INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING PULP MILLS
ON THE RIVER URUGUAY

ARGENTINA
v.
URUGUAY

REJOINDER OF URUGUAY

VOLUME I

---

29 JULY 2008

VOLUME I

REJOINDER OF URUGUAY

TABLE OF CONTENTS

Page

CHAPTER 1.
INTRODUCTION AND SUMMARY OF ARGUMENT

1.1 Pursuant to Order of the Court dated 14 September 2007 fixing the pertinent time limits, Uruguay respectfully submits this Rejoinder in response to Argentina's Reply dated 29 January 2008. As provided in Article 49(3) of the Rules of Court, Uruguay's Rejoinder will focus on bringing out the legal and factual issues that still divide the Parties.

1.2 The single largest issue still dividing the Parties is the question of whether or not the Botnia plant is causing or will cause significant harm to the Uruguay River. The grounds for dispute, however, have all but disappeared in the time since Argentina submitted its Reply. The Botnia plant entered operation on 9 November 2007. Thus, more than eight months of real-world data now exist with which to evaluate the Parties' predictions. The evidence shows that Uruguay's predictions were right and Argentina's wrong. Independent reports by technical experts confirm that the plant is performing up to the high environmental standards expected of it, and that it is not causing any harm to the Uruguay River or its aquatic environment. Indeed, the scientific evidence shows that the plant is having no measurable impact whatsoever on the river or the quality of its water.

1.3 On 10 July 2008, the independent experts retained by the International Finance Corporation ("IFC") issued their report evaluating the plant based on its operation thus far. According to the IFC's public statement issued the same day:

> The report finds that the mill is performing to the air and water quality standards projected in the Cumulative Impact Study ["CIS"] and Environmental Impact Assessment ["EIA"], as required by IFC, and well within the limits established by the

environmental permits issued by the Uruguayan regulator, DINAMA[1].

1.4 The text of the 68-page technical report itself is unequivocal. It states:

> From this review and to this point in time, all indications are that the mill is performing to the high environmental standards predicted in the EIA and CIS, and in compliance with Uruguayan and IFC standards. These results are also consistent with the performance measures for other modern mills[2].

Elsewhere, the report states:

- The water of the Río Uruguay is considered to be of high quality since the concentrations of most indicator parameters are well below the most restrictive of the applicable Uruguayan and CARU standards.…

- A comparison of the monitoring data pre- and post-commissioning of the mill shows that the water quality of the Río Uruguay has not changed as a result of the mill.…

- The water quality between the mill and Fray Bentos is comparable to the water quality further upstream beyond the influence of the mill, indicating that the mill has not affected water quality within the Río Uruguay[3].

1.5 Uruguay invites the Court to read for itself the full text of the technical report on the operation of the Botnia plant. It is submitted as Annex R98 and is located in Volume IV of this Rejoinder. The Court will see that, according to the independent experts reporting to the IFC, the plant is operating in a manner that is

---

[1] International Finance Corporation (hereinafter "IFC") Web Site, Latin America & The Carribean, "Orion Pulpmill - Uruguay", *available at*: http://www.ifc.org/ifcext/lac.nsf/content/Uruguay_Pulp _Mills (last visited on 11 July 2008). Uruguay Rejoinder (hereinafter "UR"), Vol. IV, Annex R95.

[2] IFC, *Orion Pulp Mill, Uruguay Independent Performance Monitoring as Required by the International Finance Corporation, Vol. IV (Phase 2: Six-Month Environmental Performance Review)* (hereinafter "*Environmental Performance Review*") (July 2008), ES.ii. UR, Vol. IV, Annex R98.

[3] *Ibid*., ES.iii.

fully compliant with European Union BAT (Best Available Technologies), and its emissions into the Uruguay River are below -- in most cases far below -- the limits established for environmentally-safe discharges by Uruguay (in its environmental regulations and its permits to Botnia), by CARU (in its anti-pollution regulations and water quality standards) and by the IFC itself (in its Final CIS of September 2006).

1.6 The experts' report shows that water quality monitoring data were collected before operation of the plant began and at regular intervals thereafter. In all cases, emissions of the following substances were well within the allowable limits set by Uruguay and CARU, and consistent with the levels predicted in the IFC's Final CIS: phosphorus, nitrogen, biological oxygen demand, chemical oxygen demand, total suspended solids, dioxins and furans, cadmium, nickel, copper, arsenic, chrome, mercury, lead and zinc.

1.7 The independent experts conclude that there is no reason to believe that the plant will not continue to operate in the environmentally safe and responsible manner that has characterized its performance thus far. If anything, the experts forecast, the plant will perform *even better* in the future. Modern pulp mills, like the Botnia plant, require an initial start-up period to optimize their performance. It is remarkable, therefore, that the Botnia plant has already fulfilled the goals set for it, even before it has reached its peak performance.

1.8 While Uruguay is pleased by these results, and encouraged by the IFC experts' confidence in the plant, this does not mean it will be any less vigilant than it has been so far. As Uruguay discussed in the Counter-Memorial, environmental protection and sustainable development are core national principles enshrined in its

Constitution[4]. Moreover, as the State in whose territory the Botnia plant in located, Uruguay has an obvious interest and responsibility to ensure that the plant continues to operate to the highest environmental standards. It will therefore continue vigorously to monitor all aspects of the plant's operations, including but not limited to its emissions into the Uruguay River and its impact, if any, on water quality and the aquatic environment. Uruguay reiterates that it will not hesitate to use the full authority available to it under its stringent environmental laws and regulations, and the strict conditions of the permits and licences issued to Botnia, to ensure Botnia's full compliance with those laws, regulations and conditions.

1.9 What remains in dispute is Argentina's speculation that the Botnia plant could cause significant harm to the river and its ecosystem at some point in the distant future, around 15 years from now according to the Reply. The Counter-Memorial demonstrated that Argentina's fears are groundless and scientifically unsupportable. This Rejoinder responds to their reformulation in the Reply, and demonstrates that no matter how Argentina might package them, its attempts to sow doubt about the future performance of the Botnia plant have no serious scientific basis or credibility. The independent experts retained by the IFC, as distinguished from Argentina's hired consultants, completely refute all of Argentina's hypotheses.

1.10 This leaves standing only Argentina's complaint that Uruguay violated the procedural requirements set forth in Articles 7-12 of the 1975 Statute of the River Uruguay, which require notice, consultation and, if necessary, consultations between the Parties concerning any project that might affect navigation, the régime of the

---

[4] *See* Counter-Memorial of Uruguay (hereinafter "UCM"), para. 1.12.

river or the quality of its water. Uruguay affirms, as it has from the outset of this case, that it has fully satisfied the obligations incumbent on it under Articles 7-12 with respect to the Botnia plant, as well as the ENCE plant (which was never constructed). Uruguay demonstrated this in the Counter-Memorial. This Rejoinder will refute Argentina's continued insistence on Uruguay's alleged procedural violations of Articles 7-12 and will demonstrate again that Uruguay has committed no such violations and that Argentina's arguments are entirely without merit.

1.11 The remainder of this Introduction is divided into three sections. Section I presents further observations by Uruguay on the scope of the Court's jurisdiction in this case. Section II provides a chapter-by-chapter summary of the arguments presented in this Rejoinder. Section III very briefly describes the structure of the Rejoinder.

Section I.
Further Observations on Jurisdiction

1.12 In Chapter 1 of the Counter-Memorial, Uruguay presented its observations on the Court's jurisdiction and showed that it is defined by Article 60 of the 1975 Statute[5]. Under Article 60, the Court can resolve "[a]ny dispute concerning the interpretation or application" of the Statute[6]. That is the scope of the Court's jurisdiction in this case. While the jurisdiction of the Court includes all matters covered by the Statute, it does not extend to matters beyond the Statute's reach. Thus, the Court plainly has jurisdiction over such matters as pollution and other

[5] UCM, para. 1.23.

[6] Article 60 also provides for jurisdiction over disputes concerning the interpretation and application of the 1961 Treaty Concerning the Boundary Constituted by the River Uruguay. Argentina does not, however, state any claims based on that instrument in this case.

forms of harm to the Uruguay River itself, to the organisms that live within it, and to the quality of its waters. But the Court's jurisdiction under Article 60 does not extend to such concepts as air pollution, noise pollution or "visual" pollution, since none of these three subjects is covered by the Statute.

1.13 The response Argentina offers in the Reply is notably muted. Argentina does not argue that non-aquatic forms of pollution are, in fact, embraced within the scope of the Statute and thus the Court's jurisdiction. Neither does it argue more generally that Uruguay's analysis is incorrect in any way. All that Argentina argues is that Uruguay puts "la charrue avant les bœufs" because "[l']objet de la présent instante est précisément de déterminer l'objet et la portée des obligations des Parties en vertu du Statut"[7]. In this manner, Argentina sidesteps the question of which subjects lie within the Court's jurisdiction and which do not. The failure of the Reply to address the substance of Uruguay's argument effectively concedes the point that the Statute, to the extent it addresses pollution, is exclusively concerned with water pollution. And rightly so. The plain terms of the Statute (which is the Statute on the *River* Uruguay, after all) make clear that to the extent it addresses matters of pollution, only aquatic pollution is included. The Court will find nothing in that instrument that pertains to air, noise or "visual" pollution, and Argentina points to nothing of this nature. Accordingly, any claims concerning those non-aquatic forms of pollution are outside the scope of the Statute and beyond the Court's jurisdiction.

---

[7] Reply of Argentina (hereinafter "AR"), para. 0.17 ("the cart before the horse", "[t]he subject of this proceeding is precisely to determine the subject and scope of the Parties' obligations under the Statute").

Section II.
Summary of Argument

1.14 Like the Counter-Memorial, this Rejoinder consists of two Parts and seven Chapters, followed by Uruguay's Submissions. ***Part One***, which consists of ***Chapters 2*** and ***3***, responds to the portions of the Reply dealing with Argentina's claims that Uruguay violated the procedural requirements of the 1975 Statute, and demonstrates that Uruguay has fully satisfied all of its procedural obligations. ***Part Two***, which consists of ***Chapters 4*** through ***7***, responds to the portions of the Reply addressing Argentina's claims that Uruguay has violated the Statute's substantive obligations pertaining to protection of the Uruguay River and its aquatic environment, and demonstrates that Uruguay has fulfilled those obligations as well.

1.15 ***Chapter 2*** of ***Part One*** follows immediately after this Introduction and sets forth Uruguay's response to Chapter 1 of Argentina's Reply concerning the law applicable to the procedural issues. The Parties' written pleadings to date make clear that there are two core issues lying at the heart of the procedural dispute between them. They are: (i) whether Uruguay violated Article 7 of the 1975 Statute by issuing preliminary environmental authorisations to Botnia and ENCE, and proceeding directly to State-to-State consultations with Argentina without, as a first step, sending a formal notice to CARU and awaiting its 30-day summary determination; and (ii) whether Uruguay violated Articles 8-12 of the Statute by authorizing the construction and operation of the Botnia plant before receiving the final judgment of the Court in this case. In Chapter 2, Uruguay will address these issues by examining the plain text of the Statute, by describing the Parties' practice thereunder and, where appropriate, by looking to pertinent principles of general

international law. As the Court will read, the analysis Uruguay initially presented in the Counter-Memorial stands undiminished by anything in Argentina's Reply.

1.16 As shown in Chapter 2, nothing in Articles 7-12 of the Statute or in general international law prevents the Parties from agreeing with each other (as they did in this case) to dispense with CARU's preliminary review under Article 7 and to proceed immediately to direct State-to-State consultations. By proceeding in precisely this manner -- the manner that was agreed with Argentina -- Uruguay cannot be faulted, and certainly not by Argentina, for failing to comply with preliminary procedures that they both agreed to bypass.

1.17 As the Court will read, the purpose of CARU's initial screening of projects under Article 7 is to determine in a summary fashion whether a particular project is one that might impact navigation, the régime of the river or the quality of its waters, and if the Commission so determines, to invite the Parties to engage in the direct, State-to-State consultations prescribed in Articles 8-12. In the Reply, Argentina agrees with Uruguay that this is CARU's role under these provisions of the Statute. Argentina recognizes explicitly that CARU does not authorize projects, and that its review of projects under Article 7 is preliminary in nature. While CARU's substantive functions under the 1975 Statute relating to environmental protection and pollution control are both extensive and critical to the proper management of the Uruguay River, the Commission's role in the Articles 7-12 consultative process is, according to the plain text of the Statute, distinctly more limited. There is thus no legal or logical impediment to prevent the Parties from agreeing to bypass CARU's summary review under Article 7 in favour of proceeding directly to State-to-State consultations. The Statute's procedural rules plainly do not constitute *jus cogens*,

and Argentina rightly makes no argument that they do. Thus, the Parties are free to derogate from the Statute's procedural steps pursuant to an appropriate agreement between them, which is what they did here both with respect to the Botnia plant and the ENCE plant.

1.18 In Chapter 2, Uruguay will also reiterate a point it first established in the Counter-Memorial, which Argentina still denies in the Reply: Article 7 does *not* require notice to CARU before the initiating State may issue a Preliminary Environmental Authorisation ("AAP," per the Spanish initials). The text of Article 7 is silent and therefore ambiguous as to exactly when notice of a planned project must be given. Using general international law to resolve this ambiguity, the Statute is most sensibly read to require notice that is "timely," in the sense that it is given sufficiently early to allow the remaining procedures stipulated in Articles 7-12 to run their course before a project is implemented. In fact, the AAPs that Uruguay issued to Botnia and ENCE required that numerous conditions be satisfied before further authorisations would be issued to allow even construction, let alone operation, to begin. Since the consultations required by the Statute were completed before Uruguay authorized construction of the Botnia plant (and construction of the ENCE plant was never authorized), Argentina plainly had timely notice of the project.

1.19 In marked contrast with Uruguay's behaviour, Argentina has repeatedly authorized the construction and operation of industrial plants on its side of the river *without ever* notifying Uruguay or CARU, and without engaging in the consultations or negotiations required by the 1975 statute. Uruguay presented the pertinent facts about the scores of such Argentine plants in the Counter-Memorial; significantly, the Reply makes no effort to dispute them. Rather, Argentina attempts to blunt the force

of the point by contending that its own industrial plants pose no threat to the Uruguay River. The truth is, however, to the contrary. Moreover, recent reports show that some of these plants have been sanctioned by Argentine environmental authorities, and even temporarily shut down, precisely because they are polluting the river.

1.20 Chapter 2 also addresses Uruguay's legal obligations under the 1975 Statute during both the period of State-to-State consultations under Article 12 and during any subsequent dispute resolution proceedings. Although Argentina's Reply argues to the contrary, the fact is that the Statute does not expressly address the Parties' obligations during either time period. Argentina points to no specific language on this point because there is none. Turning again to general international law -- especially the 1997 UN Convention on the Law of Non-navigational Uses of International Watercourses -- to fill this lacuna, the Statute is most reasonably read to prohibit the initiating State from implementing its project until consultations have ended, but to permit implement of the project thereafter, whether or not dispute resolution proceedings have been initiated. As explained in Chapter 2, this reading best achieves the dual objectives of the 1975 Statute: promoting both the equitable and rational use of the Uruguay River, and the protection of the river and its aquatic environment.

1.21 This does *not* mean that the State initiating a project can present the other with a *fait accompli* as the Reply protests. Allowing the initiating State to implement a project during the time a case is pending before the Court represents only an *interim* solution pending the Court's consideration of the case. The Court at all times retains the power both (i) to indicate provisional measures prohibiting

construction or operation of the project in the event of an urgent threat of irreparable harm, and (ii) to order the dismantling of the project in its judgment on the merits. The Court thus has full power to prevent a *fait accompli* from occurring.

1.22 In such circumstances, there is no logical argument for interpreting the Statute to prohibit project implementation while the case is pending in the Court. To the contrary, such an interpretation would effectively give each State a *de facto* veto over the economic development projects of the other, whether or not they are environmentally sustainable. Simply by filing an Application in this Court, one State would be able to frustrate the projects of the other. Few investors would be willing to tie up their capital for the three-to-five years it ordinarily takes for a case to proceed from Application to Judgment. Even Argentina agrees that the Statute does not allow one State to veto the economic development projects of the other. Yet, that is precisely the power Argentina claims for itself when it argues that merely by initiating litigation in the Court it can bring implementation of the Botnia project to a halt.

1.23 In ***Chapter 3*** of ***Part One***, Uruguay responds to the Reply's factual arguments relating to the procedural issues in this case. As in Chapter 2, Uruguay will again focus its presentation through the lens of the two core procedural issues still in dispute; namely, (i) whether the Parties in fact agreed to dispense with CARU's 30-day summary determinations for the Botnia and ENCE projects, and instead to proceed directly to State-to-State consultations; and (ii) whether Uruguay complied with its obligations concerning implementation of the project during consultations and dispute resolution.

1.24 Uruguay will first show that, Argentina's arguments to the contrary notwithstanding, the Parties agreed to address the issues presented by the ENCE and Botnia plants at a State-to-State level rather than submit them to CARU for preliminary review under Article 7. Indeed, in each case it was Argentina that sought to have the project handled directly at a bilateral level rather than through CARU. In October 2003, for example, Argentina solicited and received information concerning the ENCE project directly from Uruguay at a time when -- in Argentina's words -- CARU was "paralyzed". The information provided by Uruguay was reviewed by Argentina's technical advisors, who pronounced the plant environmentally sound. On this basis, Argentina and Uruguay expressly agreed in March 2004 that the plant could and would be built, subject to subsequent water quality monitoring by CARU to assure compliance with CARU's water quality and anti-pollution regulations. Thus, the 2004 Annual Report to the Congress on the State of the Nation, submitted by the Office of Argentina's President, stated that "both countries signed a bilateral agreement which put an end to the controversy over the pulp mill installation at Fray Bentos".

1.25 Similarly, in May 2005, Argentina's then Minister of Foreign Affairs, Rafael Bielsa, sent a letter to his Uruguayan counterpart, Reinaldo Gargano, explicitly requesting direct negotiations by the two States outside the ambit of CARU, which Argentina considered to be at an "impasse" at the time. Uruguay agreed to Argentina's invitation and, under the auspices of what was known as the "High-Level Technical Group" ("GTAN", per the Spanish initials), the Parties proceeded to engage in the direct consultations envisioned by the Statute. Thus, in both cases it was at Argentina's initiative that the Parties agreed to dispense with

CARU's preliminary review under Article 7 and proceed directly to State-to-State consultations. The fact that no such reviews were made by CARU therefore cannot constitute the basis for a claim against Uruguay.

1.26 Chapter 3 will also demonstrate that Uruguay complied with its procedural obligations during the GTAN consultations, as it has during the pendancy of this case before the Court. The ENCE project as initially conceived was abandoned in September 2006 before any implementation took place. Implementation of the Botnia project did not occur until after the GTAN consultations had run their course. To be sure, some preparatory work (like ground clearing and the construction of a cement plant) continued as consultations were in progress, but such preparatory work is not prohibited by the 1975 Statute and is entirely permissible under international law. Actual construction of the Botnia plant itself was not authorized until after consultations with Argentina had ended. Because neither the Statute nor general international law prohibit implementation of a project during judicial or other dispute resolution proceedings, Uruguay has not violated its procedural obligations under the 1975 Statute by permitting the construction or operation of the Botnia plant during these proceedings.

1.27 ***Part Two*** of this Rejoinder begins with ***Chapter 4*** and continues through ***Chapter 7*** which, taken together, refute the Reply's efforts to show that Uruguay has not complied or is not complying with its substantive obligations under the 1975 Statute to protect the Uruguay River and its aquatic environment. ***Chapter 4*** of ***Part Two*** demonstrates that Uruguay's and the IFC's prediction that the plant "will cause no harm to the environment" has been fully realized by its actual performance. Proven false are Argentina's claims to the contrary in its Application, its Memorial

and its Reply. Chapter 4 demonstrates that, as part of their continuing review, the independent experts retained by the IFC confirmed in November 2007, prior to start-up of the plant, that it was subject to "extremely comprehensive" monitoring programs, that Botnia was "well-positioned from an organisational aspect to meet its operational objectives including its environmental management goals", and that the plant would use "[m]odern process technologies" which would make it "perform with low emission and world-leading environmental performance". The Chapter shows that the Botnia plant's performance not only met these high expectations, it exceeded them. As the IFC's technical experts concluded after an exhaustive post-operational review, "the mill is performing to the high environmental standards predicted in the EIA and CIS, and in compliance with Uruguayan and IFC standards"[8]. As a result, the Botnia plant's lack of environmental impact is firmly established. In the words of the IFC's independent experts: "comparison of monitoring data pre-and post-start-up shows that the water quality characteristics of the Rio Uruguay have not changed as a result of the discharge of mill effluent"[9].

1.28 Section 1 of Chapter 4 describes the comprehensive pre-operational measures Uruguay, Botnia and the IFC adopted to ensure that the plant is environmentally sustainable. For Uruguay's part, these include, among other things, requiring Botnia to prepare acceptable environmental management and contingency plans, as well as to continue comprehensive monitoring of the river's water quality, sediments and aquatic life. Proceeding simultaneously, the IFC verified through

---

[8] *Environmental Performance Review*, *op. cit.*, p. ES.ii.

[9] *Ibid.*, p. 4.3.

independent expert evaluations that the plant was in compliance with BAT and that it would not harm the environment.

1.29 Section 2 of Chapter 4 shows that the Botnia plant has not caused any environmental harm. It summarizes the plant's operational performance to date. It shows that the plant has satisfied each and every regulatory requirement, whether imposed by Uruguay or CARU; that it has operated in accordance with the IFC's projections in the Final CIS; and that it has caused no harm to the Uruguay River. It shows that this exceptional performance is all the more remarkable given that modern pulp mills require a start-up period to optimise their performance. Section 2 of Chapter 4 shows that, with respect to phosphorous discharges in particular -- about which Argentina focuses most of its attention in the Reply -- the plant's performance has been outstanding; emissions have fully complied with Uruguayan law (CARU does not regulate phosphorous emissions, nor does Argentina) and the forecasts of the Final CIS. This section of Chapter 4 further demonstrates the significant steps Uruguay has taken to reduce the emission of phosphorus into the river, including treatment of the Fray Bentos municipal sewage in Botnia's environmentally friendly wastewater treatment facility; improvements to the sewage treatment in other Uruguayan municipalities through World Bank-financed infrastructure projects; and institution of a far-reaching program to reduce non-point discharges of phosphorus from Uruguayan sources into the Uruguay River. These measures will more than offset the relatively insignificant amount of phosphorus generated by the Botnia plant which, as demonstrated, has had no impact on water quality or other features of the aquatic environment.

1.30 Section 3 of Chapter 4 shows why the Court can have full confidence that the Botnia plant will continue to exhibit exemplary environmental performance. It reaffirms that Uruguay has promulgated a comprehensive regulatory regime that both requires the continuous collection of environmental data and gives the competent Uruguayan authorities the power to enforce compliance. Thus, should any adverse impacts unexpectedly occur, Uruguay can and will respond expeditiously. Further, the IFC is equally committed to assuring the environmentally sustainable operation of the Botnia plant and has mandated ongoing independent performance evaluations, including two additional formal reviews through the end of 2009.

1.31 ***Chapter 5*** demonstrates that Uruguay has fully complied with the applicable law in relation to the environmental issues in dispute. The Chapter shows that Argentina has fundamentally misconstrued the substantive obligations imposed by the 1975 Statute. Contrary to Argentina's assertions, the purpose of Article 36 is to establish the joint responsibility of the Parties, acting through CARU, for coordinating the measures necessary to avoid changes to the Uruguay River's ecological balance. Article 36, by itself, does not prohibit emissions or anything else. Rather, the substantive content of Article 36 is defined by the CARU standards that the Parties have bilaterally adopted through the Commission. Argentina is equally wrong in its view of Article 41. That provision is correctly understood as creating an obligation of due diligence for the adoption of appropriate rules and measures to prevent contamination of the Uruguay River and its aquatic environment. Uruguay has unquestionably adopted such rules and measures, and thereby fulfilled its obligations under that Article. It has done far more in this regard

than Argentina, which imposes no limits on phosphorus discharges by Argentine sources into the Uruguay River or its tributaries. Finally, Chapter 5 demonstrates that Argentina's case is aided neither by the Convention on Biological Diversity, the RAMSAR Convention on International Wetlands, or the Convention on Persistent Organic Pollutants; nor by the general principles of international law that it cites, including those of sustainable utilisation, equitable and reasonable use, prevention of transboundary damage, and the precautionary principle. In fact, as shown in Chapter 5, Uruguay readily accepts the application of all these conventions and principles to the present dispute, and has fully complied with each and every one of them.

1.32 ***Chapter 6*** refutes the technical allegations raised by Argentina's hired experts that are not addressed in earlier parts of the Rejoinder. Section 1 of Chapter 6 demonstrates that Argentina's only attempt to show likely environmental harm -- a report by two Argentine government employees that purports to predict eutrophication (i.e., algae growth caused by the presence of too much phosphorous or nitrogen) in Ñandubaysal Bay beginning in 2023 -- is so riddled with basic scientific errors as to be useless. Among other obvious problems, the report assumes the river flows backwards *100% of the time*. It also assumes, contrary to the laws of physics, that any phosphorus from the Botnia plant that flows into the bay is trapped there forever, instead of flowing out with the current of the river, and it completely ignores the much greater amount of phosphorus that enters the bay from Argentina. Indeed, when fundamental errors like these are corrected, the model presented in Argentina's Reply only confirms that the Botnia plant will not cause any of the impacts Argentina predicts.

1.33 Chapter 6 further shows that it is Argentina, not Uruguay (and certainly not Botnia) that is responsible for phosphorous entering Ñandubaysal Bay. Most of Argentina's contribution comes from the Gualeguaychú River, which feeds into the bay. Indeed, the models presented by Argentina's experts, when their fundamental errors are corrected, demonstrate that the contribution of phosphorus to the bay from Argentina is over 3,000 times the contribution of phosphorus from Botnia. Yet, Argentina (unlike Uruguay) has no laws or regulations that limit in any way its citizens' discharges of phosphorous into the Uruguay River or any of its tributaries -- a salient fact that Uruguay pointed out in the Counter-Memorial and Argentina did not contest. Argentina's industrial and agricultural enterprises, and its municipal sewage facilities, are free to dump as much phosphorous into the river as they like -- and they do. This fact, which Argentina does not dispute, raises doubts about the seriousness of Argentina's stated concerns regarding the phosphorous discharges from the Botnia plant. If Argentina is truly concerned about phosphorus in Ñandubaysal Bay, it, not Uruguay or Botnia, holds the key to a solution, by reducing phosphorous discharges from Argentine sources.

1.34 Section 2 of Chapter 6 rebuts the allegations in Argentina's Reply that the Botnia plant employs anything other than state-of-the-art technology or fails fully to satisfy the European Union BAT standards. Uruguay makes this showing with respect to the plant's effluent treatment technology, emergency basins and chemical synthesis facilities, as well as its use of water resources. The final section of Chapter 6 refutes the remaining technical arguments presented in the Reply. It shows that Uruguay has comprehensively assessed all likely risks associated with the Botnia

plant, determined that the risks are minimal and taken all reasonable measures to ensure that the plant will not cause unacceptable harm to the Uruguay River.

1.35 ***Chapter 7*** responds to Argentina's arguments on the subject of remedies. It shows that the primary remedy Argentina seeks -- an order compelling the dismantling of the Botnia plant -- is not warranted under any conceivable view of the case. Argentina's argument for the dismantling of the plant is predicated on what Argentina contends is the "lien intrinsèque"[10] between the 1975 Statute's procedural and substantive rules. According to Argentina, "[s]ans le respect des obligations procédurales, il ne peut point être affirmé qu'un État a objectivement mis en œuvre ses obligations substantielles"[11]. Argentina's motive in insisting on this so-called "strict link" is obvious: knowing it does not have a viable substantive case demonstrating actual or likely harm to the Uruguay River or its aquatic environment, Argentina constructs an argument that even a purely technical procedural violation warrants the remedy of *restitutio in integrum* in the form of dismantlement of the plant. But, of course, Argentina's "strict link" argument is fallacious; procedural and substantive compliance are distinct issues. And it is clear that the remedy for a procedural violation, like the remedy for a substantive violation, must be commensurate with (and not disproportionate to) the nature of the particular violation.

1.36 The remedy of dismantlement would plainly be inconsistent with the principle of proportionality pursuant to which the nominal benefits of the remedy

---

[10] AR, para. 1.4 ("strict link").

[11] AR, para. 1.28 ("[a]bsent respect for procedural obligations, it cannot be firmly stated that a nation has objectively implemented its substantive obligations").

must be weighed against the burdens imposed. Here, there is no question that dismantling the plant would be grossly disproportionate in the sense just stated. The benefits to Uruguay associated with the Botnia plant are enormous; it is expected to generate over 8,000 new jobs and contribute more that US$250 million to the Uruguay economy. It would be unreasonable to deny Uruguay the benefits of such economic development absent proof of actual or likely harm to the Uruguay River. Put simply, if the development is sustainable, there is no logical reason, and certainly nothing in the 1975 Statute, to prevent it. Argentina's nominal interest in securing redress for an alleged procedural violation (assuming *quod non* one had occurred) can be more than adequately addressed by the granting of satisfaction; i.e., declaratory relief. As the Court just recently held in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, a finding by the Court that a State has violated its treaty obligations itself "constitutes adequate satisfaction"[12]. In any event, the discussion of remedies for procedural violations is purely academic since, as shown in Chapters 2 and 3, Uruguay committed no procedural violations of the 1975 Statute.

1.37 Chapter 7 will also show that the remedy of dismantling the Botnia plant is inappropriate for any substantive violation of the Statute that hypothetically might occur in the future. It is telling that Argentina makes no argument that the plant is currently causing such harm to the river such that it must be shut down. Argentina makes no such argument because none can be made, given the undeniably strong environmental performance of the plant, recently confirmed by the IFC in its 10 July

---

[12] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Judgment) (4 June 2008), para. 204.

2008 report concerning operations to date. Instead, Argentina argues that the plant must be shut down to exclude the risk of future harm to the river. As Uruguay will demonstrate, this argument fails on at least three separate grounds. *First*, Argentina has failed to establish that there is any likelihood that the Botnia plant will ever harm the river, at any time. *Second*, even if, *arguendo*, some such risk were demonstrated, there are other ways to mitigate a future risk to the river short of shutting the plant down. Any deterioration in the plant's current strong performance will rapidly be detected by Uruguay's intensive monitoring of the river. In the highly unlikely event that unacceptable impacts occur, Uruguay can and will take prompt action and order all necessary corrective action. And *third*, as stated above, account must again be taken of the principle of proportionality, which, where the burden on Uruguay associated with dismantling the plant would be disproportionate to any remote benefit that might theoretically accrue to Argentina, militates strongly against such an extreme remedy. For all these reasons, and even assuming against all the evidence that any violations warranting a remedy of any kind have occurred in this case, the remedy Argentina seeks is entirely unwarranted.

1.38 In its **Submissions**, which conclude this Rejoinder, Uruguay asks that the Court reject all of Argentina's claims, and affirm Uruguay's right to continue operating the Botnia plant in compliance with the 1975 Statute. Uruguay seeks such an affirmation from the Court to leave no room for doubt as to the respective rights and obligations of the Parties on an ongoing basis and to avoid future disputes between them.

Section III.
Structure of the Rejoinder

1.39 Uruguay's Rejoinder consists of four volumes. Volume I contains the main text of the Rejoinder. Volumes II through IV contain supporting materials arranged in the following order: Government Documents (Uruguay); Government Documents (Argentina); CARU Documents; Technical Documents; Press Articles; Miscellaneous; Expert Reports; and Supplemental Documents.

1.40 The main text of the Rejoinder consists of seven Chapters divided into two parts. Part One begins immediately following this Introduction and addresses Argentina's allegations that Uruguay did not comply with its procedural obligations under the 1975 Statute. Chapters 2 and 3 together form the body of Part One. Part Two responds to Argentina's allegations that Uruguay has not complied, and is not complying, with its substantive obligations to protect the Uruguay River and its aquatic environment under the 1975 Statute, and is comprised of Chapters 4 through 7. Uruguay's Submissions are included following Chapter 7.

1.41 The Chapter-by-Chapter outline of this Rejoinder is as follows:

Chapter 1 Introduction

Chapter 2 The Law Applicable to the Procedural Issues

Chapter 3 The Evidence Concerning the Procedural Issues

Chapter 4 The Evidence Regarding Start-up and Operation of the Botnia Plant

Chapter 5 The Law Applicable to the Environmental Issues

Chapter 6 Response to Argentina's Technical Criticisms

Chapter 7 The Question of Remedies

Submissions.

PART I

CHAPTER 2.
THE LAW APPLICABLE TO THE PROCEDURAL ISSUES

2.1 The purpose of this Chapter is to respond to the arguments concerning the law applicable to the procedural issues presented in Chapter 1 of Argentina's Reply. As Uruguay will show in the pages to follow, its analysis of the provisions of the 1975 Statute in Chapter 2 of the Counter-Memorial stands undiminished by any of the arguments advanced in the Reply. Indeed, if anything, Argentina's most recent pleading only underscores the soundness of Uruguay's prior presentation.

2.2 In its Counter-Memorial, Uruguay showed that:

- The object and purpose of the 1975 Statute is the sustainable development of the Uruguay River[13];
- The Statute does not give either Party a veto over the projects of the other[14];
- Instead, the Statute creates only a system of prior notice, information sharing and consultation[15];
- The Statute's procedural rules exist to help assure compliance with its substantive obligations concerning the protection of the aquatic environment[16]; and
- Each of the Parties is obliged to accept the other's projects when they do not cause significant harm to navigation, the régime of the river, or the quality of its waters[17].

Argentina's Reply admits the truth of each of these points. No dispute remains as to any of them.

---

[13] UCM, para. 2.29.

[14] UCM, paras. 2.110-2.165.

[15] UCM, paras. 2.110-2.165.

[16] UCM, paras. 2.45-2.47.

[17] UCM, paras. 2.102-2.105.

2.3 However, at the heart of this case there continue to be two fundamental disagreements between the Parties concerning the precise nature of the procedural rights and obligations the 1975 Statute does (and does not) create. All of the other disputed issues concerning the Parties' procedural rights and obligations derive from these two. They are: (i) whether CARU's involvement in the process set forth in Articles 7-12 is indispensable, or whether the Parties are free to agree to engage in direct bilateral consultations over planned projects that might affect the Uruguay River; and (ii) whether, following direct consultations between the Parties, the initiating State may implement a planned project while dispute resolution is in progress.

2.4 The Parties are in agreement that -- in Argentina's words -- "le Statut de 1975 met en place un régime complet d'obligations procédurales consistant en l'échange d'informations, la notification et la consultation"[18]. They also agree that the Statute's procedures are -- again, in Argentina's words -- "en effet conçu de manière à éviter les blocages préjudiciables à une exploitation rationnelle et respectueuse des droits de l'autre Patie de la resource partagée que constitue le fleuve Uruguay"[19], and to maintain a "l'équilibre . . . entre les intérêts des deux Parties"[20]. The end goal of all this, too, is a matter of agreement between the Parties. As stated, Uruguay and Argentina both recognize that the ultimate aim of both the

---

[18] AR, para. 1.31 ("the 1975 Statute puts into place a complete system of procedural obligations consisting of the exchange of information, notification and consultation.").

[19] AR, para. 1.119 ("in fact designed to avoid harmful blockages of a rational and respectful exploitation of the rights of the other party to the shared resource that constitutes the Uruguay River").

[20] AR, para. 1.120 ("balance . . . between the interests of the two Parties.").

procedural and substantive provisions of the 1975 Statute is the sustainable development of the Uruguay River[21].

2.5 Where the Parties disagree, and disagree substantially, is on the question of whether the procedures set forth in Articles 7-12 constitute a set of shackles from which no derogation is permitted, even pursuant to the express agreement of the Parties. Argentina, for its part, argues that notice of a planned project to CARU must in all cases be given before the initiating State may issue even a preliminary, contingent authorisation that itself permits no actual activities. It argues further that in the absence of such a notification, the Statute's procedural rules have been so irretrievably violated that nothing that comes afterwards can possibly remedy the situation. In making these arguments, Argentina insists that CARU has a mandatory role in the Articles 7-12 process with which the Parties may not dispense.

2.6 Where the Parties also disagree, and with equal intensity, is on the question of whether or not the initiating State may implement a project after direct consultations under the Statute have ended and dispute resolution proceedings have been initiated. Relying on what it perceives to be an implication from what Article 9 does *not* say, Argentina argues that an initiating State is obligated to cease and desist from all activity in furtherance of a project throughout the several-year period leading to the Court's final judgment on the merits. Argentina further argues that when a Party violates a procedural duty, anything other than an order compelling it to tear down the project (regardless of the impact on the Uruguay River or the aquatic environment) constitutes an encouragement of further violations.

---

[21] *See* UCM, paras. 1.26 & 2.29; AR, para. 1.48.

2.7 Uruguay will respond to and refute each of Argentina's arguments in this Chapter. In Section I, Uruguay will address Argentina's arguments concerning CARU's involvement in the procedures set out in Articles 7-12 of the Statute and show:

- CARU's *substantive* functions under the 1975 Statute are both extensive and critical to the proper management and protection of the Uruguay River. Yet, according to the Statute's plain text, the Commission's role in the *procedural* mechanisms created by Articles 7-12 is limited. As stated in the Statute, the Commission conducts only a preliminary technical review of a project for purposes of determining whether or not direct consultations between the Parties are necessary. Once that preliminary review is complete, the Commission's role is essentially over, except to serve as an intermediary of communications between the Parties;

- The Statute does *not* require notice to CARU before the initiating State may issue even a preliminary, contingent authorisation. What it requires is notice that is "timely" in the sense that it is given in sufficient time to allow the consultations between the Parties stipulated in Articles 7-12 to run their course before a project is implemented; and

- There is no reason in the Statute, or in logic, that the Parties may not agree to skip CARU's preliminary review and proceed to direct consultations at any moment they consider appropriate.

In Section I, Uruguay will also (i) disprove Argentina's argument that Uruguay has ostensibly set up a "hierarchy of rights" within the Statute; and (ii) reiterate the relevance of a subject the Reply tries very hard to avoid: the scores of contaminating industrial plants Argentina has built on its own side of the Uruguay River without ever -- not once -- notifying CARU or Uruguay, let alone consulting with Uruguay about them.

2.8 In Section II of this Chapter, Uruguay will rebut Argentina's arguments about the Parties' duties during dispute resolution. In particular, it will establish that:

- Argentina's reading is tantamount to conferring a veto right on it, a right which has no basis in the 1975 Statute or in general international law;

- Subject to the Court's power both to indicate provisional measures in the event of an urgent threat of irreparable harm, and to order the dismantling of a project in its judgment on the merits, the initiating State is, *as an interim solution*, permitted to implement a project after consultations have ended but before dispute resolution proceedings have run their course; and

- Absent a finding by the Court that a project causes significant harm to navigation, the régime of the river or the quality of its water, there is no cause to order the modification or dismantling of a project, even if a procedural violation has occurred.

Uruguay will also refute Argentina's contention that Uruguay belittles the importance of environmental protection. To the contrary, it is Uruguay, not Argentina, that has been most protective of the Uruguay River and most supportive of CARU.

* * *

2.9 Uruguay is mindful of the fact that the Court has already been presented with some 316 pages of argumentation concerning the nature of the procedural obligations created by Articles 7-12 of the 1975 Statute. It will therefore not attempt to respond to each and every one of the points raised in Chapter 1 of Argentina's Reply. Instead, Uruguay will focus on the key issues that continue to separate the Parties. In so doing, there will inevitably be some points stated in the Reply that are not addressed in this Rejoinder. This should not, however, be taken as an admission of the validity of Argentina's arguments in any respect. To the contrary, Uruguay stands by the analysis presented in Chapter 2 of the Counter-Memorial in its entirety.

Section I.
The Nature and Scope of CARU's Involvement Under Articles 7-12

A. THE ROLE OF CARU

2.10 Uruguay devoted an entire section of the Counter-Memorial to elucidating the powers and functions of CARU[22]. As described there, the Commission's functions fall essentially into five categories: (i) establishing regulations concerning pollution prevention, the conservation of living resources, navigation, pilotage, and the installation of pipelines; (ii) fixing the limits on fish catches; (iii) facilitating co-ordination between the Parties; (iv) facilitating the exchange of information; and (v) serving as an intermediary for communications during consultations between the Parties[23]. CARU's functions are set forth in Article 56. According to that Article, "[t]he Commission shall perform the following functions":

- Draw up rules governing the safety of navigation, pilotage, the prevention of pollution and the preservation of natural resources (Article 56(a));
- Co-ordinate joint scientific studies (Article 56(b));
- Establish maximum fish catches (Article 56(c));
- Co-ordinate joint law enforcement activities (Article 56(d));
- Co-ordinate the mechanisms for search and rescue operations (Article 56(e), (f) and (g));
- Co-ordinate buoying and dredging (Article 56(h));
- Establish the legal and administrative régime for bi-national works (Article 56(i));

---

[22] UCM, paras. 2.188-2.205.

[23] UCM, para. 2.189.

- Publish and update the official map of the river (Article 56(j));
- Transmit communications between the Parties in accordance with the Statute (Article 56(k)); and
- Perform such other tasks as the Parties may agree to assign to it (Article 56(l))[24].

2.11 The Counter-Memorial also quoted the words of Dr. Julio Barberis, Argentina's leading expert on the Statute, at a 1987 CARU-sponsored "Technical Legal Symposium" in which he described the Commission's functions at some length[25]. Uruguay will not repeat Dr. Barberis' observations here, but invites the Court to review his analysis at paragraph 2.200 of the Counter-Memorial. As the Court will read, Dr. Barberis precisely echoed Uruguay's observations about the scope of CARU's functions. Not surprisingly, Argentina's Reply nowhere challenges the words of its own leading expert on the Statute.

2.12 Notwithstanding these undeniably broad and critical competencies, one power CARU distinctly does *not* have is the power to approve or reject projects planned by either of the Parties. Although Argentina's Memorial rather laboriously attempted to claim such a power for the Commission, the Court can readily see that no such function is identified in the text of Article 56 or anywhere else in the Statute. Nor did Dr. Barberis claim the Commission had that role, either at the 1987 symposium just mentioned or at any other time. Relying on the text of the Statute, the provisions of the CARU Digest and the Parties' consistent practice under the

---

[24] Statute of the River Uruguay (hereinafter "1975 Statute"), Art. 56 (26 February 1975). UCM, Vol. II, Annex 4.

[25] UCM, para. 2.200, *citing* CARU Technical-Legal Symposium (17-18 September 1987). UCM, Vol. IV, Annex 72.

Statute, the Counter-Memorial conclusively established that the Commission does not have the competence to approve or reject projects as the Memorial had claimed.

2.13 As it is on other issues, the response Argentina offers in the Reply is notably contradictory. In Chapter 1, Argentina directly admits that CARU does not approve or reject projects. It states:

> Le *leitmotiv* du contre-mémoire à cet égard consiste à affirmer que 'CARU does not approve or reject projects', ce que l'Uruguay répète pratiquement á chaque paragraphe de cette section. Bien inutilement: *l'Argentine en est d'accord!*[26]

2.14 Having admitted this in Chapter 1, however, Argentina then proceeds to argue exactly the opposite in Chapter 2. It appears that the two Chapters were written by different authors who failed to harmonize their positions. If the "*leitmotiv* of the Counter-Memorial" is as Argentina states, the Reply's theme song, at least in Chapter 2, is that CARU *does* have the power to decide whether or not a project may go forward. Indeed, an entire section of the argument in Chapter 2 appears underneath the heading "L'Uruguay N'A Pas Attendu la Décision de la CARU Avant de Délivrer les Autorisations de Construction Des Usines, Comme Il En Avait L'Obligation"[27]. In the text that follows, the Reply then directly challenges Uruguay's insistence "sur son argument selon lequel la CARU n'a aucune capacité pour autoriser les projects, qui échoit uniquement aux parties"[28], and argues that it is,

---

[26] AR, para. 1.158 ("The *leitmotiv* of the Counter-Memorial in this regard consists of the statement that the 'CARU does not approve or reject projects', which Uruguay repeats practically in each paragraph of this section. Indeed unnecessarily: *Argentina is in agreement*!") (emphasis added).

[27] AR, argument heading Chap. 2, Sec. I (C). ("Uruguay Did Not Wait for CARU's Decision Before Issuing the Plant Construction Authorisations, As Was Its Obligation to Do").

[28] AR, para. 2.44 ("on its argument according to which CARU has no standing to authorize projects, since only the parties have standing").

in fact, up to CARU to "decide" or "determine" whether or not a project can go forward[29]. This refrain echoes throughout the Chapter[30]. Indeed, Argentina even invokes this Court's case law concerning the scope of the term "decision" in the context of UN Security Council resolutions in order to buttress its argument about CARU's decision-making role[31].

2.15 The first thing to be said about these arguments, of course, is that they have been expressly refuted by Argentina itself. As much as the author(s) of Chapter 2 might disagree with the author(s) of Chapter 1, Argentina cannot manufacture an issue by contradicting itself. It has admitted that CARU does not approve or reject projects and must be held to that admission.

2.16 Argentina's contradictory argument that CARU has a decision-making role is meritless in any event. The ostensible textual basis for it is Article 7, paragraph 1, which provides that when a Party plans a work that might affect navigation, the régime of the river or the quality of its waters, "it shall notify the Commission, which shall determine *on a preliminary basis and within a maximum period of 30 days* whether the plan might cause significant damage to the other Party"[32]. Paragraph 2 of the same Article then states: "If the Commission finds this to be the case, or if a decision cannot be reached in that regard, the Party concerned shall notify the other Party of the plan through the said Commission."[33]

---

[29] *See* AR, para. 2.45.

[30] *See*, *e.g.*, AR, paras. 2.47 & 2.49.

[31] AR, para. 2.46.

[32] 1975 Statute, *op cit.,* Art. 7, para. 1 (emphasis added). UCM, Vol. II, Annex 4.

[33] *Ibid.,* Art. 7, para. 2.

2.17 The Reply seizes on the words "determine" and "decision" to support its argument about CARU's power. Its effort to rip the terms out of the context in which they appear is inconsistent with the most basic tenets of treaty interpretation. Under Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose"[34]. Reading Article 7 in context, it is clear that the isolated words Argentina relies on are *not* meant to confer on the Commission the power to authorize or reject projects. Consistent with the largely technical nature of its functions generally, what CARU is called upon to do is perform an initial screening of the proposed project for the limited purpose of ascertaining whether or not it "might" cause significant damage, and thus needs to be brought to the attention of the non-initiating State itself (rather than just its delegation to CARU).

2.18 This understanding emerges unmistakably from a consideration of the text of Article 7 as a whole. The Commission is given what Argentina itself calls as "le délai très bref de 30 jour"[35] to determine "on a preliminary basis" whether a project "might" cause significant damage to the non-initiating State. If the Commission preliminarily determines that it "might", or if it cannot come to a decision in that regard, it is then incumbent on the initiating State to notify the other State about its plans. The preliminary, contingent character of CARU's initial determination could hardly be clearer. What is described is not a broad power to approve a project or

---

[34] 1969 Vienna Convention on the Law of the Treaties, Art. 31(1).

[35] AR, para. 1.91 ("very short period of 30 days").

not, but rather a limited technical review, preliminary in nature, to determine whether the project is one that requires direct dealings between the Parties.

2.19 This understanding emerges too from the consequences of CARU's review. According to the Commission's own protocol, if it comes to the summary conclusion that the project will not cause significant damage to the other Party, it does not issue an authorisation or anything like it. It merely reports its findings to the Parties[36]. If, on the other hand, it comes to the summary conclusion that the project "might" cause significant harm, or if it cannot reach consensus on the question, it does not issue an order suspending the project or anything of the sort. Instead, it becomes incumbent on the initiating State to inform the other of the project (albeit through the intermediary of CARU), thereby setting in motion the rest of the procedures contemplated in Articles 7-12, potentially including direct consultations/negotiations and a referral to this Court[37].

2.20 Argentina's tendency to contradict itself reasserts itself again here. Although from one side of its mouth it argues that CARU has the authority to determine whether a project can go forward, from the other side it expressly recognizes the limited nature of CARU's role under Article 7. In the context of discussing the 30-day period applicable to CARU's initial review, Argentina states, for example: "30 jours semblent d'autant plus justifiés *qu'il ne s'agit que d'une détermination sommaire"*[38]. And elsewhere, in connection with arguing the facts

---

[36] Annex B to Subcommittee on Water Quality and Prevention of Pollution Report No. 167 (18 April 1997), *approved in* CARU Minutes No. 4/97 (18 April 1997). UCM, Vol. IV, Annex 84.

[37] *Ibid.*

[38] AR, para. 1.120 ("30 days seems more than justified since *what we are talking about is only a summary determination*") (emphasis added).

about ENCE and Botnia, it contends: "la CARU s'est vue empêchée de procéder au *'preliminary technical review'* qu'elle doit faire conformément à l'article 7"[39]. Uruguay will show in Chapter 3 that the factual assertion that it prevented CARU from performing an Article 7 review is incorrect. But the point here is that even as some of the authors of the Reply attempt to portray CARU as authorizing or rejecting projects, still others correctly recognize that CARU's role is only to make a "summary determination" *via* a "preliminary technical review". Fortunately, the Court need not be distracted by Argentina's contradictory interpretations because, as demonstrated above, the plain text of Article 7 speaks for itself.

2.21 The text of Article 7, together with that of Articles 8 through 12, likewise make clear that once it has performed its preliminary screening function, CARU's role in the process envisioned in those Articles is essentially complete. To be sure, under the third paragraph of Article 7, and under Articles 8 and 11, CARU continues to act as an intermediary for communications between the Parties. Yet, the Statute gives the Commission no further role in evaluating the planned project, or in determining whether or not it will be implemented. That is left entirely to the Parties or, if they fail to reach agreement, to the Court.

2.22 Argentina vociferously objects, claiming that "il n'est pas exact qu'une fois la décision (ou l'absence de décision) acquise sur le risque de préjudice sensible, la CARU soit réduite au rôle de simple boîte aux letters"[40]. Argentina seems

---

[39] AR, para. 2.49 ("CARU has been prevented from proceeding to the '*preliminary technical review*' which it must conduct pursuant to Article 7").

[40] AR, para. 1.109 ("it is not accurate to say that once the decision (or absence of decision) is made on the risk of considerable harm, the CARU's role is reduced to that of a simple letter-box").

especially displeased with the use of the term "letter-box" to describe CARU's role, and comes back to it repeatedly[41]. As stated in the Counter-Memorial, however, it was not Uruguay that used the phrase to describe CARU's role in the Articles 7-12 process[42]. In point of fact, it was Ambassador Julio Carasales, the former head of Argentina's own delegation to CARU, and a past president of the Commission as a whole. Speaking in 1995, Ambassador Carasales clearly stated that once CARU has performed its summary 30-day review,

> the fundamental issue is no longer in CARU's competence. It is an exclusively bilateral issue which must be resolved Government-to-Government, with the only procedural matter being that communications should be sent through the [CARU], but *[CARU's] role is that of a postal agent that may not take any substantive action*. … The dialogue must be formalized bilaterally from Government to Government and not through [CARU][43].

2.23 Argentina attempts to get out from under Ambassador Carasales' analysis (which, of course, is consistent with the text of the Statute) by insisting that CARU is not a "simple boite postale"[44]. Its basis? The fact that under Article 8, CARU is given the authority to extend the notified State's period for responding to a notification about a project "if the complexity of the plan so requires"[45]. But this does not change the analysis at all. Extending a deadline is not a substantive action.

---

[41] *See*, *e.g.*, AR, paras. 1.118, 1.165 & 1.167.

[42] UCM, para. 2.90.

[43] CARU Minutes No. 5/95, pp. 712-713 (23 June 1995). UCM, Vol. IV, Annex 77 (emphasis added).

[44] AR, para. 1.118 ("a mere letter-box").

[45] 1975 Statute, *op cit.,* Art. 8. UCM, Vol. II, Annex 4; *see* AR, para. 1.109.

Instead, it is entirely in keeping with CARU's role as a facilitator of communications rather than a decision-maker.

2.24 In a speech to the Foreign Affairs Commission of the Argentine Chamber of Deputies in February 2006 (i.e., long after the dispute in this case had been joined), Argentina's then Foreign Minister, Jorge Taiana, correctly observed that after CARU performs its preliminary review under Article 7, the matter ceases to be within the Commission's competence. Discussing the legal background to this case, he tellingly stated:

> It may occur, however, that the Parties may not reach an agreement within the sphere of CARU over the impact of the projected works on the ecosystem associated with the Uruguay River. In this last situation, the matter leaves the orbit of competence of the Commission and is turned over to be considered at the level of the Governments[46].

2.25 Uruguay hastens to add that none of this can seriously be said to diminish CARU's critical role in ensuring the rational and optimal use of the river, or in protecting the aquatic environment. As described in the Counter-Memorial, and reiterated above, CARU fulfils a large number of irreplaceable functions expressly stated in the text of the 1975 Statute[47]. It does not follow from this, however, that CARU is involved every step of the way in the procedures set forth in Articles 7-12. In fact, it is not.

2.26 The relevant guide must be the text of the Statute which, as described, makes clear that once the Commission has performed its screening function under

---

[46] Presentation of the Argentine Minister of Foreign Affairs, Jorge Taiana, Regarding the Controversy with Uruguay to the Foreign Affairs Commission of the Argentine Chamber of Deputies (14 February 2006). UR, Vol. II, Annex R16.

[47] UCM, paras. 2.189-2.205.

the first paragraph of Article 7, its role in the Articles 7-12 procedures for notification, information sharing and consultation is essentially complete. Thereafter, its role is as expressly stated in the second paragraphs of Articles 7 and 8, and the first paragraph of paragraph 11; that is, it is an intermediary of communications between the Parties (except only for its authority under the fourth paragraph of Article 8 to extend the 180-day period the notified State has to reply to the notice of a project).

*

2.27 Another of Argentina's procedural themes is that CARU's role in the Article 7 process is "obligatory"[48]. Argentina's purpose here is clear. As stated at paragraph 1.161 of the Reply: "En ne s'acquittant pas, dès l'origine, de l'obligation de saisir la CARU, l'Uruguay a d'emblée vicié toute la procédure"[49]. In other words, Argentina argues that because CARU was never called on to undertake the preliminary technical review contemplated by Article 7 in this case, everything that happened thereafter was necessarily inconsistent with the 1975 Statute.

2.28 Uruguay agrees that CARU was not called on in this case to perform Article 7 reviews of the ENCE or Botnia plants. The entirely legitimate reasons for this are discussed at length in Chapter 3. As the Court will read there, in the cases both of the ENCE plant and the Botnia plant, the Parties mutually agreed to dispense with CARU's initial screening of the projects in favor of immediate direct

[48] *See*, *e.g.*, AR, paras. 1.159-1.161.

[49] AR, para. 1.161 ("By not complying, right from the outset, with the obligation to go to CARU, Uruguay invalidated the entire procedure").

consultations[50]. Uruguay's purpose in this Chapter is simply to analyze Argentina's legal theory that CARU's preliminary review of a project under Article 7 is a condition precedent to satisfying the procedural obligations of the Statute.

2.29 Argentina's argument is easily disproved. The procedural provisions of the 1975 Statute, although they certainly are critical elements of the *lex specialés* between the Parties, do not constitute *jus cogens*. Argentina has not argued that they do. There is thus nothing to prevent the Parties from derogating from them pursuant to an appropriate understanding between them. If by their actions and/or words the Parties agree to dispense with CARU's preliminary technical review (or any other statutory step, for that matter) and advance directly to government-to-government consultations, they may do so. It is a simple matter of the consent of the Parties. Argentina's argument that "the entire procedure" was invalidated because, in the circumstances of this case, the Parties mutually chose to dispense with CARU's preliminary review under Article 7 cannot stand.

2.30 It bears noting that in addition to being consistent with the Statute, Uruguay's understanding that the Parties are free to agree to proceed without CARU's "summary determination" under Article 7 in favor of immediate direct consultations is also in keeping with the dictates of good sense. The purpose of the procedures envisioned in Articles 7-11 is to obviate the need for direct consultations under Article 12 (just as the purpose of direct consultations is to obviate the need for recourse to this Court). CARU is first given an opportunity to conduct a preliminary review in order to determine whether or not additional procedural steps are even

---

[50] *See infra* paras. 3.10-3.29.

necessary. When CARU determines that they are, or when it is unable to make a determination, the initiating State is then required to provide the notified State with information concerning the project so that the latter may conduct a more extensive review. Only if, after that review, the notified State comes to the conclusion that the project might adversely affect it, does a round of consultations ensue. Each of these steps creates an opportunity to obviate the need for direct consultations. Based on its preliminary review, CARU might find that the project poses no threat of harm. And even if CARU finds that the project might cause harm, the notified State might reach a different conclusion, or nevertheless decide that the project is acceptable, based on its more extensive review. In either case, no consultations will be necessary.

2.31 There is also no logical reason that the Parties should be precluded from jointly deciding to dispense with these earlier steps and proceed directly to consultations under Article 12. If they have an obvious difference of opinion about a project, or if there is any other reason they consider appropriate, the Parties should be free to agree to go straight to direct talks without being constrained to abide by the procedural formalities set forth in Articles 7 through 11.

2.32 As expected, this sensible approach finds support in general international law. Article 18, paragraph 2, of the Watercourse Convention, for example, provides that if watercourse States disagree about the need for a notification under Article 12, they shall proceed directly to consultations and negotiations[51]. There is no need to first decide whether notice is necessary and then revert the matter back to the beginning of the process under Articles 12 *et seq*. Similarly, the ILC commentary to

---

[51] Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter "1997 Watercourse Convention"), Art. 12 (1997).

the 2001 Draft Articles on the Prevention of Transboundary Harms makes clear that States may proceed straight away to consultations "*whenever* there is a question about the need to take preventive measures", without regard to whether the prior procedural steps have been invoked or not[52].

2.33 This does not mean, and Uruguay does not argue, that one of the Parties acting unilaterally can dispense with any of the procedures set forth in Articles 7-11. What it means is simply that if the Parties jointly agree that their interests are best served in a particular case by proceeding directly to consultations and/or negotiations -- and avoiding the steps prescribed in the Statute that normally precede such direct dealings -- they are free to do so. As shown in the Counter-Memorial, and as further demonstrated in Chapter 3 of this Rejoinder, that is exactly what happened here. With respect to both the ENCE and Botnia plants, Argentina and Uruguay specifically agreed to dispense with CARU's Article 7 review and to proceed straight away to direct talks[53]. Indeed, in both cases, they did so at Argentina's behest[54]. Thus, the Parties' mutually agreed deviation from the Statute's procedural steps, including their agreement to proceed directly to State-to-State consultations without awaiting a "summary determination" by CARU, cannot be considered a violation of the Statute.

---

[52] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries (hereinafter "2001 Draft Articles"), Art. 9, Commentary, para. 1 (emphasis added), appears in *Yearbook of the International Law Commission, 2001,* Vol. II, Part Two.

[53] *See infra* paras. 3.10-3.29.

[54] *Ibid.*

B. THE TIMING OF NOTICE TO CARU

2.34 Given the Parties' agreement to proceed immediately to the direct consultations envisioned by Article 12, the question of exactly when notice is due to CARU under Article 7 is largely academic in the circumstances of this case. Whenever that notice might have been due, the fact is that the Parties specifically agreed to dispense with that step here. There is thus no need for the Court to resolve what is largely an abstract debate. In the event the Court is nonetheless inclined to consider the issue, Uruguay will show below that notice to CARU was *not* required before Uruguay issued AAPs to ENCE and Botnia.

2.35 In the Counter-Memorial, Uruguay showed that the text of Article 7 is imprecise about exactly when notice of a project to CARU is due[55]. It provides merely that when "one Party *plans* to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters, it shall notify the Commission …"[56]. Relying on the CARU Digest and the practice of the Parties, Uruguay showed that authorisations by the initiating State can and frequently have come before notice to the Commission. In no such case did the notified State object. Using general international law to resolve the Statute's ambiguity, the Counter-Memorial established that Article 7 should be construed to require notice that is "timely" in the sense that it occurs early enough in the planning process that ample time remains for the procedures specified in subsequent Articles to be followed

---

[55] UCM, para. 2.52.

[56] 1975 Statute, *op. cit.,* Art. 7 (emphasis added). UCM. Vol. II, Annex 4.

before the project is implemented[57]. The reasons supporting this practical interpretation of the Statute will be reiterated below.

2.36 The Reply disagrees. Because Argentina's entire procedural case is built around the foundational proposition that notice to CARU was *required* before Uruguay issued AAPs to ENCE and Botnia in October 2003 and February 2005, respectively, the Reply gives the issue substantial attention. Argentina appropriately begins with the text of Article 7 which, it says, is not imprecise, and cannot be read simply to require notice that is "timely"[58]. Argentina focuses on the term "plan" ("proyectar"), and states: "Le mot n'a pas de connotation juridique particulière mais, conformément au sens commun, que reflète le dictionnaire: «Ce que l'on a *l'intention de faire dans un avenir plus ou moins éloigné»*"[59]. From this, Argentina concludes, "un project est quelque chose qui sera réalisé dans le futur mais qui ne l'est pas: c'est au moment où l'État envisage (projette) de construire un chenal, de réaliser ou d'autoriser la construction d'un ouvrage, qu'il doit en informer la CARU."[60]

2.37 Uruguay confesses that it does not see how any of this advances Argentina's argument that notice to CARU must in all cases precede even a preliminary, highly conditional authorisation such as an AAP. Indeed, in Uruguay's

---

[57] UCM, para. 2.52.

[58] AR, para. 1.89.

[59] AR, para. 1.90 ("The word does not have a particular legal connotation, in accordance with the common or ordinary meaning, but reflects the dictionary meaning: 'What one intends to do in the near or distant future'") (*citing* Dictionary *Littré* on line, http://atilf.atilf.fr/academie.htm).

[60] *Ibid.* ("a project or plan is something that will be realized in the future, but which may not be: it is when the State envisages (projects) the construction of a channel, or undertakes or authorizes the construction of an installation, that it must so inform or report to the CARU.").

view, the citation to the dictionary serves only to prove the point made in the Counter-Memorial: the text of Article 7 is ambiguous. Argentina's own definition underscores the plasticity of the term inasmuch as it states that a "plan" may relate to events envisioned for either "the near or distant future". To say further, as Argentina does, that "plan" means "envisage" merely perpetuates the debate; it does not end it. The verb "envisage" is at least as imprecise as "plan" and is thus no more helpful in answering the question of whether the text of Article 7 states explicitly when notice is due.

2.38 One additional observation concerning the text of Article 7 is warranted. If anything, the use of the term "plan" actually suggests that notice must come *after* authorisation by the initiating State, at least in the case of private projects. Although it may well be possible to say that the private entity seeking to build a project was "planning" it before receiving authorisation from the initiating State, the same cannot be said of the State itself. Until the State puts its imprimatur on a privately conceived project by granting an initial authorisation, the State cannot formally be said to be planning anything. Until that moment, in a very real sense, the project exists only as a proposal from the private entity to the State, which may or may not be accepted. It is only when the State acts by approving that proposal (i.e., issuing an authorisation) that the State adopts the private entity's plan as its own. The consequence, of course, is that in such cases, no notice to CARU can be due until after the authorisation issues.

2.39 The conclusion that notice to CARU may follow authorisation finds support in the CARU Digest, which, as Argentina acknowledges,

> procède à une interprétation authentique du Statut de 1975 et constitute en tout cas un 'accord ultérieur intervenu entre les

> Parties au sujet de l'interprétation du traité ou de l'application de ses dispositions' au sens de l'article 31, paragraphe 3 (a) de la Convention de Vienne sur le droit des traités de 1969[61].

In particular, Subject E3, Chapter 1, Article 1(a) of the Digest specifically states that each of the Parties has the competence to "*promulgate authorisations*, restrictions or prohibitions related to the different legitimate uses of the water*, informing CARU about said authorisations*, restrictions or prohibitions whenever they are originated by or related to risks for human health"[62]. This provision clearly contemplates that CARU will be notified about authorisations related to the legitimate uses of the river only when those authorisations have already been issued.

2.40 Uruguay cited this portion of the CARU Digest in the Counter-Memorial[63]. In response, the Reply argues that it does not help Uruguay because "le mot 'légitimes' renvoie aux dispositions tant de procédure que de fond du Statut"[64]. Argentina seems to be suggesting, in other words, that the use of the term "legitimate" in the Digest necessarily contemplates compliance with the procedural norms of the Statute (which, of course, are to be understood as Argentina argues). This surprising assertion badly misunderstands the structure and content of the Digest. As Uruguay previously showed[65], "legitimate use of the water" is a defined

---

[61] AR, para. 1.75 ("proceeds with an authentic interpretation of the 1975 Statute and in any case constitutes a 'later agreement made between the parties on the subject of the interpretation of the treaty or the application of its provisions' in the sense of Article 31, paragraph 3(a) of the 1969 Vienna Convention on the Law of Treaties").

[62] Digest of the Administrative Commission of the Uruguay River (CARU) (hereinafter "CARU Digest"), Subject E3 (1984, as amended). UCM, Vol. IV, Annex 60 (emphasis added).

[63] UCM, para. 2.57.

[64] AR, para. 1.100 ("the word 'legitimate' refers back to both the procedural and substantive provisions of the Statute").

[65] UCM, para. 2.28.

term in the Digest and means "any use or exploitation of the water that deserves protection"[66]. Moreover, "industrial supply" is included among the eight presumptively legitimate uses of the river[67]. "Legitimate" thus has a precisely defined meaning that has nothing to do with the procedural norms of the Statute, as Argentina suggests. The provisions of the Digest thus very much support the notion that authorisations of industrial projects come before notice to CARU.

2.41 This interpretation is also amply supported by the limited practice of the Parties under Article 7. As Uruguay previously showed, of the six examples of the Parties' practice cited in Argentina's Memorial, at least three (that is, half) constitute instances in which authorisations preceded notification to CARU[68]. Those three examples are: the Traspapel cellulose plant; the M'Bopicua port terminal and the Nueva Palmira freight terminal. Here, Argentina seems to have some trouble with its arithmetic. In the Reply, Argentina dismisses Uruguay's invocation of the Parties' practice as unpersuasive because it mentions "deux seulement" of the six cases originally referenced in the Memorial[69]. But, of course, this is wrong. It is interesting also that the one instance Argentina found it convenient to ignore was the case most directly analogous to the current dispute: the Traspapel cellulose plant. As Uruguay previously showed, the Traspapel case is uniquely instructive. In response to an informal inquiry from CARU, Uruguay's first communication with

---

[66] CARU Digest, Subject E3, Title 2, Chap. 1, Sec. 2, Art. 1(d) (1984, as amended). UCM, Vol. IV, Annex 60.

[67] *Ibid.*, Title 2, Chap. 4, Sec. 1, Art. 1(f).

[68] UCM, paras. 2.58-2.70.

[69] AR, para. 2.23 ("only two").

the Commission came only after it had issued its AAP on 11 August 1995[70]. CARU not only had knowledge of but also had actual possession of the AAP itself for many months in 1995 and 1996 without there being even a hint of a complaint that the Article 7 notice (which, in fact, never came because the project was eventually abandoned) should have come before the AAP was issued. The case thus stands as an unmistakable counterpoint disproving Argentina's current argument that notice to CARU must precede authorisation as a matter of law.

2.42 The other two cases are equally instructive. With respect to the M'Bopicua port, for example, Uruguay previously showed that the project was authorized by Uruguay's Ministry of Transport and Public Works on 7 March 2001 and that that authorisation was communicated to CARU *after the fact*[71]. CARU then proceeded to review the port project as a matter of routine. As Argentina itself stated in the Memorial: "Les étapes suivies par la CARU dans le cadre du projet de port M'Bopicuá correspondent à ce qui doit être fait avant la Commission ne prenne une décision"[72]. In the Reply, Argentina attempts to downplay the significance of the fact that the Ministry of Transport and Public Works' authorisation preceded notice to CARU by claiming that "les authorisations étaient d'une nature différente des AAP. Par ailleurs, pour le port M'Bopicuá, l'autorisation par le gouverment uruguayen a été aussitôt suivie par le saisine de la CARU …"[73] Argentina is

---

[70] UCM, paras. 2.59-2.64.

[71] UCM, para. 2.66.

[72] AM, para. 3.120 ("[t]he steps followed by CARU in connection with the M'Bopicua Port project correspond to the procedure required before the Commission makes a decision.").

[73] AR, para. 2.20 ("the authorisations [were] of a different kind than the AAPs. In addition, for the M'Bopicua Port, the authorisation of the Uruguayan government was immediately followed by a notification to CARU").

certainly correct that the Transportation Ministry's authorisation was distinct from the AAP issued by MVOTMA. Yet, it is hard to know what significance this fact has, given that Argentina's legal argument is that notice to CARU is due in all cases before the initiating State may issue any authorisation, no matter how preliminary or contingent. On its face, Argentina's argument applies just as much to the Transportation Ministry's authorisation as to MVOTMA's AAP. Even accepting there is a meaningful distinction between the two authorisations, however, Argentina's argument still fails because, as the Reply rather conveniently omits, the AAP for the M'Bopicua port was actually issued on 18 December 2000[74], nearly three months before the Transportation Ministry's authorisation and a full three months before notice of the project was sent to CARU. The M'Bopicua port example thus very much stands as compelling evidence refuting Argentina's argument that notice to CARU is legally mandated before any authorisation may issue.

2.43 The case of the Nueva Palmira freight terminal is to the same effect. Although Argentina attempts to sow confusion by presenting the issue in a rather disjointed fashion[75], the Court need not bother to untangle Argentina's story. In truth, the undisputed facts are simple and clear. On 3 November 2005, DINAMA issued the AAP for the project[76]; on 30 January 2006, the Transportation Ministry

---

[74] Inter-American Development Bank, Environmental and Social Impact Report for the M'Bopicuá Port (September 2002), *available at* http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=423041. UR, Vol. III, Annex R66.

[75] *See* AR, paras. 2.22 & 2.65-2.70.

[76] Ministry of Housing, Land Use Planning and Environmental Affairs (hereinafter "MVOTMA") Initial Environmental Authorisation for ONTUR (3 November 2005). UR, Vol. I, Annex R1.

issued its own authorisation; and on 17 February 2006, more than three months *after* the AAP and nearly three weeks *after* the authorisation by the Transportation Ministry, CARU was notified[77]. As Argentina itself admits, in the face of these facts, the Argentine delegation to CARU did nothing other than to say that, under Article 7, the Commission had 30 days to evaluate whether the project might cause significant harm to Argentina[78]. It did *not* object to the timeliness of Uruguay's notification; neither did it claim that the notice was inconsistent with the requirements of Article 7. In fact, it did the opposite. CARU accepted the notice without comment other than to note that the Commission had 30 days to perform its preliminary review.

2.44 Notwithstanding Argentina's vain attempts to belittle it, the fact that authorisation came before notice to CARU in at least half of the instances of State practice cited by Argentina constitutes probative -- indeed irrefutable -- evidence disproving Argentina's argument that notice is legally required before any authorisation may be issued. At least as often as the converse was true, the Parties authorized before notifying, without hint of objection.

2.45 The probative value of the point is still further highlighted by the fact that these three cases represent fully three quarters of the projects initiated by Uruguay and cited in Argentina's Memorial. The fact that it was Uruguay's dominant practice to authorize then notify, combined with the fact that Argentina never once

---

[77] UCM, para. 2.69, *citing* CARU Minutes No. 02/06, p. 302 (17 February 2006). UCM, Vol. IV, Annex 116.

[78] *See* AM, para. 3.122.

complained about this practice, confirms that Argentina's current position represents an about-face that was crafted purely for purposes of the current dispute.

2.46 It also bears mention that all three of the projects in connection with which authorisation came before notification to CARU were initiated by private entities. In all three cases, the private concerns submitted proposals for their projects to Uruguay, which in turn evaluated those proposals and decided to make those projects its own only upon issuance of the initial authorisations in question. This point confirms as a matter of fact the legal observation first made above; that is, it is only when the initiating State ratifies a private proposal by issuing an authorisation that the State itself may be said to be "planning" the project in the sense of Article 7 of the 1975 Statute.

2.47 In response to Uruguay's argument that notice to CARU is not required before a Party may issue a preliminary authorisation so long as it is given "timely" in the sense discussed above, Argentina argues that notice following authorisation is, in fact, prejudicial. Argentina contends:

> [L]'État ne peut influencer sur le projet et ses conséquences qu'au stade préliminaire de la conception de l'ouvrage par le biasis de l'attribution ou du refus des autorisations nécessaries à son exécution. Logiquement, une notification utile au sens de l'article 7, alinéa 1, du Statut doit donc également intervener *avant la délivrance de l'autorisation* nécessaire[79].

The Reply does not offer any support for this proposition because there is none. Argentina persists in misunderstanding the nature of preliminary and conditional

---

[79] AR, para. 1.101 (emphasis in original) ("[T]he state may influence the project and its consequences only at the preliminary design stage of the facility or installation through the granting or denial of authorisations or permits required for its execution. Logically, a useful notification pursuant to paragraph 1 of Article 7 must therefore be made *before the delivery of the required authorisation or permit."*).

authorisations under Uruguayan law. In the Counter-Memorial, Uruguay showed that the preliminary environmental authorisations, or AAPs, about which Argentina complains reflect only the initial determination by MVOTMA that, based on the review conducted to date, the proposed project is environmentally viable[80]. An AAP serves the administrative functions of establishing (i) the environmental requirements with which the project must comply; and (ii) the further environmental reviews and authorisations required to assess compliance with these requirements[81]. It is thus not the end point of the permitting process, as Argentina suggests, but merely the beginning. Following the AAP, a substantive, interactive process ensues between Uruguay and the initiating company during which Uruguay retains the right to and does, in fact, continue to insist on modifications to the project before construction, and eventually operation, can begin.

2.48 The case of the Botnia project is an instructive example[82]. Following issuance of its AAP in February 2005, it was required to and did, in fact, receive the following additional authorisations before it was permitted to enter operation in November 2007:

- Environmental Management Plan ("EMP") approval for the removal of vegetation and earth movement, 12 April 2005;
- EMP approval for the construction of the concrete foundation and the emissions stack, 22 August 2005;

[80] UCM, para. 3.10.

[81] UCM, paras. 3.10-3.11.

[82] ENCE is less clearly instructive for the simple reason that, because the plan to build it in its original location was abandoned, it only received one of the many subsequent authorisations that would have been required.

- EMP approval for the construction phase of the works, 18 January 2006;
- EMP approval for the construction of the wastewater treatment plant, 10 May 2006;
- EMP approval for an industrial non-hazardous waste landfill, 9 April 2007;
- EMP approval for the construction of solid industrial waste landfill, 9 April 2007;
- EMP approval for operations, 31 October 2007; and
- Authorisation to operate, 8 November 2007.

