

**Cour internationale  
de Justice**

**LA HAYE**

**International Court  
of Justice**

**THE HAGUE**

**ANNÉE 2009**

*Audience publique*

*tenue le vendredi 2 octobre 2009, à 10 heures, au Palais de la Paix,*

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

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

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**COMPTE RENDU**

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**YEAR 2009**

*Public sitting*

*held on Friday 2 October 2009, at 10 a.m., at the Peace Palace,*

*Vice-President Tomka, Acting President, presiding,*

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

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**VERBATIM RECORD**

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*Présents :* M. Tomka, vice-président, faisant fonction de président en l'affaire

- MM. Koroma  
Al-Khasawneh  
Simma  
Abraham  
Keith  
Sepúlveda-Amor  
Bennouna  
Skotnikov  
Caçado Trindade  
Yusuf  
Greenwood, juges  
MM. Torres Bernárdez  
Vinuesa, juges *ad hoc*
- M. Couvreur, greffier
-

*Present:* Vice-President Tomka, Acting President

Judges Koroma

Al-Khasawneh

Simma

Abraham

Keith

Sepúlveda-Amor

Bennouna

Skotnikov

Cañado Trindade

Yusuf

Greenwood

Judges *ad hoc* Torres Bernárdez

Vinuesa

Registrar Couvreur

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***Le Gouvernement de la République argentine est représenté par :***

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

*comme agent ;*

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

*comme coagents ;*

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

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

*comme conseils et avocats ;*

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

*comme autorité gouvernementale ;*

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

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

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

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

***The Government of the Republic of Argentina is represented by:***

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The VICE-PRESIDENT, Acting President: Good morning. Please be seated. The sitting is open and I invite Mr. Reichler to take the floor. You have the floor, Sir.

Mr. REICHLER:

### **THE EVIDENCE**

1. Mr. President, Members of the Court, good morning. During the second round, Argentina presented three speakers on the facts relating to their allegations of environmental harm — Dr. Colombo, Dr. Wheeler and Professor Sands —, and they spoke collectively for close to 140 minutes. Now, it is possible to sow a fair amount of confusion in that much time, and just in case they did, the Agent of Uruguay has called upon me to try to clear some of it up.

2. Mr. President, I will avoid the small issues and address only the major evidentiary themes that Argentina emphasized in the second round. Some of these were raised for the first time in the second round. Some were given new embellishments. The seven issues I will discuss are: first, nonylphenols; second, dioxins and furans; third, the water quality data reported by OSE, which is the Uruguayan Government's water and sanitation agency; fourth, wind and odours; fifth, the algal bloom of 4 February 2009; sixth, Argentina's introduction of new evidence through witnesses appearing as counsel; and seventh, the issue of the IFC's independence, competence and credibility.

3. I begin, very respectfully Mr. President, Members of the Court, by asking again for your indulgence, and your customary patient courtesy, for what will necessarily be another lengthy speech. I do offer you two consolations, however. First, this speech is definitely my last. And, second, Uruguay will complete its second round presentation well before 1 o'clock.

### **I. NONYLPHENOLS**

4. I begin with nonylphenols. Mr. President, the evidence supplied by Uruguay shows that this is now a non-issue. As you know, Argentina raised it for the first time on 30 June of this year, based on an alleged discovery of elevated levels of nonylphenols in the water near the Botnia

plant<sup>1</sup>. *How* they decided the levels were elevated, when they had absolutely no pre-operational baseline data, as they admitted, and failed to test for nonylphenols in other parts of the river, including Ñandubaysal Bay, as we showed, is only the beginning of Argentina's problem in advancing this claim<sup>2</sup>. Uruguay responded to it promptly, two weeks after receiving Argentina's 30 June report, with the affidavit of Alicia Torres attesting that Botnia does not use nonylphenols in *any* of its processes<sup>3</sup>. To which my very close friend Professor Sands reacted that the affidavit might have been artfully worded just to avoid mention of nonylphenols used by Botnia in cleaning its plant<sup>4</sup>. Uruguay responded by pointing out that when Ms Torres said no nonylphenols were used in "any of [Botnia's] processes", it covered them all, including cleaning the plant<sup>5</sup>. On behalf of Uruguay, I explicitly represented, based on an affidavit from Botnia's chief environmental manager, which the Court now knows we had in our possession at the time, that Botnia does not use nonylphenols in any of its cleaning processes<sup>6</sup>. But even this was not enough to satisfy my friend Professor Sands in the second round. "Mr. Reichler said only that Botnia *does* not use them. He spoke only in the present tense. He's hiding the fact that they *did* use them."<sup>7</sup>

5. Reading through the compte rendu, it is truly impressive how much emphasis Argentina's counsel placed on the Botnia plant's supposed emission of nonylphenols and how stubbornly they have clung to this issue. They made it one of the centrepieces of their entire case. Since nonylphenols are banned in European Union pulp mills, they claimed that the emission of these substances puts the lie to Uruguay's claim that the plant meets the highest international standards, including those of the European Union<sup>8</sup>. They *all* harped on this. Even my friend Professor Pellet got into the act. Apparently stimulated to join the fray by his colleagues' enthusiasm, even

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<sup>1</sup>New Documents submitted by Argentina, 30 June 2009, Vol. I, Scientific and Technical Report (hereinafter "Argentina's Scientific and Technical Report"), p. ES.iii and Chap. 3.1, p. 4.

<sup>2</sup>See CR 2009/16, p. 26, para. 25 (Reichler); CR 2009/17, p. 23, para. 25 (Reichler); CR 2009/20, p. 50, para. 21 (Colombo); CR 2009/17, p. 23, para. 25 (Reichler).

<sup>3</sup>Affidavit of Agr. Eng. Alicia Torres, Director of DINAMA, 13 July 2009, Uruguay's Comments on New Documents submitted by Argentina, 15 July 2009, Ann. C24.

<sup>4</sup>CR 2009/12, pp. 49-50, para. 27 (Sands); CR 2009/15, pp. 17-18, para. 13 (Sands).

<sup>5</sup>CR 2009/17, p. 23, para. 24 (Reichler).

<sup>6</sup>*Ibid.*

<sup>7</sup>CR 2009/21, p. 32, para. 37 (Sands).

<sup>8</sup>E.g., CR 2009/21, p. 13, paras. 5-6 (Sands).

Professor Pellet condemned what he called Botnia's "massive" discharges of "highly toxic" nonylphenols<sup>9</sup>. Imagine, Mr. President, hiring, retaining, Professor Alain Pellet, whom I truly consider the greatest legal mind of our generation, and asking him to talk to the Court about nonylphenols. It is like hiring Picasso and telling him to go paint your kitchen!

6. Well, Judge Bennouna's most recent question<sup>10</sup> offers us an opportunity to put an end to all this hyperventilating about nonylphenols. This obsessive parsing of words over whether "any processes" means all processes, or whether "does not" only covers the present tense. Uruguay has decided not to wait until 9 October to answer Judge Bennouna's question, so that we may quickly bury the remains of Argentina's claim. To be sure, we reserve our right to provide a fuller, written response then, but we have offered an initial one today, one which we believe is itself sufficient to terminate this debate. Uruguay today submitted an answer to Judge Bennouna's question, in the form of an affidavit of Mr. Gervasio González Seimonoff, the chemist who serves as the environmental manager at the Fray Bentos plant. He attests that Botnia has *never* used nonylphenols or any product containing nonylphenols to clean the pulp, clean the plant or for any other purpose. He identifies the specific cleaning products used by the plant, describes their chemical components, and attaches certifications from their manufacturers that they contain no nonylphenols. Uruguay has adopted Mr. González Seimonoff's statements as its own. This issue is settled. No nonylphenols means no nonylphenols.

7. On Tuesday, Professor Sands accused Uruguay of hiding the identity of Botnia's cleaning agents<sup>11</sup>. Well, we must not be very good at hiding things. All Professor Sands had to do to find this information was to read the report of AMEC, one of the expert consultants to the IFC, who were expressly commissioned by the IFC to conduct a pre-conditioning audit of the plant to determine whether it was in compliance with European Union best available technology, EU BAT. AMEC's report, which has only been in the record since July 2008, specifically described the principal cleaning chemical used by the Fray Bentos mill, the same one that is also described in Mr. González Seimonoff's affidavit, and AMEC reviewed its Material Safety Data Sheets prior to

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<sup>9</sup>CR 2009/20, p. 20, para. 13 (Pellet).

<sup>10</sup>CR 2009/21, p. 70 (Bennouna).

<sup>11</sup>CR 2009/21, p. 32, para. 37 (Sands).

confirming that Botnia's technology fully complied with the EU BAT<sup>12</sup>. Quite obviously, Professor Sands did not read, and was not otherwise made aware of, the AMEC report before he accused Uruguay of hiding its contents.

8. Before leaving this subject, I would like to respond briefly to the allegations by Argentina's counsel about what they called the "high toxicity" of the nonylphenols they claim to have found in the river<sup>13</sup>. The highest concentration of nonylphenols reported by Argentina's scientists, at any of their monitoring stations, the worst that Argentina alleges was 472 nanogrammes per litre<sup>14</sup>. Even this figure is ten times lower than the standard set by the Canadian Water Quality Guidelines and 60 times below the United States EPA standards<sup>15</sup>. This should actually be good news to Argentina because, as we showed in the first round, the main sources of nonylphenols in the Uruguay river include the Gualeguaychú Industrial Park<sup>16</sup>.

9. While I am on the subject of products *not* used by Botnia, let me bury another of Argentina's dead claims: lindane. Uruguay has already answered Judge Simma's question. The Botnia plant does not use, and has never used, lindane, in any of its processes. Nor have the growers of the trees Botnia uses to make the pulp. They do not use lindane either. Lindane has been a banned substance in Uruguay for many years<sup>17</sup>. It is not, however, banned in Argentina.

## II DIOXINS AND FURANS

10. I come now to the second of the issues I will address today: dioxins and furans. I can deal with this one rather quickly, because Argentina has not contradicted Uruguay's evidence that testing of the Botnia plant's effluent shows that *no* dioxins and *no* furans are discharged<sup>18</sup>. That should be the end of the matter. Since Botnia does not discharge dioxins or furans, it cannot be

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<sup>12</sup>AMEC Forestry Industry Consulting, Orion BKP Mill Pre-Startup Audit (Sep. 2007), RU, Vol. III, Ann. 48, p. 22.

<sup>13</sup>E.g., CR 2009/20, p. 20, para. 13 (Pellet).

<sup>14</sup>Biogeochemistry Data table 9 on password-protected Argentine website, available at <http://www.mrecic.gov.ar/scientificdata> (username: PVA; password: SAyDS).

<sup>15</sup>Environment Canada, Canadian Sediment Quality Guidelines for Dioxins and Furans (2005), available at [http://www.ec.gc.ca/ceqg-rcqe/English/Pdf/GAAG\\_DioxinFuranSed\\_e.pdf](http://www.ec.gc.ca/ceqg-rcqe/English/Pdf/GAAG_DioxinFuranSed_e.pdf); U.S. EPA, Region 5, RCRA Ecological Screening Levels (2003), available at <http://www.epa.gov/reg5rcra/ca/ESL.pdf>.

<sup>16</sup>CR 2009/17, p. 24, para. 27 (Reichler).

<sup>17</sup>CR 2009/16, p. 15, para. 16 (Gianelli).

<sup>18</sup>CR 2009/16, pp. 30-31, paras. 41-43 (Boyle); CR 2009/20, p. 51, para. 24 (Colombo).

blamed for any that may be found in the river or its fish. Dr. Colombo himself admitted they had no evidence showing any dioxins or furans in the river water. He claimed only a very low level in fish<sup>19</sup>.

11. In the second round, Dr. Colombo attempted to defend his fish study<sup>20</sup>. We found his explanation of his sampling methods, well, fishy, but we need not challenge it. He admitted all that was necessary to show that the effects on fish he purportedly found cannot be linked to the Botnia plant. First, there is no evidence that the plant emits dioxins or furans<sup>21</sup>. It does not. Second, all the fish included in his study were caught in Ñandubaysal Bay, which Dr. Colombo acknowledges is not affected by the Botnia plant or its emissions<sup>22</sup>. Third, all the fish were Sabalos, which are highly migratory — a fact admitted by Dr. Colombo himself — so there is no telling where in Ñandubaysal Bay, the Uruguay river, or the Paraná river, or the highly polluted Río de la Plata, they picked up any dioxins or furans<sup>23</sup>. This too is now a non-issue.

### III. OSE MONITORING DATA

12. My next subject is OSE's water quality monitoring data. On Tuesday, during the last day of its second round, and in the last ten minutes of the final speech on environmental issues, Professor Sands made reference for the very first time to data that, according to him, proved that effluents from the Botnia plant harmed water quality<sup>24</sup>. To heighten the Court's expectation that he had found something truly dramatic, a smoking gun, he accused Uruguay of trying to keep these data hidden<sup>25</sup>. Heightening the drama is fine, Mr. President, but it is not cricket, as they say in my friend's country, to make false accusations. If he were correct, then we certainly picked a bad

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<sup>19</sup>CR 2009/20, p. 51, para. 24 (Colombo).

<sup>20</sup>*Ibid.*, p. 43, para. 3 (Colombo).

<sup>21</sup>CR 2009/16, pp. 30-31, paras. 41-43 (Boyle).

