidly on to monitoring, or the monitoring process as it is called. The need to take account of environmental uncertainty does not stop at the environmental impact assessment, or, indeed, when the project comes into operation. Some risks may be inherently difficult to assess in advance; others may be too unlikely or remote, but nevertheless merit monitoring on precautionary grounds once the project has come into operation; other risks may indeed come to light only after operations have begun.

55. The Court will no doubt recall how in the case concerning the *Gabčíkovo-Nagymaros Project* it required the parties to "look afresh at the effects on the environment of the operation of the Gabčíkovo power plant" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment*, *I.C.J. Reports*, p. 78, para. 140). The Court's approach, and Uruguay's submission, rightly treated prior EIA and subsequent monitoring of the ongoing risks and impacts as a continuum which would operate throughout the life of a project. And this view of the relationship between EIA and monitoring (or "post-project analysis") reflects State practice in many national systems and in the provisions of modern treaties such as the United Nations Convention on the Law of the Sea and the United Nations ECE Convention on Environmental Impact Assessment[62].

56. In some cases, the alleged "risks" described by Argentina can *only* be addressed through a combination of monitoring and regulatory oversight[63]. Uruguay submits that the extensive monitoring programme it has put in place will ensure that the true impacts of the Botnia plant are identified, are assessed, and, if necessary, addressed and remedied through existing regulatory and monitoring programmes.

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[61] IFC, Final CIS, Sep. 2006, CMU, Vol. VIII, Ann. 173.

[62] 1982 United Nations Convention on the Law of the Sea, Arts. 204, 206; 1991 EIA Convention, Arts. 2, 7.

[63] Second Exponent Report, pp.6 -3-6-6, RU, Vol. IV, Ann. R83. See also First Exponent Report, p. 30 (uncertainties should be managed and resolved through a comprehensive monitoring program), CMU, Vol. X, Ann. 213.

57. The Botnia plant is now very comprehensively monitored by DINAMA under its May 2007 Monitoring Plan[64]. In total, the monitoring programme covers some 26.8 km of the river — more than enough to determine whether impacts occur either upstream or downstream.

58. There should be no doubt regarding the adequacy of the pre-operational monitoring. The IFC's technical experts conducted an evaluation of the "[s]eparate environmental monitoring programs . . . developed by Botnia and DINAMA", including their programmes for monitoring "water quality, [and] sediment quality [and] biological indicators"[65]. Their conclusion is unambiguous and categorical: "Overall, these monitoring programs [they say] are extremely comprehensive and exceed the commitments identified in the CIS."[66]

59. Botnia has conducted ongoing monitoring to supplement the work by DINAMA and provide additional insurance that operations of the plant are not causing environmental impacts. The requirement that Botnia undertake that post-operational monitoring, which is laid down by the IFC — under the direction and review of DINAMA — has been an integral aspect of DINAMA's approval process. Post-operational monitoring by Botnia continues under a monitoring plan approved by DINAMA, and that plan is described in detail at Annex 41 of the Rejoinder[67].

60. Most of DINAMA's monitoring activities have already been described to the Court, and I will not repeat those descriptions. But in addition to these, it should also be noted that post-operational monitoring by DINAMA covers operational compliance of the plant with the requirements of Uruguayan law and its environmental management plans and permits. This allows DINAMA to detect rapidly whether the Botnia plant *is* causing any adverse impacts and to respond appropriately and immediately by requiring Botnia to undertake additional remedial or protective measures.

61. The requirement that Botnia report the results of its monitoring, in conjunction with the post-operational monitoring that DINAMA itself conducts, ensures constant and thorough

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[64]May 2007 Monitoring Plan, *op. cit.*, Ann. A, para. A1, CMU, Vol. II, Ann. 39.

[65]Pre-Commissioning Review, *op. cit.,* p. ES.iii, RU, Vol. III, Ann. R50.

[66]*Ibid.*, p. ES.iv.

[67]Botnia Environmental Monitoring and Follow-up Plan, *op. cit*., RU, Vol. II, Ann. R41.

oversight. Put simply, if unacceptable impacts do materialize, Uruguay has both the legal régime and the monitoring programme in place to ensure that they are identified and dealt with.

62. More importantly, DINAMA and the Environment Ministry have the authority to suspend operation of the plant temporarily or permanently if adverse impacts occur, and to require the adoption of more stringent pollution control technology or any other measures they deem necessary to achieve water quality standards or prevent a risk to the environment[68]. DINAMA may exercise these powers even if a project is operating in compliance with the requirements of all its approvals, if unacceptable impacts are nevertheless occurring.

63. One example selected from several reported cases will show the Court how the system works in practice[69]. On 26 January 2009, a leakage of gas was traced to an operational error during routine maintenance of the Botnia plant. It set off the verification mechanisms adopted as part of the company's contingency response plan. DINAMA inspected the plant on the following morning to check on the situation and the measures adopted by Botnia. It issued an order requiring the company to implement additional monitoring and to review maintenance protocols for pipes that contain sulphur gases (TRS)[70]. Both actions were implemented in a timely way. All of this is recorded in the record of DINAMA's monitoring reports.

64. The Pre-Commissioning Review undertaken for the IFC specifically endorsed the processes and protocols for monitoring the Botnia plant, concluding that the "[c]omponents of the monitoring program follow well established protocols which will aid in design, analysis and interpretation"[71]. It singled out the monitoring programmes for "water quality, sediment quality and biological indicators", noting that these programmes were "similar to the Environmental Effects Monitoring (EEM) . . . required for pulp and paper mills in Canada".

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[68]Decree No. 253/79, *op. cit.*, Art. 17, CMU, Vol. II, Ann. 6. Law No. 17,283, General Law for the Protection of the Environment, Art. 14, 28 Nov. 2000, CMU, Vol. II, Ann. 11.

[69]DINAMA July 2009 Botnia Performance Report, *op. cit.*, pp. 23-24; DINAMA, Surface Water and Sediment Quality Data Report: Jan.-June 2009, July 2009, (hereinafter "DINAMA July 2009 Water Quality Report"), p. 29, original Spanish version available via a link entitled "Informe Agua Semestre Ene-Jun 2009" at http://www.mvotma.gub.uy/dinama/index.php?option=com_docman&Itemid=312. Translation submitted to the Court on 14 Sep. 2009.

[70]National Management Resolution 052/09. Uruguay's Comments on New Documents Submitted by Argentina, 15 July 2009, Ann. C6.

[71]Pre-Commissioning Review, p. ES.iv, RU, Vol. III, Ann. R50.

65. The third EcoMetrix Report gives a detailed report on the results of monitoring by DINAMA and Botnia in 2008[72]. And, as the Court heard on Monday, the data shows that the plant complies with all applicable regulations and environmental standards and has not caused water or air pollution. These conclusions, as I said on Monday, are fully corroborated by DINAMA's latest monitoring[73].

66. Mr. President, Members of the Court, you may be surprised to learn that until February 2006, CARU had the principal responsibility for monitoring the water quality and aquatic health of the Uruguay river. CARU developed two plans: (1) the pollution control and prevention programme — otherwise known as "PROCON"; and (2) the Uruguay River environmental quality monitoring plan for areas with cellulose plants — otherwise known as "PROCEL". These are the Spanish acronyms. PROCEL, as I mentioned on Monday, was designed — and as its title suggests — specifically for the Botnia and ENCE plants. In addition to water quality, CARU also analysed other environmental conditions of the Uruguay river. These included data on metal and organic contaminants for sediments[74]; and on various aspects of fish communities, diversity of fish populations[75], spawning[76], and levels of certain contaminants in fish[77].

67. Unfortunately, all of these CARU monitoring activities were suspended at Argentina's insistence. Argentina first blocked CARU from carrying out any further monitoring activities under PROCON or PROCEL in January 2006, shortly before it initiated the present proceedings[78]. Since that date, Argentina has consistently refused to allow CARU's previously agreed monitoring

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[72]Third EcoMetrix Report, Mar. 2009, Uruguay's Submission of New Documents, Ann. S7.

[73]See DINAMA First Year Botnia Performance Report, May 2009, *op. cit.* Uruguay's Submission of New Documents, Ann. S7; DINAMA July 2009 Botnia Performance Report, *op. cit.*; DINAMA July 2009 Water Quality Report, *op. cit.*; DINAMA, Air Quality Report: Six Month Report: Jan.-June 2009, July 2009, (hereinafter "DINAMA July 2009 Air Quality Report"), original Spanish version available via a link entitled "Informe Aire Semestre Ene-Jun2009" at http://www.mvotma.gub.uy/dinama/index.php?option=com_docman&Itemid=312. Translation submitted to the Court on 14 Sep. 2009.

[74]Final CIS, Ann. D, p. D3.7, CMU, Vol. VIII, Ann. 176.

[75]*Ibid.*

[76]*Ibid.*, p. D3.10.

[77]*Ibid.*, p. D3.16.