2.49 Argentina's argument that, in order to be useful and effective, notification to CARU must in all cases come before even a preliminary authorisation may issue is refuted by other elements of its own argument. In Chapter 2 of the Reply, Argentina argues that in March 2004 the Parties agreed to submit the ENCE project (which had received its AAP in October 2003) back to CARU for a preliminary review under Article 7[83]. Uruguay will show in Chapter 3 that this argument is false, and that the agreement reached by the Parties in March 2004 did not include referring the matter to CARU for a preliminary review under Article 7[84]. Nevertheless, what is interesting for present purposes is that in attempting to justify its version of the March 2004 agreement, Argentina states:

> Il est à relever que durant toute l'année 2004, la construction de CMB n'avait pas commencé. La CARU était donc toujours en mesure d'évaluer les projets et leur impact sur le fleuve Uruguay

[83] *See, e.g.*, AR, para. 2.106.

[84] *See infra* paras. 3.36-3.37.

> et sa zone d'influence avant même que ces travaux ne commencent[85].

In other words, even though the AAP had issued some five months earlier, there was still adequate opportunity for CARU to fulfil its statutory role! This, of course, is a frank refutation of Argentina's own argument about when notice to CARU must be given, and specifically, its argument that notice cannot be timely if it is given after issuance of an AAP.

2.50 Given the ambiguity of Article 7 on the question of when notice must be given to CARU (i.e., before or after an authorisation is issued), recourse to general international law is appropriate. In this respect, it is particularly interesting that Article 12 of the 1997 Watercourse Convention, which governs notice of projects to other watercourse States, uses exactly the same verb as the 1975 Statute: "plan". In particular, Article 12 of the Convention provides:

> Before a watercourse State implements or permits the implementation of *planned* measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with *timely notification* thereof[86].

The question of when notice is due under the Convention thus reduces to exactly the same question as under the Statute: when in the course of the planning process is notice due? The answer given by the Convention -- "timely notification" -- is therefore of material interest to answering the same question under the Statute.

---

[85] AR, para. 2.110 ("It should be pointed out that throughout the year 2004, the CMB [ENCE] construction didn't start. Consequently, CARU was still in a position to assess the projects and their impact on the Uruguay River and its area of influence even before such works had started").

[86] 1997 Watercourse Convention, *op. cit.,* Art. 12 (emphasis added).

2.51 As stated, the Convention, as elucidated in the ILC commentary, provides that notice must be given "timely" in the sense that it comes "sufficiently early in the planning stages to permit meaningful consultations and negotiations under subsequent articles"[87]. Applying this same approach to Article 7 of the 1975 Statute is not only consistent with the text of the Statute itself, it also makes eminent practical sense. So long as notice to CARU and the other Party comes early enough to allow the process envisioned in the subsequent Articles to play itself out, the notified State cannot plausibly claim prejudice from the fact that notice might conceivably have been given at some earlier moment in time. To put the same point from the opposite perspective, so long as the notice does not come so late that it precludes meaningful consultations between the Parties, the notified State has no grounds to complain.

2.52 For all these reasons, Argentina's argument that notice to CARU must be given before even an AAP may issue is an untenable, impractical and unprecedented interpretation of Article 7 of the 1975 Statute.

C. THE RELEVANCE OF THE 1997 WATERCOURSE CONVENTION

2.53 Uruguay cited Article 12 of the Watercourse Convention as well as the ILC commentary in the Counter-Memorial. Argentina does not respond directly, but opts instead for a general attack on Uruguay's reliance on the Convention and commentary. The Reply argues, for instance, that

> l'analogie affirmée entre les dispositions du Statut de 1975 d'une part et de la Convention de 1997 d'autre part est assez fantaisiste

[87] UCM, para. 2.52.

> – et témoigne à nouveau de l'acharnement avec lequel l'Uruguay s'efforce de minimiser les spécificités du premier[88].

Similar dismissive statements are included elsewhere in the Reply[89].

2.54 This is yet another issue on which Argentina is in conflict with itself. As much as some portions of Chapter 1 of the Reply attempt to portray the 1997 Watercourse Convention as irrelevant, other portions of the same Chapter enthusiastically embrace it. So, for example, the Reply also states: "Le Statut qui était, sans aucun doute, 'en avance sur son temps', a constitué l'une des sources d'inspiration principales pour l'élaboration de maintes dispositions de la Convention de 1997. Ainsi, les articles 7 à 12 … constitué un précédent auquel la Commission [du Droite International] s'est référé pour rédiger les dispositions relatives à l'obligation de notification, à sa teneur, au délai de réponse et aux 'procédures applicables au cas où les parties ne s'entendraient pas sur le projet proposé'"[90]. Similar positive citations to the Watercourse Convention and the ILC commentary can be found at various places in the Memorial as well[91]. Indeed, Argentina recognizes that the Convention contains "les principes pertinents du droit

---

[88] AR, para. 1.62 ("the analogy made between the provisions of the 1975 Statute on the one hand, and the 1997 Convention on the other, is quite fanciful -- and once again is witness to the determination shown by Uruguay to minimize the specificities of the 1975 Statute.").

[89] *See, e.g.*, AR, paras. 0.15, 1.61, 1.63-1.64, 1.92, 1.93 & 1.110.

[90] AR, para. 1.140 ("The [1975] Statute, which was without any doubt 'ahead of its time', constituted one of the principal sources of inspiration for the formulation of many of the provisions of the 1997 Convention. Thus, Articles 7 to 12 … constituted a precedent to which the [International Law] Commission referred when drawing up the provisions respecting the obligation of notification, the purport and tenor thereof, the response period and the 'applicable procedures in the event that the parties are unable to come to an agreement on the proposed project.'").

[91] *See, e.g.*, AM, paras. 3.44, 3.53-3.54, 3.71, 3.92, 3.128, 3.142, 3.163 & 3.165-3.166.

international général"[92], and relies on it heavily to assist with the interpretation of certain provisions of the 1975 Statute[93].

2.55 The Parties' mutual invocation of the Watercourse Convention makes perfect sense. It constitutes an especially pertinent source of general international law for this case. Covering much of the same subject matter as the 1975 Statute, the Convention was the subject of extended comment and discussion among States and among the leading publicists on the subject over the course of more than 20 years. As Argentina itself has acknowledged, the 1975 Statute, which was indeed ahead of its time, was a main source of inspiration for its drafters. Moreover, the Watercourse Convention was adopted by the UN General Assembly in 1997 by a vote of 104 to three, with both Uruguay and Argentina voting in favor. This Court itself has recognized the importance of the Convention in its judgment in the *case concerning the Gabčikovo-Nagymaros Project* (*Hungary/Slovakia*)[94].

2.56 Lest there be any confusion (although there should not be), Uruguay here reiterates the reasons and the ways it draws upon the Watercourse Convention[95]. It should perhaps go without saying that, under Article 31, paragraph 3(c), of the Vienna Convention on the Law of Treaties, general principles of general international law can assist with the interpretation of provisions of the 1975 Statute.

---

[92] AR, para. 1.64 ("pertinent principles of general international law").

[93] *See, e.g.*, AR, para. 1.140.

[94] *Case concerning the Gabčikovo-Nagymaros Project* (*Hungary/Slovakia*) (Judgment), I.C.J. Reports 1997, p. 56, para. 85.

[95] In fact, Uruguay's Counter-Memorial already did so. UCM, para. 2.23 fn. 62.

Argentina agrees[96]. It equally goes without saying that principles of general international law cannot be used to override the plain text of the Statute. Here again, Argentina agrees[97]. It therefore follows that to the extent they are compatible, general principles can very much be helpful in resolving ambiguities or filling lacunae in the text of the Statute. It is exactly in this sense that Uruguay cites the Watercourse Convention.

2.57 Consistent with the approach just outlined, Uruguay's Counter-Memorial cited the Watercourse Convention and the ILC commentary thereto to support its analysis of the 1975 Statute on several issues, not just the question of when notice of a project is due to CARU under Article 7. Other such issues included:

- The meaning of the "rational and optimum utilization" of the river under Article 1 (which both Uruguay and Argentina equate to "equitable and reasonable use")[98];
- The nature of the information required to be exchanged under Article 8[99];
- The duty of the notified State to accept harm that does not rise to the level of significant[100];
- The notifying State's duties during consultations under Article 12[101]; and

---

[96] AR, para. 0.16 (referring to "droit international général, dont la Partie uruguayenne indique ailleurs à juste titre qu'il est pertinent 'insofar as it gives assistance in interpreting and applying the various provisions of the 1975 Statute'") (citing UCM, para. 4.7, note 545).

[97] *Ibid*.

[98] UCM, para. 2.23.

[99] UCM, para. 2.93.

[100] UCM, para. 2.103.

[101] UCM, para. 2.180.

- The notifying State's duties during dispute resolution under Article 60[102].

2.58 The 1975 Statute and the 1997 Watercourse Convention are not, of course, identical in all material respects. Uruguay has never contended that they are. It therefore does not rely on any portions of the text of the 1997 Watercourse Convention or the ILC commentary where the terms are inconsistent with those of the 1975 Statute. Neither does it rely on them where the meaning of the terms of the 1975 Statute are clear on their face, except only to show the extent to which the terms of the Statute are consistent with general international law[103]. It is only where the two are compatible and the meaning of the Statute is not free from ambiguity that Uruguay has turned to the Watercourse Convention as an interpretive aid. Under the circumstances, the propriety of doing so is not open to serious question (as Argentina's own reliance on the Convention makes clear).

2.59 The principal difference between the 1975 Statute and the 1997 Watercourse Convention that Argentina relies on to support its argument that Uruguay's analogy to the Convention is "trompeuse et irrecevable"[104] is that the Convention "ne comporte aucun élément d'institutionnalisation"[105]. By this, Argentina presumably means that the Watercourse Convention does not establish a body equivalent to CARU. This, of course, is true, and is a function of the fact that

---

[102] UCM, para. 2.184.

[103] *See, e.g.*, UCM, para. 2.38 (concerning the obligation of the Parties to prevent pollution by prescribing appropriate rules and measures) & para. 2.107 (concerning the procedural consequences that attach when the notified State comes to the conclusion that the planned project might cause it significant harm).

[104] AR, para. 1.63 ("deceptive and inadmissible").

[105] AR, para. 1.62 ("does not embody any element of institutionalism").

the UN Convention is a general, multilateral convention rather than a treaty designed for a specific watercourse. Uruguay does note, however, that Article 24 of the Watercourse Convention specifically contemplates "the establishment of a joint management mechanism" among States sharing a watercourse[106]. There is thus nothing incompatible with the terms of the Convention and the concept of "institutionalism" to which Argentina attaches such importance.

2.60 Although Uruguay accepts the fact of the distinction Argentina mentions, it denies its relevance. It certainly does not render the procedural provisions of the UN Convention meaningless with respect to the interpretation of the procedural elements of the Statute. As elaborated in Section I.A. above, the institution the 1975 Statute establishes -- CARU -- has a limited role in the process envisioned in Articles 7-12. Under the first paragraph of Article 7, it performs a preliminary technical review of a project lasting no more than 30 days in order to determine whether or not further procedures are warranted. Once it has done so, its job (in terms of the Articles 7-12 procedures) is for all intents and purposes done, save only for the fact that it continues to act as an intermediary for communications between the Parties.

2.61 Setting CARU's screening function aside, the truth is that the procedures established by the Statute and the Watercourse Convention are very much analogous. To be sure, they are not word-for-word identical, and Uruguay has never suggested that they are. Nonetheless, the general principles bear a strong affinity, exactly as one would expect given that the Statute -- as Argentina states -- "a

---

[106] 1997 Watercourse Convention, *op. cit.,* Art. 24.

constitué l'une des sources d'inspiration principales pour l'élaboration de maintes dispositions de la Convention de 1997"[107]. Just like the 1975 Statute, the UN Convention contains articles providing that:

- The initiating State must provide prior notice the other State(s) of planned measures, and provide information sufficient to enable the notified State to ascertain the effects of the project (Article 7 of the Statute; Article 12 of the Convention);

- The notified State has 180 days to respond to the notification, although in the case of both instruments, that period may be extended if necessary (Article 8 of the Statute; Article 13 of the Convention);

- The initiating State may implement the planned project in the event it does not receive a response from the notified State within the specified period (Article 9 of the Statute; Article 16 of the Convention);

- The notified State must inform the initiating State if it objects to the planned measure, and must inform the initiating State of the basis of its objections (Article 11 of the Statute; Article 15 of the Convention);

- If the States concerned disagree about the possible effects of the project, they must enter into consultations and negotiations concerning the planned measure (Articles 11-12 of the Statute; Article 17 of the Convention);

- The States concerned shall submit to dispute resolution in the event they are unable to reach agreement during their consultations/negotiations (Article 12 of the Statute; Article 33 of the Convention)[108].

---

[107] AR, para. 1.140 ("constituted one of the principal sources of inspiration for the formulation of many of the provisions of the 1997 Convention").

[108] Article 10 of the 1975 Statute which gives the notified State the right to inspect the works has no analog in the 1997 Watercourse Convention.

2.62 Argentina contends that the 1975 Statute embodies "dispositions plus précises et plus opératoires" than the Convention[109]. But this is distinctly *not* true. In fact, between the two, it is the 1997 Watercourse Convention that contains more fully elaborated procedural norms. Thus, the Watercourse Convention contains a number of provisions covering procedural issues about which the 1975 Statute is entirely silent. For example, the Convention contains provisions concerning the following important points:

- The obligations of the notifying State during the period for reply (Article 14);
- Compensation for costs incurred as a result of a late reply to a notification (Article 16(2));
- The obligations of the notifying State during the pendancy of consultations/ negotiations (Article 17(3));
- Procedures in the absence of notification (Article 18); and
- The urgent implementation of planned projects (Article 19).

2.63 In historical context, it is not surprising that the Watercourse Convention explicitly addresses topics the Statute does not. The 1997 Convention came some 20 years after the 1975 Statute on which it drew heavily for inspiration. Especially given the attention the Convention received from both States and members of the ILC, it thus makes perfect sense that areas where there were lacunae in the Statute received explicit treatment in the text of the Watercourse Convention, as well as analysis in the ILC's commentary.

---

[109] AR, para. 1.62 ("more precise and operational provisions"). Elsewhere, Argentina states that the procedural provisions of the 1997 UN Watercourse Convention "sont infiniment moins spécifiques et moins contraignantes" than the Statute. AR, para. 1.93. As demonstrated in the text, this is false.

2.64 For all of these reasons, Uruguay stands by its well-placed reliance on the Watercourse Convention. It indisputably constitutes a source of relevant general international law dealing with virtually identical subjects that itself drew substantial inspiration from the 1975 Statute. To the extent its terms are consistent with the Statute, it can therefore very much constitute an interpretive aid.

D. THE RELATIVE STATUS OF PROCEDURAL AND SUBSTANTIVE RIGHTS

2.65 In the context of trying to lay the groundwork for its arguments about CARU's role in the procedures created by Articles 7-12 of the Statute, the opening portions of Chapter 1 of the Reply invest substantial energy in arguing that the Counter-Memorial belittles the procedural rules set forth in Articles 7-12 of the 1975 Statute. According to Argentina, Uruguay impermissibly sets up a putative "hierarchy of rights" that contradicts the maxim *ut res magis valeat quam pereat*. The Reply argues, for example, that Uruguay's

> lecture restrictive des obligations prévues par le Statut de 1975 se manifeste par la tentative de hiérarchiser les obligations substantielles et les obligations de nature procédurale, les premières prenant le dessus sur les secondes, ramenées à d'inutiles détours[110].

And elsewhere:

> Toute sa stratégie [de l'Uruguay] est construite autour de la mise en avant de droits subtantiels … et de certaines obligations substantielles y afférentes … Ce faisant, l'Uruguay occulte

[110] AR, para. 1.20 ("restrictive reading of the obligations set forth by the 1975 Statute is manifested by the attempt to establish a hierarchy for the substantive and procedural obligations, with the former taking precedence over the latter, reduced now to useless circumlocutions").

ostensiblement le régime d'obligations procédurales établi par le Statut de 1975[111].

2.66 As Uruguay will demonstrate, Argentina is attempting to manufacture an argument about an issue on which there is no real disagreement. In truth, the Parties' dispute about the role of the Statute's procedural rules is relatively narrow. That being the case, Argentina's own strategy in insisting on the point is obvious. By mischaracterizing Uruguay's presentation, the Reply seeks to cultivate the impression that Uruguay is afraid of the Statute's procedural rules which, by hypothesis, it knows it has violated. Equally, Argentina attempts to aggrandize the procedural rules in order to lay the foundation for its later argument on remedies. That is, Argentina is intent on nurturing the idea that a bare procedural violation can, without more, be sufficiently grave to warrant the remedy of dismantling the Botnia plant.

2.67 The fallacy of each of these points will be dealt with elsewhere in this Rejoinder. In Chapter 3, Uruguay will show that it has fully satisfied the procedural provisions of the 1975 Statute. And in Chapter 7, Uruguay will show that even if, *quod non*, there were a violation of a procedural element of the Statute, the remedy of dismantling the Botnia plant would be grossly disproportionate, especially given the strong environmental performance of the plant.

2.68 Notwithstanding Argentina's contrary rhetoric, the Parties are actually in substantial agreement about the importance and the function of the Statute's

---

[111] AR, para. 1.24 ("[Uruguay's] entire strategy is built around the concept of pushing forward the substantive rights … and certain substantive obligations relative thereto …. Having done this, Uruguay ostensibly hides the system of procedural obligations established by the 1975 Statute").

procedural obligations. In the Counter-Memorial, Uruguay observed that the object and purpose of Articles 7-12 is to help guarantee compliance with the substantive obligations set out elsewhere in the Statute[112]. It also noted the multiple places in the Memorial where Argentina had stated exactly the same thing[113].

2.69 Surprisingly, especially given the lengths to which Argentina goes to make it seem that the Parties' positions are irreconcilably opposed, the Reply makes exactly the same point on repeated occasions. Thus, for instance, Argentina states:

> [C]e sont les obligations procédurales qui permettent de garantir que les obligations substantielles telles la protection de l'écosystème du fleuve Uruguay, la prévention de la pollution et la préservation de la qualité des eaux ont été respectées[114].

2.70 Nor is this a mere inadvertent slip of the pen. Argentina later emphasizes the same point with words that Uruguay is content to adopt as its own:

> Les dispositions et obligations procédurales des Parties en vertu des articles 7 à 12 du Statut de 1975 ne peuvent pas être considérées isolément, sans prendre en compte *la finalité de ces obligations précises et spécifiques, cést-a-dire la réalisation des obligations substantielles du Statut*[115].

2.71 In saying that the Statute's procedural mechanisms are designed to facilitate the achievement of its substantive goals, Uruguay does not diminish their importance nor does it set up a "hierarchy of rights" (anymore than Argentina does

---

[112] UCM, para. 2.45.

[113] UCM, para. 2.46 (quoting AM, paras. 3.31 & 5.2).

[114] AR, para. 1.28 ("The procedural obligations are those which allow for guaranteeing that the substantive obligations, such as the protection of the ecosystem of the Uruguay River, pollution-prevention and preservation of water quality have been and will be respected").

[115] AR, para. 1.69 (emphasis added) ("The procedural provisions and obligations of the parties under Articles 7 to 12 of the 1975 Statute cannot be considered in an isolated manner, without taking account of *the end-purpose of these precise and specific obligations, namely the performance of the Statute's substantive obligations*.").

when it says the exactly same thing). It is merely stating the obvious and admitted truth: the procedures do not exist for their own sake as an empty exercise in formalism. Rather, they exist as an important instrument for achieving mutually agreed goals that themselves constitute the ultimate aim of the 1975 Statute: to balance economic development with environmental protection. This fact has important consequences for the interpretation of the Statute's procedural norms. In cases of ambiguity or uncertainty, the interpretation of Articles 7-12 that best advances the substantive goals of the 1975 Statute should be preferred.

2.72 Contrary to the straw man presented by Argentina, Uruguay's argument is *not* that "l'exécution des obligations procédurales [est dépendant] de la violation des obligations substantielles"[116]. Uruguay does *not* contend that "les obligations procédurales ne trouvent pas application du fait d'une prétendue conformité à des obligations substantielles"[117]. To be clear: Uruguay recognizes that violations of the procedural rules can occur either with or without concomitant substantive violations. It could not be otherwise. Articles 7-12 are integral components of the 1975 Statute. Exactly as the Court stated in its July 2006 Order on Argentina's request for the indication of provisional measures: "the procedural mechanism put in place under the 1975 Statute constitutes a very important part of that treaty régime"[118]. The non-compliance with the rules stated in those provisions plainly gives rise to international responsibility.

---

[116] AR, para. 1.21 ("the execution of procedural violations [is dependent] on the violation of substantive obligations").

[117] AR, para. 1.35 ("the procedural obligations have no applicability because of some claimed conformity with substantive obligations").

[118] *Case Concerning Pulp Mills on the River Uruguay (Order on Provisional Measures), I.C.J. Reports 2006,* p. 19, para. 81 (13 July 2006).

2.73 It does not follow from this, however, that "[s]ans le respect des obligations procédurales, il ne peut point être affirmé qu'un État a objectivement mis en œuvre ses obligations substantielles", as Argentina contends[119]. Just as procedural violations do not depend on substantive violations, so too substantive compliance does not depend on procedural compliance. Indeed, to suggest, as Argentina does, that perfect compliance with all applicable procedural provisions is a pre-condition to complying with the substantive rules of the 1975 Statute defies logic[120]. One can readily imagine a situation in which one of the Parties commits a purely technical violation of the procedural rules in the course of implementing an entirely non-polluting project. In such a situation, it would be illogical to contend that the earlier procedural error dictates the finding of a substantive violation. Indeed, in this respect it is Argentina's reading of "the 1975 Statute that runs the risk of bringing about 'unreasonable or absurd results'"[121].

2.74 The fact that non-compliance with the Statute's procedural rules is sufficient to trigger a State's international responsibility does not mean that the remedies for a procedural violation and for a substantive violation must be exactly the same, regardless of the nature or gravity of the specific violation in question. As already mentioned, this subject will be dealt with at length in Chapter 7. For present purposes, it is sufficient to note the applicability of the principle of proportionality pursuant to which the nominal benefits of the remedy must be weighed against the

---

[119] AR, para. 1.28 ("[a]bsent respect for the procedural obligations, it cannot be firmly stated that a nation has objectively implemented its substantive obligations").

[120] *See* AR, para. 1.26 ("Compliance with substantive obligations is conditioned by respect for the procedural obligations and vice versa.").

[121] AR, para. 1.26 quoting *Danzig case, (Advisory Opinion), P.C.I.J., Series B*, No. 11, p. 39 (16 May 1925).

burdens imposed. Argentina's effort to cultivate the argument that a procedural violation can only be remedied by the dismantling of a project can and must be rejected.

E. THE ISSUE OF ARGENTINA'S INDUSTRIAL PLANTS

2.75 Even as it is otherwise dedicated to aggrandizing the importance of both CARU and the Statute's procedural rules, one subject on which the Reply is conspicuously restrained is the scores of Argentine industrial plants that discharge contaminating effluents into the Uruguay River. Perhaps recognizing that there is little it can say about this subject that is consistent with its case, Argentina says very little.

2.76 In Chapter 2 of the Counter-Memorial, Uruguay showed that since 1975 when the Statute was adopted, Argentine federal, provincial and municipal authorities have authorized the construction and operation of more than a hundred industrial plants that discharge liquid and solid waste into the Uruguay River or its tributaries, all without even once -- not once -- notifying CARU or awaiting its summary determination under Article 7[122]. Uruguay identified many of these plants by name and location, and it specified the environmental risks associated with them. To mention just one example (of many), Uruguay cited the chemical plant, Fana Química, S.A., in Colón, Entre Ríos Province which operates along side the Uruguay River. The plant began operations in 1976, and manufactures chemical adhesives, plastics, paint, glue, aerosols, insecticides and silicon sealers. It discharges liquid

[122] UCM, paras. 2.140-2.150.

effluents directly into the Uruguay River and, in 2000, was sanctioned by Argentine authorities for violating local environmental laws[123].

2.77 In its Reply, Argentina does not deny or otherwise take issue with any of the facts Uruguay presented to the Court. They can therefore be taken as admitted in their entirety. Argentina's entire responsive argument on this point is to contend that all of these plants, presumably both individually and collectively, cannot be compared to the ENCE and Botnia projects because they are smaller in scale[124]. According to Argentina, none of the 170 plants Uruguay identified were "of sufficient scope" ("*de entidad suficiente*") to affect water quality and therefore did not need to be reported to CARU under Article 7[125].

2.78 This halfhearted response is remarkable in its inconsistency with the rest of Argentina's argument about the 1975 Statute. Throughout the history of this case, and again in the Reply, Argentina has decried Uruguay's alleged "unilateralism" as inconsistent with the letter and spirit of the 1975 Statute. It states, for instance, that "la grande question qui divise les Parties au présent différend est celle de l''unilatéralisme' …"[126]. Elsewhere, it states:

> L'ensemble des obligations formulées par le Statut de 1975 vise avant tout à prévenir *toute utilisation unilatérale* des eaux du fleuve Uruguay en déni des prescriptions du Statut, notamment

---

[123] UCM, para. 2.141.

[124] AR, paras. 1.83-1.84.

[125] AR, para. 1.84.

[126] AR, para. 1.156 ("the major question that divides the parties in the present dispute is that of 'unilateralism' …").

> lorsque cette utilisation est susceptible de porter préjudice à l'écosystème du fleuve[127].

2.79 Yet, Argentina now claims the right unilaterally to determine for itself whether a given project is "of sufficient scope" to affect water quality. Argentina cannot have it both ways. It is not entitled to stand on the Statute's "common and joint mechanisms" when it suits its purpose while simultaneously reserving for itself the privilege of disregarding those same mechanisms when it does not. Exactly as Argentina itself says, "une fois les engagements internationaux contractés, il n'est pas loisible à l'État de s'exonérer unilatéralement de ses obligations ni de présumer qu'une telle auto-exonération est opposable aux autres États" [128].

2.80 There is still another inconsistency in Argentina's argument on this point. The Reply attempts to deflect the force of the facts concerning Argentina's practice with respect to industrial facilities by claiming that many of the plants identified by Uruguay "ne se trouve pas directement sur la rive droite du fleuve mais sur les, ou à proximité des tributaires de celui-ci"[129]. Although this is certainly true as a statement of fact, Argentina's own interpretation of the Statute deprives it of any force. Argentina is fond of emphasising that the scope of the Statute is not confined to the river itself, but also includes its "zones of influence"[130]. Plainly, the river's

---

[127] AR, para. 1.31 (emphasis added) ("All of the obligations formulated by the 1975 Statute look before all else to prevent *any unilateral use* of the waters of the Uruguay River that is contrary to the provisions of the Statute, notably whenever such use has the potential of damaging the river's ecosystem.").

[128] AR, para. 1.33 ("once international commitments are contracted, it is not possible for the State to exempt itself unilaterally from its obligations or to presume that such a self-exemption may not be challenged by other nations").

[129] AR, para. 1.84 ("are not located directly on the right bank of the river, but on the tributaries thereof, or otherwise close to those tributaries").

[130] *See*, *e.g.*, AR, paras. 0.4, 1.47, 1.57 & 2.83.

tributaries fall within any conceivable definition of the pertinent "zones of influence." Indeed, Article 35 of the Statute specifically states: "The Parties undertake to adopt the necessary measures to ensure that the management of … the waters of the tributaries do not cause changes which may significantly impair the régime of the river or the quality of its waters"[131]. Argentina's acknowledged discharge of chemical contaminants into the Gualeguaychú River, which flows into the Uruguay River in close proximity to Argentina's Ñandubaysal beach, are thus very much relevant.

2.81 Quite apart from the obvious logical inconsistencies in Argentina's argument, the facts also disprove it. At least some of the plants Argentina has built since 1975 are demonstrably of sufficient scope to affect the river's water quality. As stated above, Fana Química was previously sanctioned by Argentine environmental authorities in 2000. This was not an isolated event. According to news reports, as recently as January 2008, Fana Química was sanctioned yet again[132]. Indeed, the situation was so serious that operations were temporarily suspended altogether[133]. An investigation by the Secretariat of the Environment and Sustainable Development of Argentina, along with the government of Entre Ríos and Colón, revealed that the company's effluents were producing a visible dark

---

[131] 1975 Statute, *op. cit.,* Art. 35. UCM, Vol. II, Annex 4.

[132] Letter SMAER 02/08 sent from the Secretary of the Environment of the Province of Entre Ríos, Eng. Fernando Raffo, to the President of the Argentine Delegation to CARU, Ambassador Hernán Darío Orduña (hereinafter "Letter SMAER 02/08") (14 January 2008). UR, Vol. II, Annex R24.

[133] *Ibid.*

sheen on the water[134]. On 11 January, they issued an order temporarily closing the Fana Química plant in order to put a stop to the contamination[135]. Two weeks later, after the company presented a plan to clean up its operations and reach compliance with the law, it obtained authorisation to renew its operations for the line of production that does not generate liquid effluents[136]. Uruguay applauds Argentina's belated response to the pollution caused by this industrial facility; as the saying goes: "better late than never". But the point remains: Argentina never notified CARU (or Uruguay) of its authorisation of this plant, or otherwise submitted it (or the scores of other plants it authorized) to the procedures set forth in Articles 7-12 of the 1975 Statute.

2.82 News reports from Argentina also indicate that that State has recently begun efforts to build an effluent treatment plant for the Gualeguaychú industrial park[137]. As discussed in Uruguay's Counter-Memorial, the park was established in 1975, the same year the Statute was signed, and is now home to some 25 industrial facilities, including an industrial dyeing facility, a battery manufacturing plant and a food and beverage processing plant that has elicited strong complaints from local

---

[134] Secretariat of the Environment and Sustainable Development of Argentina Web Site, "Clandestine Chemical Plant Closes in Entre Ríos" (11 January 2008), *available at* http://www.ambiente.gov.ar/?aplicacion=noticias&idarticulo=5192&idseccion=12 (last visited on 3 July 2008). UR, Vol. II, Annex R17.

[135] Letter SMAER 02/08, *op. cit*. UR, Vol. II, Annex R24.

[136] Letter SMAER 03/08 sent from the Secretary of the Environment of the Province of Entre Ríos, Eng. Fernando Raffo, to the President of the Argentine Delegation to CARU, Ambassador Hernán Darío Orduña (25 January 2008). UR, Vol. II, Annex R25.

[137] Entre Ríos Entre Todos, "The Draft Project for the Effluent Treatment Plant of the Gualeguaychú Industrial Park Was Sent to the [Secretariat of the Environment of the] Nation" (10 January 2008). UR, Vol. III, Annex R61.

residents[138]. Waste water from the Gualeguaychú industrial park is discharged into the Gualeguaychú River which in turn flows into the Uruguay River very close to Argentina's Ñandubaysal beach[139]. The newly acknowledged need for an effluent treatment plant stands as unmistakable evidence that (i) for the previous 23-year history of the park, effluents were being dumped into the river without adequate treatment, and (ii) those same effluents have the capacity to affect the water quality of the Uruguay River and add to the already high levels of phosphorous which Argentina does nothing to regulate or control. Here again, the facts disprove Argentina's argument about the need to notify CARU about its industrial projects along the Uruguay River since 1975.

2.83 Uruguay hastens to add that it does *not* bring up Argentina's consistent practice of building industrial plants without notifying CARU for purposes of arguing that the ENCE and Botnia plants did not fall within the ambit of Articles 7-12. As it has now repeatedly made clear to the Court, its position is that the projects do fall within the scope of the Statute's procedural rules[140]. The point is simply that, as discussed in the Counter-Memorial, prior to the advent of this dispute, the Parties did not manifest a consistent, or even clear, understanding of the Statute's application to industrial plants.[141] Never once has an industrial plant on either side of the river been the subject of a formal notification to CARU. It is only very recently that Argentina has adopted the position that it currently articulates -- and

---

[138] *See* UCM, paras. 2.144-2.146.

[139] UCM, para. 2.144.

[140] *See* UCM, para. 2.76; CR 2006/49, p. 10, para. 2 (Boyle) (8 June 2006).

[141] *See* UCM, para. 2.150.

even now that position would seem to apply only to facilities located on the Uruguayan side of the river, not to those on Argentina's side.

2.84 Argentina's practice of building scores of industrial plants along or within the zones of influence of the Uruguay River without ever once having informed CARU also powerfully refutes Argentina's effort to portray itself as the lone guardian of both the Statute and the environment. Argentina's pleadings are replete with pointed references to what it calls "la banalisation du Statut de 1975 opérée par l'Uruguay" [142], or Uruguay's "mépris de ses obligations relatives à la préservation de la quialité des eaux du fleuve Uruguay et son écosystème" [143]. Uruguay invites the Court to see these statements for what they are: transparent attempts to sully Uruguay by casting baseless aspersions that might, with greater merit, be directed at Argentina itself.

* * *

2.85 In the foregoing Section I, Uruguay showed: (i) according to the plain text of the 1975 Statute, CARU's role in the procedures established in Articles 7-12 is limited. Once the Commission has completed its preliminary technical review of a project, its role is essentially over; (ii) there is no reason the Parties may not agree to skip CARU's preliminary review and go straight to direct consultations; (iii) the Statute does *not* require notice to CARU before the initiating State may issue an authorisation for a project. It requires only notice that is "timely" in the sense it is given in sufficient time to allow the remaining procedural steps in Articles 7-12 to

---

[142] AR, para. 0.21 ("the trivialization of the 1975 Statute by Uruguay").

[143] AR, para. 4.136 ("disregard of its obligations relative to preservation of the Uruguay River's water quality and ecosystem").

be followed before a project is implemented; (iv) Uruguay's (and Argentina's) recognition that the Statute's procedural rules are there to facilitate the observance of its substantive provisions does not set up an impermissible "hierarchy of rights"; and (v) Argentina's actions permitting the construction and operation of scores of contaminating industrial plants on its own side of the Uruguay River without ever once notifying CARU directly contradict its arguments in this case.

Section II.
The Issue of Implementation During Dispute Resolution

2.86 In the preceding Section, Uruguay addressed the first of the two core procedural disputes remaining between the Parties; that is, the nature and scope of CARU's involvement in the Articles 7-12 process and, more particularly, whether the Parties are free to agree to proceed straight away to direct consultations and to dispense with CARU's intermediation. In this Section, Uruguay will turn to the second remaining dispute -- whether a Party may implement a project when dispute resolution proceedings are underway -- and show that the analysis set forth in the Reply does not withstand serious scrutiny. Indeed, it is in large measure refuted by the very authority on which Argentina purports to rely. The inescapable conclusion is that, properly interpreted, the Statute permits the initiating State to implement a project after dispute resolution procedures have been commenced.

A. The Veto Issue and the Consequences of a Disagreement

2.87 In the Counter-Memorial, Uruguay observed that Argentina's Memorial was studiously ambiguous on the question of whether or not the 1975 Statute requires the prior consent of the notified State before the initiating State may

implement a planned project[144]. Notwithstanding the obvious centrality of the issue to the dispute now before the Court, Argentina's first written pleading steadfastly refused to take a clear position. Although the Memorial seemed intent on nurturing the impression that the Statute requires prior consent, it never actually said so. In fact, the words "prior consent" and "veto" were not used anywhere in its pages. On the other hand, the phrase "prior agreement" ("accord préable") did turn up with some frequency. But even when it did, the words were used in the context of opaque references to the Statute's "obligations relating to prior agreement" and like phrases that left the reader uncertain whether Argentina was actually claiming that the Statute *requires* such prior agreement.

2.88 In response, relying on the text of the Statute, the Parties' consistent course of conduct and the rules of general international law, Uruguay's Counter-Memorial showed that the 1975 Statute does *not* require prior consent[145]. In particular, the Counter-Memorial demonstrated that the text of the Statute is silent on this point. The Statute neither says that prior consent is required nor that it is not. Using general international law to fill this lacuna, it is clear that the Statute should be construed *not* to require prior consent. As the arbitral tribunal in the *Lake Lanoux case* (*Spain v. France*) stated:

> To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the

[144] *See* UCM, paras. 2.110-2.113.

[145] *See* UCM, paras. 2.110-2.165.

> sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence[146].

2.89 The Tribunal's reasoning was echoed in the work of Dr. Julio Barberis, one of Argentina's lead negotiators of the 1975 Statute and a leading Latin American authority on shared natural resources. Writing in 1979, he stated: "Some treaties establish the principle that one State, to be able to carry out a work or hydraulic project, must have the consent of the other contracting State. … The existence of a legal régime of this type must be expressly stipulated in a treaty"[147]. Notably, Dr. Barberis listed examples of treaties that expressly stipulate a prior consent régime, none of which was the 1975 Statute[148].

2.90 Since there is no such express stipulation in the Statute, the only possible conclusion is that prior agreement is not required. This conclusion is also amply supported by the practice of the Parties, as amply described in the Counter-Memorial[149]. Put simply, the Statute does not give either Party a right of veto over the projects of the other. What the Statue creates instead is a system of prior notification and prior consultation, without however requiring prior agreement.

2.91 In contrast to the Memorial, the Reply finally makes clear what Argentina's argument is. In particular, Argentina argues that in the absence of a specific agreement between the Parties, the Statute prohibits the initiating State from implementing a project over the objections of the notified State until such time as

---

[146] *Lake Lanoux Arbitration (France v. Spain)*, *International Law Reports*, vol. 24, p. 129, para. 13 (16 Nov. 1957).

[147] Julio A. Barberis, *Shared Natural Resources Among States and International Law*, p. 46 (1979). UCM, Vol. IX, Annex 198.

[148] *Ibid*.

[149] *See* UCM, paras. 2.124-2.129 & 2.140-2.155.

this Court renders a final judgment on the merits. The Reply claims that "le fait est que, sans l'accord de la Partie notifiée, l'autre Partie ne peut mettre en œuvre son projet sans un 'feu vert' de la Cour internationale de Justice" [150].

2.92 Before exploring the basis of this argument, two threshold observations are in order. *First*, Argentina now recognizes that, as a matter of law, the Statute does not give either Party a right of veto. It admits, for example, that "ni l'une ni l'autre des Parties ne peut empêcher que soit menée à bien la construction d'un ouvrage répondant à ces conditions" [i.e., l'utilisation rationnelle du fleuve Uruguay][151].

2.93 *Second*, and equally important, it also recognizes that a veto, or what it calls a "blockage", is undesirable from a practical perspective and inconsistent with the scheme of the Statute as a whole. It states, for instance, that "[e]ncore fault-il que ce désaccord ne dure pas indéfiniment, ce qui viderait de substance l'équilibre réalisé par le Statut entre les intérêsts des deux Parties"[152]. This theme of the "balance" the Statute strikes between the interests of the two States, and the need to avoid "blockages" is one that Argentina returns to repeatedly throughout the Reply[153]. At paragraph 1.169, it states, for example:

> En effet, et l'Argentine a insisté sur ce point, le Statut, même s'il ne concède aucun droit de décision unilatérale à l'une des Parties

---

[150] AR, para. 1.126 ("the fact is that without the agreement of the notified party, the other party may not implement its project without a 'green light' from the International Court of Justice").

[151] AR, para. 1.119 ("neither party can prevent the construction of a facility or installation meeting these conditions [i.e., the rational use of the river] from being duly implemented").

[152] AR, para. 1.120 ("it is essential that this disagreement not last indefinitely, which would substantially dissipate the balance achieved by the Statute between the interests of the two parties").

[153] *See*, *e.g.*, AR, paras. 1.151-1.152 & 1.175.

> s'emploie à éviter que puisse s'instaurer (lorsqu'il est respecté) une situation de blocage[154].

Elsewhere it similarly emphasizes that the Statute's procedures are "en effet conçu de manière à éviter les blocages préjudiciables à une exploitation rationnelle et respectueuse des droits de l'autre Partie de la ressource partagée que constitue le fleuve Uruguay" [155], and that the purpose of giving the notified State a limited period to raise objections is "afin d'éviter de bloquer le processus" [156].

2.94 Argentina's argument that the initiating State may not implement a project absent a final decision from the Court is premised entirely on an inferential reading of Article 9 of the Statute. Article 9 provides that if the notified State raises no objections or does not respond within the 180-day period established by Article 8, the initiating State may carry out the work planned[157]. Based on an *a contrario* reading of this text, Argentina concludes that if the notified State *does* object, the initiating State may *not* carry out the work planned[158]. The flaws in this argument, and the reasons to be cautious about yielding to simplistic *a contrario* reasoning, have already been well documented in Uruguay's Counter-Memorial and need not be revisited in full here[159]. It is sufficient for present purposes to note that there is

---

[154] AR, para. 1.169 (footnote omitted) ("In effect, and Argentina has emphasized this point, even if the Statute does not grant any unilateral decision making right on one of the parties, it attempts to avoid (whenever complied with) the occurrence of a blockage situation.").

[155] AR, para. 1.119 ("in fact designed to avoid harmful blockages of a rational and respectful exploitation of the rights of the other party to the shared resource that constitutes the Uruguay River").

[156] AR, para 1.130 ("in order avoid any blocking of the process").

[157] 1975 Statute, *op. cit.,* Art. 9. UCM. Vol. II, Annex 4.

[158] *See* AR, para. 1.138.

[159] *See* UCM, paras. 2.130- 2.136.

another perfectly logical way to read Article 9 that does not necessitate the ever-perilous step of drawing negative inferences from what is not said. Under this reading, Article 9 (as read together with Article 10) states the procedural consequences when the notified State does *not* object to a project. That is, Article 9 states that the initiating State may proceed with the project without incurring any further procedural obligation except the requirement (under Article 10) to allow the notified State to inspect the project in question. Articles 11 and 12, in turn, state the procedural consequences when the notified State *does* object to a project. Under that alternative scenario, the two States must consult with one another and, if their disagreement persists, they agree to submit their dispute to this Court. But the procedural consequences under Article 9 when the notified State has *no* objections say nothing about the procedural consequences in the contrary situation when it *does* have objections. So viewed, Article 9 means exactly, but only, what it says: if the notifying State has no objections, the initiating State may go forward with its project without incurring any additional procedural obligations (save only for the duty under Article 10 to allow the notified State to inspect the project).

2.95 The Parties appear to be in agreement on this point insofar as they both recognize that Articles 9 and 10, on the one hand, and Articles 11 and 12, on the other, address alternative scenarios. At paragraph 1.132 of the Reply, Argentina states:

> Les articles 9 à 12 du Statut du fleuve Uruguay concernent les dernières étapes de la procédure que doivent suivre les Parties à la suite de la communication par celle qui projette de construire un ouvrage. Comme cela est rappelé ci-dessus, ces étapes se présentment sous la forme d'une alternative:
>
> > - ou bien la Partie ne formule pas d'objections dans les délais requis et 'l'autre

> Partie peut construire ou autoriser la construction de l'ouvrage projeté' – et les dispositions des articles 9 et 10 s'appliquent;
>
> - ou bien la Partie notifiée conclut que le projet risque de causer un préjudice sensible et, faute d'accord entre les deux États, le dernier mot revient à la Cour de céans, comme cela résulte des articles 11 et 12 du Statut[160].

2.96 Thus, Argentina recognizes that Articles 9 and 10, and Articles 11 and 12, lay out the scope of procedures to be followed under alternative scenarios, i.e., when the notified State does not object to the project (Articles 9 and 10) and when it does object (Articles 11 and 12).

2.97 The open question is whether implementation is permitted during the period after a notified State objects to a project -- thereby bringing it within Articles 11 and 12, as opposed to Articles 9 and 10 -- and the dispute is pending before the Court. For Uruguay, the Statute is silent on this point. But since the Statute does not afford either Party a veto right (a point with which Argentina now agrees), Uruguay concludes that the initiating State can proceed unless and until the Court orders it to stop, assuming the risk that the Court may ultimately order the dismantling of the project. By contrast, Argentina claims that Article 9 *implies* that if the notified State does object, the initiating State may not implement the project

---

[160] AR, para. 1.132 ("Articles 9 to 12 of the Statute of the River Uruguay deal with the final stages of the procedure that the parties must follow after communication by the party planning to build a facility or installation. As stated above, these stages present themselves in the form of an alternative: -Either the party makes no objections within the required periods of time and "the other party may carry out or authorize the work planned" -- with the provisions of Articles 9 and 10 applying; -Or else the notified party concludes that the project risks causing considerable harm and, absent an agreement between the two States, the last word falls to the ruling Court, as results from Articles 11 and 12 of the Statute.").

until the Court rules. Yet, as even Argentina must recognize, Article 9 actually says no such thing.

2.98 To support to its argument about Article 9, Argentina places heavy reliance on the 1997 Watercourse Convention and the ILC's commentary thereto. Yet, as will be demonstrated immediately below, the Convention actually refutes Argentina's argument. Specifically, the Convention rejects the contention that when watercourse States disagree and dispute resolution arises, the implementation of a project must await the outcome of the dispute resolution process.

2.99 The pertinent portion of the Reply is worth quoting *in extenso* precisely because it is so very telling. It states:

> Le Statut qui était, sans aucun doute, 'en avance sur son temps', a constitué l'une des sources d'inspiration principales pour l'élaboration de maintes dispositions de la Convention de 1997. Ainsi, les articles 7 à 12 ont-ils été intégralement reproduits dans le texte du commentaire de l'article 12 du projet d'articles de la C.D.I. sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation (qui allait devenir l'article 12 de la Convention) et ont-ils constitué un précédent auquel la Commission s'est référé pour rédiger les dispositions relatives à l'obligation de notification, à sa teneur, au délai de réponse et *aux 'procédures applicables au cas où les parties ne s'entendraient pas sur le projet proposé',* sans pour autant adopter une solution aussi avancée que celle préuve par le Statut. Au surplus, comme le relève la C.D.I. dans le commentaire de son projet final:
>
> > 'La seconde obligation qui incombe à l'État auteur de la notification en vertu de l'article 14 est de ne pas mettre en œuvre ou de ne pas permettre que soient mises en œuvre les mesures projetées, sans le consentement des États auxquels a été adressée la notification. (…) Peut-être va-t-il sans dire que cette seconde obligation est un élément nécessaire des procédures prévues dans la troisième partie du projet, puisque celles-ci sont destinées à maintenir un état de choses caractérisé par l'expression 'utilisation

> équitable' au sens de l'article 5. Si l'État auteur de la notification devait procéder à la mise en œuvre avant que l'État à qui a été adressée la notification ait eu la possibilité d'évaluer les effets éventuels des mesures projetées et d'informer l'État auteur de la notification de ses conclusions, ce dernier n'aurait pas à sa disposition toutes les informations dont il a besoin pour être à même de se conformer aux articles 5 à 7. Le devoir de ne pas procéder à la mise en œuvre a ainsi pour but d'aider les États du cours d'eau à s'assurer qu'aucune des mesures qu'ils projettent n'est incompatible avec les obligations qui leur incombent en vertu des articles 5 et 7'

L'obligation de l'État qui projette une opération de s'abstenir de la mettre en œuvre est donc une conséquence inhérente à l'obligation de notification et à son objectif, qui seraient privés de signification si l'on devait admettre que, nonobstant l'obligation de notifier et d'informer le projet pouvait être mené à bien[161].

---

[161] AR, para. 1.140 (emphasis added) ("The statute, which was without any doubt "ahead of its time", constituted one of the principal sources of inspiration for the formulation of main provisions of the 1997 Convention. Thus, Articles 7 to 12 have been totally reproduced in the text of the comments on Article 12 of the draft articles of the International Law Commission (ILC) respecting the law relative to the uses of international waterways for purposes other than navigation (which become Article 12 of the Convention), and constituted a precedent to which the Commission referred when drawing up the provisions respecting the obligation of notification, the purport and tenor thereof, the response period and *the "applicable procedures in the event that the parties are unable to come to an agreement on the proposed project"*, without nonetheless adopting a solution as advanced as that provided by the Statute. Moreover, as the ILC states in its commentary on the final draft: "The second obligation that is incumbent upon the notifying State pursuant to Article 14 is not to implement the proposed measure or cause them to be implemented without the consent of the States to which the notification has been addressed… It perhaps goes without saying that this second obligation is a necessary component of the procedures stipulated in the third part of the draft, since they are intended to maintain a state of things characterized by the expression "equitable use" in the meaning of Article 5. If the notifying State should proceed with the implementation before the notified State has been able to assess the possible effects of the proposed measures and inform the notifying State of its findings or conclusion, the latter would not have at its disposal all of the information needed to adhere to the provisions of Articles 5 to 7. Thus, the purpose of the obligation not to proceed with implementation is to help the waterway States to ensure that none of the proposed measures is incompatible with the obligations incumbent upon them under Articles 5 and 7." The obligation of the State that is proposing an operation to abstain

2.100 This piece of reasoning is remarkable and, Uruguay submits, conclusive of the issue now under consideration; that is, does Article 9 of the Statute prohibit the initiating State from implementing a project before the Court issues its final judgment on the merits? In the first instance, of course, this invocation of the Watercourse Convention evidences Argentina's agreement that the Convention is pertinent to the interpretation of the terms of the Statute. Indeed, for reasons Argentina itself identifies, it is hard to see how it could be otherwise. The 1975 Statute was a key source of inspiration for the ILC when crafting the "procédures applicables au cas où les parties ne s'entendraient pas sur le projet proposé".

2.101 Argentina's invocation of the Watercourse Convention is also critical because, while it is true that the Convention bars the implementation of a project during certain specified periods of time, it is *not* true that it prohibits implementation until the end of the dispute resolution process, as Argentina's quotation might suggest. The ILC commentary that Argentina quotes at such length is actually taken from the comments to Article 14 of the Convention, which expressly provides that the duty not to implement the project persists *during the period given to the notified State to Reply to a notification*[162]. This, incidentally, is in contrast to the 1975 Statute, which is silent on the point and says nothing about a duty not to implement the project during the period given to the notified State to reply to a notification. Article 17, paragraph 3, of the Convention further extends the period during which

---

from implementing it is thus an inherent consequence of the obligation of notification and its objective, which would be deprived of meaning if one allowed, notwithstanding the obligation to notify and report, the project to be carried out.").

[162] Draft Articles on the Law of Non-Navigational Uses of International Watercourses and Commentaries Thereto (hereinafter "1994 Draft Articles"), p. 114 (1994), appears in *Yearbook of the International Law Commission, 1994,* Vol. II, Part Two.

the initiating State may not implement a project to the consultation and negotiation phase specified in paragraphs 1 and 2 of the same article. Again, the 1975 Statute says nothing on the topic.

2.102 The fact that the Watercourse Convention prohibits implementation during these two earlier periods does not, however, support Argentina's argument that the duty not to implement extends all the way to the end of dispute resolution proceedings. Indeed, the Watercourse Convention leads to exactly the opposite conclusion. Just as Article 17 of the Convention makes clear that the obligation not to carry out a project lasts through the period for consultations and negotiations, it makes equally clear that the obligation ends when consultations end. The text of Article 17 is plain. It provides that during consultations and negotiations, the notifying State shall, if so requested by the notified State, "refrain from implementing or permitting the implementation of the planned measures for a period *not exceeding six months*"[163]. According to the ILC:

> Implementation of the measures during a reasonable period of consultations and negotiations would not be consistent with the requirements of good faith laid down in paragraph 2 of Article 17 and referred to in the Lake Lanoux arbitral award. By the same token, however, consultations and negotiations should not further suspend implementation for more than a reasonable period of time. … *After this period has expired, the notifying State may proceed with implementation of its plans*, subject always to its obligations under articles 5 and 7 [concerning equitable and reasonable utilization, and the obligation not to cause significant harm][164].

2.103 The differences between the 1975 Statute and the Watercourse Convention can thus be summarised as follows: under the Convention, there is an express duty

---

[163] 1997 Watercourse Convention, *op. cit.,* Art. 17 (emphasis added).

[164] 1994 Draft Articles, *op. cit.,* p. 116, comment 4 (emphasis added).

not to implement a project both during the notification and reply period, and during the consultation and negotiation period. During dispute resolution, however, implementation is permitted. In contrast, the 1975 Statute does not address the initiating State's duties during any of these phases. The Statute's silence leads to two logical alternatives. Under the first, the silence of the Statute would be interpreted to permit implementation since no express prohibitions are stated. Under this alternative, Uruguay would be free at all times to implement the project unless and until the Court ordered it not to or (if the project were already implemented) ordered the project dismantled. The second alternative would be to fill the lacunae in the 1975 Statute by reference to general international law. Under this alternative, the void in the Statute would be filled, consistent with the Watercourse Convention, by a duty not to implement during the periods of notification and consultation, but there would be no such duty during the dispute resolution phase.

2.104 As shown, Argentina relies on the Watercourse Convention for its argument that a duty not to implement should be read into the 1975 Statute. Uruguay agrees. Argentina should be bound by its own reasoning. Having enlisted the Convention as authority concerning the "applicable procedures in the event the parties are unable to come to an agreement on the proposed project", it cannot now pick and choose among those procedures, accepting the ones that it likes and rejecting those that do not support its case. It cannot in good faith invoke the Watercourse Convention for the principle that there is a duty not to implement a project during the periods of notification and consultation without accepting the principle that there is no such duty during the dispute resolution phase. Thus, by force of Argentina's own analysis, just as the Watercourse Convention permits the

notifying State to implement a project upon conclusion of consultations, so too does the 1975 Statute.

2.105 The plain terms of Article 16 of the Watercourse Convention also stand as a stark refutation of Argentina's *a contrario* reading of Article 9 of the 1975 Statute. Although perhaps more verbose, Article 16 of the Convention is quite similar to Article 9 of the Statute. It states:

> *If*, within the period applicable pursuant to article 13 [concerning replies to notifications], *the notifying State receives no communication under paragraph 2 of article 15* [concerning objections to projects], *it may*, subject to its obligations under articles 5 and 7 [concerning equitable and reasonable utilization, and the obligation not to cause significant harm], *proceed with the implementation of planned measures* …[165].

Quite obviously, Article 16 is susceptible to exactly the same sort of *a contrario* reading that Argentina gives to Article 9 of the Statute. Were one to apply Argentina's logic, Article 16 could be made to mean not only what it actually says, but also that if the notifying state *does* receive a communication voicing an objection to its planned measures, it may *not* proceed with the implementation of its plans, at least until such time as all dispute resolution proceedings have run their course. Yet, that is distinctly not what Article 16 means. Instead, as shown above, under the Watercourse Convention implementation of a project is only prohibited through the end of consultations and is permitted during dispute resolution[166]. Thus, if the language of Article 16 of the Convention may not be given an *a contrario* interpretation, neither should the very similar language in Article 9 of the Statute.

---

[165] 1997 Watercourse Convention, *op. cit.,* Art. 16 (emphasis added).

[166] *See supra*, paras. 2.101-2.103.

2.106 The reason the implementing State is permitted to implement its plans after a reasonable period of consultations is precisely because the purpose of the procedural articles of the Watercourse Convention is "to assist watercourse States in maintaining an equitable balance between their respective uses of an international watercourse"[167]. While each watercourse State has "the obligation not to exceed its right to equitable utilization", it also has the concomitant "right to utilize an international watercourse in an equitable and reasonable manner"[168]. Maintaining the proper balance between these competing rights and obligations means that at some point in the process, the notifying State's duty not to implement until it has heard the notified State's objections in good faith must yield to its entitlement "to make use of the waters of an international watercourse within its territory"[169]. Without that balance, the notified State could effectively place the notifying State's development plans on indefinite hold through the simple expedient of continuing to insist on its objections, well-founded or not.

2.107 These same considerations apply equally to the 1975 Statute, the agreed purpose of which is "to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay"[170]. As Argentina itself states in the Reply:

---

[167] 1994 Draft Articles, *op. cit.,* p. 111, comment 1.

[168] *Ibid.,* p. 97, comment 2.

[169] *Ibid.,* p. 98, comment 8.

[170] 1975 Statute, *op. cit.,* Art. 1. UCM, Vol. II, Annex 4.

[e]ncore faut-il que ce désaccord ne dure pas indéfiniment, ce qui viderait de substance l'équilibre réalisé par le Statut entre les intérêts des deux Parties"[171].

2.108 In this respect, it is interesting that even as Argentina acknowledges the fact that the Statute does not confer a veto right on either party, it tries to minimize the importance of this issue claiming that "il n'importe guère que l'on parle de veto, d'accord préalable ou de consultations préalables"[172]. In a similar way, Argentina attempts to reduce the significance of the fact that general international law does not give notified States a veto over the projects of the notifying State by arguing: "il est sans intérêt de discuter la question de savoir s'il existe un droit de veto en droit international général …"[173] But it *is* of interest. Knowing that both general international law and the 1975 Statute reject a veto right necessarily affects the interpretation of the Statute. Given that the Parties specifically chose not to confer *de jure* veto rights on each other, an interpretation of the Statute that would have the effect of creating *de facto* veto rights is logically to be avoided. Argentina appears to agree. It states for example that the Statute is "en effet conçu de manière à éviter les blocages préjudiciables à une exploitation rationnelle et respectueuse des droits de l'autre Partie de la ressource partagée que constitue le fleuve Uruguay"[174]. Yet,

---

[171] AR, para. 1.120 ("[I]t is essential that this disagreement not last indefinitely, which would substantially dissipate the balance achieved by the Statute between the interests of the two parties").

[172] AR, para. 1.129 ("it hardly matters whether one is talking about veto, prior agreement or prior consultations").

[173] AR, para. 1.124 ("it is of no interest to discuss the question of knowing whether a veto right exists in general international law …").

[174] AR, para. 1.119 ("in fact designed to avoid harmful blockages of a rational and respectful exploitation of the rights of the other party to the shared resource that constitutes the Uruguay River").

this is exactly what Argentina's reading of the Statute would do. It is not just that Argentina's interpretation of the Statute would enable the notified State to hold the initiating State's project hostage pending the outcome of protracted dispute resolution proceedings. It is more than that. As Uruguay stated in the Counter-Memorial, the extended "blockage" Argentina's reading of the Statute would likely kill any disputed private investment project[175]. Few, if any, private investors are likely to wait the years required for litigation in this Court to run its full course. Nowhere in the 510 pages of its Reply does Argentina even try to dispute this fact. And since Argentina has admitted this result is not what the Statute intends, the Statute should be interpreted in a way that avoids it.

2.109 Even as the Reply embraces the 1997 Watercourse Convention as relevant authority concerning the "procédures applicables au cas où les parties ne s'entendraient pas sur le projet proposé", it simultaneously attempts to limit its application because, unlike the 1975 Statute, it supposedly does not contain a "clause de règlement obligatoire des différends"[176]. According to Argentina, this ostensible distinction is pertinent because the Convention leaves open "la possibilité d'une impasse", inasmuch as the absence of mandatory dispute resolution means there would be "rien ne garantit que le blocage puisse être surmonté"[177]. As a threshold matter, Uruguay disputes the existence of the distinction Argentina seeks to draw. Article 33 of the Watercourse Convention expressly provides for

---

[175] UCM, para. 1.31.

[176] AR, para. 1.151 ("mandatory dispute resolution clause").

[177] AR, para. 1.151 ("the possibility of impasse", "nothing to guarantee that the blockage could be cleared").

mandatory dispute resolution in the form of impartial fact-finding (or, if agreed, mediation or conciliation) followed by optional arbitration or judicial settlement. The mandatory nature of these procedures is emphasized in Article 33(b), which states that the Parties "shall", at the request of any one of them, have recourse to impartial fact-finding.

2.110 More to the point, Argentina's claimed distinction is irrelevant. There is nothing either in the text of the Convention or the ILC commentary to suggest that the reason it permits the implementation of planned measures upon conclusion of consultations is because there is no mandatory provision for binding judicial settlement, and therefore "rien ne garantit que le blocage puisse être surmonté"[178]. To the contrary, the text and commentary make clear that the reason for permitting implementation upon conclusion of consultations is because the initiating State should only have to put its plans on hold for a "reasonable period" (not to exceed six months) while it hears the other side out and consults in good faith. Requiring the notifying State to wait any longer risks seriously impairing its right "to make use of the waters of an international watercourse within its territory".

2.111 Argentina's argument to the contrary does not withstand logical analysis. If the reason the Watercourse Convention permits the initiating State to implement its planned measures even in the face of objections from the notified State were truly because there is "nothing to guarantee that the blockage could be cleared" at the end of the dispute resolution phase, one would expect that implementation of a project would be permitted not upon the conclusion of consultations, as it is, but rather upon

[178] AR, para. 1.151.

conclusion of the impartial fact-finding procedure in the event the disagreement persists. That the Convention permits implementation at the earlier moment in time still further underscores the fact that the underlying purpose is to maintain the delicate balance at the heart of the Convention (and the 1975 Statute); namely, between "the obligation not to exceed its right to equitable utilization" and the "right to utilize an international watercourse in an equitable and reasonable manner".

2.112 Uruguay notes too that Article 33 of the Watercourse Convention contemplates the possibility of referring disputes either to arbitration or to judicial settlement if the Parties so agree[179]. Again, if the reason the implementation of planned measures were because there is "nothing to guarantee that the blockage could be cleared" at the end of the dispute resolution phase, one would also expect that the Convention would provide an exception to the rule permitting implementation upon the conclusion of consultations in the event of an agreement to binding arbitration or judicial settlement. In that case, of course, there would be a guarantee that the "blockage" could be cleared and, under Argentina's analysis, implementation should not be permitted. That implementation of a project is permitted even when arbitration or judicial settlement is agreed to underscores that the purpose of allowing the project to go forward after the notified State has had a full and fair opportunity to be heard in good faith is to prevent the notifying State from having to put its right to use a watercourse in an equitable manner on hold for more than a reasonable period of time.

---

[179] 1997 Watercourse Convention, *op. cit.,* Art. 33.

2.113 The Reply recognizes, as it must, that "[e]ncore fault-il que ce désaccord ne dure pas indéfiniment, ce qui viderait de substance l'équilibre réalisé par le Statut entre les intérêsts des deux Parties" [180]. Argentina does not and cannot deny that an indefinite or prolonged suspension of a project is the practical equivalent of a death sentence. Painted into this corner, Argentina tries to escape by arguing that forcing the initiating State to put its plans on hold until the Court has rendered a final judgment on the merits does not threaten an unreasonable delay. To support this argument, the Reply attempts to minimize the time required for the procedures contemplated in Articles 7-12 to play out. It does this by emphasising the time periods specified in Articles 7 (30 days), 8 (180 days) and 12 (180 days)[181]. Yet, it completely ignores the time required for submitting a case to this Court and litigating it to final judgment. As the history of this case shows, the time required for litigating in the Court vastly exceeds the time required for all the other procedural steps combined. The Court will recall that Article 12 consultations between Argentina and Uruguay under the auspices of GTAN reached impasse in December 2005 when Argentina announced its intent to bring this case to the Court. Argentina's Application was filed in April 2006. It is now July 2008 and the oral proceedings, which have not yet been scheduled, seem unlikely to be held before 2009. And even when they are complete, the Court will, of course, require additional time to reach its decision. By the time all this is done, it appears likely that more than three and a half years will have passed since Argentina first filed its

[180] AR, para. 1.120 ("it is essential that this disagreement not last indefinitely, which would substantially dissipate the balance achieved by the Statute between the interests of the two parties").

[181] AR, paras. 1.120-1.121.

Application, and more than four years will have elapsed since consultations ended. Under Argentina's analysis of the Statute, the notifying State (in this case, Uruguay) should wait this entire time, doing absolutely nothing in furtherance of its planned project pending the Court's decision. The untenable nature of this result speaks for itself.

2.114 Argentina's final argument against allowing the project to proceed during dispute resolution proceedings is that "l'État qui projette de construire l'ouvrage ne peut mettre l'autre Partie devant le *fait accompli* de sa construction et de sa mise en œuvre"[182]. This argument completely misunderstands both the Statute and Uruguay's position. Uruguay has never suggested, and does not now suggest, that by permitting implementation of a project upon conclusion of consultations, the Statute leaves the objecting State no choice but to accept the notifying State's project. Exactly as the text of the Statute says, the notified State may continue to press its objections by bringing them before the Court. Moreover, Uruguay has always accepted, and reiterates here, that the Court has the authority to order whatever form of relief it considers appropriate under the circumstances, including the ultimate sanction of dismantling the facility in dispute. Uruguay hereby affirms its acceptance of the Court's statement in its 13 July 2006 Order on Argentina's request for the indication of provisional measures:

> Whereas in proceeding with the authorisation and construction of the mills, Uruguay necessarily bears all risks relating to any finding on the merits that the Court might later make; whereas the Court points out that their construction at the current site

[182] AR, para. 1.122 ("the State which plans to construct the facility or installation cannot place the other party in the position of looking at the *fait accompli* of its construction and implementation").

> cannot be deemed to create a fait accompli because, as the Court has had occasion to emphasize, 'if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled'"[183][.]

2.115 In effect the debate between the Parties over whether implementation is permitted during dispute resolution reduces to the question of which is the more sensible solution *on an interim basis*: (i) prohibiting implementation, with the attendant substantial delay and risk of lost opportunities for investment and economic development that such an option necessarily involves, or (ii) permitting implementation, subject to the reservation that the Court retains the right to order the modification or even dismantling of the works in question. In Uruguay's estimation, the proper choice is obvious.

2.116 As Uruguay previously showed, reading the Statute to allow implementation while the case is before the Court does not mean that the notified State is threatened with a risk of substantial harm in the interval between when consultations end and the judgment of the Court[184]. The notified State has the right under Article 41 of the Statute of the Court, and Article 73 of the Rules, to bring a request at any time for the indication of appropriate provisional measures, including putting the implementation of the project on hold. Thus, if the notified State truly believes that it is threatened with irreparable harm by the implementation of the project during dispute resolution proceedings, it has the ability to protect itself by

---

[183] *Case Concerning Pulp Mills on the River Uruguay (Order on Provisional Measures), I.C.J. Reports 2006*, para. 78 (13 July 2006) (citing *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991*, I.C.J. Reports 1991, p. 19, para. 31).

[184] *See* UCM, para. 2.185.

petitioning the Court for provisional measures. Under Article 8 of the 1975 Statute, the objecting State has the prior obligation to "specify which aspects of the work might significantly impair navigation, the régime of the river or the quality of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations".[185] If the notified State has evidence that the implementation of the project presents an imminent threat of irreparable harm to the Uruguay River or the quality of its waters, the Court will be available on short notice to order the suspension of the project as well as other necessary protective measures.

2.117 As the Court is well aware, the notified State is not limited to seeking provisional measures upon the filing of its Application. Under Article 73, paragraph 1, of the Rules of the Court, a provisional measures request may be brought at any time during the course of proceedings. Thus, if at any point after a project has been implemented but before final judgment has been rendered the notifying State can show that is likely to suffer irreparable injury, it may come to the Court and obtain relief on an urgent basis.

2.118 Argentina attempts to dismiss the relevance of provisional measurers by contending that Uruguay's argument "ne répond pas à la logique du Statut de 1975, mais à celle des dispositions du Statut et du Règlement de la Cour de céans relatives aux mesures conservatoires"[186]. Uruguay confesses that it does not understand what Argentina is trying to say. By providing for mandatory dispute resolution in this

---

[185] 1975 Statute, *op. cit.*, Art. 8. UCM, Vol. II, Annex 4.

[186] AR, para. 1.153 ("does not respond to the logic of the 1975 Statute, but to that of the provisions of the ruling Court's Statute and rules relative to interim measures").

Court, the "logic of the 1975 Statute" necessarily encompasses all the remedies available under the Court's Statute and Rules, including those available as provisional measures. Moreover, in the absence of a showing that the notified State is confronted with actual or imminent irreparable harm, the "balance achieved by the Statute", to which Argentina itself repeatedly refers, favors permitting implementation pending the final decision of the Court. Conversely, the achievement of the "balance" called for by the Statute would favor suspension of the project if its implementation during dispute resolution threatened or caused irreparable harm. Uruguay readily agrees that if Argentina were able to demonstrate that the Botnia plant were causing irreparable harm, or was likely to do so, it would be entitled to have implementation halted. But Argentina has made no such showing. Indeed, the Court observed in its 13 July 2006 decision on Argentina's request for the indication of provisional measures that "Argentina has not provided evidence at present that suggests that any pollution resulting from the commissioning of the mills would be of a character to cause irreparable damage to the River Uruguay"[187].

2.119 Nor, in the two years since that Order, has Argentina provided evidence of such a nature. As shown in the Counter-Memorial, and again in this Rejoinder, Argentina has failed to come forward with credible evidence that the Botnia plant will cause any harm, let alone irreparable harm, to the Uruguay River or to Argentina itself. All of the evidence contradicts Argentina's dire forecasts. As of the filing of this Rejoinder, the Botnia plant has been in operation for more than

---

[187] *Case Concerning Pulp Mills on the River Uruguay (Order on Provisional Measures), I.C.J. Reports 2006*, *op. cit.*, para. 75.

eight months. Its environmental performance thus far has been outstanding. It is fully complying with BAT standards in all respects, as well as CARU's and Uruguay's water quality regulations. There is no reason to suspend operation of the plant, and no evidence that would support such a result.

B. IMPLEMENTATION OF A PROJECT AS DISTINGUISHED FROM "PREPARATORY WORKS"

2.120 Throughout this section, Uruguay has referred to the "implementation" of a project as an act that is (or, in Argentina's view, is not) permitted upon conclusion of consultations under Articles 11 and 12 of the 1975 Statute. The use of the term (in Spanish, "*realizar*") thus raises the obvious question: what does it mean to "implement" a project? Neither the Statute nor the Watercourse Convention (which uses the same term) define it. And, unfortunately, the dictionary definition does not shed any meaningful light on the issue. According to the Royal Spanish Academy Dictionary, "*realizar*" means to "[p]erform, carry something out or execute an action"[188]. These definitions do little but beg the question.

2.121 As Uruguay previously showed, in the context of the Statute as a whole, given that it seeks to prevent significant harm to navigation, the régime of the river or the quality of its waters, the implementation of a project must be the initiation of activities that are capable of harming to the river[189]. In this case, that is not the *construction* of the ENCE and Botnia plants (which Argentina nowhere contends threatened significant harm to it or the river), but only their *operation*. The

---

[188] Royal Spanish Academy Web Site, *Dictionary of the Spanish Language*, Twenty Second Edition, *available at* http://buscon.rae.es/draeI/SrvltConsulta?TIPO_BUS=3&LEMA=realizar (last visited on 9 July 2008). UR, Vol. III, Annex R67.

[189] *See* UCM, para. 2.72.

construction of the plants, as distinguished from their operation, involves no discharges of any kind into the river. Construction itself has no impact whatsoever on the river, and Argentina nowhere argues that it does. Thus, the plants cannot be said to have been "implemented", in the sense of having an impact on the river, until they have gone into operation. Argentina appears to disagree, although it is unclear what the precise basis for its disagreement is. The Reply states: "Il serait contraire à cet objectif fondamental [i.e., l'utilisation rationnelle et optimale du fleuve Uruguay] qu'un État puisse s'engager dans la construction d'un équipement considérable (deux, à l'origine, en l'espèce) et extrêmement coûteux sans que la procédure des articles 7 à 12 ait été suivie"[190]. The Reply does not bother to explain why this is so. But in any event it is beside the point since, as shown in Chapter 3 of this Rejoinder, the procedures set forth in Articles 7 through 12 were satisfied in this case before construction was undertaken. Construction on the Botnia plant commenced on 18 January 2006[191]. That is one month after Argentina declared that the consultations with Uruguay over the plant had reached an impasse and announced its intention to file suit in this Court in December 2005. Prior thereto, only preparatory work had been carried out on the Botnia plant. (It is undisputed that construction of the ENCE plant was never undertaken.)

2.122 In the Counter-Memorial, Uruguay pointed to the work of a leading publicist on prior consultation in international law for the proposition that

---

[190] AR, para. 1.94 ("It would be counter to this objective [i.e., the rational and optimum use of the river] if a State could undertake the construction of an extremely costly major installation (originally two in the case under discussion) without the procedure set forth in Articles 7 to 12 being followed").

[191] UCM, para. 3.117, *citing* DINAMA Environmental Management Plan Approval for the Botnia Plant (for the construction of the bleached cellulose plant). UCM, Vol. II, Annex 26.

"preparatory works" are permissible even as consultations are on-going[192]. Tellingly, Argentina nowhere addresses, much less disputes, this authority. It can thus be taken to admit its veracity.

2.123 In first making this point in the Counter-Memorial, Uruguay cited this Court's decision in the *Gabčikovo-Nagymaros Project* case, in which the Court observed: "A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself"[193]. The Reply disputes the relevance of the Court's statement to this case, arguing that the nature of the substantive dispute there differed "radicalement" from the procedural issue now under consideration[194]. Even assuming that is so, the force of the Court's observation is undiminished. Uruguay invoked it not because it was arguing that there is an exact parallel between the two cases, but rather because the Court's comment evidences judicial recognition of the common sense point that the actions to which the law attaches significance are frequently preceded by other actions to which the law does not attach significance. Thus, Uruguay made clear that it was invoking *Gabčikovo* because it recognizes that the "implementation" of a project under the Statute should not be confused with mere preparatory acts that themselves pose no risk of harm to the river. Uruguay stands by its point.

2.124 In this case, the Court is *not* called on to decide whether construction of an industrial facility (as distinguished from its operation) does or does not constitute

---

[192] UCM, para. 2.180 (citing Kirgis, F., *Prior Consultation in International Law: A Study in State Practice*, Charlottesville, University Press of Virginia, 1983, p. 75).

[193] UCM, para. 2.73 (citing *Gabčikovo-Nagymaros Project* (*Judgment*), p. 54, para. 79).

[194] AR, para. 1.96 ("radically").

permissible "preparatory work" while active consultations are on-going. As shown in the Counter-Memorial, and reiterated in Chapter 3 of this Rejoinder, no actual construction of the Botnia facility was undertaken during the consultations between Uruguay and Argentina[195]. During this period, Uruguay authorized only works that were themselves preparatory to the ultimate construction of the Botnia plant while GTAN consultations continued[196]. Actual construction was not authorized until 18 January 2006 after consultations in GTAN had, by Argentina's own admission, reached impasse and Argentina had indicated its intention to initiate dispute resolution proceedings before the Court[197]. Given the undisputed authority cited just above, there can be no argument that work preliminary to construction of the Botnia plant constitutes anything other than "preparatory work" that is permitted while consultations are taking place. Since actual construction of the plant did not commence until after consultations ended, and since, as shown in subsection II.A. above, implementation is permissible after consultations and during dispute resolution, the implementation of the Botnia project did not violate Articles 7-12 of the 1975 Statute.

C. THE IMPORTANCE OF ENVIRONMENTAL PROTECTION

2.125 In the context of decrying Uruguay's actions in this case, Chapter 1 of the Reply devotes a surprising amount of time to arguing that Uruguay denigrates the importance the 1975 Statute attaches to protecting the environment. It states, for example:

---

[195] *See infra*, paras. 3.106-3.109

[196] *See infra*, para 3.108.

[197] *See infra*, para. 3.109.

> L'autre point sur lequel l'analyse que fait l'Uruguay du Statut de 1975 pêche gravement concerne sa dimension environnementale, que la contre-mémoire s'emploie à minimiser systématiquement tout en lui payant tribute du bout des lèvres …[198].

2.126 Argentina's stratagem here is obvious. Just as it is intent on cultivating the (false) impression that Uruguay would prefer to ignore the Statute's procedural rules, so too it laboriously tries to make it seem as if Uruguay fears the Statute's environmental protection provisions. This argument too is a fiction of Argentina's creation.

