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Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNÉE 2009

Audience publique

tenue le jeudi 1er octobre 2009, à 15 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 Thursday 1 October 2009, at 3 p.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
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood, juges
MM. Torres Bernárdez
Vinuesa, juges *ad hoc*

M. Couvreur, greffier

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

Le Gouvernement de la République argentine est représenté par :

S. Exc. Mme Susana Ruiz Cerutti, ambassadeur, conseiller juridique du ministère des relations extérieures, du commerce international et du culte,

comme agent ;

S. Exc. M. Horacio A. Basabe, ambassadeur, directeur général de l'Institut du service extérieur de la nation, ancien conseiller juridique du ministère des relations extérieures, du commerce international et du culte, membre de la Cour permanente d'arbitrage,

S. Exc. M. Santos Goñi Marenco, ambassadeur de la République argentine auprès du Royaume des Pays-Bas,

comme coagents ;

M. Alain Pellet, professeur à l'Université Paris Ouest, Nanterre-La Défense, membre et ancien président de la Commission du droit international, membre associé de l'Institut de droit international,

M. Philippe Sands QC, professeur de droit international au University College de Londres, avocat, Matrix Chambers, Londres,

M. Marcelo Kohen, professeur de droit international à l'Institut de hautes études internationales et du développement, Genève, membre associé de l'Institut de droit international,

Mme Laurence Boisson de Chazournes, professeur de droit international à l'Université de Genève,

M. Alan Béraud, ministre à l'ambassade de la République argentine auprès de l'Union européenne, ancien conseiller juridique du ministère des affaires étrangères, du commerce international et du culte,

M. Daniel Müller, chercheur au Centre de droit international de Nanterre (CEDIN), Université de Paris Ouest, Nanterre-La Défense,

comme conseils et avocats ;

M. Homero Bibiloni, secrétaire d'Etat à l'environnement et au développement durable,

comme autorité gouvernementale ;

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

M. Howard Wheater, docteur en hydrologie de l'Université de Bristol, professeur d'hydrologie à l'Imperial College, directeur de l'Imperial College Environment Forum,

M. Juan Carlos Colombo, docteur en océanographie de l'Université de Québec, professeur à la faculté des sciences et au musée de l'Université de La Plata, directeur du Laboratoire de chimie environnementale et de biogéochimie de l'Université de La Plata,

M. Neil McIntyre, docteur en ingénierie environnementale, maître de conférences à l'Imperial College, Londres,

The Government of the Republic of Argentina is represented by:

H.E. Ms Susana Ruiz Cerutti, Ambassador, Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship,

as Agent;

H.E. Mr. Horacio A. Basabe, Ambassador, Director of the Argentine Institute for Foreign Service, former Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship, Member of the Permanent Court of Arbitration,

H.E. Mr. Santos Goñi Marenco, Ambassador of the Argentine Republic to the Kingdom of the Netherlands,

as Co-Agents;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Philippe Sands QC, Professor of International Law at the University College London, Barrister at Matrix Chambers, London,

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, associate member of the Institut de droit international,

Ms Laurence Boisson de Chazournes, Professor of International Law at the University of Geneva,

Mr. Alan Béraud, Minister at the Embassy of the Argentine Republic to the European Union, former Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Counsel and Advocates;

Mr. Homero Bibiloni, Federal Secretary of Environment and Sustainable Development,

as Governmental Authority;

Mr. Esteban Lyons, National Director of Environmental Control, Secretariat of Environment and Sustainable Development,

Mr. Howard Wheater, PhD in Hydrology at Bristol University, Professor of Hydrology at Imperial College and Director of the Imperial College Environment Forum,

Mr. Juan Carlos Colombo, PhD in Oceanography at the University of Québec, Professor at the Faculty of Sciences and Museum of the National University of La Plata, Director of the Laboratory of Environmental Chemistry and Biogeochemistry at the National University of La Plata,

Mr. Neil McIntyre, PhD in Environmental Engineering, Senior Lecturer in Hydrology at Imperial College London,

Mme Inés Camilloni, docteur en sciences atmosphériques, professeur de sciences atmosphériques à la faculté des sciences de l'Université de Buenos Aires, maître de recherche au conseil national de recherche (CONICET),

M. Gabriel Raggio, docteur en sciences techniques de l'Ecole polytechnique fédérale de Zürich (ETHZ) (Suisse), consultant indépendant,

comme conseils et experts scientifiques ;

M. Holger Martinsen, ministre au bureau du conseiller juridique du ministère des affaires étrangères, du commerce international et du culte,

M. Mario Oyarzábal, conseiller d'ambassade, bureau du conseiller juridique du ministère des affaires étrangères, du commerce international et du culte,

M. Fernando Marani, secrétaire d'ambassade, ambassade de la République argentine au Royaume des Pays-Bas,

M. Gabriel Herrera, secrétaire d'ambassade, bureau du conseiller juridique du ministère des affaires étrangères, du commerce international et du culte,

Mme Cynthia Mulville, secrétaire d'ambassade, bureau du conseiller juridique du ministère des affaires étrangères, du commerce international et du culte,

Mme Kate Cook, avocat, Matrix Chambers, Londres, spécialisée en droit de l'environnement et en droit du développement,

Mme Mara Tignino, docteur en droit, chercheur à l'Université de Genève,

M. Magnus Jesko Langer, assistant d'enseignement et de recherche, Institut de hautes études internationales et du développement, Genève,

comme conseillers juridiques.

Le Gouvernement de l'Uruguay est représenté par :

S. Exc. M. Carlos Gianelli, ambassadeur de la République orientale de l'Uruguay auprès des Etats-Unis d'Amérique,

comme agent ;

S. Exc. M. Carlos Mora Medero, ambassadeur de la République orientale de l'Uruguay auprès du Royaume des Pays-Bas,

comme coagent ;

M. Alan Boyle, professeur de droit international à l'Université d'Edimbourg, membre du barreau d'Angleterre,

M. Luigi Condorelli, professeur à la faculté de droit de l'Université de Florence,

M. Lawrence H. Martin, cabinet Foley Hoag LLP, membre du barreau de la Cour suprême des Etats-Unis d'Amérique, du barreau du district de Columbia et du barreau du Commonwealth du Massachusetts,

Ms Inés Camilloni, PhD in Atmospheric Sciences, Professor of Atmospheric Sciences at the Faculty of Sciences of the University of Buenos Aires, Senior Researcher at the National Research Council (CONICET),

Mr. Gabriel Raggio, Doctor in Technical Sciences of the Swiss Federal Institute of Technology Zurich (ETHZ) (Switzerland), Independent Consultant,

as Scientific Advisers and Experts;

Mr. Holger Martinsen, Minister at the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Mr. Mario Oyarzábal, Embassy Counsellor, Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Mr. Fernando Marani, Embassy Secretary, Embassy of the Argentine Republic in the Kingdom of the Netherlands,

Mr. Gabriel Herrera, Embassy Secretary, Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Ms Cynthia Mulville, Embassy Secretary, Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Ms Kate Cook, Barrister at Matrix Chambers, London, specializing in environmental law and law relating to development,

Ms Mara Tignino, PhD in Law, Researcher at the University of Geneva,

Mr. Magnus Jesko Langer, teaching and research assistant, Graduate Institute of International and Development Studies, Geneva,

as Legal Advisers.

The Government of Uruguay is represented by:

H.E. Mr. Carlos Gianelli, Ambassador of the Eastern Republic of Uruguay to the United States of America,

as Agent;

H.E. Mr. Carlos Mora Medero, Ambassador of the Eastern Republic of Uruguay to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, Member of the English Bar,

Mr. Luigi Condorelli, Professor at the Faculty of Law, University of Florence,

Mr. Lawrence H. Martin, Foley Hoag LLP, Member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,

M. Stephen C. McCaffrey, professeur à la McGeorge School of Law de l'Université du Pacifique, Californie, ancien président de la Commission du droit international et rapporteur spécial aux fins des travaux de la Commission relatifs aux cours d'eau internationaux,

M. Alberto Pérez Pérez, professeur à la faculté de droit de l'Université de la République, Montevideo,

M. Paul S. Reichler, cabinet Foley Hoag LLP, membre du barreau de la Cour suprême des Etats-Unis d'Amérique et du barreau du district de Columbia,

comme conseils et avocats ;

M. Marcelo Cousillas, conseiller juridique à la direction nationale de l'environnement, ministère du logement, de l'aménagement du territoire et de l'environnement de la République orientale de l'Uruguay,

M. César Rodriguez Zavalla, chef de cabinet au ministère des affaires étrangères de la République orientale de l'Uruguay,

M. Carlos Mata, directeur adjoint des affaires juridiques au ministère des affaires étrangères de la République orientale de l'Uruguay,

M. Marcelo Gerona, conseiller à l'ambassade de la République orientale de l'Uruguay au Royaume des Pays-Bas,

M. Eduardo Jiménez de Aréchaga, avocat, admis au barreau de la République orientale de l'Uruguay et membre du barreau de New York,

M. Adam Kahn, cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,

M. Andrew Loewenstein, cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,

Mme Analia Gonzalez, LLM, cabinet Foley Hoag LLP, admise au barreau de la République orientale de l'Uruguay,

Mme Clara E. Brillembourg, cabinet Foley Hoag LLP, membre des barreaux des districts de Columbia et de New York,

Mme Cicely Parseghian, cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,

M. Pierre Harcourt, doctorant à l'Université d'Edimbourg,

M. Paolo Palchetti, professeur associé à la faculté de droit de l'Université de Macerata,

Mme Maria E. Milanes-Murcia, MA, LLM, JSD Candidate à la McGeorge School of Law de l'Université du Pacifique, doctorante à l'Université de Murcia, admise au barreau d'Espagne,

comme conseils adjoints ;

Mme Alicia Torres, directrice nationale de l'environnement au ministère du logement, de l'aménagement du territoire et de l'environnement de la République orientale de l'Uruguay,

M. Eugenio Lorenzo, conseiller technique à la direction de l'environnement du ministère du logement, de l'aménagement du territoire et de l'environnement de la République orientale de l'Uruguay,

Mr. Stephen C. McCaffrey, Professor at the McGeorge School of Law, University of the Pacific, California, former Chairman of the International Law Commission and Special Rapporteur for the Commission's work on international watercourses,

Mr. Alberto Pérez Pérez, Professor at the Faculty of Law of the University of the Republic, Montevideo,

Mr. Paul S. Reichler, Foley Hoag LLP, Member of the Bars of the United States Supreme Court and the District of Columbia,

as Counsel and Advocates;

Mr. Marcelo Cousillas, Legal Counsel at the National Directorate for the Environment, Ministry of Housing, Territorial Planning and Environment of the Eastern Republic of Uruguay,

Mr. César Rodriguez Zavalla, Chief of Cabinet, Ministry of Foreign Affairs of the Eastern Republic of Uruguay,

Mr. Carlos Mata, Deputy Director of Legal Affairs, Ministry of Foreign Affairs of the Eastern Republic of Uruguay,

Mr. Marcelo Gerona, Counsellor of the Embassy of the Eastern Republic of Uruguay in the Kingdom of the Netherlands,

Mr. Eduardo Jiménez de Aréchaga, Attorney at law, admitted to the Bar of the Eastern Republic of Uruguay and Member of the Bar of New York,

Mr. Adam Kahn, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,

Mr. Andrew Loewenstein, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,

Ms Analia Gonzalez, LLM, Foley Hoag LLP, admitted to the Bar of the Eastern Republic of Uruguay,

Ms Clara E. Brillembourg, Foley Hoag LLP, Member of the Bars of the District of Columbia and New York,

Ms Cicely Parseghian, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,

Mr. Pierre Harcourt, PhD Candidate, University of Edinburgh,

Mr. Paolo Palchetti, Associate Professor at the School of Law, University of Macerata,

Ms Maria E. Milanes-Murcia, M.A., LLM; JSD Candidate, McGeorge School of Law, University of the Pacific; PhD Candidate, University of Murcia; admitted to the Bar of Spain,

as Assistant Counsel;

Ms Alicia Torres, National Director for the Environment at the Ministry of Housing, Territorial Planning and Environment of the Eastern Republic of Uruguay,

Mr. Eugenio Lorenzo, Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Territorial Planning and Environment of the Eastern Republic of Uruguay,

M. Cyro Croce, conseiller technique à la direction de l'environnement du ministère du logement, de l'aménagement du territoire et de l'environnement de la République orientale de l'Uruguay,

Mme Raquel Piaggio, bureau de la gestion des eaux (O.S.E.), consultante technique à la direction de l'environnement du ministère du logement, de l'aménagement du territoire et de l'environnement de la République orientale de l'Uruguay,

M. Charles A. Menzie, PhD., Principal Scientist et directeur d'EcoSciences Practice chez Exponent, Inc., à Alexandria, Virginie,

M. Neil McCubbin, Eng., Bsc. (Eng), 1st Class Honours, Glasgow, Associate of the Royal College of Science and Technology, Glasgow,

comme conseillers scientifiques et experts.

Mr. Cyro Croce, Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Territorial Planning and Environment of the Eastern Republic of Uruguay,

Ms Raquel Piaggio, Water Management Administration — O.S.E. — Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Territorial Planning and Environment of the Eastern Republic of Uruguay,

Mr. Charles A. Menzie, PhD., Principal Scientist and Director of the EcoSciences Practice at Exponent, Inc., Alexandria, Virginia,

Mr. Neil McCubbin, Eng., BSc. (Eng), 1st Class Honours, Glasgow, Associate of the Royal College of Science and Technology, Glasgow,

as Scientific Advisers and Experts.

The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. The Court meets today to hear the second round of oral argument of the Eastern Republic of Uruguay. I now give the floor to Mr. Martin. You have the floor, Sir.

Mr. MARTIN:

ANSWER TO ARGENTINA'S ARGUMENTS ON ARTICLE 7

1. Mr. President, Members of the Court, it is, again, a privilege to appear before you on behalf of Uruguay. Uruguay is mindful of your admonition last week not to repeat ourselves, and to keep our observations as brief as possible. We will make every effort to follow your guidance.

2. My task before you this afternoon is to respond to Argentina's second round presentation concerning the Parties' agreements to dispense with CARU's preliminary review of the ENCE and Botnia projects under Article 7, and to proceed straight to the consultations and negotiations contemplated in later articles. As you will hear, nothing Argentina said on Monday (CR 2009/20) or Tuesday (CR 2009/21) this week undermines any of the points about which we spoke to you last week.

3. Before turning to my primary task, however, there is one enduring point of confusion that must be addressed. It is this: throughout these proceedings, virtually every single one of Argentina's counsel has, on multiple occasions, referred to the preliminary environmental authorizations Uruguay issued to ENCE in 2003, and to Botnia in 2005, as "building" or "construction" permits. Their purpose was clear: to suggest that Uruguay had already committed itself to what Argentina never tires of calling a fait accompli upon the mere issuance of the preliminary authorizations.

4. The trouble is, Mr. President, Argentina's counsel are wrong. Individually, and as a group, they have badly misunderstood the purpose of a preliminary environmental authorization — known as an "AAP" — under Uruguayan law. As Uruguay discussed at length in its written pleadings[1], an AAP is, as its very name suggests, merely a *preliminary* authorization that does nothing more than reflect the Government's initial determination that, based on the review

[1]CMU, paras. 1.15, 1,32, 3.10-3.12; RU, paras. 1.18, 2.47.

conducted to date, a proposed project is environmentally viable[2]. An AAP serves two administrative functions. First, it establishes the environmental requirements with which the project must comply. Second, it sets the further environmental reviews and authorizations required to assess compliance with these environmental requirements[3]. It distinctly *does not*, by itself, authorize construction.

5. An AAP is thus not the endpoint of the permitting process, as Argentina would like the Court to believe, but rather the beginning. After an AAP is issued, the interactive process between Uruguay and the initiating company continues, and Uruguay retains the right to, and does in fact, insist on modifications to projects before even construction, much less operation, can begin[4]. To be sure, an AAP is a *necessary* step in the permitting process. But by no means is it, by itself, *sufficient* to allow construction to begin.

6. The Botnia project proves the point. After Uruguay issued the Botnia AAP in February 2005, the project was required to and did in fact receive no fewer than eight additional authorizations before it was finally permitted to enter operation in November 2007. [Slide 1 on.] These included:

— the approval for the removal of vegetation and earth movement (dated 12 April 2005);

— the approval for the construction phase of the cellulose plant (dated 18 January 2006);

— the approval for the construction of the wastewater treatment plant (dated 10 May 2006);

— the approval for the construction of solid industrial waste landfill (dated 9 April 2007); and

— the approval for operations (dated 31 October 2007)[5].

7. As the Court can see from this list, which is also included in your judges' folders at tab 1, the actual construction of the cellulose plant itself did not begin until nearly a full year after the AAP had issued[6].

8. Two other examples will suffice to illustrate the wholly preliminary and contingent character of an AAP. [Slide 1 off.] The first is the case of the proposed Traspapel cellulose plant

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[2]CMU, para. 3.10.

[3]RU, para. 2.47.

[4]CMU, para. 3.11; RU, para. 2.47.