[78]See, for example, diplomatic Note CARU-ROU No. 024/06 sent from President of the CARU Uruguayan delegation to the President of the CARU Argentine delegation, p. 1, 18 Sep. 2006, CMU, Vol. IV, Ann. 120. Diplomatic Note CARU-ROU No. 033/06 sent from President of the CARU Uruguayan delegation to the President of the CARU Argentine delegation, p. 1, 13 Oct. 2006, CMU, Vol. IV, Ann. 121.

activities to resume. Uruguay has repeatedly expressed its desire for those monitoring activities to resume to no avail[79] and Argentina continues to veto resumption of joint monitoring related to the Botnia plant[80].

IV. THE BURDEN OF PROOF ON ALL THESE ISSUES IS ON ARGENTINA, BUT URUGUAY HAS MORE THAN PROVED ITS OWN CASE, AND ARGENTINA HAS NOT

68. Mr. President, Members of the Court, I come finally to the question of burden of proof. The burden of proof in this case is on Argentina, in accordance with the Court's long-standing case law[81].

69. Nevertheless, Uruguay has put before the Court extensive evidence based on environmental impact assessments and monitoring, much of it carried out by consultants independent from either Botnia or Uruguay. That evidence has shown that there is no significant impact on the quality of the river water or its ecosystem. Nor has Argentina's evidence established even a prima facie risk of harmful pollution or ecological damage, let alone a risk of serious or irreversible damage resulting from the operation of a plant whose emissions and operations comply fully with all the applicable regulations and standards. Even if Argentina were correct about transferring the burden of proof to Uruguay, it would make no difference, given the manifest weakness of its own case.

70. The evidence in Uruguay's favour is substantial, it is strong, and it is based on actual monitoring results over an 18-month period. And as my colleague Mr. Reichler has so pointedly demonstrated, Argentina has presented no significant or credible evidence to the contrary. The evidence before the Court points overwhelmingly to the conclusion that there will be no unacceptable effects from the operation of the plant — and certainly nothing that amounts to serious or irreversible damage, as required by Principle 15 of the Rio Declaration. If it *has* to prove

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[79]See for example, diplomatic Note CARU-ROU No. 024/06, *op. cit.*, p. 1, CMU, Vol. IV, Ann. 120. See also diplomatic Note CARU-ROU No. 033/06, *op. cit.*, p. 1, CMU, Vol. IV, Ann. 121.

[80]See, for example, diplomatic Note DACARU No. 019/06 sent from President of the CARU Argentine delegation to the President of the CARU Uruguayan delegation, p. 1, 20 Oct. 2006, CMU, Vol. III, Ann. 122.

[81]Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), *Judgment, I.C.J. Reports 2007*, p. 128, para. 204 ("On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it."); case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), *Jurisdiction and Admissibility*, *I.C.J. Reports 1984*, p. 437, para. 101 ("it is the litigant seeking to establish a fact who bears the burden of proving it").

its case on pollution and ecological effects, then Uruguay submits that it has more than done so. And this shows far better than any list of laws and regulations, or descriptions of technology, that Uruguay has acted diligently in all respects in its handling of the Botnia pulp mill.

V. CONCLUSIONS

71. Mr. President, Argentina's case must fail because there is no basis in law for ordering the closure of an industrial plant that complies fully with all applicable environmental regulations agreed by both parties — even under the precautionary principle. Argentina's argument focuses on alleged harm and the supposed environmental risk posed by this plant at this location. As the International Law Commission concluded after very many years of study[82], international law requires States to act diligently to prevent pollution, but it does not prohibit otherwise lawful activities within the territory of a State simply because they *might* pose a risk to the environment if they are not adequately regulated and controlled. Mr. President, Members of the Court, Uruguay has demonstrated that the Botnia mill is very adequately regulated and controlled by DINAMA and CARU.

72. The Court today finds itself in much the same position as the International Law Commission. If it accedes to Argentina's unprecedented demand for closure of the plant on grounds of risk to the environment, despite the measures Uruguay has taken to eliminate that risk, the implications would be far-reaching, not only for the wood pulp industry worldwide but for other comparable activities.

73. Consistently with the Rio accords and the imperatives of sustainable development, the United Nations and the World Bank have focused their efforts on better regulation of industry, on more monitoring, on waste minimization, on improving efficiency, on integrating environmental protection with economic development[83] — the kind of measures the International Finance Corporation insisted on when funding the Botnia plant. A precautionary and preventive approach is certainly part of that policy and it should, of course, make States more cautious, as it has in this case, but that must not be confused with a prohibition of risk, however small, or however unlikely.

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[82]See Draft Articles on Prevention of Transboundary Damage, ILC Report (2001), United Nations doc. A/56/10, 366.

[83]UNCED, Agenda 21, Chaps. 19 and 20.

Uruguay submits that it has more than met the requirements of a precautionary and preventive approach in authorizing construction and operation of the Botnia plant on the terms outlined to the Court by Uruguay.

74. Mr. President, Members of the Court, I am conscious that this has been a long speech — no doubt far too long. So let me end by summarizing the conclusions that follow from what I have tried to explain.

75. First, there has been no violation of the provisions of the 1975 Statute on prevention of pollution and protection of the aquatic environment: Uruguay has acted diligently in taking all appropriate measures required by the Statute to prevent pollution and protect the ecological balance of the river.

76. Secondly, effluent from the Botnia plant has not altered water quality and therefore has not caused pollution of the River Uruguay, nor has it altered the ecological balance.

77. Thirdly, Uruguay has complied with Article 41 — it has discharged its duty to regulate effluent discharges in accordance with water quality and discharge standards established by CARU, or by its own laws and regulations.

78. Fourthly, the plant's technology meets all the pollution prevention and environmental protection requirements of the 1975 Statute, and fully implements a precautionary and preventive approach.

79. Fifthly — and I only have four more —, through CARU the parties have co-ordinated measures necessary to prevent any alteration of the ecological balance as required by Article 36, and any additional measures that might be required should be co-ordinated through CARU.

80. Sixthly, the plant has been subject to an EIA that meets all the requirements of Uruguayan law and international law with regard to transboundary risk. The EIA was both comprehensive and timely.

81. And seventh, the monitoring system currently in place meets all the requirements of Uruguayan law, of the 1975 Statute, and of international law with regard to transboundary risk.

82. And finally, the burden of proof on all of these issues is on Argentina, but Uruguay has more than proved its own case, while Argentina has not.

83. Mr. President, Members of the Court, I thank you for listening to me, and I would now ask you to give the floor to Professor McCaffrey.

The VICE-PRESIDENT, Acting President: I thank Professor Boyle for his presentation, and I shall pass the floor to Professor Stephen McCaffrey. You have the floor, Sir.

Mr. McCAFFREY: Thank you, Mr. President. Mr. President, distinguished Members of the Court, it is an honour to appear before you again on behalf of the Eastern Republic of Uruguay.

THE PROCEDURES UNDER THE STATUTE AND THE ROLE OF CARU

I. INTRODUCTION

1. Mr. President, you have now heard Uruguay's environmental case concerning those issues before the Court. As the speakers before me have shown, the Botnia plant is not causing, and poses no risk of causing, any harm to the water quality or the aquatic environment of the Uruguay river, let alone significant harm. Argentina's arguments to the contrary do not withstand scrutiny.

2. Having disproved Argentina's environmental case, Uruguay now turns to the other aspect of this dispute: Argentina's procedural complaints. My role now is to begin the task of refuting the claims you heard so much about last week from Argentina's advocates that Uruguay violated the procedural provisions of the 1975 Statute.

3. My comments this morning will be divided into three parts, the first two of which will be brief. First, I will offer a quick overview of the procedural rules in Articles 7 through 12 of the Statute in order to summarize for the Court the essence of the Statute's procedural scheme. Second, I will discuss the purpose of the Statute's procedural rules. In the third part of my presentation, which will occupy the bulk of my time, I will show that while CARU has an extremely important regulatory role regarding standard-setting and monitoring of water quality, and in assuring the Parties' compliance with their substantive obligations to prevent pollution, it has, by contrast, a modest role in the consultative process between the Parties with regard to projects authorized by either one of them involving utilization of the river. Following me today and tomorrow, Mr. Martin will show that, contrary to what you heard last week, Uruguay did *not* violate Article 7 of the 1975 Statute. Professor Condorelli will then show that Uruguay has

complied with the remainder of the procedural scheme established by the Statute, in Articles 8 to 12, focusing on Article 12, and he will respond to Argentina's arguments regarding the proper interpretation of those provisions.

II. OVERVIEW OF ARTICLES 7 THROUGH 12

4. Mr. President, I turn then to my first point. Articles 7 through 12 of the Statute establish a sequence of procedures to be followed when one of the States is planning to implement a project on its side of the Uruguay river that is, in the words of the Statute, "liable to affect navigation, the régime of the river or the quality of its waters". These Articles establish a series of steps culminating, in the case of a persistent dispute, in the reference of that dispute to this Court. The text of the pertinent articles may be found at tab 1 of the judges' folder. I will not burden the Court by reciting the full text of each of these provisions.

A. Article 7

5. The process begins with Article 7. Under the first paragraph of Article 7, the State planning a project that is "liable to affect navigation, the régime of the river or the quality of its waters" is to notify CARU, which then has a very brief period of 30 days to determine "on a preliminary basis" whether or not the proposed project "might cause significant damage to the other Party". If CARU decides that it will not, that is the end of the matter. No further procedures are envisioned.

