River of Discontent: Argentina and Uruguay before the International Court of Justice

Brian Spiegel
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I. INTRODUCTION

FOR decades the neighboring South American countries of Argentina and Uruguay enjoyed a peaceful and economically beneficial relationship. But that changed beginning in 2003 when Uruguay announced its decision to allow Spanish company ENCE/CMB to construct a pulp mill on its side of the River Uruguay—the natural boundary between the two countries. The claimed unilateral decision by Uruguay immediately troubled Argentina and its citizens, who feared that the pulp mill would pollute the area and cause problems to some of Argentina’s most important economic resources, such as fishing and tourism. Uruguay’s decision months later to allow for the construction of the Swedish-developed Botnia mill in the same area—also allegedly unilateral—sent Argentina into an uproar.

Argentina claimed that Uruguay violated the 1975 Statute of the River Uruguay (1975 Statute) while Uruguay countered that the country had followed all the steps required by the 1975 Statute.1 After failing to reach an agreement amicably, Argentina, pursuant to the 1975 Statute, initiated proceedings with the International Court of Justice (ICJ).2 Meanwhile, the citizens of Gualeguaychú, an Argentine town twenty-five kilometers west of the construction sites, began blockading bridges that connect Argentina and Uruguay in hopes that the construction would be unable to continue. When the Argentine government did little to stop the blockades, Uruguay initiated its own proceedings with the ICJ pursuant to the 1975 Statute.

This paper begins by detailing the 1975 Statute and how it applies to the contentious dispute between the two countries. It will then focus on

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the significance of the countries' actions in relation to their geographic location and economic relationship. Next, this paper discusses the current litigation before the ICJ, from the initial application by Argentina to the possible outcome, which is not expected until at least 2009. It will then change sides and look at the confrontation from the Uruguayan perspective, again beginning with the country's claims and ending with the its request for provisional measures. Finally, this paper will ask, and hopefully answer, whether the relationship between Argentina and Uruguay can possibly be salvaged, how the potential outcome of the ICJ proceedings will affect both countries, and whether new Argentina president Christina Kirchner offers hope for the future.

II. 1975 STATUTE

On February 26, 1975, Argentina and Uruguay signed the Statute of the River Uruguay "in order to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay."3 Because the two countries are within such close proximity to one another, and separated only by the River, it would not be difficult for one country's decision concerning use of the river to have an impact on the other. Thus, the purpose of the 1975 Statute was to prevent either of the two countries from unilaterally making a decision that could adversely affect the other country or the quality of the river.4

The 1975 Statute created the Administrative Commission of the River Uruguay (CARU), an administrative commission made up of an equal number of representatives from each country.5 CARU governs everything "from maintenance of the bridges that span" the river to conservation of fishing resources to environmental questions.6 Once CARU is notified by the acting country of its plans, consultations are deemed to have begun between that country and the notified country.7 In most situations the notified party will not raise a concern and the acting country can continue with the project.8 But if the notified party has an objection, the 1975 Statute calls for 180 days of direct negotiations between the two countries.9 If after 180 days no agreement can be reached between the countries either party may proceed before the ICJ.10 A major source of Argentina's anger stems from its belief that Uruguay disregarded the ob-

4. Id.
5. Id. at 341, art. 7. Article 7 obligates a party to notify the Commission if the country "plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the regime of the river or the quality of its waters." Id. (emphasis added).
7. Id.
8. Id.
9. Id.; 1975 Statute, supra note 3 at 341, arts. 8, 11.
ligatory notification process, a belief Uruguay refutes.11

III. ECONOMIC AND GEOGRAPHIC SIGNIFICANCE

Brought into focus by the pulp mill dispute is the eastern portion of Argentina and western portion of Uruguay, with the main area under the microscope being the twenty-five to thirty-five kilometers the River Uruguay covers. The city of Gualeguaychú, Entre Ríos is located near the international Libertador General San Martín Bridge approximately thirty-five kilometers west of the Uruguayan city of Fray Bentos, the location of the Botnia pulp mill and the proposed location of the ENCE mill. Separating Gualeguaychú and Fray Bentos is the River Uruguay, and it is common to find citizens of either country employed in the other. Moreover, it is common for tourists to visit either country and commute between the two by way of the connecting bridges.