[5]CMU, para. 4.92, footnote 662; RU, para. 2.48.

[6]CMU, para. 3.117.

that Uruguay considered in the mid-1990s in exactly the spot where Botnia now sits. The Traspapel AAP was issued in August 1995[7]. Yet, the project was subsequently dropped and the plant never built. I should note too that when it later came to CARU's attention that Uruguay had issued the Traspapel AAP without notifying the Commission under Article 7, no one in CARU, including none of Argentina's delegates, objected or adopted the position that the applicant State has in this case; that is, that notice to CARU *must* come before even the most preliminary authorization can issue[8]. By itself, this should give the Court considerable pause about the viability of Argentina's argument on this point.

9. The contingent character of an AAP is also demonstrated in the case of ENCE. By now, the Court knows well that the ENCE AAP was issued in October 2003. The project progressed further than the Traspapel project had, and a permit for ground clearing was issued on 28 November 2005, more than two years later[9]. Even so, the ENCE project too was later abandoned and the plant never built.

10. The conclusion is clear: the mere issuance of the Botnia and ENCE AAPs did not imply that construction, much less operation, was inevitable.

11. I return then to the Parties' agreements to dispense with CARU's preliminary review under Article 7 in favour of immediate direct dealings. I start by noting some welcome points of agreement. First, in their speeches earlier in the week, both Professors Pellet and Kohen finally acknowledged that there is, exactly as Uruguay has always said, no impediment to the Parties' agreeing to set aside any of the Statute's procedural steps in favour of others[10]. Second, although counsel did not directly acknowledge the facts, their failure to deny that Uruguay provided Argentina a raft of information, and consulted with it about both the ENCE and Botnia plants, must be taken as an admission of those facts.

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[7]CMU, para. 2.61.

[8]CMU, para. 2.63.

[9]CMU, para. 3.115; RU, para. 3.48; CMU, Vol. II, Ann. 25.

[10]CR 2009/14, p. 13, para. 4 (Kohen); CR 2009/20, p. 23, para. 22 (Pellet).

12. There are, however, two key differences that remain between us. First, whether the Parties did, in fact, agree to dispense with the Article 7 notice. And second, whether Argentina did or did not agree that the plants will be built. I will deal with each of these issues in turn.

13. With respect to the Parties' agreement to dispense with notice to CARU under Article 7, counsel for Argentina doggedly sticks to their argument that the Parties never so agreed. Rather, they say, what the Parties did in March 2004 was merely agree to send the ENCE matter back to CARU so it could perform its initial screening function under Article 7. Counsel's persistence is admirable, but I respectfully submit that their argument makes no more sense today than it did when we addressed you last week. As we have shown, it would be nonsensical for the Parties, working at the highest levels, to invest so much of their time and effort only to achieve an agreement to send the matter back to CARU for a wholly preliminary review, the only purpose of which is to determine whether higher level contacts are necessary. Although we may be here speaking about the finer points of international procedural law, there is nothing that requires us to set aside our common sense.

14. Quite apart from the logical problems inherent in Argentina's argument, it is also demonstrably incorrect. Last week I discussed how CARU's paralysis led the Uruguayan Foreign Ministry to send nearly 1,700 pages of documentation — that is 1,683 pages, to be precise — about the ENCE plant directly to its Argentine counterpart in October and November 2003[11]. Argentina's own evidence shows that this direct intervention of the two Foreign Ministries actually occurred at *Argentina's* request, precisely because CARU was paralysed. [Slide 2 on.] In the words of a 2005 Report to the Argentine Senate prepared by the Chief of Staff to the Cabinet of Ministers, which you can find at tab 2 of your judges' folders:

> "As a consequence of this grave situation, and not finding within the ambit of CARU the necessary consensus to resolve the matter, *CARU halted its sessions and consideration of the matter was left to both Foreign Ministries* . . .
>
> *In this context and by virtue of the impasse at CARU, the Argentinean Foreign Ministry requested the technical information corresponding to Uruguay.* In November 2003, *in accordance with the proposal by Argentinean Foreign Ministry*, the Uruguayan Foreign Ministry sent the documentation related to the Cellulose project in M'Bopicuá, presented by the company before the Department of the

[11]CMU, para. 3.40.

> Environment (DINAMA) when it requested the environmental authorisation, to the Argentinean Embassy in Montevideo."[12]

15. Last week I described for you what happened after the information the Argentine Foreign Ministry had requested was dispatched and received. [Slide 2 off.] In particular, Argentina's technical advisers to CARU proceeded to analyse it and prepared a report in which they came to the unambiguous conclusion that "*there would be no significant environmental impact on the Argentine side*"[13].

16. On Tuesday, for the first time in the history of this case, we heard Argentina finally acknowledge the existence of this report. In his address, Professor Kohen dismissed it as nothing more than the Argentine advisers' "initial opinions" expressed in their "individual capacities"[14]. This is a remarkable statement, Mr. President. More than anything else, it reflects, I suspect, Argentina's continuing unease with the issue. Individual capacities? The description of the Argentine technical report Uruguay has submitted comes from one of the most official governmental sources imaginable; that is, a formal statement by the Argentine Ministry of Foreign Affairs included in a year-end report to the Chamber of Deputies. No, Mr. President, this is undeniably the official position of the Argentine Government as a whole, and cannot so easily be tossed aside.

17. It is against this background, and in this context, that the Foreign Ministers met on 2 March 2004 and agreed on the way forward, as later documented in the CARU Minutes on 15 May 2004. In particular, it was agreed that the ENCE plant would be built and that CARU would focus its efforts on monitoring water quality.

18. When he spoke on Tuesday, Professor Kohen accused me of being selective and incomplete in my presentation of documents to the Court[15]. He is right. But the reason is not what he suggests. The truth is, Uruguay was and is faced with an embarrassment of riches. There was

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[12]RU, Vol. II, Ann. R14 (Statement by the Argentine Ministry of Foreign Affairs to the Argentine Senate, p. 616; emphasis added.

[13]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)); emphasis added.

[14]CR 2009/21, pp. 42-43, para. 20 (Kohen).

[15]CR 2009/21, p. 37, para. 5 (Kohen).

and is just too much good material to work with. The limited time available compelled us to be choosy.

19. Mr. President, time constraints today are even greater and I could not possibly do justice to the evidence in the record on this point, most of it from Argentine official sources. In the footnotes of this speech, you will find references pointing you to the many documents cited in Uruguay's written pleadings that prove our view of events is correct[16]. I invite the Court to review these documents, not just as they are presented in our pleadings, but in their entirety. Uruguay has every confidence that when you do so, you will see that our depiction of the facts is the right one.

20. For our purposes today, allow me to cite just one more. [Slide 3 on.] A statement from the Argentine Ministry of Foreign Affairs to the Chamber of Deputies described the 2004 agreement as follows:

> "Said agreement respects, on one hand, the Uruguayan national character of the project, and on the other hand, the regulations in force that regulate the waters of the Uruguay River through the CARU.
>
> Likewise, it includes a work methodology for the three phases of construction of the project: the project, the construction and the operation.
>
> Thus, inclusive control procedures were carried out on the Uruguay River which means *they will continue after the plants are in operation*."[17]

As you can see, there is nothing the least bit conditional about the facts that the plants "will" come into operation.

21. [Slide 3 off.] Professor Kohen has also argued that the Minutes from the 15 May 2004 CARU meeting he presented to the Court on Tuesday show that the Commission was still expecting to conduct an Article 7 review on the ENCE plant[18]. It was not. Uruguay invites the Court to examine closely the portions of the Minutes included in Argentina's judges' folders. The

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[16]CARU Minutes No. 01/04, pp. 18-19, p. 33 (15 May 2004); CMU, Vol. IV, Ann. 99; Presidency of the Republic of Uruguay Web Site, "M'Bopicuá: Working Methodology Established" (3 Mar. 2004), CMU, Vol. II, Ann. 17; *La Nación* (Argentina), "Uruguay Promises to Inform the Government about the Paper Mill" (3 Mar. 2004), CMU, Vol. IX, Ann. 183; Statement by Argentine Ministry of Foreign Affairs to the Argentine Senate, Report No. 65, p. 617 (Mar. 2005), CMU, Vol. III, Ann. 47; Statement by Argentine Ministry of Foreign Affairs to the Chamber of Deputies, Report No. 64, p. 136 (Mar. 2005), CMU, Vol. III, Ann. 46; Annual Report of the State of the Nation for 2004, Ministry of Foreign Affairs, International Trade and Culture, p. 105 (Mar. 2005), CMU, Vol. III, Ann. 48; Memorandum from Minister Counsellor Daniel Castillos to Ambassador Dr. Alberto Volonté Berro, para. 5 (1 Apr. 2004), CMU, Vol. II, Ann. 18; Proposed Special Minutes, Final Version, para. VIII (28 Apr. 2004), CMU, Vol. IX, Ann. 200.

[17]CMU, Vol. III, Ann. 46 (Statement by Argentine Ministry of Foreign Affairs to the Chamber of Deputies, p. 136); emphasis added.

[18]CR 2009/21, p. 38, para. 9 (Kohen).

Court will see that they very plainly contradict Argentina's argument. The text Argentina offers actually underscores the fact that the Commission was looking ahead towards construction and the eventual operation of the plant. To be sure, Uruguay was to convey the environmental management plans — known as "EMPs" — for the construction and operation of the ENCE plant to CARU for purposes of soliciting the Commission's comments, but these were to be "dismissed or decided with the company" in Uruguay's discretion[19]. Exactly as Uruguay has always maintained, CARU was given a technical role in reviewing information relating to the environmental impacts of the plant and in monitoring water quality. But there is nothing to suggest that the fact that the plant would be built was anything other than a given.

22. Professor Kohen tried to make much of the fact that Uruguay never provided the pertinent information about ENCE in 2004[20]. But the simple truth is it would have been impossible for Uruguay to turn over the materials in 2004 — because they did not exist! The only EMP — for land movement — ever issued to ENCE is dated much later, in November 2005, obviously well after 2004, and after the GTAN consultations had already approached impasse.

23. Ultimately, perhaps the most persuasive proof of the fact that the Foreign Ministers did *not* agree to send the matter back to CARU for review under Article 7 is CARU's own subsequent conduct. Argentina has cited nothing — because there is nothing — in the record to suggest that the Commission was waiting for notification under Article 7. For the reasons I have already talked about too much, the very idea makes no sense. All that CARU did was proceed to design the joint monitoring programme known as PROCEL, exactly as the Foreign Ministers had agreed.

24. Having touched again on PROCEL, let me make one additional point. In his first round presentation on 16 September, Professor Kohen told you that the Parties' agreement on PROCEL did not mean that Argentina had accepted the plants, because PROCEL was intended only to collect baseline data in the event the plants might later be built, not to conduct actual operational monitoring[21]. This argument is also wrong, as the final text of PROCEL as adopted in CARU

[19]RU, para. 3.48.

[20]CR 2009/21, p. 40, para. 12 (Kohen).

[21]CR 2009/14, p. 17, para. 17 (Kohen).

makes clear. I will cite just one part, although I certainly invite the Court to review the plan in its entirety. On the very first page, it states:

> "The plan entails a continuous monitoring process whereby trends can be determined every three work years so as to evaluate the long-term impact of the effluents by analyzing the findings of these three-yearly surveys."[22]

Plainly, the eventual operation of the plant is understood, accepted and being planned for.

25. As Uruguay showed last week, the agreement that the ENCE plant would be built was later extended to Botnia. On Tuesday, Argentina took issue with our argument, although it contented itself with just two observations. First, Professor Kohen suggested we were merely playing "grammatical" games[23]. Second, it would have been impossible, he said, for Argentina to have accepted the Botnia plant in 2004 because the Botnia AAP was not issued until February 2005[24]. Neither argument is persuasive.

26. With respect to the statement that Uruguay's argument is grammatical gamesmanship, Professor Kohen is, in effect, making light of Argentina's own official sources, and suggesting the texts do not mean what they actually say. As we previously demonstrated, formal documents from the highest levels of the Argentine Government show conclusively that the dispute with respect to both plants — plural — had been put to an end. [Slide 4 on.] Projected before you now is the same document I showed to you last Wednesday (CR 2009/18). It is from a 2004 year-end report to the Argentine Chamber of Deputies. Mr. President, I do not intend to dwell long on this document. I merely want to highlight the fact that the plural reference to both plants is not a typographical error or clerical oversight, as Argentina would have you believe. You see the frequent references to "plants". Today, I would draw your particular attention to the reference at the bottom of the screen to "both plants". In the original Spanish, this is "las dos plantas". Plainly, the authors of this document knew exactly what they were saying.

27. Nor is this the only high-level document that proves our point. [Slide 4 off.] I previously showed you the PROCEL plan as adopted in CARU, and thus agreed to by Argentina,

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[22]CMU, Vol. IV, Ann. 109.

[23]CR 2009/21, pp. 44-45, para. 25 (Kohen).

[24]CR 2009/21, p. 45, para. 26 (Kohen).

that refers to the "plants" and the "facilities", plural[25]. Here is another one. [Slide 5 on.] This from what Argentina itself has called a "detailed history" of the dispute[26] set forth in a report to the Argentine Senate:

> "In November 2004, the technical advisors completed the development of the 'Environmental Quality Monitoring Plan for the Uruguay River in Areas of *Cellulous Plants*'. The said Plan was approved by the agreement of both delegations to the CARU during plenary meeting on 12 November 2004. The actions from the Monitoring Plan are centered in areas of possible influence by *the projects* mentioned and include the implementation of monitoring actions by CARU for the protection of the quality of the waters . . ."[27]

28. Argentina's argument that it would have been impossible for it to agree to the installation of the Botnia plant in 2004 because the AAP had not yet been issued also misses the mark. [Slide 5 off.] On Tuesday, our learned opponents suggested that Uruguay was saying that Argentina agreed to Botnia "even before it knew anything about it"[28]. We are doing no such thing. In fact, the undisputed evidence shows that Argentina and CARU were aware of the Botnia project long before 2005, as early as October 2003, when company representatives met with Argentine Government officials in Buenos Aires to discuss Botnia's potential investment in Uruguay. According to a contemporaneous account of that meeting, Argentine officials were "flexible and helpful"[29]. Around that same time, Botnia also issued a press release announcing the company's plans in Uruguay[30].

29. Several months later, in April 2004, Argentine and Uruguayan delegates to CARU met with Botnia representatives to learn more about the company's plans. The CARU Minutes do not detail the contents of the meeting but do characterize it as "informative"[31]. Then, in August 2004, CARU actually sent a formal delegation to Finland, which included members of the Argentine Government, to learn more about the company and its cellulose plant technology[32].

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[25]CMU, Vol. IV, Ann. 109.

[26]RA, para. 2.104.

[27]RU, Vol. II, Ann. R14 (Statement by the Argentine Ministry of Foreign Affairs to the Argentine Senate, p. 618).

[28]CR 2009/21, p. 45, para. 28 (Kohen).

[29]CMU, Vol. II, Ann. 16.

[30]CMU, Vol. IX, Ann. 199.

[31]CMU, Vol. IV, Ann. 101.

[32]CMU, Vol. IV, Ann. 105.

30. In November 2004, CARU sent DINAMA a letter seeking an update on the administrative status of the Botnia plant in Uruguay[33]. In December, DINAMA replied and forwarded Botnia's application for an AAP[34].

31. Argentina and CARU were thus well aware of and kept regularly informed about the Botnia project beginning long before the AAP was issued in February 2005. There is nothing remarkable, let alone impossible, about the fact that Argentina and CARU accepted the project and incorporated it into their plans even before the AAP was issued.

32. Mr. President, I come then to my final destination, the GTAN, about which Professor Condorelli will have more to say shortly. The Court is, by now familiar with the 5 May 2005 letter from Argentina's Foreign Minister, Rafael Bielsa, asking that Uruguay agree to *"a more direct intervention"* than CARU could offer. Even assuming that Argentina is right that there was no prior agreement concerning Botnia, and that the matter was ripe for review in CARU under Article 7, we say that Minister Bielsa's letter is proof positive that the Parties mutually agreed to dispense with that review. Indeed, just as was the case with ENCE in 2003[35], it was *Argentina* that sought a more direct intervention of the higher-level authorities.

33. Speaking for Argentina, Professor Kohen offered a two-part response. First, he highlighted Argentina's request to consider relocating the plants stated in the same letter to support an argument that the letter shows there was no prior agreement on Botnia[36]. Professor Condorelli will deal with this question momentarily.

34. Second, Argentina says the plain implications of its own invitation to go around CARU are disproven in the Commission's Minutes from a meeting the very next day, 6 May 2005. The Court may recall that on that day, the Chairman of Argentina's delegation to CARU protested Uruguay's alleged failure to refer the Botnia project to the Commission under Article 7[37]. Indeed, Professor Kohen called these protests "conclusive" proof that the Parties had not agreed to bypass

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[33]CMU, para. 3.29.

[34]*Ibid.*

[35]See *supra*, para. 32.

[36]CR 2009/21, pp. 49-50, para. 42 (Kohen).