6. If, on the other hand, CARU determines that the project *might* cause significant harm or if it cannot reach a decision on the issue, the second paragraph of Article 7 provides that the State planning the project is to notify the other Party through CARU. The third paragraph of Article 7 states the nature of the information that the initiating State must provide to the notified State.

7. There are at least two key points to highlight about the text of Article 7. First, the substantive scope is limited. Notification is not required for any and all projects, but instead only those that are of sufficient scope to potentially affect just three things: (1) navigation; (2) the régime of the river; or (3) the quality of its waters. All other issues, including other environmental issues such as air quality for instance, are beyond the scope of these procedural rules.

8. The second key point regarding Article 7 is that the role of CARU in this process is quite limited. My colleague Mr. Martin will have more to say about this shortly, but the important point to bear in mind is that in the case of projects falling under Article 7 and notified to CARU, the Commission is assigned only the limited task of conducting a "preliminary", and necessarily quite summary, 30-day review. Thereafter, the Commission's role in the consultation process is effectively over, except only that it continues to act as an intermediary for communications between the Parties — a "postal agent" in the words of Argentine Ambassador Julio Carasales, the former head of Argentina's delegation to CARU, a past President of the Commission, and one of Argentina's leading authorities on the 1975 Statute. This is of utmost importance, because direct negotiations between the two Parties, on the "Government-to-Government" level, is precisely what occurred in the present case, as we will see presently.

B. Articles 8 to12

9. Mr. President, I turn now to Articles 8 to 12. Article 8 gives the notified State a period of 180 days to review the information provided to it by the initiating State in order "to assess the probable impact of such works on navigation, the régime of the river [and] the quality of its waters".

10. Article 9 then provides that if the notified State raises no objections or does not respond within the 180-day period referred to in Article 8, the initiating State may implement the project without incurring any further procedural obligations, except only to permit the notified State to inspect the project under Article 10.

11. Article 11 deals with the alternative possibility; that is, what happens in the event that the notified State comes to the conclusion that the proposed project might cause significant harm. In that event, further procedures are mandated. In particular, the notified State must inform the initiating State of its conclusions. The second paragraph of Article 11 places a heavy burden on the State opposing a project. It must

> "specify which aspects of the work or programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations".

12. The effect of such a notice from the notified State is to set in motion a further 180-day period for negotiations between the parties. Although Articles 7 through 12 do not explicitly provide for negotiations as such, the requirement is imported by means of Article 12, which provides that if the parties fail to reach agreement within 180 days of the notice described in Article 11, recourse is to be had to the procedure indicated in Chapter XV of the Statute. Chapter XV, in turn, consists of Article 60, which provides for the jurisdiction of this Court over "any dispute concerning the interpretation and application" of the Statute which "cannot be settled by direct negotiations".

III. THE PURPOSE OF THE STATUTE'S PROCEDURAL PROVISIONS

13. Mr. President, I come now to the purpose of the procedural provisions I have just summarized. In evaluating Argentina's argument that Uruguay breached its procedural obligations, it is important to bear their purpose in mind. As I shall show presently, the purpose of the Statute's procedural provisions is to assure consultations between the parties and ultimately the performance of the Statute's substantive obligations. Thus the Statute's procedural mechanisms do not exist for their own sake, in a vacuum, but rather as a tool to help facilitate the achievement of these goals by ensuring that both riparian States are fully informed, and have an opportunity to be consulted, about projects planned by each other, before they are carried out. The procedures are, in a phrase, means to an end. They are important means, to be sure, but they are nonetheless means.

14. During the oral proceedings on Argentina's provisional measures request in June 2006[84], Uruguay explained that the procedural provisions of the 1975 Statute cannot be considered in isolation, but must be interpreted in light of their ultimate purpose within the Statute. I am pleased to say that Argentina has explicitly agreed with Uruguay on this point, in both the Memorial and the Reply[85]. In the Reply, for instance, Argentina states:

> "The procedural provisions and obligations of the parties under Articles 7 to 12 of the 1975 Statute cannot be considered in an isolated manner, without taking account

[84]CR 2006/49, p. 31 (Reichler).

[85]See MA, paras. 3.31 and 5.2; RA, paras. 1.28 and 1.69.

> of the end-purpose of these precise and specific obligations, namely the performance of the Statute's substantive obligations."[86]

Uruguay could not have put it better, and adopts Argentina's words as her own.

15. In looking more closely at the purpose of the procedures laid down in Chapter II of the Statute, we are aided by the explanation provided by one of Argentina's great authorities on international water law, Dr. Julio Barberis. Dr. Barberis was also Argentina's lead negotiator in the talks with Uruguay that culminated in the 1975 Statute. Speaking at a Technical-Legal Symposium sponsored by CARU in 1987, Dr. Barberis described the functions of the Commission at some length[87], a description with which Uruguay agrees and that is set forth in the Counter-Memorial[88]. With regard to proposed projects, Dr. Barberis said the following:

> "Now, when one State proposes carrying out any work of sufficient size to affect the river, it should first consult with its riparian neighbor to permit the latter to determine whether said works will cause it significant damage. Articles 7 to 13 of the Statute establish the procedure to follow for this purpose and provide for the participation of the Commission."[89]

16. It is significant that Dr. Barberis, Argentina's foremost authority on the 1975 Statute, described the procedural provisions of the Statute as establishing that the State proposing a project "should first consult with its riparian neighbor", and that "Articles 7 to 13 . . . establish the procedure to follow for this purpose". The "purpose" of these provisions is thus to assure "consultation" with the riparian neighbour. Dr. Barberis does not go into any detail here about the form of the Commission's participation, but elsewhere he refers to it, as has Uruguay, as "participation in the consultation régime"[90]. As we have seen, this participation consists of receiving the initial notification from the proposing party, performing a summary review to determine whether the planned project might cause significant damage to the other party, and, if it finds the project might cause such harm, notifying the parties — at which point the proposing party is to notify the other party of the plan through the Commission. Thereafter, CARU's role regarding

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[86]RA, para. 1.69 ("Les dispositions et obligations procédurales des Parties en vertu des articles 7 à 12 du Statut de 1975 ne peuvent pas être considérées isolément, sans prendre en compte la finalité de ces obligations précises et spécifiques, c'est-à-dire la réalisation des obligations substantielles du Statut.").

[87]CARU Technical-Legal Symposium, 17-18 Sep. 1987, CMU, Vol. IV, Ann. 72.

[88]CMU, pp. 140-141, para. 2.200.

[89]CARU Technical-Legal Symposium, 17-18 Sep. 1987, CMU, Vol. IV, Ann. 72. The passage in question is quoted in CMU, p. 141, para. 2.200.

[90]*Ibid*. This is how Dr. Barberis refers to the 5th category of CARU's powers. For the substantially identical formulation of Uruguay, see CMU, p. 134, para. 2.189.

planned projects consists only of serving as a conduit for communications between the parties, as indicated earlier.

17. Last week Professor Pellet echoed this view, stating that "la CARU est essentiellement un cadre de concertation [or consultation] entre les Parties"[91]. For Uruguay, too, the main purpose of the Statute's procedural provisions is to assure consultations between the parties on the types of projects that fall under Article 7.

18. In the present case, this purpose was fulfilled, by virtue of the direct consultations between Uruguay and Argentina about the Botnia project in the six-month GTAN process that took place in 2005. To be sure, this process, commenced by the two Parties by mutual agreement at the invitation of Argentina in May 2005, provided for the immediate convening of direct, State-to-State negotiations rather than passing through the preliminary stage, envisioned by Article 7, of formal notification and preliminary review by CARU. However, if the central purpose of the Statute's procedural provisions is to ensure consultations between the parties with respect to any project calling for utilization of the river that might affect the other party, then there is no reason they should not be free, by mutual agreement, to adopt what they consider to be the best *means* of consultations in the context of a particular project, even if it does not follow the formalities of Article 7.

The VICE-PRESIDENT, Acting President: Professor McCaffrey, having looked at the outline of your wise argument for today, I consider this may be an appropriate moment to suspend the meeting, since we are now well into the second part of Uruguay's argument. So, I suspend the meeting for 15 minutes.

Mr. McCAFFREY: Thank you, Mr. President.

The Court adjourned from 11.20 to 11.35 a.m.

The VICE-PRESIDENT, Acting President: Please be seated. Professor McCaffrey, you may continue, and address the third topic of your pleading of this morning.

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[91] CR 2009/13, p. 26, para. 1.

Mr. McCAFFREY: Thank you very much, Mr. President.

IV. THE NATURE OF CARU AS A JOINT INSTITUTIONAL MECHANISM

19. Mr. President, distinguished Members of the Court, allow me to turn now to the third topic I would like to address: the nature of CARU as a joint institutional mechanism. As has been noted by both Uruguay and Argentina, CARU has been given important functions for the implementation of the relevant provisions of the 1975 Statute.

A. The purpose of CARU is to facilitate co-operation, not to prevent it

20. However, Argentina seeks to portray CARU as having powers and characteristics it was simply not given by the Statute. In particular, Argentina seems determined to create the impression that once they have given it life through the 1975 Statute, the parties must deal with each other only through CARU as to matters as to which it is competent; and that they are not free to agree to dispense with procedures or other matters with which CARU is concerned. Thus, Argentina's argument effectively treats CARU as an autonomous body with supranational powers. But such an argument rests on a serious misunderstanding of how not only CARU, but also most other international river commissions, actually function.