2.127 The truth is that Uruguay fully embraces the environmental protection aspects of the Statute. It stands behind its commitments and considers that its conduct throughout this dispute only underscores them further. Stripping away the rhetorical excesses, if either Party can be said merely to be paying "lip-service" to the importance of protecting the aquatic environment of the Uruguay River, that Party is Argentina. As first detailed in the Counter-Memorial, and discussed further in Section I.E. above, Argentina does not deny that since the 1975 Statute was adopted, it has built scores of industrial plants near the Uruguay River, many of which discharge contaminating effluents into the Uruguay River. In no case were any of these plants notified either to CARU or to Uruguay. Only after these embarrassing facts were highlighted in the Counter-Memorial has Argentina acted to remedy them.

---

[198] AR, para. 1.46 ("The other point on which the analysis made by Uruguay of the 1975 Statute is seriously troubling concerns its environmental dimension, which the Counter-Memorial systematically minimizes, all the while paying lip-service tribute ...").

2.128 The reality, of course, is that the Counter-Memorial in no way sought to diminish the importance of environmental protection, but only to state the obvious: protection of the aquatic environment is not the *only* subject of the Statute. Once again, the Parties are actually in substantial agreement on this point. Argentina's Reply states:

> L'Argentine n'a bien sûr jamais prétendu –et ne prétend pas— que les considérations écologiques soient les seules qui ont été à l'origine du Statut et que la protection de l'environnement des eaux du fleuve et de ses zones d'influence soient ses seuls objectifs. … Il ne peut faire de doute que la prévention de la pollution du fleuve et de ses zones d'influence constitue *l'un des objectifs essentiels* de la gestion commune établie par le Traité et l'une des composantes inhérentes à l'utilisation rationnelle et optimale du fleuve[199].

For a second time, Uruguay is content to adopt Argentina's words as its own.

2.129 The Parties' agreement about the role of environmental protection within the overall scheme of the 1975 Statute runs deeper still. According to the Reply:

> l'Argentine est en complet accord avec l'Uruguay: '… the 1975 Statute must be interpreted in accordance with the principle of sustainable development, which requires that the goals of economic development and *environmental protection be treated in an integrated fashion*. Thus, the 1975 Statute permits each party to develop its economy in the exercise of its sovereign rights, *provided it does not do so at the expense of environmental protection*[200][.]

---

[199] AR, para. 1.47 (emphasis added) ("Argentina has never claimed -- and does not claim -- that ecological considerations are the only ones that are at the source of the Statute, and that the environmental protection of the waters of the river and its zones of influence are the sole objectives. … There can be no doubt that the prevention of pollution of the river and its zones of influence constitutes *one of the essential objectives* of the joint management structure established by the treaty and one of the components inherent in the rational and optimum use of the river.").

[200] AR, para. 1.48 (quoting UCM, para. 2.29) (emphasis added by Argentina) ("Argentina is in complete agreement with Uruguay").

2.130 The Parties' agreement that the 1975 Statute must be interpreted consistently with the principle of sustainable development has important consequences for this case. As Uruguay discussed in the Counter-Memorial, and as the Court well knows in any event, achieving sustainable development means finding the appropriate balance between economic development, on the one hand, and protection of the environment, on the other. Development is permitted (indeed, required under Article 1 of the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, among other places) so long as the environment is protected for the benefit of future generations. Indeed, this very point is captured in the Preamble to the 1975 Statute which sets out what both Parties accept as the Statute's central object: the "rational and optimal use" of the Uruguay River. An interpretation of the Statute that sacrifices either developmental goals or environmental protection at the altar of the other must be rejected. It is no more acceptable to eviscerate the Parties' respective right to economic development than to eviscerate their mutual right to a healthy environment.

2.131 To state this does not in any way imply that Uruguay exalts economic development above environmental protection. It does not: not as a matter of national policy, or as a practice with respect to the ENCE and Botnia plants. Uruguay has authorized these plants, and approved the operation of the Botnia plant, only because it is convinced that they pose no risk of harm to the Uruguay River or the aquatic environment. And the evidence, as shown in Chapters 4 through 7 of the Counter-Memorial, and in Chapters 4 through 6 of this Rejoinder, fully supports Uruguay's decisions.

D. THE ROLE OF THE COURT

2.132 In the Counter-Memorial, Uruguay discussed the role of the Court in the procedural scheme of the 1975 Statute. It showed that Articles 7-12 set up a system of notification, information sharing and consultations all of which are focused on one question: whether or not a project will cause significant harm to navigation, the régime of the river and/or the quality of its waters[201]. It follows as a simple matter of logic that when a case comes to the Court through Article 12, the Court's role is to make an objective decision about the very same issue: does a project cause significant harm to any of the three enumerated subjects?

2.133 Argentina's Reply does not directly contradict the logic of this argument. Instead, it seeks to recast the dispute now before the Court. According to Argentina:

> À lire les quelques paragraphes que la Partie uruguayenne consacre, dans son contre-mémoire, au rôle de la Cour, on a l'impression que celle-ici a été saisie par l'Argentine sur le fondement de l'article 12. Ce n'est pas le cas. Pour qu'il en fût ainsi, il eût fallu que la procédure des articles 7 à 11 eût été convenablement suivie et menée à son terme, c'est-à-dire eût abouti à la conclusion qu'un accord était impossible. Tel n'ayant pas été le cas, *la voie de l'article 12 était fermée* et c'est sur le fondement de l'article 60 que l'Argentine a saisi la Cour …[202].

2.134 As discussed below, the reason Argentina now insists on this argument is clear. The trouble with it, however, is that it is directly contradicted by Argentina's

---

[201] UCM, paras. 1.27, 2.3, 2.48, 2.94, 2.95, 2.194 & 2.207.

[202] AR, para. 1.173 (emphasis added) ("To read the several paragraphs that the Uruguayan party devotes in its Counter-Memorial to the role of the Court, one gets the impression that the Court was appealed to by Argentina on the basis of Article 12. This is not the case. In order for that to have been, it would have been essential for the procedure spelled out by Articles 7 to 11 to have been properly followed and concluded, namely a conclusion saying than an agreement was impossible. With this not having been the case, *the path of Article 12 was closed*, and it was rather on the basis of Article 60 that Argentina appealed to the Court …").

own words, including those from the Memorial. Argentina seems to have forgotten, for instance, that in its first pleading, it clearly stated:

> On December 14, 2005, Argentina sent Uruguay a memo in which it officially reiterated the existence of a dispute with respect to the 1975 Statute, and *indicated that Article 12 was applicable* and that consequently, the procedure set out in chapter XV of the Statute was open to the parties, and that the 180-period provided in [Article 12 of] this treaty to help the parties reach a settlement by direct negotiations had started on 3 August 2005, the date of the first GTAN meeting[203].

Argentina therefore should not now be heard to argue that "la voie de l'article 12 était fermée".

2.135 In a purely literal sense, of course, it is a truism that this case did not get to the Court by operation of Article 12 standing alone. Article 12 itself makes no provision for referring cases to this Court. Instead, it states merely that in the event the Parties are unable to reach agreement during the applicable 180-day period for consultations, "the procedure indicated in Chapter XV shall be followed"[204]. It is Chapter XV, Article 60, which provides that any dispute concerning the Statute "may be submitted by either Party to the International Court of Justice"[205]. Yet, the important point is that the Court's decision-making authority has been invoked, at least in the first instance, to resolve the dispute the Parties were unable to resolve between themselves; namely, does the Botnia project threaten significant harm to navigation, the regime of the river or the quality of its waters? Indeed, Argentina

---

[203] AM, para. 2.72 (citing 14 Dec. 2005 Diplomatic Note) (emphasis added).

[204] 1975 Statute, *op. cit.,* Art. 12. UCM, Vol. II, Annex 4.

[205] *Ibid.,* Art. 60.

asks the Court to resolve this very dispute in the Reply as well and in the Memorial[206].

2.136 That is not to say that the Court lacks the competence to render a decision concerning the meaning of Articles 7-12, or whether either of the Parties has violated those procedural provisions. Uruguay readily acknowledges that the Court does have such competence. The plain terms of Article 60, which state that "[a]ny dispute concerning the interpretation or application" of the Statute may be submitted to the Court, make that abundantly clear. Yet, the fact that the case has come to the Court through Article 12 nonetheless has important implications for the issue of remedies. As Uruguay explained in the Counter-Memorial, if the Court finds that a project will *not* cause significant harm to navigation, the régime of the river or the quality of its waters, there is no basis on which to impose additional technical requirements on the project or to order it dismantled.[207] In logic, if the Court finds that a project will *not* cause significant harm, the situation should be no different than it would have been if, as under Article 9, the notified State had come to the conclusion that the project did not threaten harm; i.e., the initiating State may proceed with its project without any further procedural obligations. The mere fact that the notified State did object should not be enough to change this result, especially where the Court has decided those objections lack merit.

2.137 Again, this is not to say that the Court lacks authority to sanction an offending State for procedural violations. It may certainly do so. But in the absence of finding that a project causes significant harm, ordering the dismantling of a

---

[206] *See*, *e.g.*, AM, para. 4.80; AR, para. 1.170.

[207] UCM, para. 2.208.

project is not appropriate. A number of alternatives are available, including the standard remedy of satisfaction, or declaratory relief. The Court may declare that the initiating State has violated its specific procedural obligations under the Statute, and it may order the State to refrain from continuing to violate the Statute or from engaging in new violations in the future. It is difficult to see how such sanctions imposed by the Court could seriously be said to "constituerait un encouragement à de futures violations"[208], as Argentina states. Indeed, Argentina's hyperbolic assertion that anything less than an order dismantling a project would constitute "the death warrant of the Statute"[209] cannot be taken seriously. It is also stunningly inconsistent with notions of State responsibility (as discussed in Chapter 7 of this Rejoinder), and disingenuously dismissive of the seriousness of a finding by the Court that a State has violated its obligations under a treaty.

2.138 Argentina's scheme is clear: unable to demonstrate by credible scientific evidence that the Botnia plant threatens harm to the Uruguay River or to Argentina itself -- and therefore to obtain an order from the Court shutting the plant down on this basis -- the Applicant State seeks to justify the same result on the basis of an alleged technical violation of the Statute's procedural provisions concerning notification and consultation. Argentina's argument fails on both the law and the facts. The law simply does not countenance the disproportionate remedy of shutting down an environmentally safe plant based on a mere technical violation of procedural obligations that Uruguay sought in good faith to carry out. On the facts, as will be demonstrated in the next Chapter, there was no violation of the Statute's

---

[208] AR, para. 1.172 ("constitute an encouragement of future violations").

[209] AR, para. 1.172.

procedural obligations, technical or otherwise. In fact, Uruguay satisfied its procedural obligations under the Statute, and its only deviations from the formal process set forth in Articles 7-11 were by agreement with Argentina and in conformity with that agreement. Under these circumstances, there cannot have been a violation of the Statute.

* * *

2.139 In this section, Uruguay showed: (i) as an interim solution, the initiating State is permitted to implement a project after consultations have ended but before dispute resolution proceedings have run their course, subject however to the Court's power both to indicate provisional measures in appropriate cases and to order the dismantling of a project in its final judgment; (ii) "implementation" of a project in the circumstances presented here means putting it into operation. But even if it meant commencement of construction, Uruguay did not begin to implement the Botnia plant until after consultations with Argentina concluded (it never implemented the ENCE project); (iii) if either Party can be said to belittle the importance of environmental protection, that party is Argentina; and (iv) absent a finding by the Court that a project might cause significant harm to the Uruguay River or its aquatic environment, there is no cause to order the modification or dismantling of a project, even if (*quod non*) a procedural violation has occurred.

Conclusion

2.140 In this Chapter 2, Uruguay analyzed the applicable procedural law for purposes of elucidating the legal context in which Argentina's claims must be viewed. In Chapter 3 which follows, Uruguay will turn to an examination of the facts showing its compliance with its procedural obligations as presented in this

Chapter. Taken together, Chapters 2 and 3 demonstrate why Argentina's arguments that Uruguay has violated its procedural obligations in this case must fail.

CHAPTER 3.
THE EVIDENCE REGARDING THE PROCEDURAL ISSUES

3.1 This Chapter responds to the factual allegations in Chapter 2 of Argentina's Reply, in which it asserts that Uruguay violated the procedural rules set forth in Articles 7-12 of the 1975 Statute. Notwithstanding the contrary showing in Uruguay's Counter-Memorial, Argentina persists in arguing that Uruguay violated Articles 7-12 by failing to notify CARU and await its "summary determination" about the ENCE and Botnia projects before issuing AAPs to either company. Argentina also continues to argue that Uruguay violated Articles 7-12 by authorizing Botnia to complete construction of its plant and to begin operations before this case has been finally decided by the Court.

3.2 Before delving into the relative merits of these accusations, a comment concerning the manner in which Argentina has chosen to present its case is necessary. As Uruguay will demonstrate in the text that follows, the Reply frequently distorts pertinent facts, mischaracterizes key documents or is otherwise demonstrably unfaithful to the evidence. It also habitually misrepresents Uruguay's arguments, all of which were clearly laid out in the Counter-Memorial. Uruguay therefore respectfully invites the Court to treat Argentina's statements of fact and its characterisations of Uruguay's position with caution.

3.3 As shown in the previous Chapter of this Rejoinder, notwithstanding the extended treatment both Argentina and Uruguay have now given the subject, there are, in essence, just two core procedural issues dividing the Parties: (i) whether Uruguay violated Article 7 of the Statute by authorizing the ENCE and Botnia projects before formally notifying CARU or obtaining its "summary determination" about them; and (ii) whether Uruguay violated Articles 8-12 by permitting implementation of the Botnia project after consultations had ended but before

dispute resolution proceedings in the Court were completed. All of the particular violations Argentina accuses Uruguay of committing can be analysed under one of these two rubrics.

3.4 In the previous Chapter of this Rejoinder, Uruguay showed that CARU performs a central role in the proper management of the Uruguay River. The important substantive functions it is given under Article 56 of the 1975 Statute include, among others: prescribing rules governing the prevention of pollution and the conservation of living resources (including setting maximum fish catches), conducting scientific studies, managing the safety of navigation on the river, and co-ordinating search-and-rescue operations. In addition to these broad substantive functions, all of which are vital to the protection of the Uruguay River, CARU also plays a role in the notice, information sharing and consultation procedures set forth in Articles 7-12. The Commission's role under Articles 7-12 is, however, distinctly more limited than its function under Article 56 and other substantive provisions of the Statute. As the plain text of Article 7 states, CARU is to be given notice of projects liable to affect navigation, the régime of the river or the quality of its waters. Upon receipt of this notice, the Commission performs a summary, 30-day review of the project for the purpose of determining whether additional procedures are warranted in a given case[210]. Once it has done so, its procedural role under Articles 7-12 is essentially over. Thereafter, the matter is within the exclusive competence of the Parties themselves (except only that CARU continues to serve as a conduit for

[210] *See supra*, para. 2.30.

communications between them)[211]. As shown in the previous Chapter, there is nothing in the text of the Statute, the provisions of general international law or the sound administration of justice to prohibit the Parties from agreeing to dispense with CARU's summary review of a project under Article 7 in favor of immediate direct consultations between the Parties themselves under Article 12[212].

3.5 In this Chapter, Uruguay will show that the Parties reached just such agreements about the ENCE and Botnia projects. In particular, Uruguay will demonstrate that the Parties agreed to address the issues presented by both the ENCE and Botnia plants at a State-to-State level instead of submitting them to CARU for a preliminary review. Uruguay will further demonstrate that (i) not only did the Parties agree to proceed to immediate direct consultations, they also agreed that both plants would be built; and (ii) as a result of the Parties' agreements, Uruguay was not obligated to notify the Commission or await its "summary determination" under Article 7 before issuing initial environmental authorisations to either ENCE or Botnia, or proceeding with implementation of the Botnia project. Thus, Uruguay did not violate Article 7.

3.6 In the previous Chapter, Uruguay also analysed the text of the 1975 Statute and the provisions of general international law for purposes of illuminating the nature of the Parties' legal obligations during the course of government-to-government consultations under Article 12, as well as any subsequent dispute resolution proceedings. The 1975 Statute is, as shown, silent on both issues. Using the pertinent rules of general international law to fill these gaps, the 1975 Statute is

---

[211] *See supra*, para. 2.21.

[212] *See supra*, paras. 2.30-2.33.

properly interpreted as obligating the initiating State not to implement a project during government-to-government consultations, but as allowing it to move forward during dispute resolution proceedings, unless and until the Court rules otherwise.

3.7 In this Chapter, Uruguay will show that it complied with these obligations in all respects. The ENCE project as initially conceived was abandoned before any implementation of the project took place. And the Botnia project was not implemented until after consultations had ended. While implementation of the Botnia project has, in fact, gone forward during dispute resolution before the Court, that is not prohibited by the Statute or general international law. Accordingly, Uruguay has not violated its obligations under Articles 8-12 of the 1975 Statute.

Section I.
The Evidence Regarding Argentina's Claim that Uruguay Violated the 1975 Statute by Failing to Notify CARU and Await Its Summary Determination Before Authorizing the Botnia and ENCE Projects

3.8 Perhaps the central theme of Argentina's procedural case, a theme that pervades both the Memorial and the Reply, is that Uruguay systematically undermined CARU, first by failing to notify the Commission prior to issuing AAPs to ENCE and Botnia, then by failing to secure the necessary authorisation from it, and still later by attempting to by-pass the Commission in favor of direct State-to-State negotiations. First in the Counter-Memorial and again in Chapter 2 above, Uruguay demonstrated that none of these "facts" -- even if true, which they are not -- would constitute a violation of the Statute. Notice to CARU is not required at the AAP stage, the Commission does not have the power to authorize or reject projects, and there is nothing to prevent the Parties from agreeing to go straight to direct consultations under Article 12 without obtaining a preliminary review by CARU under Article 7.

3.9 Quite apart from these basic legal flaws, the facts disprove Argentina's argument in all material respects. The truth is simple and plain: Uruguay has done nothing to undermine CARU; everything it did was pursuant to express agreement with Argentina. Both in the case of ENCE and in the case of Botnia, the Parties agreed to dispense with CARU's preliminary review under Article 7 and to proceed immediately to direct consultations under Article 12. Indeed, it was Argentina that, in both cases, initiated direct consultations with Uruguay outside CARU at times when the Commission was not a viable option either because it had suspended work (in the case of ENCE) or because it was deadlocked (in the case of Botnia). In these circumstances, Argentina cannot legitimately complain that Uruguay by-passed CARU in violation of Article 7. If CARU was indeed "by-passed", it was at Argentina's invitation and by mutual agreement of both Parties.

A. THE GTAN CONSULTATIVE PROCESS

3.10 Because the pertinent facts are so clear, the Parties' May 2005 agreement to create the High Level Technical Group ("GTAN", per the Spanish initials) as a forum for direct consultations under Article 12 is the most obvious place to start. Coming as it did before CARU had conducted a preliminary review of the Botnia project, the Parties' agreement to consult under the auspices of GTAN stands as a frank refutation of Argentina's procedural claims in at least two respects. *First*, it shows that the Parties mutually agreed to dispense with CARU's Article 7 screening function in favor of immediate direct consultations under Article 12. *Second*, the agreement to proceed straight to State-to-State talks cured whatever alleged procedural irregularities may have occurred before that point. Each of these two points will be addressed in the paragraphs that follow.

3.11 The Court will recall that on 5 May 2005, Uruguay's President Tabaré Vázquez met with Argentina's then-President Néstor Kirchner and agreed to establish the GTAN. Uruguay described the circumstances leading to the creation of GTAN in the Counter-Memorial. In particular, it showed that the twin impetuses for GTAN were (i) the mounting opposition to the ENCE and Botnia plants among residents in Argentina's Entre Ríos Province, and (ii) the fact that CARU had been deadlocked since February 2005[213]. In a 12 January 2006 diplomatic note to Uruguay, Argentina itself described the circumstances leading to GTAN's creation as follows: "The lack of agreement within the River Uruguay Administration Commission (CARU) … led the Governments of both countries to deal with the question directly and to establish a High Level Technical Group (GTAN) in May 2005."[214]

3.12 In fact, it was Argentina that, in light of the "lack of agreement within [CARU]", initiated the effort "to deal with the question directly". On 5 May 2005, the same day that Presidents Vázquez and Kirchner met, Argentina's Minister of Foreign Affairs, Rafael Bielsa, sent a letter to his Uruguayan counterpart, Reinaldo Gargano, expressly requesting that discussions about the two plants take place *outside* CARU. Foreign Minister Bielsa wrote:

> Dear Mr. Minister, dear friend,
>
> I am writing to you in connection with the project for the installation of two cellulose production plants in the area of Fray

---

[213] *See* UCM, para. 3.67.

[214] Diplomatic Note sent from the Argentine Ministry of Foreign Affairs, International Trade and Culture, to Ambassador of Uruguay in Argentina, D. Francisco Bustillo (12 January 2006). UCM, Vol. III, Annex 59.

> Bentos, opposite the Argentine city of Gualeguaychú, Province of Entre Ríos.
>
> In this regard, I must again convey to you the deep concern of the population and authorities of the said province – concern that the Argentine federal government shares – as consequence of the environmental impact that the operation of these plants could bring about.
>
> *Without prejudice of the water quality control and monitoring procedures by CARU*, this situation, due to its potential seriousness, *requires a more direct intervention of the competent environmental authorities*, with the co-operation of specialized academic institutions[215].

Thus, it was Argentina that invited Uruguay to participate in "a more direct intervention" by the authorities of the two States, rather than proceed according to the strict terms of Article 7 of the 1975 Statute. Although the Argentine proposal dispensed with CARU's preliminary review of the project under Article 7, it expressly conserved CARU's later substantive functions of controlling water quality and monitoring the effects of the project.

3.13 The Foreign Ministers met later that month to operationalize the Presidents' decision and came to an agreement on 31 May 2005. According to a July 2005 report prepared by the Head of the Cabinet of Ministers to the Argentine Senate:

> On 31 May, after exchanging proposals and counterproposals, both countries reached the following agreement:
>
> 'In conformity with what was agreed to by the Presidents of the Republic of Argentina and the Eastern Republic of Uruguay, the Foreign Ministries of our two countries constituted, under their supervision a group of Technical Experts for complementary

[215] Letter sent from the Argentine Minister of Foreign Affairs, Rafael Bielsa, to the Uruguayan Minister of Foreign Affairs, Reinaldo Gargano (5 May 2005) (emphasis added). UR, Vol. II, Annex R15.

> studies and analysis, exchange of information and follow up on the effects that the operation of the cellulose plants that are being constructed in the Eastern Republic of Uruguay will have on the ecosystem of the shared Uruguay River'[216].

3.14 Argentina has recognized that the "direct intervention" of GTAN -- which subsequently met 12 times between August 2005 and January 2006 -- fulfilled the Parties' obligation to consult in good faith under Article 12 of the 1975 Statute. According to the Memorial, for example:

> Le 14 décembre 2005, l'Argentine transmet à l'Uruguay une note dans laquelle elle rappelle formellement l'existence d'un différend relatif au Statut de 1975, que l'article 12 de celui-ci est applicable, que par conséquent la procédure du chapitre XV du Statut est ouverte aux Parties et que le délai de 180 jours prévu par ce traité pour que celles-ci parviennent à un règlement par des négociations directes court depuis le 3 août 2005, date de la première réunion du GTAN[217].

3.15 Argentina's recognition that the GTAN process constituted the direct consultations contemplated by Article 12 was reiterated in an even more solemn manner in its Application instituting proceedings in this case. In the section dealing with the Court's jurisdiction, Argentina wrote:

> Malgré les efforts de l'Argentine, *la négociation directe* enterprise par des canaux différents, y compris le Groupe

---

[216] Statement by the Argentine Ministry of Foreign Affairs, International Trade and Culture, *included in* Report of the Head of the Cabinet of Ministers, Alberto Angel Fernandez, to the Argentine Senate (hereinafter "Statement by the Argentine Ministry of Foreign Affairs to the Argentine Senate"), Report No. 65, p. 620 (July 2005). UR, Vol. II, Annex R14.

[217] AM, para. 2.72 (*citing* 14 December 2005 Diplomatic Note). ("On December 14, 2005, Argentina sent Uruguay a memo in which it officially reiterated the existence of a dispute with respect to the 1975 Statute, and indicated that Article 12 was applicable and that consequently, the procedure set out in chapter XV of the Statute was open to the parties, and that the 180-day period provided in this treaty to help the parties reach a settlement by direct negotiations had started on August 3, 2005, the date of the first GTAN meeting.")

> technique de haut niveau (ci après "GTAN", selon le sigle en espagnol) … n'a pas abouti[218].

3.16 It is therefore clear that by requesting the creation of GTAN, Argentina invoked consultations under Article 12 of the Statute even though CARU had not yet been (and indeed never was) called upon to render the preliminary determination provided for in Article 7.

3.17 The importance of the fact that the GTAN was convened (at Argentina's request) under Article 12 by mutual agreement cannot be overstated. Argentina's entire procedural argument turns on the (false) claim that Uruguay disrupted the proper functioning of the Statute's procedures by allegedly failing to notify CARU under Article 7 and by failing to await the outcome of its preliminary review. Yet, it is clear beyond cavil that the Parties mutually agreed to dispense with CARU's screening function in favor of immediate direct consultations under Article 12. Exactly as Argentina said, the "situation, due to its potential seriousness, require[d] a more direct intervention of the competent environmental authorities"[219]. Because it was a matter of agreement to proceed directly to State-to-State consultations, the ostensible "failure" to submit the matter for CARU's preliminary review cannot form the basis for a claim against Uruguay.

3.18 In addition, by admitting that the GTAN process fulfilled the Parties' duty to consult under Article 12, Argentina effectively acknowledges that -- whatever might have happened beforehand -- the Parties were able to bring themselves back within the Statute's procedural framework. When they did so, they remedied and

---

[218] Argentina's Application Instituting Proceedings, para. 4 (4 May 2006) (emphasis added).

[219] Letter sent from the Argentine Minister of Foreign Affairs, Rafael Bielsa, to the Uruguayan Minister of Foreign Affairs, Reinaldo Gargano, *op. cit.* UR, Vol. II, Annex R15.

rendered immaterial whatever missteps, if any, might have occurred prior to that time. Had the procedures set forth in Articles 7-11 been followed to the letter, the Parties would have ended up exactly where they did -- in consultations under Article 12. Accordingly, even if Article 7 was not strictly followed, no harm was done.

3.19 Perhaps recognizing the damage the GTAN consultations inflict on its procedural case, Argentina's otherwise voluminous Reply is stunningly restrained on that lone subject. It devotes just eight short paragraphs to the topic buried deep in the middle of its Chapter 2[220]. By itself, this signals Argentina's fear of the issue. More importantly, such rebuttal as Argentina does offer is entirely without merit. Indeed, Argentina's misleading depiction of events evidences its extreme discomfort with the true facts.

3.20 Argentina opens aggressively. It claims that Uruguay's argument that "by the creation of GTAN, the Parties agreed to proceed directly to Party-to-Party consultations envisioned by Article 12 of the Statute and not to await a preliminary determination from CARU" does not withstand "la moindre analyse"[221]. It then contends that "l'Argentina n'a jamais envisagé le GTAN comme un substitut de la CARU, mais comme un moyen de négociation qui coexistait avec le fonctionnement de la CARU et qui permettrait de relancer le processus"[222]. Argentina's rhetoric is strong, but its evidence is weak. Indeed, with one exception that will readily be disposed of below, it does not cite a single source for the propositions stated.

---

[220] *See* AR, paras. 2.51-2.58.

[221] AR, para. 2.56 ("the slightest analysis").

[222] AR, para. 2.56 ("Argentina never considered GTAN to be a substitute to CARU, but considered it a negotiating means which coexisted with the operation of CARU and which allowed for the process to be relaunched").

3.21 In truth, it is Argentina's argument that does not withstand "the slightest analysis". To begin with, Argentina's contention that the GTAN process did not constitute the "Party-to-Party consultations envisioned by Article 12 of the Statute" is flatly refuted by its own prior statements, including the statement in its Memorial at paragraph 2.72 which specifically acknowledged that Article 12 "est applicable", and its statement in the Application that GTAN constituted "la négociation directe" under the Statute. Having twice admitted this fact, Argentina cannot be heard now to recant.

3.22 The Reply's assertion that "Argentina never considered GTAN to be a substitute to CARU" is likewise easily disproved by Argentina's own prior statements, including its 12 January 2006 diplomatic note cited in paragraph 3.11 stating that the deadlock in CARU "led the Governments of both countries to deal with the question directly", as well as Minister Bielsa's 5 May 2005 letter calling for "a more direct intervention of the competent environmental authorities"[223]. Indeed, the final paragraph of Foreign Minister Bielsa's letter to Minister Gargano could scarcely make the point any more clearly when it states that the "more direct intervention" Argentina seeks shall be "[w]ithout prejudice of the water quality control and monitoring procedures by CARU"[224]. As will be discussed in Section I.B. below, this is a reference to the March 2004 agreement between Ministers Bielsa and Opertti pursuant to which it was agreed that the plant would be built, subject to monitoring of the water quality by CARU. For present purposes, the key

---

[223] Letter sent from the Argentine Minister of Foreign Affairs, Rafael Bielsa, to the Uruguayan Minister of Foreign Affairs, Reinaldo Gargano, *op. cit.* UR, Vol. II, Annex R15.

[224] *Ibid.*

aspect is the extent to which it makes clear that CARU's role going forward was not the preliminary review of the project prior to its implementation prescribed in Article 7, but the monitoring and control of water quality after operation commenced pursuant to Article 56 and other substantive Articles in the Statute. All other topics were to be addressed exclusively through GTAN.

3.23 In addition to being inconsistent with its own prior statements, Argentina's argument that the Parties intended to send the ENCE and Botnia projects back to CARU for a preliminary 30-day review under Article 7 makes no sense. A referral back to CARU would plainly have been futile. As Argentina recognized, the Commission was stalemated. Indeed, by Argentina's own admission, it was precisely this deadlock that led it to seek "a more direct intervention" by the two governments in the first place. The result of a preliminary Article 7 review by CARU at that stage would therefore have been a foregone conclusion; no consensus on whether or not the projects threatened significant harm would have been reached by the two delegations, each of which reflected and advocated the position of its own government. What then would have been the consequences of a failure to achieve consensus in CARU? Merely to set in motion the procedures leading right back to direct consultations under Article 12 -- which, of course, is exactly what the Parties were already doing through the GTAN process! The irrationality of Argentina's argument speaks for itself.

3.24 In contrast, the decision to dispense with CARU's preliminary review and proceed directly to government-to-government consultations made perfect sense under the circumstances. Given that the purpose of CARU's initial review under Article 7 (and, indeed, all the procedural steps laid out in Articles 7-11) is, as shown

in Chapter 2[225], to obviate the need for State-to-State consultations under Article 12, and given that it was clear that nothing short of such a "direct intervention" by the two governments had any chance of achieving consensus, there was no reason for the Parties to send the matter back to the beginning of the procedural queue and then sit idly by as the issue wended its way through futile procedural steps all of which would inevitably have led to the direct consultations that were clearly required (and already in progress) in any event. It made much more sense to do what the Parties in fact did: agree to go straight to direct talks.

3.25 The Parties' subsequent conduct in both CARU and GTAN further refutes Argentina's argument that they intended to send the projects back to CARU for summary review under Article 7. Instead, it confirms the fact that they mutually understood that, aside from the issue of water quality monitoring and control, discussions concerning the ENCE and Botnia plants were to be held exclusively in GTAN. Here once more, the Reply is demonstrably unfaithful to the facts. Argentina contends that the "poursuite de l'activité de la CARU durant le période d'existence du GTAN et les positions de l'Argentine aussi bien au sein de la CARU que du GTAN témoignent du fait que la simple constitution du GTAN ne peut être invoquée – comme le prétend la partie défenderesse – pour justifier le manquement uruguayen de suivre la procédure de l'article 7 et suivants du Statut du fleuve Uruguay"[226].

---

[225] *See supra*, para. 2.30.

[226] AR, para. 2.58 ("continuation of CARU's activity during the time when GTAN was in existence and Argentina's positions both within CARU and within GTAN prove the fact that the mere formation of GTAN cannot be claimed -- as done by the Respondent -- to justify Uruguay's failure to follow the procedure under Article 7 *et seq*. of the Statute").

3.26 The one and only piece of evidence that Argentina cites to support its claim is a 6 May 2005 discussion in CARU during which an Argentine delegate stated that, "[d]ans le cas de Botnia, ils n'ont pas reçu non plus … l'information a fin d'éterminer techniquement si ce projet peut générer un impact environmental"[227]. This lone reference, coming just *one day* after the Presidents of the two countries had met and agreed in principle to establish the GTAN, and three weeks *before* Foreign Ministers Bielsa and Gargano met on 31 May to concretize the Presidents' agreement and establish the GTAN process, is insufficient to establish Argentina's point.

3.27 Significantly more probative -- indeed, dispositive -- is the fact that, aside from this single statement, which was made before the creation of the GTAN, Argentina cites no evidence suggesting that CARU expected to have any role in the process other than monitoring and controlling water quality after the plants initiated operations, 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 none. Nothing in the CARU minutes indicates that the Commission, or even the Argentine delegation thereto, expected to conduct an Article 7 review of the plants once GTAN was created. Throughout the period beginning in June 2005, the only references to the plants in CARU's minutes relate to the implementation of the PROCEL water quality monitoring program that the Parties had previously agreed to set up to track the performance of both the ENCE and Botnia plants. This unchallenged and

---

[227] AM, para. 2.60 *citing* CARU Minutes 05/05, pp. 966-968 (6 May 2005) ("[i]n the case of Botnia, [CARU] has not received data … for the assessment and for determining on a technical basis whether this project generates a substantial environmental effect"). AM, Vol. III, Annex 32.

indisputable fact still further proves that CARU was not intended to, and did not expect to, have any procedural role under Article 7.

3.28 In the Reply, Argentina curiously argues that Uruguay's Counter-Memorial provides "proof" that the GTAN was not a substitute for CARU in paragraph 3.78, where, according to Argentina, Uruguay stated that it notified CARU of the Botnia *port* project "pursuant to Article 7"[228]. What that paragraph of the Counter-Memorial really says, however, is that at the first GTAN meeting on 3 August 2005, "the Parties' delegations agreed to refer the *port* project back to CARU for preliminary review"[229]. In other words, the Parties jointly decided that GTAN was not the right place for discussions about the *port*, and therefore, decided to send that project to CARU. In Uruguay's view, this supports its argument, not Argentina's. The fact that the Parties referred the *port* project to CARU for a preliminary review under Article 7, but did not do so with the plants themselves only underscores the fact that GTAN was the exclusive forum for consultations about the *plants*. Indeed, it is noteworthy that not only is there nothing in the CARU minutes to indicate that the Commission had an on-going role in discussions about the plants, there is also nothing in the GTAN minutes either. Surely, if the participants in GTAN had understood that CARU would be conducting a parallel process, one would expect to see some indication of that fact somewhere in the record of the twelve GTAN meetings. Here again, Argentina offers nothing because there is nothing.

* * *

[228] *See* AR, para. 2.56.

[229] UCM, para. 3.78 (emphasis added).

3.29 In light of all the above, two truths stand out. *First*, the Parties' May 2005 agreement to create GTAN as a forum for direct consultations under Article 12 shows that the Parties mutually agreed to dispense with CARU's Article 7 preliminary determination in favor of immediate direct consultations under Article 12. *Second*, assuming *arguendo* that some ostensible procedural irregularities had occurred prior to that point, the agreement to proceed straight to State-to-State talks cured those irregularities. For both reasons, Argentina's procedural claim that Uruguay violated the 1975 Statute by ostensibly failing to notify CARU and awaiting the Commission's preliminary determination under Article 7 must fail.

B. THE MARCH 2004 AGREEMENT

1. ENCE

3.30 In the Counter-Memorial, Uruguay demonstrated that in October 2003, long before GTAN, the Parties reached a *de facto* understanding to address the ENCE plant outside the context of CARU. As shown there, following a meeting of the two States' Foreign Ministers on 9 October 2003, and in light of CARU's subsequent "paralysation" (Argentina's word[230]), Uruguay's Foreign Ministry sent directly to its Argentine counterpart a substantial volume of information concerning the ENCE plant, including

- ENCE's environmental impact assessment ("EIA");
- DINAMA's 2 October 2003 technical report on the EIA;
- The 9 October 2003 AAP; and

[230] AM, para. 2.28.

- The entire 1,683-page MVOTMA file on the ENCE project.[231]

3.31 As was true in the case of GTAN, the record again reveals that it was Argentina that sought the direct involvement of the two governments. It did so at a time when CARU was not simply "paralysed", it was not even meeting. In the words of a 2005 Report to Argentina's Senate prepared by the Chief of the Argentine Cabinet of Ministers:

> 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'Bopicua, presented by the company before the Department of the Environment (DINAMA) when it requested the environmental authorisation, to the Argentinean Embassy in Montevideo[232].

3.32 Based on the information sent, Argentina's technical advisors to CARU conducted an analysis of the plant and, in February 2004, issued their report. The report concluded that "there would be no significant environmental impact on the Argentine side"[233]. On the basis of the advisors' report, two Argentine delegates to CARU subsequently agreed:

---

[231] *See* UCM, para. 3.40.

[232] Statement by the Argentine Ministry of Foreign Affairs to the Argentine Senate, *op. cit.,* p. 616. UR, Vol. II, Annex R14 (emphasis added).

[233] 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 Fernández, to the Argentine Chamber of Deputies (hereinafter "Statement by Argentine Ministry of Foreign Affairs to the Chamber of Deputies") Report No. 64, p. 136 (March 2005). UCM, Vol. III, Annex 46.

> It must be pointed out, with complete and absolute emphasis, that none of the different technical reports evidence that the activity in question causes an irreversible and unavoidable damage to the environment, at least of a sufficient level that would warrant the suspension of the plant or opposition to its construction, at least with any scientific basis…[234].

3.33 Argentina's February 2004 report concluding that the plant would have no discernable adverse environmental impact paved the way for further meetings between the Parties and, ultimately, an express agreement on the way forward. As described in detail in the Counter-Memorial, Foreign Ministers Bielsa and Opertti met again in March 2004 and specifically agreed that the ENCE plant would be built subject only to water quality control and monitoring by CARU[235]. That agreement was subsequently memorialized in CARU's minutes on 15 May 2004. In Argentina's contemporaneous words, the agreement "put an end to the controversy over the pulp mill installation in Fray Bentos"[236].

*

3.34 Confronted with these facts, Argentina spends 43 paragraphs of the Reply attempting to refute both the substance and existence of the Parties' agreement[237]. Argentina's central argument is this: when they met in March 2004, the Foreign Ministers agreed not to put an end to the controversy, not that the ENCE plant would be built, and not that CARU would conduct monitoring to assure the plant's compliance with water quality standards. Rather, Argentina asserts, they agreed

---

[234] CARU Minutes No. 01/04, pp. 18-19 (15 May 2004). UCM, Vol. IV, Annex 99.

[235] *See* UCM, para. 1.34.

[236] Annual Report on the State of the Nation for 2004, Ministry of Foreign Affairs, International Trade and Culture, p. 105 (1 March 2005). UCM, Vol. III, Annex 48.

[237] *See* AR, paras. 2.77-2.120.

merely to send the matter to CARU for a preliminary review under Article 7[238]. In the process of making its argument, Argentina also attacks Uruguay for even mentioning the Foreign Ministers' agreement, resorting to the oft-repeated refrain that Uruguay does so "[d]ans le but de minimiser le rôle de la CARU"[239].

3.35 Uruguay will respond to the last of these assertions first. Although it should go without saying, Uruguay does not invoke the Foreign Minister's agreement for purposes of "minimizing" CARU or anything of the sort. It does so for one purpose, and one purpose only: illuminating the truth. In reality, the facts that the Parties addressed the ENCE plant via direct government-to-government consultations outside CARU and agreed that it would be built, and that CARU's ongoing role would be focused on controlling water quality and monitoring the plant's operations, in no way denigrates the very important role the Commission plays. As discussed in Chapter 2 of this Rejoinder, and reiterated above, CARU has many important substantive functions that are critical to ensuring the rational and optimal use of the river. Its role in the process outlined in Articles 7-12 of the Statute is, by contrast, limited. Beyond performing an initial screening under Article 7, the Statute assigns CARU only a minor role as an intermediary between the Parties in any subsequent dealings between them. That the Parties agreed to address the ENCE plant outside the Commission is a matter of small moment that constitutes no threat to the functioning of the Commission, much less the integrity of the Statute. And it is certainly within their power given that there is no reason in law or

---

[238] *See* AM, para. 2.40; AR, paras. 2.88-2.89.

[239] AR, para. 2.88 ("[f]or the purpose of minimizing the role of CARU").

in logic the Parties may not derogate from the procedures outlined in the Statute pursuant to an appropriate bilateral agreement.

3.36 It bears emphasis that Argentina's argument that the Foreign Ministers agreed merely to send the matter back to CARU for a preliminary review under Article 7 makes no sense. As discussed, Argentina's technical advisors to CARU reviewed the full ENCE file in February 2004 and came to the conclusion that the project would not have a "significant environmental impact"[240] (which, of course, was Uruguay's position too). It was this conclusion that paved the way for the Foreign Ministers' agreement the next month. Given the existing review by Argentina's technical advisors to the Commission, there was no need to send the matter back to CARU for a second such determination. Any such step would have been entirely redundant given what had already happened. It thus makes perfect sense under the circumstances that the Foreign Ministers would agree not to go backwards to CARU but rather forward toward construction, operation and monitoring, with CARU fulfilling the critical monitoring and control functions it is assigned by the Statute.

3.37 Still further, it bears reiterating that CARU was not a viable option during this period in any event. As Argentina itself has stated, CARU was "paralysed"[241] and stopped meeting during the entire six month period between October 2003 (when Argentina reacted to Uruguay's issuance of the ENCE AAP by suspending the work of the Commission) and May 2004 (when meetings resumed following the

---

[240] Statement by Argentine Ministry of Foreign Affairs to the Chamber of Deputies, *op. cit.,* p. 136. UCM, Vol. III, Annex 46.

[241] *See* AM, paras. 2.28-2.29.

Foreign Ministers' March agreement). The Commission was, as Argentina said, at an "impasse"[242]. Thus, if any progress was going to be made during this period, it had to be outside the channels afforded by CARU; i.e., in direct negotiations between the Parties at the level of their Foreign Ministers. As Argentina itself said before this litigation commenced, as a result of the "impasse" at CARU, "consideration of the matter was left to both Foreign Ministries".

*

3.38 Given all this, it should not be surprising that Argentina's argument that the two Foreign Ministers agreed merely to send the matter to CARU for a preliminary review under Article 7 is entirely inconsistent with the facts. Before delving into those facts in greater detail, however, there is one single, uncontroverted truth which, by itself, refutes Argentina's argument. It is this: CARU's subsequent conduct disproves it. Following the Foreign Ministers' March 2004 agreement, there is no evidence to suggest that the Commission expected to conduct a preliminary review of the project at that stage. CARU's minutes are devoid of any reference to the putative fact that it was waiting for a notification under Article 7. Indeed, one of Argentina's delegates to CARU, Mr. Darío Garín, specifically noted at CARU's 15 May 2004 meeting (its first in nearly seven months) that "an important limiting factor in our position is the agreement executed by the Foreign Ministers on 2 March 2004"[243]. Rather than awaiting notice under Article 7, CARU focused its efforts on devising and implementing the water quality monitoring plan ("PROCEL") that the Foreign Ministers agreed should be the focus of the

[242] AM, para. 2.29.

[243] CARU Minutes No. 01/04, p. 18. UCM, Vol. IV, Annex 99.

Commission's work. Accordingly, CARU's contemporaneous conduct belies the argument that Argentina now makes.

3.39 Quite apart from this key truth, the fact that the Foreign Ministers agreed in March 2004 that the plant would be built is supported by a broad array of additional facts carefully set out in the Counter-Memorial. In summary form, these facts include:

- Uruguayan Foreign Minister Opertti's statements at a 3 March 2004 press conference (the day after the two Foreign Ministers met and reached their agreement) stating that a "working methodology [was] put in place to address concerns" and detailing its three stages: "The first phase of the project was recently completed, which represents the first favorable test of the project. The second phase consists of construction of the plant, which will take no less than four years .... The third phase is the operational phase, namely, when the plant starts to operate …. At that time, it will be necessary to report on the monitoring of the water…"[244];

- Argentine Deputy Secretary for Latin American Affairs Ambassador Eduardo Sguiglia's and Argentine Foreign Minister Bielsa's statements to the Argentine press on 3 March 2004, referring to a "system that we have agreed upon" for "exhaustive monitoring to ensure compliance with the environmental guidelines established for the installation of the plant"[245];

- A contemporaneous Uruguayan memorandum recording the content of the conversation between the Foreign Ministers during a dinner on 28 March 2004, stating that "an agreement on the role of CARU was confirmed, as being the most suitable vehicle for channeling the pertinent information for organizing the system of monitoring and following the environmental management plans, both in the pre-feasibility phase (now completed) and in the construction phase

[244] Presidency of the Republic of Uruguay Web Site, "M'Bopicuá: Working Methodology Established" (3 March 2004). UCM, Vol. II, Annex 17.

[245] La Nación, "Uruguay Promises to Inform the Government about the Paper Mill" (3 March 2004). UCM, Vol. IX, Annex 183.

(which will last approximately 4 years), as well as after the start-up of the plant's operation"[246];

- The exchange of numerous drafts between Argentina's Ambassador Sguiglia and Uruguayan Ambassador Pablo Sader to finalize the text of the Foreign Minister's March 2004 agreement, the final version of which states: "On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding with respect to the course of action that the matter will take, that is, to have the Uruguayan government provide the information relating to construction of the plant, and with respect to the operational phase, to have the CARU undertake the monitoring of water quality in conformity with the Statute"[247];

- The fact that the Foreign Minister's agreement was memorialized in the 15 May 2004 CARU Minutes. In its final form, the agreement states (just as the drafts had): "On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding with respect to the course of action that this matter will take, that is, to have the Uruguayan government provide the information relating to the construction of the plant, and with respect to the operational phase, to have the CARU undertake the monitoring of water quality in conformity with its Statute"[248];

- A statement from Argentina's Ministry of Foreign Affairs in a 2004 year-end report to the Argentine Senate which states: "On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding on the course of action to give to this subject. That is, for the Government of Uruguay to facilitate information relative to the construction of the plant, and in regard to the operational phase, instruct the CARU to proceed to carry out a monitoring of the water quality of the River Uruguay in conformity with the provisions of the Statute for the River Uruguay …. The understanding of the Foreign Ministers … and the report of the technical experts coincide in that CARU should concentrate its activity on the subject of mechanisms of control"[249];

---

[246] Memorandum from Minister Counsellor Daniel Castillos to Ambassador Dr. Alberto Volonté Berro (1 April 2004). UCM, Vol. II, Annex 18.

[247] Proposed Special Minutes, Final Version, para. VIII (28 April 2004). UCM, Vol. IX, Annex 200.

[248] CARU Minutes No. 01/04, p. 33. UCM, Vol. IV, Annex 99.

[249] Statement by Argentine Ministry of Foreign Affairs to the Argentine Senate, *op. cit.,* p. 617. UCM, Vol. III, Annex 47. UR, Vol. II, Annex R14.

- A statement from Argentina's Ministry of Foreign Affairs in a 2004 year-end report to the Argentine Chamber of Deputies which states: "In June [sic] of that same year, a Bilateral Agreement was signed through which Argentina's Government put an end to the controversy. … [I]t implies a work methodology for the three phases of the 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"[250];

- A statement in the Annual Report on the State of the Nation for 2004, prepared by the Office of Argentina's President stating: "That same month, both countries signed a bilateral agreement which put an end to the controversy over the pulp mill installation in Fray Bentos. … It also provides for a working procedure for the three phases of construction of the work: project, construction, and operation"[251]; and

- CARU's subsequent preparation, adoption and implementation of a water quality monitoring program ("PROCEL") in the vicinity of the future plants. All drafts as well as the final version of the PROCEL begin the same way: "Taking into account the future installation of cellulose plants…"[252].

3.40 Faced with these facts, Argentina elects to respond to some but chooses to ignore others altogether. Indeed, an integral part of Argentina's strategy for dealing with the Foreign Ministers' March 2004 agreement is to disregard essential aspects

---

[250] Statement by Argentine Ministry of Foreign Affairs to the Chamber of Deputies, *op. cit.,* p. 136. UCM, Vol. III, Annex 46.

[251] Annual Report on the Senate of the Nation for 2004, Ministry of Foreign Affairs, International Trade and Culture, p. 105 (March 2005). UCM, Vol. III, Annex 48.

[252] Draft Plan for Monitoring the Environmental Quality of the Uruguay River in the Areas of the Pulp Mills (hereinafter "Draft PROCEL"), Annex C to Subcommittee on Water Quality and Prevention of Pollution Report No. 243, p. 863 (13 July 2004), *approved in* CARU Minutes No. 04/04 (16 July 2004). UCM, Vol. IV, Annex 102. Draft PROCEL, Annex A to Subcommittee on Water Quality and Prevention of Pollution Report No. 244, p. 1136 (11 August 2004), *approved in* CARU Minutes No. 05/04 (13 August 2004). UCM, Vol. IV, Annex 104. Draft PROCEL, Annex A to Subcommittee on Water Quality and Prevention of Pollution Report No. 246, p. 1717 (12 October 2004), *approved in* CARU Minutes No. 07/04 (15 October 2004). UCM, Vol. III, Annex 107. Draft PROCEL, Annex A to the Subcommittee on Water Quality and Prevention of Pollution Report No. 247, p. 1959 (8 November 2004), *approved in* CARU Minutes No. 08/04 (12 November 2004). UCM, Vol. IV, Annex 109.

of the narrative which, individually and collectively, confirm the fact that the Parties agreed that the ENCE plant would be built, subject to CARU's monitoring of the water quality during the operational phase.

3.41 Among the key elements of the narrative that Argentina rather conspicuously chooses to overlook is the February 2004 report of its technical advisors finding the ENCE plant would not cause significant harm. Indeed, Argentina not only does not mention the report's contents, it does not even advert to its existence. This glaring omission is all the more conspicuous because in the Counter-Memorial, Uruguay specifically took note of the same omission in the Memorial and challenged Argentina to acknowledge the existence and content of the report[253]. That it did not do so can mean only one thing: there is nothing Argentina can say to reconcile the report with its case.

3.42 Argentina also fails to acknowledge or address the statements of its Ambassador Eduardo Sguiglia to the Argentine press on 3 March 2004, the day after the Foreign Ministers' meeting. Ambassador Sguiglia stated: "It was agreed that in the next four years of construction, there will be exhaustive monitoring to ensure compliance with the environmental guidelines established for the installation of the plant, which will include permanent monitoring."[254] Two important conclusions can be drawn from this contemporaneous quotation: (i) there is no mention of sending the matter to CARU for a preliminary review; and (ii) there is no remaining dispute

---

[253] *See* UCM, para. 3.42.

[254] La Nación, "Uruguay Promises to Inform the Government about the Paper Mill," *op. cit.* UCM, Vol. IX, Annex 183.

as to whether or not the plants will be built. The facts of construction and operation are presumed. What remains for CARU to do is monitoring.

3.43 More remarkably, Argentina omits any mention of the fact that, following the Foreign Minister's March 2004 meeting, its Ambassador Sguiglia and Uruguay's Ambassador Pablo Sader exchanged a series of drafts for purposes of reducing the Foreign Ministers' agreement to writing[255]. Taking place between March and April of 2004, this exchange irrefutably confirms both the existence and substance of the agreement. The final draft exchanged reads:

> On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding with respect to the course of action that the matter will take, that is, to have the Uruguayan government provide the information relating to construction of the plant, and with respect to the operational phase, to have the CARU undertake the monitoring of water quality in conformity with the Statute[256].

Again, this draft confirms the same two points mentioned in connection with Ambassador Squiglia's press comments discussed just above; namely: (i) there is no mention of sending the matter to CARU for a preliminary review; and (ii) there is no remaining dispute as to whether or not the plant will be built. Construction and operation were presumed, and CARU was to focus its efforts on monitoring during "the operational phase". Indeed, the same two observations can be made about each and every event listed above in paragraph 3.39: (i) the construction and operation are presumed; and (ii) CARU will monitor operations to ensure that water quality is not affected.

---

[255] *See* UCM, paras. 3.55-3.56; *see also, e.g.,* Proposed Special Minutes, Final Version, para. VIII (28 April 2004). UCM, Vol IX, Annex 200.

[256] Proposed Special Minutes, Final Version, *op. cit.*, para. VIII. UCM, Vol. IX, Annex 200.

3.44 Most remarkably of all, Argentina does not cite, or even mention, the fact that the text of the agreement so painstakingly negotiated between Ambassadors Sguiglia and Sader, and approved by the Foreign Ministers, was memorialized in the minutes of the CARU meeting on 15 May 2004, CARU's first meeting since Argentina suspended the Commission's work in October 2003. Because Uruguay believes that the best evidence of the Parties' agreement is the agreement itself, the pertinent portions of the minutes are worth quoting at length. They state:

> General Agreed Matters:
>
> …
>
> II) *On 2 March 2004 the Foreign Ministers of Argentina and Uruguay reached an understanding with respect to the proper course of action that this matter will take, that is*, to have the Uruguayan government provide the information relating to the construction of the plant, and *with respect to the operational phase of the pulp mill, to have CARU undertake the monitoring of water quality in conformity with its Statute.*
>
> Specific Agreed-Upon Matters:
>
> I) Both delegations reasserted that the Foreign Ministers of the Republic of Argentina and the Republic of Uruguay agreed on 2 March 2004 that Uruguay shall communicate the information related to the construction of the pulp mill including the Environmental Management Plan. In this sense, CARU shall receive the Environmental Management Plans for the construction and operation of the plant provided by the company to the Uruguayan government via the Uruguayan delegation. Within the framework of its competency, CARU will consider those, taking into account the terms included in the aforementioned Ministerial Resolution 342/2003, particularly those terms expressly established by the Ministry of Housing, Land Use Planning and the Environment, such as actions which require additional implementation and additional assessment by the company before approval of those, formulating its observations, comments and suggestions, which shall be transmitted to Uruguay, to be dismissed or decided with the company. Once said issues are considered, CARU shall be again informed.

> II) *In relation to the operational phase, we will proceed to monitor environmental quality.* This monitoring shall be carried out in conformity with the provisions of the Statute of the Uruguay River, especially Chapter X, articles 40 to 43. Both delegations agree that in view of the scope of the undertaking and its possible effects, CARU shall adopt procedures in conformity with the current minutes. On the other hand, the sampling already done by CARU should be taken into account as the baseline for the monitoring (these show no acute toxicity and compliance of almost 100% with the quality standards as compared to the reference values). CARU's decision to add two new water sampling stations in the work area shall make monitoring more effective[257].

The minutes are duly authenticated by the signatures of the head of Argentina's delegation to CARU, Roberto García Moritán, the head of Uruguay's delegation, Walter M. Belvisi, and CARU's Administrative Secretary, Sergio Chaves.

3.45 The text of the agreement dispels whatever doubts Argentina might like to cast on the content of the Foreign Ministers' agreement. *First*, it clearly establishes the limited nature of CARU's role. CARU is called upon to do two things: (i) to comment on the environmental management plans and to transmit these comments to Uruguay to be "dismissed or decided with the company", and (ii) to undertake the monitoring of water quality during the operational phase. There is no mention, or hint even, of CARU making a preliminary determination of impact pursuant to Article 7, as Argentina pretends to read into the agreement. As of March 2004, that was clearly not contemplated by the Parties.

3.46 *Second*, the text of the agreement as a whole again makes clear that the construction and eventual operation of the plant were expected and accepted facts. Thus, the paragraph appearing under the heading "General Agreed Matters" makes it

---

[257] CARU Minutes No. 01/04, pp. 33-35. UCM, Vol. IV Annex 99 (emphasis added).

clear that during "the operational phase of the pulp mill", CARU will "undertake the monitoring of water quality". Similarly, under the heading "Specific Agreed-Upon Matters", the second paragraph provides that "[i]n relation to the operational phase, we [CARU] will proceed to monitor environmental quality. This monitoring shall be carried out in conformity with the provisions of the Statute of the Uruguay River …". There is nothing the slightest bit conditional about these choices of words. The eventual operation of the plant, and the monitoring that was to accompany it, were not the subject of ongoing debate.

3.47 Like the Memorial, the Reply tries to refute the obvious meaning of the Parties' agreement by citing to statements of Argentine Foreign Minister Bielsa before the Foreign Affairs Committee of Argentina's Chamber of Deputies on 14 April 2004[258]. According to Argentina, Minister Bielsa's comments show that the Parties agreed to send the matter back to CARU for its approval[259]. Although Minister Bielsa's comments can arguably be read to make it seem that the first stage of the agreement relating to the project's approval was not yet complete, that reading is plainly inconsistent with all the surrounding facts. *First*, it is noteworthy that Minister Bielsa's comments were unscripted and came in response an Argentine Deputy's question. It is thus not surprising that they are not a model of clarity free from ambiguity. *Second*, Minister Bielsa's comments were delivered on 14 April 2004 even as Ambassadors Squiglia and Sader were finalizing the draft text of the agreement initially reached on 2 March 2004. That final draft was dated 28 April 2004, two weeks *after* Minister Bielsa's comments, and makes clear that only two

[258] *See* AR, para. 2.88.

[259] *See* AR, para. 2.88.

stages remained: construction and operation. This same reality comes through in the text of the agreement as memorialized in CARU's minutes of 15 May 2004, discussed above, which were adopted one month after the Minister's comments. There again, it is clear that the only two remaining stages were construction and operation. Whatever Minister Bielsa might have been trying to say on 14 April, it is clear that subsequent events prove that the first stage of the agreement relating to the approval of the ENCE project was complete. As the Court will read, this same truth is revealed in a number of subsequent admissions emanating from the highest offices of the Argentine government.

3.48 Before leaving the text of the Parties' agreement, it is worth pausing briefly on the nature of the information Uruguay committed to share with CARU "related to the construction of the pulp mill". As the Commission's minutes clearly reflect, Uruguay was to convey the environmental management plans ("EMPs") for the construction and operation of the ENCE plant to CARU for purposes of soliciting the Commission's comments to be "dismissed or decided with the company". In the Reply, Argentina attempts to make much of the fact that Uruguay never provided the pertinent information notwithstanding the alleged fact that Foreign Minister Bielsa asked for it on repeated occasions in July, August, and November 2004. Argentina goes so far as to attach an affidavit by the Minister himself to buttress its case[260]. But the truth is that it would have been impossible for Uruguay to turn over the requested materials in 2004 -- for the simple reason that they did not exist yet. The only EMP (for land movement) ever generated for the

---

[260] *See* AR, para. 2.89; *see also* AR, Vol. II, Annex 42.

ENCE plant -- which, as the Court knows, was never built -- is dated 28 November 2005, obviously well after 2004, and after the GTAN consultations had approached deadlock and Argentina had begun laying the groundwork for this litigation.

*

3.49 In addition to all that has already been discussed concerning the scope and content of the Foreign Ministers' March 2004 agreement concerning the ENCE plant, Uruguay's Counter-Memorial also identified a number of key admissions in official Argentine documents confirming the existence and substance of that agreement. The pertinent admissions are found in statements: (i) by the Ministry of Foreign Affairs in the 2004 year-end report to the Argentine Senate; (ii) by the Office of the President contained in the 2004 Annual Report on the State of the Nation; and (iii) by the Ministry of Foreign Affairs in the 2004 year-end report to the Argentine Chamber of Deputies[261]. Taken individually and together, these documents reflect exactly the understanding of the Foreign Ministers' agreement discussed above; namely, the ENCE plant would be built and CARU would monitor the water quality in conformity with the Statute.

3.50 In contrast to its determined refusal even to acknowledge other elements of proof bearing on the Foreign Ministers' agreement, Argentina does at least attempt to reconcile these formal admissions with its own theory of the case. To do so, however, the Reply resorts to highly creative interpretations, which are inconsistent with both the text of its own publications as well as the balance of the record before the Court.

---

[261] *See* UCM, paras. 1.33-1.36, 3.47, 3.49, 3.54 & 3.63. UCM, Vol. III, Annexes 46, 47 & 48.

3.51 Turning first to the Foreign Ministry's report to the Argentine Senate, Argentina contends that it "contient également un examen détaillé de l'historique du différend et ne permet pas non plus de conclure que l'arrengement du 2 mars ait mis fin au différend concernant le projet CMB [ENCE]. Au contraire, il permet de comprendre que cette expression ('mis fin au différend') concernait l'opposition des thèses argentine et uruguayenne relatives à la compétence de la CARU pour s'occuper de la question."[262] Uruguay agrees that the report contains a detailed history of the dispute but disagrees that one can draw therefrom the conclusion Argentina claims.

3.52 The best way to demonstrate the point is to quote the "detailed examination" presented in the report. After recounting the history prior to March 2004, including the fact of CARU's paralisation, the exchange of technical information between the Foreign Ministries and the report of Argentina's technical advisors to CARU, it states:

> V. On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding on the course of action to give to this subject. That is, for the Government of Uruguay to facilitate information relative to the construction of the plant, and in regard to the operational phase, instruct the CARU to proceed to carry out a monitoring of the water quality of the River Uruguay in conformity with the provisions of the Statute for the River Uruguay, especially its Chapter X, Articles 40 to 43. This decision coincides with the request of the Governor of Entre Ríos Province who asked that "the Commission for the Administration of the River Uruguay adopt procedures to establish mechanisms of control and monitoring, both for the

[262] AR, para. 2.104 ("includes a detailed examination of the history of the dispute, and likewise, does not allow us to conclude that the arrangement of 2 March had put an end to the dispute concerning the CMB [ENCE] project. On the contrary, it helps us understand that such wording ("put an end to the dispute") concerned the opposition of the Argentinean and Uruguayan theses related to CARU's competence to handle this matter.").

> construction stage and particularly for the period of operation, to the effect of relying on this bi-national organisation and the Statue for the River Uruguay for a program capable of maintaining a strict control over the entire process." The understanding of the Foreign Ministers, the note from the Governor of Entre Ríos and the report of the technical experts coincide in that CARU should concentrate its activity on the subject of mechanisms of control.
>
> VI. On 15 May 2004, the Argentinean Delegation to CARU again called for a special meeting for the purpose of reaching an agreement with the Uruguayan Delegation over the concrete actions to be followed in conformity with the understanding by both Foreign Ministers in their agreement of 2 March and considering the requested by the Government of the Province of Entre Ríos in their note P-74/2 dated 24 March 2004.
>
> VII. Consequently, CARU initiated the drafting of the Monitoring Plan in conformity with the provisions from the Statute of the River Uruguay, especially Chapter X, articles 40 to 43[263].

3.53 Uruguay respectfully submits that there is no way to draw from this "detailed examination" a conclusion other than the Parties had reached agreement that the plant would be built and that CARU would "concentrate its activity on the subject of mechanisms of control", exactly as Uruguay has always maintained. There is absolutely nothing in this report to indicate either (i) that the construction and eventual operation of the plant was in any way contingent, or (ii) that the Parties had agreed to return the matter to CARU for a preliminary review. Indeed, the fact that the report indicates that "CARU initiated the drafting of the Monitoring Plan" shows plainly that CARU was not waiting for anything else to happen and was proceeding directly to prepare for monitoring of the water quality per the Parties' agreement.

---

[263] Statement by the Argentine Ministry of Foreign Affairs to the Argentine Senate, *op. cit.,* pp. 617-618. UR, Vol. II, Annex R14.

3.54 Argentina also accuses Uruguay of leaving out a section of the report to the Senate which Argentina quotes in its Reply (as it also did in the Memorial)[264]. Yet, the section Argentina cites comes from a different part of the report setting forth a different set of questions and answers. Moreover, Argentina itself leaves out the questions immediately preceding the section it quotes, which provide essential context for understanding the answers quoted in the Reply. Uruguay invites the Court to review both the questions and answers in context, whereupon it will quickly see that the section quoted by Argentina stands only for the unremarkable propositions that Argentina received information concerning the ENCE plant, that it sought information regarding Uruguay's administrative approval processes and that it played no role in Uruguay's administrative approval process[265].

3.55 Significantly, in another portion of the response to these very same questions, the Ministry of Health and Environment makes two key statements: *First*: "Once the construction works have finished and the plant is in operation, a monitoring plan should be implemented over the area of influence on the Uruguay River."[266] From this, one can see yet again that completion and operation of the plant were no longer subject to doubt or dispute. One can also see that the proposed monitoring related not only to the pre-implementation period, but rather to the time when "the plant is in operation". *Second*: "Taking into account the technology of which we have been informed, it is not believed that there will be any effects on our

---

[264] *See* AR, para. 2.102.

[265] *See* Statement by the Argentine Ministry of Foreign Affairs to the Argentine Senate, *op. cit.,* p. 528. UR, Vol. II, Annex R14.

[266] *Ibid.*, p. 531.

territory, given the distances, the river's diluting capacity and the technologies involved"[267]. This is the same conclusion that was reached separately by Argentina's technical advisors to CARU in February 2004, and together these findings explain why Argentina (and Uruguay) agreed in March 2004 that the ENCE plant could be built, subject to water quality monitoring by CARU.

3.56 With regard to the Annual Report on the State of the Nation for 2004 prepared by the Office of the President, the Court will recall that it states:

> That same month [*i.e.*, June 2004 [sic]], both countries signed a bilateral agreement which *put an end to the controversy over the pulp mill installation in Fray Bentos.*
>
> This agreement respects, on the one hand, the Uruguayan and national character of the work, which was never under discussion, and on the other hand, the regulation in force that regulates the Uruguay River waters through the CARU….
>
> It also provides for a working procedure for the three phases of construction of the work: project, construction, and operation[268].

In a later section, it also states:

> In view of the "specific agreements of both delegations at CARU" regarding the possible installation of pulp mill plants on the Uruguay River bank, a "Monitoring Plan for Environmental Quality of the Uruguay River in the Areas of the Pulp Mill Plants" was designed, which together with the "Plan of Environmental Quality of the Uruguay River" helps to maintain water quality. The "water quality" standards were also reviewed and updated, considering they remain to be included in the Digest of Uses of the Uruguay River[269].

---

[267] *Ibid*.

[268] Annual Report on the State of the Nation for 2004, Ministry of Foreign Affairs, International Trade and Culture, p. 105 (1 March 2005). UCM, Vol. III, Annex 48 (emphasis added).

[269] *Ibid.*

3.57 Argentina tries to blunt the force of these statements, at least in part, by resorting to the rather curious tactic of questioning the reliability of its own Presidency. It argues, for example, the statement is not reliable because it gets the timing of the agreement wrong, and because it refers to a "signed" agreement when, Argentina claims, the agreement was verbal only[270]. The issue of the timing of the agreement is unimportant. Although the agreement dates to May (when it was memorialized in CARU), not June, such a minor discrepancy is hardly enough to invalidate the entire content of a formal report of such significance. With respect to the issue of whether or not the agreement was signed, the fact is that it *was* signed -- not at the time of the Foreign Ministers' initial agreement in March 2004, but subsequently, when it was memorialized in CARU in May[271].

3.58 At a more substantive level, Argentina acknowledges that the language "put an end to the controversy over the pulp mill installation in Fray Bentos" could "peut-être prêter à équivoque, si elle est lue en dehors de son contexte"[272]. According to Argentina, the context shows that the dispute "settled" related to whether or not the project would be submitted to CARU for a preliminary review[273]. While Uruguay might agree with Argentina that the phrase "put an end to the controversy" could "peut-être prêter à equivoque, si elle est lue en dehors de son contexte", it cannot agree with Argentina's conclusion about the meaning of those words. The truth is that when read in the full context of the surrounding

---

[270] *See* AR, para. 2.92.

[271] *See supra*, para. 3.44 for the names of the signatories.

[272] AR, para. 2.111 ("perhaps cause ambiguity, if read out of context").

[273] AR, para. 2.111.

circumstances, the phrase can only mean that the dispute about whether or not the plant would be built was "put [to] an end". This conclusion emerges from the entire history that Uruguay has now recounted for the Court, including not least the express text of the agreement memorialized in CARU's minutes. Per the February 2004 report of its technical advisors, Argentina had satisfied itself that the ENCE plant would not cause harm, and the Parties had agreed that CARU would focus its efforts on monitoring water quality. In contrast, there is nothing to support (and everything to contradict) Argentina's argument that the Parties agreed merely that Uruguay would resubmit the ENCE project to CARU for a preliminary review under Article 7. The truth is, the dispute concerning the ENCE plant was over on 15 May 2004.

3.59 The Reply also argues that the design and implementation of a water quality monitoring plan mentioned in the President of Argentina's Report does not mean that Argentina had accepted that the plant would be built[274]. Instead, the Reply claims, the "but du monitoring était, tout simplement, d'obtenir le maximum d'information sur la qualité des eaux afin d'être en mesure de s'acquitter de sa tâche au moment où l'Uruguay notifierait la CARU du projet, conformément au Statut"[275]. The trouble with this aspect of Argentina's argument is two-fold. *First*, as Uruguay has now demonstrated repeatedly, the assertion that "Uruguay was going to notify CARU about the project" pursuant to Article 7 is entirely without support in the facts. *Second*, Argentina's suggestion that the monitoring was merely for purposes of establishing a baseline in the wholly hypothetical event the plant was later built is

---

[274] *See* AR, para. 2.96.

[275] AR, para. 2.96 ("purpose of the monitoring was, simply, to obtain the maximum of information on the water quality so as to be in a position to complete our task in time when Uruguay was going to notify CARU about the project, pursuant to the Statute").

directly contradicted by CARU's own understanding of what it was doing and why. The text of the Foreign Ministers' agreement memorialized in the CARU minutes, for example, is unambiguous. It states: "In relation to the operational phase, we [CARU] will proceed to monitor environmental quality." CARU's October 2004 draft of the PROCEL monitoring plan is similarly unambiguous. It begins by unconditionally "[t]aking into account the future installation of cellulose plants", and then states: "The plan is based on a sequence of continuous monitoring that permits the evaluation of trends every three years of work, allowing for a real long-term evaluation of the impact of the effluents, with results from some quarterly evaluations."[276] The monitoring envisioned was thus clearly for the operational phase and not, as Argentina suggests, merely for purposes of establishing a baseline in case the plant was ever ultimately built.

3.60 Lastly, the Reply tries to distance itself from the import of the President's Report on the State of the Nation by claiming that the reference to "possible" installation of the pulp mills shows there was no acceptance of the ENCE plant[277]. Perhaps the most interesting part of this argument is the extent to which Argentina seeks to have it both ways. While at all other moments, it is eager to distance itself from a literal reading of its own documents, in this one case, Argentina is intent on standing on a rigid, literalistic interpretation of the word "possible". Here, Argentina would do well to heed its own invocation of the *Nuclear Tests Case* (*Australia v.*

---

[276] Draft Plan for Monitoring the Environmental Quality of the Uruguay River in the Areas of the Pulp Mills, Annex A to Subcommittee on Water Quality and Prevention of Pollution Report No. 246, p. 1717 (12 October 2004), *approved in* CARU Minutes No. 07/04 (15 October 2004). UR, Vol. II, Annex R21.

[277] *See* AR, para. 2.98.

France), in which the Court stated that "[i]t is from the actual substance of these statements, and from the circumstances attending their making", that their true meaning is to be derived[278]. In this case, the "actual substance" of Argentina's statements, and the "circumstances attending their making" make clear that Argentina had in fact accepted the construction and operation of the ENCE plant. All of the evidence Uruguay has laid out for the Court, including but not limited to technical reports by Argentina favorable to the ENCE pulp mill, statements from Uruguayan and Argentine officials, the signed agreement in CARU, and the design and implementation of the PROCEL, show that Argentina had agreed that the ENCE plant would be built, no matter how much Argentina might dislike that fact now.

3.61 Turning finally to the 2004 year-end Report to the Argentine Chamber of Deputies, the Reply asserts that it "témoigne du fait que l'Argentine avait manifesté une certaine compréhension à l'égard des préoccupations uruguayennes, mais ne signifie pas qu'un quelconque consentement ait été donné au projet"[279]. Uruguay confesses that it does not know what Argentina means when it says that the Report shows that Argentina "had manifested a certain understanding". Whatever it may mean, the plain language of the Report clearly refutes Argentina's contention that no approval was given to the project. It states:

> In June [sic] of that same year, a Bilateral Agreement was signed through which Argentina's Government put an end to the controversy.

---

[278] *See* AR, para. 2.93 (citing para. 51).

[279] AR, para. 2.101 ("shows the fact that Argentina had manifested a certain understanding with respect to the Uruguayan concerns, but this does not mean that any approval was given to the project").

> Said agreement respects, on the 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 CARU.
>
> Likewise, it implies a work methodology for the three phases of the 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.
>
> Controls on both plants will be more extensive than those our own country has on its own plants on the Paraná River, which were nevertheless accepted by Uruguay (the technologies that the province of Entre Ríos questions Uruguay about are the same ones that are used in our country).
>
> Said controls will be carried out by a team that includes technicians from the National Office of Water Resources and the Government of the Province of Entre Ríos and the city of Gualeguaychú[280].

3.62 Argentina attempts to minimize the significance of this Report by claiming that "[i]l a été rédigé au moment où l'Argentine n'avait pas pris connaissance du fait que l'Uruguay avait autorisé la construction d'Orion [Botnia] le 14 février 2005"[281]. Even if this is true, it is hard to know what significance it has for the Parties' agreement concerning the ENCE plant. Moreover, the text of the statement itself makes it abundantly clear that Argentina was very much aware of the Botnia plant at the time it was issued. For instance, the statement refers to "the plants" and "both plants". Indeed, the caption under which the cited language reads "Construction of

---

[280] Statement by Argentine Ministry of Foreign Affairs to the Chamber of Deputies, *op. cit.,* p. 136. UCM, Vol. III, Annex 46.

[281] AR, para. 2.101 ("it was prepared at a time when Argentina had not yet become aware of the fact that Uruguay had authorized the building of Orion [Botnia] on 14 February 2005").

Cellulose *Plants* on the River Uruguay", and the question to which the Ministry of Foreign Affairs was responding similarly referred to the "decision by the Uruguayan Government to authorize the construction of the cellulose *plants* on the Uruguay River." This is no accident. As detailed in the Counter-Memorial, CARU first became aware of the Botnia plant no later than April 2004, and even sent a delegation to Finland in August of that year to learn more about Botnia's cellulose plant technology[282]. (For its part, the Argentine government was aware of Botnia's plans no later than November 2003[283].)

3.63 In Uruguay's view, the text of the Report could scarcely be any clearer. No amount of dissembling by Argentina can mask its evident import. The agreement "put an end to the controversy". The plants were to be built, brought into operation and, consistent with its substantive functions, CARU was to monitor their operation: "Thus inclusive control procedures were carried out on the Uruguay River, which means they will continue after the plants are in operation."[284] Argentina cannot backtrack from that agreement now.

3.64 Argentina's final stratagem in its effort to insulate itself from the consequences of its agreement and to distance itself from its own official statements is to invoke its *2005* State of the Nation Report which, its says, shows that it never "cessé de dénoncer les violations uruguayennes" of the 1975 Statute[285]. This bit of revisionist history was, however, published on 1 March 2006, a full year after the

---

[282] *See* UCM, paras. 3.23-3.30.

[283] *See* UCM, para. 3.62.

[284] Statement by Argentine Ministry of Foreign Affairs to the Chamber of Deputies, *op. cit.,* p. 136. UCM, Vol. III, Annex 46.