[37]CR 2009/21, pp. 46-47, para. 32 (Kohen).

CARU[38]. Yet, this lone reference, coming just *one day* after Minister Bielsa's letter, and at a time when CARU was almost certainly unaware of it, and three weeks *before* the Foreign Ministers met on 31 May to concretize the agreement to establish GTAN, does not support Argentina's argument.

35. Significantly more probative — indeed, truly conclusive — is the fact that, aside from this single statement, which was made even before GTAN was created, Argentina cites no other evidence suggesting that CARU expected to have any role in the process besides monitoring water quality after the plants came into operation, exactly as Minister Bielsa indicated in his 5 May 2005 letter. This is not a mere failure of proof; Argentina cites no evidence because there is no evidence. Nothing in the CARU Minutes indicates that the Commission, or even the Argentine delegation thereto, expected to conduct an Article 7 review of Botnia after GTAN was created. The Parties had clearly decided to bypass that step and go straight to the government-to-government consultations and negotiations contemplated in Article 12.

36. Mr. President, I am reminded of the question Ambassador Gianelli posed to Argentina in his opening speech last week. He asked: "[I]f not consulting, what is it that [Argentina's] officials were doing for six months in 2005 and 2006 when they met 12 times with Uruguayan counterparts to exchange information and views under the auspices of GTAN?"[39] It is quite remarkable that we never actually heard an answer to that question from Argentina during the course of these proceedings. The reason is obvious. As much as it might wish to deny the fact now, Argentina itself has previously recognized on repeated occasions that its officials in GTAN were indeed negotiating and consulting pursuant to Article 12 of the Statute[40].

37. Mr. President, Members of the Court, thank you again for your generous attention. I ask that you give the floor to Professor Condorelli.

The VICE-PRESIDENT, Acting President: Thank you, Mr. Martin. Je donne la parole à M. le professeur Condorelli. Vous avez la parole, Monsieur le professeur.

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[38]CR 2009/21, p. 49, para. 40 (Kohen).

[39]CR 2009/16, p. 16, para. 19 (Gianelli).

[40]See, for example, MA, para. 2.72; Argentina's Application instituting proceedings, para. 4 (4 May 2006).

M. CONDORELLI :

LE GTAN, LA COUR INTERNATIONALE DE JUSTICE ET L'ARTICLE 12 DU STATUT

I. INTRODUCTION

1. Monsieur le président, Messieurs les juges, mon intervention d'aujourd'hui sera brève, et ce pour deux raisons. La première est que j'entends m'en tenir très strictement aux instructions et aux souhaits de la Cour, qui nous demande d'utiliser ce second tour de plaidoiries exclusivement afin de répondre aux remarques et observations présentées par la Partie adverse sans rouvrir des thèmes et répéter des arguments sur lesquels les Parties se sont déjà exprimées de manière pleine et approfondie. La deuxième raison est que, concernant le sujet sur lequel je suis censé intervenir, les plaideurs de l'autre côté de la barre se sont exhibés — il est vrai — dans des plaidoiries très éloquentes, extrêmement bien faites et à première vue convaincantes, mais en réalité les arguments qu'ils ont fait valoir ne constituent pour l'essentiel que la répétition des mêmes arguments que l'Uruguay a déjà réfutés : des arguments qui ont certes été enrobés de mots nouveaux, lesquels toutefois n'en changent pas la substance. Je pourrai donc m'acquitter de ma tâche assez rapidement.

2. Comme au premier tour de plaidoiries, je vais centrer mes propos sur l'article 12 du statut et les questions connexes. Je me borne à rappeler le sens de cette disposition : si un accord n'a pas pu se former entre les Parties au travers des procédures et des étapes de négociation envisagées aux articles 7 à 11 du statut, quant à la réalisation d'un projet d'une Partie tombant sous la prévision de l'article 7 du fait d'être susceptibles de causer un préjudice sensible à l'autre Partie, un dernier délai de cent quatre-vingts jours doit être destiné à la recherche d'un accord entre les Parties au moyen de négociations directes. En cas d'échec, votre Cour peut être saisie pour le règlement du différend.

A. Le GTAN et l'article 12 du statut du fleuve Uruguay

3. Logiquement, la première interrogation sur laquelle il faut nécessairement se pencher est toujours celle-ci : le GTAN a-t-il constitué, ou non, le mécanisme de négociation directe prévu par l'article 12, à savoir cet espace de négociation entre les Parties devant précéder la saisine de la Cour d'après cette disposition du statut ? Monsieur le président, la réponse positive continue de

s'imposer : rien de ce qu'ont allégué nos contradicteurs ne le met en doute. Une telle réponse positive s'impose à tous, mais elle s'impose plus spécialement à l'Argentine pour la simple raison que c'est elle qui l'a donnée très officiellement, d'abord à l'Uruguay, et ensuite à la Cour. Je n'entends bien sûr pas reprendre les preuves incontournables de cela que je me suis permis de rappeler à la Cour le 24 septembre dernier, ni citer à nouveau les documents diplomatiques et les propos réitérés de la Partie adverse par lesquels celle-ci a, non pas admis, mais revendiqué que le GTAN — pour utiliser les mots de son ministre des affaires étrangères — «was the instance of direct negociation between both countries in relation with the dispute over the construction project for the two industrial cellulose plants»[41]. J'aimerais seulement ajouter à ce stade que le bien-fondé d'un tel constat se trouve finalement confirmé — quoique sans doute involontairement — par les propos qu'a tenus lundi dernier le professeur Pellet, quand il a admis, en discutant justement du GTAN, que «il ne s'agissait pas de renvoyer la question à la CARU comme nos contradicteurs nous le font dire, mais bien de trouver une solution négociée, bilatérale, au différend concernant le respect du statut du fleuve Uruguay»[42]. Je ne saurais mieux dire : le professeur Pellet a tout à fait raison. Le GTAN était effectivement l'instrument au travers duquel il avait été convenu entre les Parties de tenter de régler leur différend en négociant directement, ainsi que l'envisage l'article 12 du statut. Faut-il rappeler que le GTAN n'a eu a s'occuper que des usines de pâte à papier, à savoir des échanges d'information et du suivi quant aux effets de leur fonctionnement sur l'écosystème fluvial, et que c'est suite à l'échec des consultations menées au moyen du GTAN et à cause de cet échec que l'Argentine a décidé de saisir votre Cour, ainsi qu'elle a tenu à le notifier officiellement à l'Uruguay ?

4. Une observation concernant la question de savoir pourquoi le GTAN a été mis sur pied et pourquoi les Parties ont décidé qu'il convenait de mener désormais les consultations au sujet des usines au travers de ce moyen de négociation directe, et non pas au travers de la CARU. Je dois avouer que j'ai été fort surpris d'entendre mon cher ami le professeur Kohen se lancer dans la remarque que voici :

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[41] Discours du ministre des affaires étrangères de l'Argentine, Jorge Taiana, du 12 février 2006 devant la commission des affaires étrangères de la Chambre des députés, requête introductive d'instance, 4 mai 2006, annexe 3.

[42] CR 2009/20, p. 16, par. 6 (Pellet).

> «Le professeur Condorelli a invoqué un prétendu «blocage des travaux de la CARU» à ce moment-là qui aurait justifié la création du GTAN. Messieurs les juges, il n'en est rien. Il a dû se tromper avec la situation existant entre novembre 2003 et mai 2004. Au premier semestre 2005 la CARU fonctionnait normalement.»[43]

Mais Monsieur le président, le professeur Kohen se trompe d'adresse lorsqu'il formule une telle critique. Ce n'est pas l'Uruguay, ce n'est pas moi, c'est l'Argentine qui a défini le GTAN comme une «instance de négociation établie par les deux Parties du fait du manque d'accord au sein de la CARU»[44]. L'Argentine l'a fait non pas par des mots enfouis dans l'un quelconque des milliers de document échangés entre les Parties, mais par la note diplomatique au moyen de laquelle elle a notifié à l'Uruguay sa décision de saisir votre Cour, à savoir le premier document, le plus important, qu'elle a annexé a sa requête introductive d'instance. Que dire de plus quant au peu de crédibilité des allégations auxquelles je viens de me référer ?

5. Dans leurs plaidoiries nos contradicteurs n'ont pas considéré utile d'expliquer à la Cour pourquoi le GTAN avait été créé. Mais il y a autre chose au sujet de laquelle ils ont adopté la même attitude, que je qualifierais celle du silence embarrassé : comme M[e] Martin vient de le souligner lui aussi, ils n'ont toujours pas dit un seul mot, pas un mot, sur ce que le GTAN a fait pendant six mois d'activité, ils n'on commenté d'aucune façon la démonstration analytique que l'Uruguay a offerte dans ses écritures quant à la quantité et à la qualité des informations transmises à l'Argentine et quant à la liste bien complète des sujets sur lesquels les consultations au sein du GTAN se sont développées[45]. Votre Cour se souvient très certainement que M[e] Reichler et moi-même nous sommes revenus encore et encore sur cela avec beaucoup de détails la semaine dernière[46]. Qu'il plaise à la Cour de constater que l'absence totale d'objections de quelque sorte que ce soit du côté argentin implique alors la reconnaissance que le GTAN a effectivement fonctionné en tant qu'enceinte de consultation et de négociation directe entre les Parties. Une consultation qui a porté sur tous les thèmes indiqués dans l'accord entre les Parties instituant le GTAN, à savoir, ceux relatifs aux risques environnementaux susceptibles d'être causés par le «fonctionnement» des usines, comme le dit explicitement le texte de l'accord en question.

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[43] CR 2009/21, p. 48, par. 37 (Kohen).

[44] Note n[o] 149/2005 du secrétaire des affaires étrangères de l'Argentine à l'ambassadeur d'Uruguay en Argentine du 14 décembre 2005, requête introductive d'instance, 4 mai 2006, annexe II.

[45] Contre-mémoire de l'Uruguay (CMU), par. 3.100.

[46] CR 2009/16, p. 44, par. 16 (Reichler) ; CR 2009/19, p. 20, par. 17 (Condorelli).

Je rappelle que cet accord est consigné dans le communiqué de presse du 31 mai 2005 qui a été montré plusieurs fois à votre Cour ces derniers jours tant par les plaideurs d'une Partie que de l'autre, et ceci tant dans la langue originale, l'espagnol, que dans les traductions anglaise et française. Et je voudrais faire noter aussi à la Cour, en passant, que la Partie argentine s'est bien gardée de contester qu'il s'agit indiscutablement et à tous les effets d'un accord international liant les Parties, auquel le principe *pacta sunt servanda* est pleinement applicable : nos contradicteurs l'interprètent certes à leur manière, mais ils ne mettent nullement en discussion sa nature d'instrument conventionnel à caractère obligatoire.

6. S'agissant des thèmes discutés au sein du GTAN, il m'incombe de dire un mot au sujet d'une allégation qui a été répétée je ne sais pas combien de fois par les orateurs de l'autre côté de la barre. Ainsi que je l'ai signalé, ceux-ci se sont certes concertés pour passer sous silence ce sur quoi les consultations via GTAN ont porté. En revanche, ils ont insisté sans cesse, l'un après l'autre, sur un sujet qui à leur sens aurait dû faire l'objet des consultations alors que l'Uruguay s'y est opposé. Voilà la preuve, s'écrient-ils, de l'unilatéralisme de l'Uruguay, de sa volonté d'imposer un fait accompli, contrairement à l'esprit requis de bonne foi qui devrait s'imposer dans un tel contexte. Le professeur Kohen, en particulier, a cité deux fois[47] un passage d'une déclaration uruguayenne au sein du GTAN dans laquelle le représentant de l'Uruguay s'est exprimé ainsi : «la raison pour laquelle l'usine s'est installée à un endroit déterminé n'est pas du ressort du groupe (GTAN) et elle ne figure pas parmi ses compétences, puisque outre le fait même d'être une décision antérieure au présent gouvernement, la localisation des usines est déjà un fait»[48].

7. Est-ce vraiment un propos indéfendable, une affirmation scandaleuse, comme s'en indignent nos contradicteurs ? Est-ce vraiment l'expression d'un inacceptable «souverainisme unilatéraliste», pour utiliser l'une des expressions hautes en couleurs dont mon ami le professeur Pellet se plaît souvent de parer ses propos[49] ? Mais loin de là, Messieurs les juges ! L'Uruguay est en train de faire valoir très correctement que la question de l'emplacement de Botnia ne rentrait pas dans la sphère de compétence du GTAN parce qu'ainsi en ont décidé les deux

[47] CR 2009/13, p. 19, par. 25 (Kohen,) ; CR 2009/14, p. 20, par. 27 (Kohen).

[48] Mémoire de l'Argentine (MA), par. 2.65 et annexe, livre 4, annexe 4.

[49] CR 2009/20, p. 17, par. 9 (Pellet).

parties contractantes en prescrivant expressément cette limitation de compétence dans le texte même de l'accord international qu'elles ont conclu. La prétention argentine en question était donc effectivement irrecevable d'après l'engagement qui liait les deux Etats : autrement dit, si «la localisation des usines est un fait», comme l'a souligné l'Uruguay, c'est parce que les Parties en ont décidé ainsi au moyen d'un accord dont l'Argentine ne pouvait pas et ne peut toujours pas se délier unilatéralement. Faut-il rappeler encore que par cet accord l'Uruguay et l'Argentine ont convenu qu'au moyen du GTAN il fallait mener des études et des analyses supplémentaires et procéder à l'échange d'informations et de suivi quant à l'effet que le fonctionnement des usines aura sur l'écosystème fluvial. L'emplacement des usines était un fait acquis, toujours d'après le texte même de l'accord : les consultations devaient être désormais centrées sur les risques environnementaux pouvant être éventuellement causés par leur fonctionnement et sur les mesures à prendre pour les neutraliser.

8. Mon cher contradicteur, Marcelo Kohen, s'élève avec vigueur contre cette interprétation[50]. Son argument prend appui sur le fait que le GTAN a été créé par les deux présidents le 5 mai 2005. Pour le professeur Kohen il est inconcevable que l'accord ayant créé le GTAN puisse être interprété comme l'Uruguay le soutient (et comme je viens de le rappeler), étant donné que le même jour le ministre argentin, M. Bielsa, demandait à son homologue uruguayen que l'on envisageât la relocalisation des usines et que («preuve accablante»[51], dit M. Kohen) le lendemain même le délégué argentin à la CARU protestait contre la violation de l'article 7 du statut du fait d'une autorisation donnée à Botnia.

9. Mais le professeur Kohen oublie de prendre en considération deux points, fort importants tous les deux. Le premier est que la note du ministre argentin à son collègue uruguayen du 5 mai 2005 exprime ni plus ni moins que la proposition de la Partie argentine, son souhait quant au contenu à donner d'après le proposant à l'accord à conclure concernant la négociation directe entre les Parties au sujet des usines : je veux dire, le futur accord GTAN. Le second point est qu'il est vrai que le même jour, le 5 mai, les deux présidents se sont entendus sur le principe de la création du GTAN. Mais il s'agissait justement d'une entente de principe, qui ne spécifiait nullement sur

[50] CR 2009/21, p. 48-49, par. 37-41 (Kohen).

[51] CR 2009/21, p. 49, par. 41 (Kohen).

quoi les consultations via GTAN devaient porter. Il a fallu des négociations diplomatiques serrées se prolongeant sur presque un mois, il a fallu de nombreux échanges de propositions et de contre-propositions, pour que l'on en arrivât enfin a mettre au point un texte acceptable et accepté par les deux Parties. Ce texte, dont de toute évidence le contenu ne correspond pas totalement aux souhaits exprimés par le ministre argentin un mois auparavant, la Cour a pu le lire de nombreuses fois : c'est celui qui est consigné dans le communiqué de presse du 31 mai 2005. Par l'accord finalement conclu les deux Parties reconnaissaient explicitement que les usines «se están construyendo» (sont en train d'être construites) en Uruguay, et concordent quant au fait que via le GTAN il faudra mener des consultations quant aux «conséquences que sur l'écosystème du fleuve Uruguay qu'ils partagent aura le fonctionnement des usines de pâte à papier»[52]. Aux conséquences du fonctionnement, Monsieur le président, non pas à la localisation des usines.

10. Mais, s'écrie le professeur Kohen, l'Uruguay admet donc que les travaux de construction de Botnia avaient bien débuté en mai 2005 : que l'Uruguay soit cohérent, alors, et «ne vienne pas nous dire que l'autorisation de construction de l'usine … n'a été délivrée qu'en janvier 2006 !»[53]. Malheureusement mon aimable contradicteur se laisse emporter trop vite : l'Uruguay n'a rien caché quant au fait qu'avant l'autorisation de construction, qui date effectivement de janvier 2006, il avait bien autorisé la réalisation *in situ* de divers travaux préparatoires, d'ailleurs certains bien visibles : il a même indiqué ouvertement, tant la liste de ces travaux de préparation que la date de chaque autorisation y relative[54]. Cependant tous les travaux d'avant janvier 2006 laissaient pleinement ouvertes les possibilités de choisir les meilleures techniques afin d'éviter au mieux les risques environnementaux. Nos contradicteurs se sont laissés aller volontiers à l'ironie facile au sujet des travaux préparatoires en question et à leur visibilité, mais n'ont pas démontré pourquoi à leur sens leur caractère préparatoire serait à exclure concernant, par exemple, le nivèlement d'un terrain ou l'élévation d'un bâtiment administratif ou encore la mise en place de fondations, s'étant agi en particulier de travaux insusceptibles par nature d'affecter tant soit peu la navigation ou le régime du fleuve Uruguay, ou encore la qualité de ses eaux.