21. These are not autonomous bodies, but mechanisms established to facilitate co-operation between riparian States. Since they are created by their member States, those States are of course free to go outside the joint mechanism when it suits their purposes, and they often do so. To give just one example, Canada and the United States have often dealt with particularly important and sensitive matters outside the International Joint Commission, or IJC, the highly-regarded institution they established under the 1909 Boundary Waters Treaty[92]. They have done this both by taking over matters that they had initially referred to the IJC, and by not referring matters to the IJC in the first place — all of these being matters that the Commission would otherwise have been competent to consider. Perhaps the best known dispute of this kind is the one involving the smelter at Trail, British Columbia, on which the IJC submitted a report but which the two Governments ultimately

[92]Treaty between Great Britain (Canada) and the United States relating to Boundary Waters and Questions Arising between the United States and Canada, 11 Jan. 1909, 102 *BFSP*, p. 137.

took away from the Commission and referred to arbitration. This resulted in the famous *Trail Smelter* award[93], which many consider to be the cornerstone of international environmental law. Other disputes that were within the competence of the IJC but which the Governments dealt with on their own include those concerning the Garrison Diversion project and the Devils Lake drain. In the latter case, in fact, the Secretariat of the North American Commission for Environmental Cooperation ruled in response to a citizens' petition that there is no requirement that the two Governments submit boundary water disputes to the IJC[94].

22. Mr. President, in this case, Argentina and Uruguay did nothing more than Canada and the United States have done on numerous occasions with respect to their Joint Commission on shared freshwater resources, and that other States have done with regard to their joint river commissions, as well.

23. To allay any possible doubt, I should emphasize something that should go without saying, namely, that, as Ambassador Gianelli said on Monday, Uruguay values CARU highly, as an indispensable institution for the co-operative management of the Uruguay river that carries out a range of important functions, as specified in Article 56 of the Statute. Therefore, nothing I say in the balance of this presentation should be taken in any way as a denigration of this important body. My purpose, rather, is to underscore its significance, by laying before the Court in plain terms what CARU is, and what it is not, as concerns the present case.

24. On the most fundamental level, one thing CARU *is*, is a member of a grand tradition of international river commissions. While every commission's functions are tailored to the circumstances and needs of the particular case at hand, in their basic procedural characteristics most of them are quite similar. In creating CARU, Argentina and Uruguay followed a model whose origins are nearly two centuries old.

25. Those origins take the form of a body that Paul Reuter described as the doyen of international organizations — not only of river commissions[95] — the Central Commission for the Navigation of the Rhine. The Central Commission, which served as a model for river commissions

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[93]Award of 11 March 1941, 3 *UNRIAA*, p. 1938 (1941).

[94]CEC doc. A14/SEM/06-002/12/DETN, 21 Aug. 2006, available at http://www.cec.org/files/pdf/sem/06-2-DETN_en.pdf.

[95]Paul Reuter, *International Institutions*, New York, 1961, p. 207.

to follow, was established in conjunction with the 1815 Congress of Vienna. Today the Central Commission adopts resolutions by unanimous decision of representatives of the five member States in accordance with the Mannheim Convention of 17 October 1868, as amended to form the Revised Convention for Rhine Navigation of 20 November 1963. Article 46 of the Revised Convention provides that "[r]esolutions adopted unanimously shall be binding", but the article allows a Contracting State to opt out within one month, thereby nullifying the binding force of the resolution[96].

26. Thus, even in this venerable body, the descendant of the "doyen of international organizations" that began meeting in 1816, even in this body, decisions are taken by unanimous vote of State representatives — and yet such unanimously adopted decisions are still subject to being nullified or suspended by action of just one of the member States. This decision-making régime reflects the fundamental importance to the riparian States of matters relating to navigation on the Rhine. It is thus not in the least surprising that CARU would also consist of representatives of each member State and adopt decisions by unanimity, or consensus. River commissions all over the world follow the Central Commission model of decision-making by State representatives, including the Danube Commission[97], the Mekong River Commission[98], and the Permanent Indus Commission[99]. None of these bodies is autonomous; all of them are fora created by States to institutionalize and thus facilitate their co-operation.

27. CARU is no exception. Thus, in a very real sense, CARU *is* the Parties — Argentina and Uruguay — acting jointly. It is a bi-national entity, not an autonomous body.

28. There could perhaps be no stronger proof of this proposition than the decision-making rules of CARU provided for in the Statute. These rules are simple and straightforward — so much so that they in fact consist of only one rule, the entirety of which, set forth in Article 55 of the Statute, provides as follows: "For the adoption of decisions of the Commission, each delegation

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[96]Revised Convention for Rhine Navigation, 20 Nov. 1963, Art. 46, available at http://www.ccr-zkr.org/.

[97]Belgrade Convention regarding the Regime of Navigation on the Danube, Belgrade, 18 Aug. 1948, 33 *UNTS* 181, Art. 11 (majority vote of member State representatives).

[98]Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Chiang Rai, Thailand, 5 Apr. 1995, 34 *ILM* (1995) 864 , Arts. 15 and 20 (unanimous vote of ministerial-level representatives).

[99]Indus Waters Treaty, Karachi, 19 Sep. 1960, 419 *UNTS* 125, Art. IX (1) (representatives to resolve any question by agreement).

shall have one vote." Full stop. Article 49 provides that CARU is to consist of "an equal number of representatives of each Party". Thus, the "delegations" are "representatives" of the parties; no decision can be made by CARU unless both parties concur in it. There is no autonomous authority in the Commission to make decisions separately from the parties, or against the wishes of one of them. But, once again, this is not unique to CARU. It is characteristic of the vast majority of the world's international river commissions.

29. The fact that the Statute provides in Article 50 that CARU "shall be made a legal entity" and in Article 54 that it is to "conclude agreements with both Parties specifying the privileges and immunities enjoyed by its members and staff under international law" is standard for international river commissions and is not at all inconsistent with what I have just said about how CARU adopts decisions. CARU is an international organization, but the way it makes decisions makes it strictly dependent on the will of the two parties acting jointly.

30. In fact, Mr. President, in practice — in actual practice — CARU is an instrument of the two Parties' Foreign Ministries. It is the Foreign Ministry of Uruguay that appoints its delegates to CARU and to whom those delegates report, as junior officials to their seniors. The same is true of Argentina.

31. This being the case, it is perfectly natural that, with a project of this magnitude — the Botnia project — the two Foreign Ministries would decide to deal with the matter directly, at the highest political level, rather than through the mid-level subordinates who serve as their delegates to CARU. That is why, in this case, the Foreign Ministers agreed, at Argentina's invitation, to establish the GTAN — the high-level technical group — to carry out the consultations and direct negotiations called for by the 1975 Statute. It was a deliberate decision *not* to entrust such a major project, with major political implications in both countries, to their subordinates at CARU. They decided, wisely, that this particular matter had to be dealt with directly and at the highest level.

32. As we have seen, Mr. President, there is nothing in the 1975 Statute, or in the rich history of river commissions generally, to stop them from reaching agreement to proceed in this manner.

B. The Parties agree that CARU does not have the power to approve projects

33. Mr. President, Argentina contended in her Memorial that CARU has the power to "determine whether Uruguay could build or grant the authorization to build the works in question"[100]. But Argentina's Reply contradicts itself on this issue, as pointed out in Uruguay's Rejoinder[101], and last Tuesday Professor Pellet expressly recognized that CARU does *not* have the authority to authorize or reject a project[102]. This is thus a non-issue: the Parties are in agreement that CARU does not have the power to approve projects.

34. It was surprising, therefore, to hear no less than three of Argentina's advocates[103] refer last week to an answer given by a former president of the Uruguayan delegation to CARU, Madame Martha Petrocelli, in response to a hypothetical question put to her in the Environmental Committee of the Uruguayan Senate on 12 September 2005. The question was, what would have happened if the question of the mills had been referred to CARU and "the answer had been no"? Madame Petrocelli responded, in words that are now well known to the Court: "The works would not have been carried out."

35. The colloquy between Madame Petrocelli and the Committee is susceptible of at least two interpretations, neither of which supports Argentina's case. In fact, Argentina's counsel switched back and forth between which of these interpretations they preferred, frequently contradicting each other about it. According to some of Argentina's counsel, the question asked Madame Petrocelli had to do with CARU's authority to reject proposed projects, and her answer indicates that she thought it could. But if this is what the question and answer meant, the incident is irrelevant. Both Uruguay and Argentina now agree, and have both said so in this Court, that CARU does not have the power to reject proposed projects. If Madame Petrocelli intended otherwise, she was mistaken. In any event, her opinion is immaterial at this stage of the proceedings.

36. The other use to which Argentina's counsel put Madame Petrocelli's answer — and I am referring here to the way Professor Sands sought to portray it — was as an admission that Uruguay

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[100]MA, para. 4.13.

[101]RU, pp. 36-37, paras. 2.13-2.14.

[102]CR 2009/13, p. 29, para. 8.