<sup>22</sup>CR 2009/17, pp. 26-27, para. 34 (Reichler).

<sup>23</sup>Argentina's Scientific and Technical Report, Chap. 5, pp. 3, 5-8, 18 and 22; CR 2009/14, p. 50, para. 24 (Colombo) ("The main channel of the Uruguay river is a . . . migration route for several fish species."); J. C. Colombo, C. Bilos, M. R. Lenicov, D. Colautii, P. Landoni and C. Brochu, "Detritivorous fish contamination in the Río de la Plata estuary: a critical accumulation pathway in the cycle of anthropogenic compounds", *Can. J. Fish. Aquat. Sci.* 57: 1139-1150, 2000, p. 1141 (reporting "major components of organic contaminants and trace metals in Río de la Plata" Sabalo), available at <http://article.pubs.nrc-cnrc.gc.ca/RPAS/rpv?hm=HInit&afpf=f00-031.pdf&journal=cjfas&volume=57>.

<sup>24</sup>CR 2009/21, p. 28, para. 31 (Sands).

<sup>25</sup>*Ibid.*

place to hide the data: in the March 2009 EcoMetrix report, which we ourselves submitted to the Court, and cited many times in these hearings; and on the public website of OSE, Uruguay's State water agency, to which Argentina — and everyone else — obviously had free access<sup>26</sup>. And finally, as you will see when we review the evidence that was introduced with such great fanfare on Tuesday (CR 2009/21), Uruguay had no reason of any kind to want to hide it. A smoking gun? Not quite. But if Argentina's gun is indeed smoking, it is because Argentina has shot itself.

13. In what can only be described as a self-inflicted wound, Professor Sands has demonstrated, yet again, that he does not know the evidence. Let us look more closely at the slides he triumphantly displayed on Tuesday. [Slide.] This is at tab 10 of your judges' folder. He told us, on the basis of these data, that the Botnia plant was violating CARU's water quality standards<sup>27</sup>. Let us start with this first chart, which is conspicuously labelled: "Dissolved Oxygen". But the label is as erroneous as it is conspicuous. And so are all the data in the chart. In fact, even more so.

14. Professor Sands did manage to state accurately what "dissolved oxygen" is:

"[D]issolved oxygen is a measure of the amount of oxygen that is dissolved into the river water. It is one of those parameters in which you are looking for a high figure: the higher the figure, the more dissolved oxygen in the river, the better its ecological status; the lower the figure the greater the level of harm to the river."<sup>28</sup>

Because dissolved oxygen is good, not bad, CARU sets a minimum standard for it. Water quality is considered good when the standard is exceeded. On this basis, and with great flair, Professor Sands exposed for the Court Uruguay's terrible crime: dissolved oxygen levels fell below the CARU minimum standards after the Botnia plant began operating<sup>29</sup>. Except for one *tiny* little detail. He used the wrong data. The data in his chart are not data for dissolved oxygen. They have nothing to do with dissolved oxygen. They are labelled erroneously on his chart. They are OSE's measurements of an entirely different parameter, and, unlike dissolved oxygen, the lower

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<sup>26</sup>EcoMetrix 3rd Report, Mar. 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S7, p. 4.10, table 4.4; OSE Website for Water Quality Monitoring at Fray Bentos, available at [http://www.ose.com.uy/a\\_monitoreo\\_fray\\_bentos.html](http://www.ose.com.uy/a_monitoreo_fray_bentos.html).

<sup>27</sup>CR 2009/21, p. 29, para. 32 (Sands).

<sup>28</sup>*Ibid.*, p. 29, para. 33 (Sands).

<sup>29</sup>*Ibid.*, p. 29, para. 33 (Sands).

the values the better it is for the river. This chart is nothing but a colossal blunder. How could they get it so wrong? We shall show you.

15. Here is what the evidence really is. OSE does not measure for dissolved oxygen. There is no measurement for dissolved oxygen listed in the OSE table Argentina included at tab 4 of Tuesday's judges' folder, and from which it took the data it used in Professor Sands's chart<sup>30</sup>. [Slide.] The yellow highlighting is Argentina's. The item highlighted is translated from the original Spanish to English as "oxidizability". This is actually a poor translation from the Spanish original, which is "oxidabilidad", which translates into English, and appears in the EcoMetrix reports, as "oxides"<sup>31</sup>. But whether you call it oxides or oxidizability, it is not dissolved oxygen, which is something very different. In Spanish, dissolved oxygen is "oxígeno disuelto", not "oxidabilidad". And there is an enormous difference between the two parameters. In simple terms, dissolved oxygen, as Professor Sands told us, is good, and we want a lot of it in the water. But oxides, or as Professor Sands prefers to call it, oxidizability, is the opposite, because it is a measure, not of oxygen content in the water, but the level of organic substances. Thus, in contrast to dissolved oxygen, where you want the amounts to be high, you want the levels of oxides to be low. They are, in that sense, polar opposites.

16. So what Professor Sands has done here, with his customary eloquence and forcefulness — but also his typical lack of familiarity with the actual evidence — was to compare the levels of oxides to the CARU standard for dissolved oxygen. His chart is completely misleading. It misrepresents the evidence.

17. In fact, there *is* evidence in the record regarding dissolved oxygen. Not the "oxides" data displayed by Professor Sands, but the real data on dissolved oxygen. Dissolved oxygen has been measured at each of the 16 sites monitored six times per year by DINAMA<sup>32</sup>. Of those 96 samples taken in 2008, *none* of them was below the CARU minimum standard for dissolved oxygen<sup>33</sup>. The

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<sup>30</sup>See OSE Website, available at [http://www.ose.com.uy/a\\_monitoreo\\_fray\\_bentos.html](http://www.ose.com.uy/a_monitoreo_fray_bentos.html).

<sup>31</sup>EcoMetrix 3rd Report, Mar. 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S7, p. 4.10, table 4.4.

<sup>32</sup>E.g., DINAMA One Year Report, May 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S2, p. 11/54 and fig. 3.11.

<sup>33</sup>EcoMetrix 3rd Report, Mar. 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S7, p. 4.17, fig. 4.2 (subfigs. (i) and (j)).

same is true for the 48 samples analysed by DINAMA thus far in 2009<sup>34</sup>. Indeed, at the Fray Bentos water intake, the levels of dissolved oxygen are actually higher — that is, better — than they were during the pre-operational period before Botnia existed<sup>35</sup>. To the contrary of what Professor Sands told you on Tuesday, there has been no violation of CARU's water quality standards.

18. The other charts he displayed are just as problematic. [Slide.] Professor Sands told the Court that the CARU water quality standard for phenolic substances, which is 1 microgramme per litre, had never been exceeded prior to operation of the Botnia plant: “there were no pre-existing violations”<sup>36</sup>. I am sorry, I have to say it, my good friend got it wrong again. Badly wrong. In fact, there have been myriads of exceedances of this standard, throughout the river, ever since CARU started measuring for phenolic substances, years before the plant started operating. Here is what the EcoMetrix final Cumulative Impact Study, written in late 2006, stated about the presence of phenolics in the river; and this is based on CARU's water quality data covering the years 1997 to 2004: “Of particular interest, phenolics were found to frequently exceed the water quality criterion of 1 microgram per liter, with the highest values on the Argentine side of the river.”<sup>37</sup>

19. The same pattern of frequent and widespread exceedances of the CARU standard, throughout the river, not just at OSE's Fray Bentos monitoring station, continues today. There is *no evidence* that it has been affected by the operation of the Botnia plant; to the contrary, the evidence shows that it has *not* been affected by the plant. The data show that, contrary to what Professor Sands has said, the phenolic concentrations at the OSE water intake during the baseline period — that is, the pre-operational period — did, in fact, already exceed the CARU standard. The data also show, as the final CIS concluded, that phenolic exceedances are routinely seen all up and down the river. However, the post-operational levels of phenolics, both for 2008 and 2009 after Botnia started operating, are *lower* than the baseline levels, including in particular at the location of the Fray Bentos water intake. [Slide.] You can see this on the chart now being

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<sup>34</sup>DINAMA July 2009 Water Quality Report, App. A. Translation submitted to the Court on 14 September 2009.

<sup>35</sup>DINAMA July 2009 Water Quality Report, p. 7, fig. 4.5.

<sup>36</sup>CR 2009/21, p. 30, para. 34 (Sands).

<sup>37</sup>Final CIS, CMU, Vol. VIII, Ann. 173, p. 3.5.

displayed. Here are the baseline 2008 and 2009 data on phenolics, as verified by certified laboratory analysis<sup>38</sup>. Monitoring station 11 is located directly at the OSE water intake point<sup>39</sup>. The CARU standard is the solid red line running from left to right. The baseline levels of phenolics is represented by the pink line. Phenolic concentrations in 2008 are in the dashed green line, below the baseline and below the CARU standard. The concentrations in 2009 are represented in the solid blue line, also below the baseline level at the OSE water intake and at most of the stations measured, and also below the CARU standard. Concentrations of phenolic substances have actually — as you can see — gone down across all test stations, since the Botnia plant began operating. The lowest phenolic concentrations are at points closest to the Botnia discharge. They are lower at the points closer to Botnia even than they are at the Fray Bentos water station. If the plant were the source of any increases at that station, as Professor Sands would like you to believe, there would have been higher concentrations closer to the plant itself. There are none.

20. Further proof that Botnia has not impacted phenolic concentration levels at the Fray Bentos water intake or anywhere else is that Botnia's actual discharges of phenolic substances have been extremely low and on a continual decline, less than 5 per cent of its permit limit in 2008, less than 1 per cent of its permit limit in 2009<sup>40</sup>. That is why OSE, on whose data Professor Sands's argument is built, has concluded:

“During the time since the commencement of operation of the [Botnia] plant, there have been no significant changes in the characteristics of raw water taken up by OSE, and the water supplied to the town of Fray Bentos has complied at all times with OSE's Internal Potable Water Quality Standard.”<sup>41</sup>

Specifically with regard to phenolic substances, EcoMetrix — consultant to the IFC — concluded that no increases were caused by the Botnia plant “since the concentration of phenols in the effluent was less than that measured in the raw water at the time”<sup>42</sup>.

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<sup>38</sup>DINAMA July 2009 Water Quality Report, p. 21, Sec. 4.1.11.2.

<sup>39</sup>*Ibid.*, p. 3, table 1.

<sup>40</sup>DINAMA One Year Report, May 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S2, p. 19/33, table 4; DINAMA July 2009 Botnia Environmental Performance Report, p.14, table 4. Translation submitted to the Court on 14 September 2009.

<sup>41</sup>OSE Website for Water Quality Monitoring at Fray Bentos, available at [http://www.ose.com.uy/a\\_monitoreo\\_fray\\_bentos.html](http://www.ose.com.uy/a_monitoreo_fray_bentos.html).

<sup>42</sup>EcoMetrix 3rd Report, March 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S7, p. 47.

21. This brings me to the third and final chart displayed on Tuesday [Slide.] for the now familiar nutrient phosphorus. As we know, there is no CARU standard for phosphorus, so there cannot be a violation. Phosphorous levels do exceed the Uruguayan water quality standard, as they do everywhere in the river, but Uruguayan law does not prevent the licensing of new sources of phosphorus, like Botnia, so long as Uruguay initiates action to offset the new discharges<sup>43</sup>. Professor McCaffrey yesterday (CR 2009/22) explained all the actions Uruguay has undertaken to achieve these offsets<sup>44</sup>. There is no violation of Uruguayan law. Of course, Argentina's standards on phosphorous emissions have not been violated, because there are none. Argentina does not regulate phosphorus at all<sup>45</sup>.

22. Uruguay could end the story on phosphorus here: no violation of CARU standards, no violation of Uruguayan law, no harm to the river. But there is one more point to discuss. Professor Sands produced this chart to persuade you that, contrary to what Uruguay has demonstrated, the Botnia plant *has* had an impact on phosphorous concentrations, and in particular, that it has caused an increase in phosphorus of one hundredth of a milligramme per litre of water<sup>46</sup>. Now, that is an extremely small amount, and one that would not — even if it were true — have any material impact on water quality. But it is *not* true. In fact, the evidence shows that the Botnia plant has not caused *any* measurable increase in phosphorous levels, not even as small as one hundredth of a milligramme per litre. Let us look at the same OSE monitoring data that Professor Sands claims to have used for his chart. [Slide.] If the Botnia plant caused the increase in phosphorus at the Fray Bentos water intake that Argentina now alleges, we would be able to *see* that in the data, especially during the first year of operations, when phosphorous discharges from the plant were twice as high as they are today<sup>47</sup>.

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<sup>43</sup>CR 2009/22, p. 38, para. 13 (McCaffrey). See also Decree 253/79, Art. 10 (“In any water body does not comply with the conditions established for its classification, the Ministry of Housing Land Use and Environmental Affairs, [or MVOTMA per the Spanish initials] shall establish recovery programs for the water body with the aim of achieving the conditions adopted.”).

<sup>44</sup>CR 2009/22, p. 38, para. 15 (McCaffrey).

<sup>45</sup>E.g., CMU, para. 4.40.

<sup>46</sup>CR 2009/21, pp. 28-29, paras. 31-32 (Sands).

<sup>47</sup>See CR 2009/17, p. 41, para. 38 (McCubbin).