Argentina's concerns are twofold and relate to the geographic location of Fray Bentos: a concern for the quality of the river, a natural resource relied on by fishermen and citizens of their country, and a concern for the potential economic impact on tourism in the Entre Ríos region. But whether the 1975 Statute covers both of these concerns has been an issue argued during litigation. Uruguay has claimed that the 1975 Statute only covers the direct effect of the pulp mill, mainly potential water pollution.12

While the potential economic and environmental damage done to Argentina may turn out to be huge, Uruguay stands to benefit significantly from the pulp mills. When the announcement was made that there would be two mills constructed in Uruguay it represented the largest foreign investment in the history of the country.13 The effect was felt immediately as the Uruguayan citizens began to benefit from the thousands of jobs created by the construction of the mills.14 Additionally, it was claimed that the economic impact of the mills in Uruguay would result in an increase of 2 percent of the country's gross domestic product.15 It is not difficult to see why both countries care so much about the outcome of the dispute.

IV. THE INTERNATIONAL COURT OF JUSTICE

A. The Application Process

Only two types of cases come before the ICJ: contentious cases, like the one between Argentina and Uruguay, and advisory proceedings.16

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11. July Order, supra note 1, at 2, 10; Argentina Application, supra, note 2.
13. Id. at 12.
14. Id.
15. Id. It is estimated the mill could have an economic impact of $350 million annually. Id.
Contentious cases are legal disputes brought only by states that are members of the United Nations while advisory proceedings are answers to legal questions before the Court. In order for the ICJ to control a given case, both states have to agree to the Court’s jurisdiction through either a special agreement between the countries, a jurisdictional clause found in a statute, a treaty that calls for the Court’s involvement upon a dispute between the two countries, or a declaration made by both countries.\(^{17}\) The ICJ has jurisdiction over a dispute between Argentina and Uruguay by way of the 1975 Statute. Specifically, article 60 of the Statute allows for “[a]ny dispute concerning the interpretation or application of the… 1975 Statute which cannot be settled by direct negotiations [to] be submitted by either party to the [ICJ].”\(^{18}\)

Once jurisdiction is established, the Court requires a detailed application in order to institute proceedings. The application must state how the Court has jurisdiction – by way of treaty or declaration – over the facts of the dispute, and the requested outcome. Upon receipt of the application, the case is deemed opened, at which point both parties are required to exchange written arguments, or pleadings, with the other party that contains the facts and law each party will rely on.\(^{19}\) Finally, the parties argue orally in a public setting, after which the Court retires until it is ready to announce its decision.\(^{20}\) But the typical procedure is subject to exceptions, including a country’s request for provisional measures, an occurrence common and important in the dispute over the pulp mills.

B. Request for Provisional Measures

A decision by the ICJ can take years, at which time any harm caused by one of the countries could be irrevocable. To combat this problem the ICJ allows for the applicant state to submit a request for provisional measures if the state feels “that the rights which form the subject of its application are in immediate danger.”\(^{21}\) But the Court’s power to implement provisional measures is especially stringent, able to approve a request for provisional measures only “if there is an urgent need to prevent irreparable prejudice to the rights that are the subject of the dispute before the Court has had an opportunity to render its decision.”\(^{22}\)

While a request for provisional measures can be made at any time, it is customary (and some would say strategic) for the request to be submitted with the original application.\(^{23}\) According to commentators, because pro-

\(^{17}\) Id.
\(^{18}\) July Order, supra note 1, at 2.
\(^{19}\) Rules of Court, supra note 16, arts. 46, 49.
\(^{20}\) Id., arts. 53-72.
\(^{22}\) July Order, supra note 1, at 16 (emphasis added).
 provisional measures will only be granted in the most dire of circumstances, applicant states feel that their best chance of having their request granted is to submit their request with their application in order to show the extreme nature and urgency of the problem. Requests for provisional measures are also unique in that the Court does not need to reach a final decision on whether they have jurisdiction to hear the dispute. Instead, the Court need only determine that there is prima facie evidence that it has jurisdiction to deal with the merits of the case. Finally, a state that was denied provisional measures is not prevented from submitting future requests for provisional measures as long as that state feels relevant changes have been made since the Court denied its request.