[103]CR 2009/13, pp. 46 (Béraud), 53 (Boisson de Chazournes), and 67 (Sands).

did not engage in consultations with *Argentina* because, if *Argentina* had said "no" to the project "[t]he works would not have been carried out". This is plainly a misconstruction of Madame Petrocelli's answer. In the first place, if one reads the whole series of questions and answers, rather than the tiny snippet extracted by Professor Sands and Argentina's other counsel, it is clear that the whole line of questioning is about the authority of CARU, not consultations with Argentina. But even more dispositive on this point is the fact that, at the time of this exchange, September 2005, Uruguay was already deeply engaged in direct consultations with Argentina as part of the GTAN process, which had been agreed between the two States in May 2005, four months earlier. So whatever Madame Petrocelli was saying, she could not have been talking about a refusal to engage in consultations with Argentina, or a right of Argentina to reject Uruguay's project.

37. The strained attempt by Argentina's counsel to use Madame Petrocelli as a witness to support their argument that Uruguay never consulted with Argentina about the Botnia project reveals Argentina's insecurity regarding its argument on consultation. Consultations happened, especially in the GTAN process; Argentina would like the Court to think that they did not.

C. The agreement to engage in direct, government-to-government negotiations about the Botnia mill

38. Mr. President, Argentina has repeatedly argued, in both its written and oral pleadings, that Uruguay should have notified CARU of the pulp mill plans under Article 7 of the Statute notwithstanding the discussions held between the Foreign Ministers of the two countries at Argentina's own suggestion. My colleague Mr. Martin will address this argument in detail presently. My task now is simply to set the scene for the Court by providing an illustration of the Parties' agreement to deal with the mills directly, in government-to-government talks. Uruguay is confident that the Court will agree that having held directly the very kinds of consultations envisaged by Articles 7 to 12 of the Statute, it would have been redundant and even absurd to return to CARU to repeat the same process indirectly.

39. [Slide.] Mr. President, a clear indication of the Parties' determination to deal with the matter directly, outside CARU, is the excerpt now shown on the screen from a letter of 5 May 2005 sent by the Argentine Foreign Minister, Rafael Bielsa, to his Uruguayan counterpart[104].

40. Mr. Martin will have more to say about this letter but, for now, two points are worth emphasizing with respect to the letter and the events it set in motion. First, it makes clear that it was Argentina that invited Uruguay to deal with the matter directly. And second, the "more direct intervention", highlighted towards the bottom of the screen, referred to by Minister Bielsa took the form of the establishment by the two Foreign Ministers, pursuant to an agreement between the Presidents of the two countries, of a group of technical experts, known as GTAN. My learned colleague Professor Condorelli will discuss the GTAN negotiations in more detail tomorrow.

V. CONCLUSION

41. Mr. President, distinguished Members of the Court, in conclusion, Uruguay is of the view that CARU is an important, useful and effective joint mechanism created by the Parties to assist them in implementing the provisions of the 1975 Statute. It is not an autonomous entity that has authority to act irrespective of the will of the Parties. For proof of this one need look no further than Article 55 of the Statute, which provides that the delegation of each country, Argentina and Uruguay, has one vote for the adoption of decisions of the Commission. Thus the two countries control CARU, through their Foreign Ministries; it cannot act unless the two delegations concur. It follows that the two States may decide to act without invoking CARU procedures. If one of the countries later gets cold feet, as Argentina evidently has in this case, she should not be permitted to go back on her decision. *Pacta sunt servanda*. This is especially the case where the other Party has relied in good faith on the original agreement, as Uruguay plainly has done here.

42. Argentina has now abandoned her original contention that CARU has the power to approve projects. This is thus now a non-issue in this case.

43. Finally, the Parties are free to agree to do directly what they have agreed to do in the 1975 Statute through CARU. The direct discussions initiated by Argentina render superfluous the procedures under Articles 7 to 12 of the Statute. Further, as Mr. Martin will show, there was

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[104]RU, Vol. II, Ann. R15.

nothing in the agreements between the Foreign Ministers to take up the matter directly that even suggests the need to go back through the procedures under Article 7.

44. Mr. President, that concludes my presentation. I would request that you now invite to the podium my colleague Mr. Lawrence Martin, who will address Uruguay's compliance with Article 7 of the Statute. Thank you for your kind attention.

The VICE-PRESIDENT, Acting President: I thank Professor McCaffrey for his presentation and I give the floor to Mr. Lawrence Martin. You have the floor, Sir.

Mr. MARTIN: Thank you, Mr. President.

URUGUAY DID NOT VIOLATE ARTICLE SEVEN

1. Mr. President, distinguished Members of the Court, it is a very special privilege for me to appear before you today on behalf of the Eastern Republic of Uruguay. My task before you this afternoon is a simple one. I will show you that, contrary to everything you heard last week from Argentina, Uruguay did *not* violate Article 7 of the 1975 Statute.

2. My presentation will be divided into three parts. First, I will review the actual text of Article 7, focusing in particular on the nature of the task committed to CARU. My purpose is to highlight the relatively limited role the Commission plays in the procedural mechanisms established by Articles 7 through 11 of the Statute. Second, I will show that there is no logical or legal reason the Parties may not agree to dispense with CARU's initial role and proceed straight to the direct, government-to-government dealings contemplated in later articles of the Statute. Lastly, I will present the facts in the record — many of them from Argentine official sources — evidencing the Parties' agreement to do exactly that. Particularly given the limited nature of CARU's procedural role and the purely consensual nature of the Parties' choice to negotiate directly, the joint decision to bypass CARU was *not* a violation of the Statute.

I. THE ROLE OF CARU UNDER ARTICLE 7

3. In evaluating Argentina's argument that Uruguay violated Article 7 by not referring the ENCE and Botnia projects to CARU, it is important to keep in mind what role CARU plays in the Statute's procedural scheme. Without in any way detracting from the Commission's many

essential and indispensible functions, which Professor McCaffrey discussed earlier, the fact is it has only a small role to play in the procedures stipulated in Articles 7 through 12.

4. The analysis begins, as it must, with the text of the Statute. Now, we have heard quite a lot already about Article 7, but I am not sure there was enough focus on what it actually says. [Slide 2.] The first paragraph of Article 7 states — this is at tab 2 of your judges' folders:

> "If one Party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters, it shall notify the Commission, which shall determine on *a preliminary basis* and *within a maximum period of 30 days* whether the plan might cause significant damage to the other Party". (Emphasis added.)

5. [Slide 3.] The second paragraph of Article 7 then states: "If the Commission finds this to be the case or if a decision cannot be reached in that regard, *the Party concerned shall notify the other Party of the plan* through the said Commission." (Emphasis added.)

6. The plain lesson this language teaches us is that CARU's task upon receiving notification of a project is limited. It must only determine "on a preliminary basis" — in Spanish, the word used is "*sumariamente*" — and within no more than a very brief period of 30 days, whether the project might cause significant harm to the other State. As Professor McCaffrey mentioned, Argentina has finally recognized that this is distinctly *not* a general power to authorize or reject projects. It is, instead, in the nature of a preliminary screening, the purpose of which is to determine whether or not the project needs to be brought to the attention of the other Party, as contrasted from its representatives in CARU.

7. There are three possible outcomes to CARU's preliminary review: the Commission might (1) determine the proposed project poses no risk; (2) determine that it *does* pose a risk; (3) be unable to come to an agreed conclusion on the matter, given that deadlock is always a possibility since each Party has one vote. In the event the Commission determines the project does *not* pose a risk of significant harm to the other Party, that is the end of the matter. No further procedures are contemplated. If, on the other hand, CARU decides either that the project *does* pose a risk, or is unable to come to an agreed conclusion, the effect is to set in motion the information-sharing and negotiation obligations described in the balance of Articles 7 through 12.

8. Under all of these scenarios, once CARU has performed its initial screening function, its job is essentially done. As I mentioned, if CARU determines that a project poses no risk, no further procedures of any kind are necessary. And if it determines that there *is* potential risk, or if it cannot decide the matter, all further dealings are between the *Parties* — that is, the Governments of Argentina and Uruguay — themselves. CARU is involved only to the extent it facilitates communications back and forth. [Slide 3 off.]

9. If one also looks at the balance of Articles 7 through 12, one will see that the Commission has no further role to play in the procedures envisioned, except only that under Article 8 it may extend the applicable time frame. I will not burden the Court by reviewing each of those provisions now, but invite the Court to do so. When it does so, the Court will appreciate the insight of the former Chairman of Argentina's delegation to the Commission, Ambassador Julio Carasales, who described CARU's role after it completes its summary review of a project as that of a "postal agent" — "agente postal" in the original Spanish — nothing more. Argentina seems to especially dislike it when Uruguay reminds it of Ambassador Carasales's words. [Slide 4.] Lest we be accused of taking them out of context, here is *exactly* what he said about CARU's role *after* it completes its preliminary, 30-day review. This is also at tab 4 of your judges' folders:

> "[T]he fundamental issue is no longer within CARU's competence. It is an exclusively bilateral issue which must be resolved Government-to-Government, with the only procedural matter being that communications should be sent through the [CARU], but [CARU's] role is that of a postal agent that may not take any substantive action."[105]

10. This is Uruguay's position as well.

II. THE PARTIES MAY AGREE TO DISPENSE WITH THE ARTICLE 7 NOTICE TO CARU

11. That brings me to my second point regarding Article 7: namely, that Uruguay and Argentina can always agree to dispense with the Article 7 notice to CARU, and proceed directly to the party-to-party negotiations envisioned by later articles without violating the Statute. [Slide 4 off.]