However, as can be seen in these data, during the first six months of Botnia's first year of operation, when phosphorous discharges were still at their highest because the plant had not yet reached its peak efficiency, the average concentration of phosphorus at the water intake remained exactly the same: 0.08 mg/L<sup>48</sup>. There was no change. [Slide.] When we look at the whole year, as EcoMetrix did in its March 2009 report, we see that the average concentration of phosphorus at the same point in the river, as of the end of 2008, actually declined from 0.08 to 0.072 mg/L<sup>49</sup>.

23. Not shown in this chart, which ends with 2008, is that in 2009, the average monthly discharge of phosphorus from the Botnia plant fell by 50 per cent as compared to 2008 averages<sup>50</sup>. That is, Botnia is discharging only half as much phosphorus into the river in 2009 as it did in 2008.

24. So how did Professor Sands manage to make it appear that phosphorous concentrations had increased, even if only by one hundredth of a milligramme per litre? By using the data selectively and ignoring what did not help Argentina's case. Take a look at the pre-operational average in his chart. According to the chart, the only data he used for the pre-operational period covered April to November 2007 — April to November 2007. This excluded the summer months in the southern hemisphere — January through March — when phosphorous levels are normally at their highest. By not including the summer months, the pre-operational average was artificially depressed, and that made it easier to make it appear as if there was an increase after Botnia began operating. Now take a look, if you will, at the post-operational average. It covers November 2007 through May 2009. It includes two summers, one of which, January to March 2009, had, as Dr. Colombo told us, extraordinarily low water flows which lead naturally to higher concentrations of phosphorus<sup>51</sup> as well as other substances. And with all that in their favour, all they could manage to squeeze out of their carefully selected data was one hundredth of a milligramme per litre at one single, solitary point in the river?

25. This is not a change in the environment. This number tells us nothing. Dr. Colombo's own study acknowledges that phosphorous levels vary widely and naturally throughout the entire

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<sup>48</sup>EcoMetrix 2nd Report, RU, Vol. IV, Ann. R98, p. 4.9, table 4.3.

<sup>49</sup>EcoMetrix 3rd Report, Mar. 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S7, p. 4.10, table 4.4.

<sup>50</sup>See CR 2009/17, p. 41, para. 38 (McCubbin).

<sup>51</sup>CR 2009/16, p. 58, para. 50 (Reichler).

river, at all times, and they also undergo significant seasonal variations<sup>52</sup>. An increase as miniscule as one hundredth of a milligramme per litre is well within the limits of the river's natural variations, and well within the seasonal variation of phosphorous levels. In fact, the increase, if there theoretically was one, is most easily — and most scientifically — explained by the different seasons reflected in the two sample periods that Professor Sands compared. Had his pre-operational data included even as little as a single summer month, there likely would have been no increase at all. In fact, this is precisely what the data collected by DINAMA, and verified by independent laboratory analysis, show. DINAMA collected baseline data on phosphorous levels for 15 months before Botnia began operating<sup>53</sup>. When these data are compared to the phosphorous levels recorded at the Fray Bentos water intake, or at any other point in the river, they show conclusively that there has been no increase — no increase at all — in phosphorous levels since Botnia began operating. And it is on the basis of these more complete — not hand-picked — data that EcoMetrix and the IFC concluded “[t]otal phosphorous levels were generally lower post-start-up as compared to the 2005-2006 baseline”<sup>54</sup> — total phosphorous levels according to the IFC and EcoMetrix were lower post-start-up as compared to the 2005-2006 baseline.

#### IV. WIND AND ODOURS

26. Professor Sands and Argentina's counsel and retained experts have repeatedly asserted: “Uruguay got wind direction wrong” — that Uruguay failed to understand that winds frequently blow from Uruguay to Argentina<sup>55</sup>. Mr. President, I am afraid it is my friend and his colleagues who have got the evidence wrong, *again*. This is rather easy to demonstrate, and I will not take up much time to do it. My demonstration consists of two steps. First, there is abundant evidence annexed to the Counter-Memorial establishing that Uruguay and DINAMA fully analysed the issue of wind direction<sup>56</sup>. Second, not only did Uruguay fully study and analyse this issue, but Uruguay

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<sup>52</sup>Argentina's Scientific and Technical Report, Chap. 3.1, p. 24.

<sup>53</sup>CR 2009/22, p. 57, para. 41 (Boyle).

<sup>54</sup>EcoMetrix 3rd Report, Mar. 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S7, p. 4.3.

<sup>55</sup>E.g., CR 2009/12, p. 52, para. 34 (Sands); CR 2009/14, p. 39, para. 5 (Colombo); CR 2009/14, p. 57, para. 7 (Sands).

<sup>56</sup>See, e.g., CMU, Vol. V, Ann. 141; CMU, Vol. VI, Ann. 159; final CIS, pp. 4.85-4.86, CMU, Vol. VIII, Ann. 173.

came to exactly the same conclusions as Argentina. [Slide.] The Botnia EIA states that the most likely wind patterns at the mill location are “from the South, East, Southeast, and Northeast”<sup>57</sup>. This is exactly the same conclusion that Argentina reached in its Scientific and Technical Study, and it is exactly what Dr. Colombo told us on 16 September<sup>58</sup>. So either Professor Sands is telling us that Argentina got the wind direction wrong, too, or he does not know the evidence. It is all right there in the annexes to the written pleadings. But somehow they just keep missing it.

27. The evidence concerning bad odours was presented by Argentina’s two retained experts, Drs. Colombo and Wheeler. Uruguay has already explained that allegations of air pollution, including bad odours, that do not affect the quality of the water in the Uruguay river, fall outside the 1975 Statute, and outside the Court’s jurisdiction<sup>59</sup>. But Argentina persists in raising this issue, and so we respond without prejudice to our jurisdictional objection.

28. Let us start with Dr. Colombo’s statement that the Botnia mill is to blame for bad odours in Gualeguaychú, particularly hydrogen sulphide or rotten eggs, because there was “good air quality without odours before Botnia began operating”<sup>60</sup>. I suppose you can say whatever you want if you are a retained expert appearing as counsel. But, unfortunately for Dr. Colombo, the data from his own study contradict him. Argentina not only detected hydrogen sulphide in its pre-operational monitoring; it detected a hydrogen sulphide level of 0.0030 ppm, which was substantially higher than its own detection threshold of 0.0021 ppm<sup>61</sup>.

29. While Argentina would like to blame the Botnia plant for all of the bad odours that afflict Gualeguaychú, it cannot honestly do so. Uruguay recognizes that Botnia, despite having the best and most modern and most efficient technology and practices, emitted odours that were detectable at the plant site on six occasions in the year 2008, its first full year of operation, when such events

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<sup>57</sup>Botnia Environmental Assessment Submitted to DINAMA, Chap. 5, 31 Mar. 2009, CMU, Vol. VI, Ann. 159, p. 61; Summary Environmental Report of the Botnia EIA, 2 Dec. 2004, CMU, Vol. VII, Ann. 166, p. 55.

<sup>58</sup>Argentina’s Scientific and Technical Report, Chap. 1, p. 8 (stating “Based on the location of the Botnia pulp mill, it is possible to identify wind directions northeast, east, southeast, and south as those that favour the transport of pollutants from Botnia towards Argentine territory”); CR 2009/14, p. 39, para. 5 (Colombo).

<sup>59</sup>CR 2009/22, p. 61, para. 53 (Boyle).

<sup>60</sup>CR 2009/14, p. 41, para. 8 (Colombo).

<sup>61</sup>Argentina’s Scientific and Technical Report, Chap. 1, p. 29, table 5.

are most likely to occur<sup>62</sup>. The IFC's experts agree that, as in all modern pulp mills, the frequency of odour incidents will only decrease as the plant continues to operate<sup>63</sup>. But this is a far cry from the 78 odour events Argentina attempted to attribute to the Botnia mill, in the first round<sup>64</sup>. In the second round, even Dr. Wheater scaled this outrageous claim back to a total of eight malodorous incidents since the plant began operating that they found they could attribute to Botnia<sup>65</sup>. And even if Argentina's claimed hydrogen sulphide levels for these eight incidents are taken at face value, they all fall well below the most stringent health standards, including those of the World Health Organization<sup>66</sup>.

30. And even these alleged incidents cannot all be attributed to Botnia. For example, smells attributed to the mill in April 2008 arose from a widespread wildfire in Argentina, during a time when the mill was not releasing malodorous gases<sup>67</sup>; in May 2008, the Chaitén volcano in southern Chile erupted, releasing clouds of sulphur into the region's atmosphere<sup>68</sup>. However, the most likely cause of most of the odours comes from a source much closer to home, Argentina's municipal sewers, especially in Ñandubaysal Beach and Gualeguaychú.

31. Dr. Wheater told us last week that the smell of a sewer and the smell of a pulp mill are very "distinct". He assured the Court there is no possible way the two different smells could be confused<sup>69</sup>. With this in mind, let us look at two affidavits from local residents that Argentina thought were so compelling it placed them in your judges' folder<sup>70</sup>. The first reports that on 29 January 2009, "the employees of the business Confitería Balneario Ñandubaysal, notified that

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<sup>62</sup>3rd EcoMetrix Report, Mar. 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S7, pp. ES.v and 6.3.

<sup>63</sup>*Ibid.*, p. 5.1 ("Based on the experience of other modern pulp mills, it is anticipated that performance will continue to improve during the remainder of the start-up phase as further optimization measures are implemented.").

<sup>64</sup>CR 2009/14, p. 39, para. 6 (Colombo).

<sup>65</sup>CR 2009/20, p. 61, para. 15 (Wheater).

<sup>66</sup>See Argentina's Scientific and Technical Report, Chap. 1, p. 39, fig. 30 (establishing that the highest concentration detected was 0.00675 ppm); World Health Organization Air Quality Guidelines for Europe, 2000, *WHO Regional Publications, European Series*, No. 91, available at <http://www.euro.who.int/document/e71922.pdf> (where the guideline is expressed as 150 ug/m<sup>3</sup>, which converts to 120 ppb).

<sup>67</sup>Third EcoMetrix Report (March 2009), Uruguay's Submission of New Documents, 30 June 2009, Ann. S7, p. 6.1; DINAMA One Year Report (May 2009), Uruguay's Submission of New Documents, 30 June 2009, Ann. S2, p. 3/4.

<sup>68</sup>DINAMA One Year Report (May 2009), Uruguay's Submission of New Documents (30 June 2009), Ann. S2, p. 3; Third EcoMetrix Report, Uruguay's Submission of New Documents (30 June 2009), Ann. S7, pp. ES.v and 6.3.

<sup>69</sup>CR 2009/20, p. 61, para. 15 (Wheater).

<sup>70</sup>See Argentina's judges' folders for 15 September 2009, tab 18.

they and the tourists sitting on the terrace perceived disagreeable smells . . . similar to *sewer smells*". The other affiant states that while "working at the kitchen of the café at the Ñandubaysal resort he perceived a disagreeable smell [like it] came from the lavatory". It was, he said, "similar to [a] sewer". In fact, almost all of the hundreds of affidavits collected by Argentina from protesters in Gualeguaychú describe a bad smell experienced on a single date, 26 January 2009, and many of those affiants say that it was a "strong smell like sewage"<sup>71</sup> or simply that it "smelt like sewage"<sup>72</sup>. The following day, on 27 January, the press reported, in an article Argentina placed into evidence, that there was a "nauseating smell of sewers," and in that connection, reported that the "[r]esidents of Gualeguaychú explained to the press that the number of tourists in the city means the sewers habitually became overloaded"<sup>73</sup>. Now, assuming Dr. Wheater was right, and that the odours from a pulp mill could never be confused with those from a sewer, what all of these affiants from Ñandubaysal Beach and Gualeguaychú smelled could not have been the pulp mill. What smelled to them like sewage was exactly that.

## V. ALGAL BLOOM

32. Mr. President, Members of the Court, we now come to Argentina's last hope of showing that the Botnia plant has actually caused harm to the river. It is the argument to which, after nonylphenols, Argentina has given maximum emphasis throughout these oral hearings. I refer to the algal bloom of 4 February 2009. To put this event in perspective, it lasted for two days, and then it washed away. There is no evidence that it caused any lasting harm to the river, or to any aquatic organisms. Argentina has produced no evidence of even a single dead fish or even a dead rotifer. Algal blooms are not uncommon in the Uruguay river. They occur almost every year. Argentina does not deny this<sup>74</sup>.

33. The evidence — including and especially Argentina's own evidence — already establishes that the bloom was not caused by nutrients, phosphorus and nitrogen, or any other

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<sup>71</sup>Andres Ricardo Gomez, p. 14/15, available at <http://www.mrecic.gov.ar/pulpmills/pdf/en/26-50en.pdf>.

<sup>72</sup>Marcelo Hernet, p. 13/25, available at <http://www.mrecic.gov.ar/pulpmills/pdf/en/50-74en.pdf>.

<sup>73</sup>"Odour episode at Botnia reached Gualeguaychú: No harm to human health or environment," *La República* (27/1/2009), New Documents Submitted by Argentina, 30 June 2009, Vol. II: Other Documents — Press Articles.