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[52] MA, vol. IV, annexe 3 et CR 2009/19, p. 17-18, par. 12-13 (Condorelli).

[53] CR 2009/21, p. 50, par. 42 (Kohen).

[54] CMU, p. 232, par. 3.116.

B. La CIJ et l'article 12 du statut

11. J'en viens maintenant, Monsieur le président, aux quelques remarques qui s'imposent concernant le rôle de la Cour en la présente affaire et quant au jeu de l'article 12 à ce sujet. Ici aussi les plaideurs de la Partie adverse n'ont rien ajouté de remarquable aux considérations qu'ils avaient déjà avancées. Et — cela est à souligner — ils n'ont nullement répondu, en particulier, aux arguments que l'Uruguay a fait valoir pour démontrer à votre Cour que l'article 12, dûment interprété à la lumière de l'objet et du but du traité ainsi que du droit international général, permet à la Partie intéressée de réaliser l'ouvrage projeté, une fois épuisées sans succès les négociations directes et en attendant la décision finale de la Cour que l'autre Partie aura saisie. Cela étant entendu, bien sûr, que personne ne conteste la plénitude de la compétence de votre Cour s'agissant de décider si des faits illicites en violation du statut ont été commis et s'agissant aussi de déterminer le cas échéant les remèdes qu'il convient d'imposer à l'Etat responsable. Du coup, je n'ai pas besoin de revenir sur cette question : votre Cour en sera soulagée. Je me borne donc à insister sur les conclusions qui vous ont été présentées sur ce thème par l'Uruguay, notamment au moyen de ma plaidoirie du 28 septembre dernier.

12. Il convient cependant que j'insiste également sur ce qui apparaît désormais comme un véritable entêtement de la Partie adverse, qui s'obstine à nier ce qui est indéniable : à savoir qu'il a bien saisi la Cour suite à l'épuisement sans succès des négociations directes prévues à l'article 12, donc sur la base de cette disposition. Ainsi que j'ai eu déjà l'occasion de le mettre au clair, l'Argentine a déclaré très officiellement tant à l'Uruguay qu'à la Cour qu'elle se tournait vers votre haute juridiction sur la base de l'article 12 : la Cour ne saurait admettre maintenant qu'elle change de cap à la douzième heure. Il convient d'ailleurs d'ajouter que, d'après le statut, il n'y a pas de place pour une saisine de la Cour qui serait basée exclusivement sur l'article 12, comme l'Argentine voudrait nous le faire croire : l'article 12 en effet, fait renvoi, pour le règlement des différends dont il est question, à l'article 60, la seule disposition dans le statut où votre Cour figure. Autrement dit, le recours à la Cour doit toujours nécessairement se fonder sur l'application de la clause compromissoire de l'article 60, et ce même pour les cas des différends naissant à l'issue de la procédure prévue par le chapitre II du statut. En somme, l'Argentine n'aurait pu introduire son

instance auprès de la Cour sans se référer à l'article 60, et ce, même si le différend qui l'oppose présentement à l'Uruguay a incontestablement à sa base l'article 12 justement.

13. Permettez-moi toutefois de remarquer que lors des plaidoiries un rapprochement sensible entre les Parties est apparu à ce sujet, grâce au fait que le demandeur a avancé de plusieurs pas dans la bonne direction. En effet, l'Uruguay avait toujours soutenu et continue de soutenir que la Cour est appelée en la présente affaire à déterminer si oui ou non l'usine Botnia peut causer un préjudice sensible à l'Argentine en affectant la qualité des eaux du fleuve, ce qui constitue l'étape finale de la procédure prévue au chapitre II du statut ; mais le défendeur n'a jamais contesté la compétence de la Cour à vérifier le respect de toutes les obligations prescrites par le statut, y compris celles de caractère procédural. Quant au demandeur, on l'a vu désormais adopter — notamment par l'entremise du professeur Pellet — une attitude moins déraisonnable. Auparavant il soutenait que, la Cour ayant été saisie par l'Argentine, non pas sur la base de l'article 12 mais exclusivement sur la base de l'article 60, il s'ensuivrait que «le rôle que la Cour est appelée à jouer dans la présente affaire n'est pas de porter l'appréciation finale que lui confie l'article 12 du statut…»[55]. Maintenant les propos de l'Argentine sont beaucoup plus nuancés : vous avez entendu en effet le professeur Pellet se laisser aller mardi dernier à une concession remarquable :

> «Nous ne prétendons pas qu'il n'appartient pas à la Cour, dans le cadre de la présente instance, de déterminer si l'usine Botnia peut causer un préjudice sensible à l'Argentine ou affecter le régime du fleuve ou la qualité de ses eaux, mais nous avons la ferme conviction que la compétence de la Cour va très au-delà de cette détermination.»[56]

La Cour aura sans doute pris note de ce rapprochement significatif, mais aussi de ses implications inévitables : puisqu'il est désormais clairement admis par le demandeur qu'il appartient à la Cour *dans la présente affaire* (je souligne ces mots du professeur Pellet) de décider si l'usine Botnia peut ou non causer un préjudice sensible à l'Argentine et au fleuve, il faut alors admettre aussi inévitablement que, si votre Cour décide que le prétendu préjudice ne subsiste pas ou n'est pas grave, elle ne pourra que reconnaître le droit de l'Uruguay à poursuivre avec l'exploitation de Botnia. Il va de soi dans cette logique — dans laquelle l'Argentine s'inscrit elle aussi désormais —

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[55] Réplique de l'Argentine (RA), p. 142, par. 1.174.

[56] CR 2009/21, p. 58, par. 14 (Pellet).

qu'envisager le démantèlement de l'usine même en cas d'absence de préjudice écologique sensible est purement et simplement dépourvu de sens.

14. Il faut encore, Monsieur le président (ce sera là mon dernier point), que je présente à la Cour quelques commentaires aux allégations de la Partie adverse suivant lesquels la thèse qui vous est soumise par l'Uruguay porterait préjudice à l'autorité de votre Cour et abolirait les garanties, auxquelles l'Argentine a droit, d'obtenir une «évaluation impartiale par votre haute juridiction de la possibilité de construire les usines»[57] : je suis en train de parler, bien entendu, de la thèse que j'ai moi-même défendue devant vous la semaine dernière, d'après laquelle un projet peut être réalisé, une fois les négociations terminées sans succès, même avant que votre Cour n'ait pris sa décision finale. Permettez-moi de présenter ma réponse de façon synthétique en trois points seulement.

15. Premier point. Il va de soi — me semble-t-il — que l'autorité de votre Cour ne souffrirait d'aucun préjudice si vous acceptez le point de vue défendu par l'Uruguay. C'est le contraire qui est vrai, puisque la thèse uruguayenne implique la reconnaissance de la pleine compétence de la Cour à prendre toute décision qu'elle jugerait juridiquement appropriée et équitable, y compris le cas échéant celle ordonnant l'arrêt, la modification voire même le démantèlement de l'usine, si par impossible la Cour devait juger que l'Uruguay est responsable de faits illicites d'une gravité telle qu'ils justifieraient de telles mesures radicales.

16. Deuxième point. Il est indiscutable que l'Argentine a droit à une évaluation impartiale de la situation, et a aussi le droit indéniable d'obtenir le cas échéant une pleine restauration de la légalité enfreinte en cas de faits illicites dont il serait constaté qu'elle a été la victime. L'Uruguay n'a jamais contesté cela : bien au contraire, il reconnaît qu'il a l'obligation absolue de respecter la décision que la Cour adoptera et de surcroît a répété solennellement dans ce prétoire même son engagement à l'observer scrupuleusement. Dans ces conditions, a-t-il un sens de prétendre — comme le fait l'Argentine — que la thèse soutenue par l'Uruguay serait (pour rendre hommage encore une fois au langage multicolore du professeur Pellet) une «ode à l'unilatéralisme»[58] assurant la primauté à la logique du fait accompli ? A-t-il un sens de parler de faits accomplis devant des

[57] CR 2009/20, p. 18, par. 9 (Pellet).

[58] CR 2009/20, p. 17, par. 8 (Pellet).

faits que votre Cour est habilitée à défaire ? J'ose répondre moi-même à ces questions : non, Messieurs les juges, cela n'a aucun sens.

17. Troisième point. Il est vrai que le jugement final de votre Cour ne peut intervenir qu'à l'issue d'une procédure dont la longueur est tributaire pour beaucoup de l'attitude des Parties et de leur conduite dans le procès. Mais il convient de rappeler encore une fois que votre Cour a un rôle important à jouer même en cours de procédure, au cas où l'Etat qui s'oppose à l'ouvrage se considère menacé par un préjudice irréparable causé par ce dernier. Il va de soi que je suis en train de faire allusion aux mesures provisoires urgentes à effet obligatoire, dont l'indication peut être demandée par la Partie intéressée à tout stade de la procédure devant votre Cour. C'est d'ailleurs celui-là le rôle que la Cour a joué quand, le 13 juillet 2006, elle a rejeté la demande argentine en indication de mesures provisoires au motif que «l'Argentine n'a pas, à l'heure actuelle, fourni d'éléments qui donnent à penser que la pollution éventuellement engendrée par la mise en service des usines serait de nature à causer un préjudice irréparable au fleuve Uruguay» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires*, ordonnance du 13 juillet 2006, *C.I.J. Recueil 2006*, p. 132, par. 75). Il est certain que le même rôle, votre Cour aurait pu le jouer encore, notamment depuis la mise en fonctionnement de l'usine en 2006, si le demandeur était vraiment convaincu — comme il le soutient dans ses écritures et dans ses plaidoiries orales — que Botnia fait courir à l'écosystème fluvial et à l'Argentine des risques de préjudices irréparables. Or, l'Argentine ne l'a pas fait, ce qui — que cela soit dit en passant — met fortement en discussion la crédibilité de ses allégations relatives aux risques irréparables qui découleraient d'ores et déjà des prétendues violations par l'Uruguay de ses obligations substantielles prescrites par le statut de 1975.

C. Conclusion

18. Monsieur le président, Messieurs les juges, après la réfutation que nous avons présentée M^e^ Martin et moi-même de l'argumentaire proposé dernièrement par l'Argentine concernant les obligations procédurales découlant du statut du fleuve Uruguay, il est temps maintenant d'en venir aux obligations substantielles. Puis-je vous prier, Monsieur le président, de bien vouloir donner la parole à mon collègue et ami, le professeur McCaffrey. Merci.

The VICE-PRESIDENT, Acting President: Je remercie M. le professeur Condorelli. Now I give the floor to Professor 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 once again on behalf of the Oriental Republic of Uruguay.

SUSTAINABLE DEVELOPMENT

I. INTRODUCTION

1. Mr. President, Members of the Court, you have now heard Uruguay's responses to Argentina's procedural arguments, which, as Mr. Martin and Professor Condorelli have shown, do not withstand scrutiny. I will now begin the task of showing why Argentina added nothing in her second round to her already weak environmental case. Following me today on this subject will be my colleague Professor Boyle, and tomorrow my colleague Mr. Reichler.

II. ARGENTINA'S CASE WOULD PREVENT SUSTAINABLE DEVELOPMENT BY URUGUAY

2. Mr. President, despite what her Agent said on Tuesday (CR 2009/21) about the friendly relations between her country and Uruguay, Argentina — for reasons best known to herself — seems determined to frustrate Uruguay's efforts to develop economically in a manner that is environmentally sustainable — as the Rio Declaration put it, to ensure that "environmental protection [constitutes] an integral part of the development process"[59]. Uruguay has shown that the Botnia plant and the multilayered processes by which it was reviewed and approved meet all the requirements for sustainable development, despite all the horror stories conjured up by counsel for Argentina. Argentina's efforts even extended to a desperate, though ultimately futile, attempt to question the competence of the IFC, the world's principal financial institution for the financing of private sustainable development projects in developing countries. Argentina presumably felt compelled to go to this extreme because the IFC's repeated and carefully considered evaluations of the plant and its environmental performance destroy Argentina's substantive environmental case.

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[59]Rio Declaration on Environment and Development, Principle 4, United Nations doc. A/CONF.151/26, *ILM*, Vol 31, 1992, p. 874.

3. My task this afternoon is to show how Argentina misunderstands and misapplies the concept of sustainable development to the facts of this case. Professor Boyle will then show why Argentina's claims on environmental impact assessment, monitoring and pollution must fail, and that Uruguay has met all its international obligations with respect to these matters. Tomorrow, Mr. Reichler will show why Argentina's environmental case remains without foundation on the facts.

A. The involvement of the IFC in this case is fully consistent with the principle of speciality

4. Mr. President, several of Argentina's counsel have made arguments that call into question the competence of the International Finance Corporation and even whether its mandate pertains to environmental issues at all. If the legitimacy of the IFC's approval of projects can be questioned in the way Argentina advocates, investors could be reluctant to commit to project funds, and beneficiary States could stand to lose development financing much needed to realize the State's sustainable development goals. My colleague Mr. Reichler has addressed the objectivity of the independent experts on the Botnia mill commissioned by the IFC. In this presentation I will confine myself to showing that environmental issues fall squarely within the IFC's core competence, and that its conclusions on that subject are entitled to great weight.

5. Mr. President, on Monday, Professor Boisson de Chazournes said that the IFC is an institution with limited competence, which conducts its operational activities in the domain of the promotion of private investment[60]. She referred to the "principle of speciality", quoting from this Court's Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, given in response to the request by the World Health Organization, and said: "C'est ainsi que les compétences de la SFI devaient être comprises à la lumière du principe de spécialité."[61]

6. What the Court said in that Advisory Opinion was the following:

> "International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them." (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 78, para. 25.)

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[60]CR 2009/20, p. 38, para. 29.

[61]*Ibid*.

The Opinion continues:

> "The Permanent Court of International Justice referred to this basic principle in the following terms:
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> > 'As the European Commission [of the Danube] is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.' *(Jurisdiction of the European Commission of the Danube, Advisory Opinion, P.C.I.J., Series B, No. 14*, p. 64.)" (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 78, para. 25.)

7. If the IFC were substituted for the European Commission in this passage, Uruguay could not have said it better. The "principle of speciality" of course applies to the IFC — but what is its "special" mission? Professor Boisson de Chazournes herself answered this question: the promotion of private investment[62]. But *any* private investment? No — that is not the IFC's or indeed the World Bank's mission. The IFC promotes private investment in projects in developing countries that are a part of the efforts of those countries to develop in a way that is socially and environmentally sustainable[63]. Indeed, the centrality of environmental sustainability to the IFC's mission is, as Mr. Reichler explained last Thursday (CR 2009/19), embodied in the organization's development of sophisticated environmental standards against which it measures proposed projects. Argentina has never challenged this. It is thus against these standards that the 182 members of the IFC "collectively determine its policies and approve investments"[64] (quoting from the IFC website). One of the investments those 182 countries approved was of course the Botnia plant. In a word, the IFC was acting *precisely* within its "special" competence in this case: it was providing support for private investment in a project that is an important part of Uruguay's efforts to develop economically in a way that is environmentally sustainable.

8. Professor Boisson de Chazournes devoted considerable effort to showing that as she put it, referring to the IFC, "Elle n'est pas dotée d'un pouvoir de qualification juridique."[65] Well,

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[62]See the IFC's Articles of Agreement, Art. 1, available at http://www.ifc.org/ifcext/about.nsf/Content/ArticlesofAgreement.

[63]See the IFC's Policy on Social and Environmental Sustainability, available at http://www.ifc.org/ifcext/sustainability.nsf/Content/SustainabilityPolicy.

[64]*Ibid*.

[65]CR 2009/20, p. 38, para. 29.

Mr. President, nobody — including Uruguay — said it did. This is a hapless straw person constructed, then demolished, by Argentina. Uruguay's point is that the evaluations of the IFC, supported by independent technical expertise, are entitled to great weight as evidence in this case.

9. Yet Professor Boisson de Chazournes attacks the IFC on this ground as well, saying that Uruguay "accorde une place excessive aux évaluations de la SFI"[66]. She supports this assertion by referring to what this Court said in the *Armed Activities* case about the need to evaluate carefully evidence derived from a single source (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005,* p. 201, para. 61). Yet, in the same paragraph of that Judgment, this Court suggested that this approach should not apply when the source is an independent, neutral, third party, experienced in evaluating "large amounts of factual information, some of it of a technical nature"[67]. According to that Judgment, evidence from such a source "merits special attention"[68]. Further reasons for giving special weight to the reports prepared for the IFC have been given by Mr. Reichler. But the point I would like to leave with the Court is that the IFC approved this project, which is precisely the kind of function it was established to perform.