[285] AM, para. 2.99 ("ceased to denounce the Uruguayan violations").

prior Reports and after Argentina had already decided to file its Application in this Court (which it did on 4 May 2006). It therefore cannot overcome the weight of all of Argentina's contemporaneous statements made at a less adversarial time.

* * *

3.65 In summary, the overwhelming weight of the evidence confirms Uruguay's version of the facts. In late 2003, at Argentina's initiative, the Parties agreed to consider the ENCE project at the State-to-State level outside CARU (which had ceased meeting in any event). Then, in the first few months of 2004, Argentina satisfied itself that the ENCE plant would not cause a significant environmental impact. In light of this determination, and the continued impasse in CARU, Uruguay and Argentina's Foreign Ministers met and decided on a way forward. They agreed the plant would be built and CARU would monitor its construction and operation. Ambassadors Sguiglia and Sader reduced the agreement to writing, and it was memorialized in CARU's minutes of 15 May 2004. The monitoring plan was designed and implemented by CARU as the agreement mandated. The Parties' agreement to address the issues raised by the ENCE plant directly, in State-to-State negotiations -- resulting in their agreement that the plant would be built -- obviated any need to obtain a preliminary determination about the plant from CARU. Indeed, the agreement to proceed to direct negotiations was made precisely because the Parties concluded that it was not feasible to seek a preliminary determination from CARU because the Commission was, in Argentina's words, "paralysed" and at "an impasse". These simple truths refute claims that

Uruguay violated Article 7 with respect to the ENCE plant by not seeking "authorisation" from CARU prior to approving the project[286].

2. The Extension to Botnia.

3.66 Argentina's procedural claims against Uruguay concerning the Botnia plant are similarly without merit because the Parties' agreement concerning ENCE was subsequently extended to Botnia. In the Counter-Memorial, Uruguay discussed the many elements of proof establishing this fact[287]. Argentina was aware of the Botnia project at least as early as November 2003 when its officials first met with corporate representatives from Botnia, and CARU itself had taken cognizance of the project as early as April 2004 when it first met representatives of the company[288]. In fact, a delegation comprised of members of CARU and representatives from local governments in the area, including Argentina's Entre Ríos Province, visited Finland in August 2004 to learn more about Botnia's cellulose plant technology. It is thus not surprising that when in July 2004 the CARU Subcommittee on Water Quality began drafting the water quality monitoring plan mandated by the Foreign Ministers' agreement in March of that year, it incorporated *both* plants into the plan. From the beginning, each and every draft bore the same caption: "Plan for Monitoring the Environmental Quality of the Uruguay River for the Areas Around the *Pulp Mills*"[289]. Each and every draft, and the final version too, begins with the same line

---

[286] *See infra*, paras. 7.7.

[287] *See* UCM, paras. 3.61-3.65.

[288] *See* UCM, paras. 3.23-3.25; *see also* Memorandum from Minister Counsellor Daniel Castillos to Ambassador Dr. Alberto Volonté Berro (4 November 2003). UCM, Vol. II, Annex. 16.

[289] *See*, *e.g.*, Draft Plan for Monitoring the Environmental Quality of the Uruguay River in the Areas of the Pulp Mills (hereinafter "Draft PROCEL"), Annex C to Subcommittee on Water

"Taking into account the future installation of cellulose *plants* … the plan described below was developed, focusing on areas which *the facilities* may impact."[290]

3.67 As the Court can readily see, in all cases "the future installation of cellulose plants" was a given. Uruguay relied on these statements. When the PROCEL was completed by CARU's technical advisors in November 2004, it was then approved by both delegations to the Commission in plenary session on the 12th of that month. As stated in Argentina's own "detailed history" of the dispute set forth in the 2004 year-end 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…[291].

Quality and Prevention of Pollution Report No. 243, p. 863 (13 July 2004), *approved in* CARU Minutes No. 04/04 (16 July 2004). UCM, Vol. IV, Annex 102 (emphasis added).

[290] *Ibid.* Draft PROCEL, Annex A to Subcommittee on Water Quality and Prevention of Pollution Report No. 244, p. 1136 (11 August 2004), *approved in* CARU Minutes No. 05/04 (13 August 2004). UCM, Vol. IV, Annex 104. Draft PROCEL, Annex A to Subcommittee on Water Quality and Prevention of Pollution Report No. 246, p. 1717 (12 October 2004), *approved in* CARU Minutes No. 07/04 (15 October 2004). UCM, Vol. III, Annex 107. Draft PROCEL, Annex A to the Subcommittee on Water Quality and Prevention of Pollution Report No. 247, p. 1959 (8 November 2004), *approved in* CARU Minutes No. 08/04 (12 November 2004). UCM, Vol. IV, Annex 109 (emphasis added).

[291] Statement by the Argentine Ministry of Foreign Affairs to the Argentine Senate, *op. cit.,* p. 618. UR, Volume II, Annex R14.

After that, CARU asked for and received DINAMA's approval of the plan[292]. Consequently, Uruguay's delegation to CARU, and Uruguay itself, understood that Argentina had agreed that both plants could and would be built.

3.68 The 2004 year-end reports discussed above similarly contemplate the construction and operation of *two plants*, not just the ENCE plant. The Report to the Argentine Chamber of Deputies cited above contains a very instructive question (from a legislator) and answer (from the Ministry of Foreign Affairs) that make clear that the agreement was extended to both plants. Uruguay will not burden the Court by quoting the question and answer in full here. It did so in the Counter-Memorial and invites the Court to review paragraph 3.63 thereof. As the Court will see, the Argentine Report not only contains repeated plural references to the "cellulose plants", it also makes it abundantly clear it was "Argentina's position" that the "controversy" concerning "both plants" was "put an end to"[293].

3.69 Remarkably, the Reply never directly responds to Uruguay's showing that the Foreign Ministers' March 2004 agreement was extended to Botnia. Nor does it make any effort to refute the pertinent facts stated in the Counter-Memorial. They should therefore be taken as admitted. All that Argentina says is this: "S'il en était ainsi [i.e., if the agreement had been extended to Botnia], il n'y aurait eu aucun besoin" for the Parties to negotiate directly in GTAN[294]. Yet, this misses the point

---

[292] UCM, para. 3.28, *citing* Subcommittee on Water Quality and Prevention of Pollution Report No. 247, p. 1951 (8-12 November 2004), *approved in* CARU Minutes No. 08/04 (12 November 2004). UCM, Vol. IV, Annex 109. CARU Minutes No. 08/04 (12 November 2004), pp. 1859-1860. UCM, Vol. IV, Annex 108.

[293] Statement by Argentine Ministry of Foreign Affairs to the Chamber of Deputies, *op. cit.,* p. 136. UCM, Vol. III, Annex 46.

[294] AR, para. 2.51 ("If this were the case", "there would have been no need").

entirely. If anything, the facts surrounding the creation of GTAN only underscore Uruguay's point. Uruguay has already cited the Parties' joint press release (which Argentina itself labels an "agreement") issued on 31 May 2005 announcing the creation of GTAN[295]. The language is, however, worth revisiting here in light of the point currently under discussion. It states that the Parties will constitute

> a group of Technical Experts for complementary studies and analyses, exchange of information and follow up on the effects that the operation of *the cellulose plants that are being constructed* in the Eastern Republic of Uruguay *will have* on the ecosystem of the shared Uruguay River[296].

By referring to "the cellulose *plants* that are being constructed" and by alluding to the effects the operation of both "will have", this joint release again makes clear that it is understood and accepted that the plants -- both plants -- will be built.

3.70 Given Argentina's existing agreement that the plants would be built, subject only to water quality monitoring by CARU, Uruguay was, just as it stated in the Counter-Memorial, under no obligation to participate in additional consultations with Argentina[297]. Nonetheless, Uruguay recognised that mounting opposition within Argentina's Entre Ríos Province was causing a political problem for Argentina's government. Uruguay saw the GTAN as a way to provide additional information to Argentina and Entre Ríos and reassurance that the plants were environmentally viable. In no sense, however, did the creation of GTAN detract

---

[295] *See supra*, para. 3.13.

[296] Joint Argentine-Uruguayan Press Release Constituting GTAN No. 176/05 (31 May 2005). UCM, Vol. V, Annex 126 (emphasis added).

[297] *See* UCM, para. 3.71.

from the Parties' prior agreement that the plants would be built, as evidenced by the text of the joint press release announcing the creation of GTAN.

3.71 Just as with ENCE, Argentina's agreement that the Botnia plant would be built, and that CARU would monitor its construction and operation, mooted any procedural claim it might have had under Articles 7 *et seq.* of the 1975 Statute[298].

C. THE TIMING OF NOTICE TO CARU

3.72 In the Counter-Memorial, and again in Chapter 2 of this Rejoinder, Uruguay showed that Article 7 of the 1975 Statute is vague as to exactly when notice of a project must be submitted to CARU for its preliminary review. Uruguay showed that based on the text of the Statute, the Parties' historical practice under it, and the rules of general international law, it is clear that notice is *not* required prior to an initial environmental authorisation of the sort issued to ENCE and Botnia here. Rather, what is required is "timely" notice such that ample time remains for CARU and the notified State to assess the likely impacts of the project on navigation, the regime of the river, and/or water quality, and, if necessary, to consult on appropriate preventative measures before a potentially harmful project is carried out[299].

3.73 In the face of this demonstration, the Reply persists in the argument that Uruguay breached its obligations under Article 7 by "failing" to notify CARU prior to issuing AAPs to ENCE and Botnia in October 2003 and February 2005, respectively. Indeed, Argentina goes so far as to argue that Uruguay's ostensible "failure" to notify CARU before issuing AAPs to the two companies "vicié toute la

---

[298] *See infra*, paras. 7.7.

[299] *See supra*, paras. 2.35; *see also* UCM, para. 3.13.

procédure" under the 1975 Statute[300]. Argentina thereby seeks to leverage what it claims is Uruguay's initial error into a reason to disregard everything else that came afterwards, and -- most extremely of all -- a reason to dismantle the Botnia plant. Such an argument fails for several reasons. *First*, as shown above, the Parties agreed to direct negotiations rather than formal compliance with Article 7; notice to CARU per Article 7 was not required. Second, even if *arguendo*, the Parties had not agreed to dispense with the formal requirements of Article 7, Uruguay did not "fail" to notify CARU prior to the issuance of the AAPs because notice to the Commission was not due at that preliminary stage of Uruguay's review of the project. *Third*, as Uruguay will detail in Chapter 7 of this Rejoinder, even if, *quod non*, there were a procedural error, the remedy of dismantling the Botnia plant, the environmental performance of which is undeniably excellent, would be grossly disproportionate to that error.

*

3.74 Uruguay has already demonstrated at paragraphs 3.11-3.71 above that notice to CARU was not required because the Parties agreed to proceed immediately to direct negotiations, without awaiting a summary determination by CARU. Accordingly, there was no reason for a formal notification to CARU under Article 7, and the question of whether Uruguay should have notified CARU before or after issuance of the AAPs to ENCE and Botnia is moot. Even absent the Parties' agreement to dispense with CARU's summary determination, however, Argentina's argument that notice was required before issuance of the AAPs continues to

[300] AR, para. 1.161 ("invalidated the entire procedure").

misapprehend the nature of an initial environmental authorisation under Uruguayan law. Notwithstanding Uruguay's detailed explanation in the Counter-Memorial of the preliminary, contingent nature of an AAP[301], the Reply repeatedly insists on claiming that an AAP is tantamount to "autorisation immédiate de construction"[302]. Yet, AAPs represent nothing of the sort. They constitute only an *initial* determination by MVOTMA, based on the review conducted to date, that a project is environmentally viable[303]. Several additional approvals are required before construction may commence, including, for example, approval of environmental management plans for all pre- and post-operational phases in the life-cycle of the plant[304]. As succinctly explained by the Director of DINAMA, who administers and applies Uruguayan environmental laws and regulations on a daily basis:

> The AAPs authorize Botnia and ENCE merely to request approval to begin construction only; an AAP does not authorize either plant to begin operations; nor do they even authorize construction itself. The AAP requires the submission of an Environmental Management Plan ("Plan de Gestión Ambiental" or "PGA") for construction, an Environmental Management Plan for operation, a Mitigation Plan, and a Monitoring and Follow-up Plan (including monitoring of effluent quality and effect on living creatures)[305].

3.75 Argentina's Reply attempts to bolster its argument by citing to Article 7 of Law No. 16466 of 19 January 1994, which establishes that an AAP is required prior

---

[301] *See* UCM, paras. 1.15 & 3.10-3.12.

[302] AR, para. 2.13 ("an immediate construction permit").

[303] Decree No. 435/995, Environmental Assessment Regulation (hereinafter "Decree No. 435/994), Art. 17, para. 3 (21 September 1994). UCM, Vol. II, Annex 9.

[304] *See* UCM, para. 3.11.

[305] Sworn Declaration of Alicia Torres, Director of the Department of the Environment, p. 6, para. 3 (June 2006). UCM, Vol. II, Annex 30.

to the "execution of activities, construction, or works"[306]. From this, Argentina concludes: "L'AAP est la condition indispensable pour le début de la construction, indépendamment du fait que d'autres autorisations partielles – liées au degré d'avancement des travaux-puissent ou non être ultérieurement octroyées."[307] Yet, none of this undermines the essential point: although an AAP is certainly a *necessary* condition for commencing construction of a project, it is not a *sufficient* condition. As Argentina itself acknowledges, the additional authorisations required "shall or shall not be granted"; that is, they are contingent and far from certain. Indeed, this very point is neatly captured in the next paragraph of the Reply where Argentina quotes the February 2005 Botnia AAP which authorizes "the execution of the project in question *subject to the fulfillment of a series of additional conditions* stipulated in paragraph 2 of this resolution"[308].

3.76 The point is perhaps best illustrated simply by listing the various additional authorisations and permits Botnia was required to obtain after it obtained its February 2005 AAP but before proceeding with the various aspects of that project. They are:

- Environmental Management Plan ("EMP") approval for the removal of vegetation and earth movement, 12 April 2005;
- EMP approval for the construction of the concrete foundation and the emissions stack, 22 August 2005;

---

[306] *See* AR, para. 2.15.

[307] AR, para. 2.15 ("The AAP is a prerequisite to the beginning of construction works, regardless of the fact that other partial authorisations -- related to the degree of progress of the works -- shall or shall not be granted subsequently.")

[308] AR, para. 2.16 (quoting Botnia AAP) (emphasis added).

- EMP approval for the construction phase of the works, 18 January 2006;
- EMP approval for the construction of the wastewater treatment plant, 10 May 2006;
- EMP approval for an industrial non-hazardous waster landfill, 9 April 2007;
- EMP approval for the construction of solid industrial waste landfill, 9 April 2007;
- EMP approval for operations, 31 October 2007; and
- Authorisation to operate, 8 November 2007.

3.77 Ironically, even as it erroneously characterizes the AAPs as a "final construction permit", Argentina elsewhere recognizes that notification *after* an AAP can still be "timely" in the sense of permitting meaningful consultations to take place before a project comes into operation. At paragraph 2.110 of the Reply, after earlier noting that Uruguay issued the AAP to ENCE in October 2003, Argentina expressly states:

> Il est à relever que durant toute l'année 2004, la construction de CMB n'avait pas commencé. La CARU était donc toujours en mesure d'évaluer les projets et leur impact sur le fleuve Uruguay et sa zone d'influence avant même que ces travaux ne commencent[309].

Argentina therefore recognizes that there is no magic to an AAP such that the date of its issuance must be given dispositive significance for determining when notice to CARU is due. In the passage quoted above, Argentina clearly admits that after the

---

[309] AR, para. 2.110 ("It should be pointed out that, throughout the year 2004, the CMB construction didn't start. Consequently, CARU was still in a position to assess the projects and their impact on the Uruguay River and its area of influence even before such works had started.").

AAP was issued to ENCE, there was still sufficient time (if the Parties had so desired) for CARU to asses the project and its impact on the Uruguay River. Uruguay agrees. *Ipso facto*, notice to CARU prior to issuance of the AAP was not required.

3.78 The Reply also makes much out of the issue of the specific location of the plants, and appears to argue that because the AAPs assume specific locations they are effectively final construction permits. The first thing to be said about this argument is that it again misunderstands the nature of an AAP. As stated, an AAP by itself implies nothing other than the fact that, based on an initial assessment, a project appears to be environmentally viable. Before construction will be permitted, the entity undertaking the project must submit and receive approval for environmental management plans which are site-specific. If the proponent fails to demonstrate that the project will not harm the environment at that site, it will be rejected.

3.79 The second thing to be said about this argument is that location has no independent relevance under the 1975 Statute. Article 7 of the 1975 Statute requires notification when a work is liable to cause significant harm to (i) water quality, (ii) navigation, or (iii) the regime of the river. Argentina acknowledges the limited substantive scope of the Statute's procedural rules[310]. Consequently, location as such is only pertinent only insofar as it has a necessary bearing on these three factors. Otherwise, it does not fall within the purview of the 1975 Statute.

---

[310] *See* AR, para. 1.112 (agreeing that the notifying State has "no obligation to provide information that has no bearing on these issues").

3.80 Even as it agrees with Uruguay that the scope of the Statute's procedural rules is limited to water quality, navigation and the régime of the river, Argentina not so subtly tries to expand that scope by arguing for an inappropriately broad definition of the river's "régime". At paragraph 1.113 of the Reply, it claims that "par 'régime du fleuve' (et de ses zones d'influence), il faut entendre l'ensemble des éléments qui influencent, ou qui sont influencés par, l'écosystème du fleuve pris dans son ensemble."[311] Argentina seems to be arguing, in other words, that "régime of the river" means essentially anything that either affects or is affected by the river. Under such an expansive definition, it is hard to imagine anything that would *not* be included in the régime of the river.

3.81 Argentina appears to have forgotten in the Reply what it acknowledged in the Memorial. In point of fact, "régime" is a hydrographic term with a well-defined meaning. In its first pleading, Argentina cited the Hydrographic Dictionary for the proposition that "régime" in general means "l'esemble d'éléments don't les variations saisonnières caractérisent la situation en un lieu donné"[312]. In the context of a river, this means "the condition of a river with respect to the rate of its flow as measured by the volume of water passing different cross sections in a given time"[313]. The Dictionary of Hydrology and Related Sciences ("*Diccionario de Hidrología y Ciencias Afines*") is to the same effect. It defines "régimen" in Spanish as:

---

[311] AR, para. 1.113 ("the term 'régime of the river (and its zones of influence), must be understood as all of the elements that influence or which are influenced by the river's ecosystem in its entirety").

[312] AM, para. 3.129 ("all elements whose seasonal variations characterize the situation in a given place").

[313] Webster's Third New International Dictionary (Unabridged, Massachusetts, Miriam Webster, 2002) p. 1911.

> Characteristic behavior of a body of water in a watershed or lake, including losses or gains in a period of the year. Flow characteristic of a current with respect to the speed, volume, shape and alteration of the channel, as well as in its capacity to transport sediments and the quantity of the material transported[314].

The location of the plants is therefore relevant to the procedural rules of the Statute only to the extent it has an effect on water quality, navigation, or the flow of the river. And since Argentina nowhere maintains that it does have such an affect, location is irrelevant to this dispute.

*

3.82 Uruguay showed in the Counter-Memorial that both Argentina and CARU were well aware of the ENCE and Botnia projects before either received their AAPs from DINAMA[315]. In the case of ENCE, CARU first became aware of the project on or around 14 December 2001, nearly two years before ENCE's AAP was issued[316]. In the case of Botnia, CARU first became aware of the project no later than April 2004, some ten months before Botnia received its AAP[317]. The Reply responds by asserting that CARU's knowledge "l'existence des projects n'est pas un

---

[314] G. Lanza, C. Cáceres, S. Adame, S. Hernández, *Dictionary of Hydrology and Related Sciences* ("*Diccionario de Hidrología y Ciencias Afines* "), First Edition, Editorial Plaza y Valdés, Mexico (1999) p. 236. UR, Vol. III, Annex R65. (Comportamiento característico de una cantidad de agua en una cuenca de drenaje o lago, incluyendo pérdidas y ganancias en un periodo del año. Flujo característico de una corriente con respecto a la velocidad, volumen, forma y alteración del canal, así como en la capacidad de transporte de sedimentos y la cantidad de material transportado.)

[315] *See* UCM, paras. 3.14 & 3.23.

[316] *See* UCM, para. 3.16.

[317] *See* UCM, para. 3.23.

raison pour que l'Uruguay s'abstienne de s'acquitter de ses obligations"[318]. Elsewhere, it states: "la CARU peut être au courant des projets, recevoir de l'information de source diverse, demander davantage d'information sur un projet, sans que cela signifie que l'une ou l'autre des Parties au Statut soit libérée de l'obligation claire et dépourvue d'ambiguïté qu'elles ont stipulée à l'article 7"[319].

3.83 Here again, Argentina misrepresents Uruguay's argument. Uruguay stated quite plainly in the Counter-Memorial that the purpose of demonstrating CARU's knowledge of the plants was not, as Argentina suggests, to argue that that knowledge relieved it of the obligation to comply with Article 7 of the Statute. (Uruguay was relieved of that obligation by Argentina when the Parties agreed to proceed directly to State-to-State consultations and dispense with CARU summary determination under Article 7, as described above.) Instead, Uruguay's point in demonstrating CARU's early knowledge about the plants was simply that the fact that CARU both knew about the projects before the AAPs were issued, and knew too that the AAPs were imminent, yet did not request notification pursuant to Article 7 (as it is expressly and undisputedly empowered to do) constitutes additional evidence that notice was not due at the AAP stage[320] . This is not to say, as the Reply suggests, that Uruguay considered it CARU's "duty" to request notification[321]. It is merely to

---

[318] AR, Chap. 2, Sec. 1 Heading B ("of the existence of the projects does not justify Uruguay's failure to fulfill its obligations"). *See also* paras. 2.30-2.32.

[319] AR, para. 2.31 ("CARU can be aware of the existence of the projects, can receive information from various sources, ask further information on a project without that meaning that one or the other Party to the Statute be released from the clear unambiguous obligation that the Parties stipulated under article 7.").

[320] *See* UCM, para. 3.15.

[321] *See* AR, para. 2.34.

say that, whatever Uruguay might have thought, if CARU had considered that notice was due prior to the issuance of the AAPs, one would expect to see some indication of that fact in the record given the Commission's awareness of the projects and the stage of Uruguay's review . But there is none. There is nothing even from Argentina's own delegates to the Commission to indicate that they expected to be formally notified under Article 7 before Uruguay issued the AAPs. Argentina nowhere disputes these facts.

3.84 Argentina does, however, try to sow confusion by asserting that it "a déjà démontré que la CARU a insisté auprès des autorités uruguayennes en demandant de l'information sans que celles-ci se soient acquittées de cette obligation au moment où l'Uruguay a procédé à délivrer les autorisations préalables," thus implying that CARU requested formal notification[322]. Yet, the documents cited by Argentina confirm merely that CARU knew that ENCE and Botnia would imminently receive AAPs. At the same time, it never requested formal notification pursuant to Article 7 prior to their issuance.

3.85 The Reply cites paragraphs 2.5, 2.7 to 2.16, and 2.50 to 2.51 of the Memorial to support its position. Yet, none of these refer to Article 7 notification. Paragraph 2.5, for instance, cites to a letter of 17 October 2002, which requests information from MVOTMA to assist CARU in developing its water quality monitoring program. But it says nothing about Article 7 notification or the 1975 Statute. It reads:

---

[322] AR, para. 2.33 ("already proved that CARU insisted that the Uruguayan authorities provide further information and the latter failed to fulfill this obligation at the time Uruguay granted the prior authorisations").

> This Commission, as you know, has been developing within the scope of its competencies programs pertaining to the preservation of water quality in the Uruguay River through its sampling stations in coastal areas and in the center of the navigation channel, located in the said area.
>
> Consequently, with the goal of taking official notice of the Environmental Impact Assessment study that M'Bopicua may have presented to your consideration, we request that you consider the possibility of providing us with a copy of the said material and any other background information that may be useful to us.[323]

3.86 As another example, Paragraph 2.7 of the Memorial refers to the CARU Minutes of 21 March 2003. The Minutes state that CARU has not yet received information on the ENCE environmental impact study, and that Mr. Belvisi (of Uruguay) personally requested the document[324]. Again, it makes no reference to Article 7 notification or to the 1975 Statute. The others are to similar effect.

3.87 Statements by Argentina's delegation to CARU show that Uruguay was open about ENCE and was attempting to keep the Commission informed. On 17 October 2003 -- following the issuance of the ENCE AAP -- Ambassador García Moritán, the President of the delegation, acknowledged:

> The environmental studies relating to the establishment of the plant have been part of our discussions at all our plenary meetings for more than a year. We have also had meetings with experts to understand the environmental scope of the issue and they have helped us on several occasions to include the technical details that must be considered in writing the letters we have sent to the Department of the Environment. These meetings with the experts have brought up various issues that must be kept in mind when dealing with a cellulose plant. Among other things it was

---

[323] Letter SET-10413-UR sent from CARU President, Walter M. Belvisi, to the Minister of MVOTMA, Carlos Cat (17 October 2002). UR, Vol. II, Annex R19.

[324] Subcommittee on Water Quality and Prevention of Pollution Report No. 233, p. 463 (18 March 2003), *approved in* CARU Minutes No. 03/03 (21 March 2003). UR, Vol. II, Annex R20.

> agreed that new monitoring stations would have to be installed to check the water quality in those areas. We have discovered that all the historic records describe a water quality of 100%. The CARU monitoring stations will continue to provide information. I also believe that CARU has had extensive correspondence with that agency we esteem so highly, the Department of the Environment[325].

3.88 The situation was the same with respect to Botnia. In paragraph 2.50 of the Memorial, Argentina states that on 19 October 2004 (four months before issuance of the AAP), CARU met with Botnia representatives and "souligne le besoin de disposer d'information au sujet de la procédure en cours devant la DINAMA."[326] The document cited in support mentions that CARU met with Botnia representatives, and then states:

> Regarding the project for the cellulose plant of the referenced group that will be installed at Fray Bentos (ROU), it would be of interest to have information about the status of the steps initiated to obtain the Initial Environmental Authorisation from the Department of the Environment (DINAMA). It was agreed: To take note and to stay informed about the group's steps before DINAMA[327].

Here again, there is nothing about Article 7 notification, although CARU was aware that Botnia was seeking an AAP.

3.89 Paragraph 2.51 of the Memorial states that on 16 November 2004, CARU indicated that it was aware of Botnia's intention to seek a "construction permit" for a cellulose plant and asked DINAMA to provide it with information. The letter from

---

[325] CARU Minutes No. 11/03, pp. 2181-2182 (17 October 2003). UCM, Vol. IV, Annex 97.

[326] AM, para. 2.50 ("emphasized the need to obtain information on the current proceeding before DINAMA").

[327] Subcommittee on Legal and Institutional Affairs Report No. 193, pp. 1870-1871 (8 November 2004), *approved in* CARU Minutes No. 08/04 (12 November 2004). UR, Vol. II, Annex R22.

CARU does not reference a "construction permit," but rather indicates that CARU was aware that BOTNIA "a entamé des démarches … afin d'obtenir l'Autorisation environnementale preamble" and "il est dans le plus grand intérêt" for CARU to "connaître les demarches faites jusqu'á présent..."[328]. In reality, this then is just one more piece of evidence showing that CARU knew Botnia was in the process of seeking an AAP, yet said nothing about Uruguay having to provide notice under Article 7 of the 1975 Statute. Instead, CARU's request was based solely on what it termed its "interest".

3.90 Argentina neglects to mention that in December 2004, DINAMA replied to CARU's November request, sending the Commission a fax "forwarding the text of the public file for the Kraft cellulose plant project, application for initial environmental authorisation [AAP] filed by Botnia S.A."[329]. Tellingly, in the same CARU minutes in which receipt of DINAMA's fax is noted, Ambassador Moritán, the President of Argentina's delegation to CARU, expressed his pleasure at how well CARU was fulfilling its mandate with respect to ENCE and Botnia, stating that "congratulations are in order for the manner in which this matter was treated"[330] but saying nothing about any notification required under Article 7 of the Statute.

3.91 Argentina also contends that at a summit meeting on 9 October 2003 then Uruguayan President Jorge Battle and Foreign Minister Didier Opertti both promised

---

[328] AR, Vol. II, Annex 27. In the Memorial Argentina incorrectly cited a different 16 November 2004 document as Annex 36 thereto. The correct document is included as Annex 27 to the Reply ("has began the process … with the goal of obtaining the corresponding AAP" and "it is of [CARU's] interest" to "learn about the steps taken up to the present date").

[329] CARU Minutes No. 09/04, p. 2148 (10 December 2004). UCM, Vol. IV, Annex 111.

[330] *Ibid.*, pp. 2153-2153*bis*. *See also* UCM, para. 3.29.

to inform CARU about the plant before issuing an AAP[331]. The Reply bases its argument on a 27 October 2003 diplomatic note from Argentina to Uruguay. The note is not reliable evidence for the propositions stated. *First*, contrary to Argentina's assertion that it was written "a couple of days" after the 9 October meeting[332], it was actually written nearly three weeks later at a time when relations between the Parties on the subject had become significantly more strained. The self-serving assertions set forth therein must therefore be viewed with caution. *Second*, the note's contents are refuted by a contemporaneous internal (i.e., not for public consumption) Uruguayan document which makes clear that no such promises were made[333]. *Third*, Argentina's argument defies logic. On the one hand, Argentina complains because Uruguay allegedly promised to inform CARU before issuing the AAP to ENCE. Yet, on the other hand, it complains that Uruguayan Foreign Minister Opertti ostensibly denied that CARU was competent to review the matter around the same time[334]. Both allegations obviously cannot be true. *Fourth*, according to Argentina's 27 October diplomatic note, President Battle promised to consult with Argentina before issuing ENCE's "contractual authorisation"[335]. Even accepting Argentina's (erroneous) depiction of events, it is not clear that the 9 October AAP was the contractual authorisation to which President Battle referred. Given the very preliminary nature of an AAP, it is more likely that President Battle

---

[331] *See* AR, paras. 2.78-2.82.

[332] AR, para. 2.78.

[333] Memorandum from Minister Counsellor Daniel Castillos to Ambassador Dr. Alberto Volonté Berro (28 October 2003). UCM, Vol. II, Annex 15.

[334] *See* AM, para. 2.26.

[335] Diplomatic Note No. 226/03, sent from the Embassy of Argentina to the Uruguayan Ministry of Foreign Affairs (27 October 2003). AM, Vol. II, Annex 20.

was referring to a later authorisation, such as the authorisation to construct the plant or even the final authorisation to operate.

3.92 In light of the above, it is therefore clear both (i) that Argentina and CARU were well aware of the ENCE and Botnia plants long before either company received its AAP from MVOTMA; and (ii) that neither CARU nor Argentina's delegates thereto stated (or even suggested) that they expected to receive notification pursuant to Article 7 before the AAPs were issued. Especially given CARU's undisputed power to request formal notification under the Statute, these facts constitute additional probative evidence that neither Party authentically considered notice to CARU to be required before the AAPs were issued.

3.93 In response to Uruguay's showing that notice to CARU was not due at the AAP stage, the Reply responds that "[l']argument du caractère 'préliminaire' des autorisations préalables est fallacieux car aucune des autorisations postérieures délivrées par l'Uruguay … n'ont été soumises à la CARU pour sa considération conformément à l'article 7 du Statut"[336]. According to Argentina, "non seulement n'a pas soumis à la CARU le projet Orion avant de délivrer l'AAP, mais il ne l'a pas fait *non plus après*"[337]. It is Argentina's argument that is "fallacious", for the reasons discussed immediately below.

---

[336] AR, para. 2.18 ("the argument of the 'preliminary' nature of these prior authorisations is fallacious, since none of the subsequent authorisations issued by Uruguay … were submitted to CARU to consider them as stipulated under Article 7 of the Statute").

[337] AR, para. 2.18 (emphasis in original) ("not only did Uruguay fail to submit the Orion project to the approval of CARU before issuing the AAP but it never submitted it, *not even subsequently*").

3.94 *First*, as explained in both the Counter-Memorial and Chapter 2 of this Rejoinder, it is not CARU's role to "approve" anything[338]. Indeed, Argentina itself admits this very fact in Chapter 1 of its Reply where it specifically agrees that "CARU does not approve or reject projects"[339].

3.95 *Second*, the fact that Uruguay never subsequently submitted the projects to CARU for a preliminary determination under Article 7 of the 1975 Statute is due to the fact, described above, that the Parties agreed between themselves to dispense with CARU's preliminary review under Article 7 and to proceed directly to government-to-government talks. In October 2003, with CARU paralysed and at Argentina's initiative, Uruguay's Foreign Ministry sent its Argentine counterpart a large amount of information concerning the ENCE project. Argentina's technical advisors to CARU proceeded to review that information and, in February 2004, came to the conclusion that the project did not pose a risk of harm. With CARU still at an impasse in March 2004, Foreign Ministers Bielsa and Opertti met and, on the basis of the advisors' February report, agreed that the plant would be built subject to monitoring by CARU. That understanding was later extended to Botnia, as Argentina itself has recognized at the highest levels. Still later, when mounting opposition in Argentina forced that government's hand, Uruguay agreed to additional talks about the plants under GTAN. It was Argentina that asked for these direct consultations under Article 12 of the Statute because, in its words, "a more direct intervention" than CARU could offer was necessary. Argentina thus has no cause to complain about the fact that CARU was never formally notified and called

---

[338] *See* UCM, paras. 2.188-2.205; *see also supra*, para. 2.12.

[339] AR, para. 1.158

upon to perform the preliminary review contemplated by Article 7. At Argentina's initiative on both occasions, in October 2003 (with respect to ENCE) and in May 2005 (with respect to Botnia), the Parties agreed to dispense with these procedural steps.

3.96 These facts deprive Argentina's repeated invocation of Uruguayan Ambassador Felipe Paolillo's comments at a 29 May 2006 symposium of any force. The Court may recall that on that date Ambassador Paolillo stated that "Uruguay has informed the Argentinean authorities about the projects and the construction works and, several times, provided the information requested by the Argentinean authorities. However, it did not follow the procedure provided in the Statute of the Uruguay River. Why? Because the authorities of the two nations, at the highest levels -- in one case, the Ministers of Foreign Affairs [ENCE], and in another, the Presidents of the two countries themselves [Botnia] -- agreed to other alternative procedures"[340]. In both the Memorial, and again in the Reply, Argentina insists that Ambassador Paolillo's comments somehow prejudice Uruguay's case[341]. Not at all. In fact, as the Court has read, they fully support Uruguay's legal position -- that Argentina and Uruguay "agreed to other alternative procedures" in place of those specified in Article 7 of the 1975 Statute. As has already been demonstrated the Parties agreed, at Argentina's request, to dispense with the initial procedures provided in the Statute in favor of direct information-sharing and consultation between the Parties themselves, something they had every right to do. Argentina

---

[340] Press release from the Presidency of the Republic of Uruguay, "Uruguay informs about the construction of Cellulose Plants" (29 May 2006). AM, Vol. VI, Annex 13.

[341] *See* AM, para. 4.73; *see also* AR, para. 2.2.

may not now pretend that it never agreed with Uruguay to dispense with these procedural steps and try to hold Uruguay accountable for proceeding directly to State-to-State consultations, as Argentina invited it to do, rather than formally notifying CARU and waiting 30 days for its summary determination before engaging in the direct consultations. In these circumstances, Uruguay cannot honestly be accused of violating Article 7. The evidence plainly shows that it did not.

Section II.
The Evidence Regarding Argentina's Claim that Uruguay Violated the 1975 Statute by Implementing the Botnia Project Before the Court Has Rendered Its Judgment in This Case.

A. URUGUAY COMPLIED WITH ITS PROCEDURAL OBLIGATIONS DURING CONSULTATIONS.

1. Uruguay Participated in Consultations in Good Faith

3.97 As Uruguay explained in Chapter 2 of the Counter-Memorial, the Parties' foremost duty during consultations is to participate in the process in good faith with an open mind and willingness to take into account the other side's views[342]. The Parties are not obligated to agree with each other, but they are obligated to listen to and take each other's views into consideration. And as Uruguay described in Chapter 3 of the Counter-Memorial, it did just that during the Article 12 consultations conducted under the auspices of GTAN. Nowhere either in the Memorial or most recently in the Reply does Argentina dispute Uruguay's good faith in the GTAN process. It should therefore be taken as admitted.

3.98 If either Party can be accused of a lack of good faith in the GTAN process, that Party is Argentina. Argentina's behavior in the GTAN process showed that it

---

[342] *See* UCM, para. 2.174.

was intent on frustrating not just an agreement but any kind of meaningful progress. So, for example, Argentina flooded Uruguay with information requests that far exceeded any conceivable interpretation of Uruguay's information-sharing obligations under the Statute. It asked Uruguay to generate a wealth of new data and studies -- most of which Uruguay produced in its efforts to accommodate Argentina -- and sought information bearing on subjects that had nothing whatever to do with the effect of the projects on navigation, the régime of the river or the quality of its water.

3.99 Perhaps the best illustration of Argentina's approach to the GTAN process was discussed at paragraph 3.105 of the Counter-Memorial. As described there, the water quality sub-group was engaged in a previously scheduled meeting in Buenos Aires in late in the GTAN process to finalize the text of its report on the effects of plant emissions on water quality. The group had made substantial progress and was able to reach agreement on a large number of points. In the middle of the group's meeting, however, Argentina's Ambassador García Moritán (the same Ambassador Moritán who headed Argentina's delegation to CARU) came into the room and perfunctorily announced without explanation that the session was over and the group's work terminated[343]. As a result, the report was never finalized and all the progress the group had made went to waste.

2. Uruguay Provided More Than Adequate Information

3.100 Under the third paragraph of Article 7 of the 1975 Statute, the initiating State is required to provide the notified State with information describing "the main

---

[343] *See* UCM, para. 3.105.

aspects of the work and, where appropriate, how it is to be carried out" and to "include any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the regime of the river or the quality of its waters"[344]. The ILC commentary to the 1997 Watercourse Convention, which reflects the content of general international law, suggests that a "notifying State is not required to conduct additional research at the request of a potentially affected State, but must only provide such relevant data and information as has been developed in relation to the planned measures and is readily accessible"[345]. The Reply does not question either of these points as matters of law.

3.101 As a matter of fact, the Reply is all but silent on the issue of the quality and quantity of information it received from Uruguay. Only one paragraph (in Chapter 2) even addresses the issue[346], notwithstanding the fact that Uruguay devoted nearly twenty-five pages of the Counter-Memorial to detailing the array of information Uruguay provided to Argentina both before and during the GTAN process[347]. Argentina's lone paragraph states meekly that even if "l'information transmise à l'Argentine était plus que suffisante – à supposer même qu'elle soit avérée, *quod non* – ne sert pas non plus à justifier le comportement uruguayen" because a party cannot "s'ériger en juge de sa propre information", and "[l']Argentine est en droit de considérer que l'information transmise était imcomplète et/ou inadéquate, tout comme l'Uruguay a le droit d'avoir l'avis

---

[344] 1975 Statute, *op. cit.,* Art. 7. UCM, Vol. II, Annex 4.

[345] 1994 Draft Articles, *op. cit.,* p. 112, comment 5.

[346] *See* AR, para. 2.42.

[347] *See* UCM, paras. 3.86-3.106.

opposé"[348]. Argentina is entitled to have its opinion, but it is not entitled to have the Court adopt it unless it furnishes sufficient evidence to support it. Argentina furnishes none. It fails to state how or in what ways the voluminous information supplied by Uruguay was "incomplete and/or inadequate". Given the thoroughness of Uruguay's presentation on this point, the weakness of Argentina's argument is apparent.

3.102 The *only* support that Argentina offers for its assertion that Uruguay's information was insufficient is that a DINAMA Report issued in February 2005 found some problems with Botnia's EIA, and that on 27 March 2006, IFC advisors believed that sufficient information had not been provided in the IFC's original Cumulative Impact Study ("CIS")[349]. Yet, even if both assertions are true, they say nothing about the sufficiency of information Uruguay supplied to Argentina. The information given to Argentina about Botnia was not limited to the EIA; much more was given. Indeed, the Counter-Memorial contains an 11-page, single-spaced list of all the information Uruguay gave Argentina in the context of GTAN, none of which Argentina disputes[350].

3.103 With respect to Argentina's reliance on the March 2006 Report from the IFC, Uruguay already showed in the Counter-Memorial that such reliance is misplaced[351]. The consultants who prepared the report were focused on the

---

[348] AR, para. 2.42 ("the information sent to Argentina was more than enough -- supposing even that it would be proven, *quod non* -- is not enough to justify Uruguay's conduct", "be the judge of its own information", "Argentina is entitled to consider that the information sent was incomplete and/or inadequate, just as Uruguay is entitled to have the opposite opinion.").

[349] *See* AR, para. 2.42.

[350] UCM, para. 3.100.

[351] UCM, para. 3.103.

adequacy of the IFC's own CIS, not on the adequacy of the information in the Botnia EIA or the information Uruguay gave to Argentina before or during the GTAN process.

3.104 Argentina's own conduct demonstrates the adequacy of the information Uruguay gave it. As discussed above, in February 2004, Argentina's technical advisors to CARU reviewed the information Uruguay had sent to Argentina's Foreign Ministry in October and November of 2003, and issued their report concluding that "there would be no significant environmental impact on the Argentina side"[352]. This same conclusion was echoed by Argentina's delegates to CARU in May 2004 when Dr. Darío Garín so emphatically stated: "It must be pointed out, with complete and absolute emphasis, that none of the different technical reports evidence that the activity in question causes an irreversible and unavoidable damage to the environment…"[353]. Dr. Garín's statements were seconded by another Argentine delegate, Dr. Héctor Rodriguez, who "adopt[ed] as his own" Dr. Garín's comments[354].

3.105 The information concerning Botnia was even more abundant. During the 12 GTAN meetings convened over the course of six months, Uruguay gave Argentina all the information set forth on the 11-page list contained in the Counter-Memorial, as noted above. Given that the more limited information concerning ENCE had clearly been sufficient for Argentina to review the impact of that plant,

---

[352] Statement by Argentine Ministry of Foreign Affairs to the Chamber of Deputies, *op.cit.,* p. 136. UCM, Vol. III, Annex 46. *See also* UCM, para. 3.96.

[353] CARU Minutes No. 01/04, pp. 18-19 (15 May 2004). UCM, Vol. IV, Annex 99.

[354] *Ibid.* p. 23.

the vastly more extensive information concerning Botnia must certainly have been sufficient as well.

3. Uruguay Engaged Only in Preparatory Works

3.106 Although Argentina does not challenge the fact that Uruguay consulted with it in good faith during the GTAN process, it argues that Uruguay nonetheless violated its procedural obligations during this time. In particular, Argentina argues that Uruguay undertook more than mere preparatory works in furtherance of the Botnia project while GTAN consultations were on-going[355].

3.107 As Uruguay explained in the Counter-Memorial, and reiterated in Chapter 2 of this Rejoinder, the 1975 Statute is silent as to whether or not the notifying State may or may not implement a project while consultations are ongoing[356]. General international law provides that the initiating State should refrain from implementing a project during that period. That does not mean, however, that all work must be stopped. Instead, preparatory work is permitted[357]. Notably, Argentina nowhere disputes this principle.

3.108 What Argentina does argue is that "[a]u moment de la fin de l'activité du GTAN en février 2006, il est difficile d'accepter que les travaux de foundation de l'usine Orion et sa cheminée, ainsi que le post par lequel la pâte à papier sera acheminée, revêtaient un caractère 'préliminaire'"[358]. While Argentina may purport

---

[355] *See* AR, paras. 2.59-2.64.

[356] *See* UCM, paras. 2.179-2.182.

[357] Kirgis, F., *Prior Consultation in International Law: A Study in State Practice*, Charlottesville, University Press of Virginia, 1983, p. 75.

[358] AR, para. 2.61 ("it is difficult to accept that, at the time when GTAN's activity ended, in February 2006, the foundation work of the Orion plant foundation and its road, as well as the port through which the pulp would be shipped had a 'preliminary' character").

to find this "difficult to accept," it is nonetheless true. None of the specific steps authorized by Uruguay threatened to foreclose meaningful consultations about the elements of the plant that could conceivably cause environmental impacts, such as the bleaching technology to be employed, the facilities for or methods of waste water treatment, the nature and location of discharges into the river, etc. Merely laying the groundwork for the plant, as Uruguay did, did not constitute anything more than preparatory works.

3.109 It was only on 18 January 2006 that Uruguay might be said to have taken a step that was not purely preparatory, when it authorized the construction of the Botnia bleached cellulose plant. Although the Reply suggests that GTAN activities ended in February 2006, the truth is that they formally ended in January and were effectively over more than a month before that in December 2005. In its diplomatic note dated 14 December 2005, Argentina itself declared consultations "on the way to an impasse" and set the stage for filing its Application to this Court[359]. The same position was reiterated twice subsequently on 26 December and 12 January[360]. Significantly, even as the Reply attempts to make it seem that GTAN was on-going through February 2006, it nowhere denies the existence of an impasse in December 2005. The relevant period for measuring when Uruguay became entitled to undertake more than preparatory works is thus December 2005. That Uruguay then proceeded to authorize the construction of the Botnia plant a month later, in January 2006, after the consultations had ended, affords Argentina no grounds for complaint.

---

[359] UCM, para. 3.117.

[360] *See* UCM, para. 3.114.

*

3.110 Before concluding this subsection, Uruguay pauses to make some brief observations on Argentina's complaint that Uruguay has also violated the Statute by constructing the Botnia port and bringing it into operation in 2007. The facts concerning the port were thoroughly set out in the Counter-Memorial and need not be revisited here[361]. The point to emphasize is that Argentina offers no serious basis to oppose the port. As Uruguay demonstrated in the Counter-Memorial, the port is environmentally innocuous, and Argentina nowhere contends to the contrary. Neither in the Memorial nor more recently in the Reply does Argentina argue that the port will cause any harm, let alone significant harm to navigation, the régime of the river or the quality of its water. Given that Argentina has had all the pertinent technical data in its possession since at least October 2005, it can be presumed that if Argentina had a substantive basis to oppose the project, it would have said so. In this connection, it bears recalling that the Botnia port is significantly smaller than the M'Bopicuá port which CARU summarily determined posed no threat to the river in 2001. Rather than allow CARU to consider the project, Argentina instead has chosen to stymie the Commission's work entirely by refusing to let the topic be addressed at all.

3.111 It also bears recalling that Uruguay showed in the Counter-Memorial that Argentina has repeatedly authorized port construction and rehabilitation projects on its side of the Uruguay River without bothering to notify Uruguay or CARU, let alone to consult with Uruguay[362]. Argentina's Reply does not -- because it cannot --

---

[361] *See* UCM, paras. 3.77-3.80.

[362] *See* UCM, para. 3.80.

challenge any of these facts. The Botnia port thus stands as yet a further example of Argentina's efforts to hold Uruguay to standards by which it cannot be bothered to abide itself.

B. URUGUAY COMPLIED WITH ITS PROCEDURAL OBLIGATIONS DURING DISPUTE RESOLUTION

3.112 After the end of the GTAN process, Uruguay did in fact take steps to move toward the implementation of the Botnia project. As just noted, on 18 January 2006, Uruguay authorized Botnia to begin construction of the plant itself. On 4 July 2007, Uruguay approved Botnia's wastewater treatment system; on 31 October 2007, DINAMA approved Botnia's Environmental Management Plan, an umbrella management plant containing 11 annexes addressing various aspects of the plant's operations; and on 8 November 2007, Botnia received its AAO authorizing operations. The plant began operations on 9 November 2007.

3.113 Argentina challenges Uruguay's implementation of the project as inconsistent with the terms of the 1975 Statute. In Argentina's view, Uruguay was obligated to desist from carrying out the work until such time as this Court renders its final judgment on the merits. Uruguay's response to this argument turns not on the facts, which are not in dispute, but rather on the law. In particular, as shown in Chapter 2 of this Rejoinder, Argentina's view of the law is plainly incorrect. The Statute permits the initiating State to implement a project following the end of consultations, and while dispute resolution proceedings are under way, unless and until the Court rules otherwise.

3.114 Because Uruguay's analysis of the law has already been fully elaborated in Chapter 2 above, it will not be repeated in detail here. Instead, Uruguay respectfully refers the Court back to Section II.B. of the previous Chapter where the pertinent

analysis is presented. It is sufficient for present purposes to note that the 1975 Statute does not expressly address the question now under consideration. It states neither that the initiating State may carry out a planned project during dispute resolution proceedings nor that it may not. Argentina's argument that the Statute prohibits implementation is based entirely on an *a contrario* reading of Article 9 of the Statute which provides merely that "if the notified Party raises no objections" within the mandated period, "the other Party may carry out" the planned project. But as shown in Chapter 2, Article 9 cannot bear the weight of Argentina's argument.

3.115 This is perhaps most easily demonstrated by reference to Article 16 of the 1997 UN Watercourse Convention. The Watercourse Convention expressly permits implementation of a planned project after the period for consultations has expired, even if dispute resolution procedures have been invoked. Of particular interest, Article 16 of the Watercourse Convention is susceptible to exactly the same *a contrario* reasoning that Article 9 of the 1975 Statute is. Stripped of unnecessary verbiage (which contains only internal cross-references), Article 16 reads: "If, within the period applicable to [replies to notifications], the notifying State receives no communication [concerning objections to projects], it may … proceed with the implementation of planned measures"[363]. Adopting Argentina's logic, one could equally turn this provision around to mean that if the notifying State does receive a communication objecting to the project, it may not implement it, at least until all dispute resolution procedures have been exhausted. But that is not what the

[363] 1997 Watercourse Convention, *op. cit.,* Art. 16.

Convention does. It permits implementation at the end of consultations. That it does so, at a bare minimum, contradicts Argentina's *a contrario* reading of Article 9.

3.116 It also bears reiterating that Argentina now expressly recognizes that the 1975 Statute does not give either Party a veto right over the projects of the other, and that the Statute is designed to avoid what Argentina labels "blockages" because that "viderait de substance l'équilibre réalisé par le Statut entre les intérêts des deux Parties"[364]. This point too is critical because giving the Statute the reading Argentina advocates would create a "blockage" for a period not just of months, but for years as a case is heard to conclusion by the Court. Although perhaps not a *de jure* veto, such a sustained delay would plainly constitute the *de facto* equivalent. And since Argentina admits that a veto right is inconsistent with the scheme of the Statute, the interpretation it now presses on the Court must, under its own reasoning, be rejected.

3.117 Uruguay showed in Chapter 2 that none of this means that the notified State must accept a *fait accompli*. Uruguay accepts that the Court retains the power to order the dismantling of a project that has already entered operation if it concludes that the circumstances so warrant. It is thus up to the initiating State to decide whether or not it wants to bear the risk associated with implementing a project that is the subject of active opposition from the notified State while dispute resolution proceedings are under way. In effect, the operative question before the Court is which of the Parties' two readings of the Statute constitutes the preferable *interim* solution pending final decision of the Court, either (i) forbidding implementation at

---

[364] AR, para. 1.120 ("would substantially dissipate the balance achieved by the Statute between the interests of the two parties.").

the end of consultations, with the veto power that would effectively confer, or (ii) allowing implementation subject to the Court's power to order a return to the *status quo ante* upon resolution of the dispute. Particularly given the availability of provisional measures as a way to protect the notified State from likely irreparable harm, Uruguay submits that the choice between the alternatives offered by the Parties is clear. Implementation pending the final decision of the Court is consistent with the language of the Statute as well as its object and purpose. Accordingly, Uruguay's decision to authorize the implementation of the Botnia plant after consultations ended and while dispute resolution proceedings were in progress was entirely consistent with the terms of the 1975 Statute.

Conclusion

3.118 Uruguay has now come to the end of Part I of this Rejoinder addressing the procedural aspects of Argentina's case. As discussed first in Chapter 2 and reiterated in this Chapter 3, there are, in essence, just two fundamental procedural points of dispute between the Parties: (i) whether CARU's role in the Articles 7-12 process in indispensable, or whether the Parties are free, by mutual agreement, to proceed directly to bilateral consultations over planned projects without awaiting CARU's summary determination; and (ii) whether the initiating Party may implement a planned project at the conclusion of consultations and while dispute resolution is in progress.

3.119 In Chapter 2, Uruguay responded to the analysis of Articles 7-12 set forth in Chapter 1 of Argentina's Reply and showed that that analysis is riddled with errors and inconsistencies. In particular, Uruguay showed that:

- CARU's substantive functions under the 1975 Statute are both extensive and critical. According to the Statute's plain text, however,

the Commission's role in the procedural mechanisms created by Articles 7-12 is limited. The Commission conducts a preliminary technical review of a project for purposes of determining whether direct consultations between the Parties are necessary. Once that preliminary review is complete, the Commission's role is all but over;

- The Statute does *not* require notice to CARU before the initiating State may issue a preliminary, contingent authorisation like an AAP. What it requires is notice that is "timely" in the sense it is given in sufficient time to allow the remaining procedures stipulated in Articles 7-12 to run their course before a project is implemented;

- There is no legal or logical reason the Parties may not agree to skip CARU's preliminary review and proceed to direct consultations at any mutually agreed moment;

- Subject to the Court's power to indicate provisional measures and to order the dismantling of a project in its Judgment on the merits, the initiating State is -- *as an interim solution* -- permitted to implement a project after consultations have ended but before dispute resolution proceedings are over; and

- Absent a finding by the Court that a project is likely to cause significant harm to navigation, the régime of the river or the quality of the river, there is no cause to order the modification or dismantling of a project, even if a procedural violation has occurred.

3.120 In this Chapter 3, Uruguay responded to the factual allegations of in Chapter 2 of Argentina's Reply and showed that at all times Uruguay complied with its procedural obligations under the 1975 Statute. In particular, Uruguay showed that:

- At Argentina's initiative, the Parties agreed to address the issues presented by both the ENCE and Botnia plants directly at a State-to-State level instead of submitting them to CARU for a preliminary review;

- Not only did the Parties agree to proceed to immediate direct consultations, they also agreed that both plants would be built;

- As a result of the Parties' agreements, Uruguay was not obligated to notify the Commission or await its "summary determination" under Article 7 before issuing AAPs to either company, or proceeding with implementation of the projects;

- The ENCE project as initially conceived was abandoned before any implementation of the project took place, and the Botnia project was not implemented until after consultations had ended; and

- While implementation of the Botnia project has, in fact, gone forward during dispute resolution proceedings before the Court, that is not prohibited by the 1975 Statute or general international law.

3.121 For all the reasons thus articulated, Argentina's procedural submissions can and should be rejected.

3.122 With this, Part I of this Rejoinder is complete. Uruguay will now turn to Part II, which will address the environmental claims that make up Argentina's substantive case. Part II will show that those claims too are without merit, and should be rejected by the Court.

PART II

CHAPTER 4.
THE EVIDENCE REGARDING START-UP AND OPERATION OF THE BOTNIA PLANT

Introduction

4.1 The Botnia plant has not harmed the Uruguay River or the organisms that live in it. This is the unqualified conclusion not only of Uruguay and Botnia, but also of the independent technical experts retained by the IFC to provide an impartial evaluation of the plant's potential impacts. The conclusions of these technical experts categorically demonstrate the environmental suitability of the Botnia plant and are fatal to Argentina's attempts to show otherwise.

4.2 The IFC, in addition to commissioning the Final CIS (which, along with the Botnia EIA, exhaustively assessed the plant's potential impacts), arranged for equally extensive technical evaluations prior to start-up of the plant. These evaluations showed beyond a doubt that the plant was ready for operation; in the words of the IFC, it proved that the plant "will not cause harm to the environment" and "will comply with the IFC and MIGA's environmental and social policies". Among their findings, the IFC's independent experts concluded that the Botnia monitoring programs were "extremely comprehensive and exceed the commitments identified in the CIS"[365]; that Botnia was "well-positioned from an organizational aspect to meet its operational objectives including its environmental management goals"[366]; and that the plant uses "[m]odern process technologies" which "promise to perform with low emission and world-leading environmental performance"[367].

---

[365] International Finance Corporation (hereinafter "IFC"), *Orion Pulp Mill, Uruguay Independent Performance Monitoring as Required by the International Finance Corporation (Phase I: Pre-Commissioning Review)* (hereinafter "*Pre-Commissioning Review*"), p. ES.iv (November 2007). UR, Vol. III, Annex R50.

[366] AMEC Forestry Industry Consulting, *Orion BKP Mill Pre-Startup Audit* (hereinafter "*Pre-Startup Audit*"), p. 2 (September 2007). UR, Vol. III, Annex R48.

[367] *Ibid.,* pp. 5-6.

4.3 The sanguine views of the IFC's impartial technical experts have been fully realized by the actual operational performance of the Botnia plant. To verify that the plant was operating in accordance with all Uruguayan, CARU and permit standards, and that it was having no impact on the river, the IFC commissioned an exhaustive follow-up study. Based on the first six months of operation, its independent experts concluded without qualification that "all indications are that the mill is performing to the high environmental standards predicted in the EIA and CIS"[368]. Their technical analysis found that not only is the plant's effluent entirely within the required regulatory limits but also that the effluent characteristics are fully consistent with the predictions made in the Final CIS. Given that the effluent was within the permitted levels, the IFC's technical experts made a crucial (and, to Argentina's case, devastating) finding -- the Botnia plant has had absolutely no adverse impact on the environmental quality of the river. In the words of the IFC's technical experts, "comparison of monitoring data pre-and post-start-up shows that the *water quality characteristics of the Rio Uruguay have not changed as a result of the discharge of mill effluent discharge*"[369]. Put simply, Argentina's predictions of environmental degradation have been proven wrong.

4.4 As the Court has no doubt noticed, Argentina's case rests entirely on speculative predictions about the environmental performance of the Botnia plant. In fairness, Argentina had no other choice, because a cellulose plant cannot, by

---

[368] IFC, *Orion Pulp Mill, Uruguay Independent Performance Monitoring As Required by the International Finance Corporation (Phase 2: Six-Month Environmental Performance Review)* (hereinafter "*Environmental Performance Review*"), p. ES.ii (July 2008). UR, Vol. IV, Annex R98.

[369] *Ibid.*, p. 4.3 (emphasis added).

definition, cause emissions before it is operational and Argentina's submissions were prepared before the plant began to operate. Now that the plant is in operation, however, Argentina can no longer rely on criticism of the environmental analysis of Uruguay, the IFC and others, or on its own conclusory forecasts of catastrophic damage to the river, because there are actual operating data and environmental quality monitoring results which reveal the plant's performance. This Chapter demonstrates that those data and results comprehensively refute Argentina's case on alleged substantive harm. The evidence is indisputable that the Botnia plant is not harming the environment of the Uruguay River.

4.5 This Chapter is divided into 3 sections. Section 1 describes the exhaustive measures that Uruguay, Botnia and the IFC undertook before allowing the plant to operate in order to ensure that it does not have any detrimental environmental impact. It shows that Uruguay, among other things, required that Botnia adopt elaborate environmental management and contingency plans to ensure that the plant operates safely and without impacting the Uruguay River or the aquatic environment. Only after Uruguay approved these plans, after studious review, was Botnia authorized to begin operating the plant. In parallel with Uruguay's regulatory actions, prior to commencement of operation, the IFC and its associated technical experts undertook extensive scientific evaluations to verify its compliance with BAT and its ability to operate without detrimental impacts. Section 1 shows that, in the view of the IFC, technical reviews of the Botnia plant by independent experts "confirm[ed] that the Orion pulp mill will generate major economic benefits for

Uruguay and will not cause harm to the environment"[370]. Further, Section 1 details the comprehensive pre-operational monitoring conducted by Uruguay and Botnia of the Uruguay River, its sediments and aquatic life, in order to amass a sufficient store of data against which to measure any potential environmental impacts.

4.6 Section 2 shows that the Botnia plant has not caused any environmental harm during the first six months of actual performance by the plant. The operational results confirm that the plant has functioned in conformity with the IFC's projections and has not perceptibly impacted the environmental quality of the Uruguay River, as determined by the IFC's own independent technical experts. The results also confirm that the plant has met or exceeded Botnia's regulatory obligations under Uruguayan law and under CARU regulations, both with respect to the concentrations of all relevant parameters in the plant's effluent and with regard to its impact on the water quality of the river. Section 2 demonstrates that the first six months of operation are all the more remarkable because during its start-up phase a cellulose plant is expected to operate below its long-term environmental performance. That, during even this initial period the Botnia plant is already operating in conformance with the IFC's estimates and Uruguayan law, is a testament to its world-class, state-of-the-art technology, precisely as predicted in the Final CIS. The conclusion that the plant has not impacted the environment is widely held: as one Argentine news

[370] IFC Web Site, Latin America & the Caribbean, "Orion Pulp Mill - Uruguay," *available at* http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_Pulp_Mills (last visited on 2 July 2008). UR, Vol. III, Annex R80.

source reported, there have been "no reports that show that the plant contaminates the environment"[371].

4.7 Section 2 also documents other important developments in Uruguay's continuing efforts to preserve and protect the Uruguay River from nutrient-induced eutrophication, the only concern discussed in any detail by Argentina in its Reply. Because the plant has not and will not cause any of the impacts hypothesized by Argentina, these actions cannot be considered "remedial" or "compensatory" for the operation of the plant, nor are they necessary to avoid impacts that would otherwise be caused by the plant. They are, however, responsible measures taken by a State committed to preserving and improving the environmental quality of the resources it controls. The efforts described in Section 2 include a groundbreaking agreement to treat the Fray Bentos municipal sewage in Botnia's advanced wastewater treatment plant; major World Bank-backed investments to improve the sewage treatment of other Uruguayan cities along the river; and a far-reaching program to minimize nutrient discharge from non-point sources. Although Uruguay has shown conclusively in its Counter-Memorial and in this Rejoinder that the Botnia plant will not have adverse effects on the river, which has been confirmed by actual operational data, these actions will further reduce Uruguay's overall discharge of nutrients to the river, thereby rendering any potential for eutrophication even more remote.

4.8 Finally, Section 3 demonstrates the comprehensive procedures that Uruguay has implemented to ensure that if any impacts were to occur, they would be

---

[371] Infobae.com, "Eight Months After Start-up, Experts Agree that Botnia Does Not Contaminate" (3 July 2008). UR, Vol. IV, Annex R93.

detected and addressed immediately. This includes a summary of the actions Uruguay and Botnia have taken, and will continue to take throughout the life of the plant, to ensure the absence of any environmental impacts by comprehensively monitoring the plant's effluent, the water quality of the river and any potential impacts to its biota. Put simply, if unacceptable impacts were unexpectedly to materialise, Uruguay has both the legal regime and the monitoring program in place to ensure that they are eliminated without delay.

Section I.
Prior to Uruguay's Authorisation of Operations, the Botnia Plant Was Subject to Comprehensive Evaluations by Both Uruguay and the IFC to Ensure It Would Not Harm the Environment

4.9 For years prior to allowing the Botnia plant to commence operation, Uruguay's regulatory authorities subjected the plant to searching scrutiny and, in accordance with its authorisations and Uruguayan law, required that Botnia apply for, and receive, a succession of regulatory permits. Proceeding in parallel with Uruguay's program, the IFC conducted its own review of the plant to ensure that it was fully protective of the environment before it commenced operation. This Section demonstrates that before Uruguay permitted the plant to operate, Uruguay and the IFC independently confirmed its environmental suitability.

4.10 As explained in detail in the Counter-Memorial, Uruguay granted Botnia its Initial Environmental Authorisation (AAP), on 14 February 2005[372]. Botnia's AAP was merely the first stage in the permitting process and did not, itself, allow Botnia to engage in any construction or related activities, let alone begin to operate. Under the terms of the AAP, final authorisation was contingent upon, among other

[372] UCM, para. 4.92.

things: the approval by DINAMA of detailed environmental management plans for each phase of construction; detailed environmental management plans for the operation of each component of the plant, including contingency plans to address a host of potential issues; completion of extensive baseline environmental quality monitoring; and the presentation of an acceptable post-operational environmental monitoring program. In addition, Botnia was required to receive an approval of its wastewater treatment system from DINAMA[373] and, ultimately, an Authorization to Operate (AAO)[374].

4.11 At the time Uruguay submitted its Counter-Memorial, Botnia had partially completed this regulatory course. It had received its AAP and Wastewater Treatment System Approval, as well as the necessary approvals of the environmental management plans for the construction phase of the project. However, Uruguay had not yet issued any of the other required permits. Ultimately, after extensive review by DINAMA, Uruguay determined that Botnia had complied with the requirements of the AAP and Uruguayan law, and as a result, issued Botnia's AAO on 8 November 2007[375].

---

[373] Decree No. 253/79, Regulation of Water Quality (9 May 1979, as amended) (hereinafter "Decree No. 253/79"), Arts. 28-29. UCM, Vol. II, Annex 6.

[374] Decree No. 349/005, Environmental Impact Assessment Regulation revision, Art. 23 (21 September 2005). UCM, Vol. II, Annex 24. In accordance with the AAP, MVOTMA Initial Environmental Authorisation for the Botnia Plant, Art. 2(d) (14 February 2005), UCM, Vol. II, Annex 21, Uruguay required that Botnia submit an update of its Environmental Impact Assessment, prior to the issuance of the AAO. The update, among other things, provided an expanded description of the plant's operations, an updated discussion of the water dispersion study from the diffuser, and an updated air dispersion study with meteorological data as well as a study of the thermal inversion layer. (Second) Affidavit of Eng. Alicia Torres, National Director of DINAMA (24 June 2008) (hereinafter "(Second) Torres Aff."), para. 4. UR, Vol. IV, Annex R92.

[375] MVOTMA Authorisation to Operate for the Botnia Plant (8 November 2007) (hereinafter "Botnia AAO"), Secs. III, VI & VII. UR, Vol. II, Annex R6. Certain works were pending but

4.12 While the Botnia plant was being scrutinized by the Uruguayan regulatory authorities, it was simultaneously subject to an equally searching review pursuant to the terms of its financing arrangements with the IFC. In the Counter-Memorial, Uruguay described how the IFC, after subjecting the Botnia plant to extensive review, determined it would "cause no environmental harm" and that it complied with the World Bank environmental and social guidelines, based on a Final CIS prepared by the independent technical experts EcoMetrix[376].

4.13 Uruguay will not burden the Court by repeating the Final CIS's conclusions here, other than to note that the Final CIS included recommendations regarding certain actions to be taken to address environmental and social issues. To ensure that the Botnia plant complied with those recommendations, Botnia and the IFC agreed that the company would implement a 16-item Environmental and Social Action Plan ("ESAP"). The ESAP included action items relating to such environmental issues as independent monitoring of environmental and social performance; independent verification of process and preparedness; hazardous materials; emergency preparedness and response; conservation; and solid waste. The IFC required in the ESAP that each such topic be subject to review by its technical advisors.

---

were found to involve no technical or environmental impediment to the commencement of operations. *Ibid.*, Sec. II. The AAO required that these works be completed by 31 December 2007, *ibid.*, Sec. II, a condition with which Botnia complied. *See* DINAMA Resolution Approving Further Works Pursuant to the Authorisation to Operate (31 December 2007). UR, Vol. II, Annex R7.

[376] UCM, para. 5.48. Faced with such a categorical endorsement by an indisputably independent multilateral organization and its impartial technical experts, Argentina's Reply did not challenge the independence or objectivity of either the IFC or its experts. Nor could it, since Argentina had on previous occasions recognized them as "indepéndants". *See, e.g.*, Application of Argentina, 4 May 2006, para. 20 (referring to the authors of the CIS as "experts indépendants") ("independent experts").

4.14 On 13 November 2007, the IFC released two reports, prepared by separate sets of "independent external consultants" -- to use the IFC's words -- who had been tasked with reviewing the status of each of the 16 action items in the ESAP[377]. These reports concluded that Botnia had completed each such item or was on schedule to do so. As these same experts later noted, "[p]rior to the commissioning of the mill, EcoMetrix undertook an independent review to confirm compliance with the commitments detailed in the ESAP. It concluded that the requirements identified in the ESAP had been achieved, and, for many of the identified actions, the minimum requirements had been exceeded."[378]

4.15 The analyses contained in the IFC's expert reports verified the environmental suitability of the Botnia plant. That was certainly the conclusion of the IFC, which upon the reports' release, stated that they demonstrated "that Botnia's Orion pulp mill in Uruguay is ready to operate in accordance with IFC's environmental and social requirements and international BAT standards"[379]. The IFC concluded that the reports, in conjunction with an updated ESAP released the same day, "confirm[ed] that the Orion pulp mill will generate major economic benefits for Uruguay *and will not cause harm to the environment*"[380]. The IFC therefore found that "*the mill will comply with IFC and MIGA's environmental and*

---

[377] IFC Web Site, Latin America & the Caribbean, "Orion Pulp Mill - Uruguay," *available at* http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_Pulp_Mills (last visited on 2 July 2008). UR, Vol. III, Annex R80.

[378] *Environmental Performance Review*, *op. cit.*, p. 1.1. UR, Vol. IV, Annex R98.

[379] IFC Web Site, Latin America & the Caribbean, "Orion Pulp Mill - Uruguay," *available at* http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_Pulp_Mills, *op. cit.* UR, Vol. III, Annex R80.

[380] *Ibid.* (emphasis added).

social policies while generating significant economic benefits for the Uruguayan economy"[381].

4.16 The first expert report, entitled *Orion Pulp Mill, Uruguay, Independent Performance Monitoring as Required by the International Finance Corporation, Phase 1: Pre-Commissioning Review* ("*Pre-Commissioning Review*"), was prepared by EcoMetrix, the same independent technical experts who drafted the Final CIS[382]. This was the first of four planned reports to be published over a two-year period regarding the ESAP's requirements for Independent Monitoring of Environmental and Social Performance. As the *Pre-Commissioning Review* itself explained, its purpose was: (1) "to review the environmental, health, safety and social monitoring program" for the Botnia plant to "verify that it has been designed according to plan and serves the purpose of stakeholders"; and (2) to "review the progress of Botnia in meeting commitments detailed in the ESAP"[383]. As noted above, the IFC, based on the report of its technical experts, concluded that both objectives were fully satisfied.

4.17 Second, as described in more detail below, to fulfil the ESAP requirement for independent verification of process and preparedness, another set of independent experts (AMEC) audited the Botnia plant's technology to verify that it was fully compliant with BAT. Again, these experts confirmed the plant's environmental fitness.

---

[381] *Ibid.* (emphasis added).

[382] *See Pre-Commissioning Review, op. cit.* UR, Vol. III, Annex R50.

[383] *Ibid.*, p. ES.i. Although Argentina made passing references to the *Pre-Commissioning Review* in the Reply, the Applicant State neglected to inform the Court that the report categorically affirmed the plant's environmental suitability. It therefore falls to Uruguay in this Rejoinder to identify for the Court the salient points of the *Pre-Commissioning Review*.

4.18 In the paragraphs that follow, Uruguay describes in more detail the thorough review to which Uruguay and the IFC have subjected the Botnia plant.

A. THE IFC'S TECHNOLOGY AUDIT FOR COMPLIANCE WITH BAT

4.19 As discussed in detail in the Counter-Memorial, Uruguay required confirmation that the Botnia plant complies with BAT in all respects. The IFC imposed the same obligation, and required that the plant be subject to an independent audit prior to commissioning to verify that it was designed and would operate in accordance with BAT (in fulfilment of the ESAP's Independent Verification of Process and Preparedness requirement). The independent technical experts from the international engineering consulting firm AMEC were contracted to provide: (1) "[i]ndependent verification that the mill has been constructed as described in the EcoMetrix Cumulative Impact Study (i.e., to meet EU IPPC BREF standards of performance for Kraft Pulp Mills)"[384]; and (2) confirmation of "the preparedness of the mill to commence operations prior to start-up"[385]. The IFC required these consultants to conduct a comprehensive assessment of the technical components and protocols for the plant; in particular, they were mandated to:

> (1) Review the specifications of all installed major equipment to ensure consistency with the description of the mill in the CIS;
>
> (2) Review the training programs for operators, maintenance personnel and their supervisors and recommend corrective action as necessary;
>
> (3) Review the written procedures for ensuring that each piece of equipment, and system, is ready to be commissioned

---

[384] *Ibid.*, p. ES.vii

[385] *Ibid.*

> before the start-up of the digesting process. Follow-up to ensure that these procedures are followed completely in operations; and
>
> (4) Verify that before any effluent flows out of the system, or stack gases are vented, the appropriate monitoring equipment, laboratory procedures and environmental management systems are operating[386].

4.20 In sum, AMEC was retained to, in the words of the IFC, "assess[] whether the Orion pulp mill in Uruguay has been built to BAT standards and whether plant operators have been adequately trained"[387].

4.21 AMEC's audit of the Botnia plant proceeded in two stages, involving both site visits and extensive review of documentation. In Phase I, AMEC undertook to "[r]eview process equipment installed or planned to be installed at the Orion mill, with particular emphasis on those facilities that influence or control the quantity and quality of liquid, gaseous and solid waste discharges, to confirm that the equipment is similar or equivalent to the best available techniques (BAT) described in the CIS"[388]. AMEC also sought to "[r]eview the Orion commissioning plan" in order to "assess the capacity of Botnia to implement that plan and to meet its environmental requirements and performance commitments at mill start-up and during the commissioning phase"[389]. In Phase II, AMEC reviewed the "commissioning and operational status of the mill production facilities" and "confirm[ed] that the

---

[386] *Ibid.*

[387] IFC Web Site, Latin America & the Caribbean, "Audit of Readiness to Begin Operations: Nov. 2007," *available at* http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_Orion_AMEC_Report (last visited on 3 July 2008). UR, Vol. III, Annex 81.

[388] *Pre-Startup Audit*, *op. cit.,* p. 1. UR, Vol. III, Annex R48.

[389] *Ibid.*

recommendations for corrective action and improvements identified in the first audit visit had been carried out"[390].

4.22 AMEC's report, entitled *Orion BKP Mill Pre-Startup Audit* ("*Pre-Startup Audit"*), was released simultaneously with the *Pre-Commissioning Report* on 13 November 2007. On every measure, the *Pre-Startup Audit* demonstrated the fitness of the Botnia plant and its compliance with BAT. Regarding Botnia's organization, the audit found that "Botnia has built a strong organization for the Orion Fray Bentos mill"[391]. Regarding process equipment and technology, the *Pre-Startup Audit* concluded that "[a]ll process equipment and technology installed or planned to be installed at Botnia-Orion is similar or equivalent to best available technology as described in the CIS"[392]. It further found that Botnia's environmental management team "has an appropriate level of environmental awareness for a project of this type" and that "Botnia's and Kemira's commission plans and procedures" as well as those selected to carry out these plans "have the features and characteristics that are normal for a project of this type"[393]. It likewise noted that the "caliber of personnel compare favourably with other projects of this type", and that the "mill appears well-positioned from an organizational aspect to meet its operational objections including its environmental management goals"[394]. In sum, the *Pre-Startup Audit* concluded:

---

[390] *Ibid.*, p. 2.

[391] *Ibid.*

[392] *Ibid*.

[393] *Ibid.*, pp. 3-5. Kemira is the entity that operates the chemical synthesis facility used by the Botnia plant.

[394] *Ibid.*, p. 2.

> The overall impression was gained of a well designed and generally well executed project. Modern process technologies are used that *promise to perform with low emission and world-leading environmental performance*[395].