<sup>74</sup>CR 2009/14, p. 44, para. 14 (Colombo).

substance emitted by Botnia. We showed in the first round that Dr. Colombo's own study proved that there were no changes in phosphorous or nitrogen concentrations in areas of the river that he claimed were influenced by the Botnia plant, and especially that there were no increases in phosphorous or nitrogen concentrations at any time leading up to 4 February 2009<sup>75</sup>. We also showed that levels of chlorophyll, which mark the presence of algae, were always low near the Botnia plant, and that they were particularly low in the period leading up to 4 February<sup>76</sup>. By contrast, again according to Dr. Colombo's study, both phosphorous and chlorophyll levels were elevated in Ñandubaysal Bay preceding the algal bloom — in fact, several times higher than the levels in the part of the river allegedly influenced by Botnia<sup>77</sup>. In his second round speech, Dr. Colombo made no attempt to dispute any of these points<sup>78</sup>. It was all there before him, just as Uruguay laid it out in the first round. He had his chance to dispute it. He did not even try.

34. With this water quality evidence in mind — this now undisputed water quality evidence — let us look at some new satellite photographs: new in the sense that they have not been displayed before, although they certainly have been in the record. As a point of departure, let us start with one you were shown by Argentina in the second round, a satellite photo of the algal bloom of 4 February<sup>79</sup> (this is at tab 16). [Slide.] And this is as Argentina presented it, with the algal bloom circled in green. As the Court will recall, the white areas of the river depict the algal bloom. But Argentina did not show you the full picture. If we look at a more complete photo from the same day, not previously displayed to the Court, we can see a much larger portion of the river upstream from the Botnia plant, where we can find more white streaks representing algal blooms far beyond any place that even Argentina claims could be affected by emissions from the Botnia plant (this is at tab 17). [Slide.] Here we are looking at a part of the river that is 55 km upstream from the plant. Argentina has not argued that Botnia's effluents are carried more than 25 km upstream.

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<sup>75</sup>CR 2009/16, pp. 48 *et. seq.*, paras. 26 *et. seq.* (Reichler);

<sup>76</sup>*Ibid.*, pp. 60-63, paras. 56-62 (Reichler).

<sup>77</sup>CR 2009/20, pp. 56 and 62, paras. 44 and 59 (Reichler).

<sup>78</sup>CR 2009/20, pp. 44-50, paras. 5-20 (Colombo).

<sup>79</sup>CR 2009/20, p. 45, para. 8 (Colombo).

35. The algal blooms are easier to discern on this next satellite photo, which shows the blooms in red extending upstream from the Botnia plant more than 55 km (this is at tab 18). [Slide.] Like the similar photo I displayed in the first round, what this one actually depicts is the chlorophyll that gives the algae its pigment. The areas of highest chlorophyll, and algae, are shown in red, next highest in yellow, lowest in blue. By comparing this photo with the previous ones, we can see that the red areas on this photo match almost exactly the white ones on the other (at tab 19). [Slide.] This leaves no doubt that the red areas in the photo on the right correspond to significant algal abundances or blooms.

36. These photos show that the area in front of the Botnia plant was not the only one experiencing an algal bloom on 4 February. There were numerous other algal blooms upstream, starting at least 55 km upstream from the plant. Since Argentina has not argued that the river flows in reverse that far upstream, we can assume from this photo that on 4 February algal blooms originating far upriver were headed downstream with the normal current toward the Botnia plant.

37. [Slide.] Let us now take a very quick look at the satellite photo we showed you before (which is at tab 20), which our Argentine friends, quite understandably, were not too happy with in their second round. This, again, was taken on 2 February. Now, the reason Argentina does not like this photo is quite obvious: because it shows where the algal abundances were two days before they showed up and bloomed near the Botnia plant.

38. As we saw before, there are very high levels of algae in Ñandubaysal Bay, transported there by the Gualeguaychú river, then through the Bay and along the Argentine coast. In the second round, Argentina struggled to discredit this rather incriminating photo<sup>80</sup> — incriminating in the sense that it identifies the most likely source of the algal bloom that took place two days later in an area, in front of the Botnia plant, that, as you can see, showed no signs of algae on 2 February. If Argentina is right that the river flowed in reverse consistently between 31 January and 5 February, as they repeatedly insisted and emphasized in the second round, even by playing the same animated simulation video that they had already played in the first round, showing, purportedly, that the river flowed in reverse between 31 January and 5 February, then there can be

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<sup>80</sup>CR 2009/20, p. 46, para. 11 (Sands).

little doubt that the algae from the Bay were transported a few kilometres upriver to the site of the plant. But wait, Dr. Colombo told us, the red in this photo does not depict chlorophyll or algae in the Bay; it depicts only sediments, which are abundant in the turbid conditions of the Bay<sup>81</sup>. Well, if that is true, then how is it that there is no red in Inés Lagoon, right next door, just adjacent to the top of Ñandubaysal Bay and to the right on the photo? When Dr. Colombo showed us on Monday, in four separate satellite photos, that Inés Lagoon was *always* as turbid and full of sediments as the Bay, if not more so? As you can see on this photo, there is bright red in Ñandubaysal Bay, and no red at all in Inés Lagoon. The red does not represent sediments or turbidity. This is further confirmed by the red streaks upstream from the plant, in the main channel of the river, where there are only minimal sediments. And how is it that the previous pair of photos that we displayed, from 4 February, showed red streaks matching almost perfectly with the locations of known algal blooms and abundances? Red equals a lot of algae. There is no denying it, try as Argentina might. In fact, according to the scientific literature on the subject, at a readily available internet site, the presence of high levels of sediments masks a portion of the algae in turbid waters<sup>82</sup>. If anything, the satellite photo from 2 February *under-represents* the amount of algae that were present in the Bay on that date.

39. Let us now put this information together with what we learned a few minutes ago about the terrible smells — just before this photo was taken — which emanated from the overflowing sewers in Gualeguaychú on 26 January, and at Ñandubaysal Beach on 29 January. Sewers that were overwhelmed by the enormous throngs of tourists who attended the most successful and widely attended carnival in the region's history<sup>83</sup>. Where does that tremendous and unprecedented mass of human waste, heavily laden with phosphorus and bacteria, go from the sewers of Gualeguaychú and Ñandubaysal Beach? It goes to Ñandubaysal Bay, and then into the Uruguay river. You will recall how red the Gualeguaychú river was on 2 February, while the sewers were

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<sup>81</sup>CR 2009/20, p. 46, para. 11 (Colombo).

<sup>82</sup>Artigas and Pechmann, "Chlorophyll Detection and Mapping of Shallow Water Impoundments Using Image Spectrometry", *Research Letters in Ecology* (2008), p. 4 *et seq.* ("Although these spectral indices are developed for use with reflectance measurements, in turbid waters, optical signals correlated with Chlorophyll-a are often masked by signals from detritus or total suspended solids."); Lee and Rast, "Light Attenuation in a Shallow, Turbid Reservoir: Lake Houston, Texas", U.S. Geological Survey Water-Resources Investigations Report (1997): 4064 ("The presence of suspended sediment in water reduces the amount of light that enters the water and reduces transparency", which limits the ability of sensors to see algae and cyanobacteria deeper in the water.).

<sup>83</sup>CR 2009/17, p. 56, para. 27 (McCaffrey).

still working overtime, as reported in the press — a report, as I said, that Argentina introduced into evidence<sup>84</sup>. Look at how much red is in the Bay. We know now that it was sewage, in massive quantities, that produced these algal abundances.

40. Now let us consider Argentina's other evidence regarding the algal bloom, which consists of a sample of blue-green algae taken from the river. What they found in it were bacteria known as faecal coliforms, in concentrations more than a thousand times higher than those normally found in the river<sup>85</sup>. Faecal coliforms are, faecal. They come from human waste, not pulp mills. And we know where that waste came from. They found a lot of bacteria called klebsiella<sup>86</sup>. They come from everywhere, and are plentiful throughout the river, including areas unaffected by Botnia<sup>87</sup>. They too thrive in municipal sewer systems<sup>88</sup>. They found microscopic cellulose fibres — cellulose fibres<sup>89</sup>, could they be linked to the Botnia plant? Actually, cellulose fibres are just as likely to come from decomposed toilet paper<sup>90</sup>. I actually have a footnote to a readily available internet site on this very point.

41. This was indisputably a dense concentration of algae; although it was not quite as dense as Argentina claims. When Argentina says that the algae concentration in the bloom was thousands of times higher than in past blooms<sup>91</sup>, it is playing a little loose with the data. In the case of prior blooms, samples of the water with algae in it — samples of the water with algae *in* it — were

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<sup>84</sup>“Odour episode at Botnia reached Gualeguaychú: No harm to human health or environment”, *La República* (27/1/2009), New Documents Submitted by Argentina, 30 June 2009, Vol. II: Other Documents — Press Articles.

<sup>85</sup>Argentina's Scientific and Technical Report, Chap. 3.1, p. 4 (noting that the scum sample involved “very high abundances of fecal coliforms 2-3 orders of magnitude higher than normal values”).

<sup>86</sup>CR 2009/14, p. 45, para. 17 (Colombo).

<sup>87</sup>See, for example, Wong, Cullimore and Bruce, “Selective Medium for the Isolation and Enumeration of *Klebsiella* spp”, *Applied and Environmental Microbiology*, Apr. 1985, Vol. 49, No. 4: 1022-1024 (*Klebsiella* is “widely distributed in nature”); Bagley, “Habitat association of *Klebsiella* species”, *PMID-PubMed*, indexed for MEDLINE: 3882590 (*Klebsiella* is “seemingly ubiquitous in terms of its habitat associations”); “*Klebsiella pneumoniae*,” Wikipedia Online, available at [http://en.wikipedia.org/wiki/Klebsiella\\_pneumoniae#cite\\_ref-Sherris\\_0-0](http://en.wikipedia.org/wiki/Klebsiella_pneumoniae#cite_ref-Sherris_0-0) (establishing that *Klebsiella* exists naturally in the human mouth, skin, and intestines).

<sup>88</sup>Wu, Saratale, Lo, Chen, Tseng, Chang, Chang, Tsai, Su and Chang, “Simultaneous production of 2,3-butanediol, ethanol and hydrogen with a *Klebsiella* sp. strain isolated from sewage sludge”, *Bioresource Technology* — ISSN 0960-8524, Vol. 99, No. 17 (2008): 7966-7970; S.R. Andersen, “Effects of waste water treatment on the species composition and Antibiotic resistance of coliform bacteria”, *Current Microbiology*, Vol. 26, No. 2, Feb. 1993.

<sup>89</sup>CR 2009/14, p. 45, para. 16 (Colombo).

<sup>90</sup>See Website of Aracruz, a Brazilian company dedicated to the production of bleached eucalyptus pulp, arguing that “no pulp can beat eucalyptus” for the softness that is “undisputably the most wanted characteristic” of toilet paper), available at [http://www.aracruz.com.br/show\\_prd.do?act=stcNews&menu=true&lastRoot=234&id=459&lang=2](http://www.aracruz.com.br/show_prd.do?act=stcNews&menu=true&lastRoot=234&id=459&lang=2).

<sup>91</sup>See, for example, CR 2009/15, p. 24, para. 7 (Sands).

measured<sup>92</sup>. In February 2009, Argentina just scooped up the algal scum off the top, and it found that there is more algae in a handful of pure algae than there is in a beaker of water with some algae in it<sup>93</sup>. That hardly proves the unprecedented nature of this year's algal bloom. But, to be sure, the algae were thick enough so that many of the substances that were in the river at the time got trapped in it. This does not mean that they caused it. Argentina does not claim that the bloom was caused by klebsiella, faecal coliforms, or eucalyptus fibres. They do not cause algal blooms.

42. Nutrients, under the right climatic conditions, are what cause algal blooms, as Professor Sands himself acknowledged<sup>94</sup>. And there is no evidence — no evidence — that nutrients from the Botnia plant had anything at all to do with the February bloom. In fact, Argentina's own evidence, which shows that phosphorous and nitrogen levels near the plant were low and unchanged prior to the bloom, proves that it was not caused by any nutrients emitted by the plant<sup>95</sup>. By contrast, Argentina's own evidence shows that nutrients, especially phosphorus, were abnormally high in Ñandubaysal Bay, as were chlorophyll and algae, just prior to the bloom<sup>96</sup>. The evidence points its finger firmly in Argentina's direction as the source of the bloom, not at Botnia. Unless they are wrong about reverse flow. Unless the river was not flowing in reverse. In which case the satellite photography shows that it could just as well have originated far upstream and travelled down with the normal current to the Botnia site. Either way, the evidence eliminates the plant as a potential source of the bloom.

## **VI. INTRODUCTION OF NEW EVIDENCE THROUGH WITNESSES APPEARING AS COUNSEL**

43. Mr. President, Uruguay is troubled by Argentina's use of its retained experts in this case to introduce new evidence into the record during the oral hearings. This has been a persistent problem in this case: the propensity of Argentina's experts, both Dr. Wheater and Dr. Colombo, to step outside their role as counsel, and introduce facts that are not anywhere to be found in the written record of this case, as well as their personal opinions never before expressed in, or even

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<sup>92</sup>Argentina's Scientific and Technical Report, Chap. 4, p. 117.

<sup>93</sup>*Ibid.*, pp. 117 and 131 (establishing that "the scum" of the 4 February bloom was what was sampled).

<sup>94</sup>CR 2009/17, p. 15, para. 10 (Sands) ("That algal bloom was caused by nutrients, and it is an indicator of ecological change.").