B. Phosphorus: the Botnia plant complies with European standards

10. Of course, Mr. President, the IFC approved the Botnia mill for construction and operation in Uruguay, on the Uruguay river. Again, in their second round, Argentina's advocates repeatedly suggested that the Botnia plant could not have been built in Europe, and their reason was always the same: phosphorus. Professor Sands asserted again and again in various statements that the Botnia plant would comply with European standards are "demonstrably false"[69]. But I am afraid that it is Professor Sands's argument that is demonstrably false. Professor Sands seems to have missed the fact that Mr. McCubbin already demonstrated that a mill of Botnia's size and scale could be, and was, built on a European river, the Elbe, that is far smaller than the Uruguay river. He showed that when Germany commissioned the most modern pulp mill in Europe in 2002, the

[66]CR 2009/20, p. 41, para. 34.

[67]*Ibid.*

[68]*Ibid.*

[69]CR 2009/21, pp. 13-14, para. 5.

Stendal mill, its phosphorous discharges were considerably higher relative to the flow of the Elbe — whose flow is only 15 per cent of the Uruguay's — than are those of the Botnia mill relative to the Uruguay river — this is illustrated on the screen, and is at tab 6 of your folders. None of Argentina's advocates even attempted to refute this incontrovertible fact.

11. Nor is this a unique comparison. As Mr. McCubbin pointed out, there is no river in Western Europe that is larger than the Uruguay river. Thus, European pulp mills, many of which discharge phosphorus in greater amounts than does Botnia, are located on rivers that are significantly smaller than the Uruguay. For example, the Zellstoff Pols mill was built on the Mur river in Austria, and discharges 50 per cent more phosphorus than the Botnia mill, even through it is sited on a river with an average flow of only 139 cubic meters per second, which is over 30 times smaller than the flow of the Uruguay river. As a result, the incremental phosphorous load to the Mur is more than 50 times larger than Botnia's to the Uruguay. Similarly, the M-real mill in France, on the Seine, discharges over 40 tons of phosphorus per year, that is, more than three times the amount discharged by Botnia, into a river with a flow less than 10 per cent the size of the Uruguay. A similar wide discrepancy may be seen with the Kwidzyn mill in Poland, which is sited on the Vistula. That mill discharges three times the amount of phosphorus as the Botnia plant, but into a river less than one-sixth the size of the Uruguay. And StoraEnso's Imatra mill in Finland discharges slightly more phosphorus than does Botnia, but into a river, the Vuoksi, whose flow is less than 10 per cent that of the Uruguay river[70].

12. Returning for a moment to the Uruguay river, another point that Mr. McCubbin raised that Argentina did not attempt to refute was the fact that approximately 19,000 tons of phosphorus flow past Fray Bentos each year, not including any contribution from Botnia. In contrast, only 15 tons (using Botnia's 2008 performance) or lower (using its 2009 performance) are contributed by Botnia — this is shown on the screen and at tab 7 of your folders. And of this amount, almost 3 tons come from the pre-existing level of phosphorus in the river water used by the plant[71]. Thus, for every ton of phosphorus discharged into the river by Botnia, more than 1,000 tons are

[70]RU, Ann. 83, p. 5-9, table 5-1.

[71]IFC, Cumulative Impact Study, Ann. H, CMU, Vol. VIII, Ann. 176, p. D3.19; Uruguay's Submission of New Documents, 30 June 2009, Ann. S7, p. D3.2.

contributed from other sources, including from Argentine industry and agriculture. Again, Argentina's advocates made no effort to challenge these figures; the Court may therefore treat them as established facts.

13. Indeed, not only is Botnia's phosphorous contribution insignificant in comparison to the overall phosphorous load of the river — less than 1/1000th of that load — Uruguay is making efforts to offset the entirety of that comparatively modest contribution. This is consistent with Uruguayan law, which provides that:

> "If any water body does not comply with the conditions established for its classification, the Ministry of Housing, Land Use Planning and Environmental Affairs [or MVOTMA using the Spanish initials] shall establish recovery programs for the water body with the aim of achieving the conditions adopted."[72]

14. That is why, to comply with both the letter and spirit of this law, and to protect the quality of the Uruguay river water, Uruguay has taken strong measures not only to offset Botnia's phosphorous discharges, but to go beyond Botnia's discharges and reduce the overall phosphorous contribution from the Uruguayan side.

15. As described by Professor Boyle, OSE, Uruguay's State Water Works, has contracted with Botnia for the treatment of the Fray Bentos sewage. [Tab 8.] Pipelines will soon connect Fray Bentos to the Botnia plant's waste water-treatment facility. When the construction is completed, the quantity of phosphorus removed from the Fray Bentos sewage, and no longer discharged into the Uruguay river, is expected to offset substantially the phosphorus presently emitted by the Botnia plant. Beyond this, the OSE has secured World Bank financing for sewage treatment facilities at the cities of Salto and Paysandú, further upriver. As the slide on the screen demonstrates, when these additional phosphorous reductions are taken into account, the combined results will much more than offset Botnia's entire contribution of phosphorus to the river. This slide is at tab 8 of your folders.

16. Mr. President, for all its talk about phosphorus, algal blooms and eutrophication, for all its protestations over the urgent need to protect this fragile and threatened watercourse, what has Argentina done to address the problem of phosphorus in the river?

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[72]Decree No. 253/79, Regulation of Water Quality (9 May 1979, as amended), Art. 10; CMU, Vol. II, Ann. 6.

17. The answer would appear to be nothing. If a discharge of phosphorus into the river is such a concern, why does Argentina not regulate it? In fact, Argentina has no laws or regulations that limit the discharge of phosphorus into the Uruguay river by Argentine industries, farmers, ranchers or municipalities. Despite Argentina's constant refrain that eight or 15 tons of phosphorus from the mill are far too much, it has never even tried to challenge the fact that 25 times that amount is discharged into Ñandubaysal Bay by Argentina, as was explained by Mr. McCubbin. Argentine companies operate industrial enterprises that discharge effluents, including phosphorus, into the river directly, or via tributaries like the Gualeguaychú river; thousands of hectares of Argentine farmland and ranch land border on the river, and shed their phosphorus-bearing fertilizers and animal feeds into it; and Argentine cities like Gualeguaychú, Colón and Concepción del Uruguay, continue to dump sewage into the river every single day. If Argentina were truly driven by a desire to protect the Uruguay river from excess phosphorus, would it not start there, by cleaning up its own house? But again, it has passed no law, adopted no regulation, to limit phosphorous discharges from its own side of the river.

18. Mr. President, the 1975 Statute establishes the right of equitable use of the river's water. There is nothing equitable about Argentina's making whatever industrial, agricultural or municipal uses of the water she desires — regardless of the amount of phosphorus contributed to the river — while, at the same time, preventing Uruguay from making use of the river in a way that does not add phosphorous concentration — does not add to the phosphorous concentration of the water. The inequity is especially striking in view of the measures being taken by Uruguay that will more than offset the phosphorus discharged by the plant and produce an overall net effect of lowering the amount of phosphorus in the river.

C. There is no evidence that the Botnia plant has affected tourism in Gualeguaychú or Ñandubaysal Bay

19. Mr. President, Argentina's obstinance in opposing the mill is all the more unfathomable because the plant has simply not had an effect on Argentina's uses of the river. Argentina continues to argue, in the face of all the evidence, including her own, that the Botnia plant has affected tourism in Gualeguaychú and in Ñandubaysal Bay.

20. In her speech last Monday, Professor Boisson de Chazournes bravely tried again to make this argument[73], like a salmon swimming upstream but being stopped by a dam. The "dam" in this case is, of course, the actual evidence. In fact, Professor Boisson de Chazournes admitted that tourism had actually increased in Gualeguaychú and the Ñandubaysal beaches. She gave two remarkable explanations for this. Her explanations were that there are now more tourists because of the efforts of the Gualeguaychú Tourism Council and because a kind of touristic *schadenfreude*: curious people are attracted by unfortunate situations. Whatever the explanation, as I have noted last week, the city of Gualeguaychú is profiting mightily from the increased visitations and can hardly complain that the plant is causing a precipitous drop in tourism. Nor is this unexpected. Mr. Reichler and I have also noted that Argentina's own Scientific and Technical Report states a number of times that Ñandubaysal Bay is not affected by factors in the river[74], such as effluents from the Botnia plant. [Tab 9.] Nor has the "natural beauty" of the beach or Gualeguaychú — referred to by counsel for Argentina even though the Statute obviously does not deal with it — nor has this been significantly affected by the sight of the plant, as shown in the picture on the screen taken of the plant from the beach in Ñandubaysal Bay with a 35 mm lens — which shows the view as seen with the naked eye. If it is difficult to make the plant out across the river, perhaps this arrow [slide] will be of assistance. The picture is at tab 9 of your folders.

21. So much for Argentina's factual claim that Uruguay's use of the river is incompatible with Argentina's. Nonetheless, in both the first[75] and second rounds Argentina asserted that tourism and even leisure in Gualeguaychú and on the beaches are an "existing use" with which the plant is incompatible[76]. At this juncture, I would simply note that even to the extent that these are uses of the river — swimming, for example — and even assuming they qualify as "existing uses", and finally, assuming *arguendo* that they would be affected by the mill, despite the evidence, that

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[73]CR 2009/20, pp. 30-32, paras. 9-16.

[74]Argentina Scientific and Technical Report, Chap. 3.2, para. 4.1.2 (arguing that Argentina's scientists were able "to clearly set the bay apart, as it acts as an ecosystem that is relatively detached from the Uruguay river" and that the data "shows that the bay is an environment that is detached from the short term fluctuations of the river"); para. 4.3.1.2 (pointing to data that "reinforces the interpretation that the bay is an environment that is relatively detached from the river"); and para. 1 (arguing that the Bay "is apparently not tied to the river's natural and human-derived short-term variations").

[75]See, for example, CR 2009/13, pp. 16-17, paras. 15-17 (Kohen).

[76]CR 2009/20, p. 30, para. 9, and p. 32, paras. 13-16 (Boisson de Chazournes).

would not compel a conclusion that the mill could not operate. "Existing uses" are only one factor to be considered in arriving at an equitable and reasonable utilization under Article 6 of the 1997 Convention on International Watercourses[77], which the Parties agree should inform the interpretation of the Statute[78]; and this factor is listed together with "potential uses" of the watercourse, of which the Botnia plant was certainly one. Under Article 10 of the Convention, any conflict between uses is to be resolved with reference to the principle of equitable and reasonable utilization, not by giving one use automatic priority over the other[79].

22. All of which means I need not take much of the Court's time by responding to the breathtaking claim, also made by Professor Sands (CR 2009/21, p. 14, para. 5), that Uruguay is legally bound vis-à-vis Argentina, under your 1974 decision in the *Nuclear Tests* case[80] by statements not only by Uruguay, but also the IFC and even Botnia, about the plant's compliance with European law and BAT standards. Certainly, there can be no question of Uruguay's having intended to bind herself vis-à-vis Argentina in this regard. To be sure, the Botnia plant *is* required to comply with European Union BAT — Uruguay has always insisted it must, and in fact, has made compliance with European Union BAT an express condition of its permits and authorizations. As for European Union law, Uruguay has not agreed to import it into the applicable law for purposes of the 1975 Statute. But that does not mean European Union law has no role to play in this case; it provides a useful yardstick against which to measure Botnia's environmental performance. It is thus highly significant that Argentina has failed to show that any European Union law or regulation would be transgressed, even were it to apply. In fact, no European Union law has been transgressed. In short, application of European Union law merely confirms that the plant comports with all the requirements of sustainable development.

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[77]Convention on the Law of the Non-Navigational Uses of International Watercourses, A/RES/51/869, 21 May 1997, Art. 6.

[78]See, for example, RA, para. 1.140.

[79]*Ibid*., Art. 10 (2).

[80]*Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J Reports 1974*, p. 472, para. 46.

III. CONCLUSION

23. Mr. President, Members of the Court, in conclusion, both Parties in this case have acknowledged its significance. Indeed, the importance of the case extends well beyond a pulp mill on the River Uruguay. What the Court decides in this case will have a profound influence on the efforts of the developing countries of the world to raise the living standards of their populations — in other words, to develop economically in a manner that is environmentally sustainable. Uruguay has full confidence that the Court will ensure that the promise of sustainable development will not be left unfulfilled.

24. Mr. President, Members of the Court, thank you for your kind attention. I invite you to call to the podium my learned colleague Professor Boyle, perhaps after a coffee break. Thank you.

The VICE-PRESIDENT, Acting President: Thank you, Professor McCaffrey, for your presentation. Indeed the time has come for the Court to take a break. The hearing is suspended for 15 minutes.

The Court adjourned from 4.30 to 4.45 p.m.

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

Mr. BOYLE:

ENVIRONMENTAL PROTECTION

1. Mr. President, distinguished Members of the Court, it is a pleasure to appear before you once again. I have three submissions for you this afternoon in response to Argentina's environmental case.

2. First, I would like to argue that, contrary to the claims of Professors Boisson de Chazournes and Wheater, the environmental impact assessment carried out by Uruguay was comprehensive and soundly based. It meets all of Uruguay's obligations under the 1975 Statute and international law with regard to the environmental impact assessment. And for the sake of brevity, I will use the term EIA in future.

3. Secondly, contrary to the claims in particular of Professor Wheater, Uruguay's monitoring programme is sophisticated, it is superior to any programme introduced by Argentina, and it is fully capable of detecting changes in the riparian environment that could signal potential environmental harm.

4. Thirdly, Argentina's written and oral pleadings fail to make out any case for jurisdiction over alleged air pollution, nor do they sustain its arguments on Articles 36 and 41 of the Statute.

5. In short, Argentina has done nothing to show that there is any violation of Uruguayan law, or of the 1975 Statute, or of international law with regard to transboundary environmental risk.

I. ENVIRONMENTAL IMPACT ASSESSMENT

6. Let me turn then to environmental impact assessment. First, some theory. The point of an EIA in international law is to enable the appropriate authorities to assess the potential for significant transboundary harm[81]. The International Law Commission interpreted the phrase "significant harm" in the following way: they said "[t]he harm must lead to a real detrimental effect . . . in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards."[82] Measured by that test, the evidence in the record shows that all potentially significant impacts on the river's water quality and ecology were assessed well before the decision to authorize the plant was taken[83]. So were the potential impacts of airborne emissions, wind direction, reverse flow and low flow, algae blooms, and the capacity of the receiving environment — but I will come back to all of those in a moment.

7. At several points in his speeches Professor Wheater described the Botnia EIA as "inadequate" and DINAMA's assessment of it as "uncritical"[84]. But an "uncritical" DINAMA would surely not have written in its report that, "[i]n the documents provided by Botnia during the

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[81]Art. 7, Draft Articles on Prevention of Transboundary Harm, International Law Commission, Report on the work of its fifty-third Session (23 Apr., 1 June, and 2 July-10 Aug. 2001), United Nations, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 157; Principle 17, Rio Declaration on Environment and Development; Art. 2, 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context, (hereinafter "Espoo Convention").

[82]Commentary to Art. 2, Draft Articles on Prevention of Transboundary Harm, International Law Commission, Report on the work of its fifty-third Session (23 Apr.-1 June, and 2 July-10 Aug. 2001), *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 152.

[83]CR 2009/18, pp. 24-28, paras. 41-53 (Boyle).

[84]For example, CR 2009/20, pp. 55-59, paras. 6-12 (Wheater).

EIA evaluation process, the following were noted: information gaps, contradictions (even within the same document) and tangential and unsatisfactory responses"[85]. And there was more about Botnia: "The information received could also be characterized as being at once both voluminous and vague, as well as repetitive, irrelevant, and of rather poor quality"[86], something you might see on a rather bad student essay. Yes, that was the uncritical DINAMA on the Botnia EIA. But, what happened then? Well, in fact, DINAMA responded to the Botnia EIA by requesting further information from Botnia and compelling it to improve the quality of the EIA until the final assessment was complete in its judgment[87]. That is what a regulatory agency is supposed to do. DINAMA was no pushover for Botnia. In the end DINAMA was satisfied that, and I will quote from their report, "those issues not deeply studied would not cause impacts that would be difficult to mitigate or compensate". And, as for those issues where there was insufficient knowledge they decided to adopt, and I will quote, "a continual and exhaustive monitoring of all parameters and bio-indicators, as necessary"[88]. So, yes, DINAMA was critical of the EIA initially submitted. But by the time they took the decision to recommend approval of the plant by the Environment Ministry, DINAMA was fully satisfied that Botnia had supplied all the information necessary and in sufficient detail to merit a favourable report, and also to specify the conditions under which the plant would be permitted to operate. That is, after all, the point of an EIA: to assist those who have to license the plant to take an informed decision about the likelihood of harm and the conditions under which the plant would operate. So, DINAMA fully supported and recommended the decision to approve the Botnia plant.