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[105] CMU, Vol. IV, Ann. 77 (CARU Minutes No. 5/95, pp. 712-713, 23 June 1995).

12. Argentina's contrary argument is legally and logically unsupportable. It describes CARU's role in the Article 7 process as "obligatory"[106]; it describes notice to CARU as "an initial and essential formality"[107]. On this ostensible basis, Argentina has argued: "By failing, from the outset, to meet its obligation to refer the matter to CARU, Uruguay immediately invalidated the entire procedure . . ."[108] We heard this same argument last week from Professor Pellet, among others[109]. Argentina appears to be arguing that the Parties could not validly agree to dispense with this allegedly "mandatory" and "essential" formality without violating the Statute.

13. Argentina is wrong. Although the procedural provisions of the Statute, including Article 7, certainly constitute elements of the *lex specialis* between the Parties, they by no means constitute *jus cogens*. Argentina sensibly does not argue that they do, and Uruguay is gratified by Professor Kohen's express recognition of that fact last week[110]. The consequence, of course, is that there is nothing at all to prevent the Parties from derogating from the Statute's procedural formalities. If the Parties agree to dispense with CARU's preliminary review under Article 7, and advance directly to the government-to-government consultations envisioned by later articles, there is nothing stopping them. It is a simple matter of consent.

14. This is all the more true given the limited nature of CARU's initial review and the function it serves in the scheme of the Statute. As Professor McCaffrey described earlier, the essential function of CARU's preliminary review is to determine whether further dealings directly between the Parties are even necessary. If the Commission decides that a project poses no risk of harm, there is no need for Party-to-Party contacts. If CARU comes to the opposite conclusion, however, or if the two delegations cannot agree, direct Government-to-Government consultations ensue.

15. If, as happened in this case, the Parties have an obvious difference of opinion about a project that will render direct dealings necessary, they are free to agree to go straight to direct talks without being chained to the procedural formalities set forth in Article 7. After all, where does

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[106]RA, para. 1.161.

[107]*Ibid.*

[108]*Ibid*.

[109]See, for example, CR 2009/13, p. 29, para. 9 (Pellet).

[110]CR2009/14, p. 13, para. 3 (Kohen).

CARU's summary review lead when the two delegations cannot agree? The answer is to direct contacts between the two Governments. What possible sense would it make to insist that the Parties adhere to all the prior formalities if they are obviously going to end up in direct talks anyway? The answer, of course, is "none".

16. In this respect, I was very interested to hear my friend Professor Sands's resounding statement last week that, if Uruguay had notified Argentina about the Botnia project through CARU, "I can assure you that such objection would most certainly have been forthcoming"[111]. OK; fair enough. So why on earth would you go back to CARU where deadlock was preordained and when the need for direct negotiations was already blindingly obvious? You would not, and, as I will explain, the Parties did not.

17. Uruguay's sensible, real-world reading of the Statute finds support in general international law, the relevance of which Professor Condorelli will have more to say about tomorrow. Article 18, paragraph 2, of the 1997 United Nations Watercourses Convention, for instance, provides that if watercourse States disagree about the need for a notification, they shall proceed directly to consultations and negotiations[112]. There is no need to decide first whether notice is necessary and then revert the matter back to the beginning of the process, only to end up back in direct negotiation. Again, the irrationality of the results speaks for itself.

18. Since Argentina is fond of recharacterizing Uruguay's arguments, let me be clear. Nothing I have said means that *one* of the Parties can *unilaterally* dispose of any of the procedures set forth in Articles 7 to 12. All it means is that if both Parties agree that their interests are best served by going straight to negotiations — and skipping over the procedural steps that normally precede and lead to such direct dealings — they are free to do so.

19. Mr. President, Members of the Court, before I take up the evidence demonstrating the Parties' decision to deal with each other directly, outside the ambit of CARU, there is one other issue I should address. Argentina's recent embrace of the sanctity of notice under Article 7 represents something of a change of heart. The Statute has been in force since 1976. In the 33 years since, Argentina has authorized the construction and operation of scores of industrial

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[111]CR 2009/13, p. 65, para. 8 (Sands).

[112]Convention on the Law of the Non-navigational Uses of International Watercourses, 1997, Art. 18, para. 2

plants that discharge waste into the Uruguay river and the waters directly flowing into it. Never once did it notify CARU under Article 7. And never once did it consult with Uruguay about these projects[113].

20. In its written pleadings, Uruguay identified many of Argentina's industrial plants by name and specified the environmental risks associated with them[114]. Argentina has never made any effort to deny any of the facts. In fact, Professor Boisson de Chazournes acknowledged that 170 industrial plants have been built on or near the Uruguay river since 1976[115]. How then did she try to explain why Argentina never notified CARU about any of them under Article 7? Because, she said, none of them were, at least in Argentina's estimation, of sufficient scope to affect navigation, the régime of the river or water quality[116].

21. Mr. President, this rationalization is flatly inconsistent with Argentina's own arguments about the 1975 Statute. How many times last week did we hear Argentina decry Uruguay's alleged "unilateral" actions? In his summation of Argentina's case last Thursday, Professor Kohen stated that the Statute "leaves no room for unilateralism"[117]. Argentina cannot then seriously claim for itself the right to determine on its own, independent of CARU and Uruguay, whether a project is or is not of sufficient scope to affect the river.

22. I should add that Professor Boisson de Chazournes's explanation is factually incorrect as well. As demonstrated in Uruguay's written pleadings, many of Argentina's plants can and do affect the river. To cite just one example, the chemical plant, Fanaquímica, operates alongside the Uruguay river in Colón, Entre Ríos Province. It manufactures chemical adhesives, plastics, glue, aerosols, insecticides, and silicon sealers, and discharges liquid effluents into the river. In the year 2000, it was sanctioned by Argentine environmental authorities. More recently, in January 2008, Fanaquímica was sanctioned yet again after an investigation revealed that the company's effluents were producing a visible dark sheen on the river. In fact, it was temporarily shut down until it could bring itself into compliance with Argentine environmental law. Plainly, it

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[113]CMU, paras. 1.140-2.150.

[114]CMU, Vol. X, Ann. 224 (Ministry of Industry, Energy and Mines, "Works on the River Uruguay").

[115]CR 2009/13, pp. 32-33, para. 23 (Boisson de Chazournes).

[116]*Ibid*.

[117]CR 2009/15, p. 58, para. 6 (Kohen).

is of sufficient size to affect the quality of the river's waters. Yet, Argentina never notified CARU, or Uruguay, prior to issuing operating permits for Fanaquímica, or before authorizing it to restart operations in 2008.

III. THE EVIDENCE CONCERNING THE PARTIES' AGREEMENTS

23. Mr. President, I come then to the evidence showing the Parties' agreement to dispense with CARU's summary review under Article 7 and proceed straight to direct talks. The issue has been fully briefed in the Parties' written pleadings and I do not intend to repeat what is stated there. In the footnotes of this speech, you will find references to the relevant sections of *both* Parties' pleadings[118].

24. The essential facts are these. In October 2003, Uruguay issued a preliminary environmental authorization for ENCE. For the reasons described in our pleadings, Uruguay did not and does not consider that notice to CARU was due at that time[119]. Argentina, of course, has a different view[120]. We say Uruguay has by far the better of that argument. But be that as it may, the undisputed fact is that as a result of the disagreement in CARU, the Commission became "paralysed". That, by the way, is Argentina's word[121]. And it is accurate. For the six-month period between October 2003 and March 2004, CARU did not meet. Throughout this period, it would therefore have been impossible for Uruguay to notify CARU under Article 7, or even send any information to Argentina through the Commission.

25. What then happened during this period? The evidence is clear. On 27 October 2003, the Uruguayan Foreign Ministry sent a diplomatic Note to Argentina in which it included ENCE's 22 July 2002 environmental impact assessment, DINAMA's 2 October technical report on the EIA, and the 9 October preliminary environmental authorization[122]. Argentina does not dispute these

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[118]CMU, paras. 3.45-3.74; RU, paras. 3.10-3.71; MA, paras. 2.32-2.35, 2.59, 2.61; RA, paras. 2.51, 2.56.

[119]CMU, paras. 2.52-2.71 and 3.7-3.17; RU, paras. 2.35-2.52.

[120]MA, paras. 2.15-2.29.

[121]MA, para. 2.29.

[122]CMU, para. 3.40; MA, para. 2.23.

facts, at least in its written pleadings. Argentina also admits that Uruguay subsequently sent its entire file on the ENCE project to Argentina — nearly 1,700 pages — on 7 November 2003[123].