<sup>95</sup>CR 2009/16, p. 46 *et seq.*, Sec. II (Reichler).

<sup>96</sup>*Ibid.*

pertaining to matters in, their own written reports. Uruguay objected to this practice during the first round<sup>97</sup>, but there were even more egregious violations of what we perceive as the Court's Rules during Argentina's second round, in the case of both Dr. Wheeler and Dr. Colombo.

44. Take Dr. Colombo, for example. His opinions have bloomed faster and farther than the algae we have just been talking about. As I pointed out last week, in his study, submitted on 30 June, which *is* evidence in this case, he never once asserted that effluents from the Botnia plant caused the algal bloom of 4 February 2009. As I quoted last week, he attributed the algal bloom *not* to an excess of nutrients emitted from the plant — as Professor Sands has argued<sup>98</sup> — but to the low level of nitrates at the time of the bloom, indicating that abundances of algae were consuming the nitrates. He was categorical in regard to where this was occurring: in Ñandubaysal Bay, which he said repeatedly — in his study — was not influenced by the effluent from the Botnia plant<sup>99</sup>. That is what he said in his study, and that is what is in evidence.

45. But it is not what he said to the Court. In the first round, Dr. Colombo expressed a different opinion than the one he wrote in his study. He said there was “clear evidence that the mill effluents have contributed to this bloom of unprecedented intensity”<sup>100</sup>. And he did not stop there. No! He grew even bolder in the second round, telling us that “[t]he presence of effluent products in the scum unambiguously demonstrates that Botnia's discharges played a central role in the eutrophication of the Uruguay river”<sup>101</sup>. It is a good thing there is not a third round. There is no telling how much farther Dr. Colombo would go then.

46. There are important lessons here. First, Dr. Colombo's oral opinions are not evidence. He is here as counsel, not as a witness. He cannot create new evidence during these oral hearings. Nor can he change the evidence that he himself produced in writing. As counsel, he is supposed to be limited to commenting on or explaining evidence that is already in the record. Argentina's team know the rules. Yet they allowed him to repeatedly violate them.

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<sup>97</sup>CR 2009/19, pp. 33 *et seq.* (Reichler).

<sup>98</sup>CR 2009/12, p. 42, para. 14 (Sands).

<sup>99</sup>Argentina's Scientific and Technical Report, Chap. 3.1, p. 24 (noting that nitrogen nutrients had “somehow lower values in the Bay than in the Uruguay River during the summer due to its biological consumption”) and Chap. 3.2, paras. 1, 4.1.2 and 4.3.1.2. See also, for example, CR 2009/16, p. 49, fn. 95 (Reichler).

<sup>100</sup>CR 2009/14, p. 45, para. 15 (Colombo).

<sup>101</sup>CR 2009/20, p. 49, para. 18 (Colombo).

47. Second, in his zeal to embellish, and embellish again, on his written report in support of positions taken by the Party that hired him and to which he is counsel, Dr. Colombo has proven that he can hardly be considered an “independent” expert. And the same goes for Dr. Wheater. It is rather remarkable that Professor Sands stood up here and told you — with a straight face — that Dr. Colombo and Dr. Wheater are “independent” experts<sup>102</sup>, notwithstanding that they are retained and paid by Argentina, notwithstanding that they appeared here as counsel for Argentina, because — and I hope you will pause on these words — Professor Sands tells us, they “have no interest in the outcome of this case”<sup>103</sup>. Dr. Colombo and Dr. Wheater have “no interest in the outcome of this case”? I simply cannot believe he had the audacity to make such an implausible statement: Dr. Colombo, who was hired by Argentina, his own Government, for purposes of this litigation, in order to produce evidence that Argentina could use to prove that the Botnia plant harms the Uruguay river, has *no interest* in the outcome? Dr. Wheater, also paid by Argentina, who has been one of their most zealous and aggressive advocates, has *no interest* in the outcome?

48. My good friend Professor Pellet says that emolument alone is not sufficient to deprive an expert of his independence. He says it depends on the expert’s state of mind<sup>104</sup>. Assuming, *quod non*, that he is right about this, my response to him, in regard to the state of mind of Dr. Colombo and Dr. Wheater, in a language we all know my good friend speaks fluently, is: *res ipsa loquitur*. And then: *quod erat demonstrandum*.

49. While, in this case, the state of mind of Argentina’s retained experts is splashed all over the compte rendu, the Court might wish to adopt a more objective standard for differentiating between experts who are truly independent and those who are not. Uruguay has already presented its views on this issue in response to an earlier question from Judge Bennouna<sup>105</sup>, and will not take up the Court’s time with elaboration. Simply put, Uruguay believes that any expert retained and paid by a party is by definition *not* independent. His or her views may be admissible as evidence, but, under the Court’s consistent jurisprudence, they must be treated with caution, and they are not

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<sup>102</sup>CR 2009/21, p. 23, para. 21 (Sands).

<sup>103</sup>*Ibid.*

<sup>104</sup>CR 2009/20, p. 22, para. 19 (Pellet).

<sup>105</sup>CR 2009/19, pp. 33 *et seq.* (Reichler).

entitled to the same weight as reports and opinions rendered by experts unaffiliated with the parties, especially when they emanate from respected international organizations expert in the subject matter.

## VII. THE IFC

50. Mr. President, Members of the Court, this brings me to my seventh and final point, regarding the competence, independence and credibility of the IFC and the expert consultants that it retained.

51. As he must, since Argentina's case ultimately depends on it, Professor Sands did everything he could to impugn the credibility of the expert reports on the Botnia plant produced by the IFC and its independent consultants. No surprise there. What was surprising, however, was the tack he took in attempting to accomplish this result. He did not attack the expertise, independence or credibility of the IFC itself, or of the IFC's consultants, especially EcoMetrix, Hatfield and AMEC.

52. Instead, he employed an entirely different approach. He acknowledged the good faith, independence, expertise, and even the commitment of the IFC and its consultants to environmental protection. What went wrong, and what deprives their well-intentioned reports of credibility, Professor Sands said, is that they were all deceived by Uruguay. Uruguay intentionally misled them, he said, and it was based on Uruguay's deliberate deception that they all concluded the Botnia plant was a good one, and would not cause any harm to the Uruguay river or its ecosystem, and they gave it their approval<sup>106</sup>.

53. What was the nature of the fraud, the hoax, perpetrated by Uruguay on this respected international institution and its expert consultants? According to Professor Sands, Uruguay *knew* that the river frequently flows in reverse, but withheld this information from the IFC and its consultants, and worse, convinced them that flow reversals were rare occurrences, in order to get them to approve and finance the Botnia project<sup>107</sup>. And well-meaning naifs that they were, the IFC and its experts swallowed Uruguay's story hook, line and sinker. They approved the project solely

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<sup>106</sup>CR 2009/21, p. 22 *et seq.*, Sec. III (Sands).

<sup>107</sup>CR 2009/21, p. 21, para. 18 (Sands).

because of Uruguay's deception. As a result, none of the reports is entitled to any credibility whatsoever<sup>108</sup>.

54. It is a plot juicy enough to turn into a major motion picture.

55. But does Professor Sands's theory survive scrutiny?

56. Let us look more closely at what he actually said in his truly spellbinding closing speech on Tuesday, and then, as we have done repeatedly with his oratorical masterpieces in this case, let us compare it to the evidence.

57. On Tuesday, Professor Sands told us that Uruguay knew that the river flows in reverse with great frequency, that it assumed a flow reversal rate of 29 per cent, that it built on this basis a modelled reverse flow simulation, and even — even — that it may have presented all this to Argentina during the GTAN negotiations in 2005<sup>109</sup>. Wait a minute! Is this the same Professor Sands who, together with his colleagues, told us no less than 13 times in the first round that Uruguay had no clue about reverse flow, had developed no model, had said nothing to Argentina, and had never even thought about the subject until after it authorized the Botnia project?<sup>110</sup> What a turnabout! What a reversal of flow!

58. What is going on here? It is not that hard to figure out. Professor Sands's target is no longer Uruguay and its alleged incompetence, or servitude to Botnia. He has his eyes set now on undermining the credibility of the IFC, and its expert reports on the Botnia plant, the only reports in this case by truly independent experts, and the only reports that the Court's jurisprudence requires be given special attention. These reports are devastating to Argentina's claims of environmental harm, and Professor Sands and Argentina cannot risk allowing the Court to rely on them.

59. So he came up with an inventive theory, between the end of the first round and the beginning of the second, that required him to change course on whether Uruguay was fully aware of the extent and frequency of reverse flow, and, instead of accusing it of not knowing enough about the phenomenon, he decided to accuse it of knowing too much about it, and hiding its

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<sup>108</sup>CR 2009/21, p. 21, para. 18 (Sands).

<sup>109</sup>CR 2009/21, p. 19, para. 12 (Sands).

<sup>110</sup>For a partial list of citations, see CR 2009/16, p. 41, fn. 74 (Reichler).

knowledge from the IFC, and worse yet, feeding the IFC false information that reverse flows are rare events, in order to gain approval and financing for the project<sup>111</sup>.

60. It is very instructive to me, because as a professional advocate myself, I always enjoy watching a skilled British barrister, a QC no less, perform his craft, and Professor Sands's performance on Tuesday — I am sure everyone would agree — was masterful indeed. To mask his own about-face on Uruguay's knowledge of reverse flow, Professor Sands accused Uruguay — he accused Uruguay — of a 180° change in its position on this subject<sup>112</sup>. Nicely done, my friend! Or at least, nice try.

61. What is Uruguay's alleged 180° change in position? According to Professor Sands, it is a contradiction between what he now acknowledges was Uruguay's assumption of a worst-case scenario of 29 per cent flow reversal, and Uruguay's insistence in the written pleadings that, in reality, in real life, reverse flows occur less frequently, and that full flow reversals, when the entire river flows in reverse, are rare events<sup>113</sup>. We did say it in our written pleadings, many times, that in real life flow reversals are infrequent, and that full flow reversals are rare<sup>114</sup>. But there is no contradiction. None at all.

62. As we explained in the first round, citing directly to the evidence in the record, Uruguay deliberately decided to assume an extreme, worst-case scenario of low and reverse flows, with the latter assumed to occur 29 per cent of the time, in considering and ultimately approving the Botnia project<sup>115</sup>. But that is a far cry from holding the view that the 29 per cent figure represents what happens in real life. It was, as the evidence shows, a worst-case hypothesis used to provide assurance to Uruguay among others that, even if such an unrealistically high frequency of reverse flow were to become the reality, the river would still be able to quickly dilute, disperse and wash away all of Botnia's effluents, leaving water quality unharmed<sup>116</sup>.

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<sup>111</sup>CR 2009/21, p. 22 *et seq.*, Sec. III (Sands).

<sup>112</sup>CR 2009/21, p. 15, para. 7 (Sands).

<sup>113</sup>CR 2009/12, p. 16, para. 8 (Sands).

<sup>114</sup>E.g., CMU, paras. 4.43, 4.56, 5.58 and 5.71-5.72.

<sup>115</sup>CR 2009/16, pp. 42-46, paras. 14-22 (Reichler).

<sup>116</sup>*Ibid.*

63. Professor Sands should not be surprised that Uruguay held the view, at the time it employed this worst-case assumption, and at all times since, that in reality, in reality flow reversals, and especially full flow reversals, occur with far less frequency. Assuming he were aware of the evidence, in this case, Argentina's own evidence, he would know that Argentina's own expert consultants on hydrodynamics reported that the Uruguay river experiences full flow reversals only 1 per cent of the time — 1 per cent of the time. Both Latinoconsult and Dr. Rabinovich, two separate hydrodynamic consultants retained by Argentina, reached the same conclusion<sup>117</sup>. Here for example, is what Latinoconsult concluded:

“Hydrodynamic modeling of the Rio Uruguay near the Botnia site indicates that the river flows downstream 82% of the time [downstream 82% of the time] . . . During 1% of the days, that is approximately 3-4 days per year, strong southeasterly winds in the Rio de la Plata . . . cause what we refer to as pure flow reversals.”<sup>118</sup>

This is from Argentina's experts. The Court may also be interested to note that one of the experts behind this analysis, that full flow reversals occur only 1 per cent of the time, and that the river flows downstream 82 per cent of the time, was Dr. Gabriel Raggio, who is Argentina's current hydrodynamics expert, and a member of its delegation here in The Hague<sup>119</sup>.

64. Well, Mr. President, we are coming to the end of this great mystery, and we shall soon solve it. We need only ask: What information did Uruguay give the IFC and its independent experts about reverse flow? And, what were the reverse flow assumptions employed by the IFC and its consultants when they approved the Botnia project?

65. The answers to these two questions are perfectly clear from the evidence. First, Uruguay gave the IFC and its consultants everything it had on reverse flow, including the documentation that demonstrated a 29 per cent reverse flow rate, and including the hydrodynamic model simulation, which reflects that assumption. In other words, Uruguay gave the IFC the same information and documentation that Professor Sands now admits it may have given Argentina

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<sup>117</sup>Latinoconsult Report, MA, Vol. V, Ann. 3, p. 14/57, para. 2.1; Rabinovich Report, RA, Vol. III, Ann. 43, p. 74.

<sup>118</sup>Latinoconsult Report, MA, Vol. V, Ann. 3, p. 14/57, para. 2.1.