8. Argentina's second argument is that the EIA was not timely. They said that an EIA must be carried out in full before any authorization to construct is granted. And they claim that that was not what occurred. So let me take you through the facts once more. Publication in summary form of the Botnia EIA took place on 7 December 2004[89]. A public hearing was organized in

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[85]DINAMA, EIA Report for the Botnia Plant (11 Feb. 2005), CMU, Vol. II, Ann. 20, para. 6.

[86]*Ibid.*

[87]*Ibid.*, para. 1.

[88]*Ibid.*, para. 8.

[89]Botnia EIA submitted to DINAMA, published 7 Dec. 2004, RU, IM, Vol. II, Ann. 15, para. 3.3.

Fray Bentos by DINAMA on 21 December 2004[90]. DINAMA's final EIA report was published on 11 February 2005[91]. The initial environmental authorization was granted on 14 February 2005. And my learned colleague Mr. Martin explained earlier this afternoon the full implications of that authorization. It was not an authorization to construct, it was provisional. There can simply be no argument: the Botnia EIA and all of the associated procedures for public consultation and comment were completed before any authorization of any kind was given. Argentina's only argument to the contrary is that the Botnia EIA approved by DINAMA was so inadequate that it cannot be regarded as an EIA at all. So let us consider that argument as developed by Argentina's counsel.

9. Professor Sands said that the key issues were ignored in the Botnia EIA. Well, it is again evident that he does not know the evidence. There is extensive discussion of eutrophication and algal blooms in the Botnia EIA[92], and the issue is referred to in DINAMA's EIA report[93]. This was certainly not a problem of which Botnia and DINAMA were unaware. After all, such blooms had happened before, especially since the opening of the Salto dam in 1979. It was also quite reasonable for DINAMA to conclude that the Botnia plant would not make matters worse if the nutrient loading from the plant were adequately regulated — as it has been. The capacity of the receiving environment, we were told, was not taken into account but it was fully assessed in the Botnia EIA — indeed there are two whole chapters on the subject and they are neither short nor easy to miss[94]. There is an entire chapter on airborne emissions[95]. The discussion of river flow occupies some 20 pages[96]. It is clear to anybody who actually reads these reports that on this evidence DINAMA was duly diligent in considering all of the relevant matters before the decision to authorize a plant was taken.

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[90]DINAMA, EIA Report for the Botnia Plant (11 Feb. 2005), CMU, Vol. II, Ann. 20, paras. 1 and 7.

[91]DINAMA, EIA Report for the Botnia Plant (11 Feb. 2005), CMU, Vol. II, Ann. 20.

[92]Botnia EIA, paras. 6.2.1.2.f and 6.3.3.1, CMU, Ann. 160.

[93]DINAMA EIA Report, CMU, Vol. II, Ann. 20, paras. 4.6 and 6.1.

[94]Botnia EIA, CMU, Vol. VI, Anns. 159 and 160.

[95]*Ibid*., Ann. 159, Sec. 5.2.3.

[96]Studies of Plume Dispersion and Sediment Studies, Additional Report 5 of the Botnia EIA, Ann. VIII, 12 Nov. 2004, CMU, Vol. VII, Ann. 164; DINAMA Environmental Impact Assessment Report for the Botnia Plant 11 Feb. 2005, CMU, Vol. II, Ann. 20; Botnia EIA submitted to DINAMA, Chap. 5, "Characterization of the Existing Environment, CMU, Vol. VI, Ann. 159.

10. The Botnia EIA, in its final form as approved by DINAMA, is complete and adequate. Among other things, it covers the possible transboundary impact of the Botnia plant[97], the river's flow characteristics — including reverse flow —[98], air pollution[99], water quality[100], biodiversity[101], the occurrence of algal blooms[102]. I will say more about identification of alternative sites in a moment, but the crucial point is that alternative sites, at this stage, had already been identified, evaluated and rejected. The choice of Fray Bentos, as you will see in a moment, was never a foregone conclusion. Uruguay thus invites the Court to hold that the Botnia EIA, as approved by DINAMA, was carried out in a timely fashion, before the grant of any authorization to construct or operate and in accordance with the requirements of international law.

11. Argentina's advocates devoted a great deal of energy to pointing out alleged inadequacies, mistakes, and flaws in the various environmental assessments carried out on the Botnia proposal. They are plainly inviting the Court to hold that what was done was not done well, is not sufficient, and cannot sustain the decision to authorize the plant. In effect they are impugning the judgment, the competence and the good faith, not only of Uruguay but also of the International Finance Corporation, as you have heard from Professor McCaffrey. Environmental impact assessments on such large projects are often the focus of intense controversy, both in national courts and increasingly in international courts. And those opposed to these projects will rarely ever be satisfied by an EIA, however voluminous and detailed it may be, so it is no surprise that Argentina has made these arguments. One would expect no less.

12. But what constitutes an environmental impact assessment in accordance with international law is a question for lawyers, it is not a question for technicians. Whatever a technical expert may say, national case law emphasizes that an EIA need not address every aspect of a project in depth, and that its purpose is to assist the decision maker and alert the public, not to test every possible hypothesis or provide detailed solutions to theoretical problems that may have

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

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

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

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

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

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

been identified[103]. We might also recall the sensible prescription found in the United Nations Environment Programme's Principle 5, which says that "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance"[104]. So from that perspective the relevant question is whether the assessments actually undertaken provided evidence on which it was reasonable to base the decisions which DINAMA, and the Environment Ministry, and the IFC took with respect to the likely impact of the plant on the river or on Argentina[105]. Uruguay invites the Court to conclude that they did so.

13. But as Uruguay has also consistently argued, EIA is a process, not a single event. If new issues emerge or new problems have to be dealt with, they can be addressed at later stages. And the sufficiency of an EIA process must then be judged as a whole, not simply by reference to the Botnia EIA in 2004. All the assessments may then be taken into account, including DINAMA's EIA report and information subsequently supplied by Botnia at DINAMA's request, and the IFC's final Cumulative Impact Study, which was finalized in September 2006: and the final CIS fully supported the conclusions already reached by DINAMA.

14. Now, even Argentina's experts agree that the environmental impact assessment of the Botnia plant was consistent with international norms and standards of care. Let me quote from the Wheater report — and here is what it says: "The final Cumulative Impact Assessment (CIS) was much improved, and mainly consistent with what might reasonably be expected from an international impact assessment."[106] Similarly, if we look at Argentina's Latinoconsult report, this says that the final Cumulative Impact Study "is consistent with current professional practice"[107]. Well, these endorsements are impossible to reconcile with the personal opinions that were expressed by Professor Wheater in his oral submissions to the Court on Monday afternoon

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[103]See *Prineas* v. *Forestry Commission of New South Wales* (1983) 49 *LGRA* 402; *The Belize Alliance of Conservation Non-Governmental Organisations* v. *The Department of the Environment* (2003), Judicial Committee of the Privy Council (from Belize Ct. App.), RU, Vol. IV, Ann. R84; *Marsh* v. *Oregon Natural Resources Council*, 490 *U.S.* 360 (1989); *Robertson* v. *Methow Valley Citizens Council*, 490 *U.S.* 332 (1989); *Wilderness Society Inc.* v. *Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007], *FCAFC* 175 (22 Nov. 2007).

[104]UNEP, Principles and Goals of EIA, 17 Jun. 1987, as endorsed by United Nations General Assembly resolution 42/184 (1987).

[105]US and Canada — Continued Suspension of Obligations in the EC Hormones Dispute, WT/DS320/AB/R and WT/DS321/AB/R (14 Nov. 2008), para 591; Argentina — Safeguard Measures On Imports Of Footwear, WT/DS121/AB/R (14 Dec. 1999), para 121.

[106]Wheater Report, *op.cit.*, p. 1 (introductory para.), MA, Vol. V, Ann. 5.

[107]Latinoconsult Report, *op. cit.*, p. 13, MA, Vol. V, Ann. 3.

(CR 2009/20). Could it be that he was himself uncritical in writing his earlier assessment? Or has he just, perhaps, changed the state of his mind? Does he, perhaps, not know his own evidence? His long website CV makes no mention of any expertise in environmental impact assessment. In his even longer list of publications not one appears to be about environmental impact assessment. So it is strange that Argentina did not call an expert to testify on EIA when it is so critical of the process in this case.

15. The wealth of data and evaluation in the Botnia EIA, the DINAMA report, and the final CIS, more than justifies the decision to authorize the plant and the conclusion that it would pose no risk to Argentina or to the river. Such an EIA meets the requirements of Uruguayan law and it meets the requirements of international law, and Argentina has cited no precedents to the contrary.

16. Well, it is now time to look at one of Argentina's more insistent arguments — that the choice of a site at Fray Bentos was a fait accompli and that the Botnia EIA should have considered alternative and more suitable sites. Uruguay rejects all these arguments. On this issue Argentina has given the Court an erroneous account of the facts, and of the law.

17. It is almost certainly common knowledge to anyone who has ever eaten Fray Bentos corned beef that Fray Bentos is the site of what was once the largest meat processing plant in Latin America. It is the oldest industrial site in Uruguay. So Fray Bentos is no stranger either to odours, or to effluents. The choice of the Fray Bentos site for the Botnia mill may be understood by reference to five factors[108]:

— proximity to existing plantations of eucalyptus;

— good transport links and the ready availability of labour in Fray Bentos;

— the availability of water that can be extracted and returned to the river without risk of pollution or the loss of the drinking water supply;

— the dispersal of effluent into a very large river capable of diluting it, even at low flow; and finally

— the suitability of the site.

[108]IFC, Cumulative Impact Study (Sep. 2006), Chap. 2.3, CMU, Vol. VIII, Ann. 173.

18. The Botnia EIA and DINAMA's own studies demonstrated to DINAMA's satisfaction that the siting of a plant at Fray Bentos would have no harmful impact on the river and none on Argentina. The IFC's final CIS also reviewed the siting of the plant, and they confirmed the receiving capacity of the river, the lack of any harmful impact, and the proximity of plantations. Their experts found that Botnia had sufficiently considered the relevant environmental issues when deciding where to locate the plant; and they confirmed the environmental suitability of the location[109].

19. But there is nevertheless no basis for saying that Botnia or Uruguay failed to consider alternative sites or that the choice of Fray Bentos was a fait accompli. Once again, Argentina's counsel simply do not know the evidence. The material on site selection and alternative sites is set out in considerable detail in the IFC's Final Cumulative Impact Study[110]. It shows that, well before selecting Fray Bentos, Botnia evaluated four locations in total: at La Paloma, at Paso de los Toros, Nueva Palmira, and at Fray Bentos. And, anticipating Professor Sands, one of those potential sites was indeed on the coast — the one at La Paloma. That site had to be rejected at the outset because of the limited availability of fresh water — sadly, pulp mills cannot use sea water to process pulp.

20. A detailed analysis of the advantages and disadvantages of the three remaining sites was then carried out[111]. And the details again are set out in the final CIS. Paso de los Toros was rejected because of concerns over effluent dilution at low flow, and also potential conflict with other water uses. Nueva Palmira and Fray Bentos were both on the Uruguay river. But the Fray Bentos site was preferred over Nueva Palmira essentially for logistical and environmental reasons — there was better availability of timber at locations closer to Fray Bentos, which would reduce the environmental impact of heavy lorries[112].

21. So it is simply beyond reasonable argument that Botnia did consider various sites before opting for Fray Bentos, and their reasoning is fully documented in the final CIS. If there is an

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[109]See Final CIS, *op. cit.*, pp. 2.9-2.12, CMU, Vol. VIII, Ann. 173.

[110]IFC, Cumulative Impact Study, Sep. 2006, Chap. 2.3.

[111]IFC, Cumulative Impact Study, Sep. 2006, Chap. 2.3, CMU, Vol. VIII, Ann. 173.

[112]IFC, Cumulative Impact Study, Sep. 2006, Chap. 2.3, table 2.3-1, CMU, Vol. VIII, Ann. 173.

obligation to consider alternative locations at an early stage then Botnia did so. And that is probably sufficient to dispose of Argentina's arguments on this issue.

22. But the Court should also look carefully at the legal precedents relied on by Argentina's counsel. Argentina claims that as a matter of law an environmental impact assessment must include a review of alternative sites. That is what they say. So let us see what the treaties, the guidelines and the State practice have to say about alternative sites. I think the results are quite revealing.

23. Now, Professor Boisson de Chazournes based her argument on Principle 4 *(c)* of the United Nations Environment Programme's Goals and Principles of Environmental Impact Assessment, adopted in 1987 and also on the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, which I shall refer to as the Espoo Convention, and the 1998 IFC Environment Assessment Operational Policies[113].

24. Read fully, all of these sources demonstrate the precise opposite of Argentina's position. Just for good measure, and given Argentina's assertion that Uruguay must comply with European Union standards, I will also make some reference in a moment to the European Union's EIA directive[114]. But the fundamental point is that there is no requirement in any of these instruments to consider alternative locations as part of an EIA unless it is necessary in the circumstances to do so. And the point about the present case is that it was never necessary to do so once the evidence showed that there would be no significant risk to the river or to Argentina if the plant was located at Fray Bentos.

II. UNEP PRINCIPLES

25. So let us just have a look at Principle 4 *(c)* of the UNEP Principles. This provides that an EIA should include, at a minimum, "[a] description of practical alternatives, as appropriate". That is what it says.

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[113]CR 2009/14, p. 27, fn 60.

[114]Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, *Official Journal*, L 175, 5.7.1985, p. 40, as amended by Council Directive 97/11/EC of 3 March 1997, *Official Journal*, L 73, 14.3.1997, p. 5, and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, *Official Journal*, L 156, 25.6.2003, p. 17.

26. As is, I am sure, clear to the Court from that text, Principle 4 *(c)* simply mentions "practical alternatives", a phrase which is then qualified with the words "as appropriate". It says nothing about alternative locations, as Argentina would have had you believe. But how have these guidelines been interpreted and applied? Well, I would like to draw to the Court's attention UNEP's 2008 *Desalination Resource and Guidance Manual for Environmental Impact Assessments*[115]. Yes, I would not normally want to refer you to a document of that kind but it is helpful here. While obviously this was intended primarily for desalination projects, the document outlines a typical EIA process. It also considers what might constitute a practical alternative. While alternative location is given as one option, it is neither mandatory nor presented as part of an exhaustive list — it is just one of a number of options from a non-exhaustive list. And other options also listed for consideration include technological alternatives, or altering the scale of the project, or altering the process which is used[116]. Consideration of these alternatives should start, according to the guidelines, early in the planning of a new project, well before the EIA. Well, that is exactly what Botnia did, when it considered the four possible sites referred to earlier. And it also considered the relative merits of elemental chlorine free technology and totally chlorine free technology, as you heard last week. And it considered the relevant merits of secondary waste treatment and tertiary waste treatment — again, as you heard last week. And it is those technological options that were clearly the most relevant alternatives, and the choice between them had significant environmental implications, as were pointed out last week, particularly in response to the Court's questions. The details of all of this, the details of Botnia's thinking on ECF and TCF, on secondary treatment and tertiary treatment, are set out fully in its EIA[117].

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[115]UNEP (2008), *Desalination Resource and Guidance Manual for Environmental Impact Assessment*, United Nations Environment Programme at http://www.unep.org.bh/Newsroom/pdf/EIA-guidance-final.pdf.

[116]*Ibid*., p. 23, para. B.4.5 where it states:

> "The consideration of alternatives to a proposal is a requirement of many EIA systems, and should ideally begin in the early EIA stages . . . when the tolerance and disposition to make major modifications to the project is still high. Possible alternatives include alternative location, technology, scale or process, but also the 'no project' alternative . . .
>
> Possible alternatives to the project or project parts should be briefly listed and described in the EIA to indicate that alternative options have been seriously considered and evaluated. Reasoning should be provided why certain options have been dismissed or selected, leading to the one or two project configuration(s) that are eventually investigated in the EIA."

[117]CMU, Vol. VI, Ann. 158.

27. The UNEP *Manual* then goes on to make clear that other major alternatives — and this would include alternative locations — need to be seriously considered only if the EIA has revealed *significant* impacts — which, of course, the Botnia EIA did not reveal, because there were none. But let me quote the passage from UNEP:

> "As project planning progresses and consolidates, major alternatives will only be seriously considered if the EIA has revealed significant impacts . . . that cannot be mitigated otherwise. The investigation of impact mitigation measures should thus be understood as a process, [and I am still quoting UNEP] which starts with the consideration of major alternatives in early project planning and continues after potential impacts have been analyzed."[118]

That passage explains very clearly the position that Uruguay has consistently taken. Given the favourable EIA findings, it was simply not necessary to give further consideration to alternative sites. It would have been futile.

III. ESPOO CONVENTION

28. But let us also have a look at the Espoo Convention. The same conclusions are evident if we do so[119]. Appendix II, entitled "Content Of The Environmental Impact Assessment Documentation", provides as follows. It says the documentation shall contain: "*(b)* A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative."[120]

29. I notice the words "for example", "where appropriate" and "reasonable" in this Appendix. In the same way that the UNEP Principles and the UNEP *Manual* provide a non-exhaustive list of possible alternatives, so too does Appendix II of the Espoo Convention. It cannot realistically be read to mandate assessing alternative sites in the EIA as a matter of course. But there is also State practice on what is meant by "reasonable alternatives" under the Espoo Convention, and it is more helpful to Uruguay than to Argentina.