4.23 In light of Uruguay's and the IFC's independent verifications that the Botnia plant conforms with BAT, despite Argentina's unsupportable protestations to the contrary, the Court should have no doubt as to the plant's state-of-the-art anti-pollution technology[396].

B. ENVIRONMENTAL MANAGEMENT PLANS

4.24 As a further pre-condition to authorising the Botnia plant to operate, Uruguay required that Botnia submit for approval a comprehensive Environmental Management Plan for Operations, which Botnia prepared in close consultation with the Uruguayan authorities. Spanning hundreds of pages, this plan included, among other things:

- a Mitigation and Compensation Measures Implementation Plan;
- an Environmental Monitoring and Follow-up Plan;
- an Operation and Monitoring Plan;
- an Analysis of Environmental Risks;
- a Contingency Plan;
- an Abandonment Plan;
- an Environmental Management Plan for the Premises Not Directly Affected by the Plant;
- an Accident Prevention Plan;
- a Solid Waste Management Plan; and
- an Environmental Management Plan for the Operation of the Port.[397]

---

[395] *Ibid.*, pp. 5-6 (emphasis added).

[396] The issues raised in Argentina's Reply pertaining to choice of technology are further discussed in Section 2 of Chapter 6, paras. 6.31 through 6.49.

[397] (Second) Affidavit of Eng. Alicia Torres, National Director of DINAMA (24 June 2008), pp. 1-2. UR, Vol. IV, Annex R92. A complete copy of the Environmental Management Plan for Operations is contained on the CD submitted to the Court herewith.

4.25 After thorough review, DINAMA approved the plan and its various subcomponents on 31 October 2007[398]. These plans, and the additional management and contingency plans required by the IFC as part of the ESAP, are discussed in the paragraphs that follow. They represent further binding commitments on the part of Botnia to ensure that the plant operates safely and without damage to the environment.

1. Management of Hazardous Materials

4.26 Both Uruguay (in the AAP) and the IFC (in the ESAP) required that Botnia develop comprehensive plans to address hazardous materials. In that regard, Botnia was required to "[d]evelop and implement a Hazardous Material Management Plan as specified in IFC guidelines" that would, among other things, "[m]anage the risks associated with all Hazmat facilities and activities" through appropriate management actions[399]. This was required to include "training, worker health and safety, record keeping, and reporting"; prevention plans, including for "transportation, processes and operations, and hazardous wastes"; and emergency preparedness and response plans, including for "response activities, medical assistance, communications, and incident reporting"[400]. Botnia's Hazardous Material Management Plan was described in detail in the Environmental Management Plan for Operations that it submitted to DINAMA pursuant to its AAP, and in that document's various annexes, including its Contingency Plan, Accident

---

[398] DINAMA Resolution Approving the Environmental Management Plan for Operations (Final Consolidated Text), Sec. 4 (31 October 2007). UR, Vol. II, Annex R4.

[399] *Pre-Commissioning Review*, *op. cit.*, p. 2.1. UR, Vol. III, Annex R50.

[400] *Ibid.*, p. 2.1.

Prevention Plan, Solid Waste Management Plan, and Environmental Management Plan for the Operation of the Port[401].

4.27 Both Uruguay and the IFC found that Botnia had fully satisfied its obligations to address hazardous materials. The *Pre-Commissioning Review* concluded that Botnia had "complete[d]" its requirement to prepare a Hazardous Material Management Plan[402]. And, contrary to the suggestion in Argentina's Reply[403], the *Pre-Commissioning Review* expressly included hazardous materials associated with the so-called Kemira chemical synthesis facility in this assessment[404]. With respect to management actions, the report found that Botnia had "developed management actions to address" the various "potential risks" posed by hazardous materials, including those concerning the "release of liquid effluent; release of gaseous emissions; handling of hazardous wastes; transport of hazardous materials; fire; and procedure"[405].

4.28 The IFC's *Pre-Commissioning Review* likewise approved Botnia's approach to prevention, finding that its "hazardous materials management plan incorporates a prevention program to address potential risks associated with the accidental release of uncontrolled hazardous materials"[406]. The *Pre-Commissioning*

---

[401] *See ibid.*, p. 2.2 ("The hazardous materials management plan is described in the following documents: "Plan de Autoprotección de Botnia", "Plan de Gestion de Residuos", "Plan de Gestion Ambiental - Operación", "Plan de Gestión Ambiental Operación del Puerto", and "Plan de Contingencias").

[402] *Ibid.*, p. 2.2.

[403] AR, para. 3.107.

[404] *Pre-Commissioning Review*, *op. cit.,* pp. 2.2-2.4. UR, Vol. III, Annex R50.

[405] *Ibid.*, p. 2.6.

[406] *Ibid.*, p. 2.7.

Review found that the plan "considers an array of factors to minimize the potential risk", including "design elements for the overall layout and construction of the plant processes; the types and quantities of materials used or produced; transportation and storage requirements; monitoring and reporting; operational procedures; contingency plans; and training and supervision"[407]. The *Pre-Commissioning Review* found that the plant was "designed to diminish potential risks"; that its "layout" provided "for a logical flow and storage of materials", which "minimiz[e] the degree of handling, transport and interaction"; and that "[d]esign elements include comprehensive systems of automatic sensing and alarm", which "provide continuous information regarding security and process control"[408].

4.29 In light of Uruguay's and the IFC's independent approvals of the plant's approach to hazardous materials, the Court should have full confidence that Botnia has treated and will treat hazardous materials in an environmentally responsible manner.

2. Emergency Preparedness and Response

4.30 Botnia was also required by both Uruguay and the IFC to produce comprehensive plans for emergency preparedness and response. Botnia fulfilled this obligation by describing in exhaustive detail its plans for addressing emergencies in the following documents that it submitted to DINAMA as part of its Environmental Management Plan for Operations pursuant to its AAP: Analysis of Environmental Risks; Contingency Plan; Accident Prevention Plan; and the Environmental Management Plan for the Operation of the Port.

---

[407] *Ibid.*

[408] *Ibid.*

4.31 The *Pre-Commissioning Review* left no doubt as to the adequacy of Botnia's plans, demonstrating again that Argentina's critiques of Botnia's emergency planning have no basis[409]. With regard to prevention, the IFC experts found that Botnia's approach included "avoid[ing]" "unnecessary use of dangerous chemicals"; "minimiz[ing] volumes of storage and use of chemicals"; "contain[ing] hazardous zones using structures"; adopting an "effective design of the plants and all processes"; using "automatic monitoring"; ensuring adequate "training of all personnel"; mandating "continuous availability of appropriate personnel with knowledge and decision authority for response to any type of incident"; and adopting a "high standard of practice required of all contractors working for Botnia or Kemira"[410].

4.32 Uruguay's and the IFC's dual approvals of Botnia's plans for emergency preparedness and response confirm that its plans are fully adequate[411].

3. Transportation Management

4.33 Both Uruguay and the IFC required Botnia to adopt comprehensive plans for transportation management. The IFC's technical experts conducted a close review of Botnia's various operational plans, including those submitted to Uruguay pursuant to the AAP, such as the Environmental Management Plan for the Operation

---

[409] *See, e.g.*, Jorge Rabinovich & Luis Tournier, "Scientific Report to the Argentine Ministry of Foreign Affairs with replies to Uruguay's Counter-Memorial concerning aspects of the Botnia Pulp Mill near Fray Bentos, Uruguay" (hereinafter "Rabinovich Report"), paras. 2.11-2.12. AR, Vol. III, Annex 43. This issue is discussed in more detail in paras. 6.70 to 6.75.

[410] *Pre-Commissioning Review*, *op. cit.,* p. 3.3. UR, Vol. III, Annex R50.

[411] *Ibid.*, p. 3.1.

of the Port. They concluded that Botnia fulfilled its obligations with respect to transportation management, including for transport of chemicals.

4.34 Specifically, the IFC's technical experts found that "[h]azardous materials will be handled in a designated zone of the wharf specially designed to prevent possible spills to the river" and that a "perimeter curb isolates the area and the floor is sloped to a central drain which drains to a recovery tank"[412]. In addition, "[s]pecial procedures" would be followed "to ensure the safe transfer of materials", including "identification of material and associated danger"; review of the corresponding material safety data sheet and safety procedures"; verification that "the drainage system is closed"; "visual inspection of the state of the containers"; and "preparation of the final destination"[413]. The *Pre-Commissioning Review* also noted that a "floating boom and suction hose" would be "deployed to contain the area around the ship"[414]. Moreover, Botnia's third-party contractors responsible for transporting chemicals are required to "operate following international norms for navigation and the MARPOL convention for prevention of contamination"[415].

4.35 In light of these findings, it is readily apparent that the assertions in the Reply pertaining to whether transportation safety was adequately reviewed have no basis in fact.

---

[412] *Ibid.*, p. 4.12.

[413] *Ibid.*

[414] *Ibid.*

[415] *Ibid.*

4. Conservation

4.36 Uruguay and the IFC also both required that Botnia take action to conserve environmental resources remote from the Botnia plant itself. The AAP mandated that Botnia acquire and manage a conservation area located outside the immediate vicinity of the plant for integration into Uruguay's National System of Protected Areas ("SNAP", per the Spanish initials)[416]. The ESAP similarly required that Botnia adopt a conservation plan.

4.37 Botnia, through its subsidiary Forestal Oriental, on 21 August 2007 submitted a detailed management plan to protect an ecologically valuable area of wetlands known as Mafalda, located near Uruguay's RAMSAR site of Esteros de Farrapos[417]. This plan was developed using the Guidelines for Management Planning of Protected Areas – Best Practice Protected Area Guidelines Series No. 10 – of the World Commission on Protected Areas[418]. The Mafalda site is to be integrated into Uruguay's SNAP[419]. Other conservation measures that are contemplated include: (1) continuation of the ongoing biodiversity monitoring program; (2) implementation of a monitoring and restoration program for certain plant species, wetlands and forest areas; (3) continuation of the ongoing program to eliminate invasive exotic plant species; (4) eventual elimination of grazing in the

---

[416] *Ibid.*, p. 6.1.

[417] *See* Botnia/Forestal Oriental, Malfada Management Plan (21 August 2007), p. 12. UR, Vol. IV, Annex R85.

[418] *Ibid.*, p. 2.

[419] *Ibid.* Forestal Oriental and Botnia have submitted the proposal for including Mafalda in the SNAP. *Ibid.*, p. 12.

protected area; and (5) coordination of conservation efforts with the Esteros de Farrapos RAMSAR site[420].

4.38 DINAMA approved Botnia's conservation plan on 24 September 2007, and the *Pre-Commissioning Review* concluded that Botnia had fulfilled its commitment under the ESAP[421].

5. Solid Waste Management

4.39 Botnia's AAP required it to prepare a Solid Waste Management Plan acceptable to DINAMA, and the ESAP likewise obligated Botnia to "[p]repare and implement detailed design and operational procedures for solid waste management". Uruguay approved Botnia's submission, and the IFC's *Pre-Commissioning Review* found that Botnia had fulfilled this obligation, concluding that the "industrial landfill has been designed following the technical guidelines of the IFC (International Finance Corporation, Environmental, Health and Safety Guidelines for Waste Management Facilities) and norms approved by [*Comisión Técnica Asesora de la Protección del Medio Ambiente*] COTAMA (*Proyecto de Reglamento de Residuos Sólidos Industriales, Agroindustriales y Servicios, Versión 2*)"[422]. Thus, the *Pre-Commissioning Review* confirmed the earlier conclusions of DINAMA and the Final CIS that the landfill poses no risk to the Uruguay River[423].

---

[420] *Ibid.*, p. 19.

[421] *See ibid.*; DINAMA Resolution Approving the Conservation Area Proposed by Botnia, the "Mafalda" Establishment (24 September 2007). UR, Vol. II, Annex R3. *See Pre-Commissioning Review*, *op. cit.*, p. 6.1. UR, Vol. III, Annex 50.

[422] *Ibid.*, p. 7.4. UR, Vol. III, Annex R50.

[423] UCM, paras. 6.56-6.57.

6. Social Impact Monitoring

4.40 The social impacts of the Botnia plant were also subject to extensive review. Finding that the social impact monitoring programs were "comprehensive", the *Pre-Commissioning Review* noted that "Botnia has been very mindful of their responsibility to the community", having "invested in infrastructure, resources, programs, and business partnerships"[424]. It also found, based on "[f]irst-hand observation", that Botnia had "generated considerable prosperity in the community with new restaurants, hotels, art galleries, shops and businesses in evidence" and that it was "common to hear from stakeholders how the quality of life has improved in Fray Bentos and surrounding communities"[425]. These are some of the benefits that this heretofore depressed area of Uruguay has begun to enjoy as a result of the Botnia plant.

C. PRE-OPERATIONAL ENVIRONMENTAL QUALITY MONITORING

4.41 As a final, critical element to the activities that preceded Uruguay's authorisation for the Botnia plant to operate, the Uruguay River and its biota were subject to comprehensive pre-operational monitoring. In Chapter 7 of the Counter-Memorial, Uruguay described the comprehensive pre-operational monitoring campaign it was then conducting to establish a database of information against which potential environmental impacts could be measured. Uruguay completed this pre-operational monitoring program on schedule prior to the plant's commissioning. In addition, between 1987 and 2005, Uruguay and Argentina, through the CARU,

---

[424] *Pre-Commissioning Review, op. cit.,* p. ES.iv.

[425] *Ibid.*, p. ES.v.

gathered significant water quality baseline information through the implementation of the PROCON and PROCEL monitoring programs[426].

4.42 Complementing the data collected through Uruguay's (and CARU's) monitoring efforts, Botnia conducted its own pre-operational monitoring of the river and its biota. Botnia's AAP required it to design and implement a comprehensive environmental quality monitoring plan, and obligated Botnia to collect baseline data for all relevant parameters for at least one year prior to commencing operations[427]. In fact, Botnia's pre-operational monitoring exceeded its regulatory obligations. Every parameter that is potentially implicated by the Botnia plant -- including all parameters identified by Argentina as being of concern -- were rigorously assessed and a comprehensive store of information was gathered. This data enables Uruguay to detect any unacceptable environmental impacts caused by the operation of the Botnia plant and to act to address them.

4.43 There should be no doubt regarding the adequacy of the pre-operational monitoring[428]. The IFC's independent technical experts conducted an impartial evaluation of the "[s]eparate environmental monitoring programs that have been developed by Botnia and DINAMA", including the programs for monitoring "water

---

[426] El Telegrafo, "President of CARU: Argentina Lacks the Political Will to Control the Quality of the Water in the Uruguay River," p. 1 (17 Aug. 2006). UCM, Vol. IX, Annex 187A. *See also* DINAMA Press Release, "New Environmental Monitoring of the Uruguay River," p. 1. (17 August 2006). UCM, Vol. II, Annex 32. Unfortunately, Argentina refused to allow the PROCEL program to continue. UCM, para. 7.9.

[427] UCM, Chap. 7.

[428] As noted above, the pre-operational monitoring by Uruguay and Botnia has been augmented by wide-ranging studies conducted over the years, apart from preparation for the Botnia plant. In that regard, Uruguay and Argentina have, through CARU, engaged in extensive monitoring of the river under the PROCON program, which further helps to establish a baseline against which impacts can be judged.

quality, sediment quality [and] biological indicators (plankton, invertebrates, fish)"[429]. The conclusion of these independent experts is unambiguous and categorical: "Overall, these monitoring programs are extremely comprehensive and exceed the commitments identified in the CIS."[430]

1. Pre-Operational Water Quality Monitoring

4.44 Both DINAMA and Botnia conducted extensive pre-operational water quality monitoring. The comprehensive dataset that Botnia and Uruguay amassed goes well beyond what is reasonably needed to detect changes to water quality caused by the plant's effluent. Between August 2006 and September 2007, DINAMA conducted seven water quality monitoring campaigns spaced at two-month intervals[431]. These were done at 15 locations strategically selected throughout the Uruguay River, ranging from Isla Zapatero upstream from the plant to Las Cañas downstream[432]. Uruguay's monitoring program assessed a host of water quality parameters, including, but not limited to, phosphorus, nitrogen, biological oxygen demand, AOX, total suspended solids, dioxins and furans and metals[433]. In addition to the comprehensive pre-operational water quality monitoring that DINAMA conducted, the Uruguayan State Waterworks Agency (*Obras*

---

[429] *Pre-Commissioning Review*, *op. cit.,* p. ES.iii. UR, Vol. III, Annex R50.

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

[431] (Second) Torres Aff., *op. cit.*, Annex A. UR, Vol. IV, Annex R92.

[432] *Ibid.*

[433] *Ibid.*

Sanitarias del Estado or "OSE") has also conducted water quality monitoring in Fray Bentos[434].

4.45 Botnia also conducted its own wide-ranging pre-operational water quality monitoring campaign. Like Uruguay's pre-operational water quality program, Botnia's was extensive, involving sampling from locations both upstream and downstream from the plant. Botnia's program covered numerous water quality parameters, including, but not limited to, biological oxygen demand, chemical oxygen demand, total suspended solids, phosphorus, total nitrogen, AOX, dioxins and furans and metals[435].

4.46 Nothing in Argentina's Reply questions the adequacy of the pre-operational monitoring. The principal objection raised by Argentina is that the monitoring allegedly did not comply with Before-After-Control Impact Paired Series ("BACIPS") in two respects. In neither case is Argentina correct. First, Argentina alleges that the pre-operational monitoring did not begin "antérieure au commencement des opérations pendants au moins deux ans consécutive"[436]. However, Botnia's pre-operational monitoring began in April 2005[437] and lasted until October 2007[438] (the month before operations commenced), more than

---

[434]OSE Web Site, "Water Quality Monitoring at Fray Bentos," *available at* http://www.ose.com.uy.a_monitoreo_fray_bentos.htm (last visited on 5 July 2008). UR, Vol. II, Annex R12.

[435] (Second) Torres Aff., *op cit.*, Annex A. UR, Vol. IV, Annex R92.

[436] AR, para. 3.58 ("prior to the commencement of operations for at least two consecutive years").

[437] Argentina itself acknowledges this. AR, para. 3.57.

[438] Botnia Environmental Management Plan for Operations, Appendix 3 (Environmental Monitoring and Follow-up Plan) (hereinafter "Botnia Environmental Monitoring and Follow-up Plan") (24 September 2007). UR, Vol. II, Annex R41. (Second) Torres Aff., *op. cit.*, Annex A. UR, Vol. IV, Annex R92.

satisfying the two-year pre-operational monitoring requirement asserted by Argentina, even without consideration of the extensive earlier data generated through CARU as part of the PROCON and PROCEL water quality monitoring programs (which were carried out from 1987 to 2005[439]).

4.47 The other alleged non-compliance with BACIPS raised in the Reply is that monitoring was not done at a "nombre suffisant de sites" since, Argentina claims, "un site seulement a été proposé pour évaluer les conditions du flueve"[440]. This is baseless. Uruguay and Botnia conducted pre-operational monitoring at more than a dozen sites, far more than the sole location acknowledged by Argentina. It is therefore beyond dispute that the pre-operational monitoring program used a "nombre suffisant de sites"[441]. In short, the pre-operational monitoring was satisfactory, even by Argentina's own standard developed for the Reply.

4.48 Argentina also complains that the pre-operational monitoring campaign did not begin long enough before construction of the plant commenced and that, as a result, the baseline includes "la pollution causée par l'étape de construction"[442]. There is no merit in this charge either. As an initial matter, Argentina has not cited any authority for the proposition that pre-operational monitoring for a cellulose plant must begin before *construction*. Uruguay is certainly aware of none. Second, Argentina concedes that construction of the Botnia plant did not commence until September 2005, five months after Botnia's monitoring began and after data were

---

[439] UR, para. 4.41 and n.426.

[440] AR, para. 3.58 ("sufficient number of sites") ("only one site was proposed to evaluate the conditions of the river").

[441] AR, para. 3.58.

[442] AR, para. 3.57 ("the pollution caused by the construction stage").

collected from the PROCON and PROCEL monitoring programs[443]. Consequently, Uruguay and Botnia have collected monitoring data since substantially before construction began. In any event, construction activities, such as pouring a foundation and constructing an emissions stack, do not impact the river. Indeed, nowhere has Argentina alleged that construction of the plant caused any pollution to the river.

4.49 Argentina's failure to levy any valid criticisms against the pre-operational monitoring of the Uruguay River is underscored by the fact that the Reply alleges that the monitoring of only one parameter was inadequate. Even there, Argentina falls far short of the mark. The only pre-operational water quality monitoring parameter that Argentina specifically criticises is dioxins and furans (2,3,7,8-TCDD and 2,3,7,8-TCDF), which the Reply alleges was inadequately monitored because, it claims, samples were only taken from three locations[444]. But Argentina has got the facts wrong again. The evidence shows that between Uruguay and Botnia water quality samples were taken for dioxins and furans in at least 19 different locations[445].

---

[443] AR, para. 3.57.

[444] AR, para. 3.64. Argentina also relies upon the report prepared by Hatfield Consultants for the IFC on 27 March 2006 (hereinafter "First Hatfield Report"), UCM, Vol. VIII, Annex 170, for the allegation that sufficient baseline data did not exist with respect to dioxin levels in fish. AR, para. 3.64. As discussed in paragraph 4.56 of this Chapter, Botnia and DINAMA conducted baseline monitoring of the presence of dioxins and furans in fish species, which both confirmed that contaminant levels were low and, as Uruguay's experts confirm, sufficient to establish an adequate baseline. Exponent, Inc., Response to the Government of Argentina's Reply, Facility Design Technology and Environmental Issues Associated with the Orion Pulp Mill, Fray Bentos, Uruguay River, Uruguay (hereinafter "Exponent Report") (July 2008), pp. 3-1 & 3.16-3.17. UR, Vol. IV, Annex R83.

[445] (Second) Torres Aff., *op. cit.*, Annex A. UR, Vol. IV, Annex R92. In addition, Botnia, as part of its baseline fish studies, conducted four pre-operational sampling campaigns at three different locations, for a total of 12 additional samples. Jukka Tana, A Baseline Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay – Part I, pp. 8-9 (23 June 2005). UR, Vol. II, Annex R28. Jukka Tana, A Baseline

As a result, dioxins and furans were sampled no fewer than 100 times[446]. The issue is moot in any event. As described in Section 2 of this Chapter, dioxin and furan concentrations have been monitored in the plant's effluent, including the key congeners of 2,3,7,8-TCDD for dioxins and 2,3,7,8-TCDF for furans. These key congeners are below detection levels[447], even with a detection limit of one part per quadrillion.

4.50 Argentina's Reply raises some alleged deficiencies in Uruguay's assessment of sedimentation and geomorphology[448]. None is valid, and Argentina unsurprisingly fails to present any evidence of actual sedimentation or geomorphological changes (including with respect to the Botnia port, which it raises as a particular concern[449]) since there is none. The Counter-Memorial demonstrated that sedimentation and geomorphological change were adequately assessed before operation began, and that operation of the Botnia plant will not meaningfully impact those conditions[450]. As described in the Counter-Memorial, the Final CIS carefully

---

Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay – Part II, December 2005, pp. 7-8 (17 February 2006). UR, Vol. II, Annex R30. Jukka Tana, A Baseline Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay – Part III, November 2006, pp. 7-8 (20 February 2007). UR, Vol. II, Annex R38. Jukka Tana, A Baseline Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay – Part IV, April 2007, pp. 7-8 (27 June 2007). UR, Vol. III, Annex R46.

[446] (Second) Torres Aff., *op cit.*, Annex A. UR, Vol. IV, Annex R92.

[447] *Environmental Performance Review*, *op. cit.*, p. 3.4. UR, Vol. IV, Annex R98.

[448] AR paras. 3.32, 3.48, 3.159, 3.166 & 3.177.

[449] Professor Howard Wheater and Dr. Neil McIntyre, Technical Commentary on the Counter-Memorial of Uruguay in the case concerning pulp mills on the River Uruguay (hereinafter "Second Wheater Report"), p. 115. AR, Vol. III, Annex 44.

[450] UCM, paras. 6.86-6.92.

considered the issues of sedimentation and geomorphological change[451]. The Second Wheater Report's assertion that the Final CIS "provided no evidence" to support its conclusions is incorrect[452]. The Final CIS noted that Yaguareté Bay (the focus of comments in the Second Wheater Report) is "regularly flushed during high flow periods and due to wind/wave action, as evidenced by the lack of sedimentary features (e.g., islands)"[453]. The Final CIS also cited specific calculations regarding flow and current rates in support of its findings[454]. The ASA Report submitted by Uruguay confirmed these conclusions[455]. Apart from the conclusory assertions in the Second Wheater Report, Argentina makes no attempt to challenge the scientific validity of the Final CIS's analysis.

2. Pre-Operational Sediment Monitoring

4.51 In addition to the comprehensive pre-operational water quality monitoring discussed above, Uruguay has undertaken equally extensive efforts to ensure that it has a complete database of information against which to measure any potential post-operational impacts to sediments in the river. Between August 2006 and September 2007, DINAMA conducted seven sediment sampling campaigns at two-month intervals from nine locations at strategically selected sites both upstream and downstream from the Botnia plant[456]. The sediments were evaluated for numerous

---

[451] IFC, Cumulative Impact Study, Uruguay Pulp Mills (hereinafter "Final CIS"), p. 4.50 (September 2006). UCM, Vol. VIII, Annex 173.

[452] Second Wheater Report, *op. cit.*, Sec. 9. AR, Vol. III, Annex 44.

[453] Final CIS, *op. cit.,* p. 4.50. UCM, Vol. VIII, Annex 173.

[454] *Ibid.*

[455] UCM paras. 6.86-6.89.

[456] (Second) Torres Aff., *op cit.*, Annex B. UR, Vol. IV, Annex R92.

compounds, including but not limited to metals, EOX, dioxins and furans and PCBs[457].

4.52 Botnia, as required by its AAP, also conducted extensive baseline monitoring of sediments, upstream of the plant at Nuevo Berlín, at the diffuser site, and downstream in the area of Las Cañas[458]. Although only required by the AAP to conduct pre-operational sediment monitoring for one year, Botnia exceeded this obligation by collecting two years of sediment data, which were evaluated for numerous compounds, including for total organic material, phosphorus, and nitrogen[459]. Between April 2005 and April 2007, Botnia conducted eight sediment monitoring campaigns[460].

4.53 In light of the extensive pre-operational sediment monitoring by both Uruguay and Botnia, it is unsurprising that the program was categorically endorsed by the IFC's technical experts, who concluded that the "sediment quality"

---

[457] *Ibid.*

[458]Center for Applied Limnological Studies, Establishment of a Baseline for Phytoplankton, Zooplankton and Benthic Communities in the Uruguay River (from Nuevo Berlín to Las Cañas), Rio Negro-Uruguay (hereinafter "CELA March 2006 Baseline Study"), pp. 20 & 62 (March 2006). UR, Vol. II, Annex R31. Uruguay Technological Laboratory (hereinafter "LATU"), Assessment Report No. 952512, Study of the Communities of Phytoplankton, Zooplankton and Macrozoobenthos in the Lower Section of the Uruguay River (Nuevo Berlín, Fray Bentos and Las Cañas) (12 July 2007) (hereinafter "LATU July 2007 Assessment Report"), pp. 6-7. UR, Vol. III, Annex R47.

[459] CELA March 2006 Baseline Study, *op. cit.*, p. 61. UR, Vol. II, Annex R31. LATU July 2007 Assessment Report, *op. cit.*, p. 8. UR, Vol. III, Annex R47.

[460] CELA March 2006 Baseline Study, *op. cit.,* pp. 11 & 20. UR, Vol. II, Annex R31. LATU July 2007 Assessment Report, *op. cit.,* p. 6. UR, Vol. III, Annex R47. Argentina criticizes the alleged lack of data in the Final CIS regarding dioxin and furan concentrations in the sediments. AR, para. 3.64. It should be noted that Argentina's own expert, Professor Wheater is quoted in contradiction of this, only a few paragraphs before. *Ibid.*, para. 3.62.

monitoring was "extremely comprehensive" and "exceed the commitments identified in the CIS"[461].

3. Pre-Operational Biological Monitoring

4.54 Argentina makes no criticism of the pre-operational monitoring of *plankton*, but it does challenge the pre-operational *benthos* monitoring in one respect. According to the Reply, Botnia allegedly did not comply with the AAP's requirement that it monitor one species of sessile benthic fauna as an indicator of the presence of AOX. Argentina's criticism is misplaced. In fact, Botnia sampled and tested the species *Limnoperna fortunei* for the presence of AOX in November of 2006[462]. Botnia undertook ten monitoring campaigns of the benthic and plankton communities at three locations between April 2005 and November 2007[463]. In addition, as required by the AAP, Botnia conducted a baseline study of epyphyte species in the area[464].

4.55 Botnia and DINAMA also conducted separate, extensive baseline surveys of the fish communities in the Uruguay River. Between August 2006 and July 2007,

---

[461] *Pre-Commissioning Review*, *op. cit.,* p. ES.iv. UR, Vol. III, Annex R50.

[462]Jukka Tana, Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay, Monitoring Studies in the Recipient of Botnia Pulp Mill, November 2006, *op. cit.*, pp. 17. UR, Vol. II, Annex R38. When referring to the benthic population, AOX is technically referred to as EOX. *See ibid.*

[463] CELA March 2006 Baseline Study, *op. cit.,* pp. 10-11, UR, Vol. II, Annex R31; LATU July 2007 Assessment Report, *op. cit*., UR, Vol. III, Annex R47; *ibid.*, p. 6; Informe Parcial de Ensayo, No. 1006312 (August 2007) (Partial Report of Assay, No. 1006312) (included on the CD provided herewith); Informe Parcial de Ensayo, No. 1020042 (November 2007) (Partial Assay Report, No. 1020042) (included on the CD provided herewith).

[464] *See* GeoAmbiente, Survey of Species Belonging to the Genus *Tillandsia* (September 2006). UR, Vol. II, Annex R34.

Uruguay conducted five fish baseline studies[465]. Uruguay's pre-operational fish monitoring took place at three different locations -- one upstream, one near the Botnia discharge, and one downstream from the Botnia plant[466]. Botnia complemented Uruguay's pre-operational fish studies with its own extensive pre-operational monitoring of the fish communities. Beginning in April 2005, Botnia conducted five studies that evaluated the fish communities and species diversity and five studies that evaluated concentrations of resin acids, chlorinated phenols and sterols in fish[467]. The extensive baseline studies for fish communities collected by Uruguay and DINAMA form a "robust" pre-operational fish monitoring study[468].

4.56 Argentina attempts to criticise the fish-monitoring program by citing a minor and out-dated issue raised in the first Hatfield report -- that pre-operational dioxin and furan levels should be studied in fish[469], but its criticism is groundless. Botnia conducted five such studies of dioxins and furans in fish, and Uruguay

---

[465]National Aquatic Resources Office (DINARA-MGAP), "Establishing a Baseline for Monitoring Fish Fauna in the Area Around the Botnia Pulp Mill" (Fray Bentos, Río Negro) (hereinafter, "DINARA Baseline Fish Study"), p. 5 (March 2008). UR, Vol. II, Annex R8.

[466] *Ibid.*, pp. 4-5.

[467] Jukka Tana, A Baseline Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay – Part I, *op. cit.*, UR, Vol. II, Annex R28; Jukka Tana, A Baseline Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay – Part II, December 2005, *op. cit.*, UR, Vol. II, R30; Jukka Tana, Studies on Fish Community and Species Diversity in Rio Uruguay prior to the Planned Botnia Pulp Mill, Third Test Fishing Period, May 2006 (27 June 2006), UR, Vol. II, Annex R33; Jukka Tana, A Baseline Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay – Part III, November 2006 (20 February 2007), UR, Vol. II, Annex R38; Jukka Tana, A Baseline Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay – Part IV, April 2007, *op. cit.*, UR, Vol. III, Annex R46.

[468] Exponent Report, *op. cit.*, pp. 3-4. UR, Vol. IV, Annex R83.

[469] AR, paras. 3.60-3.61.

undertook four more on its own. It thus comes as no surprise that the second Hatfield report -- which Argentina conspicuously fails to mention -- found that:

> In the monitoring program suggested in the CIS, the important ecological compartments are targeted; that is, water, bottom sediments, benthic macroinvertebrates, and fish. Consideration of contaminants like dioxins and furans are also integrated into the program to ensure these contaminants are not bioaccumulating in river organisms. Essentially the experimental design of the monitoring program follows that of the Environmental Effects Monitoring Program in Canada. Appropriate sampling stations have been selected, and comprehensive lists of test parameters are also outlined[470].

4.57 It cannot be disputed, therefore, that Botnia and Uruguay have conducted extensive pre-operational monitoring of the aquatic biota of the Uruguay River. As the IFC's independent experts concluded, the monitoring program for "biological indicators", including for "plankton, invertebrates, [and] fish", was "extremely comprehensive" and "exceed the commitments identified in the CIS"[471].

Section II.
Monitoring Results for the First Six Months of Operation

4.58 Section 1 demonstrated that the Botnia plant was the subject of comprehensive scrutiny prior to being allowed to commence operations. It was, among other things, required to prepare detailed and exhaustive plans, submit to an extensive audit of its technology for compliance with BAT, have its social impacts assessed, and most importantly, conduct comprehensive pre-operational environmental quality monitoring for the Uruguay River and its biota. As a result of

---

[470] Hatfield Consultants, Report of Expert Panel on the Final Cumulative Impact Study for the Uruguay Pulp Mills. p. 7 (14 October 2006). UCM, Vol. VIII, Annex 178. In addition, Argentina alleges that the baseline monitoring of fish species, as reported in the Final CIS, is inadequate because only two studies were reported. AR, para. 3.62. This, however, ignores the additional baseline studies detailed above, that Botnia and DINAMA undertook.

[471] *Pre-Commissioning Review*, *op. cit.,* p. ES.iv. UR, Vol. III, Annex R50.

these actions, Uruguay and the IFC (based on reports by its impartial technical experts) independently concluded that the Botnia plant had been designed and would operate in accordance with BAT, that its management and operators were prepared for all possible contingencies, and that the plant posed no meaningful risk to either the Uruguay River or its biota. The evaluative processes to which the Botnia plant had been subjected fully entitled Uruguay and the IFC to reach these conclusions.

4.59 Section 2 now demonstrates how these conclusions have been proven accurate by comprehensive post-operational monitoring, which, through the date of completion of this Rejoinder, fully confirms the excellent performance of the plant[472]. The IFC's independent experts are categorical in that regard; after reviewing the extensive effluent and water quality data generated since operations began, they concluded that "the water quality characteristics of the Rio Uruguay have not changed as a result of the discharge of mill effluent"[473]. In other words, the plant has had no impact on the environment, and Argentina's sensational predictions of catastrophic harm have been proven wrong.

4.60 The Botnia plant's environmental performance is all the more exceptional since, as the IFC's independent experts acknowledge, "[o]perationally, the first six months of any new pulp mill is referred to as the initial start-up phase, during which time production is periodically interrupted to facilitate process changes to improve operational efficiency and performance"[474]. It is thus noteworthy that even during

---

[472] *Environmental Performance Review*, *op. cit.*, p. 3.1. UR Vol. IV, Annex R98.

[473] *Ibid.*, p. 4.3.

[474] *Ibid.*, p. ES.i. The IFC's experts further observed that "[b]ased on" their "experience with other new modern pulp mills, these operational improvements continue through the first two

its initial months of operation the Botnia plant has demonstrated a consistent ability to meet both the stringent regulatory limits set by DINAMA and the performance assumptions included in the Final CIS.

4.61 The operational results place beyond all doubt that the Botnia plant, in the words of the IFC, "will not cause harm to the environment"[475]. In the paragraphs that follow, Uruguay will review the regulatory limits established for the Botnia plant's effluent and for the water quality in the river, and demonstrate that Botnia has complied with those limits. Uruguay also shows that the assumptions made by the IFC in the Final CIS regarding the plant's predicted performance have been fully realized.[476] In short, the Uruguay River remains unharmed.

4.62 This section, in subpart A, documents the program of post-operational monitoring that forms the foundation of the environmental performance evaluation. It is followed, in subpart B, by a presentation of the actual results, as documented in the IFC's *Environmental Performance Review*. Those results demonstrate the outstanding performance of the Botnia plant and the absence of environmental impacts.

---

years following start-up, during which time perfecting steps are taken to optimize performance". *Ibid.*

[475] IFC Web Site, Latin America & the Caribbean, "Orion Pulp Mill - Uruguay," *available at* http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_Pulp_Mills, *op. cit.* UR, Vol. III, Annex R80.

[476] The only exceptions concerned inconsequential exceedances regarding colour and NOx emissions to the air. *See infra* paras. 4.110-4.111.

A. THE POST-OPERATIONAL MONITORING PROGRAM

4.63 Uruguay, as promised in the Counter-Memorial[477], has been conducting post-operational monitoring of all relevant effluent and water quality parameters, including every parameter identified by Argentina as being of concern. In that regard, Uruguay's post-operational monitoring includes scrutiny of the following: pH, biological and chemical oxygen demand, phenols, AOX, acute toxicity, nitrogen, phosphorus, colour, mercury and other metals, and dioxins and furans. This post-operational monitoring program, which was designed in close consultation with reputable international experts, is described in a monitoring plan adopted in May 2007[478], and subsequently amended in October 2007 based on the results of the pre-operational monitoring and again in June 2008 after the plant had completed six months of operation ("Post-Operational Plan")[479].

4.64 Complementing Uruguay's monitoring, Botnia is conducting its own, equally comprehensive, post-operational monitoring. This includes, among other things, monitoring of flow, phosphorus, AOX, total suspended solids, phenols, metals (arsenic, cadmium, copper, chrome, mercury, nickel, lead and zinc), sterols, acidic resins, coliforms, colour, sulphur, nitrogen, and dioxins and furans, as well as tests for chronic toxicity, and acute toxicity in microtox, daphnia, and fish[480]. Like

---

[477] UCM, para. 7.22.

[478] UCM, para. 7.11.

[479] *See* DINAMA Monitoring Plan for Cellulose Plant in Fray Bentos (May 2007 (Version 2)) (October 2007), UR, Vol. IV, Annex 86; DINAMA Monitoring Plan for Cellulose Plant in Fray Bentos (May 2007 (Version 2.1)) (June 2008), UR, Vol. IV, Annex 89.

[480] *See* Botnia Environmental Management Plan for Operations, Appendix 4 (Operation Monitoring and Follow-Up Plan) (hereinafter "Botnia Operation Monitoring and Follow-Up Plan") (30 June 2007). UR, Vol. II, Annex R42.

Uruguay's monitoring, this program includes monitoring of all parameters identified by Argentina as being of concern.

4.65 The particulars of Botnia's post-operational monitoring program were established through a consultative process that involved extensive discussions with DINAMA. As described in the Counter-Memorial, Botnia included a preliminary post-operational monitoring plan in its EIA, which was supplemented with additional requirements imposed by Uruguay in 2005 pursuant to Botnia's AAP and Wastewater Treatment System Approval[481], all of which culminated in Uruguay's approval of the plan on 31 October 2007[482].

4.66 Botnia's monitoring plan renders moot the criticisms made by Argentina in the Reply about earlier iterations of Botnia's plan and about suggestions for monitoring contained in the Final CIS. In particular, Argentina complains that the "Final CIS is vague and non-committal on all aspects of monitoring"[483]. Leaving aside the fact that the Final CIS does not, as Argentina claims, lack specificity, the binding commitments made in Botnia's final monitoring plan are unequivocally specific and detailed. In that regard, Uruguay respectfully draws the Court's attention to the Botnia plan, found at Annex 41 of this Rejoinder[484], which describes in great detail all aspects of the monitoring program to which Botnia is legally bound.

---

[481] UCM, paras. 7.31-7.40.

[482] DINAMA Resolution Approving the Environmental Management Plan for Operations (Final Consolidated Text) (31 October 2007). UR, Vol. II, Annex R4.

[483] AR, para. 3.222.

[484] Botnia Environmental Monitoring and Follow-up Plan, *op. cit.* UR, Vol. II, Annex R41.

4.67 The Court can have full confidence in the adequacy of the post-operational monitoring regime, since the IFC's independent technical experts have given the environmental monitoring of the Botnia plant their unqualified endorsement. The *Pre-Commissioning Review* found that "[o]verall" the Botnia monitoring programs, including its monitoring of "mill effluent, mill air emissions, water quality, sediment quality, biological indicators (plankton, invertebrates, fish), meteorological parameters, air quality, air inversions, groundwater, soil quality, and terrestrial indicators (flora and fauna)", are "extremely comprehensive and exceed the commitments identified in the CIS"[485]. It noted that "[c]ollectively, these monitoring components will provide a quantifiable record of the source emissions (effluent and air), media response (water, air, soil, and groundwater) and biological response (aquatic animals, flora and fauna)"[486].

4.68 The *Pre-Commissioning Review* specifically endorsed the processes and protocols for the monitoring of the Botnia plant, concluding that "[c]omponents of the monitoring program follow well established protocols which will aid in design, analysis and interpretation"[487]. It singled out the monitoring programs for "water quality, sediment quality and biological indicators", noting that these programs were "similar to the Environmental Effects Monitoring (EEM) program required for pulp and paper mills in Canada" that "has been in effect since the early 1990's". The Canadian program, the *Pre-Commissioning Review* noted, would provide "well established technical guidance for implementation of the program and analysis of

---

[485] *Pre-Commissioning Review, op. cit.,* p. ES.iv.

[486] *Ibid.*

[487] *Ibid.*

monitoring data" as well as "a comprehensive database to support the interpretation of the monitoring results"[488].

4.69 Indeed, the IFC's *Pre-Commissioning Review* observed that the water quality monitoring may be *overly* comprehensive since it "includes a long list of physical and chemical parameters including aesthetic parameters, conventional parameters, nutrients, metals, organics, microbiological, toxins and pesticides … many of which are not indicative of the mill effluent"[489]. The *Pre-Commissioning Review* therefore recommended that the list of parameters be reviewed periodically and unnecessary parameters eliminated[490].

4.70 The *Pre-Commissioning Review* likewise concluded that the monitoring program for biological organisms went beyond what was required for prudent biological monitoring, finding that the "biological monitoring program is very extensive and perhaps more ambitious than necessary"[491]. It found that the monitoring program for soil, flora and fauna went beyond what is generally required in other jurisdictions, noting that "[m]onitoring of soil quality, flora and fauna exceeds the commitments made in the CIS" and that the monitoring of the "terrestrial indicators" required for Botnia "is not a conventional requirement of most pulp mills"[492]. It found:

> The program includes a comprehensive sampling and analysis of sediment, plankton, invertebrates and fish collected from

---

[488] *Ibid.*

[489] *Ibid.*, p. 10.7.

[490] *Ibid.*

[491] *Ibid.*, p. 10.8.

[492] *Ibid.*

> reference (Nuevo Berlin), near-field exposure (Yaguareté Bay) and far-field exposure (Las Cañas) areas. Sampling is completed at a quarterly interval (every 3 months) for sediment, plankton and invertebrates, and a semiannual interval (every 6 months) for fish. This frequency is perhaps too ambitious considering it can take 6 months or more to process all of the samples and report on the monitoring results[493].

4.71 In fact, the *Pre-Commissioning Review* noted that the Botnia monitoring program was much more extensive than the monitoring programs in Canada and other well-regulated jurisdictions: "In comparison, pulp mills in Canada are required to complete this type of environmental effects monitoring program every 3 years, and most other countries have no such requirement."[494]

4.72 With respect to fish, the IFC's experts concluded that the post-operational monitoring to be conducted by Botnia went beyond the stringent requirements of the Canadian guidelines. Moreover, as they observed in the Final CIS, because the effluent plume from the plant's diffuser is small and dilutes to a ratio of 100:1 within 35 meters of the discharge site, Canadian regulations would not require any post-operational fish monitoring[495].

4.73 The IFC's technical experts reaffirmed their endorsement of the monitoring regime in their assessment of the Botnia plant's operational performance, where they observed that "comprehensive monitoring of air and water emissions was undertaken", which "provide a detailed characterization of the quantity and quality of the air and water emissions, and a direct measure of the operational efficiency and

---

[493] *Ibid.*

[494] *Ibid.*, p. 10.9. In light of these differences, the *Pre-Commissioning Review* stated that it would be acceptable to modify the monitoring program.

[495] IFC, Cumulative Impact Study, Uruguay Pulp Mills, Annex D (hereinafter "Final CIS, Annex D"), p. D7.13 (September 2006). UCM, Vol. VIII, Annex R176.

performance of the mill"[496]. The experts expressly found that the information is sufficient "to verify that the mill is operating according to the authorization limits specified in the environmental authorizations for the mill"[497].

4.74 The IFC's experts likewise reconfirmed their endorsement of Uruguay's independent monitoring efforts, noting that "[m]onitoring has also been conducted by DINAMA" as well as by OSE and other "independent laboratories" to "evaluate the potential effects of the mill operations on the ambient environment"[498], and that "[c]omprehensive field surveys have been undertaken along the Rio Uruguay to measure water quality"[499]. Uruguay's experts share the same view: they deem the monitoring program "comprehensive and well designed" and "more than sufficient to serve the purpose of identifying future changes."[500]

4.75 In sum, the Botnia plant is subject to a comprehensive post-operational monitoring regime that meets independent expert approval and which is fully capable of detecting any unexpected environmental impacts, no matter how unlikely they might be.

4.76 None of the allegations Argentina makes in the Reply regarding the scope or effectiveness of Uruguay's or Botnia's monitoring program has any merit. Despite its complaints, Argentina did not identify a single parameter it contends

---

[496] *Environmental Performance Review*, *op. cit.*, p. 1.2. UR, Vol. IV, Annex R98.

[497] *Ibid*.

[498] *Ibid*.

[499] *Ibid*. The IFC's technical experts also approved of Uruguay's monitoring regime for air, finding that "an air monitoring station has been constructed near the City of Fray Bentos to measure ambient air quality". *Ibid*.

[500] Exponent Report, *op. cit.*, pp. 3-1 & 3-5. UR, Vol. IV, Annex R83.

should be monitored but is not[501]. Moreover, although Argentina cites a long-outdated report by DINAMA that observed that an early draft of Botnia's effluent monitoring plan did not include certain parameters encompassed in Uruguay's general discharge standard, Argentina fails to acknowledge that the final version of the monitoring plan covered all relevant parameters and, thus, was approved by both DINAMA and the IFC's independent experts[502]. Also baseless is Argentina's assertion that the frequency of the monitoring is inadequate[503]. Argentina does not identify which parameters should be subjected to more frequent analysis, nor does the Reply cite any scientific or technical authority for its assertion that the frequency of the monitoring is insufficient, and Uruguay is aware of no such authority. Indeed, many parameters are monitored on a daily basis, including chemical oxygen demand, biological oxygen demand, total suspended solids, pH and conductivity[504].

4.77 Nor is Argentina aided by citing the early DINAMA report's statement that Botnia should implement a program to monitor metabolites[505]. Botnia conducted four baseline studies of the following metabolites in fish: resin acids, chlorinated phenols and plant sterols[506]. To date, it has also conducted one post-

---

[501] AR, para. 3.219.

[502] Botnia Operation Monitoring and Follow-Up Plan, *op. cit.* UR, Vol. IV, Annex R42.

[503] AR, para. 3.220.

[504] *See* DINAMA Resolution No. 0148/07, Approval of Wastewater Treatment System for the Botnia Plant (hereinafter "Wastewater Treatment System Approval") Sec. 1.3, Table III (4 July 2007). UCM, Vol. X, Annex 225.

[505] AR, para. 3.219.

[506] Jukka Tana, A Baseline Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay – Part I, *op. cit.* UR, Vol. II, Annex R28. Jukka Tana, A Baseline Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay – Part II, December 2005, *op. cit.* UR, Vol. II, Annex 30. Jukka Tana, A Baseline Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in

operational study of fish metabolites, the results of which confirm that operation of the plant has caused no impacts to the fish communities with respect to these metabolites[507].

4.78 Argentina's Reply faults Uruguay for allegedly having not committed itself to conduct its post-operational monitoring in precisely the same manner as the pre-operational monitoring[508]. But Argentina has not cited any authority for its assertion that post-operational monitoring must, in each and every respect, precisely replicate the corresponding pre-operational monitoring. Nor could it, since such a system would be contrary to accepted practice[509]. Indeed, Argentina does not impose that requirement for post-operational monitoring of its own cellulose plants[510]. Regardless, Botnia's post-operational monitoring does, in fact, replicate the final phase of its pre-operational monitoring.

4.79 The Court need not be detained by Argentina's assertion that certain suggestions for monitoring made in the Final CIS vary in unimportant respects from the final Botnia monitoring plan[511]. The Final CIS made clear that the suggestions

---

Fish from Rio Uruguay – Part III, November 2006, *op. cit.* UR, Vol. II, Annex 38. Jukka Tana, A Baseline Study on Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay – Part IV, April 2007, *op. cit.* UR, Vol. III, Annex R46.

[507] Jukka Tana, Concentrations of Resin Acids, Chlorinated Phenols and Plant Sterols in Fish from Rio Uruguay, Monitoring Studies in the Recipient of Botnia Pulp Mill, December 2007, *op. cit.*, p. 22. UR, Vol. III, Annex R53.

[508] AR, para. 3.223.

[509] *See Pre-Commissioning Review*, *op. cit.*, p. 10.7. UR, Vol. III, Annex R50.

[510] Secretariat of the Environment and Sustainable Development, Restructuring Plan for the Cellulose and Paper Industry: Technical Evaluation Manual, pp. 10-11 (January 2007). UCM, Vol. III, Annex 49.

[511] AR, para. 3.223 (describing differences relating to locations and frequency of sampling). Although Argentina notes in the same paragraph and in paragraph 3.9 that the number of sampling locations changed after the preparation of the Final CIS, it conspicuously fails to note

contained therein were just that -- suggestions -- and not binding requirements that permitted no variance[512]. Further, Argentina fails to note that the authors of the Final CIS were subsequently tasked by the IFC with reviewing the final Botnia monitoring plan and they *did not find any deficiencies with Botnia's monitoring program*. Had they identified any such issues, they were obligated to report them to the IFC. Likewise, the IFC's six-month post-operational report does not contain any hint that the pre-operational monitoring was anything other than sufficient to use as a baseline against which to measure any post-operational impacts[513]. To the contrary, the IFC's technical experts expressly endorsed it[514].

B. THE BOTNIA PLANT'S EXCEPTIONAL ENVIRONMENTAL PERFORMANCE HAS NOT IMPACTED THE URUGUAY RIVER

4.80 In the paragraphs that follow, Uruguay demonstrates the superior environmental performance of the Botnia plant through the date of submission of this Rejoinder. *First*, Uruguay shows that the plant has complied with all applicable regulatory standards for its effluent, i.e., the concentration and load of chemicals in the water discharged from the plant into the river. Further, Uruguay shows how the plant's performance is in complete accord with the predictions of the IFC's technical experts in the Final CIS regarding the effluent's characteristics. *Second*, Uruguay

---

that the Final CIS was prepared assuming that two plants would be constructed, and that some of the points were selected specifically to monitor discharges from the now cancelled ENCE plant. Final CIS, *op. cit.*, p. 1.1. UCM, Vol. III, Annex 173.

[512] Final CIS, Annex D, *op. cit.,* pp. D7.7-7.9. UCM, Vol. VIII, Annex 176.

[513] Argentina's assertion that effluent monitoring for the plant should include studies of effluent plume dispersion fares no better. AR, para. 3.220. A plume dispersion study is included in the ESAP, *Pre-Commissioning Review*, *op. cit.*, p. 10.6, UR, Vol. III, Annex R50, and Botnia is undertaking such a study. The IFC's technical experts accordingly found that "Botnia will conduct an effluent plume delineation study following start-up of the mill". *Ibid.*

[514] *See infra*, paras. 4.73-4.74.

proves that the Botnia plant has had no appreciable impact on the Uruguay River by comprehensively reviewing all relevant water quality characteristics and demonstrating that operation of the plant has left each unchanged, exactly as predicted by the IFC's technical experts. As noted above, this is all the more impressive since the performance of a cellulose plant for certain parameters is expected to improve over time after the "start-up" phase[515].

4.81 Any doubt as to the Botnia's plant's environmental suitability was dispelled on 10 July 2008, when the IFC published a report entitled *Orion Pulp Mill, Uruguay Independent Performance Monitoring as required by the International Finance Corporation, Phase 2: 6-Month Environmental Performance Review* ("*Environmental Performance Review*"). This report, which was authored by EcoMetrix -- the same technical experts who drafted the Final CIS -- was prepared as part of the IFC's ongoing oversight of the project, and was a requirement of the ESAP. It serves two purposes: First, it gives the IFC an independent evaluation of the Botnia plant's environmental performance by assessing the extensive operational data collected from the plant's discharges; thus, the report states that it is intended "to provide an independent review and analysis of the data on air and water emissions based on actual performance of the mill during the initial six month period"[516]. Second, it confirms whether, as predicted by the Final CIS, the Botnia plant will not detrimentally impact the river's environmental quality; as the report

---

[515] *Environmental Performance Review*, *op. cit.*, pp. ES.i-ES.ii. UR, Vol. IV, Annex R98.

[516] *Ibid.*, p. ES.i.

makes clear, its task is "to assess the actual environmental effects as compared to those predicted in the CIS"[517].

4.82 The IFC's technical experts who authored the *Environmental Performance Review* drew upon the extensive database of monitoring data that had been collected by Botnia, DINAMA and OSE, as well as other independent laboratories[518]. These experts expressly found that the data were sufficient to achieve a robust evaluation, concluding that the "monitoring data provide a direct measure of the emissions from the mill and the associated effects, if any, on the ambient environment"[519]. They likewise found that the data "provide a basis to confirm that the authorization limits for air and water emissions from the mill are protective of human health and the environment" and a "basis to confirm that the various predictions of environmental effect are valid"[520].

4.83 As shown below, the IFC's technical experts verified (a) that the plant is not harming the environment; (b) that it is operating in compliance with all applicable regulations, permits and authorisations; and (c) that its performance is consistent with the IFC's predictions in the Final CIS.

1. The Plant Effluent Complies with Applicable Regulations, Standards and Predictions

4.84 Both Uruguay and the IFC concur that the effluent of the Botnia plant complies with all applicable regulatory standards, without exception, and further that its characteristics are consistent with, or better than, predicted by the IFC's technical

---

[517] *Ibid*.

[518] *Ibid.*, pp. ES.ii & 4.3-4.19.

[519] *Ibid.*, p. ES.ii.

[520] *Ibid.*, p. 1.2.

experts in the Final CIS. The IFC's independent experts were categorical in this regard.

4.85 With respect to the regulatory obligations concerning the concentration of potential pollutants in its effluent, the IFC's *Environmental Performance Review* found that "[t]he mill has complied with the maximum concentration limits specified by DINAMA for 5-day biochemical oxygen demand (BOD_5), total phosphorus, total nitrogen, adsorbable organic halogens (AOX), pH, ammonia, nitrate, fecal coliform, sulphide, oil and grease, mercury, arsenic, cadmium, copper, chromium, nickel, lead, zinc and dioxin and furan"[521]. The *Environmental Performance Review* likewise concluded that the Botnia plant had satisfied the requirements with respect to monthly maximum loading, finding that "[t]he mill has complied with the allowable monthly maximum load limit as specified by DINAMA for all regulated parameters, which are chemical oxygen demand, BOD_5, TSS, total phosphorus, total nitrogen and AOX"[522].

4.86 The IFC's technical experts likewise concluded that their predictions in the Final CIS regarding the plant's anticipated environmental performance were borne out by its actual performance and, indeed, for many parameters, that performance exceeded expectations. The *Environmental Performance Review* found that "[o]n a production basis, the monthly maximum load for COD, TSS, ammonia, total nitrogen and total phosphorus was below the expected load as predicted in the CIS. The monthly load for BOD_5 was consistently below the expected load following the

---

[521] *Ibid.*, p. ES.ii. The only exception was a brief, two-hour exceedance of TSS on one occasion, for which corrective action was taken and a contingency report prepared and filed with DINAMA. *Ibid.*, p. 3.1.

[522] *Ibid.*, p. 3.1.

first month of operation and after the required period to initialize the biological treatment system."[523] In sum, the IFC's experts found: "After six months of operation, all indications are that the mill is performing to the high environmental standards predicted in the EIA and CIS, and in compliance with Uruguayan and IFC standards."[524]

4.87 Uruguay will now describe in detail the post-operational findings regarding each of the relevant parameters.

(a) Phosphorus

(i) The Botnia Plant's Superior Performance Regarding Phosphorus

4.88 Argentina has identified phosphorus as the most important parameter in the Botnia plant's effluent. As set forth in Chapter 6, Uruguay believes that Argentina has vastly overestimated the theoretical impacts of phosphorus discharges from the Botnia plant. Indeed, the absence of a phosphorus standard in CARU, and more importantly Argentina's own failure to establish any standard for phosphorus under its own laws, further undermines the credibility of Argentina's attack[525]. Nevertheless, Uruguay is pleased to report that the Botnia plant's emissions of phosphorus is far below its regulatory limits. Uruguayan Decree 253/79 establishes a maximum discharge limit of 5 milligrams per liter[526]. As the *Environmental Performance Review* confirms, the average discharge of 0.58 mg/L is a little more

---

[523] *Ibid.*

[524] *Ibid.* This conclusion renders moot Argentina's insinuation in the Reply, *e.g.*, AR, para. 3.9, that the IFC's consultants should have used a different loading calculation when they modelled the impact of the plant.

[525] UCM, paras. 4.38 & 4.40.

[526] Decree No. 253/79, *op. cit.*, Art. 11(2). UCM, Vol. II, Annex 6.

than one tenth of that regulatory limit, and at no time did the discharge exceed 1.34 mg/L[527].

4.89 Indeed, the Botnia plant's performance with respect to phosphorus concentrations is better even than the artificially low discharge standard of 1 mg/L that Argentina asserted should apply[528]. Argentina asserts that "in cases where the population is equal to more than 10,000 people and the receiving environment is subject to eutrophication -- these two conditions are satisfied for Orion -- the European directive on urban wastewater treatment requires that the phosphorous concentration in the effluent not exceed 1 mg/l"[529]. Leaving aside the fact that the receiving environment is not subject to eutrophication as a result of the Botnia plant's phosphorus discharge[530] and that EU law does not apply in this case -- and that even if it did, the law would not apply to cellulose plants[531] -- the phosphorus concentration in Botnia's effluent is on average *more than 40% lower than that referenced in the European directive*.

---

[527] *Environmental Performance Review*, *op. cit.*, p. 3.4. UR Vol. IV, Annex R98. Argentina's observation that the phosphorus concentration in the plant's effluent is five to eight times the concentration in the river, AR, para. 3.9, betrays the weakness of its argument, because it fails to note that the discharge, which constitutes less than 0.02% of the total river flow, becomes indistinguishable from the river mere meters from the discharge point. UCM, para. 5.62; Final CIS, *op. cit.*, p. 4.47. UCM, Vol. VIII, Annex 173. Its attack on the phosphorus removal efficiency predicted in the Final CIS, AR, para. 3.82 & 3.115, also comes to naught, since the performance of the plant predicted by the IFC's experts has been substantiated by the plant's actual performance.

[528] *See, e.g.*, Second Wheater Report, *op. cit*., p. 25. AR, Vol. III, Annex 44. AR, para. 3.175. Of course, because Argentina itself has no enforceable standards for phosphorus, the "standard" urged in the Reply would apparently apply only to facilities constructed in Uruguay, but not in Argentina.

[529] Second Wheater Report, *op. cit.*, p. 25. AR, Vol. III, Annex 44.

[530] *See* UR, paras. 6.14-6.24.

[531] *See* UR, para. 6.67.

4.90 The Botnia plant also emits far below the maximum monthly average loading requirements for phosphorus established in the plant's Wastewater Treatment Plant Authorization. Although the plant has a limit of 0.074 tons per day, its maximum monthly average discharge is about half that, or 0.046 tons/day. The efficiency of the plant, measured in kilograms of phosphorus per ton of pulp produced has been consistent with the prediction by the IFC's independent experts in the Final CIS. The Final CIS estimated the plant would produce at a rate of 0.03 kg/ADt; in the first months of operation, it has averaged 0.026 kg/ADt[532].

(ii) Uruguay's Efforts to Reduce Phosphorus in the Uruguay River

4.91 Argentina repeatedly stresses the presence of elevated phosphorus levels in the Uruguay River and the potential environmental impacts that this condition poses[533]. Although Argentina grossly exaggerates the potential impacts, it is true that concentrations of phosphorus in the Uruguay River at various locations exceed the water quality standard established in Uruguay's Decree 253/79. As the *Environmental Performance Review* noted, the phosphorus levels "are attributed to natural and anthropogenic sources derived throughout the watershed of the Río Uruguay, which extends over approximately 365,000 km^2 through portions of Uruguay, Argentina and Brazil. The present and past levels of total phosphorus are not attributed to the mill effluent discharge."[534] In other words, the river receives a significant influx of phosphorus not from the Botnia plant but from Argentina and Brazil upstream from the plant. Of course, Uruguay has no authority to control or

---

[532] *Environmental Performance Review*, *op. cit.*, p. 3.4. UR, Vol. IV, Annex R98.

[533] AR, paras. 3.26 & 4.161.

[534] *Environmental Performance Review*, *op. cit.*, p 4.2. UR, Vol. IV, Annex R98.

prevent discharges of phosphorus from Argentina or Brazil. Unfortunately, Argentina makes no effort to regulate or limit phosphorus discharges into the Uruguay River from industrial, agricultural or municipal sources within its own territory. It has not adopted any regulations in this regard. Nor has CARU promulgated regulations on phosphorus. Only Uruguay regulates or limits phosphorus discharge into the river. Thus, the prominent position phosphorus plays in Argentina's Reply can be charitably characterised as ironic.

4.92 Although Uruguay is not the sole or even primary cause of the phosphorus in the river, it has, consistent with its Decree 253/79, made significant efforts to reduce contributions of phosphorus from its territory to the Uruguay River. Uruguay's unilateral efforts will improve the quality of water and, once fully implemented, will more than offset the total phosphorus discharged from the Botnia plant. These comprehensive efforts address contributions both from discrete effluent discharges, such as those of municipal wastewater, and from diffuse or "nonpoint" sources, such as agricultural and other land-use activities.

4.93 Of most importance, Uruguay's State Waterworks Agency (*Obras Sanitarias del Estado* or "OSE") and Botnia have entered into an agreement pursuant to which the Botnia plant will treat the municipal wastewater of the city of Fray Bentos[535]. This will dramatically reduce nutrients like phosphorus and other contaminants discharged into the Uruguay River in the immediate vicinity of Fray Bentos and the Botnia plant[536]. Construction is projected to be complete by 2010[537].

---

[535] *See* Agreement between OSE and Botnia Regarding Treatment of the Municipal Wastewater of Fray Bentos (29 April 2008). UR, Vol. III, Annex R71.

[536] OSE, Discharge of Residual Liquids in the Uruguay River Basin (hereinafter "OSE, Discharge of Residual Liquids in the Uruguay River Basin"). UR, Vol. II, Annex R13.

Once operational, OSE and Botnia will jointly monitor the influent municipal wastewater to the Botnia plant to ensure the efficacy of this innovative and collaborative pollution control effort[538]. The Final CIS specifically recommended that Botnia and the Uruguayan regulatory authorities undertake this effort as a means to further reduce the plant's already acceptable contribution of phosphorus to the Uruguay River[539]. Specifically, the Final CIS found that the treatment of the Fray Bentos municipal wastewater by the Botnia plant "reduces the total loading of organics and nutrients, in particular phosphorus, to the Rio Uruguay"[540] and "*virtually off-sets the net loading of organics and nutrients from the Botnia mill*[.]"[541] By OSE's calculations, this process should reduce phosphorus discharges in the immediate vicinity of the plant by 8.8 tons, which is nearly three quarters of the Botnia plant's estimated annual discharge of 12 tons[542].

4.94 OSE is also engaged in a multi-phased effort to expand and update the quality of other municipal wastewater systems across Uruguay, including systems that discharge to the Uruguay River[543]. These efforts began long before this litigation and years before the issuance of the Botnia plant's AAP. The first phase of

---

[537] *Ibid*.

[538] Agreement between OSE and Botnia Regarding Treatment of the Municipal Wastewater of Fray Bentos, Section 9, *op. cit.* UR, Vol. III, Annex R71.

[539] Final CIS, Annex D, *op. cit.*, p. D4.5-4.6. UCM, Vol. VIII, Annex 176.

[540] *Ibid.*, p. D4.5.

[541] *Ibid.*, p. D4.6 (emphasis added).

[542] OSE, Discharge of Residual Liquids in the Uruguay River Basin, *op. cit*. UR, Vol. II, Annex R13. *See also* Final CIS, Annex D, *op. cit.*, p. D4.6. UCM, Vol. VIII, Annex 176.

[543] World Bank, Press Release, "World Bank Approves US$50 Million to Expand and Upgrade Water and Sanitation Services," *available at* http://web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P101432 (28 June 2007) (last visited on 9 July 2008). UR, Vol. III, Annex R69.

this work, primarily devoted to evaluating the current conditions of water and sanitation services, was supported by a World Bank loan approved in June 2000[544]. On 28 June 2007, the World Bank approved a second loan of US$50,000,000 to support the second phase of the project, which will include upgrading and rehabilitating existing water and sewage treatment plants throughout Uruguay, including those cities whose municipal discharges are likely to affect phosphorus levels in the Uruguay River[545]. Among the actions being undertaken, OSE will install an advanced wastewater treatment system with special chemical treatment for nutrients, including phosphorus, for a majority of Salto, a city of approximately 100,000 people. This system will remove approximately 85% of the phosphorus from the sewage[546], thus providing a significant reduction in Uruguay's phosphorus contribution to the river[547]. In fact, OSE estimates indicate that this installation will reduce phosphorus discharges to the Uruguay River by approximately 25 tons annually, or more than twice the anticipated discharge from the Botnia plant[548]. Construction is projected to be completed by 2010. This and other related efforts will further improve the quality of water in the river and further offset any incremental contribution of phosphorus from Botnia.

---

[544] *Ibid*.

[545] *Ibid.*

[546] OSE, Discharge of Residual Liquids in the Uruguay River Basin, *op. cit.* UR, Vol. II, Annex R13.

[547] OSE also plans to upgrade the municipal wastewater system for other cities, including Artigas and Mercedes; the improvements at those cities will result in 85% phosphorus removal capacity. *Ibid*. Neither city discharges directly to the Uruguay River, but these efforts reflect Uruguay's overall commitment to reduce phosphorus.

[548] *Ibid.*

4.95 Finally, Uruguay, through its Ministry of Livestock, Agriculture and Fishing, is developing a comprehensive conservation and control plan to reduce phosphorus and other nutrient contributions from land-use activities[549]. The primary activities targeted by the plan will be farming and livestock practices, both of which contribute phosphorus and other nutrients to water bodies as a result of soil erosion and run-off containing fertilizer and manure[550]. The plan creates a team of experts from the public and private sectors to identify and implement strategies for soil conservation and reduction of nutrient discharges. It requires an evaluation of the sources of nutrient discharges, the implementation of best management practices and the development of education and enforcement programs.

4.96 In short, the comprehensive efforts to reduce phosphorus by Uruguay target the significant sources of contribution from Uruguay's territory. When fully implemented, they will more than offset the small discharge of phosphorus from the Botnia plant. The efforts will render the conclusions of the Final CIS all the more conservative as its analysis did not take into account these changes, including the treatment of the Fray Bentos municipal wastewater by the Botnia plant. These efforts conclusively refute Argentina's claim that Uruguay has not made appropriate efforts to reduce phosphorus levels. Uruguay's efforts stand in stark contrast to Argentina's historic neglect of phosphorus emissions from its territory, including its complete failure to regulate the discharge of phosphorus.

---

[549] Affidavit of Eng. Andrés Berterreche, Undersecretary of Livestock, Agriculture and Fishing of Uruguay (11 July 2008) UR, Vol. IV, Annex R95.

[550] *Ibid.*

(b) Nitrogen

4.97 Like phosphorus, the Botnia plant has exhibited superior performance with respect to nitrogen. The concentration of nitrogen in the effluent is far below the regulatory limit. The Botnia plant must maintain an annual nitrogen concentration of no more than 8 mg/L[551]. In contrast, if the Botnia plant were located on the Argentine side of the river in Entre Ríos, its discharges of nitrogen would not be subject to any limit[552]. The annualized performance to date is below this limit, and on average has been less than half the limit. Moreover, Argentina concedes that a well run cellulose plant should have an effluent concentration of nitrogen of 2-4 mg/L[553]. The average concentration of nitrogen for the first six months of operations is 3.4 mg/L, well within the range identified by Argentina[554].

4.98 The Botnia plant is also compliant with the nitrogen requirements in its Wastewater Treatment System Approval, which establishes a maximum monthly average loading requirement of 0.74 tons per day[555]. In fact, in the month with the highest load, December 2007, the monthly load was less than half the maximum monthly average, and the loadings for all of the other months have been significantly less[556]. Similarly, the average discharge of nitrogen has been well within the Final

---

[551] In the Initial Environmental Authorisation, DINAMA established an annual concentration limit for total nitrogen. Botnia AAP, *op. cit.*, Art. 2(z). UCM, Vol. II, Annex 21

[552] Regulatory Decree No. 5837, Government of Entre Ríos, Exhibit 1 (26 December 1991). UCM, Vol. III, Annex 42.

[553] AR, para. 3.111.

[554] *Environmental Performance Review*, *op. cit.*, p. 3.4. UR Vol. IV, Annex R98.

[555] Wastewater Treatment System Approval, *op. cit.*, Table 1. UCM, Vol. X, Annex 225.

[556] *Environmental Performance Review*, *op. cit.*, at 3.9. UR, Vol. IV, Annex R98.

CIS estimate of 0.26 kg/ADt[557]. In that regard, the IFC's technical experts noted that "[o]n a production basis, the maximum monthly load was 0.22. kg/ADt during the initial month of operation, and reduced to the range of 0.06 to 0.14 kg/ADt thereafter. In comparison, the expected maximum monthly load predicted in the CIS was 0.26 kg/ADt."[558]

(c) Biological Oxygen Demand

4.99 The Botnia plant's performance regarding biological oxygen demand (BOD) has been equally exceptional. Decree 253/79 establishes a maximum effluent concentration for BOD of 60 mg/L[559]. Botnia has always remained below this limit. The effluent concentration of BOD has decreased since the plant began operations[560], and over the first six months of operation averaged 12 mg/L[561], about 20% of the applicable standard. The IFC's technical experts confirmed this finding, concluding that the "mill effluent" is "well below the daily maximum permit limit"[562]. In addition, DINAMA has established a maximum monthly loading average for BOD of 2.6 tons/day. The plant has performed far better, with a maximum load of 1.2 tons/day during November and loads ranging between 0.5 and 0.9 tons per day thereafter[563]. As the IFC's technical experts concluded, the plant's

---

[557] *Ibid.*, p. 3.4.

[558] *Ibid.*

[559] Decree 253/79, *op. cit.*, Art. 11(2). UCM, Vol. II, Annex 6.

[560] *Environmental Performance Review*, *op. cit.*, p. 3.7. UR, Vol. IV, Annex R98.

[561] *Ibid.*, p. 3.3.

[562] *Ibid.*

[563] *Ibid.*

"loads are well below the permit limit"[564]. Regarding the IFC's performance projections, the *Environmental Performance Review* found that "[t]he monthly load for BOD_5 was consistently below the expected load following the first month of operation and after the required period to initialize the biological treatment system".

4.100 Tellingly, if the plant were located across the river in Entre Rios Province in Argentina, it would be subject to the much less stringent standard for BOD of 250 mg/L -- that is more than four times higher than the Uruguayan standard and 20 times higher than Botnia's actual performance[565]. One can only express surprise at Argentina's questioning of Uruguay's commitment to the environment when Argentina itself has established much less stringent environmental standards -- and, as discussed above, in the case of phosphorus and nitrogen, no standards at all.

(d) Chemical Oxygen Demand

4.101 The Botnia plant's performance regarding chemical oxygen demand (COD) has been no less exceptional. It is fully compliant with the regulatory limit for COD. Botnia's Wastewater Treatment System Approval obligates the plant to maintain a maximum monthly average loading limit of 56 tons per day. The plant has averaged less than 50% of the limit[566]. Similarly, the plant's average COD discharge of 9.6 kg/ADt is well below the monthly Final CIS estimate of 15 kg/ADt[567]. The IFC's technical experts confirmed the plant's superior performance regarding COD, finding that its "maximum monthly load" was "well below the

---

[564] *Ibid.*

[565] Regulatory Decree No. 5837, Government of Entre Ríos, Exhibit 1, *op. cit.* UCM, Vol. III, Annex 42.

[566] *Environmental Performance Review*, *op. cit.*, p. 3.3. UR, Vol. IV, Annex R98.

[567] *Ibid.*

permit limit" and that on a "production basis" the plant's performance was better than "predicted in the CIS"[568].

(e) Total Suspended Solids

4.102 The evidence establishes the Botnia plant's excellent performance regarding total suspended solids (TSS). Decree 253/79 sets a maximum discharge limit of 150 mg/L for TSS[569]. Concentrations of TSS in the effluent are far below this limit, averaging only 24 mg/L[570]. The Botnia plant has also performed well within the 3.7 tons per day maximum monthly average load limit established in the Wastewater Treatment System Approval[571]. Moreover, as the IFC's independent experts found, the plant's average TSS discharge of 0.92 kg/ADt "is below the expected load of 1.3 kg/ADt predicted in the CIS"[572].

(f) AOX

4.103 Also first-rate is the plant's performance regarding AOX. The Wastewater Treatment System Approval established a maximum monthly average of 0.56 tons per day for AOX. The average monthly load per day of 0.13 tons per day[573] is less than one quarter of this limit. The plant's performance is also better than anticipated by the IFC, whose independent experts noted that the load of 0.05 kg/ADt was "well below the expected value predicted [in] the CIS of 0.15 kg/ADt"[574].

---

[568] *Ibid.*

[569] Decree 253/79, *op. cit.*, Art. 11(2). UCM, Vol. II, Annex 6.

[570] *Environmental Performance Review*, *op. cit.*, p. 3.3. UR, Vol. IV, Annex R98.

[571] *Ibid.*

[572] *Ibid.*

[573] *Ibid.*, p. 3.4.

[574] *Ibid.*

(g) Dioxins and Furans

4.104 The results for dioxins and furans are equally outstanding. As required by its Wastewater Treatment System Approval, Botnia has monitored dioxin and furan concentrations in its effluent, including the key congeners of 2,3,7,8-TCDD for dioxins and 2,3,7,8-TCDF for furans[575]. Even using sophisticated methodology capable of detecting the extremely low concentration of one part of dioxin per quadrillion of water, these key congeners are below detection levels[576]. As the IFC's technical experts found:

> Dioxins and furans are generally not associated with modern pulp mills. As reported in the CIS, experience at other modern ECF mills throughout the world has shown that the most toxic congeners of dioxins and furans are not produced in the bleaching process at detectable levels, and that the less toxic congeners, although potentially detectable, are generally not elevated above ambient levels.
>
> This statement that dioxins and furans are not associated with modern mills is also true for the Orion mill. The most toxic congeners 2,3,7,8-TCDD and 2,3,7,8-TCDF were non-detectable at the 1pg/L (as TEQ) level based on three separate analyses[577].