<sup>119</sup>*Ibid.*, p. 55/57, App. A (noting that Raggio was responsible for “modeling of river”); see also Ann. A to Latinoconsult Report, p. 1 (entitled “Flow Reversal Conditions of the Rio Uruguay, By Gabriel Raggio”).

during the GTAN negotiations<sup>120</sup>. The footnotes to this statement will show exactly where in the record this can be found. As for the second question, the evidence shows that the IFC and its consultants, especially EcoMetrix, used the same model and the same assumptions as Uruguay<sup>121</sup> — that there would be, in the worst of cases, a 29 per cent rate of flow reversal — and that it was on this basis that EcoMetrix recommended approval of the project, that Hatfield endorsed the recommendation, and that the IFC, and the World Bank’s Board of Directors, approved it.

66. How could Professor Sands tell us that Uruguay misled the IFC about reverse flow, and that the IFC approved the Botnia project based on Uruguay’s false assurances that reverse flows were rare events?<sup>122</sup> There is only one explanation for his statements. He does not know the evidence. I can imagine, Mr. President, that it is probably getting a little tiresome for the Court to keep hearing that refrain from me. But I can assure you, Mr. President, that it is not pleasant for us — although we are obliged to do so — to have to get up and show, time after time, exactly where in the record facts completely contrary to those Professor Sands so eloquently and forcefully asserts are established indisputably and without contradiction. He may have all the oratorical skills. But we have all the evidence.

67. Argentina makes one more run at undermining the credibility of the IFC and its reports. Not only by my friend Professor Sands, but also his colleague Professor Boisson de Chazournes, raised the spectre of a conflict of interest — conflict of interest —, because the IFC indicated to EcoMetrix that it should include on its team, as *one* of its two hydrodynamic experts,

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<sup>120</sup>IFC, Cumulative Impact Study, Uruguay Pulp Mills, Ann. H: Terms of Reference, Sep. 2006, CMU, Vol. VIII, Ann. 177, p. H3.9 (establishing that EcoMetrix used “Botnia’s existing RMA2 hydrodynamic model and input files” and obtained “information on the hydrodynamic model and Orion [i.e., Botnia] effluent discharges . . . from documentation prepared by Botnia”, which was what Uruguay presented to GTAN); IFC, Cumulative Impact Study, Uruguay Pulp Mills, Ann. D: Water Quality, Sep. 2006, CMU, Vol. VIII, Ann. 176, p. D1.4 (“An understanding of the project was gained through a visit to Uruguay and meetings with representatives from Botnia [and . . .] DINAMA . . . These meetings provided updated information about water quality, an understanding of the regulatory context, and an accurate and up-to-date description of the projects. Various sources of information were utilized to support the assessment. The [EIAs] for the mills provided background information regarding the existing hydrological and aquatic environment. Additional information was provided by DINAMA.”) and p. D3.1 *et seq.* See CR 2009/16, pp. 42-45, paras. 14-18 and related footnotes (Reichler) for a discussion of the documents provided to Argentina during the GTAN process.

<sup>121</sup>*Ibid.*

<sup>122</sup>CR 2009/21, p. 19, paras. 13 *et seq.* (Sands).

Dr. Ismail Piedra Cueva<sup>123</sup>. Argentina's counsel complain that the same Dr. Piedra Cueva had been retained by Botnia and had developed the reverse flow model used by Botnia, which, the record shows, involved a reverse flow rate of 29 per cent. The evidence shows that the IFC wanted Dr. Piedra Cueva on its team precisely because his modelling of river flow was so conservative and precautionary, and that it was based on the conservative assumption that "the phenomena of reverse flow [were] frequent in the area" near the Botnia plant<sup>124</sup>. Not only Botnia, but also Uruguay and eventually the IFC used Dr. Piedra Cueva's model, and his precautionary 29 per cent flow reversal rate, in approving the plant<sup>125</sup>.

68. Argentina did, in fact, write to the IFC objecting to its decision that Dr. Piedra Cueva be included on EcoMetrix's team<sup>126</sup>. But what is most significant about Argentina's posture vis-à-vis Dr. Piedra Cueva, however, is not Argentina's protest, but its reaction after the IFC considered the protest and decided that Dr. Piedra Cueva should remain engaged. Argentina's reaction to the IFC's decision, written on 13 November 2006 by its then Secretary of the Environment, Dr. Romina Picolotti, was that Dr. Piedra Cueva and the rest of the IFC's team are "extremely qualified scientists [whose] merits have not been questioned"<sup>127</sup>.

69. Mr. President, Argentina's attempts to impugn the credibility of the IFC have been exposed as unsustainable. The applicant State's shots at it — delivered by its most eloquent counsel — have missed their target. The IFC emerges from Argentina's assault with its credibility fully intact. In any event, Argentina's attacks on the IFC and its independent consultants go only to the Final Cumulative Impact Study, and the period leading up to it, and especially to the manner in

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<sup>123</sup>See, e.g., CR 2009/20, p. 39, para. 31 (Boisson de Chazournes); CR 2009/20, p. 57, para. 8 (Wheater). See also IFC, Cumulative Impact Study, Uruguay Pulp Mills, Ann. D: Water Quality, Sep. 2006, CMU, Vol. VIII, Ann. 176, p. D1.3 (establishing that Piedra Cueva was not the only person on the Final CIS team focused on hydrodynamic and water quality modeling).

<sup>124</sup>I. Piedra Cueva, Additional Report 5 of the Botnia Environmental Impact Assessment, Ann. VIII, "Studies of Plume Dispersion and Sediment Studies", 12 Nov. 2004, CMU, Vol. VII, Ann. 164, p. 56.

<sup>125</sup>DINAMA Environmental Impact Assessment Report for the Botnia Plant, 11 Feb 2005), CMU, Vol. II, Ann. 20, para. 4.1 (demonstrating that DINAMA based its findings on the river's capacity to dilute Botnia's effluents on "[t]he results obtained when applying the hydrodynamic model"); IFC, Cumulative Impact Study, Uruguay Pulp Mills, Ann. H: Terms of Reference, Sep. 2006, CMU, Vol. VIII, Ann. 177, p. H3.9 (establishing that EcoMetrix used "Botnia's existing RMA2 hydrodynamic model and input files" and obtained "information on the hydrodynamic model and Orion [i.e., Botnia] effluent discharges . . . from documentation prepared by Botnia"). See also Remarks on the Argentine Government Report on the Problem of Phosphorus, RU, Vol. II, Ann. R11, p. 2.

<sup>126</sup>Note of the Secretary of the Environment and Sustainable Development of the Republic of Argentina, 13 Oct. 2006, MA, Vol. II, Ann. 17, para. 5.

<sup>127</sup>Note of the Secretary of the Environment and Sustainable Development of the Republic of Argentina, 13 Nov. 2006, MA, Vol. II, Ann. 18, para. 14.

which the issue of reverse flow was handled, prior to and during the project approval process, which ended in November 2006. As the Court will recall, the plant did not start operating until a year later, in November 2007. In other words, the only fault with the IFC's reporting that Argentina could manage to allege — and we have seen that there really is no fault at all — concerns the pre-approval, pre-operational period. It is significant, therefore, that Argentina has not offered any basis for doubting the IFC, or its experts, or their credibility, or the reliability of their reports, subsequent to the commencement of operations, addressing the issue of the Botnia plant's actual performance between November 2007 and December 2008, which is the last month covered by the IFC's reports thus far. Of course, Argentina disagrees with their conclusions, that the Botnia plant has had no impact on water quality, no impact on the Uruguay river or its ecosystem, no impact on ambient air quality, no impact on concentration levels of phosphorus, nitrogen or any of the other effluents discharged by the plant, no violations of CARU water quality standards, no violations of Uruguayan water quality standards, no violations of Botnia's permit requirements, no exceedances of effluent discharge limits, no harm to the environment whatsoever<sup>128</sup>. Argentina may disagree with the IFC and its independent experts about all of these findings, but it has introduced no evidence — no evidence at all — other than the unsupported opinions of its own paid consultants, to put any of the IFC's conclusions into dispute. Argentina may disagree with the IFC, but it has failed to suggest any reason why the Court should not give that international organization and its specially-selected, expert consultants, the special deference they are due as experienced, knowledgeable and independent finders of fact.

70. Mr. President, Members of the Court, you all know the Court's jurisprudence better than I: “[E]vidence obtained [by independent persons] experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention” (case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment, I.C.J. Reports 2005*, p. 201, para. 61, but see generally paras. 60-62). Reports of specialized international organizations are entitled to “considerable authority” based on the “care taken in preparing the report, its comprehensive sources and the independence of those responsible

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<sup>128</sup>See, for example, EcoMetrix 3rd Report, March 2009, Uruguay's Submission of New Documents, 30 June 2009, Ann. S7. See also CR 2009/16, pp. 17 *et seq.* (Boyle).

for its preparation” (case concerning the *Application of the Convention on the Prevention And Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007*, pp. 135-137, paras. 228-230). And “evidence of a disinterested witness — one who is not a party to the proceedings and stands to gain . . . nothing from its outcome” is “regarded as prima facie of superior credibility” (case concerning *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 43, para 69).

71. Mr. President, Members of the Court, the reports of the IFC and its experts meet all of these criteria. And they demonstrate, beyond any doubt, that there is no merit whatsoever to any of Argentina’s claims regarding harm to the Uruguay river or its ecosystems. If you choose to believe what the IFC and its independent consultants have concluded, then Argentina has no case. No case at all. But even if, for the sake of argument, you were to choose to completely ignore the IFC and its experts, Argentina would still have no case. As we have shown, Argentina has failed to produce any credible evidence that the Botnia plant has harmed the Uruguay river or its water quality. The evidence, including, as we have shown, Argentina’s own evidence, proves that it has not. And, therefore, all of Argentina’s claims based on alleged violations of the substantive provisions of the 1975 Statute must be rejected.

72. That concludes my speech this morning. I take this opportunity to thank you Mr. President, and Members of the Court, for allowing me to enjoy the great honour of appearing before you in these proceedings, not once, but several times. It has been a great privilege, and I thank you all for your patience, courtesy and kind attention. And I want to personally thank, as well, the world’s best interpreters.

73. I ask that you now call Uruguay’s next speaker, Professor Luigi Condorelli, who will respond to Argentina’s second round presentation on remedies, perhaps after the coffee break.

The VICE-PRESIDENT, Acting President: I thank Mr. Reichler for his presentation and I suspend the hearing for a 15-minute coffee break.

*The Court adjourned from 11.30 to 11.45 a.m.*

Le VICE-PRESIDENT, faisant fonction de président : Veuillez vous asseoir. L'audience est reprise et je donne la parole à M. le professeur Luigi Condorelli. Vous avez la parole, Monsieur le professeur.

M. CONDORELLI :

## **RETOUR SUR LES REMEDES**

### **I. INTRODUCTION**

1. Merci beaucoup, Monsieur le président. Monsieur le président, Messieurs les juges, je vous remercie d'avance d'avoir la patience de m'écouter une dernière fois avant les conclusions que prononcera tout à l'heure l'agent de l'Uruguay, l'ambassadeur Gianelli, en clôture des plaidoiries. Je suis chargé de répondre aux propos de la Partie adverse en matière de remèdes. Je pourrai être bref puisque, lors du second tour de plaidoiries, l'Argentine n'a introduit en substance aucune vraie nouveauté dans le débat. L'Argentine ne bouge pas d'un iota de la position prise auparavant (ou faut-il parler de parti pris ?). Elle répète, elle répète, elle répète encore et toujours, sans la moindre retenue, que, l'Uruguay ayant violé d'après elle ses obligations prévues par le statut, l'Argentine serait en droit d'obtenir pour l'essentiel une seule et unique chose : le démantèlement de l'usine au titre de la *restitutio in integrum*<sup>129</sup>. Aucun autre remède, y compris la cessation et l'indemnisation, ne saurait prendre la place de l'ordre que la Cour devrait impartir à l'Uruguay de démanteler Botnia. Il ne faut pas se leurrer, en effet : en aucun cas de figure il ne pourrait revenir à la Cour de décider que l'usine doit être transférée ou réaffectée, comme semblent le suggérer nos contradicteurs<sup>130</sup>. En somme, pour l'Argentine, la seule issue possible de la présente procédure est le démantèlement et rien de moins : ceci tant en cas de violation des seules obligations procédurales, que des seules obligations substantielles, que des deux ensemble ; quelle que puisse être leur gravité ; et même si de telles violations n'avaient pas le moindre effet nocif sur l'écosystème fluvial.

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<sup>129</sup> CR 2009/12, p. 24, par. 27 (Ruiz Cerutti) ; CR 2009/14, p. 21, par. 28 (Kohen) ; CR 2009/15, p. 42, par. 16 (Müller) ; CR 2009/21, p. 35, par. 42 (Sands), p. 55 et suiv., par. 5 et suiv. (Pellet).

<sup>130</sup> CR 2009/21, p. 55, par. 8 (Pellet).