30. We can find the information on State practice in publications of the United Nations Economic Commission for Europe reviewing the Espoo Convention. Their *Review of*

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[118]UNEP (2008), *Desalination Resource and Guidance Manual for Environmental Impact Assessment*, United Nations Environment Programme, p.17, para. A.2.7.

[119]The Espoo Convention Preamble expressly refers to the UNEP Principles. See the authentic text at link from http://www.unece.org/env/eia/eia.htm.

[120]App. II *(b)*, Espoo Convention.

Implementation 2006 covered the period between 2003-2005[121], and is based primarily on responses to questionnaires sent to States about the implementation of the Convention. Question 19 asked how States interpreted "reasonable alternatives" for the purposes of the Appendix. And paragraphs 62 and 63 of the *Review* provide an overview of the responses[122] — but let me summarize them.

31. The answers reveal a wide range of different practices with respect to "reasonable alternatives" in an EIA[123]. There is no single definition that emerges from State practice. But, and I think this is the most important point, few States regard the identification of alternative sites as mandatory. In general, "reasonable alternatives" have to be identified on a case-by-case basis. Some countries simply require an EIA to indicate what alternatives have actually been considered. So, once again, let me look at the practice disclosed here in Europe. Consideration of alternative sites will depend on the nature of the project and whether locating it somewhere else would avoid the risk of harm.

IV. EUROPEAN EIA DIRECTIVE

32. Before I leave alternative sites, I should add a last few words about the European Union EIA directive[124]. Article 5 (3) of the directive requires member States to adopt necessary measures to ensure that a developer supplies information that includes: "an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects".

33. Again, this does not specify "alternative sites". There is no reason to doubt that Botnia's EAI would comply with Article 5 (3) of the European Union directive. But in June 2001, the European Commission also published guidance on EIA screening, under Article 4 of the directive,

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[121]ECE/MP.EIA/11. Available at: http://www.unece.org/env/eia/implementation/review_implementation.htm.

[122]*Ibid.*, p. 20, paras. 62-63. The individual country survey responses are available at: http://www.unece.org/env/eia/implementation/review_implementation_2006.htm.

[123]*Ibid.*

[124]Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, *Official Journal* L 175, 5.7.1985, p. 40, as amended by Council Directive 97/11/EC of 3 Mar. 1997, *Official Journal* L 73, 14.3.1997, p. 5, and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, *Official Journal* L 156, 25.6.2003, p. 17.

and scoping under Article 5[125]. The aim of the guidance is to provide practical help to those involved in these stages of the EIA process, drawing upon experience from Europe and around the world.

34. In regard to Article 5 (3), the scoping guidance says this — and I think this is a good summary:

> "Some Member States have made consideration of alternatives a mandatory requirement for EIA whilst others leave it to the developer to decide if alternatives are relevant to their project. It is, however, widely accepted good practice to consider alternatives during project planning, to examine their environmental impacts in deciding which alternative to choose and to report the appraisal of alternatives in the EIS. Alternatives are, essentially, different ways in which the developer can feasibly meet the project's objectives, for example by carrying out a different type of action, [or] choosing an alternative location or adopting a different technology or design for the project."[126]

35. So that is what the European Union says. And I think you will probably agree with me that that is yet another restatement of the wide definition given to alternatives for the purposes of an EIA. All of these precedents, whether we look at UNEP, or Espoo, or the European Union, tell the same story. So in fact does the World Bank's practice, but at this hour on a Thursday afternoon I will not bore you by going through that. But whichever one you choose to look at, none of them supports Argentina's case on alternative sites. They all encourage States to take a practical and common-sense approach. They show that an EIA is not the mechanistic process, certainly not the one that Argentina would like you to endorse. Alternatives are not just about identifying different locations. They are about finding an environmentally acceptable solution. And that, I submit, is precisely what Uruguay did with respect to the Botnia mill. It considered alternative technologies and operating processes at an early stage in the process in order to select an environmentally beneficial and sustainable plant. The record shows that Botnia set out those alternatives in the EIA documentation. Uruguay also considered the potential transboundary impact of this plant at Fray Bentos and concluded that the site was entirely suitable: there would be no harmful impact on the river or on Argentina[127]. Once that became clear, as I have said before, there was then no practical

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[125]Guidance on EIA Screening, 2001, available at: http://ec.europa.eu/environment/eia/eia-guidelines/g-screening-full-text.pdf.

[126]Guidance on EIA Scoping, 2001, para. B6.2, available at: http://ec.europa.eu/environment/eia/eia-guidelines/g-scoping-full-text.pdf.

[127]DINAMA EIA Report, CMU, Vol. II, Ann. 20.

need to consider alternative sites. Only if the evidence had shown the likelihood of significant harm to the river or to Argentina would Uruguay have been required under any of these precedents to consider alternative sites. And that is precisely the point that Uruguay has made all along: requiring Botnia to consider alternative sites once again would have been an exercise in futility, and it would only have been necessary if the Fray Bentos site had proved to be unsuitable. But it did not prove to be unsuitable. And that, I respectfully suggest, disposes conclusively of Argentina's arguments about alternative sites.

36. Before we leave EIA, however, there is one further argument that requires a brief response — the alleged failure to consult the public likely to be affected in Argentina. As I pointed out in my previous speech, the Argentine public were in fact given the opportunity to make representations during the public hearing at Fray Bentos. The details of that are set out in the information provided to the Inter-American Commission on Human Rights and also recorded in the initial environmental authorization issued on 14 February 2005[128] — I will not bore you by repeating those details here.

37. Uruguay does not doubt for one moment that public consultation is and should be part of an EIA, as it was in this instance. Nor does it doubt that Argentine citizens are entitled on a non-discriminatory basis to participate in public hearings held in Uruguay and to make written representations to the relevant authorities, as they did in this instance. That was the essence of its response to the Inter-American Commission and it remains Uruguay's position on this question today. The case of *Claude Reyes* on which Professor Boisson de Chazournes relied earlier in the week has nothing to do with the right of "populations riveraines susceptibles d'être affectées" to be adequately consulted, but it concerns instead the right of citizens to obtain documents and information from governmental authorities. So, we can now move on to monitoring, and I apologize for having to go over this again, but it is necessary to rebut Argentina's wholly unmeritorious criticisms, which were repeated yet again earlier this week.

[128]Interim Measures, June 2006, Observations of Uruguay, Vol. II, Exhibit 15, Sect. 3.

V. MONITORING

A. IFC endorsement

38. As I outlined for the Court last week, the environmental monitoring of the Botnia plant involves substantial, and co-ordinated efforts by Botnia, the company, and by the Uruguayan Government[129]. The Court can have full confidence in the adequacy of this integrated and comprehensive programme, as the IFC's independent technical experts have unequivocally and repeatedly endorsed it[130].

39. The IFC's pre-commissioning review found that the various aspects of the monitoring programme combine, in their words, to create a plan that is "extremely comprehensive and exceed[s] the commitments identified in the CIS"[131]. Indeed, after noting that the programme covers all the necessary components and follows "well established protocols"[132], the IFC's experts also went on to say that the monitoring plan for the Botnia plant is much more extensive than the programmes in place in Canada and other well-regulated jurisdictions[133]. Since the Botnia plant began operating almost two years ago, the IFC's independent experts have repeatedly reconfirmed their endorsement of the monitoring régime[134].

40. So Professor Wheater appears to be the only person who is dissatisfied with the way that Uruguay monitors the environmental performance of the Botnia plant — but that was only his opinion. His few specific criticisms regarding alleged pollution "incidents" are not supported by the evidence or even by common sense, so, I will not waste the Court's time demonstrating point by point why that is so. But I would like to take a few moments to demonstrate the excellence of Uruguay's monitoring programme.

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[129]RU, paras. 4.63-4.66.

[130]RU, paras. 4.67 & 4.73-4.74; 3rd EcoMetrix Report, Mar. 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S7, pp. ES.ii-ES.iii and 1.2 (describing the "comprehensive monitoring" involved).

[131]RU, para. 4.67 (quoting IFC, Pre-Commissioning Review, Nov. 2007, RU, Vol. III, Ann. R50, p. ES.iv).

[132]RU, paras. 4.67-4.68 (quoting IFC, Pre-Commissioning Review, Nov. 2007, RU, Vol. III, Ann. R50, p. ES.iv).

[133]RU, paras. 4.67-4.72.

[134]RU, paras. 4.73-4.74; 3rd EcoMetrix Report, Mar. 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S7, pp. ES.ii-ES.iii and 1.2.

B. Pre-operational monitoring

41. This programme is grounded on substantial pre-operational monitoring. DINAMA conducted 15 months of pre-operational water quality monitoring[135], not the seven you were told by Argentina, and it required Botnia to conduct even more[136]. These many months of pre-operational monitoring, which targeted the region of the Uruguay river nearest the plant, augmented almost 15 years of more general monitoring that had been carried out within CARU under the PROCON programme[137]. So, in total, Uruguay has been involved in over 16 years of pre-operational water quality monitoring of the Uruguay river. How much more can Argentina reasonably expect?

C. Number of sampling stations

42. Uruguay's post-operational monitoring programme involves 16 sampling stations, all of them located on the River Uruguay[138]. And the Botnia plant collects samples at a further four stations, so the total of 22[139] is more than double the nine sampling stations established in the PROCEL plan, which both Uruguay and Argentina agreed was sufficient in November 2004[140].

D. Station location

43. Of DINAMA's 16 monitoring stations, three are located in close proximity to the Botnia plant, and the others substantially upstream and downstream so that they can reasonably function as control points. Uruguay has also established a station to monitor the effects of the Fray Bentos sewage outfall. So this overall set-up allows Uruguay to monitor the actual effects, if any, of the Botnia plant.

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[135]DINAMA, Performance Report for the First Year of Operation of the Botnia Plant and the Environmental Quality of the Area of Influence, May 2009, (hereinafter "DINAMA May 2009 Water Quality Report"), Uruguay's Submission of New Documents, 30 June 2009, Ann. S2, App. I, p. 1/54.

[136]Botnia Environmental Management Plan for Operations, App. 3 (Environmental Monitoring and Follow-up. Plan), 24 Sep. 2007, RU, Vol. II, Ann. R41, p. 6/66 (establishing that Botnia conducted pre-operational monitoring from April 2005 until the start of operations in Nov. 2007, or over 18 months).

[137]CMU, paras. 7.5-7.9 (explaining that PROCON was established in 1987 and was carried out through 2005).

[138]DINAMA May 2009 Water Quality Report, *op. cit.*, Ann. S2, App. I, pp. 2-3/54, fig. 2.1 and table 1.

[139]Botnia Environmental Management Plan for Operations, App. 3, (Environmental Monitoring and Follow-up. Plan), 24 Sep. 2007, RU, Vol. II, Ann. R41, para. 2.2.2.2.

[140]Subcommittee on Water Quality and Prevention of Pollution Report No. 247, 8-12-Nov. 2004, approved in CARU Minutes No. 08/04, 12 Nov. 2004, Plan for Monitoring the Environmental Quality of the Uruguay River in the Areas of the Pulp Mills (hereinafter "PROCEL"), CMU, Vol. IV, Ann. 109, p. 1961.

E. Sampling frequency

44. And as far as the frequency of the monitoring is concerned, that is one of the subjects of Professor Wheater's specific criticisms, DINAMA conducts some 150 per cent of the water quality analysis that Argentina considered to be sufficient under PROCEL[141] — and that is half as much again — and at exactly the same frequency as the Argentine scientists responsible for Chapter 4 of Argentina's Scientific and Technical Report[142]. DINAMA also conducts sediment sampling three times as often as was required under PROCEL[143] — in agreement with Argentina.

45. Professor Wheater is also wrong when he says that Uruguay's monitoring programme involves no continuous monitoring[144]. Botnia's effluent would be the direct source of any Botnia-related changes in the water of the Uruguay river. Now, that effluent is continuously monitored for certain critical parameters, such as conductivity[145]. It is electronically linked to a real time "contingency prevention" and reporting system[146], the essence of that is that it allows Botnia and DINAMA to recognize any important changes in the effluent characteristics, and that obviously allows them in turn to take preventive action when they realize there is the possibility of any impacts on the quality of the river's water. Argentina has not proposed any alternative superior to this integrated and practical system[147].

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[141]PROCEL, *op. cit.*, CMU, Vol. IV, Ann. 109, p. 1961 (establishing that sampling was to be conducted four times a year); DINAMA Monitoring Plan for Cellulose Plant in Fray Bentos, RU, Vol. IV, Ann. R86, p. 12/40 (establishing that DINAMA is to conduct water quality sampling six times a year).

[142]Argentina's Scientific and Technical Report, Chap. 4, p. 63 (establishing that the Argentine scientists responsible for Chap. 4 of the Report conducted samples once every two months between May 2008 and January 2009).

[143]PROCEL, *op. cit.*, CMU, Vol. IV, Ann. 109, p. 1961 (establishing that sediment monitoring was to be conducted once annually); DINAMA Monitoring Plan for Cellulose Plant in Fray Bentos (Version 2: May 2007), Oct. 2007, RU, Vol. IV, Ann. R86, App. B, para. B.3 (establishing that DINAMA is to conduct sediment sampling three times a year).

[144]See, for example, CR 2009/15, p. 26, para. 15 (Wheater).

[145]IFC Pre-commissioning Review, Nov. 2007, RU, Vol. III, Ann. R50, p. 10.3, table 10.1. See also DINAMA Monitoring Plan for Cellulose Plants in Fray Bentos, Preliminary Draft, Aug. 2006, CMU, Vol. II, Ann. 31, App. 3 ("Continuous: Volume, T, pH, Conductivity" and "The measuring parameters continue with real-time information").

[146]DINAMA Monitoring Plan for Cellulose Plants in Fray Bentos, May 2007, CMU, Vol. II, Ann. 39, para. 39 (explaining that there is "remote access to the monitoring data in real time"); Botnia Environmental Management Plan for Operations, App. 5 (Analysis of Environmental Risks), 30 June 2007, RU, Vol. II, Ann. R43, p. 2, table 1 (explaining that if certain limits are reached such that "there is a possibility that the permitted levels will be exceeded, production is cut back"); Botnia Environmental Management Plan for Operations, App. 6 (Contingency Plan), 20 Sep. 2007, RU, Vol. II, Ann. R44, p. 21, para. 3.2.1 (establishing that, if decreasing production fails to normalize the effluent, the plant manager is under the legal obligation to report the situation to DINAMA immediately).

[147]See CR 2009/17, pp. 26-27, para. 15 (Wheater) (implying that Uruguay should monitor the water of the Uruguay river on an hourly or daily basis in order to pick up changes "lasting from hours to days"). See also *Standard Methods*, 20th Edition, 1999 (for BOD5) and DINAMA Monitoring Plan for Cellulose Plant in Fray Bentos (Version 2 — May 2007), Oct. 2007, RU, Vol. IV, Ann. R86, App. A, table A1 (establishing that the analysis of certain water quality parameters, such as BOD5, require up to five days of turnaround time, such that meaningful hourly or daily monitoring would be impossible).

F. Scope of monitoring

46. And, contrary also to Professor Wheater's allegations, Uruguay has ensured that substantial water and sediment quality monitoring has been conducted during the operation of the Botnia plant. While PROCEL planned only for the monitoring of 28 water and six sediment parameters[148], DINAMA has fully executed every aspect of its 68-parameter water quality monitoring plan and its 18-parameter sediment quality monitoring plan[149]. It has required even more substantial water quality monitoring from Botnia. But Dr. Wheater is correct that Botnia is committed to monitoring 72 water quality parameters[150]. This is exactly what the company has done[151], and Argentina has provided no evidence to the contrary[152].

47. So DINAMA has fully complied with its obligations to ensure that Botnia operates within the requirements of its authorization. And Botnia is also required to monitor its own effluents. DINAMA has repeatedly established, via audits and reports, that the company is holding up its end of the bargain[153].

48. Professor Wheater also says that Argentina's monitoring programme is better than Uruguay's because it involves what he calls an "ecosystematic" approach[154] — I think that means "ecosystemic". But this is a false comparison, even according to Argentina's own counsel. On

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[148]PROCEL, *op. cit.*, CMU, Vol. IV, Ann. 109, p. 1962.

[149]DINAMA Monitoring Plan for Cellulose Plant in Fray Bentos (Version 2: May 2007), Oct. 2007, RU, Vol. IV, Ann. R86, pp. 8-10/40 and 14/40, tables A1 and B1 (where some entries involve multiple parameters); DINAMA, May 2009 Water Quality Report, *op. cit.*, Uruguay's Submission of New Documents, 30 June 2009, Ann. S2, Water and Data Tables; DINAMA Surface Water and Sediment Quality Data Report (six-month report: January-June 2009), July 2009, Anns. 1 and 2, original Spanish version available at http://www.mvotma.gub.uy/dinama/index.php?option=com_docman&Itemid=312. Translation submitted to the Court on 14 September 2009.