4.105 Accordingly, Argentina's concerns regarding dioxins and furans, misleading as they were to begin with in light of modern pulp mill technology, have been proven completely unfounded by the Botnia plant's operating performance.

(h) Metals

4.106 Nor has the Uruguay River been harmed in any manner by the discharge of metals. Decree 253/79 establishes maximum effluent discharge limits for various

---

[575] *See* (Second) Torres. Aff., *op. cit.*, Annex C. *Environmental Performance Review*, *op. cit.*, p. 3.4. UR, Vol. IV, Annex R98.

[576] *Environmental Performance Review*, *op. cit.*, p. 3.4. UR, Vol. IV, Annex R98.

[577] *Ibid.*, p. 3.4.

metals, including arsenic, cadmium, copper, chromium, mercury, nickel, lead and zinc[578]. No exceedances of the Uruguayan regulatory limits have been detected in the Botnia plant's effluent[579]. Indeed, as expected for an industrial process where metals are very sparingly used[580], the presence of metals in the effluent is so low that it is generally not detectable[581]. The IFC's technical experts explain: "Metals are generally not of concern in modern pulp mills."[582] Unsurprisingly, therefore, they found that concentrations of arsenic, cadmium, copper, chrome, iron, mercury, nickel, lead and zinc "in the final effluent are below the respective detection limits and well below the respective permit limits"[583]. Thus, the metals that Argentina identified as a concern (iron, copper, chrome, zinc, cadmium, nickel and arsenic) in its Reply[584] simply have nothing to do with the Botnia plant.

4.107 The absence of metals in Botnia's discharge renders irrelevant Argentina's assertions about the potential detrimental environmental effects of metals in the environment[585]. Even if those arguments had merit, they simply have no relevance to the operation of the Botnia plant.

---

[578] Decree 253/79, *op. cit.*, Art. 11(2). UCM, Vol. II, Annex 6.

[579] *Environmental Performance Review*, *op. cit.*, p. 3.4. UR, Vol. IV, Annex R98. *See also* (Second) Torres Aff., *op. cit.*, Annex C. UR, Vol. IV, Annex R92.

[580] *See Environmental Performance Review*, *op. cit.*, p. 3.4. UR, Vol. IV, Annex R98.

[581] *Ibid.*; (Second) Torres Aff., *op. cit.*, Annex C. UR, Vol. IV, Annex R92.

[582] *Environmental Performance Review*, *op. cit.*, p. 3.4. UR, Vol. IV, Annex R98.

[583] *Ibid.*

[584] AR, para. 3.26, 3.73 & 3.96.

[585] *See, e.g.*, AR, paras. 3.8, 3.26, 3.30, 3.52-3.53, 3.96, 3.167 & 3.223; Rabinovich Report, *op. cit.*, pp. 25-27. AR, Vol. III, Annex 43.

(i) Acute Toxicity

4.108 As required by its Wastewater Treatment System Approval, Botnia conducts monthly acute toxicity tests for its effluent, using three biological organisms[586]. The tests have revealed no acute toxicity from mill effluent whatsoever[587]. The IFC's technical experts concluded that "[m]onthly testing has been completed following standard protocols using three separate test procedures" and "[t]oxicity analysis shows no lethal response"[588].

(j) Flow

4.109 With respect to water intake and effluent flow, the plant has also demonstrated exceptional performance. Compared to a discharge limit of 1 cubic meter per second, the plant on average has discharged 0.86 m^3/s[589]. This is consistent with the expected discharge rate of 0.83 m^3/s predicted in the CIS[590].

(k) Other Aquatic Parameters

4.110 Monitoring of the Botnia plant also reveals the outstanding performance of the plant for other parameters not featured in Argentina's Reply. The temperature of the effluent discharge has averaged below the permit limit; the few exceedances have been brief in duration, and have been found by the IFC not to have any adverse effects[591]. The pH (acidity) of the discharge has been well within permit limits.

---

[586] *Environmental Performance Review*, *op. cit.*, p. 3.6. UR, Vol. IV, Annex R98.

[587] *Ibid.* UR, Vol. IV, Annex R98.

[588] *Ibid.*, p. 3.5. UR, Vol. IV, Annex R98.

[589] *Ibid.*

[590] *Ibid.*, p. 3.2. UR, Vol. IV, Annex R98.

[591] *Ibid*. In fact, the exceedances of the temperature limit corresponded with factors beyond Botnia's control such as elevated temperatures in the Uruguay River. *Ibid.*

According to the IFC's technical experts, the pH "is within the typical range for the ambient waters of the Río Uruguay and within the permit limits of 6.0 to 9.0. The expected pH from the CIS was also within the range of 6.0 to 9.0."[592] The maximum colour of the discharge exceeded IFC expectations but the IFC determined that the difference between the estimate and the initial performance was insignificant and "within the natural variability"[593].

(l) Air

4.111 Although the plant's impacts on air quality are plainly beyond the jurisdiction of the 1975 Statute, Uruguay is pleased to report that the Botnia plant has exhibited exceptional performance in this regard as well. The IFC's technical experts found that the "air emissions from the mill have remained well within the allowable limits specified in the permit issued by DINAMA"[594]. Although one parameter -- NOx -- was somewhat higher than initially anticipated in the Final CIS, the IFC's experts attributed this minor variance to start-up instability, and expected emissions to decline in the future[595]. In any event, NOx emissions are within DINAMA's permitted limits, and the IFC's report indicates that regional monitoring shows no adverse impacts on air quality from the NOx emissions[596].

---

[592] *Ibid.*

[593] *Ibid.*, pp. 3.2-3.3.

[594] *Ibid.*, p. 5.1.

[595] *Ibid.*, p. 5.1-5.3.

[596] *Ibid.*, pp. 5.2 & 6.2. The IFC's experts found that "[t]he concentration of NO_x has been below the threshold concentration of 300 mg/NM^3, approximately 96% of the time (on an annualized basis), well below the permissible 10% frequency of exceedance". *Ibid.*, p. 5.2. This is in accordance with the emissions limit set in Article 2(t) of the Botnia AAP. Botnia AAP, *op. cit.*, Art. 2(t). UCM, Vol. II, Annex 21. Argentina grossly mischaracterizes the nature of certain events that occurred at the Botnia plant prior to the submission of the Reply in

4.112 Further confirming the Botnia plant's environmental sustainability with respect to air emissions, the plant is implementing a Clean Development Mechanism project under the United Nations Framework Convention on Climate Change and, thus, receives Certified Emission Reductions for greenhouse gas emissions avoided by the project[597]. Indeed, as anticipated in the Final CIS[598], the plant will be a significant source of renewable energy that displaces the combustion of fossil fuels[599].

2. The Botnia Plant Has Not Caused Any Change to Ambient Water Quality in the Uruguay River

4.113 As explained above, the characteristics of the Botnia plant's effluent are, without exception, within its strict regulatory limits and entirely consistent with the

---

January 2008. Although Argentina asserts that "[d]ès les dernières étapes de sa construction Orion a été à l'origine d'événements divers qui ont eu un impact négatif sur l'écosystème du fleuve Uruguay et de ses zones d'influence, notamment la santé des habitants, ainsi que celle des ouvriers et des autres employés de Botnia, dans les régions voisines" ("[s]ince the final stages of its construction, Orion [Botnia] has caused various events having a negative impact on the ecosystem of the Uruguay River and its influence zones, especially the health of its inhabitants as well as that of the workers and other Botnia employees in the neighboring regions") (AR, para. 0.10) the sole evidence it cites are industrial accidents that Argentina does not even claim to have had an impact on the external environment, and odours. As for the latter, apart from stronger odours detected twice during the first three weeks of operation, EcoMetrix identified only four reported occasions of "mild" odours associated with plant operations. *Environmental Performance Review, op. cit.*, p. 6.1. UR, Vol. IV, Annex R98. Neither justifies Argentina's sweeping conclusion that these events have had a "un impact négatif sur l'ecosysteme du fleuve Uruguay et de ses zones d'influence" ("a negative impact on the ecosystem of the Uruguay River and its zones of influence").

[597] Botnia Web Site, "CDM Project," *available at* http://www.botnia.com/en/default.asp?path=204,1490,1494,1373 (last visited on 2 July 2008). UR, Vol. III, Annex R76.

[598] Final CIS, *op. cit.*, pp. 4.98-4.99. UCM, Vol. VIII, Annex 173.

[599] CDM Project, *op. cit.* UR, Vol. III, Annex R76. As explained on Botnia's Web Site, "[t]he proposed CDM project consists of about 32 MW biomass-based surplus electricity generations. Electricity will be generated in the power plant that is part of a pulp mill and will be situated in the mill site. While the conventional eucalyptus/hardwood pulp mill with a power plant produces the electricity required for its own processes, this project is designed to generate surplus electricity which can be used outside the mill site. The amount of surplus electricity is according to preliminary design values about 270 GWh annually. This would be enough to supply all the electricity consumed by 150,000 Uruguayan homes". *Ibid.*

projections made by the IFC's technical experts in the Final CIS. These limits were designed in order to prevent any harm to the river from the plant's effluent. It will thus come as no surprise that the emissions from the Botnia plant, which comply with its effluent limits, have not caused any exceedance of the applicable Uruguayan and CARU water quality standards. Nor have they changed the water quality of the river. The monitoring results that establish this conclusion, endorsed by the IFC's independent experts and by Uruguay's, are detailed below.

4.114 As an initial matter, operation of the Botnia plant has not caused any parameter to exceed the applicable Uruguayan and CARU water quality standard. In that regard, the IFC's *Environmental Performance Review* observed that DINAMA and CARU have promulgated water quality standards "to protect aquatic life and to permit domestic water use"[600], and that review of the extensive post-operational water quality monitoring data showed that operation of the Botnia plant had caused no exceedances of these limits[601]. The *Environmental Performance Review* thus found that the Uruguay River's water quality, after operation of the plant, was of high quality[602]. It found that concentrations of most indicator parameters are well below the most restrictive Uruguayan and CARU standards. These parameters include: pH, dissolved oxygen, BOD_5, nitrate, turbidity, fluoride, chloride, sulphate, R.A.S., cyanide, arsenic, boron, copper, chromium, mercury, nickel, zinc and total phenols[603].

---

[600] *Environmental Performance Review*, *op. cit.*, p. 4.2. UR, Vol. IV, Annex R98.

[601] *Ibid*.

[602] *Ibid*.

[603] *Ibid*. The only exceptions noted by the *Environmental Performance Review* were "bacteria, total phosphorus and iron", which it observed had prior to the commencement of operations of

4.115 The IFC's experts specifically found that the Botnia plant had not caused an exceedance of Uruguay's phosphorus standard[604] (as noted above, neither Argentina nor CARU has adopted a standard for phosphorus.) In that regard, they noted that the data for total phosphorus collected during post-operational monitoring showed that the level of phosphorus in the river was "comparable to the baseline levels previously reported for the Río Uruguay"[605]. Their conclusion with respect to the role of the Botnia plant was categorical: "The present and past levels of total phosphorus are not attributed to the mill effluent discharge."[606] Uruguay's experts concur with the IFC's assessment[607].

(i) The IFC's technical experts thus found that "[a] comparison of the monitoring data pre- and post-commissioning of the mill shows that *the water quality of the Río Uruguay has not changed as a result of the mill*"[608]. They came to this unambiguous conclusion after conducting a detailed review to compare water quality in the river both before and after the plant began to operate[609]. Indeed, these impartial experts concluded that, with respect to phosphorus, "[t]otal phosphorus levels were generally *lower* post-start-up as compared to" the pre-operational

---

the Botnia plant, already "exceeded the most restrictive standard prior to commissioning of the mill due to natural and anthropogenic sources throughout the watershed". *Ibid.*

[604] *Ibid*.

[605] *Ibid*.

[606] *Ibid*.

[607] Exponent Report, *op. cit.*, pp. 3-10-3-11. UR, Vol. IV, Annex R83 ("[E]ven during start-up, the facility … was not impacting nutrient levels within the receiving waters of the river").

[608] *Environmental Performance Review*, *op. cit.*, p. 4.1 (emphasis added). UR, Vol. IV, Annex R98.

[609] *See, e.g.*, *ibid.*

baseline[610]. Their conclusion was confirmed by a "statistical analysis", which demonstrated that "the concentration of most parameters is not significantly different between upstream and downstream monitoring stations at the 95% confidence level"[611]. In sum, the IFC's experts concluded, just as they had predicted in the Final CIS, that "[t]he water quality between the mill and Fray Bentos is comparable to the water quality further upstream beyond the influence of the mill indicating that *the mill has not affected water quality within the Río Uruguay*"[612].

4.116 Uruguay's experts fully concur with the IFC's experts regarding the Botnia plant's lack of impact on water quality[613]. So do independent Argentine experts. As one Argentine news outlet concluded in an article entitled *Eight Months After Start-Up, Experts Agree that Botnia Does Not Contaminate*, based on interviews with numerous scientists in Argentina, there are "no reports that show that the plant contaminates the environment."[614] Another Argentine publication reported: "Almost eight months after starting up, the Botnia plant is passing one of

---

[610] *Ibid.*, p. 4.3 (emphasis added).

[611] *Ibid.*, p. 4.4. This statistical analysis included all parameters that Argentina has indicated are of concern, plus many others: temperature, conductivity, pH. sechi depth, dissolved oxygen, bacteria, BOD_5, TSS, phosphate, total phosphorus, organic nitrogen, total nitrogen, nitrite, nitrate, ammonia, AOX, colour, turbidity, alkalinity, calcium, hardness, magnesium, sodium, potassium, fluoride, chloride, sulphate, silica, silicon, R.A.S., total cyanide, arsenic, boron, cadmium, copper, chromium, iron, mercury, nickel, lead, selenium, zinc and total phenols. *Ibid*.

[612] *Ibid.,* p. 4.1 (emphasis added).

[613] Exponent Report, *op. cit.*, pp. 3-10-3-11. UR, Vol. IV, Annex R83.

[614] Infobae.com, "Eight Months After Start-up, Experts Agree that Botnia Does Not Contaminate" (3 July 2008). UR, Vol. IV, Annex R93.

its most difficult tests: the scrutiny of Argentine experts who are starting to acknowledge that the cellulose production is not polluting the Uruguay River."[615]

4.117 In sum, there is no evidence to support Argentina's predictions of harm to the river. To the contrary, the evidence conclusively demonstrates that the Botnia plant has had no detrimental impact.

Section III.
Uruguay's Continuing Commitment to Protect the River

4.118 As should now be readily apparent, Uruguay has undertaken extraordinary measures to ensure that the Botnia plant does not degrade the Uruguay River or its biota. This has included insisting upon a pre-operational monitoring program to establish a comprehensive baseline against which to measure any potential impacts, and an equally far-reaching post-operational monitoring regime to compare the river's environmental quality against the historical record. The previous Section proved that, to date, the Botnia plant has performed precisely as anticipated, namely, with world-class environmental performance that has resulted in no perceptible impact on the river. In this Section, Uruguay demonstrates its commitment to remaining vigilant for any impacts, and its equal commitment to taking whatever measures are necessary to ensure that the Botnia plant continues to operate in an environmentally responsible manner.

A. CONTINUED POST-OPERATIONAL MONITORING

4.119 Uruguay is itself continuing to conduct and to receive from Botnia comprehensive effluent and environmental quality data that allows it to exercise

---

[615] El País Digital, "Argentine Experts Confirm that Botnia Does Not Pollute the River" (4 July 2008). UR, Vol. IV, Annex R94.

strong oversight over Botnia, and will do so throughout the life of the plant. In that regard, Botnia's Wastewater Treatment System Approval requires it to submit detailed reports that allow the Uruguayan regulatory authorities to evaluate the environmental performance of the plant's effluent treatment system and its optimization of water use[616]. Botnia is also obligated to submit to DINAMA bimonthly reports on the effluent treatment plant's performance[617]. Further, Botnia must provide to DINAMA the comprehensive environmental quality data it is obligated to collect. In combination with DINAMA's own monitoring (discussed in Section 1), these reports ensure that Uruguay is fully apprised of the plant's environmental performance and potential impacts so that it can take timely, and if necessary, immediate corrective action in the unlikely event the plant's discharge exceeds its regulatory limits or impacts unexpectedly materialise.

B. CONTINUED IFC OVERSIGHT

4.120 The IFC is also committed to overseeing the environmental performance of the Botnia plant through the work of its independent technical experts, at least through 2009. In that regard, the Independent Monitoring of Environmental and Social Performance requirement of the ESAP requires that the IFC's experts conduct two further reviews of the Botnia plant's environmental, health and safety monitoring data, the first to be completed in November 2008, and the second in November 2009. Each evaluation must assess the actual environmental effects as compared to those predicted in the Final CIS, and must identify any variances with

---

[616] Wastewater Treatment System Approval, *op. cit.*, Sec. 2. UCM, Vol. X, Annex 225. (Second) Torres Aff., *op. cit*., Secs. 5-6. UR, Vol. IV, Annex R92.

[617] Wastewater Treatment System Approval, *op. cit.*, Sec. 2(a). UCM, Vol. X, Annex 225. (Second) Torres Aff., *op. cit*., Secs. 5-6. UR, Vol. IV, Annex R92.

respect to the limits described in the Final CIS, including with respect to the requirements of IPPC BREF, DINAMA, and the World Bank and IFC. The IFC's technical experts are also required to review social monitoring data to assess the plant's impacts on housing, policing, health care, education, employment, tourism, fishery resources, farming resources and bee-keeping. These evaluations must confirm whether Botnia has met all commitments detailed in the ESAP[618].

C. URUGUAY'S ONGOING REGULATORY OVERSIGHT AND COMMITMENT TO PREVENT UNACCEPTABLE IMPACTS TO THE RIVER

4.121 The regulatory process is a continuing one. In addition to Uruguay's regular scrutiny of monitoring and effluent data, and its authority and commitment to take action in the event of unacceptable impacts, Botnia must obtain a renewal of its AAO every three years[619]. This renewal requirement ensures that operating procedures will continue to be state-of-the-art, and that the plant continues to provide the highest standard of environmental protection[620]. The renewal process includes revision and updating of the project's environmental management plans, and the need for the plant to obtain new approvals with respect to emissions, including effluent discharges[621].

4.122 Uruguay is fully confident that the Botnia plant will continue to exhibit superior environmental performance; and to ensure that it does, Uruguay has mandated a detailed legal regime that gives its regulatory authorities the unquestioned ability to take whatever actions are necessary to enforce compliance.

---

[618] *Pre-Commissioning Review*, *op. cit*., p. 10.1. UR, Vol. III, Annex R50.

[619] UCM, para. 1.16.

[620] UCM, para. 1.16.

[621] UCM, para. 1.16.

4.123 Botnia is required as a matter of general Uruguayan law and as a specific obligation of its AAO to operate in compliance with Uruguay's environmental laws and CARU standards. As Uruguay showed in the Counter-Memorial (and which Argentina has not disputed), Uruguayan law prohibits actions or activities that cause unacceptable environmental impacts, and MVOTMA has an affirmative duty to deny authorisation for any activities that will cause prohibited impacts to the environment[622]. Should Botnia's performance fall short of this mark, Uruguay has the regulatory authority to take action, up to and including the authority to order that Botnia implement additional protective measures or that it cease operation altogether[623]. Although Uruguay has every expectation that the Botnia plant will continue to be environmentally responsible, Uruguay hereby repeats its commitment to the Court to use all available legal measures to enforce compliance.

4.124 In sum, Uruguay has both the will and the legal authority to regulate the Botnia plant appropriately. It has constructed a regulatory regime that ensures it receives comprehensive and timely information about the plant and its potential impacts, and it will not shirk from implementing all necessary measures. The Court can thus have full confidence that the Uruguay River will continue to be fully protected.

Conclusion

4.125 This Chapter has demonstrated why the Botnia plant continues to receive accolades from the independent experts at the IFC. As demonstrated by intense monitoring during the first six months of operation, the plant has performed as

---

[622] UCM, para. 7.45.

[623] UCM, paras. 7.46-7.47.

Uruguay and the IFC expected, and there have been no incidents or reports of harm to the river. To the contrary, operation of the Botnia plant has left the river unaffected. These facts prove correct Uruguay's prior submission to the Court, and show that Argentina's forecasts of environmental disaster have come to naught.

4.126 The next Chapter of the Rejoinder, Chapter 5, examines the applicable substantive law and demonstrates why Uruguay's authorisation of the Botnia plant and Botnia's subsequent operation have fully comported with all applicable substantive environmental standards in the 1975 Statute and general international law. Chapter 6 reviews and responds to the claims of Argentina's hired experts presented in the Reply. Just as the first six months after start-up have discredited Argentina's claims of imminent disaster, Chapter 6 shows why Argentina's Reply utterly fails to rebut Uruguay's proof that the plant is state-of-the-art and that long-term operation will damage neither the river nor the surrounding environment. Chapter 7 responds to the portions of Argentina's Reply pertaining to the question of remedies.

CHAPTER 5.
THE APPLICABLE LAW REGARDING ENVIRONMENTAL ISSUES

5.1 It has already been demonstrated in Chapter 4 that emissions from the Botnia plant comply with all applicable regulatory standards imposed by Uruguay and CARU; that there have been no adverse environmental impacts since commencing operation; and that Argentina has produced no evidence to rebut the conclusions of the Final CIS that there will be no violation of applicable standards in the future. Argentina does not seriously dispute these points. However, it continues to argue that the plant is nevertheless operating in violation of Articles 1, 36, and 41 of the 1975 Statute. For this purpose it relies on a very broad and loose interpretation of the Statute, which, it claims, differs significantly from the 1997 UN Convention on International Watercourses relied on by Uruguay as an aid to interpretation. Chapter 2 of this Rejoinder has already set out in detail why Argentina is wrong in its reading of the Watercourses Convention, and the arguments made there are of equal relevance to this Chapter. In the following sections, Uruguay will recapitulate its already comprehensive treatment of the law applicable to the environmental elements of this dispute[624], and will respond to those points on which there appears to be continuing disagreement between the Parties. In so doing, there will inevitably be some points stated in the Reply that are not addressed in this Rejoinder. This should not, however, be taken as an admission of the validity of Argentina's arguments in any respect. To the contrary, Uruguay stands by the analysis presented in Chapter 4 of the Counter-Memorial in its entirety.

5.2 Uruguay will show once again that Argentina's arguments with respect to interpretation of Articles 1, 36 and 41 are misguided. They do not reflect the

---

[624] UCM, Chap. 4.

ordinary meaning of those provisions taken in context. Nor are they consistent with what Uruguay believes their object and purpose to be. Under the guise of evolutionary interpretation Argentina is asking the Court to revise the 1975 Statute and decide questions of detail that the Statute empowers the Parties to determine jointly or through CARU, including which substances are to be regarded as "pollution", when water quality standards should be adopted, and what an environmental impact assessment is required to assess.

Section I.
The Risk Prevention Regime Created by the 1975 Statute Requires Joint and Equitable Measures to Promote the Optimum and Rational Use of the River

5.3 Argentina argues that the regime established by the 1975 Statute is uniquely different from other international instruments. It sees the Statute as providing specific obligations with respect to protection of water quality and the river ecosystem[625]. These specific obligations, in its view, give content to the principle of optimum and rational utilisation of the river set out in Article 1. In particular it reiterates its claim that any pollution of the Uruguay River is prohibited by Articles 36 and 41[626]. It also contends again that Articles 1 and 41 of the Statute require Uruguay to comply with the Convention on Biological Diversity, the

[625] AR, para. 4.18 ("le Statut de 1975 est un régime de protection globale qui énonce des obligations spécifiques en matière de protection de la qualité des eaux et de l'écosystème du fleuve") ("the 1975 Statute is a legal regime involving global protection, which sets specific obligations in terms of the protection of water quality and the river ecosystem").

[626] AR, paras. 4.19-4.20 ("Est interdite toute pollution qui porterait atteinte à la protection et à la préservation du milieu aquatique ou qui modifierait l'équilibre écologique du fleuve Uruguay.") ("Any pollution that would threaten the protection and preservation of the aquatic environment or that would change the ecological balance of the Uruguay River is prohibited.").

RAMSAR Convention, and the POPS Convention[627]. Finally it argues that "[l]e principe de l'effet utile des traités internationaux … implique de donner un effet utile à chacune des dispositions du statut de 1975", and it invites the Court to take account of various principles of international environmental law in order to interpret the Statute in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties[628]. It accuses Uruguay of not acting in good faith, and claims that Uruguay's interpretation of Articles 1, 36, and 41 of the 1975 Statute "équivaut à dénaturer la substance et la fonction des obligations prévues par le Statut au mépris du principe *pacta sunt servanda*"[629].

5.4 Uruguay has a different view of the object and purpose of the 1975 Statute. Argentina's attempt to unilaterally impose -- for the first time and in the context of this litigation -- its own definition of what concentrations of particular substances constitute "pollution" prohibited by the Statute has no basis in either the text of the Statute or its object and purpose. As the text demonstrates, the Statute serves as a basis for co-operation through CARU and for co-ordination of national policies and regulations in pursuit of the shared goal of equitable and sustainable use of the waters and biological resources of the Uruguay River. The importance of co-

---

[627] AR, para. 4.26 ("Lorsque des clauses de renvoi font mention explicite de la necessité de prendre en compte d'autres instruments aux fins de l'application et de l'interprétation d'un traité international, comme c'est le cas des articles 1 et 41a) du Statut de 1975, les Etats parties audit traité doivent s'y conformer.") ("When the referral clauses explicitly mention the need to take into consideration other instruments for purposes of applying and interpreting an international treaty, as is the case with Articles 1 and 41 a) of the 1975 Statute, the States party to that treaty must comply with it.").

[628] AR, para. 4.31 ("[t]he principle of useful effect of international treaties … implies giving useful effect to each of the provisions of the 1975 Statute").

[629] AR, para. 4.13 ("equivalent to distorting the substance and function of the obligations provided for by the Statute despite the principle of *pacta sunt servanda*").

operation can be observed throughout the Statute. Article 1 refers to the establishment of "the joint machinery necessary for the optimum and rational utilization of the River Uruguay". Article 4 requires the Parties to "agree on provisions governing safety on the river…". Article 36 requires them to "co-ordinate … the necessary measures" to avoid changes in the ecological balance and to control pests. Articles 37 and 38 require them to "agree on rules governing fishing activities" and on "maximum catches per species". Article 41 requires them to prevent pollution "by prescribing appropriate rules and measures". CARU is specifically empowered by Article 56 to draw up rules governing, *inter alia*, safety of navigation, conservation and preservation of living resources and prevention of pollution.

5.5 In Uruguay's view these provisions are characteristic of many river treaties and environmental agreements. They provide a framework for further agreement and the adoption of more specific and detailed rules, which can be updated as necessary by the Parties, acting either through CARU or in a co-ordinated manner. In particular, the 1975 Statute identifies the detailed content of its environmental provisions by reference to other instruments, and allows for further measures to be adopted. Its provisions cannot be seen as a complete code in themselves. If the Statute itself already provided, as Argentina argues, a complete and specific regime ("un regime de protection globale") for the regulation of such matters, it would scarcely be necessary either to empower CARU to adopt regulations or to require the Parties to co-ordinate or agree on the necessary measures.

5.6 In its Counter-Memorial, Uruguay did not deny that Articles 1 and 41 of the 1975 Statute can be read as a referral to other treaties in force between the Parties. However, for reasons already made clear in the Counter-Memorial and set out again below, the other treaties relied on are of no assistance to Argentina's case because Uruguay is not in breach of any of them.

5.7 Uruguay does not deny that "rational and optimal use" of the waters of the Uruguay River is "l'objet même du Statut"[630]. However, in the words of the International Law Commission, "the attainment of optimal utilization and benefits *entails cooperation between watercourse States* through their participation in the protection and development of the watercourse. Thus watercourse States have a right to the co-operation of other watercourse States with regard to such matters as flood-control measures, pollution-abatement programs, drought-mitigation planning, erosion control, disease vector control, river regulation (training), the safeguarding of hydraulic works and environmental protection, as appropriate under the circumstances. Of course, for greatest effectiveness, the details of such co-operative efforts should be provided for in one or more watercourse agreements"[631]. That is precisely how Uruguay sees the object and purpose of the 1975 Statute.

5.8 Uruguay therefore finds no justification for resorting to the principle of "useful effect" relied on by Argentina in support of its otherwise implausible attempt to persuade the Court to amend or rewrite the 1975 Statute in accordance with Argentina's priorities. The following paragraphs make clear that Uruguay's interpretation of Articles 1, 36 and 41 of the Statute finds useful effect for all three

---

[630] AR, para. 4.18 ("the very purpose of the Statute").

[631] II *YbILC* (1994) pt. 2, p. 97, para. (5) (emphasis added).

articles. The fundamental difference between it and Argentina is that Argentina will not accept the need for implementation measures to be agreed by both Parties rather than imposed through unilateral interpretation of the Statute.

5.9 First and foremost a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[632]. Uruguay ratified the Vienna Convention in 1982 and accepts that, consistently with the jurisprudence of international tribunals, the Convention's provisions on interpretation reflect customary international law[633], and in that form they govern interpretation of the 1975 Statute.

5.10 Under the principles of interpretation reflected in the Vienna Convention, the plain wording of Article 36 of the 1975 Statute, taken in context, cannot bear the meaning attributed to it by Argentina. Article 36 provides: "The Parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it." The ILC commentary on the UN Watercourses Convention refers specifically to Article 36 of the 1975 Statute as a precedent for Article 20 of the Watercourses Convention. It points out that: "The requirement of article 20 that watercourse States act 'individually or jointly' is therefore to be understood as meaning that joint, cooperative action is to be taken where appropriate, and that such action is to be taken on an equitable basis. For example, joint action would usually

---

[632] Vienna Convention on the Law of Treaties, Art. 31(1).

[633] *Iron Rhine Arbitration*, PCA (2005) para. 45 ("There is no case after the adoption of the Vienna Convention in 1969 in which the International Court of Justice or any other leading tribunal has failed so to act.").

be appropriate in the case of contiguous watercourses or those being managed and developed as a unit."[634]

5.11 The ILC thus confirms that the straightforward purpose of Article 36 is to affirm the joint responsibility of the Parties, acting through CARU, for co-ordinating the measures necessary to avoid changes in the river's ecological balance. It cannot be understood in isolation from the broader context of the Statute's framework for co-operative action through CARU. Article 36 must be read in conjunction with the powers over conservation and preservation of living resources and prevention of pollution conferred on CARU by Article 56. It can be seen that Article 36 empowers, indeed it requires, the Parties to co-ordinate action they deem necessary to protect the ecosystem of the river. It is plainly for the Parties to determine – jointly – when such action is necessary and what action to take in order to protect the "ecological balance". It requires co-operation. It sets an objective. It prohibits nothing. Emissions from the Botnia plant cannot violate Article 36, but may entail an obligation to co-ordinate the necessary measures if these do not already exist. On that basis it is plainly an obligation of conduct, not of result.

5.12 Insofar as phosphorus levels in the river have not so far been the subject of co-ordinated action by the Parties, the responsibility is as much Argentina's as it is Uruguay's. Phosphorus levels are not regulated by CARU, the Parties have not taken co-ordinated action to control phosphorus levels, and Argentina has never once suggested that they should. Argentina admits that sources discharging into the Gualeguaychú River (in Argentina itself) cause high concentrations of phosphorus

---

[634] II *YbILC* (1994) pt. 2, p. 119, para. (4).

and organic matter in Ñandubaysal Bay[635]. Implementation of Article 36 in regard to phosphorus would thus require significant action by Argentina as well as by Uruguay. In these circumstances it cannot equitably or in good faith be asserted that phosphorus emissions from the Botnia plant per se violate Article 36 of the 1975 Statute or that this Article prohibits phosphorus emissions. Nevertheless, as shown in Chapter 4 of this Rejoinder, the IFC's independent experts have confirmed that the small discharges of phosphorus from the Botnia plant cause no impact to the river, and Uruguay's steps to further reduce its own input of phosphorus more than offset those discharges[636].

5.13 Argentina has also advanced an interpretation of Article 41 far removed from its ordinary meaning. Article 41 provides:

> Without prejudice to the functions assigned to the Commission in this respect, the Parties undertake:
>
> (a) To protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures, in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies.

5.14 Argentina appears to think that Article 41(a) creates an absolute prohibition on pollution[637]. It does not. As Uruguay has pointed out in its Counter-Memorial, Article 41 creates an obligation of due diligence – to prescribe appropriate rules and measures in order to "protect and preserve the aquatic

---

[635] AM, para. 6.32.

[636] UR, paras. 4.91-4.96 (discussing the connection of Fray Bentos' municipal discharges to Botnia's advanced wastewater treatment facility, construction of new wastewater treatment plants for other cities that discharge into the Uruguay River, and Uruguay's phosphorus reduction plan).

[637] AR, para. 5.159.

environment" – not an obligation of result (no pollution)[638]. Moreover, even if Article 41 does prohibit "pollution," not all emissions into the river constitute "pollution." In accordance with the definition of "pollution" under Article 40 of the 1975 Statute, the introduction of substances or energy into the aquatic environment will constitute prohibited pollution only if they can be shown to have "harmful effects."

5.15 In this respect Article 41(a) establishes a precedent followed in other watercourse treaties and adopted by the International Law Commission in Articles 7 and 21 of the UN Convention on International Watercourses[639]. The ILC

---

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

[639] Article 21 of the UN Convention provides:

> Prevention, reduction and control of pollution
>
> 1. For the purpose of this article, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.
>
> 2. Watercourse States shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.
>
> 3. Watercourse States shall, at the request of any of them, consult with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of an international watercourse, such as:
>
> (a) Setting joint water quality objectives and criteria;
>
> (b) Establishing techniques and practices to address pollution from point and non-point sources;
>
> (c) Establishing lists of substances the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

commentary and learned commentators agree on viewing Articles 7 and 21 of the UN Convention as obligations of due diligence, not of result[640]. The ILC notes that the practice of states "indicates a general willingness to tolerate even significant pollution harm, provided that the watercourse state of origin is making its best efforts to reduce the pollution to a mutually acceptable level"[641].

5.16 Chapter 4 of this Rejoinder explains in considerable detail how Uruguay has prescribed appropriate rules in conformity with Article 41 and taken additional measures to further strengthen control of phosphorus emissions from Uruguayan sources[642]. Decree 253/79 on the regulation of water quality sets maximum discharge limits and water quality standards for phosphorus[643]. The permits granted to the Botnia plant require it to comply with these regulations[644]. Monitoring records to date show that its emissions are well below the required level[645]. Argentina has no such legislation on phosphorus.

---

[640] *See* II *YbILC* (1994) pt. 2, p. 103 & 124; McCaffrey and Sinjela, 92 *AmJIL* (1998) 100; Bourne, 35 *CanYbIL* (1997) 223-5. An explicit requirement to "exercise due diligence" in the ILC's 1994 draft of Article 7 was altered to read "take all appropriate measures" in the 1997 Convention text, but no change in meaning results. The same phraseology is used in many other environmental treaties, including the 1992 UNECE Transboundary Watercourses Convention, Article 2(1). Other variants include "all measures necessary". *See* Part 12 of the 1982 United Nations Convention on the Law of the Sea. Compare the ILC's 1991 draft Article 7, which reads: "Watercourse states shall utilise an international watercourse in such a way as not to cause appreciable harm to other watercourse states."

[641] II *YbILC* (1994) pt. 2, p. 122, para. 4, and *ILC Report* (1990) GAOR, A/45/10, 161. *See also* 1992 UNECE Transboundary Watercourses Convention, Arts. 2(2) and 3. The same point is evident in Article 5(4)(b) of the 1999 Rhine Convention, which commits the parties only to a gradual reduction in discharges of hazardous substances.

[642] UR, paras. 4.91-4.96.

[643] UCM, paras. 4.19 & 4.39.

[644] UCM, para. 4.33.

[645] UR, paras. 4.84-4.110.

5.17 Moreover, it is certainly the case that the small amount of phosphorus introduced into the river by the Botnia plant cannot be considered "pollution" under with Article 40 in light of Argentina's failure to show that it has "harmful effects". This point is developed further in the next section of this Chapter; but for present purposes, the practice of CARU in allowing phosphorus at present levels shows that the Parties have not until now treated phosphorus as "pollution" within the terms of this Article. If these emissions do have harmful effects, then why has Argentina not adopted its own regulations on phosphorus emissions or proposed that co-ordinated measures be adopted through CARU?[646] Its own conduct belies the proposition that there is "pollution" of the river within the terms of Article 40. On the contrary, it shows that phosphorus emissions to the river are not prohibited by the Statute, and will not be until CARU agrees on an appropriate water quality standard. Contrary to Argentina's assertions, therefore, Article 41 of the Statute does not prohibit the introduction of phosphorus into the river.

5.18 As the evidence from independent experts has made clear, Uruguay does not accept that phosphorus emissions from the Botnia plant will cause eutrophication or result in widespread and persistent changes in overall phosphorus concentrations in the river[647]. However, assuming solely for the purposes of argument that Argentina is correct in suggesting that the addition of phosphorus emissions from the Botnia plant will reduce water quality to a level which threatens the aquatic

---

[646] UCM, paras. 4.38-4.40.

[647] Evaluation of the Final Cumulative Impact Study for the Botnia S.A.'s Bleached Kraft Pulp Mill (Fray Bentos, Uruguay) with Respect to Impacts on Water Quality and Aquatic Resources and with Respect to Commetns and Issues Raised by the Government of Argentina. Dr. Charles A. Menzie (Exponent, Inc.), p. 26 (July 2007). UCM, Vol. X, Annex 213.

environment of the river, it still does not follow that Uruguay would then be in breach of Article 41, for two reasons.

5.19 First, consistently with the object and purpose of the Statute as a framework for co-operative action, it would plainly be the joint responsibility of both Parties to take the necessary measures to reduce phosphorus inputs and restore the quality of the river's water. The obligation of notification in Article 41(c)[648] makes clear that the purpose of Article 41 is to enable the parties to "establish equivalent rules in their respective legal systems". Far from this being a matter for unilateral action by Uruguay, as Argentina claims, it is evident that co-operation and negotiation are required in order to implement Article 41 effectively. Both States must agree on what level of protection is necessary.

5.20 Second, any measures necessary to improve protection of the river from phosphorus must respect the "equal and correlative right" of both Parties to make equitable and reasonable use of the river[649]. Uruguay has already drawn attention to the ILC's conclusion that where joint action is required "such action is to be on an equitable basis"[650]. It would not be equitable or reasonable to focus solely, as Argentina appears to suggest, on emissions from the Botnia plant. Botnia's contribution to phosphorus in the river is insignificant, and it is nothing compared to

---

[648] Article 41 requires that "the Parties undertake … (c) To inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems."

[649] *Territorial Jurisdiction of the International Commission of the River Oder Case*, PCIJ Ser. A No. 23 (1929); *Diversion of Water from the Meuse Case*, PCIJ Ser. A/B No. 70 (1937); *Lac Lanoux Arbitration* 24 *ILR* (1957) 101.

[650] UCM, para. 4.65.

total inputs of phosphorus from all sources to the river[651]. Achieving an equitable allocation of phosphorus loading at levels which are not harmful to the river would concentrate on reducing inputs elsewhere, including those made by Argentina and possibly Brazil. Such reductions would again require a co-operative solution agreed by all three riparian States.

5.21 Moreover, if phosphorus emissions do constitute prohibited pollution, then Argentina's phosphorus inputs in the Ñandubaysal Bay and Gualeguaychú area represent a far greater share of prohibited pollution than those from the Botnia plant. If in these circumstances Argentina wishes to ask the Court to hold Uruguay responsible for pollution of the river, it is apt to recall the wise words of Judge Hudson in the *Diversion of the Water from the Meuse Case*:

> It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party[652].

5.22 Nor does the concept of "optimum and rational utilization" of the waters of the river alter the ordinary meaning of Article 41 of the Statute or its object and purpose. Articles 40 and 41 have to be understood in conjunction with Article 27, which recognizes the right of each Party to make use of the river for domestic, sanitary, industrial and agricultural purposes. Those uses are an essential part of the context within which Article 41 has to be interpreted. It is precisely the use of the river for all these purposes by both Parties which has resulted in the present

---

[651] International Finance Corporation (hereinafter "IFC"), Cumulative Impact Study, Uruguay Pulp Mills (hereinafter "Final CIS"), pp. 4.47-4.64 (September 2006). UCM, Vol. VIII, Annex 173.

[652] PCIJ, Series A/B No. 70, p.77.

permitted level of phosphorus in the river, and which explains the absence of any regulation by CARU or Argentina.

5.23 This in no way precludes the application of other relevant international instruments. Uruguay accepts that Article 41 contains a referral to other "applicable international agreements". The Convention on Biological Diversity, the RAMSAR Convention on International Wetlands and the Convention on Persistent Organic Pollutants ("POPS") all fall within this category insofar as they relate to the Uruguay River. Measures taken under Article 41 must therefore be "in accordance with" these treaties. As Uruguay has already pointed out in its Counter-Memorial,[653] however, the measures it has taken fully conform to their requirements.

5.24 Uruguay does not doubt that conservation of biological diversity should be included in any measures which the Parties may conclude are necessary to protect the river pursuant to Articles 36 and 41 of the Statute. Beyond that it is not clear what case Argentina is trying to make. It simply asserts in the most general terms that Uruguay has not taken the necessary measures, without identifying what these might be. It has not claimed that Uruguay is in violation of Article 3 of the Convention on Biological Diversity, no doubt because emissions from the Botnia plant at a level which is not harmful to the ecological balance of the river will not result in "damage to the environment of other states" within the terms of that article. Nor has it sought to argue that Uruguay has failed to implement Articles 8 or 10 of the Convention within its own territory. It is plain that Uruguay has already taken the

[653] UCM, paras. 4.71-4.78.

necessary measures "as far as possible and as appropriate" to implement those articles[654].

5.25 If there is a risk to biological diversity in the river from phosphorus emissions, then two other articles are more pertinent. Consistent with the 1975 Statute, Article 5 requires Parties to co-operate on matters of mutual interest through international organisations – which for this purpose means CARU, in the view of Uruguay. Article 7 requires Parties to monitor biological diversity, "paying particular attention to those [biological resources] requiring urgent conservation". Uruguay has already undertaken or proposed such monitoring schemes[655]. Even if the entire Convention on Biological Diversity is imported into Article 41 of the 1975 Statute, Argentina has neither developed a case under the Convention nor has it begun to show non-compliance by Uruguay.

5.26 The RAMSAR Convention on International Wetlands is irrelevant to the present proceedings because the RAMSAR wetland at Esteros de Farrapos is 16 km upstream and will not be affected by the operation of the Botnia plant. It is simply too far away. Even if Argentina's evidence regarding flow reversal of the river were correct, it has still presented no evidence that such reversals have ever reached or could ever reach or affect Esteros de Farrapos[656]. As of 12 May 2008, Esteros de Farrapos was not included in the list of RAMSAR sites whose ecological character is threatened by pollution, nor had Argentina made any proposal to the RAMSAR

---

[654] *See* UR, paras. 5.44-5.48.

[655] UR, paras. 4.70-4.71.

[656] UCM, para. 4.75; Jorge Rabinovich & Luis Tournier, "Scientific Report to the Argentine Ministry of Foreign Affairs with replies to Uruguay's Counter-Memorial concerning aspects of the Botnia Pulp Mill near Fray Bentos, Uruguay" (hereinafter "Rabinovich Report"), p. 46. AR, Vol. III, Annex 43.

Bureau in accordance with Article 8 that it should be so listed for the purposes of Article 3 of the Convention. In these circumstances it is not credible to allege the likelihood of any breach of the RAMSAR Convention. If any evidence of such a threat were subsequently to emerge, then it would be far more appropriate and in keeping with Articles 2-5 of the RAMSAR Convention to deal with the matter at that point through the mechanisms provided by the Convention, or through CARU.

5.27 The POPS Convention is similarly irrelevant to any discussion of Article 41 of the 1975 Statute. Phosphorus is not a persistent organic pollutant and is not covered by the POPS Convention. Argentina makes no allegation that the Botnia plant either produces or consumes POPS listed in Annex A of the Convention. Annex B, which deals with DDT, is irrelevant. Annex C could be relevant if the plant incidentally emitted dioxins or furans as by-products of its combustion process. Argentina has presented no evidence that the Botnia plant is likely to do so. The Second Wheater Report, prepared by Argentina's consultant and annexed to the Reply, simply asserts that "the accumulation of persistent organic pollutants in the sediments, and their impact on ecosystems, are international concerns which have not been addressed significantly in the EIA process"[657]. It does not explain how the operation of the Botnia plant could in any way violate the POPS Convention or emit persistent organic pollutants at levels that are likely to pose a risk of harm. Monitoring data confirm that dioxins and furans are simply not an issue in emissions from the Botnia plant[658].

---

[657] AR, para. 4.176.

[658] UR, paras. 4.104-4.105.

5.28 Anthropogenic releases of POPS listed in Annex C must be minimized and eventually eliminated "where feasible" through action plans, substitute materials and processes, and other practical measures that can "expeditiously achieve a realistic and meaningful level of release reduction or source elimination"[659]. For this purpose parties must "promote" the use of best available techniques (BAT) and best environmental practices (BEP) for existing sources, and they must require new sources to use them within four years from entry into force. The Convention defines BAT and BEP (Article 5) and gives detailed guidance in Annex C. This aspect of the Convention represents a considered compromise between those who sought complete elimination and other States that regarded this as unrealistic in the short-term. Initial proposals to set targets and a timetable for reducing and eliminating emissions were not pursued, and Article 5 emerged as an obligation of conduct (to take the specified measures) – rather than one of result (reducing/eliminating emissions).

5.29 Both in its choice of technology and in its regulation of the Botnia plant Uruguay has done everything necessary to comply with Annex C of the POPS Convention, and this is confirmed by the IFC's independent experts[660]. Argentina has developed no case to the contrary. It is also worth recalling the 2,110 g of dioxin which Argentina emits every year according to its own National Inventory on the Discharge of Dioxins and Furans, dated 2001 and available on the website of the

---

[659] POPS Convention, Art. 5(b).

[660] UCM, para. 4.78.

POPS Convention[661]. By comparison, in 2002 the whole of Uruguay emitted a total of 55 g according to its National Inventory, also available on the same website.

5.30 Uruguay therefore readily accepts Argentina's argument that its compliance with Articles 36 and 41 of the 1975 Statute should be judged by reference to the Convention on Biological Diversity, the RAMSAR Convention on International Wetlands and the POPS Convention. None of these Conventions prohibits emissions to the Uruguay River. As indicated above, all of them set standards of conduct in the regulation of pollution and the protection of the aquatic environment with which Uruguay is in full compliance.

Section II.
CARU Standards Define the Content of Articles 36 and 41 of the Statute

5.31 Remarkably, in its Memorial, Argentina failed to allege any breach of CARU standards. Uruguay took note of this in its Counter-Memorial, at paragraph 4.36. In its Reply, Argentina now makes very general allegations about emissions of substances which could violate CARU water quality standards, but nowhere does it identify any specific violation caused by emissions from the Botnia plant, or provide any evidence of such a violation[662]. In fact, there is no such evidence.

5.32 Equally remarkable, while alleging potential harm to the living resources and ecosystem of the Uruguay River in violation of Article 36 of the Statute, Argentina makes no reference -- either in the Memorial or the Reply -- to any violation of the CARU standards that implement Article 36[663].

---

[661] POPS Convention website at www.pops.int/documents/guidance.

[662] AR, paras. 4.152-4.166.

[663] The standards are summarized in UCM, paras. 4.48-4.54.

5.33 Uruguay reiterates its earlier argument that compliance with Articles 36 and 41 of the 1975 Statute must be judged by reference to CARU standards. As it has already explained, Articles 36 and 41 in themselves set no specific standard for environmental protection and pollution control: both Articles require the Parties to adopt further regulations and to make judgments about what measures are "necessary" or "appropriate". For this purpose the CARU standards, set forth in the CARU *Digest*, serve as an important medium for co-ordinating the regulations applicable in both jurisdictions.

5.34 Uruguay does not argue that CARU standards form a complete code for implementing the Statute. But two points are important to the present dispute. First, it cannot realistically be argued that emissions which comply with jointly-agreed CARU standards are nevertheless in violation of the Statute. Apart from depriving CARU standards of any purpose if full compliance is no defence, the argument casts doubt on the good faith of any State making such a claim. It also ignores the obvious objection that adoption of regulations intended to implement a treaty creates a legitimate expectation and quite possibly also an estoppel that compliance will not constitute a breach of the treaty. Whatever the character of the regime created by the 1975 Statute, it is simply untenable to suggest as Argentina does that emissions complying with CARU standards may nevertheless violate the Statute. If such emissions are deemed to be harmful to the ecology of the river, or to legitimate uses thereof, the appropriate remedy open to Argentina is to propose a revision of the applicable standards pursuant to Article 56 of the Statute.

5.35 Second, CARU water quality standards also serve to define what constitutes pollution for the purpose of Article 40. That Article provides: "For the

purposes of this Statute, pollution shall mean the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects." This wording is not self-explanatory. In order to make sense of it a judgment has to be made about what substances have potentially harmful effects and at what concentrations. That judgment is for CARU to make. Plainly, once CARU specifies a water quality standard for a particular substance it can be presumed that water which does not meet that standard is polluted. As already noted, CARU does not set standards for phosphorus levels in the river, nor does Argentina. Only Uruguay has done so, and it therefore cannot be blamed for the absence of any CARU regulation on the matter.

5.36 Where CARU has not agreed to a specific water quality standard, emissions of the relevant substances will not constitute pollution unless they can be proved to have significant harmful effects in accordance with Article 40. Argentina helpfully draws attention to the definition of "harmful effects" given in the CARU *Digest*[664]. The burden of proof is thus on Argentina to show that phosphorus emissions not regulated by CARU are harmful in any of the ways listed in the *Digest* and therefore capable of constituting pollution. On this issue the Parties are in dispute. According to Argentina's Reply, the volume of phosphorus emissions constitutes a massive and harmful increase in already high levels, which will adversely affect tourism and fishing. The independent experts consulted by the IFC disagree. They have concluded that the increase in phosphorus emissions is

[664] AR, para. 4.79 ("any change in water quality that impedes or makes difficult any legitimate use of the waters, producing deleterious or harmful effects to living resources, risks to human health, a threat to aquatic activities, including fishing, or a reduction in recreational activities") (quoting Digest of the Administrative Commission of the Uruguay River, E3, Chap. 1, Title 1, Art. 1).

extremely modest, will not lead to eutrophication, and will have no impact on water quality, tourism or fishing. That view is expressed by the Final CIS assessment[665], and by the results of actual operation of the plant[666].

5.37 In Chapter 4 Uruguay also sets out in fuller detail additional steps it has taken to further reduce Uruguay's overall discharge of phosphorus and other nutrients to the river. These include treatment of Fray Bentos municipal sewage in Botnia's advanced wastewater treatment plant, major World Bank-backed investments to improve the sewage treatment of other cities along the Uruguay River, and a far-reaching program to minimize nutrient discharge from non-point sources. Indeed, the improvements to municipal sewage treatment undertaken by Uruguay will more than offset the phosphorus emissions of the Botnia plant.[667]

5.38 Even in the hypothetical and extremely unlikely eventuality that eutrophication does occur and causes significant losses in tourism and fishing, Article 42 of the Statute provides an adequate and sufficient remedy agreed upon by the Parties. It makes the Parties liable. Compensation would thus be payable for any damage resulting from failure by Uruguay to regulate the Botnia plant adequately, or from a failure by Botnia to comply with regulations or permit limits[668]. Of course, Argentina would also be jointly responsible for any damage caused by eutrophication, since effluents from agricultural activities, the Gualeguaychú

---

[665] UCM, paras. 4.42-4.44.

[666] UR, paras. 4.88-4.90.

[667] UR, paras. 4.91-4.96.

[668] Article 42 provides: "Each party shall be liable to the other for damage inflicted as a result of pollution caused by its own activities or by those carried out on its territory by individuals or legal entities."

Industrial Park and sewage from the City of Gualeguaychú on the Argentine side of the river contribute significantly (and many times more than the Botnia plant) to the present phosphorus loading[669]. Any compensation that Uruguay might be required to pay in such circumstances would thus be subject to an equitable adjustment that would reflect its proportionate share of any damage on the Argentine side[670]. Argentina would likewise be liable for its contribution to any damage on the Uruguayan side. Argentina cannot reasonably expect to hold Uruguay wholly liable for pollution to which Argentina is the prime contributor.

5.39 As noted earlier, if such a scenario were to occur or to become likely, it would be for both States to co-ordinate the necessary measures for reducing phosphorus levels on an equitable basis and preventing further damage. CARU provides an entirely adequate mechanism for doing so. Indeed, it is the mechanism stipulated in the 1975 Statute.

Section III.
General Principles of International Environmental Law Do Not Alter the Terms of the Statute

5.40 Argentina invokes Article 31(3)(c) of the Vienna Convention on the Law of Treaties and invites the Court to interpret the 1975 Statute in accordance with four principles of international environmental law:

- Sustainable utilisation
- Equitable and reasonable use
- Prevention of transboundary damage

---

[669] Argentine National Directorate for Public Investment and Project Finance, Report on Gualeguaychú River Basin Cleanup, *Gualeguaychú River Basin Cleanup* (August 1997). UCM, Vol. III, Annex 44.

[670] UCM, para. 4.65.

- The precautionary principle

5.41 One objective of the 1975 Statute is to give effect to some of these rules or principles through the medium of CARU and further co-operation by the Parties. To that extent they are already an inherent element of the Statute. It should be noted, however, that the legal character of these various "principles" is diverse. Some are rules of international law, others are general principles endorsed by States in multilateral treaties or non-binding soft-law instruments. Nevertheless, for the purposes of argument Uruguay is happy to accept that all are relevant within the terms of Article 31(3)(c). What it does not accept is the argument that any of them adds to or alters the existing provisions of the 1975 Statute in a manner that assists Argentina's case.

A. SUSTAINABLE UTILISATION

5.42 Sustainable use of the components of biological diversity is one of the objectives of the 1992 Convention on Biological Diversity, and various articles of the Convention require parties to take measures to promote it[671]. Because Article 41 of the Statute entails "prescribing appropriate rules and measures in accordance with" the Convention on Biological Diversity, Uruguay does not dispute the relevance of the principle of sustainable use referred to in the Convention. What it does dispute is the argument that the operation of the Botnia plant will in some way lead to unsustainable use of the components of biological diversity as defined in Article 2 of the Convention on Biological Diversity.

[671] Arts. 1, 6 & 10.

5.43 Argentina is wrong to claim that Article 2 of the Convention on Biological Diversity obliges States to cause no long-term depletion of biological resources and natural ecosystems[672]. Article 2 simply defines the term: "*Sustainable use* means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby threatening its potential to meet the needs and aspirations of present and future generations."

5.44 More pertinently, Article 8 prescribes measures intended to promote *in-situ* conservation of biological diversity. Argentina makes no complaint about Uruguay's compliance with Article 8. Paragraphs (a), (c) and (d) are the most relevant provisions of this article. The full article provides that: "Each Contracting Party shall, *as far as possible and as appropriate*:

> (a) *Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity*;
>
> (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;
>
> (c) *Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use*;
>
> (d) *Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings*;
>
> (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;

---

[672] AR, para. 4.34.

(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies;

(g) Establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health;

(h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species;

(i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

(k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations;

(l) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities; and

(m) Cooperate in providing financial and other support for in-situ conservation outlined in subparagraphs (a) to (l) above, particularly to developing countries.

5.45 Article 8 of the Convention on Biological Diversity does not require parties to avoid anything that might at some point have an impact on biological resources of the river. Conserving biodiversity does not mean preserving every

living thing. Nor does it require parties to preserve the natural environment in an unchanged and unchanging state. It means maintaining the "variability among living organisms" and the "diversity within species, between species and of ecosystems"[673]. Article 8 is carefully worded in terms which envisage the progressive adoption of conservation measures when "possible", and insofar as they are "appropriate". It is deliberately drafted in such a way as to leave considerable discretion to individual States in deciding what action to take, when to take it, and which resources are sufficiently "important" to merit action.

5.46 Nor does Argentina allege a violation of Article 10 of the Convention, dealing with sustainable use of the components of biological diversity. With respect to the Botnia plant, Uruguay has taken all appropriate measures to implement Article 10. Like Article 8, this article envisages the progressive adoption of measures. The most relevant paragraphs are (a) and (b). The full text provides that:

> Each contracting party shall, *as far as possible and as appropriate*:
>
> a) Integrate consideration of the conservation and sustainable use of biological resources into national decision-making;
>
> (b) Adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity;
>
> (c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;
>
> (d) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; and

---

[673] Art. 2.

(e) Encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.

5.47 More importantly, the provisions on conservation and sustainable use found in the Convention on Biological Diversity can only realistically be implemented with respect to an international river through measures co-ordinated by the riparians. In this case that means through CARU standards implementing Article 36 of the Statute. Argentina does not allege any violation of those standards and Uruguay reiterates its full compliance[674].

5.48 Uruguay therefore believes that it has taken all appropriate measures required by the Convention on Biological Diversity with a view to ensuring that there will be no significant harmful effects on important components of biological diversity in the river. The Botnia plant is not adjacent to any protected area. The location chosen ensures that the protected wetland at Esteros de Farrapos will not be affected in any way, even under conditions of flow reversal downstream. The technology employed by Botnia does not involve the emission or use of persistent organic pollutants covered by the POPS Convention. Even though the Parties disagree about the level of phosphorus emissions and their potential impact on the river, as shown in Chapter 4, the IFC's independent experts have concluded, based on the first six months of the plaint's operation, that its emissions of phosphorus are insignificant and will have no impact on the river. If, *arguendo*, additional measures were required to reduce phosphorus levels in the river, they should be taken jointly by both Parties on an equitable basis negotiated through CARU.

---

[674] UCM, paras. 4.48-4.58.

B. EQUITABLE AND REASONABLE USE

5.49 Successive rapporteurs of the International Law Commission have endorsed the equitable and reasonable use of international watercourses as an established rule of international law[675]. This view has been supported by States[676], by the Court[677], and by Article 5(1) of the UN Convention on International Watercourses.

5.50 Argentina argues that Uruguay is required to take into consideration the obligations contained in the 1975 Statute when making use of the Uruguay River for purposes permitted by Article 27. Uruguay agrees and has done so, as previously explained at length in its Counter-Memorial[678].

5.51 Argentina also argues that Uruguay has not taken into account "les utilisations préalables et légitimes"[679], and has thereby violated the Statute. This is plainly not so. Uruguay has indeed taken appropriate measures which are detailed in its Counter-Memorial,[680] to mitigate the impact of the Botnia plant on existing uses. But existing uses of an international watercourse, such as tourism or fishing, have no priority over new legitimate uses; as reflected in Article 10 of the 1997 UN Watercourses Convention which recognizes this point by providing that no category of use has inherent preference over any others. Judicial decisions, commentators and

---

[675] McCaffrey, II *YbILC* (1986) pt. 1, p. 103-5, 110 ff; Schwebel, II *YbILC* (1982) pt. 1, 75 ff.

[676] *ILC Report* (1987) GAOR A/42/10, p. 70; Evensen, II *YbILC* (1984) pt. 1, 110; Schwebel, II *YbILC* (1982) pt. 1, 75.

[677] *Gabčíkovo-Nagymaros Case*, ICJ Reports (1997) 7, para. 55.

[678] UCM, Chap. 4.

[679] AR, para. 4.53 ("the prior and legitimate uses").

[680] UCM, Chap. 4.

the views of codification bodies suggest that an equitable balance of interests may displace or limit earlier established uses[681]. European and North American practice confirms this conclusion, which the *Lac Lanoux* case implicitly supports[682]. Thus tourism and fishing must compete with other equitable claims, including industrial and domestic uses resulting in higher levels of phosphorus in the river. If such uses are inequitable then Argentina must explain why it has so far refrained from regulating levels of phosphorus in the river.

C. PREVENTION OF TRANSBOUNDARY DAMAGE

5.52 As Uruguay has already noted in its Counter-Memorial[683], the obligation to ensure that activities within a State's jurisdiction or control do not cause harm to the environment of other States (i.e., transboundary damage) is also an established rule of international law. It is reiterated, *inter alia*, in Principle 21 of the 1972 Stockholm Declaration on the Human Environment, in Principle 2 of the 1992 Rio Declaration on Environment and Development, in Article 3 of the Convention on Biological Diversity, and in the ILC's Articles on Prevention of Transboundary Harm adopted in 2001[684]. Articles 7 and 21 of the 1997 UN Watercourses Convention restate the general principle[685], which successive rapporteurs and the

---

[681] *See* ILA 1966 Helsinki Rules, Arts. V(d), VI, VII, VIII, and commentary at 493; ILA 2004 Berlin Rules, Art. 14; Lipper, in Garretson *et al.*, *The Law of International Drainage Basins* (New York, 1967), 50-8, 60 ff; McCaffrey, *The Law of International Watercourses* (2nd edn., Oxford, 2007), 386-8; *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Colorado v. New Mexico*, 459 U.S. 176 (1982).

[682] Bourne, 3 *CanYbIL* (1965) 187, 234-253.

[683] UCM, paras. 4.66-4.72.

[684] Article 3 provides that "the State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof."

[685] UCM, Vol. I, paras. 4.67-4.69.

ILC have regarded as a codification of established customary law for all forms of damage to other States[686]. In the *Nuclear Weapons Advisory Opinion* the Court also held that the terms of Principle 2 of the Rio Declaration are "now part of the corpus of international law relating to the environment"[687].

5.53 The object and purpose of including Articles 36, 41, 42 and 56(a)(4) in the 1975 Statute was to give effect to the obligation to prevent transboundary damage in the Uruguay River. Contrary to Argentina's argument, it is not plausible to suggest that anything more can be read into the Statute than was subsequently codified by the ILC in the Watercourses Convention. In both cases the essential character of the obligation is one of due diligence – to take appropriate measures in accordance with any applicable or relevant international standards. That is precisely what Article 41 envisages, and why Argentina seeks to differentiate it from the Watercourses Convention is a mystery.

5.54 Argentina also cites a passage from the award of the *Iron Rhine Arbitration* for the proposition that "Environmental law and the law of development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm…"[688] Uruguay agrees. This passage shows, however, that Uruguay is required to mitigate harm, not to prevent all harm.

---

[686] Schwebel, II *YbILC* (1992) Pt. 1, 91, para. 111; Evensen, II *YbILC* (1983) pt. 1, 172; McCaffey, II *YbILC* (1986) pt.1, 133; *ILC Report* (1988) GAOR, A/43/10, at 60, para. 148 (draft Article 16(2)) and 88ff. *See generally* McCaffrey, *The Law of International Watercourses*, Ch. 11.

[687] ICJ Reports (1996) 226, at para. 29. *See also Iron Rhine Arbitration*, PCA (2005) paras. 222-223.

[688] PCA (2005), pp. 28-29, para. 59.

Nor is some harm to the natural resources of the river incompatible with the protection of biodiversity. The actions Uruguay has taken to regulate river pollution, protect biodiversity, comply with CARU standards, and assess, monitor and control the possible effects of the Botnia plant, are intended to implement its legal obligations in a manner that avoids significant harm and promotes environmentally sound and sustainable development. The success of these measures in preventing pollution of the river is fully set out in Chapter 4 of this Rejoinder[689]. The scientific evidence establishes that Uruguay has guaranteed, to use Argentina's words, "[l]'équilibre entre considérations économiques environnementales et sociales … de manière effective…"[690].

5.55 Argentina sees the prevention of transboundary harm as an element of the principle of optimum and rational utilisation[691]. Since Uruguayan law and the permits granted to the Botnia plant comply with the obligations under Article 41 of the 1975 Statute, including CARU standards, there can be no basis for suggesting that Uruguay has in some unidentified sense failed to comply with the principle of optimum and rational utilisation. Uruguay has already set out the steps it has taken in its national law to comply with the Statute. Uruguay regulates phosphorus emissions[692], while Argentina does not. It gives effect to CARU standards and Argentina has not demonstrated otherwise. Argentina has not identified in what ways Uruguay's legislation or the permits granted to the Botnia plant might be

---

[689] UR, paras. 4.80-4.117.

[690] AR, para. 4.40 ("[t]he balance between economic, environmental, and social considerations … in an effective manner").

[691] AR, para. 4.45.

[692] *See* UR, para. 5.13 above.

deficient in the exercise of due diligence. Its case rests wholly on hypotheses and vague assertions about possible transboundary harm. In contrast, Chapter 4 of this Rejoinder shows that recent technical reviews of the actual operation of the Botnia plant by the IFC's independent experts "confirm that the Orion pulp mill will generate major economic benefits for Uruguay and will not cause harm to the environment"[693]. Plainly the independent experts regard the Botnia plant as a good example of optimum and rational utilisation of the river.

D. THE PRECAUTIONARY PRINCIPLE

5.56 Unable to present the Court with any evidence of actual or likely harm, Argentina continues to rely on the precautionary approach to sustain its threadbare case. Uruguay accepts that the precautionary approach has potential relevance to the management of activities where there is significant scientific uncertainty and a risk of serious or irreversible damage, in accordance with Principle 15 of the Rio Declaration on Environment and Development. The precautionary approach has been incorporated into Uruguayan law and DINAMA must give effect to it when performing its regulatory duties[694].

5.57 The 2001 POPS Convention adopts a precautionary approach to the listing and control of hazardous chemicals and Article 1 refers expressly to Principle 15 of the Rio Declaration on Environment and Development.[695] Uruguay has already demonstrated that it fully complies with its obligations under the POPS

---

[693] IFC Web Site, Latin American & the Caribbean, "Orion Pulp Mill-Uruguay," *available at* http://www.ifc.org/ifcext/lac.nsf/content/Uruguay-Pulp-Mills (updated on 10 July 2008) (last visited on 11 July 2008). UR, Vol. IV, Annex R96.

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

[695] UCM, para 4.78.

convention[696]. The Convention on Biological Diversity notes that "[w]here there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat." Again, Uruguay has shown that it has taken necessary and sufficient measures to protect biodiversity and ensure not just that the threat is minimized but that there is no threat of "significant reduction or loss of biodiversity". In neither case has Argentina demonstrated the "threats of serious or irreversible damage" to the river required for Principle 15 of the Rio Declaration to be applicable in the present case – a threshold standard which Argentina itself advances in its Memorial[697].

5.58 Nor are there such gaps or uncertainties in the evidence available to the Parties, or to the Court, as would justify Argentina's attempt to invoke the precautionary approach in the present dispute. Pulp mills are a well-understood technology. The Botnia plant has been designed with the benefit of many years of experience of such installations. It operates to the highest standards. Effluents have been minimized and strictly controlled. Risks associated with the operation of the plant are monitored comprehensively and can be empirically tested. In all these ways any uncertainties have been eliminated or dealt with[698].

5.59 On the evidence set out in Chapters 4 to 7 of the Counter-Memorial, in Chapters 4 and 6 of the present Rejoinder, and in the report of the IFC's independent

---

[696] UR, para 5.29.

[697] AM, para 5.14 ("risque de dommage graves ou irreversibles").

[698] UR, paras. 6.60-6.65.

experts[699], Uruguay believes that it has established that the construction and operation of the Botnia plant (a) have caused no harm and no significant risk of harm to Argentina, (b) caused no harm and no significant risk of harm to the water quality of the Uruguay River or its ecological integrity, and (c) caused no harm and no significant risk of harm to biological diversity or protected sites. The evidence for these conclusions is substantial, it is strong, and it is based on actual monitoring results and on the judgment and research of independent scientific experts. Argentina has presented no significant or credible evidence to the contrary. The evidence points overwhelmingly to the conclusion that there will be no unacceptable effects from the operation of the plant – and certainly nothing that amounts to serious or irreversible damage.

5.60 Nor has Argentina demonstrated any current connection between climate change and the operation of the Botnia plant. The regulatory and monitoring systems which govern the plant's future operation are sufficiently robust to enable Uruguay to identify any future changes in climatic conditions affecting river flow and to deal with them appropriately, if necessary through CARU and in co-operation with Argentina. This is not a matter that Uruguay takes lightly: if climate change posed a serious threat to Argentina's use of the river then it would necessarily threaten Uruguay at the same time. But at present there is no basis for suggesting that

---

[699] International Finance Corporation, *Orion Pulp Mill, Uruguay, Independent Performance Monitoring as Required by the International Finance Corporation (Phase 1: Pre-Commissioning Review)* (hereinafter *"Pre-Commissioning Review"*) (November 2007) at ES.iv. UR, Vol. III, Annex R50; AMEC Forestry Industry Consulting, *Orion BKP Mill Pre-Startup Audit* (hereinafter *"Pre-Startup Audit"*) (September 2007), pp. 2-6. UR, Vol. III, Annex R48. IFC, Orion Pulp Mill, Uruguay Independent Performance Monitoring as Required by the International Finance Corporation (Phase 2: Six-Month Environmental Performance Review), pp. ES.ii-ES.v (July 2008). UR, Vol. IV, Annex 98.

Uruguay has in some unidentified way failed to deal in a precautionary fashion with the potential risks of climatic change.

5.61 Argentina also misunderstands the role of the precautionary principle in relation to uncertainty and risk. Argentina appears to think that the more unlikely a risk the more uncertain it becomes and thus the greater the role for the precautionary principle. Precedents show, however, that when applying the precautionary principle it is not necessary to take "a purely hypothetical approach to risk, founded on mere conjecture which has not been scientifically verified"[700]. The point about the precautionary principle as articulated in Principal 15 of the Rio Declaration is that it applies where *some evidence of risk exists* but there is a "lack of full scientific certainty" about the probability that it will occur or how serious the consequences may be[701]. It bears reiterating once again that Rio Principle 15 and the precautionary approach come into play only where it can first be shown that there are "threats of serious or irreversible damage". In other words, it must first be shown that this kind of damage is likely to some degree.[702] Whether such threats do exist has to be assessed in the light of all the evidence, including evidence concerning the measures that Uruguay has taken to counter potential threats and ensure that the Botnia plant

---

[700] *Pfizer Animal Health v. Council of the EU* (2002) II ECR 3305, para. 143. *See also EC Measures Concerning Meat and Meat Products*, WTO Appellate Body, WT/DS26/AB/R (1998) paras. 179-186 ("not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die").

[701] *MOX Plant Case (Provisional Measures)* ITLOS No. 10 (2001) paras. 71-81.

[702] UCM, para. 4.86. *See also* European Commission, *Communication on the Precautionary Principle*, COM(2000)1, p. 4 ("Recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined with sufficient certainty").

operates in a safe, reliable and environmentally responsible manner, conforming to the best international standards. If, as the IFC evidence conclusively shows, Uruguay has taken all the measures that are reasonable and necessary to counter the Botnia plant's actual potential – however small – for serious adverse effects on the river in the real world, then there remains no basis for suggesting that the precautionary principle has any further role to play.

5.62 Argentina makes two additional arguments about the precautionary principle, both of them wrong. First, it continues to assert that the principle shifts the burden of proof from the Applicant State to the Respondent[703]. For reasons already set out in Uruguay's Counter-Memorial this is incorrect[704]. Uruguay does not agree that it must prove that there is *no* risk of harm in order to conform to a precautionary approach. Proving a negative of this kind is inherently difficult if not impossible[705] – risk cannot be eliminated entirely from human activities – and the elimination of all risk is not what the precautionary approach is seeking to achieve. If it were, the operation of oil tankers, nuclear power plants, hazardous waste disposal facilities, chemical plants, oil refineries, and similar activities presently regulated by international and national law would be illegal – which of course they are not[706]. The real issue is not whether environmental risk has been eliminated, but whether it has

---

[703] AR, para. 4.55.

[704] UCM, paras. 4.84-4.86.

[705] UR, paras. 6.60-6.61

[706] But contrast commercial whaling, which is currently illegal by decision of the International Whaling Commission unless it can be shown that it will be sustainable under the Revised Management Procedure. Similarly, trade in endangered species listed under Annex I of the CITES is banned unless the parties can be persuaded that a species is no longer endangered and can be de-listed. Both are examples of reversing the burden of proof.

been properly managed and minimized to the fullest extent possible using cost-effective measures – a point well understood by Argentina's own experts, Professor Wheater and Dr McIntyre[707].

5.63 In international law, who bears the burden of proving that a risk exists cannot be answered dogmatically, but depends on the context in which the question arises. International courts have generally required the party alleging a risk of serious environmental harm to adduce enough evidence to establish its case[708]. They have not taken the view that the precautionary principle necessarily shifts the burden of proof to the respondent State. Provisional measures were thus refused in the *MOX Plant Case* and in this very case because the applicants failed to prove a serious risk of harm, despite their reliance on the precautionary principle; by contrast, provisional measures were granted in *Land Reclamation* and *Southern Bluefin Tuna* because the applicants were able to satisfy their evidentiary burden[709].

5.64 In the absence of express treaty language to the contrary, the precautionary principle does not reverse the burden of proof applicable to claims of environmental harm. For example, a reversal of the burden of proof was quite deliberately *not* adopted when a precautionary approach to fisheries conservation was elaborated in some detail by Article 6 of the 1995 UN Fish Stocks Agreement; nor does Article 1

---

[707] Professor Wheater and Dr. McIntyre, "Technical Commentary on the Counter-Memorial of Uruguay in the Case Concerning Pulp Mills on the River Uruguay" (hereinafter "Second Wheater Report"), pp. 5-6. AR, Vol. III, Annex 44.

[708] The European Court has taken the same view. *See Pfizer Animal Health v. Council of the EU* (2002) II ECR 3305, paras. 136-148, 164-173. So has the WTO. *See Beef Hormones Case* (1998) WTO Appellate Body, paras. 97-109.

[709] *MOX Plant Arbitration (Jurisdiction and Provisional Measures)*, PCA (2002) paras. 53-55; *Pulp Mills Case (Provisional Measures*) ICJ Reports (2006) paras. 73-77; *Southern Bluefin Tuna Cases (Provisional Measures)*, ITLOS Nos. 3&4 (1999) para. 79; *Land Reclamation Case (Provisional Measures)*, ITLOS No.12 (2003) para. 96.

of the 2001 Convention on Persistent Organic Pollutants reverse the burden of proof, notwithstanding that both treaties are expressly based on the precautionary approach set out in Principle 15 of the Rio Declaration. Addressing the same argument in the *Beef Hormones Case*, the WTO Appellate Body examined the applicable treaty for wording that might reverse the burden of proof[710]. It could find none and thus rejected the argument. In the present case, neither the Convention on Biological Diversity nor the 1975 Statute contains any wording that could justify the conclusion that the burden of proof has been shifted to the party proposing to undertake activities potentially harmful to the river in disputes under either treaty.[711]

5.65 Article 7 of the 1975 Statute shows quite clearly that once notified of proposed works, it is for the notified party to "assess the probable impact of such works" and then to respond with its own observations. CARU may determine that there is a risk of significant damage, and so might Argentina, but the Statute in no sense requires Uruguay to demonstrate to CARU, to Argentina or to the Court that its actions do not entail a risk of harm to the river, the ecosystem or biodiversity. The burden of proving such a risk remains with Argentina as the Applicant State in the present litigation. The precautionary principle cannot override or amend the terms of the Statute in the way that Argentina suggests[712]. Argentina must prove its case.

---

[710] *Beef Hormones Case* (1998) WTO Appellate Body, paras. 97-109.