2. Monsieur le président, l'Uruguay ne peut pas ne pas remarquer à nouveau avec tristesse et étonnement ce leitmotiv obsessif, cet acharnement à répéter inlassablement : «Delenda Carthago !», «Delenda Carthago !», «Carthage doit être détruite !» Il faut l'avouer, Messieurs de la Cour : un tel acharnement apparaît à la Partie uruguayenne difficilement conciliable avec l'esprit d'amitié entre les deux pays qu'a invoqué, lors de ses conclusions de mardi dernier, l'agent de l'Argentine, Mme l'ambassadeur Ruiz Cerutti<sup>131</sup>. Heureusement la décision de votre Cour est imminente : la sagesse de la Cour pourra, il faut l'espérer vivement, aider à faire revenir au beau fixe les relations entre les deux pays, actuellement troublées par cette affaire.

3. Monsieur le président, il n'est certainement pas le cas de reprendre en détail à ce stade tardif la démonstration que j'ai eu l'honneur de présenter à la Cour au premier tour de plaidoiries concernant les remèdes demandés par l'Argentine, qui resteraient inappropriés, inéquitables, excessifs et radicalement disproportionnés même si, par impossible, votre Cour devait décider de faire droit à telle ou telle conclusion de la Partie adverse concernant les violations du statut dont l'Uruguay serait prétendument responsable. Ainsi, dans les minutes qui suivent je vais d'abord me borner à trois remarques rapides afin de réfuter certains arguments proposés dernièrement par nos contradicteurs, au sujet justement des remèdes demandés par l'Argentine. Ensuite je reviendrai un peu plus longuement sur la demande présentée par le défendeur visant à ce que votre Cour reconnaisse explicitement que l'Uruguay a le droit de faire poursuivre le fonctionnement de l'usine de pâte à papier et que l'Argentine a l'obligation de respecter un tel droit.

#### **A. Quelques commentaires au sujet des remèdes demandés par l'Argentine**

4. Quant aux remarques relatives aux remèdes demandés par l'Argentine, la première est celle-ci. La Cour se souvient certainement des propos présentés par l'Uruguay faisant valoir que la présence dans le statut des articles 42 et 43 confirme que le remède ordinaire, en cas de violation des obligations substantielles du statut, est l'indemnisation et pas la restitution<sup>132</sup>. Le professeur Pellet s'inscrit en faux contre cet argument. Pour lui, ces dispositions n'auraient rien à voir avec la responsabilité internationale des Etats pour fait illicite. L'article 43 — affirme-t-il —

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<sup>131</sup> CR 2009/21, p. 67, par. 24 (Ruiz Cerutti).

<sup>132</sup> CR 2009/19, p. 53, par. 22 (Condorelli).

«concerne clairement non pas les relations entre les deux Etats, mais les conséquences des infractions commises par les utilisateurs et relevant de la juridiction respective des parties»<sup>133</sup>. Cependant, ce propos n'est pas du tout convaincant. Il suffit de lire avec attention l'article cité pour se rendre compte qu'il en va tout autrement. Certes, il est indéniable qu'il y est question des infractions commises par les utilisateurs, mais pas seulement : il y est écrit en toutes lettres que l'exercice de la juridiction de la part de l'un des deux Etats à l'égard de «toute infraction en matière de pollution» ne préjuge d'aucune façon le droit de l'autre partie «à être indemnisée des dommages qu'elle a également subis par suite de cette infraction». Ce droit de chaque Etat à être indemnisé lors de comportements illicites attribuables à l'autre partie doit naturellement être entendu à la lumière du principe inscrit à l'article 42, qui envisage clairement une responsabilité d'Etat à Etat.

5. J'en viens à ma deuxième remarque. Elle concerne l'usage abusif que tente de faire le demandeur de l'ordonnance de votre Cour du 13 juillet 2006 relative à la demande de l'Argentine en indication de mesures provisoires, s'agissant de discuter la question de savoir si le remède de la restitution est en l'espèce disproportionné ou pas. Mardi dernier, en effet, le professeur Pellet a repris encore la thèse inédite qu'il avait déjà exposée lors du premier tour de plaidoiries, d'après laquelle l'évaluation du caractère proportionné ou non de la restitution ne devrait pas se faire au présent, mais en se rapportant à une sorte de «date critique» qui serait, au plus tard, celle de l'ordonnance de votre Cour que je viens de citer. Pour essayer de rendre plus crédible une thèse qu'il n'a appuyée sur aucun élément de la pratique internationale (sans doute parce qu'il n'en existe pas), le professeur Pellet fait valoir maintenant que l'Uruguay se trouverait soumis à une sorte d'*estoppel* qui découlerait de la position qu'il avait prise lors de la procédure relative aux mesures provisoires. D'après mon éminent contradicteur et cher ami, l'Uruguay «s'est engagé alors à se conformer à un ordre de démantèlement ou de cessation d'activité»<sup>134</sup>. Il s'ensuivrait alors que «de bonne foi, l'Uruguay ne peut aujourd'hui se dédire et soumettre la Cour (et le demandeur) au chantage du «dommage colossal»»<sup>135</sup> : l'idée est que le prix de la *restitutio in integrum* peut être devenu colossal aujourd'hui, alors qu'il ne l'était sans doute pas en 2006.

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<sup>133</sup> CR 2009/21, p. 52, par. 4 (Pellet).

<sup>134</sup> CR 2009/21, p. 55, par. 7 (Pellet).

<sup>135</sup> CR 2009/21, p. 55, par. 7 (Pellet).

6. Cette théorie est très imaginative, mais elle n'a aucun fondement. Il est vrai, en effet, que dans l'ordonnance du 13 juillet 2006 la Cour a dit qu'elle ne pouvait pas exclure d'avance la possibilité d'un jugement final ordonnant que l'usine doit être éliminée ou modifiée<sup>136</sup>. Il est vrai aussi que l'Uruguay a reconnu à la Cour le pouvoir de prescrire de telles mesures, en acceptant l'idée que le démantèlement de l'usine pourrait représenter dans certains cas extrêmes le remède approprié, mais ceci seulement face à d'éventuels faits illicites d'une exceptionnelle gravité : à savoir, si par impossible la Cour devait constater qu'il s'agit là de la seule option envisageable aux fins de la protection de l'environnement du fleuve Uruguay, la construction et le fonctionnement de l'ouvrage en question étant radicalement incompatibles avec les obligations substantielles prescrites par le statut. L'Uruguay, cependant, n'a jamais accepté de considérer le démantèlement de l'ouvrage comme un remède approprié et proportionné qui serait applicable dans tous les cas de violations du statut, en particulier face à la violation d'obligations procédurales.

7. La troisième remarque, elle concerne le rapport qui devrait subsister, d'après l'Argentine, entre le remède de la restitution et l'indemnisation. On sait que le demandeur accorde la primauté absolue, sinon l'exclusivité, à la restitution, celle-ci devant comporter nécessairement, à son avis, l'annulation des autorisations de construire les usines et toutes les installations connexes, ainsi que leur démantèlement<sup>137</sup>. L'Argentine fait cependant valoir qu'elle aurait droit aussi à l'indemnisation, mais elle accorde à celle-ci un rôle pouvant être qualifié d'ancillaire : en effet, l'indemnisation n'est pas envisagée en tant qu'alternative possible à la restitution, mais elle est demandée exclusivement en tant qu'accessoire, afin de compléter la réparation due. Lors des plaidoiries le professeur Pellet a indiqué que le demandeur maintient cette thèse qui figure dans les conclusions de la République argentine présentées par son agent mardi dernier<sup>138</sup>.

8. Une telle manière de concevoir les remèdes auxquels l'Argentine soutient d'avoir droit mérite d'être prise attentivement en considération par votre Cour. L'Uruguay demande à la Cour de noter que le demandeur refuse ouvertement l'idée que l'indemnisation puisse lui être accordée à la place et en substitution de la restitution, puisque d'après lui «[s]eul le démantèlement de l'usine

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<sup>136</sup> *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 133, par. 78.

<sup>137</sup> Mémoire de l'Argentine (MA), par. 8.23-8.24 ; réplique de l'Argentine (RA), par. 5.3.

<sup>138</sup> CR 2009/15, p. 53, par. 20 (Pellet) ; CR 2009/21, p. 55, par. 9 (Pellet).

et de ses installations connexes ... est de nature à rétablir le *statu quo ante*»<sup>139</sup>. Il s'ensuit alors, dans cette logique, que si par impossible la Cour devait décider que l'Uruguay a violé ses engagements internationaux prévus par le statut, mais elle devait refuser d'accorder à l'Argentine le remède principal qu'elle demande, du même coup le remède ancillaire de l'indemnisation tomberait avec, puisque d'après le demandeur l'indemnisation ne saurait avoir un but autre que celui de servir en tant que complément de la restitution.

9. Monsieur le président, j'en ai terminé avec les commentaires portant sur les remèdes demandés par l'Argentine. Des commentaires à qualifier encore une fois — vous l'avez bien compris — comme purement académiques et subsidiaires, puisque l'Uruguay est convaincu que la Cour ne pourra que rejeter toutes les demandes dont la Partie adverse l'a saisie.

### **B. La reconnaissance par la Cour des droits de l'Uruguay**

10. J'en viens donc tout à fait logiquement à la requête présentée par le défendeur visant à ce que votre Cour ne se borne pas à rejeter les demandes présentées par l'Argentine, mais qu'en sus elle déclare explicitement que l'Uruguay a le droit, conformément au statut de 1975, de maintenir en fonctionnement l'usine Botnia et que l'Argentine a l'obligation de ne pas entraver la jouissance d'un tel droit. L'Uruguay est convaincu, en effet, qu'en tirant au clair de façon absolument nette quels sont les droits de l'Uruguay et les obligations de l'Argentine, la Cour pourrait contribuer remarquablement au règlement du différend en éliminant tout doute risquant de le prolonger à l'avenir. L'importance que l'Uruguay accorde à une telle déclaration a été abondamment illustrée dans la duplique du défendeur ainsi que dans l'une des plaidoiries de M<sup>e</sup> Reichler de la semaine dernière<sup>140</sup>. S'il apparaît nécessaire de revenir maintenant sur ce thème, c'est surtout pour répondre à l'objection formulée par le professeur Pellet, qui a allégué que la demande de l'Uruguay serait «irrecevable aux termes de l'article 80 du Règlement», puisqu'elle constituerait en fait une «demande reconventionnelle déguisée»<sup>141</sup>.

11. Dans l'ordonnance du 17 décembre 1997 en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide*, votre Cour a dit

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<sup>139</sup> MA, par. 8.24 ; les italiques sont de moi.

<sup>140</sup> Duplique de l'Uruguay (DU), p. 401-406, par. 7.30-7.40 et CR 2009/19, p. 42, par. 23 (Reichler).

<sup>141</sup> CR 2009/21, p. 57, par. 12 (Pellet).

«qu'une demande reconventionnelle présente, au regard de la demande de la partie adverse, un double caractère ; qu'elle en est indépendante dans la mesure où elle constitue une «demande» distincte, c'est-à-dire un acte juridique autonome ayant pour objet de soumettre une prétention nouvelle au juge, et, qu'en même temps, elle s'y rattache, dans la mesure où, formulée à titre «reconventionnel», elle riposte à la demande principale ; que le propre d'une demande reconventionnelle est ainsi d'élargir l'objet initial du litige en poursuivant des avantages autres que le simple rejet de la prétention du demandeur» (*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), demandes reconventionnelles, ordonnance du 17 décembre 1997, C.I.J. Recueil 1997, p. 256, par. 27*).

12. Grâce à cet enseignement de votre haute juridiction, il est aisé de mettre en évidence que la demande de l'Uruguay n'a nullement le caractère d'une demande reconventionnelle : il est clair, en effet, qu'en priant la Cour de déclarer que l'Uruguay a le droit de continuer l'exploitation de l'usine Botnia le défendeur n'introduit aucune demande «distincte» par rapport à la demande introduite par l'Argentine, par laquelle le demandeur conteste justement le droit de l'Uruguay, en arguant que la construction et le maintien en fonction de Botnia constitueraient des violations du statut. Encore moins par sa demande l'Uruguay tente «d'élargir l'objet initial du litige» en présentant une «prétention nouvelle» et «autonome». Bien au contraire, le droit dont l'Uruguay demande la reconnaissance est déjà soumis à la Cour dans la présente affaire : il est même au cœur du différend que votre Cour est appelée à régler suite à la requête de l'Argentine.

13. Il convient de rappeler encore une fois ce que votre Cour a souligné avec une clarté exemplaire dans son ordonnance du 23 janvier 2007 relative à la demande de l'Uruguay en indication de mesures provisoires. La Cour y a reconnu que «tout droit que peut avoir l'Uruguay de poursuivre la construction de l'usine Botnia et de mettre celle-ci en service, conformément aux dispositions du statut de 1975, en attendant une décision définitive de la Cour, constitue effectivement un droit invoqué en l'espèce» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 23 janvier 2007, C.I.J. Recueil 2007, p. 10-11, par. 29*) ; et la Cour d'ajouter : «les droits que l'Uruguay invoque dans sa demande, et qu'il cherche à protéger aux termes de celle-ci ... possèdent un lien suffisant, aux fins de la présente procédure, avec le fond de l'affaire» (*ibid.*, p. 11, par. 30). En somme, contrairement à ce que prétendent nos contradicteurs, l'Uruguay ne présente pas une demande «nouvelle» et «distincte» par rapport à celle de l'Argentine, il ne joue aucunement le jeu de l'élargissement de l'objet du différend : bref, il n'y a en l'espèce aucune demande

reconventionnelle, déguisée ou pas déguisée. L'objection avancée par la Partie adverse ne saurait donc être retenue par la Cour.