[150]Botnia Environmental Management Plan for Operations, App. 3 (Environmental Monitoring and Follow-Up Plan), 24 Sep. 2007, RU, Vol. II, Ann. R41, pp. 7-11/66, table 1.

[151]DINAMA, Six-Month Report on the Botnia Environmental Performance Plan (11 Nov. 2008-31 May 2009), 22 July 2009 (hereinafter "DINAMA July 2009 Botnia Performance Report"), p. 4, para. 2, Original Spanish version available at: http://www.mvotma.gub.uy/dinama/index.php?option=com_docman&Itemid=312. Translation submitted to the Court on 14 September 2009.

[152]The fact that Botnia's website includes data on only six especially important parameters (CR 2009/17, pp. 32-33, para. 28 (Wheater)) is not evidence that that the company has failed to complete its full monitoring program. Botnia is under no obligation to report all of its sampling data to the public.

[153]DINAMA July 2009 Botnia Performance Report, *op. cit.*, p. 4, para. 2 ("Five inspections and tow audits of the implementation of the environmental management operation . . . were carried out" between 10 Nov. 2007 and 31 May 2009. No violations have ever been recorded.)

[154]CR 2009/17, p. 28, para. 18 (Wheater).

Monday, you were told by Professor Boisson de Chazournes that Uruguay's monitoring programme is also based on an ecosystemic approach[155].

49. Uruguay's monitoring involves robust study of the river's aquatic organisms. As far as fish are concerned, Uruguay quite deliberately focuses its analysis on the two most abundant species whose members spend their entire lives in the Uruguay river and they could therefore accurately reflect changes actually caused by the Botnia plant[156]. Even Professor Wheater concedes that Uruguay's study of these fish populations involves "detailed analysis"[157]. And Uruguay has deliberately chosen not to focus on the Sabalo that forms the basis for Dr. Colombo's fish study because those are a migratory species that feed and breed far away in the polluted waters of the Rio de la Plata and the Parana river[158] — not much point in monitoring those. This means that the Sabalo are entirely inappropriate for the monitoring of Botnia's effects on the environment. And Dr. Colombo has himself established that they reflect contamination from sources far away from the plant[159].

50. So, these are perhaps rather too many specific examples of the problems with Professor Wheater's argument. But they also demonstrate to the Court that Uruguay oversees an excellent programme to monitor the environmental performance of the Botnia plant. The IFC's independent experts have repeatedly confirmed that this is true, and comparison between Uruguay's programme and PROCEL, to which Argentina agreed, highlights that the programme is more than adequate.

51. Professor Wheater's criticisms of the monitoring programme essentially boil down to the allegation that Uruguay has either neglected or been unable to "look for connections between . . .

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[155]CR 2009/20, p. 28, para. 4 (Boisson de Chazournes) (arguing that "toutes les évaluations environnementales réalisées dans le cadre du projet Botnia . . . auxquelles se réfère l'Uruguay de manière intensive reposent toutes sur une approche écosystémique").

[156]See DINAMA Monitoring Plan for Cellulose Pulp in Fray Bentos (Version 2: May 2007), Oct. 2007, RU, Vol. IV, Ann. R86, p. 23/40.

[157]CR 2009/15, p. 28, para. 18 (Wheater).

[158]Argentina's Scientific and Technical Report, Chap. 5, pp. 3, 5-8, 18 and 22; CR 2009/14, p. 50, para. 24 (Colombo) ("The main channel of the Uruguay river is a . . . migration route for several fish species.").

[159]J. C. Colombo, C. Bilos, M. R. Lenicov, D. Colautii, P. Landoni & C. Brochu, "Detritivorous fish contamination in the Río de la Plata estuary: a critical accumulation pathway in the cycle of anthropogenic compounds", *Can. J. Fish. Aquat. Sci.* 57: 1139-1150, 2000, p. 1141 (reporting "major components of organic contaminants and trace metals in Río de la Plata" Sabalo), available at http://article.pubs.nrc-cnrc.gc.ca/RPAS/rpv?hm=HInit&afpf=f00-031.pdf&journal=cjfas&volume=57 (last visited on 30 Sep. 2009).

deteriorating water quality and . . . ecosystem impacts"[160] — that is what he said. But Uruguay's monitoring has established — and the IFC's independent experts have confirmed — that the Botnia plant has *no* negative effect on water quality. That is what Dr. Colombo's water quality data show as well. So there is no deteriorating water quality to which ecosystem impacts could be connected. Surely Uruguay cannot be faulted for failing to detect what is not there.

52. Finally, if Professor Wheater's critique had any merit — any merit at all — then it would be very easy to modify and strengthen the monitoring scheme, with or without Argentina's co-operation.

VI. POLLUTION AND CHANGES TO THE ECOLOGICAL BALANCE OF THE RIVER

53. Enough of monitoring. That brings us finally to Articles 36 and 41, and Argentina's claims about pollution and the ecological balance of the river. So, let me start with the simple points. Air pollution first. Professor Boisson de Chazournes performed a characteristically graceful tango around the CARU *Digest* — as one would expect — and she discovered that the definition of "industrial pollution" includes gas emissions. Indeed so. But these are gas emissions that have an impact on the aquatic environment pursuant to Article 41 — that is all, they are not a reference to air pollution in general, or to acid rain, or to transboundary odours. The CARU *Digest* still regulates none of these things. Neither does the Statute. And Argentina has still provided no proof — indeed it has not made any case at all — to show that airborne emissions from the Botnia plant have caused any pollution of the river itself. Its evidence focuses on odours in Gualeguaychú — but that is not the river. Common sense would tell us that phosphorus in rivers is not normally deposited there by industrial chimneys, but Argentina is remarkably coy about what other pollutants it thinks have been deposited in the river from the air. And if airborne depositions have not caused non-compliance with CARU water quality standards then they cannot possibility be in breach of the Statute. Uruguay reiterates its previous arguments that the plant has not caused air pollution of the river and that Argentina's case on air pollution beyond the river is outside the scope of Article 60 of the Statute and the jurisdiction of the Court.

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[160] CR 2009/15, p. 28, para. 18 (Wheater).

54. Now, Article 36. Professor Sands has reread Article 36 and he still thinks that it obliges Uruguay to prevent "any" — "any" was his emphasis — change in the ecological balance. Well, I could simply reiterate my argument that the ordinary meaning of the text, read in context and in the light of its object and purpose, contradicts that interpretation[161]. But let us also look at the authentic Spanish text of Article 36: this does not seem to include the word "any", not even in Spanish. And we can look at the text and compare it with the unofficial English translation used by Professor Sands.

55. So here is the Spanish — and I hope you will pardon my Spanish: it is not one of my languages: "Las Partes coordinarán, por intermedio de la Comisión, las medidas adecuadas a fin de evitar la alteración del equilibrio ecológico . . . [a fin de evitar la alteración del equilibrio ecológico]." Rather obviously to me, this text does not support Professor Sands's interpretation. It does not say "cualquier alteración", which is what you would expect, if it did. But enough of modern languages.

56. Article 36 still, even today, envisages action by both parties: the "co-ordination" — is the word it uses in English — of measures to avoid changes in the ecological balance. And it says that in all three languages. And this is the point that Professor Sands seems to have missed. By its very nature it is an obligation that could only be fulfilled jointly, not one which imposes unilateral obligations. Argentina has not identified what more Uruguay could do to co-ordinate measures under Article 36. It has co-operated in adopting the necessary rules through the CARU *Digest*, as I explained last week. Argentina might also like to recall that if effluents from the Botnia plant are capable of producing ecological change then so are effluents from Gualeguaychú industrial park. Uruguay's interpretation of Article 36 at least has the merit of allowing both parties to decide how much change, if any, they wish to tolerate.

57. Thirdly, let us just say something about the burden of proof. On Monday (CR 2009/20), my good friend Professor Pellet offered the Court the remarkable proposition that the Statute places the burden of proof equally on both parties. Well, I read the compte rendu with reasonable care, but he cited no provisions of the text and he offered no reasoning in support of his analysis in his

[161] 1969 Vienna Convention on the Law of Treaties, Art. 31.

remarks to you. The straightforward reading of the text reveals nothing that might sustain what I am sure the Court will probably correctly recognize as a characteristic Gallic flourish. Eh bien.

58. That brings us finally to phosphorus. On Tuesday Argentina's counsel referred to phosphorus and argued that Uruguay had failed to comply with the European Union's Water Quality Directive[162]. Well, even if that directive were applicable in this case, which it is not, it is utterly unhelpful to Argentina. It is true that the Directive envisages the progressive elimination of priority hazardous substances, including nonylphenols, although it does not ban them entirely. But the Botnia plant, of course, does not use nonylphenols, a point to which Mr. Reichler will return tomorrow. And Argentina does not regulate them, as we know, nor does CARU. The European Union directive also promotes reduction of pollutants, including phosphorus. But it does not prohibit the introduction of new sources of phosphorous emissions. Rather, what it does, is to require member States to co-operate in the management of transboundary river basins so as to facilitate the objectives of the directive. So phosphorus in the transboundary rivers of the European Union has to be tackled jointly, over a longish period of time. That sounds very familiar. Uruguay already regulates phosphorus and it would like to have some co-operation from Argentina in making further reductions. But I have to say that if the European Union directive were applicable law in this case, Uruguay would be in compliance with it. Argentina would not.

59. Uruguay has never concealed the fact that its water quality standard for phosphorus is regularly exceeded, and was exceeded even before the Botnia plant was built[163]. It is there in the Counter-Memorial. The reason for this is quite simple: as Professor McCaffrey showed earlier this afternoon, the cause of phosphorus in the River Uruguay has nothing to do with Botnia and very much to do with Argentina's input, which dwarfs Botnia's.

60. Now on Monday, Professor Sands told us not only that Argentina had proposed a CARU standard for phosphorus, but he also said that Uruguay blocked it. And to support these claims, he referenced various sources that do not appear anywhere in the record[164]. However, we were able to

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[162]CR 2009/21, p. 13, para. 5 and pp. 30-32, paras. 35-36 (Sands).

[163]CMU, paras. 4.91-4.92.

[164]CR 2009/20, pp. 30-31, para. 35, fns. 36 and 37 (Sands). While Argentina has continued to insist on relying on evidence outside of the record to lend credibility to its alleged claims, Uruguay would be happy to submit the relevant documents to the Court, should it so desire.

locate them and we can now report that Professor Sands is unambiguously wrong on both counts. First, no Argentine delegate ever proposed a phosphorus standard in CARU. Second, Uruguay never blocked a proposal since it did not exist, it could not and would not[165]. So much for the pulp fiction. What is the real story?

61. Now, what these documents do tell us, when you read them, is that in April 2005, CARU — just to recall, that means the delegations of both States — requested that the Commission's technical advisers should study the issue of phosphorus in the river[166]. The technical advisers presented the requested study. Now, by definition, these CARU technical advisers are clearly not members of the Argentine delegation, despite what Professor Sands might like you to believe[167]. But nowhere in this document did the technical advisers actually propose establishing a CARU standard for phosphorus. So even if they were, it would not make any difference. So what was the outcome of this grand report? A suggestion to further evaluate the sources of phosphorus in the river, which was adopted by CARU[168]. And very little more resulted from that exercise.

62. And so the time passed, and until one year later, when, if you believe Professor Sands, Uruguay blocked another Argentine proposal for phosphorus regulation, included, so he says, in a larger proposal for CARU "to take a holistic ecological approach to its activities"[169]. There is one part of this statement that is correct. Uruguay did reject the proposal as a whole, because the revisions proposed went beyond CARU's authority under the Statute. But even this expansive proposal did not actually include any mention of the claimed phosphorus standard. So Uruguay was not rejecting a proposal to regulate phosphorus, it was rejecting a proposal to rewrite the 1975 Statute and the responsibilities of CARU — totally different things. And we searched high and low in Argentina's supporting evidence and, yet again, we found no proposal to adopt a

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[165]CARU Minutes 05/2005, cited in CR 2009/21, p. 30, para. 35, fn. 36 (containing a technical report prepared by CARU Technical Secretary, proposing further evaluation of the sources of phosphorus in the river); CARU Minutes 07/2006, cited in CR 2009/21, p. 30, para. 35, fn. 37 (containing reference to Argentina's proposal for expanded monitoring but not proposing any phosphorous standard).

[166]CARU Minutes 05/2005, cited in CR 2009/21, p. 30, para. 35, fn. 36.

[167]CARU Minutes 07/2006, cited in CR 2007/21, p. 30, para. 35, fn. 37.

[168]CARU Minutes 07/2006, cited in CR 2007/21, p. 30, para. 35, fn. 37.

[169]CR 2009/21, pp. 30-31 (Sands).

phosphorus standard. Probably not surprising, since Argentina has itself never adopted a phosphorus standard, as Professor McCaffrey told you, and all we have been able to identify is a suggestion from the technical advisers that phosphorous levels should be evaluated, as was already being done[170].

63. In these circumstances the actions of Uruguay in permitting phosphorous discharges to the river cannot possibly be characterized as a breach of the 1975 Statute or of Uruguayan law. Nor has Argentina proved any harm to the river resulting therefrom — its only real evidence focuses on the algal bloom of 4 February. But algal blooms are not evidence of ecological change — they come and go, they are a long-standing and normal feature of the river. Argentina has not shown that this particular bloom caused any harm. Given the other evidence Argentina has produced one would at least have expected some pictures of dead fish. The Court's own pond currently has an algal bloom, let me tell you, but the fish are still very much alive. They certainly were at a quarter to three this afternoon — and so are the seven ugly ducklings.

64. Well, I think that is probably enough on phosphorus, so let me come to my conclusions.

VII. CONCLUSIONS

65. Mr. President, Members of the Court, you have been told that pulp mills are inherently risky. Some older ones may be, but this mill at this location seems inherently benign and unproblematic, provided it is properly monitored and the permits are enforced. That was DINAMA's original judgment and all of the evidence you have heard suggests that it was a sound judgment. The evidence also shows that the plant is properly monitored and that the permits can be and will be and have been enforced.

66. Argentina says that Uruguay has been negligent and incapable of dealing with the scientific issues, including most importantly the flow of the river, the environmental impact assessment and monitoring. But Uruguay's own evidence shows that all of the important issues were fully understood and comprehensively assessed, in advance, at the appropriate time. Its monitoring data is more comprehensive, more reliable, and based on a far longer run of baseline data than Argentina's. Argentina's own science has been more helpful to Uruguay than to its own

[170]CARU Minutes 07/2006, Report No. 264 of the Undercommission of Water Quality and Prevention, p. 02442, cited in CR 2009/21, p. 31, para. 35, fn. 37.

side, and it has failed to identify either actual harm or any real risk of harm. Only things that might be associated with the plant but it has no proof. The Court can and should take a common-sense approach to this evidence, but Mr. Reichler will say more about that tomorrow.

67. The precautionary principle has also been invoked by Argentina, but it has made — I think it fair to say — no real effort either this week or in its opening submissions to demonstrate any likelihood of serious or irreversible harm that would be required for that principle to be applicable. As I explained to the Court last week, Uruguay has made sure that there is no risk of serious or irreversible harm by requiring the use of modern technology with waste minimization techniques and processes that eliminate persistent organic pollutants and other toxic substances, in accordance with Agenda 21 of the Rio Conference. Uruguay has done all that a diligent government should have done in the circumstances to assess, to eliminate and to regulate the risk of pollution or ecological harm. The results are evident in the absence of pollution or harm, in the continued compliance with CARU water quality standards and compliance with Articles 36 and 41 of the Statute. But Professor Reichler will also say more on the evidence about those questions tomorrow.

68. Finally, you have also been told that this is an important environmental case, but that is obvious to all of us. Uruguay has sought throughout these proceedings to be guided by and to promote a coherent view of international environmental law — one that reflects the consensus of developed and developing States forged at Rio in 1992 and subsequently developed by the International Law Commission and in other contexts by the United Nations. That is why Uruguay has not taken a narrow reading of the 1975 Statute, even though on certain issues, most obviously the environmental impact assessment, there is at best only a very slender basis in the text itself. At the heart of the Rio consensus is of course the concept of sustainable development with its emphasis on integrating economic development with environmental protection. The balance that this concept entails is equally reflected in the Draft Articles of the ILC on Prevention of Transboundary Harm and in the United Nations Convention on International Watercourses. It is regrettable that that balance has not been reflected in the arguments advanced by Argentina. One may wonder what vision of international environmental law motivates Argentina, but it is not one that rests on firm or widely accepted foundations in contemporary international society. Nor does

it rest on the jurisprudence of this Court or on the conclusions of the International Law Commission. Uruguay has no doubt whatever that the Court shares its own concern for environmental protection. As this case has once again shown, the environment is certainly not an abstraction.

69. Mr. President, Members of the Court, it has been an honour to address you in this case on behalf of Uruguay and I thank you for your patience and attentiveness.

The VICE-PRESIDENT, Acting President: I thank Professor Boyle for his presentation. The Court now rises and will resume tomorrow morning at 10 o'clock.

The Court rose at 5.50 p.m.