[711] Some treaties do reverse the burden of proof, but this is an exceptional rule. *E.g.* 1996 Protocol to the London Dumping Convention; 1992 OSPAR Convention, Art. 4. *EC Communication on the Precautionary Principle* (2000) at 5, notes that there is no general rule to this effect, but that requirements of prior approval for products deemed dangerous "*a priori* reverse the burden of proving injury, by treating them as dangerous unless and until businesses do the scientific work necessary to demonstrate that they are safe".

[712] *Beef Hormones Case*, *op. cit.*, paras. 124-125.

5.66 Argentina argues that the precautionary principle is a rule of customary international law. Certainly, the precautionary approach is a "soft law" principle which must be taken into account when interpreting treaties in accordance with Article 31(3)(c) of the Vienna Convention. But it is doubtful whether it can be any more than this. Distinguished commentators agree that the precautionary principle has an uncertain legal status and that its specific normative implications remain unclear: "le principe de précaution a été repris par la suite dans un grand nonmbre d'instruments conventionnels qui en précisent la portée et en tirent certaines conséquences concrètes, dont il serait cependant aventureux de prétendre qu'elles sont d'ores et déjà consolidees en norms coutumières obligatoires pour tous les États ne serait-ce que du fait de leur fréquente imprécision"[713]. It does not appear to meet the requirements of customary international law laid down by the Court in the *North Sea Continental Shelf Case*[714]. No international court or tribunal has treated the precautionary principle as an obligatory rule of customary law, although the point has been argued[715]. There is no consensus among scholars or governments about its meaning, or even on the correct terminology; Principle 15 of the Rio Declaration and

---

[713] P. Daillier and A. Pellet, *Droit International Public* (7th edn., Paris, 2002), p. 1308.

[714] ICJ Reports (1969) 3, para. 72 ("It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law".).

[715] In *Measures Concerning Meat and Meat Products*, WTO Appellate Body WT/DS26/AB/R (1998), at paras. 120-125, the WTO Appellate Body concluded that the applicable agreement already incorporated precautionary elements, but it found the legal status of the precautionary principle in general international law uncertain. In the *Southern Bluefin Tuna Cases (Provisional Measures,)* ITLOS Nos. 3 & 4 (1999) at paras. 77-79, the International Tribunal for the Law of the Sea relied on scientific uncertainty to justify ordering provisional measures to protect tuna stocks, but it said nothing about the precautionary principle in general international law.

UN treaties prefer the term "precautionary approach"[716] while the "precautionary principle" is essentially a European concept[717].

5.67 But even if Uruguay is wrong about the status of the precautionary principle in international law, it makes no difference to the manifest weakness of Argentina's case. It has still failed to identify any significant risk in respect of which necessary and reasonable measures have not been taken, and in relation to the precautionary principle or approach that is the only conclusion that matters.

Section IV.
Uruguay Has Carried Out the Required Environmental Impact Assessment

5.68 Argentina's Reply adds nothing to its case on environmental impact assessment. It reiterates the arguments from the Memorial with the same misconceptions. It has not answered Uruguay's arguments in the Counter-Memorial with regard to the sufficiency of the assessments that were carried out or the nature of the process. The Wheater-McIntyre Report[718] continues to claim, quite wrongly, that the Botnia EIA was inadequate and did not sufficiently address the concerns of potentially affected local people. It also asserts that the Final CIS is seriously flawed

---

[716] *See, e.g.,* 1992 Convention on Climate Change, Art. 3; 1992 Convention on Biological Diversity, Preamble and 2000 Protocol on Biosafety; 1994 Sulphur Protocol, 1998 Heavy Metals Protocol, and 1998 Persistent Organic Pollutants Protocol to the 1979 Convention on Long Range Transboundary Air Pollution; 1996 Protocol to the London Dumping Convention, Art. 3; 2001 POPS Convention, Art. 1.

[717] *See, e.g.*, 1992 Paris Convention for the Protection of the Marine Environment of the Northeast Atlantic, Art. 2; 1992 UNECE Convention for the Protection of Transboundary Watercourses and Lakes, Art. 2(5); 1992 Maastricht Treaty on European Union, Art. 174; 1994 Danube Convention, Art. 2(4); 1999 Rhine Convention, Art. 4.

[718] Second Wheater Report, *op. cit.* AR, Vol. III, Annex 44.

insofar as it fails to demonstrate "the necessary assurance of lack of unacceptable environmental impact"[719].

5.69 Most of these claims disappear once tested against the reality of the actual operation and impact of the Botnia plant. Both the Botnia EIA and the Final CIS assessed the potential environmental impact and found that it was minimal. In that respect they have been proved right: it cannot be said with any credibility that the EIA "fails to provide the necessary assurance of lack of unacceptable environmental impact."[720] The Uruguay River is not a sensitive environment, nor will the Botnia plant cause "massive nutrient contamination"[721]. These questions are fully considered in Chapter 6 of this Rejoinder, but there is no basis for suggesting that the EIA process was mistaken in either respect. The same can be said about the performance of the plant itself: the Final CIS assessment is sound and supported by the evidence. Wheater and McIntyre's remaining concerns are also fully addressed in Chapter 6. None of their criticisms is shared by the IFC's independent experts.

5.70 Environmental impact assessment is simply "a procedure for evaluating the likely impact of a proposed activity on the environment"[722]. The role played by an EIA is well expressed in the 1991 Convention on EIA in a Transboundary Context: "The Parties shall ensure that, in the final decision on the proposed activity, *due account* is taken of the outcome of the environmental impact assessment documentation, as well as the comments thereon received pursuant to Article 3,

---

[719] *Ibid.*, p. 5.

[720] *Ibid.*

[721] *Ibid.*, p. 6.

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

paragraph 8 and Article 4, paragraph 2, and the outcome of the consultations as referred to in Article 5."[723] Typically, and as this wording suggests, while governments must take account of an EIA, they are not bound to adopt every recommendation or finding therein. It is thus an aid to governmental decision-making, whose conclusions will necessarily inform the terms and conditions on which any permits or licences are granted, but which will not always be reflected in them.

5.71 In the present case Argentina's principal interest in EIA is to use it as a mechanism for obstructing Uruguay's legitimate exercise of its right to sustainable development. Its insistence that every conceivable risk must be assessed, however small or insignificant, and that all aspects of an EIA must be completed before Botnia has even acquired the necessary land, before notifying CARU, and long before authorisation of construction or operation of the plant, not only has no textual basis, but is also illogical and unrealistic. As Uruguay has already pointed out, this approach leaves no room for taking into account representations from Argentina or for subsequently revisiting any aspect of the proposal at a later stage[724]. Argentina's reading elevates form over substance and turns the whole EIA process into a mechanistic event that has little to do with protecting the environment.

5.72 Uruguay has conducted an EIA of the Botnia plant in accordance with its own law and with customary international law[725]. That EIA was entirely sufficient for the purpose of evaluating the likely impact of the plant on the Uruguay River and

---

[723] *Ibid.*, at Art. 6(1) (emphasis added).

[724] UCM, para. 4.95.

[725] UCM, paras. 4.108-4.116.

on Argentina, as required by customary international law; it was extensive and contained a great wealth of technical information and environmental data[726]. It was as complete as possible and necessary at the time.

5.73 It is entirely legitimate in customary international law to confine the scope of the EIA to "significant adverse impacts" and to address only those transboundary risks that are objectively significant or likely. Uruguay cited as authority on this point both the International Law Commission and the WTO Appellate Body decision in *Japan-Measures Affecting Import of Apples*[727]. Argentina does not attempt to dispute the relevance or authoritative status of either precedent. Many of the "risks" identified by Argentina are neither significant nor likely within the terms of those precedents. If, contrary to all expectations, they become likely or significant at a later date, then it would be appropriate to consider further measures at that stage.

5.74 Uruguay reiterates its argument that the sufficiency of the EIA process must be judged as a whole, taking all the evidence into account, including the IFC's Final CIS. Viewed against the totality of the documentation, it can be seen that the possible transboundary impact of the Botnia plant has been subject to the most elaborate review by the company, by DINAMA and by several groups of independent experts on behalf of the IFC, which reinforce the well-founded conclusions reached by each individually. The process equals or exceeds in its scope and depth any other EIA that has been subject to international litigation[728].

---

[726] UCM, paras. 4.117-4.139.

[727] UCM, para. 4.105.

[728] Compare the *MOX Plant Arbitration*, PCA (2002).

5.75 Argentina persists in its wholly fallacious argument that the Botnia EIA was not completed prior to authorisation of construction. This is simply not so. The initial authorisation (which did *not* approve commencement of construction or operation) was granted on 14 February 2005 – some 11 months *after* Botnia submitted its initial EIA on 31 March 2004, and one month *after* Botnia provided sufficient additional information to DINAMA)[729]. To sustain its argument on timing, Argentina relies instead on the claim that the EIA was inadequate, that it cannot be rectified by later assessments carried out for the IFC, and that the whole EIA process must, therefore, be disregarded as defective from the outset. This not only lacks a legal basis; it defies common sense.

5.76 It must be remembered that there is no specific article on EIA in the 1975 Statute. CARU has not adopted guidelines on EIA procedures. Article 7 of the Statute merely provides that any notification given to the other party "shall describe the main aspects of the work and, where appropriate, how it is to be carried out and shall include any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the regime of the river or the quality of its waters". Article 8 provides for the notified party to request additional information if the information supplied is incomplete.

5.77 Neither Argentina nor Uruguay is a party to the 1991 UNECE Convention on EIA in a Transboundary Context. Since it is not an applicable international agreement between the Parties, and is not applicable law in the present dispute, it cannot be taken into account as an aid to interpretation for the purposes of Article

---

[729] UCM, paras. 4.117-4.133.

31(3)(a) or (c) of the Vienna Convention on the Law of Treaties[730]; nor does it come within the terms of Article 41(a) of the 1975 Statute.

5.78 Insofar as Article 41(a) of the Statute may require the Parties to adopt national laws and practices on environmental impact assessment on subjects within the ambit of the 1975 Statute, it leaves them free to determine and define the specific elements. Uruguay does not dispute that an EIA was required for the Botnia project in accordance with customary international law. What it does dispute is the argument that specific requirements for an EIA should be imported into the 1975 Statute from ENECE treaties or that the very detailed provisions of these treaties represent customary international law. If such detailed rules are necessary to protect the river they should be negotiated by the parties in the same way that other rules have been adopted in implementation of Articles 36 and 41. They should not be imposed by the Court, for four reasons.

5.79 First, based on its assessment of State practice, the ILC's 2001 Articles on Prevention of Transboundary Harm require only that an EIA should include an evaluation of the possible impact on persons, property and the environment of other States, but otherwise they leave the detailed content for individual States to determine[731]. Uruguay has indisputably conducted an EIA that meets the requirements envisaged by the ILC[732].

5.80 Second, 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

---

[730] *OSPAR Arbitration*, PCA (2003), paras. 101-105.

[731] Article 7 and commentary in ILC Report (2001) 405, paras. (7) & (8).

[732] UCM, paras. 4.107-4.144.

alert the public, not to test every possible hypothesis or provide detailed solutions to theoretical problems that have been identified[733]. Argentina's own EIA laws do not conform to the very exacting standard it seeks to apply to Uruguay. For example, Decree 5837 of 26 December 1991 regulates environmental impact assessment in Entre Rios Province and thus applies to industrial plants in Gualeguaychú. Article 4 provides only that: "Persons intending to install a new industry, and persons wishing to make changes or relocations in existing industries must commence the administrative procedures before the Directorate of Industries and Industrial Promotion. It shall evaluate the aspects relating to its function and shall then send the file to the Environmental Sanitation Directorate so it may do the same"[734]. That is all. There are no requirements on the contents or details of the EIA.

5.81 Third, Article 14 of the Convention on Biological Diversity also requires EIA, but only in very general terms and without specifying detailed rules on content. It provides that:

> 1. Each Contracting Party, as far as possible and as appropriate, shall:
>
> (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.

---

[733] *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.), UR, Vol. IV, Annex R84; *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

[734] Regulatory Decree No. 5837, Government of Entre Ríos (26 December 1991). UCM, Vol. III, Annex 42.

Uruguay's EIA procedures fully comply with this requirement[735].

5.82 Fourth, Uruguay is entitled to expect some degree of stability and certainty in its treaty relations with Argentina. It should not be required to comply with a revision of the 1975 Statute that has neither been negotiated nor agreed by the Parties. Any reliance on Article 31(3) of the Vienna Convention must take account of the principle *pacta sunt servanda*. States can only be required to comply with the provisions of treaties they have negotiated and by which they are bound, not with some completely different text.

5.83 The practice of the World Bank relating to EIA is not relevant to the present dispute. The Bank's practices are not law and do not constitute an "applicable international agreement". Even if the Bank could be viewed as "an international technical body" for the purposes of Article 41, its practices on EIA are designed to serve its own needs as a responsible lender, not to set standards for national legislation. The Court should be wary of importing into the 1975 Statute detailed rules adopted by other bodies for entirely different purposes. In any event, the environmental impact assessment process has fully met the elaborate standards set forth by the International Finance Corporation, a part of the World Bank Group[736]. The IFC's independent experts confirm this[737].

5.84 Argentina cites several precedents relating to "strategic environmental assessment" – which address the potential impact of policies, plans or programs,

---

[735] UCM, paras. 4.108-4.116.

[736] UCM, paras. 5.3-5.52.

[737] IFC, Press Release, "IFC and MiGA Board Approves Orion Pulp Mill in Uruguay, 2,500 Jobs to be Created, No Environmental Harm," p. 1 (21 November 2007). UCM, Vol. IX, Annex 206.

rather than specific projects such as the Botnia plant. Precisely because they are intended for a wholly different purpose, these precedents are irrelevant to the present dispute.

5.85 Argentina makes one additional argument with regard to EIA: that there was inadequate provision for public participation in the process[738]. By this, Argentina means that Uruguay did not provide for participation by the Argentine public. As detailed below, there is no dispute that the Uruguayan public participated in the process. Argentina once again asserts that Uruguay should have complied in this respect with the most advanced requirements of UNECE treaties and World Bank practices that are inapplicable to this dispute. For reasons already explained this is an untenable argument. The Arhus Convention on which Argentina relies has a far broader purpose unconnected to EIA procedures, and there is no basis for importing its requirements into the 1975 Statute. Neither Uruguay nor Argentina is a party. Moreover Argentina again makes no comparable provision in its own law[739]. It cannot expect more of Uruguay than it is willing to require of itself.

5.86 There is no other basis for interpreting the 1975 Statute to require some form of transboundary public participation in the EIA process. Other relevant instruments supported by both Uruguay and Argentina do not sustain Argentina's case on public participation. Principle 17 of the Rio Declaration does not refer to public participation in EIA procedures. Principle 10 merely says that "[a]t the national level, each individual shall have appropriate access to information

---

[738] AM, paras. 3.206-3.209; AR, paras. 4.101-4.105.

[739] *See* Regulatory Decree No. 5837, Government of Entre Ríos, *op. cit.* UCM, Vol. III, Annex 42.

concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes." This does not appear to envisage transboundary participation in EIA processes. Nor do the 1987 UNEP EIA Principles. Principle 7 says only that "[b]efore a decision is made on an activity, government agencies, members of the public, experts in relevant disciplines and interested groups should be allowed appropriate opportunity to comment on the EIA." It is easy to see why Argentina did not refer to this provision. It is not mandatory, it limits participation to the opportunity to comment, and it is not intended to have transboundary effect. Principle 12, which does deal with transboundary impacts, makes no reference to communication to the public of the affected State or to their participation in a national EIA.

5.87 Assuming for the purposes of argument that a requirement of transboundary public participation can be read into the Statute, then it has been complied with by Uruguay. The EIA process undertaken by Uruguay included consultation with the public likely to be affected in Argentina as required by Uruguayan law[740]. Inhabitants of Fray Bentos and nearby regions of Uruguay and Argentina participated, including representatives from Argentine towns in Entre Rios Province. All of these representations were taken into account by DINAMA when deciding whether to approve the DINAMA/Botnia EIA and recommend the

[740] Decree No. 435/994, Environmental Impact Assessment Regulation (21September 1994) UCM, Vol. II, Annex 9. Decree No. 349/005, Environmental Impact Assessment Regulation revision (21 September 2005). UCM, Vol. II, Annex 24. MVOTMA Initial Environmental Authorisation for the Botnia Plant, paras. XI-XIII (14 February 2005). UCM, Vol. II, Annex 21.

grant of an AAP[741]. Indeed, the matters raised at the hearing are extensively referred to in the AAP itself[742]. It is clear on this evidence that participation by the potentially affected public in Argentina was provided for and did, in fact, take place. Even if Article 2 of the 1991 Convention on EIA were applicable, it would require Uruguay to do no more than this. It only provides for "an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures…"[743].

5.88 Uruguay has manifestly complied with all the requirements of international law concerning EIA. Argentina has no basis for suggesting that in this respect Uruguay has violated any provision of the 1975 Statute.

Section V.
Uruguay is Not Required to Assess the Suitability of Alternative Sites

5.89 Argentina asserts that the location of the Botnia plant is a central aspect of the dispute ("C'est un aspect central du différend")[744]. In Annex 43 of its Reply it purports to rank various possible sites on a basis which makes Fray Bentos appear the worst possible location. But the criteria used to reach this conclusion are wholly self-serving and without any legal basis. In conducting the analysis, the Rabinovich Report (created by Argentina for this litigation) ranked each site based on four factors, none of which have anything to do with effect on water quality. As tangible evidence of the Report's lack of transparency, the rankings make clear that distance

---

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

[742] MVOTMA Initial Environmental Authorisation for the Botnia Plant, paras. XIII (14 February 2005). UCM, Vol. II, Annex 21.

[743] Art. 2(6).

[744] AR, para. 4.126 ("This is a central aspect of the dispute.").

from Argentine population centres was the most important, indeed the only factor that could affect the outcome of its analysis[745]. On this wholly spurious basis -- which entirely disregards the river itself -- it is of course inevitable that Fray Bentos will come out badly.

5.90 The choice of the Fray Bentos site may be understood by reference to five key factors:

(1) Accessibility: on a navigable river and near a major bridge over that river;

(2) Raw materials: proximity to existing plantations of eucalyptus;

(3) Manpower: ready availability of labour in Fray Bentos;

(4) Availability of water: it can be extracted and returned to the river without risk to drinking water supply or pollution; and

(5) Suitability: no likelihood of significant harm to the river environment or Argentina.

Argentina ignores all but the last of these considerations and takes an extreme position, which discounts Uruguay's right to pursue sustainable development. In contrast, as detailed in the Counter-Memorial, the site selection process undertaken by Botnia was careful and considered each of those factors[746]. On that basis, Botnia determined that Fray Bentos was a suitable location where unacceptable impacts to the river were not likely to occur -- a conclusion that was confirmed first by Uruguay, then by IFC's technical experts in the Final CIS[747] and again in the July

---

[745] Rabinovich Report, *op. cit.*, para. 1.6.6, Tables 1 and 2. AR, Vol. III, Annex 43.

[746] UCM, para. 4.118.

[747] UCM, para. 4.118.

2008 *Environmental Performance Review*, which found no impacts on the river during the first six months of the plant's operation.

5.91 All the evidence now available – whether from monitoring reports or from the IFC's most recent evaluations of the plant's operation – confirms in the clearest possible way that Botnia was correct in its choice of site and that Uruguay was right to approve that choice. Whether other sites might hypothetically have been better from an Argentine perspective is irrelevant. The actual site at Fray Bentos is demonstrably unproblematic, and the location poses no risk of significant harm to Argentina, while maximising the economic, social and environmental benefits to Uruguay.

5.92 Argentina seems to believe that Uruguay should have carried out an EIA for a range of possible alternative sites. This is neither practical nor obligatory. It is not practical because applicants can only carry out an EIA in relation to sites they already own or control. To assess other hypothetical locations which might not in practice be available would be futile. It would also be prohibitively expensive and time-consuming. Even the precautionary principle only requires states to take "cost-effective" measures to prevent environmental degradation[748].

5.93 It is not obligatory to assess alternative sites because there is nothing to that effect in the 1975 Statute or in the 1991 Espoo Convention on EIA in a Transboundary Context, or in international law[749]. Article 3 of the Espoo Convention requires notification to potentially affected States of information about the proposed

---

[748] 1992 Rio Declaration on Environment and Development, Principle 15.

[749] Principle 4(c) of the UNEP EIA Principles provides in heavily qualified terms for an EIA to include "A description of practical alternatives, *as appropriate*." Appendix II (b) of the Espoo Convention uses similarly qualified language.

activity and its possible transboundary impact. It makes no mention of assessing alternative sites. Article 5(a) of the Convention provides for *consultations* between the States concerned regarding "alternatives to the proposed activity, including the no-action alternative and possible measures to mitigate significant adverse transboundary impact and to monitor the effects of such measures at the expense of the Party of origin". It is clear from the wording and context of this article that it does not envisage or require assessment of alternative sites in the EIA. What it requires are "consultations between the States concerned", and it is indisputable that these in fact took place, as described in Chapter 3 of the Counter-Memorial, and in Chapter 3 of this Rejoinder.

5.94 In any event, when Botnia carried out an initial assessment of the site it did look at other options. The EIA reviewed the suitability of the site and identified no reason for not locating the plant there. The no-action option is only relevant if the EIA had revealed a risk of serious harm sufficiently high that the costs of the project would outweigh the benefits. That is not the case here. The EIA revealed a very limited potential impact on the river and none on Argentina. The measures taken by Uruguay have minimized the impact of the plant to the fullest possible extent. There is simply no basis for suggesting that other sites would have been better.

Conclusion

5.95 This Chapter has shown that the Parties do not dispute that the applicable law on the environmental aspects of the present case will be found in Article 36 and 41 of the Statute of the Uruguay River, together with such provisions of the Conventions on Biological Diversity and on Persistent Organic Pollutants as are relevant. It has also shown that Uruguay is not in breach of either of those

Conventions, or of Articles 36 and 41. The fact that Argentina makes no allegation that CARU standards on water quality have been violated is a very good indication that the Botnia plant is not a threat to the quality of water or the biological diversity of the Uruguay River, since it is only by altering water quality that pollution can occur.

5.96 Whatever the merit of Argentina's reliance on the principles of sustainable utilisation, equitable and reasonable use, prevention of transboundary damage and the precautionary principle, what is clear is that Uruguay has done all that is necessary to comply with them. No violation of the Statute can be attributed to Uruguay in this respect. Nor has Argentina made out a case for questioning the sufficiency or legality of any element of the environmental impact process. The actual operation of the Botnia plant -- showing no significant harm to the river -- amply demonstrates the correctness and adequacy of the EIAs undertaken by Botnia and by the IFC, and of the choice of site.

CHAPTER 6.
RESPONSE TO ARGENTINA'S TECHNICAL CRITICISMS

Introduction

6.1 This Chapter responds to the technical criticisms of the Botnia plant made by Argentina's hired experts. For the sake of brevity, Uruguay does not repeat the proofs provided in its Counter-Memorial, nor does it attempt to respond to each paragraph or subparagraph in the Reply or the reports in Annexes 43 and 44; but lest there be any confusion, it should be noted that Argentina's Reply raises no new arguments of substance, and Uruguay fully stands by its positions stated in the Counter-Memorial.

6.2 This Chapter is divided into three sections. Section 1 rebuts the only actual attempt by Argentina's experts to show, through scientific modelling, that the operation of the Botnia plant will have an adverse impact on the river, specifically a single claim that after 15 years (that is, in the year 2023) nutrient discharges (including phosphorus) from the plant will increase the level of algae in Ñandubaysal Bay to the point where eutrophication will occur in that location. This Section shows that Argentina's "model" to support its claim is riddled with errors and is of no scientific value. After demonstrating that the nutrient discharges from the Botnia plant will not harm the river, Section 1 then demonstrates that Uruguay's other efforts elsewhere in the river, some begun years before the plant was ever conceived, will more than offset the generation of nutrients from Botnia. It further demonstrates that Argentina, not Uruguay, and certainly not Botnia, has the greatest opportunity to address the issue of nutrients in the river because Argentina is by far the largest source of nutrients in the parts of the river on which Argentina focused in its Reply. Simply put, Argentina's complaints about phosphorus amount to nothing:

despite strenuous efforts, Argentina fails to show any risk of eutrophication from the operation of the Botnia plant.

6.3 Section 2 provides a further rebuttal to Argentina's claims that the Botnia plant fails to meet state-of-the-art technology standards, including the European Union's BAT guidelines. Argentina's arguments in the Reply do nothing to refute the international consensus that the Botnia plant is among the best in the world.

6.4 Section 3 responds to the potpourri of remaining claims made by Argentina's witnesses, none of which demonstrates any meaningful failure in the permitting process or the design of the plant, or any meaningful risk to the affected environment in the river or the aquatic environment.

Section I.
The Evidence Shows that the Botnia Plant Will Not Cause Eutrophication or Otherwise Harm the Uruguay River

6.5 As demonstrated in Chapter 4, despite all its dire predictions in both the Memorial and the Reply, Argentina has failed to identify any present adverse impacts to the river from the operation of the Botnia plant. The independent experts retained by the IFC have concluded that there are none. In this Section, Uruguay will demonstrate that Argentina's equally strident warnings that there will be adverse impacts in the future are also without merit. As set forth in the Counter-Memorial, neither Argentina's Memorial nor the thousands of pages of annexes attached to it, provided any credible proof of likely harm. Although Argentina argued that there was inadequacy in evaluation, testing and design of the plant, it never presented a valid scientific basis to demonstrate that the plant will or is likely to harm the river. Argentina's Reply largely suffers from the same omission as the Memorial – it attacks details, but never shows how its attacks, even if they were correct (which

they are not), translate to a real risk of environmental damage. In short, Argentina has failed again to show any reasonable likelihood of damage to the river from the operation of the plant.

6.6 Argentina's Reply makes but one attempt to show an actual or likely impact, namely an increased risk of eutrophication (algae growth) in Ñandubaysal Bay from phosphorus discharges, which Argentina expects to occur, if at all, fifteen years in the future. This prediction is unworthy of serious attention because the lone report on which Argentina relies is simply of no scientific value. This is demonstrated by the following: *First,* Argentina's so-called "indépendant"[750] experts are, in fact, employees of Argentina and can in no way be considered independent. *Second,* Argentina's experts conclude that phosphorus is *not* the cause of eutrophication, rendering the extended discussion of phosphorus in Argentina's Reply all but meaningless. *Third*, Argentina's experts erroneously assume Ñandubaysal Bay is a lake, not a bay, and then assume that any nutrient that flows into the bay never flows out, in contravention of the laws of chemistry and physics. *Fourth*, the calculations of Argentina's experts wrongly assume that the Uruguay River flows backwards 100% of the time. *Fifth,* by virtue of these errors Argentina exaggerated the annual phosphorus contribution of the Botnia plant to the bay by over 38,000%. *Sixth*, after these errors are corrected, the very methodology developed by Argentina's experts to predict that the Botnia plant would cause eutrophication demonstrates precisely the opposite. *Seventh*, as set forth in Section 1.B. of this Chapter, the contribution of phosphorus by Argentina to the bay is

---

[750] *See, e.g.*, AR, paras. 3.12 & 3.14.

thousands of times the contribution of Botnia. *Eighth*, Uruguay's nationwide program of phosphorus reduction will further reduce its contribution to the river. In short, if Argentina is truly concerned about eutrophication in Ñandubaysal Bay, it should look to its own contribution to that phenomenon, not to the Botnia plant, for a solution. These points will be set out in more detail below.

A. ARGENTINA CANNOT SHOW ANY RISK OF INCREASED EUTROPHICATION IN ÑANDUBAYSAL BAY FROM THE OPERATION OF THE BOTNIA PLANT

6.7 The conclusion in the Reply that Botnia-related eutrophication in Ñandubaysal Bay may be an issue fifteen years hence relies solely on a report entitled "Scientific Report to the Argentine Minister of Foreign Affairs in response to Uruguay's Counter-Memorial," prepared by Jorge Rabinovich and Luis Tournier (the "Rabinovich Report" or "Rabinovich")[751]. A brief discussion of the identity of these experts is in order.

6.8 As Uruguay described in its Counter-Memorial, the IFC's endorsement of the Botnia plant is entitled to particular weight, given that "[i]ndependent fact-finding reports prepared by disinterested international organizations are often found to be particularly credible"[752]. Despite all of the (groundless) arguments Argentina makes with respect to the IFC's findings, Argentina has not put forth any argument to refute the fact that special deference should be paid to the independent experts retained by the IFC since both their independence and their expertise are unchallenged in the Reply.

---

[751] Jorge Rabinovich & Luis Tournier, "Scientific Report to the Argentine Ministry of Foreign Affairs with replies to Uruguay's Counter-Memorial concerning aspects of the Botnia Pulp Mill near Fray Bentos, Uruguay" (hereinafter "Rabinovich Report"). AR, Vol. III, Annex 43.

[752] *See* UCM, para. 5.5 (internal citations omitted).

6.9 In stark contrast to the IFC's experts, Drs. Rabinovich and Tournier cannot be considered "independent". Argentina states that its Reply is based on "expertises scientifiques indépendantes"[753], and that the "rapports de ses experts indépendants", specifically referring to the Rabinovich Report, confirm the claims made in the Memorial[754]. It further asserts that "[l]e rapport Rabinovich est également un rapport indépendant sur lequel se fonde l'Argentine au soutien de sa thèse…."[755]. However, the authors of Argentina's reports are in no sense of the word "independent". Indeed, Argentina's curious failure to provide a C.V. or indeed any background about them may be explained by the fact that these "experts" are, in fact, employees of Argentina.

6.10 Dr. Jorge Rabinovich has been a Principal Investigator of Argentina's National Council for Scientific and Technical Research ("CONICET"[756]) since 1986[757]. CONICET, as described on its own website, is an Argentine "governmental entity, under the jurisdiction of the Secretary of Science, Technology and Productive Innovation, dependent upon the Ministry of Education, Science and Technology"[758]. As a government agency dedicated to the promotion of science and technology in

---

[753] AR, para. 3.233 ("independent scientific analyses").

[754] AR, para. 4.169 ("reports of its independent experts").

[755] AR, para. 3.14 ("[t]he Rabinovich Report is also an independent report used by Argentina to support its theses…"); *see also* AR, para. 3.7.

[756] "Consejo Nacional de Investigaciones Científicas y Técnicas".

[757] *See* Initiative on Science and Technology for Sustainability Workshop, *available at* http://www.hks.harvard.edu/sustsci/ists/TWAS_0202/participants/Rabinovich_bio.htm (last visited on 2 July 2008). UR, Vol. III, Annex R77.

[758] *See* National Council for Scientific and Technical Research (hereinafter "CONICET") Web Site, "About CONICET," *available at* http://www.conicet.gov.ar/cdofertatec/ingles/index.htm (last visited on 30 May 2008). UR, Vol. III, Annex R73.

Argentina, CONICET specifically notes that its objectives are to be carried out in consideration of the guidelines established by the Argentine government[759]. Dr. Rabinovich's role as Principal Investigator[760] to CONICET eviscerates any claim that the Rabinovich Report can be considered "*independent*". Furthermore, Argentine media sources confirm that Dr. Rabinovich's ties to the government are much stronger than even his service to CONICET suggests. As of July 2007, Dr. Rabinovich served as a scientific advisor to the National Secretary of the Environment[761], and was a member of the Argentine delegation to the negotiations facilitated with Uruguay by the King of Spain[762]. It also appears that Dr. Rabinovich may lack the subject matter expertise relevant to this dispute: his primary expertise appears to be insect damage to crops[763].

6.11 Similarly, Dr. Luis Alberto Tournier, co-author of the Rabinovich Report, was among the group of government scientists selected to monitor the activities of the Botnia plant[764]. And, more significantly, Dr. Tournier was listed on the

---

[759] *See* CONICET Web Site, "Objectives," *available at* http://www.conicet.gov.ar/INSTITUCIONAL/Descripcion/objetivos.php (last visited on 30 May 2008). UR, Vol. III, Annex R74.

[760] CONICET Web Site, Resume of Jorge Eduardo Rabinovich, *available at* http://www.conicet.gov.ar/php/datos_rrhh.php?n=3059 (last visited on 30 May 2008). UR, Vol. III, Annex R75.

[761] Clarin, "Argentina and Uruguay Resume 'Direct Dialog' about the Pulp Mills Today" (30 July 2007). UR, Vol. III, Annex R57.

[762] ZonaColon.com, "After the Crossroads of Statements About the Paper Mill" (26 May 2007). UR, Vol. III, Annex R56.

[763] *See* CEPAVE Web Site, "Ecology of Pests," *available at* http://www.cepave.edu.ar/ecologia_ing.htm (last visited on 2 July 2008). UR, Vol. III, Annex R79.

[764] *See* ZonaColon.com, "After the Crossroads of Statements About the Paper Mill," *op. cit*. UR, Vol. III, Annex R56.

government's official payroll for 2007[765] and employed as a scientific and technical advisor to the Secretary of the Environment and Sustainable Development[766].

6.12 In sum, neither Dr. Rabinovich nor Dr. Tournier can be considered a disinterested, or independent, party — "one who is not a party to the proceedings and stands to gain or lose nothing from its outcome"[767]. Given the lack of independence of these two experts, their predictions regarding the impacts of the Botnia plant and any conclusions derived from their modelling activities should be treated with caution[768]. As the Court has observed in similar circumstances, "a member of the government of a State engaged in litigation before this Court" will "'probably tend to identify himself with the interests of his country.'" Consequently, "'while in no way impugning the honour or veracity' of such a person, the Court should 'treat such evidence with great reserve'"[769].

---

[765] *See* Office of the Head of the Cabinet, Undersecretary of Public Management and Employment of the Office of the Secretary of Public Management, National Office of Public Employment, Central Registry of Contract Personnel, Payroll for Personnel with Current Contracts in 12/2007 Employed in the Agency, *available at* http://www.sgp.gov.ar/sitio/empleo/regimenes/contratados/listadocontratados/rcpc_1184/al_31_12/41078_rcpc_6.html (last visited on 30 May 2008). UR, Vol. II, Annex R18.

[766] *See* Stockholm Convention on Persistent Organic Pollutants - Report of the Toolkit Expert Meeting, Annex II, *available at* http://www.pops.int/documents/meetings/toolkit/Toolkit_rpt_Dec07.pdf (last visited on 30 May 2008). UR, Vol. III, Annex R72.

[767] UCM, para. 5.5 (*quoting Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports 1986, p. 43, para. 69).

[768] Professor Wheater and Dr. McIntyre, authors of the report entitled "Technical Commentary on the Counter-Memorial of Uruguay in the case Concerning Pulp Mills on the River Uruguay" (hereinafter "Second Wheater Report"), AR, Vol. III, Annex 44, also self-describe their report as "independent". *Ibid.*, p. 5. AR, Vol. III, Annex 44. As hired experts, their opinions carry none of the weight of the experts of the IFC. Their findings are not addressed in detail in this section because they did not attempt to make an affirmative showing that the operation of the Botnia plant will cause harm.

[769] *Case Concerning Armed Activity on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports 2005, p. 36, para. 65 *(quoting Nicaragua v. United States of America*, *op. cit.*, p. 43, para. 70).

6.13 Notwithstanding their partisanship, Drs. Rabinovich and Tournier fail to show that the Botnia plant has any reasonable likelihood of causing future harm to the river. It is difficult to decide where to begin listing the errors that permeate the Rabinovich Report, utterly invalidate the analysis and, indeed, prove the contrary conclusion that the Botnia plant will not cause eutrophication.

6.14 Part 4 of the Rabinovich Report is entitled "Argentina's demonstration that there is a real risk of serious harm"[770]. Covering a scant four pages plus some short sub-annexes, the Rabinovich Report asserts that "ecological mathematical models . . . show that the operation of the pulp mill . . . poses a serious and real hazard to the Argentine coast, both to the ecological system and to the health of the human population in the proximity, especially the tourists that visit the river beach facilities on such [Ñandubaysal] Bay"[771]. The serious and real "hazard" identified by Rabinovich is "associated with the significant amount of phosphorus and nitrogen contained in the effluent of the pulp mill . . . that increase the production of algal blooms that include toxic microalgae"[772]. However, Rabinovich predicts that algae growth of concern would not be seen until fully 15 years after operations commence[773]. Thus, even Argentina's hired expert is unable to predict any short-term effects -- that is, before the year 2023 -- requiring immediate or short-term intervention. As will be shown below, the Rabinovich Report is so plagued by errors that even the far-into-the-future effects that it predicts are groundless.

---

[770] Rabinovich Report, *op. cit.*, pp. 48-52 . AR, Vol. III, Annex 43.

[771] *Ibid.*, para. 4.4.2.

[772] *Ibid.*, para. 4.4.3.

[773] *Ibid.*, para. 4.4.8 & Annex 1, p. 71.

6.15 Before delving into the errors in the Rabinovich Report, it is worth highlighting that Rabinovich, despite the constant refrain from Argentina that phosphorus from the plant is the effluent of most serious concern[774], states plainly that *phosphorus is not the cause* of the eutrophication it forecasts for 2023 and beyond. Thus, the repeated references to phosphorus throughout Argentina's Reply appear now to be largely irrelevant, because Rabinovich states without ambiguity or hesitation that "for all possible scenarios N [nitrogen] was the constraining nutrient", i.e., the purported cause of the alleged future eutrophication[775]. By its reliance on Rabinovich, Argentina has effectively adopted the view that phosphorus will not be the cause of future eutrophication in the river. It is puzzling, therefore, that Argentina devoted such substantial attention in the Reply to phosphorus discharges from the Botnia plant when its own experts -- who also serve as technical advisors to Argentina's Secretary of the Environment -- do not believe that phosphorus emissions will cause the harm to the river!

6.16 Now the errors. Rabinovich's first error was to assume for the purpose of predicting the effects of discharges from the Botnia plant that Ñandubaysal Bay, a part of the Uruguay River, is neither a river nor even a bay, but instead is a lake[776]. This assumption is wrong. And, as Uruguay's experts confirm, this "seriously

---

[774] *See, e.g.,* AR, paras. 3.177-3.178, 3.180, 4.20, 4.140, 4.160 & 4.163.

[775] Rabinovich Report, *op. cit.*, para. 4.4.7. AR, Vol. III, Annex 43. Exponent, Inc., Response to the Government of Argentina's Reply - Facility Design Technology and Environmental Issues Associated with the Orion Pulp Mill, Fray Bentos, Uruguay River, Uruguay (hereinafter "Exponent Report"), p. 4-22 (July 2008). UR, Vol. IV, Annex R83.

[776] Rabinovich Report, *op. cit.*, Annex 1, p. 54. AR, Vol. III, Annex 43.

flawed"[777] and contra-factual assumption dramatically exaggerates the modelled impact of the Botnia plant. They note that Ñandubaysal Bay:

> is an open system within which water mixes and leaves. This open system receives water from the Gualeguaychú and Uruguay Rivers and water is exchanged between the Bay and the Uruguay River. The net flow of water is out of the Bay and the residence time indicates the time it takes the Bay to flush. Rabinovich and Tounier (2008) ignore these processes and instead treat the Bay as a closed system, equivalent to a lake[778].

6.17 Compounding the error in incorrectly treating Ñandubaysal Bay as a lake, Rabinovich then incorrectly assumes (contrary to the laws of physics and chemistry) that any nitrogen or phosphorus that enters the bay is trapped and never flows out of it[779]. There is no water body in the world -- and certainly not a river or a bay -- that functions as Rabinovich has assumed, where water and nutrients flow in, but nutrients never flow out[780]. The error is apparent from the Rabinovich Report itself, which in other places confirms that water (and nutrients) regularly flow in and out of the bay[781]. Specifically, Rabinovich lists the "residence time" of water (and nutrients) in the bay as 7-8 days, meaning that water (and dissolved nutrients) reside in the bay an average of 7-8 days before flushing out[782]. Despite explicitly recognizing this basic principle, Rabinovich astonishingly fails to include this residence time in its mathematical model. The effects of this error are significant.

---

[777] Exponent Report, *op. cit.*, Attachment B, p. 1. UR, Vol. IV, Annex R83.

[778] *Ibid.*, p. 4-29.

[779] Rabinovich Report, *op. cit.*, Annex 1, p. 63. AR, Vol. III, Annex 43.

[780] Exponent Report, *op. cit.*, pp. 4-29. UR, Vol. IV, Annex R83.

[781] Rabinovich Report, *op. cit.*, Annex I, p. 54. AR, Vol. III, Annex 43 (stating that water in the bay has a residence time of 7-8 days).

[782] *Ibid.*, Annex I, p. 54.

Simply using Rabinovich's own figures of residence time (i.e., 7-8 days) results in nitrogen and phosphorus concentrations 40 times lower than were projected by Rabinovich for the first year of Botnia's operation[783]. This error -- in assuming that the nitrogen and phosphorous emitted by the Botnia plant *never* leave Ñandubaysal Bay, despite having an admitted residence time of 7-8 days -- is compounded and exaggerated when it is applied over the 60-year time period modeled in the Report[784].

6.18 If this were not enough, Rabinovich makes a second, equally egregious error: the Report grossly exaggerates the amount of phosphorus and other nutrients generated by the Botnia plant that enter the bay in the first place. How did Rabinovich make this error? Simply put, Rabinovich's model assumes that the Uruguay River flows backwards 100% of the time[785].

6.19 Rabinovich calculates the amount of nutrients entering the bay from the Botnia plant by extrapolating from the fraction of Botnia's total effluents that enter the bay. Normally, this fraction is extremely small, resulting in immeasurable contributions of nitrogen and phosphorus to the bay; this is the conclusion of the

---

[783] Exponent Report, *op. cit.*, Attachment B, p. 1. UR, Vol. IV, Annex R83. ("Using R&T's own assumption of water 'residence time' in the Bay this error results in an exaggeration of average nutrient concentrations by a factor of approximately 40 on an annual basis.").

[784] Had Rabinovich applied its model to the phosphorus discharges from Argentina, the errors in the model would cause it to predict that the discharges from Argentina alone would eventually turn the bay into solid phosphorus and nitrogen. *Ibid.*, p. 4-14.

[785] *Ibid.*, Attachment B, pp. 2 & 5-6. ("This error dramatically overstates the effect of flow reversal, essentially by assuming that the river is always flowing net backwards into Ñandubaysal Bay."). Exponent notes that Rabinovich presents two mutually inconsistent calculations of the impact of the Botnia plant on the bay, one 25 times the other. *Ibid.*, p. 3. In one calculation, Rabinovich merely assume the river flows backwards twice as often as their own data show. In another, they simply assume the river flows backwards continuously.

IFC's[786] independent experts, whom Argentina has not seriously challenged. Argentina's Latinoconsult report, cited in its Memorial, reaches the same conclusion[787]. However, Rabinovich argues that during certain periods of extended flow reversal the contribution of nutrients from the Botnia plant is higher. Rabinovich begins by identifying four severe flow reversals from a model covering the past two decades, isolating roughly 20 days from the past 20 years[788]; these are the times when contributions from the Botnia plant to the bay would be expected to be the greatest. By Rabinovich's own calculation, these 20 days include some of the most severe and extended flow reversals, representing the most severe 1% of reversals. Not content to extrapolate based on a scenario that occurs only 1% of the time, Rabinovich selects the last 12-hour period in each of those periods, which is the period when the reversal is at its greatest[789]. This creates a scenario where Rabinovich's daily model is based entirely on severe conditions selected from only 48 hours over the past 20 years[790] and treating them as if they persist *24 hours per day, 365 days per year for a period of 60 years*[791].

---

[786] *See* International Finance Corporation, Cumulative Impact Study, Uruguay Pulp Mills, Annex D (hereinafter "Final CIS, Annex D"), p. D6.16 (September 2006) (finding that under both average and low flow conditions the calculated dilution of the effluent will be 1000:1 and 693:1 under rare occasions of flow reversal). UCM, Vol. VIII, Annex 176.

[787] AM, paras. 7.19 & 7.37.

[788] Rabinovich Report, *op. cit.*, Annex 1, pp. 63-64. AR, Vol. III, Annex 43. Exponent Report, *op. cit.*, Attachment B, p. 5 ("By definition, the selected time periods cannot be representative."). UR, Vol. IV, Annex R83.

[789] Rabinovich Report, *op. cit.*, p. 6. AR, Vol. III, Annex 43.

[790] Exponent Report, *op. cit.*, Attachment B, p. 3. UR, Vol. IV, Annex R83.

[791] Rabinovich Report, *op. cit.*, Annex 2, p. 78. AR, Vol. III, Annex 43.

6.20 The magnitude of this error on an annual average impact is huge. Since by Rabinovich's own calculations, flow reverses on average only 10% of the time[792], by definition Rabinovich's figures are exaggerated for *at least* the 90% of the time that the river flows in its usual direction; and, in fact, the figures are exaggerated far more than that, since it is undisputed that most flow reversals are much less extreme and shorter in time than the ones selected for the model[793]. And, because Rabinovich's model assumes that nutrients continuously accumulate from year to year, the longer the time period evaluated, the greater the error[794].

6.21 Interestingly, if two of Rabinovich's own assumptions stated in its Report are actually plugged into its model, i.e., that (1) the water and nutrients in Ñandubaysal Bay have a residence time of 7-8 days (as opposed to never leaving it); and (2) flow reversal in the Uruguay River occurs approximately 10% (not 100%) of the time, they show that the predicted annual contribution of nutrients (including phosphorus) from the Botnia plant in the Report -- and on which Argentina places great reliance in its Reply -- have been exaggerated by a factor of 381, or more than 38,000%[795]. Over time, the exaggeration becomes even more extreme[796].

---

[792] *Ibid.*, *op. cit.*, Annex 4, p. 96 (predicting flow reversal of 964 hours/year, or 10.8%).

[793] Contrary to the assertion in Rabinovich Report, *op. cit.*, paras. 3.8.6 & 2.20.9, AR, Vol. III, Annex 43, Uruguay and the IFC's models have always included the effects of flow reversals. International Finance Corporation, Cumulative Impact Study, Uruguay Pulp Mills (hereinafter "Final CIS"), p. 4.47 (September 2006). UCM, Vol. VIII, Annex 173. *See also* UCM, para. 5.58.

[794] Exponent Report, *op. cit.*, p. 4-25. UR, Vol. IV, Annex R83.

[795] *Ibid.*, Attachment B, p. 7. The other calculation presented by Rabinovich is off by a factor of 83. *Ibid.*, Attachment B, p. 4.

[796] *Ibid.*, Attachment B, p. 4.

6.22 Indeed, using the same methodology for predicting increases in eutrophication adopted in the Rabinovich Report, and the values as corrected to reflect those determined by Rabinovich itself, it is readily demonstrable that the Botnia plant will not cause eutrophication in Ñandubaysal Bay: not now, not in fifteen years, not ever[797]. Uruguay's experts have made such a demonstration -- using Rabinovich's own model and values, but without the obvious errors discussed above[798]. This additional analysis confirms that the Botnia plant will not cause any meaningful increase in algae growth in Ñandubaysal Bay, which is the only area identified by Argentina as likely to suffer such a consequence as a result of discharges from the Botnia plant[799].

6.23 The Exponent Report supplied by Uruguay confirms the conclusions of the Menzie Report, as set forth in the Counter-Memorial: the expected increase in phosphorus from the Botnia plant's discharge will have no adverse effect on the water quality of Ñandubaysal Bay[800]. In contrast to the well-supported conclusions of the Menzie Report as confirmed, using Rabinovich's own methodology for predicting eutrophication, by the Exponent Report, neither Argentina nor the reports on which it relies provide any valid results. The criticism of the Menzie Report by the Second Wheater Report[801] (which Argentina submitted with its Reply) are unsubstantiated and limited to the assertion that "[t]he addition of nutrients to a

---

[797] *Ibid.*, pp. 4-12 - 4-35. UR, Vol. IV, Annex R83.

[798] *Ibid.*

[799] *Ibid.*

[800] UCM, para. 6.93.

[801] Second Wheater Report, *op. cit.*, p. 29. AR, Vol. III, Annex 44.

water body is a complex process" and hence evaluation of impacts involves uncertainties. The conclusions reached by Uruguay's experts cannot be undermined by such general platitudes, especially when Uruguay's experts used the same methodology employed by Argentina's experts in the Reply[802] and, after correcting the errors discussed above, confirmed that the conclusions expressed in the Counter-Memorial were correct.

6.24 Those conclusions, reached by Uruguay's experts and the independent experts of the IFC are: the calculated incremental concentration from the Botnia plant during worst-case low flow conditions, 0.001 mg/L, is insignificant under any circumstances and especially when compared to the average concentrations of phosphorus in the river[803]. That contribution is well within the natural variation of the river and, thus, has essentially no effect on the natural environment. Argentina's Reply, and especially the Rabinovich Report, once corrected, fully corroborate the conclusions in the Final CIS that the impact on Ñandubaysal Bay or other areas in Argentina of phosphorus and nitrogen discharges from the Botnia plant is insignificant.

B. ARGENTINA IS THE MAJOR SOURCE OF PHOSPHORUS IN ÑANDUBAYSAL BAY, AND ANY PROBLEMS WITH NUTRIENTS IN THE BAY CANNOT BE ATTRIBUTED TO URUGUAY OR THE BOTNIA PLANT.

6.25 Beyond its utter failure to demonstrate any connection between operations of the Botnia plant and possible future eutrophication in Ñandubaysal Bay,

---

[802] Rabinovich Report*, op. cit.*, p. 83. AR, Vol. III, Annex 43.

[803] UCM, para. 4.43. Using the figures of 0.04 to 0.24 mg/L in the Final CIS, as cited in the Second Wheater Report, *op. cit.*, p. 25, AR, Vol. III, Annex 44, the average concentration in the river is 40 to 240 times the contribution of Botnia under worst case conditions; using the figures specified in para. 2.16.2. of the Rabinovich Report, the concentration is 140 to 220 times the maximum incremental contribution of Botnia under worst case conditions.

Rabinovich makes another fundamental error: the Report makes no mention whatsoever of other contributors of nutrients to the river. Although Argentina has spent hundreds of pages in its pleadings and annexes complaining about nutrient loads from the Botnia plant, it virtually ignores a far larger source of nutrients -- itself. In any nutrient model, it is imperative to consider all impacts, since there is no physical way to distinguish one molecule of phosphorus (or nitrogen) from another. As Uruguay's experts confirm, Rabinovich's model improperly ignores the effects of other sources of nutrients in the river[804]. From a tactical perspective, this is hardly surprising because by far the largest contributor of phosphorus to Ñandubaysal Bay is Argentina. If the discharge of nutrients truly poses a health hazard to the residents of Argentina, that State would be far better served by reducing the phosphorus entering the bay from its own sources rather than expending all of its efforts attacking the *de minimis* contribution from the Botnia plant.

6.26 Rabinovich's grossly inflated estimate of the Botnia plant's annual contribution of phosphorus to the bay was variously presented as 98 kg/yr or 990 kg/yr[805]. Uruguay's experts demonstrate that Argentina's contribution is thousands of times more than the contribution of Botnia.

---

[804] Exponent Report, *op. cit.*, Attachment B, p. 3 ("R&T … ignore the other nutrient loads, a serious error…that renders the model virtually meaningless."). UR, Vol. IV, Annex R83. As the Exponent Report notes, had Rabinovich applied the same methodology to the Argentine phosphorus discharge as it did to the Botnia plants, it would have predicted concentrations of phosphorus in the Bay hundreds of times higher than what is currently seen. *Ibid.*, pp. 4-14.

[805] Rabinovich Report, *op. cit.*, Annex 2, pp. 63 & 78. AR, Vol. III, Annex 43. Exponent Report, *op. cit.*, Attachment B, pp. 4 & 7. UR, Vol. IV, Annex R83.

6.27 A principal source of nutrients in the bay is the Gualeguaychú River, which discharges directly into the bay. Simply multiplying the concentration of phosphorus in the Gualeguaychú River reported in the Rabinovich Report, 0.130 mg/L[806], and the average annual flow of the Gualeguaychú River reported by Argentina, 120 m^3/s[807], yields an annual Argentine phosphorus discharge from that river alone directly into the bay of over 491,000 kg/yr[808]. This is almost 5,000 times more than Rabinovich's lower estimate and 500 times more than Rabinovich's discredited higher estimate of phosphorus emitted from the Botnia plant. Because considerable phosphorus enters the bay from Argentina in locations other than the Gualeguaychú River, the total Argentine contribution is actually far higher.

6.28 Other studies confirm that Argentina's contribution of nutrients to the bay is dramatically greater than Botnia's. Uruguay's experts performed an analysis of the estimated discharge of nitrogen and phosphorus from Argentine sources to the Gualeguaychú River, which deposits them into Ñandubaysal Bay on a continuous basis. This river drains an extensive agricultural area and also receives treated sewage input from the city of Gualeguaychú. Uruguay's experts have estimated that loadings from the Gualeguaychú River watershed are conservatively estimated to be over 350,000 kg/yr for phosphorus[809]. Even using the highest figure in Ravinovich's

---

[806] Rabinovich Report, *op. cit.*, para. 2.16.2. AR, Vol. III, Annex 43.

[807] Piedracueva, Ismael - "Proyecto Botnia - Estudios de la Pluma del Emisario y Estudios Sedimentológicos", ["Botnia Project-Studies of the Effluent Flow and Sedimentology Studies"] *available at* http://www.ifc.org/ifcext/lac.nsf/AttachmentsByTitle/Uruguay_PulpMills_AnnexD_A/$FILE/CIS_AnnexD_partA-pdf.

[808] Using a refined evaluation of phosphorus concentrations in the river (0.116 mg/L), but the same basic methodology, Exponent calculated the discharge as approximately 439,272 kg/yr. Exponent Report, *op. cit.*, pp. 4-5. UR, Vol. IV, Annex R83.

[809] *Ibid.* The conservative estimate for nitrogen is over 3,400,000 kg. *Ibid.*, Annex D.

discredited analysis, which implausibly concluded that a full 990 kg/yr of phosphorus would be contributed to the Ñandubaysal Bay by the Botnia plant in a year, and Exponent's lowest estimate of the discharge from the Gualeguaychú River, Argentina contributes over 350 times more phosphorus to the bay than Botnia. When Rabinovich's erroneous assumptions are corrected, Argentina contributes more than 3,200 times the phosphorus contributed by Botnia to the bay on an annual basis[810].

6.29 In short, if Argentina is truly concerned about levels of phosphorus in Ñandubaysal Bay, it need look no farther than itself for a solution[811]. It could begin by emulating Uruguay's example of adopting regulations -- for the first time[812] -- that place limits on discharges of phosphorus into the Uruguay River, or into tributaries such as the Gualeguaychú River, by Argentine sources. Or, it could collaborate in good faith with Uruguay to incorporate limits on phosphorus emissions into CARU regulations pertaining to water quality and pollution. Until Argentina manifests a willingness to undertake either of these self-evident protective measures, it is difficult to respond to its hand-wringing over phosphorus levels in Ñandubaysal Bay with anything other than suspicion.

---

[810] *Ibid.*, p. 4-2.

[811] Professor Wheater noted the construction of a new wastewater plant in Gualeguaychú, Second Wheater Report, *op. cit.*, p. 72; AR, Vol. III, Annex 44; AR, para. 3.68, but neither Annex 47 nor the remainder of the Reply contain any information about phosphorus discharges. Apparently, outside of this litigation, Argentina considers the issue of phosphorus too insignificant to mention.

[812] Argentina does not currently regulate its phosphorus discharges. UCM, para. 4.40. *See also* Regulatory Decree No. 5837, Government of Entre Ríos, Exhibit 1 (26 December 1991). UCM, Vol. III, Annex 42.

6.30 Argentina's inaction is all the more striking when it is contrasted with Uruguay's proactive efforts to minimize phosphorus discharges. As set forth in Chapter 4, Section 2 of this Reply, Uruguay has undertaken several initiatives that, once complete, will more than completely offset the contribution of phosphorus from the Botnia plant. Connecting the Fray Bentos municipal discharge to the Botnia plant will reduce phosphorus discharge to the river by 8.8 tons annually, approximately three-quarters of the phosphorus discharge from the Botnia plant[813]. Constructing new wastewater treatment plants elsewhere on the river, which had been planned before the Botnia plant was proposed, will reduce phosphorus discharges further. The construction of the improved plant at Salto, for example, will reduce phosphorus discharges by an estimated 25 tons annually, or more than twice the expected discharge from the Botnia plant[814]. And, although the precise benefit cannot be calculated, Uruguay's plan to reduce non-point source nutrient pollution will result in still further reductions.

Section II.
The Evidence Shows that the Botnia Plant Complies with BAT and Is Among the Best Cellulose Plants in the World

6.31 As Chapter 4 of this Rejoinder demonstrates, the actual operational results from the Botnia plant confirm that its effluent discharges comply with the IPPC BAT requirements in all respects, as well as with all applicable regulations and

---

[813] OSE, Discharge of Residual Liquids in the Uruguay River Basin (hereinafter "OSE, Discharge of Residual Liquids in the Uruguay River Basin") (undated). UR, Vol. II, Annex R13. Final CIS, Annex D, *op. cit.*, p. D4.6. UCM, Vol. VIII, Annex 176.

[814] OSE, Discharge of Residual Liquids in the Uruguay River Basin, *op. cit.* UR, Vol. II, Annex R13. (51 tons of phosphorus produced currently; the new project will reduce phosphorus discharges for the 59% of the population connected to the sewer by 85%, yielding a 25 ton phosphorus reduction).

standards of Uruguay and CARU. Furthermore, the IFC's independent technical experts remain steadfast in their conclusion that the plant's technology is fully compliant with BAT[815]. On these bases alone, Argentina's challenges to the environmental performance of the plant and its compliance with BAT should be rejected. Nevertheless, Argentina persists in its attempts to challenge the plant's compliance with BAT by making a smörgåsbord of assertions about the technology employed in the plant and its associated chemical production facilities[816]. This Section demonstrates that each of Argentina's assertions is without merit.

A. EFFLUENT TREATMENT TECHNOLOGY

6.32 In its Reply, Argentina continues to assert that the plant should be obligated to construct a tertiary treatment system[817]. Argentina bases this claim on the allegation that the Uruguay River is environmentally sensitive to nutrient discharges and subject to eutrophication[818]. However, as demonstrated in Section 1 of this Chapter, the impact on eutrophication of discharges from the Botnia plant is inconsequential, and as will be demonstrated below, the Parties agree that tertiary treatment is very rarely used in pulp mills -- even for the most modern, and even for those situated on much smaller water bodies. Tellingly, tertiary treatment has not been required or implemented for any pulp mill in Argentina. This is yet another

---

[815] *See* AMEC Forestry Industry Consulting, *Orion BKP Mill Pre-Startup Audit* (hereinafter "*Pre-Startup Audit*") (September 2007). UR Vol. III, Annex R48. *See* UR, paras. 4.19-4.23.

[816] Notably, Argentina's Reply retreats from the argument that the bleaching technology to be employed at the Botnia plant -- elemental chlorine free light technology -- is inadequate. Therefore, the arguments contained in the Counter-Memorial with respect to this issue can be taken as accepted and admitted by Argentina. UCM, paras. 6.43-6.46.

[817] AR, paras. 3.15, 3.83 & 3.108-3.116.

[818] AR, para. 3.110.

example of Argentina's penchant for double standards, one for itself and a much higher one for Uruguay -- in this case a standard far exceeding the "state-of-the-art" and far more than is necessary to protect the Uruguay River.

6.33 Although Uruguay will not burden the Court by repeating the arguments of the Counter-Memorial, it bears emphasising those facts in the Counter-Memorial regarding tertiary treatment that Argentina does not dispute in its Reply and, hence, effectively concedes. In this regard, Argentina does not dispute that tertiary treatment is very rarely used in pulp mills, and even then only in highly unusual circumstances[819]. Further, Argentina does not dispute the finding of the Final CIS that tertiary treatment may result in harmful effects by increasing the chemical load of the effluent and needlessly complicating the wastewater treatment system[820]. Nor does Argentina contest that its own recently-adopted program for modernising its pulp mills, whose guidelines are expressly based on BAT standards, does not require the use of tertiary treatment for phosphorus removal[821].

6.34 Botnia's actual operational data confirm that tertiary treatment is not required, because the phosphorus emissions are well within the range prescribed by BAT even in the early stages of operation, and the monitoring data show no increase of phosphorus levels in the river as a result of the plant's operations[822]. As the

---

[819] UCM, paras. 6.33-6.34. Argentina also has not identified other facilities elsewhere in the world that employ this treatment, including the new state-of-the-art Stendal Mill located in Germany.

[820] UCM, para. 6.33 (citing Final CIS, *op. cit.*, p. 2.23. UCM, Vol. III, Annex 173).

[821] UCM, para. 6.35.

[822] See *supra* Chapter 4; International Finance Corporation, *Orion Pulp Mill, Uruguay Independent Performance Monitoring As Required by the International Finance Corporation (Phase 2: Six-Month Environmental Performance Review)* (hereinafter "*Environmental Performance Review*"), pp. 4.3-4.4 (July 2008). UR, Vol. IV, Annex R98.

EcoMetrix report demonstrates, current phosphorus loadings are already within the range of BAT[823]. In addition, the nutrient concentrations achieved by Botnia, even in the first months of operation (average 0.58 mg/L[824]), are well below the standard that Argentina asserts should apply, which is the (inapplicable) European Union standard of 1 mg/L that is suggested by Wheater as the reason for needing tertiary treatment[825].

6.35 Finally, Argentina suggests that the decision to forego the installation of tertiary treatment was cost-driven on the part of Botnia, even though such costs would have been relatively modest[826]. Uruguay agrees that the installation and operating costs associated with tertiary treatment are not onerous. That is why those costs played no role in the wastewater treatment technology chosen for the plant. As discussed in the Counter-Memorial, there are also negative impacts associated with tertiary treatment -- including an increase in chemical load to the environment[827]. Moreover, the operational data from the plant have confirmed the predictions of Botnia and the Final CIS that tertiary treatment is not necessary to achieve the required phosphorus discharge levels[828]. Rather than cost, it was these considerations relating to environmental impacts that were conclusive in the decision not to install tertiary treatment.

---

[823] *Ibid.*, p. 3.4.

[824] *Ibid.*

[825] Second Wheater Report, *op. cit.,* p. 25. AR, Vol. III, Annex 44.

[826] AR, para. 3.83.

[827] *See, e.g.*, AR, para. 3.26. UCM, para. 6.33; *see also* Final CIS, *op. cit.*, p. 2.23. UCM, Vol. VIII, Annex 173.

[828] *See supra* Chapter 4.

6.36 Argentina's argument that Botnia should have considered the installation of an artificial wetland as additional nutrient control technology is baseless. Argentina purports to base its argument on the Rabinovich Report's unfounded assertion that the results of such a pilot wetland at the Valdivia pulp mill in Chile have been "prometteurs"[829]. Rabinovich's failure to provide any support for this conclusion is unsurprising, since the pilot project in Chile has been abandoned. The Environmental Director for the Valdivia mill recently stated: "Our experimental wetland study, implemented several months ago at the Valdivia pulp mill, did not obtain good results on reducing phosphorous and other parameters. For that reason we finished the trial."[830]

6.37 In sum, Argentina's Reply does nothing to undermine the conclusions of EcoMetrix and Hatfield (the IFC's independent experts), and Uruguay's experts that tertiary treatment is not required for compliance with BAT or to avoid unacceptable impacts to the environment. Argentina's argument that an artificial wetland should have been constructed to provide additional nutrient removal is scientifically unsound and devoid of factual support. And, the data obtained from operation of the plant since November 2007 confirm that the discharge from the plant (an average of 0.58 mg/L[831]) more than meets the standard of 1 mg/L suggested by Argentina in the Second Wheater Report.

---

[829] AR, para. 3.84 ("promising").

[830] Exponent Report, *op. cit.*, Attachment A, p. A.31 (Osses, M. Environmental Director, Arauco Celulosa Valdivia Mill, e-mail correspondence, 28 April 2008). UR, Vol. IV, Annex R83.

[831] *Environmental Performance Review*, *op. cit.*, p. 3.4. UR, Vol. IV, Annex R98.

B. EMERGENCY BASINS

6.38 The Reply fails to rebut the conclusion of the Final CIS and the Counter-Memorial that the emergency basins of the Botnia plant are adequate. In its Memorial, Argentina argued that an emergency basin should have a retention capacity of 24 hours[832]. Uruguay's Counter-Memorial demonstrated that the Botnia plant's emergency spill basin has a 24 hour capacity[833]. Neither the Reply nor its accompanying expert reports attempt to refute that fact. Indeed, the Second Wheater Report specifically declined to comment on the analysis[834], and the Rabinovich Report limited itself to making the unsupported statement that the Botnia plant does not have a retention capacity of 24 hours[835]. In so doing, Rabinovich ignores the detailed analysis in the Counter-Memorial documenting the ability of the plant to retain 24 hours of flow. Given Argentina's failure to address this argument, the sufficiency of the retention capacity of the plant's emergency spill basins, as described in the Counter-Memorial, is unimpeached.

---

[832] Argentina's Reply reaffirmed that an emergency spill basin capacity of 24 hours is sufficient for the Botnia plant. It specifically cites to the Latinoconsult analysis that retention capacity should be at least 18 to 24 hours. Moreover, Dr. Rabinovich reaffirms the conclusion of Latinoconsult:

> Consequently, taking into account the complexities of this type of pulp mills and the time required to solve emergency situations, the usual provision is to try to withhold for a time as long as possible, being the goal of at least 24 hours a normal consideration.

AR, para. 3.121 (citing to Rabinovich Report*, op. cit*., para. 2.13.8. AR, Vol. III, Annex 43).

[833] UCM, para. 6.50; Dr. Thomas L. Deardorff & Mr. Douglas Charles Pryke, Available Technologies and Best Environmental Management Practices for Botnia S.A.'s Bleached Kraft Pulp Mill, Fray Bentos Uruguay, pp. 33-34 (Exponent, Inc.) (8 July 2007). UCM, Vol. X, Annex 215.

[834] Second Wheater Report, *op. cit.*, p. 118. AR, Vol. III, Annex 44.

[835] Rabinovich Report*, op. cit.,* para. 2.13.8. AR, Vol. III, Annex 43. "The Botnia pulp mill does not have such a capacity [of 24 hours]." AR, para. 3.121.

C. CHEMICAL SYNTHESIS

6.39 Chapter 6 of Uruguay's Counter-Memorial discussed the production of chemicals at the Botnia plant[836] for use in the environmentally sensitive ECF-light bleaching technology employed at the plant[837]. Like the Memorial, Argentina's Reply raises unfounded objections to these chemical synthesis facilities[838]. Argentina does not identify any actual environmental risks that these facilities pose[839]. Rather, Argentina asserts that the chemical processing facilities were inadequately assessed.

6.40 As an initial matter, as stated above, Argentina has not identified a single potential risk to the river posed by the chemical synthesis facilities. This is unsurprising since they generate no regular liquid effluent discharge whatsoever[840], and any unplanned discharges of liquids from the chemical synthesis facilities are routed through the overall wastewater treatment system[841].

6.41 DINAMA and Botnia have always considered the chemical production facilities to be part of the Botnia plant. Accordingly, contrary to Argentina's allegations, assessments of these facilities were included in the regulatory approval

---

[836] UCM, para. 6.52.

[837] UCM, para. 6.52.

[838] AR, paras. 3.105-3.107.

[839] The Rabinovich Report states that these facilities are of "serious environmental concern", Rabinovich Report, *op. cit.*, p. 16, AR, Vol. III, Annex 43, but never identifies exactly what types of risks the facilities might pose, in particular to the Uruguay River.

[840] Botnia Environmental Impact Assessment, Chapter 4: Description of Cellulose Pulp Plant Operations (Submitted to DINAMA), pp. 21, 90 & 134 (undated). UR, Vol. III, Annex R54. Botnia Environmental Management Plan for Operations, Appendix 6 (Contingency Plan) (hereinafter "Botnia Contingency Plan"), p. 35 (20 September 2007). UR, Vol. II, Annex R44.

[841] Botnia Contingency Plan, *op. cit.*, pp. 10 & 21. UR, Vol. II, Annex R44.

processes to which the Botnia plant itself was subject[842]. Argentina fails to acknowledge the extensive environmental submissions regarding these facilities that were part of the Botnia EIA submitted in 2004, as described in Uruguay's Counter-Memorial[843].

6.42 Argentina contends that the environmental assessment of the chemical synthesis facilities was improper because it did not contain a BAT conformity analysis[844]. But the IPPC BREF document setting the BAT guidelines for these types of facilities was not finalized until August of 2007[845], only three months prior to the commencement of plant operations and more than two years after the AAP was issued[846]. Nonetheless, Argentina has presented no information to the contrary to suggest that the chemical synthesis facility does not meet IPPC BAT.

6.43 Argentina is also incorrect in asserting that there are no contingency or emergency plans for the chemical production facilities[847]. As demonstrated in Uruguay's Counter-Memorial, the AAP required Botnia to submit environmental management and response plans for all aspects of the plant, including the chemical synthesis facilities[848]. Botnia submitted these plans, and DINAMA approved them,

---

[842] UCM, para. 6.52.

[843] UCM, para. 6.52.

[844] AR, para. 3.106.

[845] European Commission, Integrated Pollution Prevention and Control Reference Document on Best Available Techniques for Large Volume Inorganic Chemicals – Solids and Others Industry, *available at* http://eippcb.jrc.es/pages/FActivities.htm (last visited on 11 June 2008).

[846] MVOTMA Initial Environmental Authorization for the Botnia Plant (hereinafter "Botnia AAP") (14 February 2005). UCM, Vol. II, Annex 21.

[847] AR, para. 3.107.

[848] *See* Botnia AAP, *op. cit.*, Art. 2(h). UCM, Vol. II, Annex 21.

on 31 October 2007[849]. The plans are described in paragraphs 4.24 to 4.39 of this Rejoinder.

6.44 The Rabinovich Report suggests that emergency management may be deficient on the basis that the United States Environmental Protection Agency's so-called "Program 3" would apply to the chemical synthesis facilities[850]. This comment is inapposite for two reasons. First, the regulations of the United States are irrelevant because they are not incorporated into the 1975 Statute by reference, and, thus, are not binding on facilities located in Uruguay. Second, the Botnia Environmental Management Plan offers protections similar to those required by "Program 3"[851], and Rabinovich does not state otherwise. As shown in paragraphs 6.70 to 6.75 below, Botnia has developed, and DINAMA has approved, a comprehensive environmental management plan that includes risk management, emergency response, and employee supervision and training provisions[852]. The fact that the *form* of Botnia's Environmental Management Plan may not be identical to

---

[849] *See* DINAMA Resolution Approving the Environmental Management Plan for Operations (Final Consolidated Text) (31 October 2007). UR, Vol. II, Annex R4.

[850] Rabinovich Report*, op. cit.,* p. 17. AR, Vol. III, Annex 43.

[851] A summary of the requirements of U.S. EPA Program 3 may be found at U.S. EPA, Document No. 550-F-96-002, *Risk Management Planning: Accidental Release Prevention, Final Rule: Clean Air Act section 112(r) - Factsheet* (May 1996), *available at* http://www.epa.gov/OEM/docs/chem/rmprule.txt (last visited on 11 June 2008). These requirements include an emergency response program, an overall management system, and a risk management plan (RMP). *Ibid.*

[852] Botnia Environmental Management Plan for Operations, Appendix 5 (Analysis of Environmental Risks) (hereinafter "Botnia Analysis of Environmental Risks"), pp. 13-17 (30 June 2007). UR, Vol. II, Annex R43. Botnia Environmental Management Plan for Operations, Appendix 9 (Accident Prevention Plan) (30 June 2007), pp. 47-50 and Botnia Instruction sheets attached. UR, Vol. II, Annex R45.

the submissions required in the United States is of no moment -- the protections offered are comprehensive and meet the requirements of that program[853].

6.45 Finally, Uruguay does not dispute that a portion of the production output of the chemical synthesis facilities will be sold to buyers other than Botnia[854]. Uruguay does contest, however, Argentina's insinuation that this is somehow environmentally unsound. Indeed, the opposite is true. The availability of the chemical plant's production will greatly facilitate the adoption of environmentally friendly pulp plant technology at other locations, including in Argentina. As the IFC's technical experts stated in the Second Hatfield Report:

> The Botnia project includes installation of a plant to manufacture sodium chlorate, which will also become available on the regional market. This will greatly facilitate conversion of the existing Uruguayan and Argentinean bleached kraft mills from the current systems that use only chlorine to bleach pulp to modern ECF bleaching. Based on the UNEP emission factors, such a conversion would reduce dioxin discharges from these existing mills from the current level of about 1.7 g/year to about 0.02 g/year (TEQ basis)[855].

D. USE OF WATER RESOURCES

6.46 Argentina contends that the Botnia plant will not comply with BAT, and does not function as one of the best mills in the world, because it uses water from the Uruguay River to "dilute" the effluent to achieve certain required effluent discharge

---

[853] Argentina's Reply points out that the Final CIS did not discuss this risk management program for the chemical synthesis facility. AR, para. 3.107. However, the Final CIS explicitly indicated that such risk management plans would be developed as the permitting process continued. *See* Final CIS, *op. cit.*, pp. 1.6 & 4.104. UCM, Vol. VIII, Annex 173.

[854] AR, para. 3.107.

[855] Hatfield Consultants, Report of Expert Panel on the Final Cumulative Impact Study for the Uruguay Pulp Mills, p.10 (14 October 2006). UCM, Vol. VIII, Annex 178.

concentrations[856]. This is demonstrably false. Effluent sampling is conducted prior to addition of water from the river[857], and Argentina has presented no evidence to the contrary.

6.47 Argentina also incorrectly asserts that the allowable extraction rate of 1.9 cubic meters per second exceeds the allowable average 1.0 cubic metres per second consumption limit approved by DINAMA during the regulatory approval process, and, therefore, increases the allowable discharges to the river[858]. As Uruguay has previously explained, the higher extraction rate allows for short-term variability in discharge and for the use of river water for cooling purposes, but it does nothing to increase the previously authorized annual industrial consumption limit of 1.0 cubic metres per second. Uruguay specifically confirmed this to Argentina[859]. And, the amount of water extracted is a tiny fraction of total flow, 0.03% of the median flow of the river[860].

---

[856] AR, paras. 3.15 & 3.92; Rabinovich Report, para. 2.29. AR, Vol. III, Annex 43. Professor Wheater's claims are substantially more limited then suggested in Argentina's Reply; he claims only that effluent is diluted to comply with temperature and does not argue that dilution is used to address any other characteristic of the effluent. Second Wheater Report, *op. cit.*, p. 38. AR, Vol. III, Annex 44. Uruguay's experts confirm that this practice is widely accepted and increases the effectiveness of wastewater treatment operations. Exponent Report, *op. cit.*, Attachment A, pp. A.19-A.20. UR, Vol. IV, Annex R83.

[857] Botnia, Figure Demonstrating Effluent Cooling and Monitoring Locations of the Botnia Effluent Treatment Plant (undated). UR, Vol. III, Annex R82.

[858] Rabinovich Report, *op. cit.*, para. 2.29.6. AR, Vol. III, Annex 43.

[859] Diplomatic Note No. 604/06, sent from the Uruguayan Minister of Foreign Affairs, Reinaldo Gargano, to the Argentine Minister of Foreign Affairs, International Trade and Culture, Jorge Taiana (10 November 2006). UR, Vol. II, Annex R2.