14. Monsieur le président, l'Uruguay est bien conscient que, depuis le dépôt de sa duplique, votre Cour a eu l'occasion de se pencher sur une demande similaire présentée par le défendeur dans une autre affaire ; et l'on sait que la Cour a rejeté une telle demande en considérant, en particulier, que les motifs de l'arrêt par lequel les prétentions du demandeur avaient été repoussées suffisaient en principe pour identifier avec précision les obligations de celui-ci et les droits du défendeur, s'agissant de questions qui avaient été «soulevées ... et débattues entre les Parties tout au long de la procédure» (*Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt du 13 juillet 2009, par. 154). La sagesse dont cet enseignement est empreint est évidente. Toutefois, le cas présent se caractérise à ce sujet par des particularités qui suggèrent — de l'avis de l'Uruguay — une approche sensiblement différente.

15. Dans notre cas, en effet, les dangers de prolongement de la controverse au-delà de l'imminente décision de la Cour risquent de dépendre spécialement d'attitudes argentines que le défendeur n'a pas cessé de dénoncer, y compris devant votre haute juridiction. Votre Cour ne saurait ignorer ce qui est notoire, à savoir qu'en Argentine certains milieux manifestent une attitude ouvertement hostile à l'égard de la grande initiative industrielle relative à l'exploitation des ressources naturelles de l'Uruguay qui est au cœur du présent différend. Et on sait bien aussi qu'il existe, du côté argentin, une attitude de soutien, ou tout au moins de tolérance bien évidente, en faveur du segment de l'opinion publique argentine manifestant davantage d'opposition active à l'encontre de l'initiative uruguayenne en question, y compris par des moyens manifestement illégaux, tel le blocage de ponts internationaux enjambant le fleuve Uruguay et reliant le territoire uruguayen au territoire argentin. Le risque que les attitudes dénoncées survivent après le règlement du différend par votre Cour est sérieux et ne saurait être sous-évalué : nombreux sont d'ailleurs, malheureusement, les indices présageant de cette persistance : ainsi, par exemple, les manifestants qui bloquent depuis des années, et encore maintenant, le pont General San Martín proclament publiquement qu'ils continueront leur «lutte» contre Botnia quel que sera votre arrêt<sup>142</sup>. Dans ces

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<sup>142</sup> «Argentine Pulp Mill Protestors Promise to «Fight on» Whatever the Hague Ruling», *Merco Press*, 7 septembre 2009 (<http://en.mercopress.com/2009/09/07>).

conditions, il serait précieux — si la demande introduite par l'Argentine est rejetée — que la Cour indique au demandeur de façon explicite qu'il a l'obligation de ne pas entraver la jouissance du droit que votre Cour aura reconnu à l'Uruguay et que, dans ce but, le demandeur doit prendre toutes les mesures nécessaires pour éviter qu'une telle jouissance ne soit gênée par des obstacles qu'il est dans son pouvoir d'éliminer.

16. Monsieur le président, du déroulement de la phase orale de la présente procédure l'Uruguay n'a malheureusement pas pu dégager des indications lui permettant de se sentir rassuré par rapport à la préoccupation que le différend que votre Cour est appelée à régler puisse se prolonger au-delà de votre imminente décision. D'une part, du côté du demandeur n'est venu le moindre mot assurant à la Cour et à l'Uruguay que, si la demande de l'Argentine est rejetée et le droit de l'Uruguay de continuer à maintenir en activité Botnia est reconnu, l'Argentine respectera scrupuleusement ce droit et prendra toutes les dispositions en son pouvoir afin d'éviter des entraves à son exercice.

D'autre part, votre Cour a pu entendre l'agent de l'Argentine déclarer mardi dernier que ce qu'elle appelle la «réaction» des manifestants auteurs des blocages de ponts internationaux «n'est que la conséquence de l'installation de l'usine sur la rive gauche du fleuve Uruguay»<sup>143</sup> ; ce qui semble justifier la prévision que, si votre Cour refuse d'ordonner le démantèlement de Botnia, la «réaction» continuera comme les manifestants le promettent haut et fort, et, avec elle, continuera aussi le refus bienveillant des autorités argentines de prendre des mesures adéquates pour y mettre un terme. Ne s'agit-il pas de raisons supplémentaires qui devraient amener votre Cour à faire droit à la demande de l'Uruguay à ce sujet, telle qu'elle sera articulée dans un instant par l'agent de l'Uruguay ?

### **C. Conclusion**

17. Mais il est grand temps maintenant que l'agent de la République orientale de l'Uruguay, l'ambassadeur Gianelli, vienne présenter à la Cour les conclusions du défendeur. Il ne me reste quant à moi qu'à dire combien je me sens honoré d'avoir pu comparaître encore une fois dans ce

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<sup>143</sup> CR 2009/21, p. 67, par. 25 (Ruiz Cerutti).

prétoire, et combien je suis reconnaissant de l'attention que vous avez bien voulu me réserver. Monsieur le président, Messieurs les juges, je vous remercie beaucoup.

The VICE-PRESIDENT, Acting President : Je remercie Monsieur le professeur Condorelli, and I give the floor to His Excellency Ambassador Carlos Gianelli for his concluding remarks and final submissions. You have the floor, Sir.

Mr. GIANELLI:

### **CONCLUDING REMARKS AND SUBMISSIONS**

1. Mr. President, distinguished Members of the Court, it is an honour and a privilege to address you once again, this time to close not only Uruguay's second round, but also the oral proceedings in this case.

2. We are a long way from the early days of June 2006 when we all first appeared before you on Argentina's request for the indication of provisional measures. Then, and at all times since, Uruguay has been truly overwhelmed by the commitment to justice the Court has displayed. I know I speak for all our delegation when I express my gratitude to you, Mr. President, to the Members of the Court, to the Registrar and Madam Deputy-Registrar including their remarkable staff, to the interpreters, and to each and every one who works here.

3. Mr. President, when I first stood before you ten days ago, I spoke of the sadness that I and all Uruguayans felt at finding ourselves here confronting a neighbour with whom we share an unbreakable bond, which is not based only in economic and commercial ties but also in a strong historical, social and cultural relationship. Although that sadness remains palpable, our dominant emotions today are relief and pride. We are relieved that this terrible knot our relationship with Argentina is now, finally, after three years, on the verge of being cut. We have confidence that when the Court issues its judgment, it will be a just and equitable one.

4. We are proud of our team, Uruguayans and non-Uruguayans, great advocates and experts, which has demonstrated its unflinching commitment not only to this case, but also to the Court and the rules by which proceedings before it are conducted.

5. We are also proud to have had this opportunity to prove to the Court, and to the world, our commitment to sustainable development, both of the Uruguay river and our country as a whole.

6. Mr. President, it is a remarkable thing that a small developing country like ours has made the protection of the environment such a high priority, and that it has insisted that Botnia employ only the most modern methods and technologies in its plant. Uruguay has permanently insisted on it. It could not be otherwise. The protection of the environment has constitutional status in Uruguay and the principle of sustainable development is also incorporated in our law, which states that it is the fundamental duty of the State, and public entities in general, to promote a model of environmentally sustainable development, protect the environment, and were it to be damaged, recover it or demand that it be repaired.

7. Mr. President, Members of the Court, the manner in which Uruguay has managed the implementation of the Botnia plant not only comports with our domestic laws, it is also entirely consistent with our obligations under the 1975 Statute of the River Uruguay. As I promised they would in my opening speech, Uruguay's counsel have now presented the Court with a substantial volume of evidence, much of it from Argentine official sources, that proves, beyond the shadow of a doubt, that Uruguay has met all of its obligations under the Statute.

8. With respect to the environmental issues you have just heard about again from Mr. Reichler, it is absolutely clear that the Botnia plant has caused no pollution of the Uruguay river, nor has it caused any effects on the ecosystem of the river as a whole. Even with the partial reverse flows we all have now heard so much about, the assimilative capacity of the Uruguay river is considerable. It can easily handle the modest amount of effluents Botnia discharges. We are talking about the twenty-fifth largest river in the world, not the babbling stream Argentina has portrayed.

9. These conclusions are not Uruguay's alone. They are shared by the one and only independent voice to be heard in these proceedings, that is the IFC and the independent experts retained at its direction. This report has been endorsed by the Board of Executive Directors of the World Bank in November 2006, when it approved the loan to finance the Botnia project by all its members, with the sole exception of Argentina's Executive Director.

10. Argentina's entire environmental case is built around the alleged contribution of the Botnia plant to a single, one-day algal bloom, in February 2009, that apparently did not even cause any measurable harm. Yet, as Uruguay has now conclusively shown, there is absolutely no scientific basis on which to conclude that Botnia caused, or even contributed to the bloom. As this claim falls, so too does the entirety of Argentina's environmental case.

11. With respect to the procedural issues, the evidence is equally clear. Even setting aside the very real and substantial evidence showing that Argentina long ago agreed that the Botnia plant could and would be built, the indisputable fact remains that Argentina was consulted at great length and provided a tremendous amount of information about the plant before construction activities were begun. Uruguay's negotiations in the GTAN process show its willingness to participate in the resolution of the dispute, and Argentina's refusal to articulate clearly its environmental and technical concerns suggests that other considerations motivated its actions.

12. Neither Uruguay nor Argentina is obligated to achieve agreement prior to authorizing constructions of a project on the river. The notice and consultation mechanism in the Statute does not require prior approval for a project to go forward. Actually, this would be giving a veto right to the other party which would give them an easy opportunity to obtain benefits as the price of consent.

13. Mr. President, Uruguay's main conclusion in these hearings is that Argentina may not have a case, but it does have a target. That target is the Botnia plant. It will not have escaped the Court's notice that all of Argentina's arguments are designed to support just a single contention: the plant must be dismantled. Nothing else will be sufficient as Professor Condorelli has just explained very clearly.

14. In 2006 Argentina requested His Majesty the King of Spain to lead a facilitation process, which of course Uruguay accepted. But this process did not succeed for the very same reason: Argentina's only concern was the plant's relocation, even though there were other important issues to consider.

15. Mr. President, Members of the Court, by itself, this extreme position shows that Argentina's agenda is less about protecting the environment, or ensuring the integrity of the Statute, than it is about to deny Uruguay's right to make an equitable use of the river. We know

that Argentina has over 100 industrial enterprises on or near the Uruguay river, pouring thousands of tons of phosphorus each year to the river, so contrary to what Argentina stated, pollution is linked not to the size of the plant, but to the technology used.

16. In the spirit of rekindling the co-operation that always characterized our relationship before 2006, Uruguay reiterates the offer it has now made too many times to count to resume the joint monitoring of the Uruguay river with Argentina. Although perhaps it is true that co-operation between our two countries is generally close, the monitoring of the river remains a glaring and wholly unnecessary exception.

17. Argentina's persistent refusal to participate in joint monitoring is inexplicable, not to mention inconsistent with its commitments in CARU. It is even harder to understand given that, for a tiny fraction of the resources it has devoted to this case, it could easily have supported its share of a comprehensive monitoring programme and at the same time taken concrete steps to address its own nutrient discharges into the river. This is exactly what Uruguay has done, even as it has been saddled with the entirely counterproductive costs associated with defending this senseless case.

18. Besides, it is obvious that the existence of a pending dispute before this Court does not release the Parties from complying with the obligation to protect and conserve the aquatic environment and to provide comprehensive protections to the river, established in the Uruguay River Statute.

19. The resumption of joint monitoring would not only be a powerful demonstration of our countries' respect for the principle of good neighbourliness and international co-operation, it would also directly help to ensure that the river remains a vital and viable resource for the sustainable development of both our countries. In addition to these obvious virtues, the results of the joint monitoring Uruguay proposes would also, by definition, be undisputed and would assist the Parties in addressing whatever real issues, if any, there might be that require addressing.

20. Mr. President, Members of the Court, Uruguay confidently places itself in the hands of this very distinguished institution. Of all countries in the world, Uruguay has the oldest optional clause declaration still in force, first submitted to the Permanent Court of International Justice in 1921. We have never wavered in our trust in, and respect for, this Court's judgment. As our

distinguished first Agent, Professor Gros Espiell, assured the Court at our very first session in June 2006, Uruguay will fully comply with whatever judgment the Court may, in its great wisdom, render. On behalf of the Government of Uruguay, I reiterate that commitment today.

#### **SUBMISSIONS OF URUGUAY**

21. Finally, Mr. President, on the basis of the facts and arguments set out in Uruguay's Counter-Memorial, Rejoinder and during the oral proceedings, 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.

22. Mr. President, Members of the Court, thank you for your kind and patient attention. Uruguay's oral pleadings are now ended.

The VICE-PRESIDENT, Acting President: Thank you, Ambassador Gianelli. The Court takes note of the final submissions which you have just read on behalf of the Eastern Republic of Uruguay, as it took note of the final submissions of the Republic of Argentina on Tuesday 29 September 2009.

This brings us to the end of the three weeks of hearings devoted to the oral arguments in this case. I should like to thank the Agents, counsel and advocates of the two Parties for their statements during these past three weeks. In accordance with the usual practice I shall request both Agents to remain at the Court's disposal to provide any additional information the Court may require.

With this proviso, I now declare closed the oral proceedings in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its judgment.

As the Court has no other business before it today, the sitting is now closed.

*The Court rose at 12.25 p.m.*

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