26. That is not all. Argentina then proceeded to analyse these materials, and in February 2004, its technical advisers to CARU issued a report specifically addressing the environmental impact of the plant[124]. Mr. President, there are two equally remarkable things about this report. First, Argentina has never *once* acknowledged its existence in these proceedings. Uruguay highlighted the report in its Counter-Memorial and all but *dared* Argentina to respond[125]. It did not. There is no mention of it anywhere in its Reply. Which brings me to the second remarkable thing about the report. It established that there would be no significant environmental impact from the plant. [Slide 5.] Let me show you a description of the report from a 2004 year-end report prepared by the Chief of Staff to Argentina's Cabinet of Ministers. This is at tab 5 of your judges' folders:

> "In February 2004, *the report from CARU's advisors established that there would be no significant environmental impact on the Argentine side*; it was estimated that said impact would be, mainly, the bad odors that usually come from pulp mills and that might reach the Argentine shore of the Uruguay River."[126]

27. The same year-end report also notes: "Controls on both plants will be more extensive than those our own country has . . . on the Paraná River, which were nevertheless accepted by Uruguay."[127] I will come back to the reference to "both plants" — that is, both the ENCE and Botnia plants — in a moment. [Slide 5 off.]

28. On the basis of this February 2004 report, one of *Argentina's* delegates to CARU, Mr. Darío Garín, subsequently stated flatly and on the CARU record [Slide 6.]:

> "It must be pointed out, with complete and absolute emphasis, that none of the different technical reports evidence that the activity in question causes an irreversible and unavoidable damage to the environment, at least of a sufficient level that would

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[123]CMU, para. 3.40; MA, para. 2.25.

[124]CMU, para. 3.42.

[125]CMU, para. 3.42; RU, para. 3.41.

[126]CMU, Vol. III, Ann. 46 (Statement by Argentine Ministry of Foreign Affairs, International Trade and Culture, included in "Report of the Head of the Argentine Cabinet of Ministers, Alberto Angel Fernandez, to the Argentine Chamber of Deputies Ministry of Foreign Affairs to the Chamber of Deputies", Report No. 64, p. 136, March 2005).

[127]CMU, para.3.43.

> warrant the suspension of the plant or opposition to its construction, at least with any scientific basis . . .”[128]

This is at tab 6 of your judges’ folder.

29. Mr. President, I am not here to discuss Article 9, but I cannot help but note that Argentina’s February 2004 report looks very much like an expression of no objection under that Article.

30. At any rate, what happened then? With CARU still not meeting, the Foreign Ministers of the two countries met on 2 March 2004 and agreed on the way forward[129]. [Slide 6 off.] Specifically, they agreed that the plant would be built and CARU would focus its efforts on monitoring water quality. According to a 3 March 2004 press account in Argentina’s leading paper, *La Nación*, the Argentine Deputy Minister for Foreign Affairs for Latin American Affairs, Ambassador Eduardo Sguiglia, described the Foreign Ministers’ agreement [Slide 7.] this way — you will find this at tab 7 of your judges’ folder:

> “It was agreed that in the next four years of construction, there will be exhaustive monitoring to ensure compliance with the environmental guidelines established for the installation of the plant, which will include permanent monitoring.”[130]

31. Ambassador Sguiglia and Ambassador Pablo Sader of Uruguay proceeded to exchange drafts of the agreement throughout March and April 2004 for inclusion in the minutes of CARU at its next meeting. [Slide 7 off.] That agreement is indeed reflected in the minutes of the first meeting of CARU since October 2003, which took place on 15 May 2004. I have to say, Mr. President, one of the more remarkable aspects of Argentina’s presentations last week was the lengths to which they went *not* to show you that agreement. Professor Kohen had a lot to say about it, but he dared not actually show it to you. Allow me do so. [Slide 8.] Mind you, this is from the agreed minutes of CARU and can be found at tab 8 of your judges’ folders:

> “On 2 March 2004 the Foreign Ministers of Argentina and Uruguay reached an understanding with respect to the proper course of action that this matter will take, that is, to have the Uruguayan government provide the information relating to the

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[128]CMU, Vol. IV, Ann. 99 (CARU Minutes No. 01/04, pp. 18-19 (15 May 2004)).

[129]CMU, para. 3.45.

[130]CMU, Vol. IX, Ann. 183 (*La Nación* (Argentina), “Uruguay Promises to Inform the Government about the Paper Mill” (3 March 2004)).

construction of the plant, and *with respect to the operational phase . . ., to have CARU undertake the monitoring of water quality in conformity with its Statute*."[131]

32. In its written pleadings and again last week, Argentina has tried to tell you that this agreement reflects nothing more than a decision to send the ENCE plant back to CARU for a summary review under Article 7[132]. We say that is wrong, and obviously so. First, the text. It says absolutely *nothing* about sending the matter back to CARU for review under Article 7. Instead, it says that CARU will "undertake the monitoring of water quality in conformity with its Statute". *Expressio unius est exclusio alterius*. Instead, the agreement reflects that the construction and eventual operation of the plant are agreed facts. Uruguay submits that there is just no other way to read the statement that it will provide information "relating to the construction of the plant" and that "with respect to the operational phase" CARU will undertake monitoring. [Slide 8 off.]

33. Second, the practicalities of the situation. Argentina would have you believe that the Foreign Ministers of Argentina and Uruguay met, and two ambassadorial level officials conferred for over a month, only to agree to send the matter back to CARU so it could perform its initial screening function, the purpose of which, as we have seen, is to determine whether higher level talks are necessary. It just makes no sense. Moreover, the truth is that Argentina's technical advisers to the Commission had already reviewed the information concerning the plant and come to the conclusion that "there would be no significant environmental impact on the Argentine side". There was therefore no need to send the matter back for a review that had already taken place.

34. Third, the subsequent conduct. After the fact, there is nothing in the record to suggest that CARU expected to undertake a review under Article 7. Exactly as one of its own delegates stated on the record on 15 May 2004, "an important limiting factor in our position is the agreement executed by the Foreign Ministers on 2 March 2004" [133]. Instead, what CARU proceeded to do was design the water quality monitoring programme known as "PROCEL", to which Professor Boyle referred earlier today. Each and every one of the drafts of PROCEL, and the final plan as adopted in CARU, which was later abandoned by Argentina, contain exactly the same

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[131]CMU, Vol. IV, Ann. 99 (CARU Minutes No. 01/04, *op. cit.*, p. 33); emphasis added.

[132]See, for example, RA, para. 2.106.

[133]CMU, Vol. IV, Ann. 99 (CARU Minutes No. 01/04, p. 33, 15 May 2004).

phrase in the very first line: "Taking account of the future installation of cellulose plants . . ."[134] Again, the installation is a given and agreed fact.

35. This same understanding is reflected in multiple other Argentine documents, a great many of which are cited in the written pleadings — or at least the Uruguayan written pleadings[135]. Here, now, let me mention just one. According to a statement of the Argentine Foreign Ministry of Foreign Affairs contained in a 2004 year-end report to [slide 9] the Argentine Senate that is at tab 9 of your judges' folders:

> "On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding on the course of action to give to this subject. This is, for the Government of Uruguay to facilitate information relative to the construction of the plant, and *in regard to the operational phase, instruct the CARU to proceed to carry out a monitoring of the water quality of the River Uruguay* . . . The understanding of the Foreign Ministers, the note from the Governor of Entre Rios and the report of the technical experts coincide in that *the CARU should concentrate its activity on the subject of mechanisms of control*."[136]

36. I hesitate to repeat myself, but there is just no way to read this so that it means anything other than that it was understood that the plant would be built and CARU would focus exclusively on monitoring.

37. Mr. President, you heard quite a lot, from quite a lot of people last week, about certain statements attributed to Uruguay's former Foreign Minister, Mr. Didier Opertti, and one of its Ambassadors, Mr. Felipe Paolillo. [Slide 9 off.] With respect to former Minister Opertti's 2003 statements about CARU, Uruguay has already made clear on multiple occasions that both the ENCE and Botnia plants are within CARU's competence, so the issue is moot. The fact that virtually every one of its counsel seized on the same single statement reflects, I suspect, a certain lack of material to work with, more than anything else. Moreover, the statements attributed to former Minister Opertti came long before the agreement between Uruguay and Argentina I have described for the Court, and quickly faded into historical irrelevance anyway.

38. With regard to Mr. Paolillo's statement, that Uruguay did not formally inform Argentina about ENCE through CARU but, rather, "agreed to other alternative procedures at the highest

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[134]CMU, para. 3.28.

[135]CMU, paras. 3.46-3.49 and 3.54-3.58.

[136]CMU, Vol. III, Ann. 47 (Statement by Argentine Ministry of Foreign Affairs, International Trade and Culture, included in Report of the Head of the Cabinet of Ministers, Alberto Angel Fernandez, to the Argentine Senate, Report No. 65, p. 617, Mar. 2005); emphasis added.

levels": this, of course, is a reasonably accurate depiction of reality. In our view, the essential fact is that Argentina was, just as the Ambassador said, fully informed and consulted and, that at the highest levels. Indeed, it specifically came to the conclusion that the ENCE plant was environmentally viable.

39. So much for the argument that Uruguay violated Article 7 with respect to ENCE.

40. The evidence also shows that Uruguay did not violate Article 7 with respect to Botnia either. Indeed, the facts show that the agreement concerning ENCE was later extended to Botnia, as well.