[860] *Ibid.*

6.48 Moreover, there is no dispute that the effluent *discharge* limit is and has remained at 1.0 cubic meters per second measured on an annual average[861]. The IFC's consultants confirm that operational data show the Botnia plant has met that limit[862].

6.49 Contrary to Argentina's unsupported assertions[863], extracted river water used in addition to the plant process water is employed for the cooling of the effluent temperature[864], and is added *after* the compliance monitoring sampling point for all other parameters[865]. Therefore, the loading and compliance monitoring for all other physical parameters, including BOD, COD, AOX, phosphorus, nitrogen and TSS, are unaffected by the cooling water despite Argentina's suggestion to the contrary[866]. Use of river water to cool the effluent to meet the temperature limitations established by DINAMA was anticipated and evaluated in the Final CIS[867]. Cooling of effluent temperature is necessary because the optimal temperature for biological waste

---

[861] *See* DINAMA Environmental Impact Assessment Report, p. 4 (11 February 2005). UCM, Vol. II, Annex 20.

[862] *Environmental Performance Review*, *op. cit.*, pp. 3.1-3.2 (average discharge is 0.86 m^3/sec). UR, Vol. IV, Annex R98.

[863] AR, paras. 3.15 & 3.92.

[864] Exponent Report, *op. cit.*, p. 2-3. UR, Vol. IV, Annex R83.

[865] *Ibid.* Final CIS, Annex D, *op. cit.*, D4.4. UCM, Vol. VIII, Annex 176. Botnia, Figure Demonstrating Effluent Cooling and Monitoring Locations of the Botnia Effluent Treatment Plant, *op. cit.* UR, Vol. III, Annex R82.

[866] Exponent Report, *op. cit.*, p. 2-3. UR, Vol. IV, Annex R83. Final CIS, Annex D, *op. cit.*, p. D4.4. UCM, Vol. VIII, Annex 176. In at least some places in its Reply, Argentina appears to concede that river water will only be used to ensure that the effluents meet the temperature requirement, to the exclusion of all other physical parameters. AR, para. 3.92. Nevertheless, Uruguay is clarifying the point to avoid further confusion raised by other portions of the Reply. *See, e.g.*, AR, 3.15.

[867] Final CIS, Annex D, *op. cit.*, pp. D4.5. UCM, Vol. VIII, Annex 176.

treatment is between 35-37 degrees Celsius[868], in contrast to the discharge limitation established by Uruguayan law of 30 degrees Celsius[869]. The cooling process that allows maximum treatment of wastewater while ensuring the required temperature of the discharge does not adversely affect the river environment. Indeed, the Final CIS considered this cooling process to be the best and most energy efficient alternative[870]. Finally, because the additional water is not used in the plant's wastewater treatment process, the assertion by the Rabinovich Report that the sizing of the effluent treatment system is inadequate, is incorrect[871].

Section III.
Argentina's Criticisms of the Botnia Plant Are Contradicted by the Facts

6.50 As shown in Section 1 and 2 of this Chapter, Argentina's two main criticisms of the Botnia Plant -- that it will cause eutrophication in Ñandubaysal Bay and that its technology does not meet BAT standards -- are unfounded and refuted by the evidence. This Section responds to Argentina's other arguments against the plant and shows that they, too, are without merit or evidentiary support.

A. THE URUGUAY RIVER IS NOT A "UNIQUELY SENSITIVE ENVIRONMENT"

6.51 To support its twin claims that the Botnia plant will cause unevaluated impacts to the river and that tertiary treatment is required[872], Argentina's Reply asserts that the Uruguay River and its surroundings are uniquely "sensitive" in two

---

[868] Exponent Report, *op. cit.*, p. 2-3. UR, Vol. IV, Annex R83.

[869] Decree No. 253/79, Regulation of Water Quality (9 May 1979, as amended) (hereinafter "Decree No. 253/79"), Art. 11(2). UCM, Vol. II, Annex 6.

[870] Final CIS, Annex D, *op. cit.*, p. D4.5. UCM, Vol. VIII, Annex 176.

[871] Exponent Report, *op. cit.*, p. 2-3. UR, Vol. IV, Annex R83.

[872] AR, paras. 3.32-3.48, 3.83-3.84 & 3.108-3.116.

principal ways: that the river is highly sensitive to nutrient discharges (nitrogen and phosphorus) and that rare animal species are found in the vicinity of the plant.

6.52 More specifically, Rabinovich states that "the simple fact that the Uruguay river, and in particular its bays, a *[sic]* eutrophic condition (see Annex 2) invalidates '*per se*' the Counter-Memorial's assertion that the Uruguay river does not represent a sensitive environment"[873]. Rabinovich then extrapolates that assertion into an argument that the claimed eutrophic condition of the river renders tertiary treatment mandatory: He notes that IPPC BAT indicates that tertiary treatment is "usually only regarded as necessary when the concentrations of nutritive substances in the effluents must be reduced, 'i.e., if the mill discharges to very sensitive recipients which, as shown above, is the case of the Botnia pulp mill in the Uruguay river'"[874].

6.53 The Second Wheater Report, while acknowledging the conclusion of the Second Hatfield Report that "relative to most sites for pulp mills and other large process industries, Fray Bentos in not an environmentally sensitive site", asserts that the area should nonetheless be considered sensitive because there are rare animal species in the area that "may be sensitive to changes within that [eco]system, whether or not direct connections with the most contaminated zone can be identified"[875]. The Second Wheater Report makes no affirmative attempt to show that the rare animal species in the area are actually sensitive to changes in the ecosystem, nor did it identify what changes to the ecosystem might occur, or what the effect of those changes would be.

---

[873] Rabinovich Report, *op. cit*., p. 39. AR, Vol. III, Annex 43.

[874] AR, para. 3.83 & 3.109. Rabinovich Report, *op. cit.*, p. 23. AR, Vol. III, Annex 43.

[875] AR, para. 3.40. Second Wheater Report, *op. cit.*, pp. 22-23. AR, Vol. III, Annex 44.

6.54 Both claims miss the mark. The concept of whether an environment is "sensitive" can only be understood in relation to the activity being assessed -- any environment would be "sensitive" to a major disaster such as a nuclear explosion, and no environment would be "sensitive" to tiny changes such as the discharge of a single grain of sand. Here, Argentina's arguments about whether the river or its associated biota is "sensitive" can only be answered in the context of whether the particular characteristics of the Uruguay River environment would or could be meaningfully affected by the Botnia plant.

6.55 They will not. Rabinovich's argument that the Uruguay River is sensitive "per se" because of intermittent eutrophic conditions fails because exhaustive environmental assessments and indeed Rabinovich's own model[876] demonstrate that the Botnia plant will not cause or contribute to eutrophication or other nutrient-related harm in the river. Stated differently, although the river certainly can be affected by eutrophication, the cause of the eutrophication could not be the Botnia plant.

6.56 The river in the vicinity of the Botnia plant can readily assimilate the plant's nutrient discharge. This has been demonstrated by models affirmed by the IFC[877] and verified by the performance of the plant during its first six months of operation[878]. Apart from the outstanding performance of the Botnia plant itself, the physical characteristics of the river enable it to absorb the nutrients from the Botnia

---

[876] *See* Section I of this Chapter.

[877] *See* Final CIS, *op. cit.*, pp. 4.48, 4.49 & 4.54-4.57.

[878] *Environmental Performance Review*, *op. cit.*, p. 4.3. UR, Vol. IV, Annex R98. (concluding no change in phosphorus levels as a result of the plant's operation); Exponent Report, *op. cit.*, p. 5-4. UR, Vol. IV, Annex R83.

plant without adverse effect. The most important characteristic of the river that renders it relatively insensitive to nutrient or other discharge-related effects is the magnitude of its flow, which averages over 6,230 m^3/s[879]. This flow is high, and considerably larger than many rivers in Europe that host pulp mills[880]. This natural feature of the river provides an important benefit in this case as it results in a rapid and substantial dilution of the effluent[881]. Furthermore, an analysis of incremental increases of phosphorus in Ñandubaysal Bay demonstrates that phosphorus associated with the plant will not have any measurable effect on the trophic status within the bay[882]. In addition, as set forth in the Exponent Report, the large natural variability of phosphorus in the river dwarfs any incremental contribution from the Botnia plant, thus rendering its contribution ecologically undetectable[883]. Rabinovich has indicated that phosphorus is not the cause of eutrophication in the Uruguay River, making his claim that the river is "sensitive" to phosphorus meaningless[884].

6.57 Finally, the Final CIS and the Exponent Report both demonstrate that were any effects from the Botnia discharge to occur, they would be tightly limited to the

---

[879] Final CIS, Annex D, *op. cit.*, p. 3.1. UCM, Vol. VIII, Annex 176.

[880] E.g., the Seine (410 m^3/sec), the Vistula (1,000 m^3/sec), the Mur (139 m^3/sec), and the Vuoksi (470 m^3/sec). *See* Exponent Report, *op. cit.*, p. 5-9. UR, Vol. IV, Annex R83.

[881] *See* Final CIS, *op. cit.*, pp. 4.48, 4.49 & 4.54-4.57.

[882] *See* Section I of this Chapter. *See also* Exponent Report, *op. cit.*, pp. 4-12 - 4-19. UR, Vol. IV, Annex R83.

[883] Exponent Report, *op. cit.*, pp. 5-13 - 5-14. UR, Vol. IV, Annex R83.

[884] *See* Section I of this Chapter.

immediate vicinity of the discharge[885], and exclusively within Uruguay's part of the river. Uruguay explained in the Counter-Memorial that Canada's experience with pulp mills has demonstrated that a mill's effluent is only expected to have measurable impacts where the dilution ratio is less than 1:100, and that in the case of the Botnia plant this area extends only a matter of metres from the plant's diffuser under normal conditions and no more than 35 metres under very rare low flow conditions. As the Exponent Report explains, this zone represents only 0.006% of the river in the vicinity of the plant, and a much smaller percentage of the river as a whole and is "too small to influence populations of fish and wildlife species (including those that are rare) that utilize the river and its embayments"[886]. Neither Argentina's Reply nor its associated expert reports have disproved that, in the unlikely event there are any impacts in this zone, they would be too circumscribed to have any wider effects. Uruguay has demonstrated, again based on the Canadian experience, that impacts where the dilution ratio falls between 1:100 and 1:1000 are also unlikely. In the case of the Botnia plant, this zone is also too small to have any wider impact on the river. Indeed, the vast majority of the Uruguay River falls outside the 1:1000 dilution zone, including those areas that may be legitimately described as environmentally sensitive (such as Uruguay's RAMSAR site at Esteros de Farrapos).

6.58 Turning to the claims in the Second Wheater Report: Argentina makes no affirmative case that any animals will be affected by the discharge. At most, it

---

[885] Final CIS, *op. cit.*, p. 4.48. UCM, Vol. VIII, Annex 173. Exponent Report, *op. cit.,* p. 5-20. UR, Vol. IV, Annex R83.

[886] Exponent Report, *op. cit.*, p. 5-4. UR Vol. IV, Annex R83.

claims that there is some quantum of risk to rare species because ecosystems are "complex" and there is, accordingly, not absolute certainty about the impacts of the plant. In fact, the Exponent Report demonstrates that the species identified by Argentina have limited or no contact with the receiving waters and, thus, will not be affected by the operation of the plant. The Exponent Report demonstrates that there are no species whose populations reside or forage wholly or even to a significant degree within the immediate vicinity of the discharge. It further demonstrates that the impacts to the "food web" that the Second Wheater Report hypothesizes could come from Botnia's nutrient discharges are so small that indirect effects are remote at best[887]. In any event, as set forth in Section III of Chapter 4, if there are any effects, they will be detected through monitoring, and unacceptable impacts will be addressed immediately.

6.59 Uruguay does not dispute that the river is a significant ecological resource. Indeed, if Uruguay did not value the river as a resource, it would not have required such an extended environmental review or imposed such detailed conditions on the operation of the Botnia plant. It is precisely these efforts that enables Uruguay to conclude that the Botnia plant will not disturb the ecological balance of the river or the animals that inhabit it.

B. RISK ASSOCIATED WITH THE BOTNIA PLANT HAS BEEN ASSESSED AND MINIMIZED

6.60 Argentina persists in espousing views regarding the role of risk in the development of industrial projects that have no grounding in reality. In particular, Argentina's expert asserts that a project "must be investigated until there is no doubt

---

[887] *Ibid.*, *op. cit.*, pp. 5-21 - 5-22.

as to the possible effects"[888] -- in other words, until all risk has been eliminated. As explained below, this assertion simply does not comport with the requirements of the 1975 Statute or international law, much less real-world practice, and for good reason: it is inherently unworkable.

6.61 As demonstrated in Chapter 5, international law does not prohibit a project from moving forward until all theoretical risks have been eliminated. In so claiming, Argentina sets a standard that can never be met. It is impossible to eliminate to a mathematical certainty all risk associated with a project. However, Uruguay has properly assessed risks, and taken feasible and practicable measures to reduce them. It has certainly done all that the law requires.

6.62 The first step to minimize risk was the elaborate environmental review, which has been endorsed not only by Uruguay and its experts, but also by the impartial experts of the IFC[889]. Although Argentina's Reply is replete with suggestions that the assessment might have been conducted differently, it never shows how different conclusions would have been reached. If Argentina could have shown a meaningful risk of significant harm, the Court would have seen that proof at the provisional measures hearing, in the Memorial, or certainly in the Reply. Argentina has not. All it has presented is a model of nutrient impacts so flawed, that when only its most obvious errors are corrected[890], it supports Uruguay's conclusion that the plant will not cause harm.

---

[888] Rabinovich Report, *op. cit.*, p 37. AR, Vol. III, Annex 43.

[889] *See* Final CIS, *op. cit.* UCM, Vol. VIII, Annex 173.

[890] *See* Section 1 of this Chapter.

6.63 In fact, there are multiple, mutually reinforcing lines of evidence demonstrating that the plant will not have unacceptable impacts. The evidence includes: (1) use of established and tested plant designs that have been shown to be state-of-the-art in other applications; this generates reliable information about the emissions from the plant; (2) use of accepted scientific models to determine that the emissions will not unacceptably change the conditions in the Uruguay River; and (3) a comprehensive monitoring program to confirm the predicted emissions and their effects. The conclusions from the evidence have been affirmed not only by Uruguay's environmental agencies, but also by Uruguay's outside technical experts and by the IFC's independent experts.

6.64 Collectively, these efforts serve as a means of addressing any uncertainties. When taken together, all lines of evidence converge to support the conclusion set forth in the Final CIS, and supported by Exponent's independent review, that the Botnia plant is unlikely to have adverse impacts on water quality or the biota of the river.

6.65 Of course, the conclusions regarding risks associated with the plant's operation can and will be tested empirically through monitoring. As the Exponent Report explains, "[t]he purpose of monitoring is not only to check the original forecasts but to provide the appropriate bases for taking corrective actions should these be needed"[891]. This is precisely what Uruguay has done with respect to the Botnia plant -- establish a comprehensive monitoring regime to ensure than the pre-operational estimations are borne out under actual operational conditions, and that

[891] Exponent Report, *op. cit.*, p. 6-5. UR, Vol. IV, Annex R83.

any discrepancies are fully addressed through appropriate regulation. The initial results from the IFC demonstrate that the predictions of the Final CIS have been borne out: the plant is meeting applicable discharge standards and is not affecting water quality in the river. But Uruguay will continue its vigilance.

C. THE BOTNIA PLANT MEETS EUROPEAN UNION STANDARDS

6.66 Against all the evidence, Argentina asserts that the Botnia plant could not be built in the European Union because of its phosphorus discharges[892]. Leaving aside the fact that European Union law is irrelevant to this dispute since it is not incorporated by reference into the 1975 Statute, and that the hypothetical relocation of this plant to Europe adds nothing meaningful to the volumes of careful environmental analysis conducted by Uruguay, Argentina is simply wrong: The actual experience in Europe contradicts Argentina and demonstrates that the Botnia plant would face no regulatory impediment to being built in the EU.

6.67 Argentina asserts that under the European Urban Wastewater Treatment Directive the effluent concentrations of phosphorus in the Botnia discharge would have to be less than 1 mg/L if the plant were to be located in Europe[893]. As an initial legal matter, the standard cited is completely inapplicable to industrial facilities, even in Europe, so it certainly is irrelevant to the Botnia plant in Uruguay. The directive applies only to domestic wastewater treatment plants and certain industrial sectors, but not the paper and pulp industry. A copy of the Urban Waste Water Treatment Directive is found at http://ec.europa.eu/environment/water/water-urbanwaste/directiv.html. In any event, as a factual mater, Paragraph 4.88 of this

---

[892] AR, para. 3.97.

[893] Second Wheater Report, *op. cit.*, p. 25. AR, Vol. III, Annex 44.

Rejoinder demonstrates that the Botnia effluent has a phosphorus concentration of significantly less than 1 mg/L. Accordingly, even by Argentina's own chosen guidelines, the concentration of phosphorus in Botnia's effluent is allowable under EU law, and by a comfortable margin[894].

6.68 Equally meritless is Argentina's allegation that the Botnia plant's effluent discharge is incompatible with the European Water Framework Directive because "phosphorus concentrations in the River Uruguay have been as high as 0.24 mg/L"[895]. Leaving aside the fact that the phosphorus level in the Uruguay River is 0.24 mg/L in only very limited areas[896], actual European practice refutes Argentina's assertions about European practice with regard to pulp mills. The Stendal Pulp Mill on the Elbe River was permitted by Germany in 2002[897] even though the phosphorus concentration in that river (0.277 mg/L) was higher than in the Uruguay River[898], and higher than the value Argentina asserted would prohibit the construction of the mill in Europe. Moreover, with an average flow of 220 m^3/s, the dilutive capacity of the Elbe River is significantly less than that of the Uruguay River, whose average flow (6,230 m^3/s) is more than twenty times greater[899]. Indeed, the increase in phosphorus concentration in the Elbe River from the Stendal Pulp Mill is expected to be much higher than the inconsequential increase resulting from operation of the

---

[894] It should also be noted that although the EU directive discusses the need for primary and secondary treatment of effluents, it mentions no need for tertiary treatment.

[895] AR, para. 3.97. Second Wheater Report, *op. cit.*, pp. 25 & 40. AR, Vol. III, Annex 44.

[896] Final CIS, Annex D, *op. cit.*, p. D3.20 (Table D3.2-2) (showing varying water quality data from historical CARU records). UCM, Vol. VIII, Annex 176.

[897] Exponent Report, *op. cit.*, Attachment A, p. A-13. UR, Vol. IV, Annex R83.

[898] *Ibid.*

[899] *Ibid.*

Botnia plant. Estimates show that the Stendal Pulp Mill will increase ambient phosphorus concentrations by 0.004 mg/L[900]. In contrast, ambient concentrations of phosphorus in the Uruguay River under *worst case* scenarios are expected to increase by no more than 0.001 mg/L, and only in a few isolated locations[901]. Changes in phosphorus levels are not expected at all during average flow conditions[902]. It is also noteworthy that despite the low flow and elevated concentrations of phosphorus in the Elbe River, the Stendal Pulp Mill uses only secondary treatment[903], exposing as false Argentina's assertion that tertiary treatment is required by IPPC BAT[904].

6.69 In sum, against Argentina's unsupported and irrelevant assertions that the Botnia plant could not be built in Europe, the actual facts show the opposite: a pulp mill was permitted under EU law in circumstances where (a) the river's existing phosphorus concentration was significantly higher than the Uruguay River; (b) the river's flow was less than one-twentieth of that of the Uruguay River; and (c) the anticipated increase in the water's phosphorus level was estimated to be four times that of the anticipated increase, under a worst case scenario, in the Uruguay River.

---

[900] *Ibid.*

[901] Final CIS, *op. cit.,* p. 4.50. UCM, Vol. VIII, Annex 173.

[902] *Ibid.*

[903] Exponent Report, *op. cit.*, Attachment A, p. A-13. UR, Vol. IV, Annex R83.

[904] AR, para. 3.83.

D. URUGUAY HAS COMPREHENSIVELY REVIEWED AND REGULATED EMERGENCY PREPARATION AND MANAGEMENT

6.70 Argentina's assertion that operation of the Botnia plant under "abnormal conditions" has not been evaluated is incorrect[905]. To the contrary, the Botnia plant, including the Kemira chemical synthesis facility, has been the subject of extensive analysis with respect to the environmental risks associated with emergencies and other unusual conditions. These analyses were relied on by Uruguay in its assessment and approval of the plant.

6.71 In this regard, the Botnia Environmental Management Plan, which was required by the AAP Uruguay issued to Botnia in February 2005, and which was submitted to and approved by Uruguay in 31 October 2007, identifies numerous potential abnormal scenarios, and contains detailed assessments of the consequences and contingency planning for them. The conditions evaluated included, among other improbable events, spills in the mixing tank and the spill-over tank of the recovery boiler; release of liquid effluents toward the canals if the meters (measuring conductivity and flow) do not work or give erroneous readings; release of effluents toward the canals if a pipe or tank valve is opened by mistake; a spill or loss in the filtration tanks of the brown pulp area, for instance, due to corrosion, or if a truck collides with the tank; a fuel oil spill from the pipes or in the storage area; and spill of "black liquor" that reaches a rainwater drainage facility[906].

6.72 As indicated, this Environmental Management Plan was required by Uruguay as part of its review and approval of the plant, and had to be in place as a

---

[905] AR, paras. 3.123-3.124. *See also* AR, para. 3.147.

[906] Botnia Analysis of Environmental Risks, *op. cit.*, pp. 6-11. UR, Vol. II, Annex R43.

condition of Botnia's authorisation to operate. The Botnia plant's assessments also included consideration of circumstances involving theoretical emergencies associated with the chemical synthesis process. The situations evaluated for the chemical synthesis facilities included, among other circumstances: leaks due to a breakdown in pumps, valves, joints or pipes, or an operating error; leaks from the extraction feed tank to the extraction tower; overflows from the working solution preparation tank; leaks from the palladium recovery area; leaks from the peroxide purification area; spills of hydrogen peroxide due to a breakdown in the valve, joint or pipe, or due to operator error outside the containing dike area; leaks of sodium chlorate solution due to breakdown of the pump, valve, joint or pipe, or operating error outside the dike area; and leaks of chlorine dioxide solution due to breakdown in the valve, joint or pipe or operating error outside the containment area[907].

6.73 The Botnia Environmental Management Plan, "[b]ased on environmental risk analysis", further identified "contingencies that may have an effect on the environment", including, among other things, those related to "liquid emissions" and "the transport of raw materials and products, both by land and by river"[908]. Botnia formulated detailed plans for each such contingency[909]. In addition, Botnia developed a detailed Accident Prevention Plan "based on the requirements of the

---

[907] *Ibid.*, pp. 13-17.

[908] Botnia Contingency Plan, *op. cit.*, p. 9. UR, Vol. II, Annex R44.

[909] *Ibid.*, p. 9 (contingencies related to liquid emissions) & p. 15 (contingencies related to river transport).

Seveso II directive established by the European Economic Community and on the environmental and risk evaluations carried out for the project"[910].

6.74 DINAMA carefully reviewed the Botnia Environmental Management Plan, including its consideration of abnormal operating conditions, contingency planning and accident prevention plans, and ultimately approved the plan on 31 October 2007[911]. In addition, Botnia's assessments were thoroughly reviewed by the IFC's independent technical experts, who approved Botnia's evaluations and approach in the section of their *Pre-Commissioning Review* devoted to Botnia's "Emergency Preparedness and Response Plan"[912].

6.75 In short, any assertions by Argentina that operational circumstances under "abnormal conditions", including those pertaining to the chemical synthesis facilities and risk management plans, were not adequately developed is simply false, as demonstrated by the comprehensive environmental management plan in effect for the plant, which was reviewed and approved both by DINAMA and the IFC's independent experts.

E. THE BOTNIA PLANT WILL NOT CAUSE OR EXACERBATE ACCUMULATION OR CONTAMINATION OF SEDIMENTS

6.76 Argentina alleges that the Botnia plant might increase the accumulation of sediments in the river. Argentina does not present any evidence that any

---

[910] Botnia Environmental Management Plan for Operations, Appendix 9 (Accident Prevention Plan) (30 June 2007), p. 5. UR, Vol. II, Annex R45.

[911] *See* DINAMA Resolution Approving the Environmental Management Plan for Operations (Final Consolidated Text) (31 October 2007). UR, Vol. II, Annex R4.

[912] International Finance Corporation, *Orion Pulp Mill, Uruguay, Independent Performance Monitoring as Required by the International Finance Corporation (Phase 1: Pre-Commissioning Review)* (hereinafter "*Pre-Commissioning Review*") (November 2007), p. 3.1. UR, Vol. III, Annex R50.

accumulation will or might occur. Instead, the approach in the Reply is to complain about certain alleged deficiencies in Uruguay's assessment of this "risk"[913]. Uruguay stands by its conclusions in the Counter-Memorial that geomorphological change and sedimentation were adequately assessed and that operation of the Botnia plant will not meaningfully impact those conditions[914]. These conclusions are confirmed by the operation of the plant since its start-up in November 2007. As previously discussed in Chapter 4 of this Rejoinder, at paragraph 4.102, the extremely low to non-detectable concentrations of TSS in Botnia's discharges means that the plant simply does not contribute to the accumulation of sediments, as Argentina groundlessly hypothesizes.

6.77 As described in the Counter-Memorial, the Final CIS carefully considered the issues of sedimentation and geomorphological change[915]. Argentina's assertion, in the Second Wheater Report, that the Final CIS "provided no evidence" to support its conclusions is incorrect[916]. The Final CIS noted that Yaguareté Bay (a focus of comments in the Second Wheater Report) is "regularly flushed during high flow periods and due to wind/wave action, as evidenced by the lack of sedimentary features (e.g., islands)"[917]. The Final CIS gave specific calculations regarding flow and current rates in support of its findings[918]. The ASA Report, submitted by Uruguay, supported these conclusions and further confirmed that the assessment of

---

[913] AR, paras. 3.32, 3.48, 3.159, 3.166 & 3.177.

[914] UCM, paras. 6.86-6.92.

[915] Final CIS, *op. cit.*, p. 4.50. UCM, Vol. VIII, Annex 173.

[916] Second Wheater Report, *op. cit.*, p. 115. AR, Vol. VIII, Annex 44.

[917] Final CIS, *op. cit.*, p. 4.50. UCM, Vol. VIII, Annex 173.

[918] *Ibid.*

geomorphological conditions was conducted in accordance with generally accepted scientific standards[919]. Apart from the conclusory assertions in the Second Wheater Report, Argentina does not attempt to critique the scientific validity of the analysis in the Final CIS. It asserts that Uruguay should have conducted additional studies, including collecting new bathymetric data, to evaluate the potential for geomorphological changes,[920] but does not suggest what such further studies would achieve[921].

6.78 The Second Wheater Report also takes issue with the conclusions of the Final CIS and the ASA Report regarding the impact that discharges from the Botnia plant will have on sedimentation. The Second Wheater Report asserts that the discharge of total suspended solids ("TSS") from the Botnia plant will be much higher than the baseline condition[922] and, therefore, implies that the discharge could increase rates of sedimentation. As discussed in the Final CIS, however, effluent discharges of TSS will not meaningfully contribute to an increase in sedimentation[923] given their exceedingly low concentration, the fact that the effluent discharge from the Botnia plant constitutes less than 0.02% of the total flow of the Uruguay River[924], and the rapid dilution at 35 meters downstream from the discharge

---

[919] *See* UCM, para. 6.88. Dr. J. Craig Swanson & Dr. Eduardo A. Yassuda, Hydrologic Analysis for the Proposed Botnia Cellulose Plant on the Uruguay River (hereinafter "ASA Report"), pp. 18-19 (Applied Science Associates, Inc.) (June 2007). UCM, Vol. X, Annex 214.

[920] AR, para. 3.171.

[921] AR, para. 3.171.

[922] Second Wheater Report, *op. cit.*, p. 114. AR, Vol. III, Annex 44.

[923] Final CIS, *op. cit.*, p. 4.50. UCM, Vol. VIII, Annex 173.

[924] *Ibid.*, p. 4.47.

point[925]. Expert review of this modelling in the ASA Report confirmed these conclusions[926]. Because the analysis of the Second Wheater Report does not take into account the rapid dilution of the effluent (including the TSS content), it incorrectly asserts that the contribution of the Botnia plant will be 30 mg/L of TSS in all areas of the river[927]. In fact, the Final CIS demonstrated that contributions would be dramatically lower (between 0.0 mg/L to 0.5 mg/L under worst-case scenarios) in Yaguareté Bay, the part of the river Argentina claims is most likely to experience sedimentation[928].

6.79 The operation of the plant since November 2007 justifies the conclusion reached in the Final CIS. In particular, the *Environmental Performance Review* concluded that the plant has discharged less TSS than authorized by its permits or expected in the Final CIS, averaging 24 mg/L of TSS discharge[929]. The *Environmental Performance Review* also confirmed that no change in TSS levels was detected in the river, including in Yaguareté Bay[930]. Accordingly, it comes as no surprise that Argentina has provided no evidence that the Botnia plant has caused any increased sedimentation or geomorphological changes[931] to the river. Nor has

---

[925] *Ibid.*, p. 4.48.

[926] ASA Report, *op. cit.,* pp. 18-19. UCM, Vol. X, Annex 214.

[927] Second Wheater Report*, op. cit*., p. 114. AR, Vol. III, Annex 44.

[928] Final CIS, *op. cit.,* p. 4.50. UCM, Vol. VIII, Annex 173. This extensive dilution makes the small variations in anticipated TSS concentrations immaterial. AR, para. 3.166.

[929] *Environmental Performance Review*, *op. cit.*, p 3.3. UR Vol. IV, Annex R98. As demonstrated in the ASA Report, the assessment of geomorphological conditions was conducted in accordance with generally accepted scientific standards. ASA Report, *op. cit.*, p. 18. UCM, Vol. X, Annex 214. Argentina has suggested nothing to impeach that conclusion.

[930] *Environmental Performance Review*, *op. cit.*, pp 4.2-4.6. UR Vol. IV, Annex R98.

[931] AR, paras. 3.48-3.52, 3.159, 3.163-3.166 & 3.170.

Argentina presented any evidence in connection with the Botnia port -- even though it was cited by the Second Wheater Report as a particular concern[932].

6.80 As Uruguay explained in the Counter-Memorial, the appropriate manner to respond to the possibility of something as speculative as major geomorphological change (like the formation of a new island) through long-term accumulation of sediments from the Botnia discharge is to conduct long-term monitoring[933]. Uruguay is doing so, and it will continue to do so during the life of the plant[934]. Thus far, the results confirm that since operation of the Botnia plant no change in TSS has occurred[935].

6.81 In sum, Argentina's Reply does nothing to undermine the demonstration in the Counter-Memorial that geomorphology and sedimentation are not likely to be affected by operation of the Botnia plant, and that the risk of increased sedimentation from the discharge is nil. Nor has the Reply identified any deficiencies in Uruguay's long-term monitoring plan to detect changes in geomorphology or sedimentation. Results from actual operation since November 2007 confirm that ambient concentrations of TSS have not changed since the plant commenced functioning. The evidence thoroughly refutes Argentina's claims.

F. ARGENTINA HAS SHOWN NO ADVERSE IMPACTS TO TOURISM

6.82 As set forth in Chapter 5 of the Counter-Memorial, impacts to tourism not directly related to adverse impacts to water quality are outside the scope of the 1975

---

[932] Second Wheater Report, *op. cit.*, p. 115. AR, Vol. III, Annex 44.

[933] UCM, para. 6.89.

[934] *See supra* Chapter 4.

[935] *Environmental Performance Review*, *op. cit.*, pp. 4.2-4.6. UR, Vol. IV, Annex R98.

Statute[936]. Accordingly, they lie beyond the Court's jurisdiction in this case. Nevertheless, even if the Statute did regulate impacts to tourism, Argentina has failed to show that tourism has been negatively affected by the Botnia plant.

6.83 As Uruguay detailed in its Counter-Memorial, the Final CIS concluded that tourism on both sides of the Uruguay River will not be affected by emissions from the plant, either by discharge into the water or by air emissions[937]. Without specifically refuting any of the conclusions of the Final CIS with respect to tourism, Argentina's Reply refers only to the Second Wheater Report, which states merely that the plant emits discharges that are "visibles" from the Argentine bank of the river[938]. No evidence is presented that the plant's "visibility" has turned away Argentine tourists. Indeed, all of Argentina's arguments on the impacts to tourism rely on mere speculation rather than objective data. For example, when citing to the Second Wheater Report's observations on tourism, Argentina says that the report refers to "différents facteurs liés à réduire le nombre de visiteurs dans cette zone", including "une *possible* diminution de la qualité de l'eau qui affecterait les activités qui ont lieu sur la plage et les activités nautiques"[939]. The Rabinovich Report admits

---

[936] UCM, para. 5.74.

[937] *See* UCM, paras. 5.74-5.77.

[938] AR, para. 3.214 ("visible").

[939] AR, para. 3.215 (emphasis added) ("different factors tied to the Orion mill that *could* play a role in reducing the number of visitors in this area") ("a *possible* reduction in the quality of the water that would affect the activities that take place on the beach and water-based activities"). Note that while Argentina cites the Second Wheater Report in the text of the Reply, it is actually quoting from the Rabinovich Report, as indicated correctly by the footnotes.

that the "scale of the Botnia related reduction in number of visitors is difficult to estimate"[940].

6.84 Argentina's fear of a decline in tourism is not only unsubstantiated, it is also contradicted by reputable Argentine news sources. In fact, these sources confirm that there has actually been an increase in tourism to the region. For example, *La Nación* reported an 8% increase in the number of visitors to Gualeguaychú from 2006 to 2007, according to the local Secretary of Tourism[941]. The numbers speak for themselves: in the last twenty months, Gualeguaychú has had over 1.5 million visitors, with nearly 500,000 visitors in the summer of 2007 alone. As another indicator of the rise in tourism, *La Nación* reported that the number of hotel reservations increased by 5% in the past year.

6.85 EcoMetrix confirmed this growth in tourism in its November 2007 *Pre-Commissioning Review* prepared for the IFC. While the *Review* noted that the closing of the international border between Gualeguaychú and Fray Bentos (by Argentine protesters) prevented additional "benefits experienced in Gualeguaychú and Ñandubaysal from cross border visitation", it nonetheless identified an 8% increase in tourism[942].

6.86 More recently, the President of the Joint Council of Tourism in Gualeguaychú, Maria Luz Villagra, declared that tourism is on the upswing in the

---

[940] Rabinovich Report, *op. cit.*, para. 4.6.4. AR, Vol. III, Annex 43.

[941] La Nación, "The Pulp Plants, an Undeniable Attraction" (30 July 2007). UR, Vol. III, Annex R58.

[942] *Pre-Commissioning Review*, *op. cit.*, p. 10.16. UR, Vol. III, Annex R50.

area of Argentina across from the Botnia plant; she stated that "[t]he expectations for the tourist season in our city are the very best"[943].

6.87 In sum, Argentina's Reply, like its Memorial, fails to support its allegation that tourism will decline as a result of the Botnia plant, and fails to bring to the Court's attention the contrary evidence that tourism, in fact, has been increasing since the construction of the plant. Argentina does, however, allude to the growth of the tourism industry by noting that "the number of facilities for housing tourists increased by 39% between 2004 and the first half of 2006"[944]. Clearly, the providers of tourist accommodations in Argentina are optimistic about the future of tourism in the area, notwithstanding the presence of the Botnia plant.

Conclusion

6.88 This Chapter has demonstrated that the Botnia plant cannot and will not have the impacts claimed by Argentina. Argentina's experts have argued that the plant's principal adverse effect would be to increase algae levels in Ñandubaysal Bay a decade-and-a-half in the future. But, as shown, Argentina reaches this conclusion only by distorting and misinterpreting the most basic scientific information; and when the technical and mathematical errors are corrected, Argentina proves that Uruguay and the IFC's independent experts are right and that the plant will not cause the harm that Argentina predicts. Argentina's misguided effort to try to show an impact on Ñandubaysal Bay from the Botnia plant's extremely small and insignificant discharges of phosphorus into the river ignores the

---

[943] Web Site of Gualeguaychú Municipality, "An Excellent Tourist Season is Expected" (2 January 2008). UR, Vol. III, Annex R60.

[944] AR, para. 3.215.

truth: that if the concentration of phosphorus becomes a problem on its side of river, Argentina itself will be the cause, and Argentina itself holds the key for the solution. Argentina's effort to hold Uruguay to a standard for phosphorus emissions that Argentina refuses to apply to itself is unfair and inequitable. Uruguay regulates phosphorus discharges into the river. Argentina does not. The Botnia plant fully complies with Uruguay's regulations on phosphorus, and the IFC's independent experts have concluded that the plant's phosphorus emissions will have no adverse impact on the river. Operation of the plant thus far confirms these conclusions. Argentina has neither grounds nor standing to complain.

6.89 Just as Argentina's Reply fails to show that the Botnia plant will have unacceptable impacts, it also fails to show that the plant is anything other than state-of-the-art. It fails to show any deficiencies, shortcomings or insufficiencies in the plant's technology, design, construction or component facilities. It fails to show that the plant falls short of BAT standards, or that it could not operate in the EU. It fails to demonstrate a lack of emergency planning, or of adequate review of the chemical synthesis facilities. It fails to show any likelihood that the plant would affect sedimentation. Finally, despite its claims that the plant would damage tourism, the evidence shows precisely the opposite.

6.90 In sum, Argentina has failed to make any valid criticisms regarding the Botnia plant. All of them are disproved by the evidence.

CHAPTER 7.
REMEDIES

7.1 The purpose of this Chapter is to respond to Chapter 5 of Argentina's Reply concerning remedies. The central thrust of all of Argentina's arguments on the subject of remedies is that if the Court finds that Uruguay has committed any violation of the 1975 Statute, no matter its scope or content, the only meaningful remedy the Court can give is to order the dismantling of the Botnia plant. In Uruguay's view, such an extreme argument effectively defeats itself. Nevertheless, in the paragraphs that follow, Uruguay will detail the specific reasons that Argentina's presentation is unpersuasive both in fact and in law.

7.2 In the Reply, Argentina makes the following inter-related arguments concerning remedies:

> i) Uruguay must dismantle or re-locate the Botnia plant as a consequence of the allegedly grave violations of its procedural and substantive obligations under the 1975 Statute;
>
> ii) Such a remedy is not disproportionate under the circumstances of this case;
>
> iii) The fact that Uruguay has established a comprehensive monitoring system to track the effects, if any, of the Botnia plant on the Uruguay River is not relevant because monitoring is not a form of remedy; and
>
> iv) In addition to *restitutio in integrum*, Argentina is also entitled to compensation for damages done in order to erase the consequences of Uruguay's putatively wrongful acts.

7.3 Before turning to each of these points, Uruguay notes at the outset that Argentina's arguments are predicated heavily on what it alleges to be a strict link between the Statute's procedural and substantive obligations. As discussed already in Chapter 2 of this Rejoinder, the Reply insists that "[s]ans le respect des obligations procédurales, il ne peut point être affirmé qu'un État a objectivement mis

en œuvre ses obligations substantielles"[945]. This same theme reappears in Chapter 5 of the Reply where Argentina asserts that:

> Les dispositions procédurales du Chapitre II du Statut de 1975, qui, on ne le répètera jamais trop, forment un tout avec les obligations substantielles que les Parties ont acceptées en ratifiant cet instrument, poursuivent cet objectif fondamental. [preventing damage to the river]. En ne décidant pas que l'usine Orion doit être démantelée ou désaffectée (ce qui n'empêche pas, le cas échéant, sa délocalisation en un emplacement plus approprié), la Cour permettrait du même coup que soit remis en question son rôle de gardien ultime du respect de la procédure statutaire et, par ricochet, des règles, tant procédurales que substantielles, posées par le Statut. En ne tirant pas toutes les conséquences des violations des unes et des autres, elle remettrait en cause le Statut lui-même et, avec lui, 'l'intégrité de la règle *pacta sunt servanda*'[946].

7.4 Chapter 2 of this Rejoinder has already addressed and disproved the existence of the strict link between the Statute's procedural and substantive norms. As stated there, Argentina itself has explicitly and repeatedly acknowledged that the Statute's procedural rules do not exist for their own sake, but rather serve as a mechanism for helping to ensure the observance of the substantive rights[947]. Still more, Argentina's argument defies the most basic logic. It is not difficult to envision situations where procedural violations exist independent of any substantive

---

[945] AR, para. 1.28 (emphasis in original) ("[a]bsent respect for the procedural obligations, it cannot be firmly stated that a nation has objectively implemented its substantive obligations").

[946] AR, para. 5.40 ("The procedural provisions of Chapter II of the 1975 Statute, which, it cannot be repeated enough, form a whole together with the substantive obligations which the Parties accepted by ratifying this instrument, pursue this fundamental goal [preventing damage to the river]. By not deciding that the Orion plant must be dismantled or shut down (which does not prevent, if necessary, it being moved to a more appropriate site), the Court would at the same time permit the questioning of its role as the final guardian of respecting the procedure under the Statute and, indirectly, the rules, both procedural and substantive, set forth in the Statute. By not taking all of the consequences of the violations of the one and the other, it would challenge the Statute itself and, with it, 'the integrity of the *pacta sunt servanda* rule'").

[947] *See supra*, paras. 2.65-2.74. *See also* AR, para. 1.69.

violation (and vice versa). Thus, for example, one can readily imagine a Party notifying the other somewhat belatedly about a project that causes no harm to navigation, the régime of the river or the quality of its waters. In such a case, it would be senseless to insist that the procedural error precludes the fulfilment of the Party's substantive obligations. The question of procedural and substantive violations must be assessed separately.

7.5 Argentina's purpose in insisting on the allegedly strict link between the Statute's procedural rules and its substantive obligations is clear. As detailed in both the Counter-Memorial and again in Chapters 4 through 6 of this Rejoinder, Argentina has no evidence that the Botnia plant causes or threatens to cause significant harm to the Uruguay River. Knowing that it has no such evidence, and choosing instead to focus on its procedural case, the only way Argentina can argue for the remedy it seeks is by doing exactly what it does: claiming that a sufficiently grave substantive violation must be presumed from the existence of a procedural violation without more. Once the fallacy of this linkage is exposed, Argentina's argument for dismantling the Botnia plant collapses with it. Analysing the consequences to be drawn from a procedural violation and a substantive violation independently, it is clear that awarding the remedy of *restitutio in integrum* for a purely procedural violation is disproportionate to the interests sought to be vindicated. And analysing the issue of the appropriate remedy for a substantive violation separately, it is also clear that an order compelling the dismantling of the Botnia plant would only be appropriate if there were no other viable way to eliminate the threat of significant harm to navigation, the régime of the river or the quality of its waters.

Section I.
Dismantling the Botnia Plant Is Not an Appropriate Remedy for a Procedural Violation of the 1975 Statute.

7.6 In Chapter 3 of the Counter-Memorial and again in Chapter 3 of this Rejoinder, Uruguay demonstrated that it did not violate any of its procedural duties under the 1975 Statute. With respect to both the ENCE and Botnia plants, Uruguay and Argentina mutually agreed to dispense with CARU's preliminary review under Article 7 and to address both projects directly at the government-to-government level. Indeed, in both cases, it was Argentina that initiated the direct talks between the States at times when it agreed that CARU was deadlocked and "paralysée"[948].

7.7 Disregarding these facts, and assuming *arguendo* that Uruguay's behaviour was somehow incompatible with the Statute's procedural rules, the remedy of dismantling the Botnia plant would still be wholly inappropriate in the circumstances of this case. Several independent lines of analysis support this conclusion. *First*, pursuant to the Foreign Ministers' March 2004 agreement described at length in Chapter 3, Argentina waived its procedural claims against Uruguay. In 2004 Argentina and Uruguay negotiated directly and reached an understanding concerning the manner in which the ENCE plant would be handled. The understanding was later extended to Botnia. Pursuant to that understanding, it was agreed that both plants would be built and that CARU would focus its efforts on monitoring water quality. As stated in contemporaneous Argentine government

[948] AM, para. 2.29 ("paralysed").

reports, the agreement "put an end to the controversy" concerning the two plants[949]. This statement -- issued by the office of the Argentine president, no less -- is clear and unequivocal. By agreeing to "put an end to the controversy", Argentina waived its right to invoke Uruguay's responsibility for the alleged breaches of its procedural obligations occurring before that point. Exactly as stated in Article 45 of the ILC's 2001 Articles on State Responsibility: "The responsibility of a State may not be invoked if: a) the injured State has validly waived the claim …"[950].

7.8 *Second*, quite apart from the Foreign Ministers' 2004 agreement, by agreeing in May 2005 to engage in Article 12 consultations under the auspices of GTAN, the Parties cured any procedural violations of Articles 7-11 that might have been committed earlier. As the circumstances of this case fully demonstrate, even if the procedures set forth in Articles 7-11 had been followed to the letter, the Parties would still have ended up in consultations under Article 12. And that is exactly where they took themselves when they agreed to and carried out the GTAN consultations. In so doing, the Parties remedied and rendered immaterial any procedural irregularities that might have taken place prior to that time. In other words, even if, *quod non*, the Parties got "off track" in terms of their literal compliance with the procedures set forth in the Statute, they put themselves back "on track" when they agreed to Article 12 consultations under GTAN. The end result was precisely the same as it would have been had no procedural violations

---

[949] *See supra*, para. 3.33, *citing* Annual Report on the State of the Nation for 2004, Ministry of Foreign Affairs, International Trade and Culture, p. 105 (1 March 2005). UCM, Vol. III, Annex 48.

[950] Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 45, appears in *Yearbook of the International Law Commission, 2001,* Vol. II (Part Two).

occurred. No harm was done to either Party or to the objects and purposes of the Statute.

7.9 The same essential point can be made from a slightly different perspective. As Argentina itself states, "le Statut de 1975 met en place un régime complet d'obligations procédurales consistant en l'échange d'informations, la notification et la consultation"[951]. The facts described in Chapter 3 are clear. With respect to both ENCE and Botnia, Uruguay notified, exchanged information and consulted with Argentina over an extended period of time. Even if these steps did not precisely track the tidy, step-wise process set forth in Articles 7-12, there can be no honest dispute that the "régime complet d'obligations procédurales" Argentina describes was nonetheless fulfilled in all meaningful respects. The law can require no more. Argentina, therefore, has no viable claim concerning compliance with Articles 7 *et seq*.

7.10 *Third*, an order compelling the dismantling of the Botnia plant as a remedy for a procedural violation is also inappropriate because it would be dramatically disproportionate to the nature of the violation (again, assuming one had occurred, which it did not). Here, it must be stressed that for purposes of determining the nature of the appropriate remedy, the content of the primary rule that has been breached must be given due account. In the present case, the 1975 Statute is designed to ensure the Parties' mutual rights -- in Argentina's words -- to make "une exploitation rationnelle et respectueuse des … de la ressource partagée que constitue

---

[951] AR, para. 1.31 ("the 1975 Statute puts into place a complete system of procedural obligations consisting of the exchange of information, notification and consultation").

le fleuve Uruguay"[952]. The Statute subjects the exercise of that right to the procedural requirements set forth in Articles 7-12. In a situation where, by hypothesis, only the procedural obligations have been breached, *restitutio in integrum* is disproportionately onerous, particularly in the form requested by Argentina. This point was aptly stated in the ILC commentary to the Articles on State Responsibility:

> The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases not involving the return of persons, property or territory of the injured State, the notion of reverting to the status quo ante has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed[953].

7.11 The ILC Special Rapporteur on State Responsibility, Professor James Crawford, addressed the same point just as clearly:

> Whatever the theoretical standpoint, individual cases could be settled only by taking into account the particular circumstances of each case and especially the primary rules, as, by doing so, the State requesting restitution was often trying to obtain something to which it might not be entitled. Thus, in the case of the Iran-United States Claims Tribunal, the United States was under the obligation to discontinue certain judicial bodies, but not to make provision to ensure that no new bodies could be set up later as a result of a further amendment to its legislation. In the same way, a State obliged to carry out an environmental impact study or to provide notification before undertaking an activity could avoid doing so, but nevertheless had every right to

---

[952] AR, para. 1.119 ("a rational and respectful exploitation of … the shared resource that constitutes the Uruguay River").

[953] ILC, Report on the work of its fifty-third session, UN doc. A/56/10, p. 236, para. 518; *see also* note 518, where reference is made to the ICJ's judgment in *the LaGrand* case, which, in the ILC's view, supports the above-mentioned observation.

> carry out the activity in question. In such cases, the link between the violation and what one wished to obtain through restitution was indirect and contingent, and that affected the analysis of the court hearing the case. The reservations to which the priority given to restitution had led resulted from the fear that States would be requested to "undo" everything they had done within the framework of a lawful activity by invoking an incidental breach of international law[954].

7.12 By demanding the dismantling of the Botnia plant based solely on an alleged procedural violation, Argentina is clearly requesting "more than it [is] entitled to if the obligation [to comply with the procedures of Articles 7-12] had been performed".

7.13 Argentina's insistence that the plant be dismantled must also be rejected given the clear disproportion between the significant costs that such a measure would impose on Uruguay, on the one hand, and the limited benefit to Argentina, on the other. As Uruguay discussed in the Counter-Memorial[955], Article 35 of the Articles on State Responsibility disclaims a State's responsibility for making restitution when such restitution would "impose a burden out of all proportion to the benefit deriving from restitution instead of compensation"[956]. In its commentary, the ILC explained that the proportionality analysis is "based on considerations of equity and reasonableness"[957].

7.14 Here, there can be no question but that ordering the demolition of the Botnia plant would be grossly disproportionate, and inconsistent with notions of

---

[954] Yearbook of the International Law Commission, 2000, Vol. I, p. 172, para 5.

[955] UCM, para. 7.55.

[956] Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentary, Art. 35 (2001).

[957] *Ibid.,* Art. 35, comment 11.

equity and reasonableness, especially in the absence of a showing that the plant threatens significant harm to the Uruguay River. An order to dismantle the plant, which is expected to generate over 8,000 new jobs and contribute more than US$270 million to the Uruguayan economy, would impose heavy costs on Uruguay without any appreciable benefit to Argentina. As the Court determined in the *Case Concerning the Gabčikovo-Nagymaros Project* (*Hungary/Slovakia*), when confronted with already-constructed industrial works that were found to be in violation of treaty obligations, "[i]t would be an administration of the law altogether out of touch with reality if the Court were to order … the works at Čunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structure"[958]. Thus, rather than order the works destroyed, as Argentina seeks in the present case, the Court in *Gabčikovo* refused to do so and ordered the parties to resume co-operation instead[959]. Uruguay respectfully submits that demolition of the Botnia plant in the circumstances presented here would be similarly "out of touch with reality".

7.15 Uruguay first presented its argument on the issue of proportionality in the Counter-Memorial[960]. The response Argentina offers in the Reply is conspicuously weak. Other than the bare contention that "la comparaison des avantages qui résulteront du démantèlement de l'usine Orion ou de sa reconversion avec les coûts

---

[958] *See Case Concerning the Gabčikovo-Nagymaros Project* (*Hungary/ Slovakia*) (Judgment), *I.C.J. Reports 1997,* p. 77, para. 136.

[959] *Ibid*., p. 80, para. 150.

[960] *See* UCM, paras. 7.55-7.56.

qu'une telle opération entraînera pour l'Uruguay est difficile à établir"[961], Argentina has nothing to say. Uruguay submits that this unelaborated and unsubstantiated assertion constitutes a tacit recognition by Argentina that there is nothing it can usefully say to negate the evident disproportionality of the remedy it seeks.

7.16 Even as it implicitly acknowledges the disproportion of the remedy it requests, Argentina tries to minimize the force of the point by arguing that Uruguay assumed the risk of authorizing the implementation of the Botnia project rather than awaiting the Court's resolution of the dispute. Presumably, Argentina means to suggest that by assuming the risk, Uruguay accepted the possibility of a disproportionate remedy. But this argument entirely misconstrues the nature of the risk Uruguay assumed. Although Uruguay has acknowledged that the Court has the power to order the dismantling of the plant -- indeed, it has reiterated exactly that point in Chapter 2 of this Rejoinder -- that does *not* mean that Uruguay has ever accepted Argentina's dubious legal argument that tearing the plant down would be an appropriate and proportionate remedy in the event the Court determines that Uruguay violated only its procedural obligations. Uruguay's recognition of the Court's power relates solely to the purely hypothetical possibility that the Court decides that it violated its substantive obligations under the 1975 Statute, and that the plant is so irremediably incompatible with those obligations that dismantling it is the only viable option. In that event, the Court unquestionably would have the power, and quite possibly the duty, to order the plant torn down. On the other hand,

---

[961] AR, para. 5.32 ("the comparison of the advantages that will result from the dismantling of the Orion plant or its conversions with costs that such an operation would entail for Uruguay is difficult to calculate").

Uruguay remains convinced that the remedy requested by Argentina is grossly disproportionate even if it assumed the risk in the sense just stated.

7.17 As Uruguay discussed in Chapter 2 of this Rejoinder[962], the fact that an order compelling the dismantling of the Botnia plant would be a disproportionate remedy for a violation of the Statute's procedural rules does *not* mean that the Court is powerless in the face of such a violation. The Court has available to it a number of alternatives, including the standard remedy of satisfaction, or declaratory relief. Indeed, since the nominal harms resulting from a violation of the procedural obligations are not financially assessable, satisfaction would seem to be the most appropriate remedy should the Court determine that Uruguay has violated its procedural obligations under the Statute. As the ILC stated: "Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State."[963] As the Court very recently held in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, a finding by the Court that a State has violated its treaty obligations itself "constitutes adequate satisfaction"[964]. In fact, Uruguay notes that Argentina's arguments that anything less than an order dismantling a project would constitute "l'arrêt de mort du Statut"[965] is disturbingly dismissive of the gravity of a finding by

---

[962] *See* UR, para. 2.133.

[963] ILC, Report on the work of its fifty-third session, UN doc. A/56/10, p. 264, para. 2.

[964] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Judgment) (4 June 2008), para. 204.

[965] AR, para. 1.172 ("the death warrant of the Statute").

the Court that a State has violated its treaty obligations -- a matter, of course, of the highest international significance.

Section II.
Dismantling the Botnia Plant Is Not an Appropriate Remedy for a Substantive Violation of the 1975 Statute in the Circumstances of This Case.

7.18 In addition to complying with its procedural duties, Uruguay is also complying with its substantive obligations under the Statute. The Botnia plant entered operation on 9 November 2007 and, as demonstrated in Chapter 4 above, is operating within expected and environmentally sustainable parameters. It is clearly not causing harm, let alone significant harm, to navigation, the régime of the river or the quality of its waters. It is equally clear that the monitoring system Uruguay has established can and will detect any future risk of environmental pollution.

7.19 The response Argentina presents in Chapter 5 of the Reply is perhaps more interesting for what it does *not* say than for what it does. Argentina conspicuously does *not* argue that the Botnia plant is causing or threatens to cause such grievous harm to the Uruguay River that it must be shut down. As already mentioned, Argentina makes no such argument because it knows none can be made. There is no evidence that the plant threatens significant harm to the river. Uruguay submits that this fact is of determinative significance on the issue of remedies. As discussed in Chapter 2 of this Rejoinder[966], the Court's primary task when a case comes to it, as here, by operation of Article 12 of the 1975 Statute is to decide the question the Parties themselves were unable to: will the project cause significant harm to navigation, the régime of the river or the quality of its waters? Without at least the

[966] *See supra*, paras. 2.132-2.138.

likelihood of such harm, there is no basis on which to impose additional technical requirements on a project, and no basis for ordering it dismantled. Logically, if the Court finds that a project will *not* cause significant harm, the situation should be no different than it would have been under Article 9 if, rather than objecting, the notified State had come to the same conclusion, i.e., that the project did not threaten harm. In such a case, the initiating State may proceed with its project without any further procedural obligations. The mere fact that the notified State *did* object should not be enough to change this result. where the Court has decided that the objection lacks merit.

7.20 Rather than argue the unarguable, Argentina tries to turn the debate on its head. Instead of showing why the remedy of dismantling the plant is appropriate in the circumstances of this case, the Reply proceeds with an argument that is intended to exclude all other remedies as possibilities. Argentina's argument is premised on the allegation that the "principal objectif" of the Statute "est de *prévenir* les dommages à l'écosystème du fleuve, et non pas simplement de les guérir"[967]. According to Argentina, "[l]e mécanisme [procédural] mis en place par le Statut est justement destiné à *prévenir* les conséquences de la construction de tout ouvrage *projeté* à ces divers points de vue *avant* que celui-ci soit construit et non de tenter de faire face *ex post* au 'préjudice sensible', une fois celui-ci survenu"[968]. And, Argentina says, since Uruguay has violated its procedural obligations, there is now

---

[967] AR, para. 5.9 (emphasis in original) ("principal objective", "is to prevent damage to the river's ecosystem, and not merely to heal it").

[968] AR, para. 5.10 (emphasis in original) ("the [procedural] mechanism put in place by the Statute is correctly aimed at *preventing* the consequences of the construction of all *planned* work to these different points of view *before* it is built and not to attempt to deal to the 'significant harm', *after the fact*, once it has occurred").

no meaningful way to realize the substantive goal of preventing harm other than to return to the *status quo ante* by tearing the plant down.

7.21 Uruguay respectfully submits that the fallacies in this argument are self-evident. In the first instance, the Court will note that Argentina is again fusing procedure and substance in an attempt to get the procedural elements of its argument to do all the work for its unsupportable substantive arguments. Given Argentina's open admission that the Statute's procedures exist as a means to the end of ensuring the observance of the Parties' substantive obligations, the primacy Argentina gives to procedural matters is plainly inconsistent with Argentina's own (correct) understanding of the scheme of the Statute.

7.22 Moreover, the Reply's argument is predicated on the erroneous assumption that the only way to prevent harm to the river in this case is to shut the plant down. But, of course, that is not true at all. As discussed repeatedly in this Rejoinder, the plant is not, in fact, causing any harm to the river. Nor is there any indication that it might do so in the future. Indeed, as discussed in Chapter 4, the plant's already outstanding environmental performance is only expected to improve in the future once the initial start-up period is past. There is thus no harm that needs preventing. Accordingly, even under Argentina's own reasoning, there is no reason to order the plant dismantled.

7.23 Even if there were some threat of future harm, the Court need not be concerned that if that risk eventuates it will pass undetected. As Uruguay stated in the Counter-Memorial, it has conducted, is conducting and will continue to conduct frequent monitoring of the river in order to ensure compliance with all CARU and

Uruguayan water quality standards[969]. As also stated, DINAMA has broad authority to require Botnia to undertake whatever corrective measures might be necessary to put an immediate stop to any violations of those standards, including but not limited to ordering the suspension of operations[970].

7.24 In response, the Reply argues that Uruguay's monitoring is irrelevant because "le monitoring unilatéral ne peut, de toute manière, pas tenir lieu de réparation pour le non-respect du Statut et des procédures qu'il institue pour la Partie uruguayenne"[971]. But this observation fails to meet the force of Uruguay's point concerning monitoring. Uruguay has never claimed either that monitoring can be considered a form of remedy or that it can replace the procedures set forth in Articles 7-12. Instead, Uruguay maintains that its monitoring serves to guarantee the observance of its substantive obligations under the Statute, including its duty under Article 41 "to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures"[972]. Again, the point is simply that the Court need not be concerned about the possibility that the plant might cause harm in the future. If it shows signs that it might, it will be detected in sufficient time for Uruguay to take corrective action.

7.25 Argentina's Reply tries to exclude monetary compensation as an appropriate remedy in the event that some harm to the river does come to pass. It states, for example:

---

[969] *See* UCM, para. 4.46.

[970] *See* UCM, para. 7.44.

[971] AR, para. 5.8 ("unilateral monitoring cannot, in any case, take the place of reparation for non observance of the Statute and the procedures which it sets forth for the Uruguayan Party").

[972] 1975 Statute, *op. cit.,* Art. 41. UCM, Vol. II, Annex 4.

> en ne respectant pas ces obligations procédurales, étroitement liées à ses obligations substantielles, l'Uruguay a engagé sa responsabilité à l'égard de l'Argentine et il ne saurait s'en exonérer en remplaçant un système reposant sur l'exclusion ou la limitation *ex ante* des risques, voulu conjointement par les Parties et qu'elles se sont engagées à respecter en ratifiant le Statut, par un mécanisme de réparation *ex post* 'garanti' par un système de monitoring qui ne trouve aucune justification dans le Statut[973].

7.26 Several responses to this assertion recommend themselves. *First*, the Court will note yet again the extent to which Argentina insists on the unbreakable tie between procedure and substance. The fallacy of Argentina's argument has already been demonstrated and need not be reiterated any further. *Second*, Argentina's argument proves too much. Risk can never be excluded *a priori*. Even perfect procedural compliance in every case is no guarantee that no pollution will ever be introduced into the aquatic environment. For reasons as diverse as life, the unexpected happens. *Third*, and relatedly, the text of the Statute itself is very clearly designed to take account of this reality. In particular, Articles 42 and 43 directly address the situation that Argentina now claims the Statute was designed to exclude. They provide:

> *Article 42*. Each Party shall be liable to the other for damage inflicted as a result of pollution caused by its own activities or by those carried out in its territory by individuals or legal entities.
>
> *Article 43*. The jurisdiction of each Party with regard to any violation of pollution laws shall be exercised without prejudice

---

[973] AR, para. 5.26 (emphasis in original) ("not respecting these procedural obligations, closely tied to its substantive obligations, Uruguay has undertaken its responsibility with Argentina and will not be able to exempt itself from it by replacing a system based on the exclusion or the limitation *ex ante* of risks, jointly entered into by the Parties and which it agreed to respect in ratifying the Statute, by a mechanism of *ex post* compensation "guaranteed" by a monitoring system which finds no justification in the Statute").

> to the rights of the other Party to obtain compensation for the losses it has suffered as a result of such violation[974].

The Court can thus see that the Statute expressly contemplates situations in which damage is, in fact, caused to the river. In such situations, the Statute specifically makes compensation a remedy. Monetary damages are therefore not, as Argentina claims, *per se* inadequate under the Statute.

7.27 In light of Articles 42 and 43, it would be unreasonable to hold that *restitutio in integrum* invariably takes precedence over compensation when a State violates its substantive obligation to protect the environment and prevent pollution. In fact, both provisions suggest that compensation would generally take priority over *restitutio*, at least in situations where the project in question is not so irremediably incompatible with the initiating State's substantive obligations that dismantlement is the only viable option. Here once more, the principle of proportionality must come into play. As already noted, Article 35 of the Articles on State Responsibility specifically states that *restitutio* is inappropriate when it would "impose a burden out of all proportion to the benefit deriving from restitution instead of compensation"[975]. It necessarily follows that compensation *is* an appropriate and adequate remedy in cases where restitution would be disproportionate to the harm caused.

7.28 Although Argentina rejects monetary compensation as an adequate remedy in favor of tearing the Botnia plant down, it does argue that it should be awarded compensation to the extent that dismantling the plant would be insufficient to wipe

---

[974] 1975 Statute, *op. cit.,* Arts. 42-43. UCM, Vol. II, Annex 4.

[975] Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentary, Art. 35 (2001).

out all the consequences of the allegedly wrongful acts committed by Uruguay[976]. Under this rubric, Argentina seeks compensation for, *inter alia*: losses suffered by its tourist industry; damages resulting from the decline in property values; and agricultural losses. According to Argentina, "[l]'ensemble de ces dommages résulte directement de l'autorisation et de la construction … de l'usine Orion et de l'altération de l'écosystème du fleuve Uruguay et des ses zones d'influence"[977].

7.29 Uruguay submits that none of these categories of damages is recoverable. In the first instance, of course, Uruguay has committed no wrongful acts that can form the basis for a compensation claim. Even if it did, none of the damages Argentina claims is, in fact, directly linked to the allegedly wrongful acts in question, as the law requires. Inasmuch as Argentina seeks to reserve questions concerning the quantum of damages suffered for a subsequent phase of the proceedings, it is sufficient at this stage to note that, should the Court find that Uruguay has a duty of compensation, the only damages that may be assessed are those incurred as a direct result of a violation by Uruguay of its substantive obligation not to affect the quality of the river's waters. And the burden rests squarely on Argentina to prove the existence of a direct link between the actual alteration of the quality of the waters and the damages it claims.

---

[976] *See* AM, paras. 8.28-8.31.

[977] AM, para. 8.30 ("All these damages result directly from the authorisation and construction of the Orion plant and the alteration of the ecosystem of the Uruguay river and its zones of influence.").

Section III.
The Court Should Reject Argentina's Claims and Confirm Uruguay's Right to Operate the Botnia Plant in Compliance with the 1975 Statute.

7.30 As demonstrated in Chapters 2 through 6 of this Rejoinder, Argentina has failed to prove its claims against Uruguay. It has failed to prove that Uruguay violated the procedural provisions of the 1975 Statute. And it has failed to prove that Uruguay violated the substantive provisions of the Statute. Accordingly, as set forth in the Submissions that conclude both Uruguay's Counter-Memorial and this Rejoinder, Argentina's claims should be rejected by the Court in their entirety.

7.31 The Court's rejection of Argentina's claims would, of course, leave Uruguay free to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute. Accordingly, Uruguay respectfully requests, in addition to a rejection of Argentina's claims, an explicit confirmation from the Court of Uruguay's right to continue operating the plant in conformity with the Statute, and of Argentina's corresponding obligation to respect Uruguay's right as recognized by the Court and to refrain from any acts or omissions that would have the effect of impeding Uruguay's enjoyment of this right.

7.32 In its Order of 23 January 2007, the Court expressly recognized that Uruguay's right "to continue the construction and to begin the commissioning of the Botnia plant in conformity with the provisions of the 1975 Statute, pending a final decision by the Court, effectively constitutes a claimed right in the present case …"[978]. Uruguay respectfully submits that it is entitled to have the Court adjudicate this claimed right, and declare whether it, in fact, exists. Specifically, Uruguay

---

[978] *Case Concerning Pulp Mill on the River Uruguay (Order on Provisional Measures), I.C.J. Reports 2007,* para. 29 (23 January 2007).

requests that the Court adjudge and declare in its final decision whether it may continue to operate the Botnia plant, in conformity with the provisions of the 1975 Statute. Given Argentina's failure to prove that operation of the Botnia plant has violated the Statute or is likely to do so in the future -- and, further, given Uruguay's proof that the plant has not harmed and will not harm the Uruguay River or its aquatic environment -- Uruguay submits that the declaration to which it is entitled is one that leaves no doubt as to its right to continue operating the plant.

7.33 A declaration by the Court in this regard is not only necessary to address and avoid leaving unresolved the principal right claimed by one of the Parties to these proceedings, but also to make perfectly clear to both Parties what their respective rights and obligations are, and thus to minimize the possibility of future disputes between them. Among other benefits, a clear and unambiguous declaration by the Court regarding the Parties' rights and responsibilities would leave no doubt as to the impermissibility of self-help measures by Argentina that would diminish any of the rights of Uruguay formally confirmed by the Court.

7.34 Unfortunately, Argentina continues to resort to such *de facto* measures to punish Uruguay for pursuing its right to operate the Botnia plant, and to compel it to abandon this right even before the final decision in this case. The blockade of the international bridges leading to Uruguay, about which Uruguay has advised the Court at every stage of these proceedings, continues as of the date of this Rejoinder, and the blockade continues to enjoy not only the tolerance but also the active support

of the Argentine State[979]. The blockade has now been in effect (with only limited interruptions) for more than two and a half years[980]. Uruguay advised the Court in its November 2006 Application for the Indication of Provisional Measures that the blockade had, by that time, already caused "severe economic losses to Uruguay, including lost trade, lost tourism, and lost jobs associated with these activities"[981]. As of July 2008, more than 18 months later, those losses are far greater.

7.35 As Uruguay stated in its Application for the Indication of Provisional Measures, Argentina's tolerance of the blockade has already been adjudicated a violation of Argentina's obligations under the Treaty of Asunción by a unanimous Mercosur Tribunal. Argentina has not only defied the tribunal's judgment and persisted in its unlawful behavior, it has aggravated the offense. Argentina's Secretary of the Environment, Romina Picolotti, herself a former participant in the blockade, continues publicly to voice strong support for the protestors, their agenda and their actions[982]. Still worse, the government of Argentina's Entre Ríos Province provides significant funding and other forms of direct assistance to the protestors to keep the blockade in place[983].

---

[979] *See* Uruguay's Request for the Indication of Provisional Measures, paras. 8-12 (30 November 2006); *see also* La Nación, "How the Protesters Are Financed" (2 December 2007). UR, Vol. IV, Annex R87.

[980] *See* Uruguay's Request for the Indication of Provisional Measures, para. 7 (30 November 2006).

[981] *Ibid.*

[982] Perfil.com, "Picolotti: 'The Demand of the Protesters is Legitimate" (2 February 2008). UR, Vol. IV, Annex R88.

[983] La Nación, "How the Protesters Are Financed" (2 December 2007). UR, Vol. IV, Annex R87.

7.36 In sharp contrast to its relevant and, indeed, supportive approach to the bridge blockades for the better part of two and a half years, Argentina recently took swift and decisive action when farmers objecting to an increase in grain export tariffs resorted to the same means of protest and took to the streets to block key internal transit routes, thereby impeding the flow of goods and people throughout (but entirely within) Argentina. Argentine security forces were dispatched and arrested many of the individuals involved, promptly terminating the blockades in order to restore the internal movement of people and goods[984].

7.37 The contrast between Argentina's actions with respect to the farmers' blockades, on the one hand, and its actions with respect to the blockade of the international bridges, on the other, provides stark evidence of Argentina's double standard when it comes to the fulfilment of its own obligations under international law and what it claims to be Uruguay's. Having read the Memorial and the Reply, the Court is familiar with Argentina's repeated efforts to portray itself as the lone guardian of the 1975 Statute against a scofflaw Uruguay. Yet, even as Argentina seeks to wrap itself in the cloak of international law before the Court, its actions outside the Court unapologetically flout its already adjudicated international responsibilities.

7.38 Argentina's double standard need not merely be inferred from the evidence. It has been expressly proclaimed by Argentina's most senior officials. At a 16 June 2008 press conference about the farmers' blockades, Argentina's Chief of Cabinet, Alberto Fernández, was asked why the farmers' actions were treated

---

[984] La Nación, "The San Martín Bridge has been Blocked for 19 Months" (21 June 2008). UR. Vol. VI, Annex R91.

differently than the blockade of the international bridges to Uruguay. His response merits attention, precisely because it reveals so much about Argentina's attitude toward its international responsibilities. According to Mr. Fernández, the bridge blockade was different "because what was being blocked was the international crossing, but not the internal transit"[985]. In other words, Argentina's international obligations do not merit the same respect or observance as its domestic ones.

7.39 Interesting too is Mr. Fernández's response to another question at the same press conference, in which he was quick to condemn the farmers involved in the street blockades. He stated:

> I am confident that as of tomorrow, sensibility will come to those who have lost it and that we will be able to go back to work in Argentina, that we may guarantee that food will arrive to the tables of Argentineans, the supplies to their factories, fuel for whoever may need it to travel in Argentina; that no Argentinean will be subjected to a man who decides at will that you may cross and you may not, and that no Argentinean be subjected to loading grains if I want to and if I don't then no. This is the greatest example of unscrupulousness, it is the greatest example of intolerance, that someone may stand on a road and say: you may pass and you may not; you may carry grains and you cannot; passengers may pass but the milk cannot; cars can pass but not the cows[986].

Uruguay submits that these same considerations apply with equal force to the blockade of the international bridges. The actions Mr. Fernández describes are no less "unscrupulous" and no less "intolerant" when they are inflicted on Uruguay and its people. Indeed, if anything, they are more so, because they are incompatible with

---

[985] Web Site of the President of Argentina, Press Conference with the Head of the Cabinet of Ministers, Alberto Fernández, and the Minister of Justice, Security and Human Rights, Anibal Fernández (16 June 2008), *available at* http://www.casarosada.gov.ar/index.php?option=com_content&task=view&id=3485 (last visited on 9 July 2008). UR, Vol. IV, Annex R90.

[986] *Ibid.*

the standard of conduct expected of a State appearing before this Court, which demands, at the very least, the avoidance of just this type of self-help measure, which, by its nature, cannot help but interfere with the proper administration of justice.

7.40 Uruguay chose not to submit a counter-claim relating to Argentina's bridge blockade at the time it submitted its Counter-Memorial because it believes that the interests of the Parties and their future amicable relations are best served by having the Court come to a final decision concerning the Botnia plant as promptly as possible, without the delay a counter-claim would necessarily entail. Precisely so that the final decision can put an end to this troublesome dispute between two States that historically have enjoyed the closest and most harmonious of relations, Uruguay requests that the Court issue a clear and unambiguous declaration that Uruguay has the right to continue operating "the Botnia plant in conformity with the provisions of the 1975 Statute"[987], and that Argentina is obligated to respect this right. Doing so would materially advance the interests of justice, as well as good neighbourliness, by clarifying the scope and content of the Parties' rights and obligations subsequent to the Court's final disposition of the case.

* * *

7.41 Based on all the above, it can be concluded that:

> a) Argentina has not demonstrated any harm, or risk of harm, to the river or its ecosystem resulting from Uruguay's alleged violations of its substantive obligations under the 1975 Statute that would be

[987] *Case Concerning Pulp Mill on the River Uruguay (Order on Provisional Measures), I.C.J. Reports 2007,* para. 29 (23 January 2007).

sufficient to warrant the dismantling of the Botnia plant;

b) The harm to the Uruguayan economy in terms of lost jobs and revenue would be substantial;

c) In light of points a) and b), the remedy of tearing the plant down would therefore be disproportionately onerous, and should not be granted;

d) If the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has violated its procedural obligations to Argentina, it can issue a declaratory judgment to that effect, which would constitute an adequate form of satisfaction;

e) If the Court finds, notwithstanding all the evidence to the contrary, that the plant is not in complete compliance with Uruguay's obligation to protect the river or its aquatic environment, the Court can order Uruguay to take whatever additional protective measures are necessary to ensure that the plant conforms to the Statute's substantive requirements;

f) If the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has actually caused damage to the river or to Argentina, it can order Uruguay to pay Argentina monetary compensation under Articles 42 and 43 of the Statute; and

g) The Court should issue a declaration making clear the Parties are obligated to ensure full respect for all the rights in dispute in this case, including Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute.

SUBMISSIONS

On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed.

29 July 2008,

Ambassador Hector Gros Espiell

Agent of Uruguay

Certification

I certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.

Ambassador Hector Gros Espiell

Agent of Uruguay

LIST OF DOCUMENTS IN SUPPORT

VOLUME II

Annex

GOVERNMENT DOCUMENTS (URUGUAY)

GOVERNMENT DOCUMENTS (ARGENTINA)

CARU DOCUMENTS

TECHNICAL DOCUMENTS

VOLUME III

TECHNICAL DOCUMENTS (CONTINUED)

Annex

PRESS ARTICLES

MISCELLANEOUS

VOLUME IV

Annex

SUPPLEMENTAL DOCUMENTS

EXPERT REPORTS

OTHER SUPPLEMENTAL DOCUMENTS

REJOINDER OF URUGUAY VOLUME I 29 JULY 2008

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING PULP MILLS
ON THE RIVER URUGUAY

ARGENTINA
v.
URUGUAY

REJOINDER OF URUGUAY

VOLUME I

29 JULY 2008