41. This is perhaps most easily demonstrated by reference to another one of Argentina's own official documents. A 2004 year-end report, prepared by the Chief of Staff of the Argentine Cabinet of Ministers, contains an extremely informative — and we say dispositive — question and answer between an Argentine legislator and the Foreign Ministry. [Slide 10.] The full text is before you at tab 10 of your judges' folders and projected on the screens[137]. Although a 2004 year-end report, it was actually prepared in March 2005[138].

42. Mr. President, I do not propose to read the entire text. But what makes it particularly interesting, and the reason we offer it to you, is the extent to which it defines Argentina's understanding of the scope of its controversy with Uruguay, Argentina's position on that controversy, and the agreement putting it to an end. As you can see, the heading above the question and answer make clear that the issue encompasses the "installation of the cellulose *plants*" that is, a plural reference to *both* plants. The question likewise addresses itself to the installation of the "*plants*", again, plural. The scope of what is referred to as "the official Argentine claim", and thus the controversy, similarly encompasses "the installation of the cellulose *plants*". Therefore, when the report states, as you see in the middle of the page, that the Government of Argentina had "put an end to the controversy", it can only mean the controversy with respect to *both* plants. This reading is confirmed in subsequent paragraphs of the statement which makes reference to the time "after the plants begin to operate" and the fact that "controls on *both plants will be* [i.e., future

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[137]CMU, Vol. III, Ann. 46 (Statement by Argentine Ministry of Foreign Affairs, International Trade and Culture, included in Report of the Head of the Argentine Cabinet of Ministers, Alberto Angel Fernandez, to the Argentine Chamber of Deputies Ministry of Foreign Affairs to the Chamber of Deputies", Report No. 64, p. 136, Mar. 2005).

[138]*Ibid*., cover page.

tense, unconditional — 'serán' in Spanish] more extensive than the ones our country has". There can therefore be no doubt that Argentina understood that the controversy covered "the two plants", and that that controversy as to both ENCE and Botnia — not just ENCE— was "put to an end".

43. Before leaving this report, one other point bears mention. Although the report relates to events during the year 2004, it was, as I said, delivered in March 2005; that is, one month *after* Uruguay issued Botnia's preliminary environmental authorization in February 2005. Uruguay's allegedly "unilateral" authorization of the Botnia plant thus did not elicit a contemporaneous objection from Argentina at the highest levels. Quite the contrary. As of March 2005, the controversy was over. [Slide 10 off.]

44. Again, CARU's subsequent conduct confirms the point. [Slide 11.] As I have already mentioned, each and every draft of the joint monitoring programme PROCEL contains precisely the same phrase, "taking into account the future installation of cellulose plants . . ." You can find that at tab 11 to your judges' folders. You will also see the reference to "the facilities", again plural. In fact, the PROCEL monitoring programme was, as Professor Boyle mentioned, formally approved and adopted, in CARU, on 12 November 2004[139]. It thus has the force of an international agreement between the two Parties and represents a binding obligation on Argentina with which it did not comply.

45. Mr. President, even as CARU was putting the finishing touches on the PROCEL programme, [Slide 11 off] the ground almost literally shifted under Argentina's feet. Popular opposition to the plants among elements of the Gualeguaychú population exploded, as did discontent with the Argentine Government's approach to the issue. This is most dramatically illustrated by the fact that on 30 April 2005, approximately 40,000 Argentinians marched on the General San Martín Bridge connecting Argentina and Uruguay in protest[140]. As Ambassador Gianelli mentioned in his opening speech, they have been there virtually ever since.

46. The result of this mounting internal pressure was that Argentina began backtracking from its prior acceptance of the plants, and CARU again became stuck. On 5 May 2005, Argentina's Minister for Foreign Affairs, Rafael Bielsa, sent a letter to his Uruguayan counterpart, expressly

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[139]CMU, Vol. IV, Ann. 108 (CARU Minutes No. 08/04, 12 Nov. 2004).

[140]CMU, para. 3.67.

requesting further negotiations about the Botnia and ENCE plants, but specifically *outside* the ambit of CARU. [Slide 12.] The text of Foreign Minister Bielsa's letter is included at tab 2 of your judges' folder and reads:

> "Dear Mr. Minister, dear friend,
>
> I am writing to you in connection with the project for the installation of two cellulose . . . plants in the area of Fray Bentos, opposite the Argentine city of Gualeguaychú, Province of Entre Ríos.
>
> In this regard, I must again convey to you the deep concern of the population and authorities of the said province — concern that the Argentine federal government shares — as a consequence of the environmental impact that the operation of these plants could bring about.
>
> *Without prejudice of the water quality control and monitoring procedures by CARU, this situation, due to its potential seriousness, requires a more direct intervention of the competent environmental authorities, with the cooperation of specialized academic institutions.*"[141]

47. Recognizing the difficult political situation the Government of its much larger neighbour found itself in, Uruguay acceded to Argentina's request for further consultations and negotiations. [Slide 12 off.] Thus, GTAN was born. As stated in a July 2005 report from the Head of Argentina's Cabinet of Ministers to the Argentine Senate [Slide 13], the text of which is at tab 12 of your judges' folders:

> "On 31 May, after exchanging proposals and counterproposals, both countries reached the following agreement:
>
> > 'In conformity with what was agreed to by the Presidents of the Republic of Argentina and the Eastern Republic of Uruguay, the Foreign Ministries of our two countries constituted, under their supervision a group of Technical Experts for complementary studies and analysis, exchange of information and follow up on the effects that the operation of *the cellulose plants that are being constructed* in the Eastern Republic of Uruguay *will have* on the ecosystem of the shared Uruguay River.'"[142]

48. Professor Condorelli will have more to say about the language of this agreement tomorrow, and in particular the fact that this agreement in no way detracted from the prior understandings, relied upon by Uruguay, that the plants would be built. The point on which I invite

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[141] RU, Vol. II, Ann. R15 (Letter sent from the Argentine Minister for Foreign Affairs, Rafael Bielsa, to the Uruguayan Minister for Foreign Affairs, Reinaldo Gargano, 5 May 2005); emphasis added.

[142] RU, Vol. II, Ann. R14 (Statement by the Argentine Ministry of Foreign Affairs, International Trade and Culture, included in "Report of the Head of the Cabinet of Ministers, Alberto Angel Fernandez, to the Argentine Senate", Report No. 65, p. 620, July 2005); emphasis added.

the Court to focus for present purposes is the fact that it was *Argentina* that invited Uruguay to participate in "a more direct intervention" by the authorities of the two States, rather than proceed through CARU under Article 7 or otherwise. If, contrary to the facts I have now set out, the Botnia plant was still ripe for CARU's preliminary review under Article 7, it was Argentina that invited Uruguay to skip that step and proceed straight to high-level consultations and negotiations. As stated in the final paragraph of Argentina's 5 May letter, "this situation, due to its potential seriousness, requires a more direct intervention of the competent environmental authorities". Argentina cannot now be heard to complain about the fact that Uruguay accepted its proposal. [Slide 13 off.]

49. In its written pleadings and again last week, Argentina tried to escape the implications of this agreement by claiming that, like the 2 May 2004 agreement on ENCE, it was nothing more than an agreement to send the matter back to CARU for preliminary review under Article 7. Yet, once again, the argument makes no sense. First, as I described, the Parties had already agreed that both plants would be built, subject to monitoring by CARU. Second, even were that not the case, does Argentina seriously expect the Court to believe that the Presidents and Foreign Ministers of Argentina and Uruguay would invest so much of their time working to achieve only an agreement to send the matter back to CARU for a purely preliminary review, especially when the only possible outcome at that point would have been further direct dealings between the two Governments? It just cannot be. Third, and very much related to that last point, reference back to CARU at that point would have been an exercise in futility. Argentina itself has recognized that it was exactly because recourse to CARU at that point was pointless that GTAN was created. In an important diplomatic Note dated 12 January 2006, about which Professor Condorelli will have more to say tomorrow, the Argentine Foreign Ministry itself recounted the events leading to the creation of GTAN as follows: "The lack of agreement within [CARU] . . . led the Governments of both countries to deal with the question directly and to establish a High Level Technical Group (GTAN) in May 2005."[143]

[143]CMU, Vol. III, Ann. 59 (Diplomatic Note sent from Argentine Minister for Foreign Affairs to Uruguayan Ambassador in Argentina, 12 Jan. 2006).

50. Mr. President, I respectfully submit that the evidence on the record before you shows unmistakably that Uruguay did not violate Article 7 of the 1975 Statute. Instead, Uruguay and Argentina together jointly decided to dispense with CARU's preliminary, 30-day review in favour of the direct negotiations contemplated in Article 12. The direct negotiations were conducted by the GTAN, which was specifically established by the Parties for that purpose.

51. Mr. President, Members of the Court, thank you very much for your patient attention. Tomorrow morning, Professor Condorelli will address what happened in and during the GTAN process, and show that Uruguay fully complied with all of its obligations under the Statute to consult and to negotiate in good faith. That concludes Uruguay's presentations this afternoon.

The VICE-PRESIDENT, Acting President: Thank you, Mr. Martin. The Court now rises, and will resume tomorrow morning at 10 o'clock, when Uruguay will complete its first round argument.

The Court rose at 12.40 p.m.