V. ARGENTINA’S APPLICATION AND REQUEST FOR PROVISIONAL MEASURES

A. INITIAL RESPONSE: 2002-2003

In 2002, Argentina began to hear rumors that Uruguay had authorized the Spanish company ENCE to begin construction of a pulp mill near Fray Bentos. According to Argentina, it immediately requested information from Uruguay regarding the project, even though official confirmation of the construction had not been given. Argentina, concerned with the potential environmental impact of the mill, wanted Uruguay to provide an environmental impact study disclosing whether the mill would prove harmful in Argentine territory. Although refuted by Uruguay, Argentina stated that Uruguay’s delegates within CARU disregarded the requests.

In the second week of October 2003, Uruguay officially announced that it had authorized ENCE to construct the CMB pulp mill near Fray Bentos. A week later Argentina called an extraordinary session of CARU to request information regarding the project and implement the required consultation period. When Argentina alleged that Uruguay was intentionally avoiding the matter, Argentine Foreign Minister Jorge Taiana told the Foreign Affairs Commission of the Chamber of Deputies that "this has become a controversy at the [national] government level

24. Id. at 151-154.
25. Id.; July Order, supra note 1, at 15.
27. Rules of Court, supra note 16, art. 73; July Order, supra note 1 at 20; International Disputes, supra note 23.
29. Id.
30. Id.
31. The parties dispute the official date of announcement.
32. July Order, supra note 1, at 2; Argentina Application, supra note 2.
over the implementation and interpretation of the Statute."\textsuperscript{34}

B. THE ATTEMPT TO COMPROMISE AND THE ALLEGED AGREEMENT

On March 2, 2004, the Ministers of Foreign Affairs for both Argentina and Uruguay met in Buenos Aires with hopes of settling the dispute that had then reached over a year in length.\textsuperscript{35} The date of the meeting is essentially all that the two countries now agree on, with Uruguay claiming that an agreement was reached between the two countries\textsuperscript{36} and Argentina vehemently denying that such an agreement was reached.\textsuperscript{37} In its first round of oral hearings Uruguay stated to the Court that the two ministers had agreed on three things: (1) "[T]he CMB mill could be built according to Uruguayan plan"; (2) Argentina would be provided "with information regarding [the] specifications and operation" of the mill; and (3) once the mill became operational, CARU would monitor the quality of the water "in order to ensure compliance with the Statute."\textsuperscript{38} Furthermore, Uruguay claimed that the agreement discussed above was to be extended to the building of the second mill, the Botnia mill.\textsuperscript{39}

Argentina refuted Uruguay's claims when they spoke in front of the ICJ during the oral hearings. According to Argentina, the meeting "was nothing more or less than a meeting held in Buenos Aires by Ministers Bielsa and Opertti in which Argentina once again expressed its willingness to settle the dispute on the basis of compliance with the 1975 Statute."\textsuperscript{40} While Uruguay claimed that Argentina gave it permission during the March 2 meeting to construct the CMB mill according to its desires, Argentina asked in oral hearings why this alleged agreement was not put in writing.\textsuperscript{41} In fact, even the Uruguayan delegate to CARU admitted to only hearing about the agreement and never seeing a "protocol."\textsuperscript{42}

Argentina attempted to show the lack of knowledge the country had regarding the project as proof that no agreement existed. During the oral hearings Argentina asked the ICJ how it would be possible for the Foreign Minister to have given permission to Uruguay to continue the project when the country still had not received any of the information concerning the CMB mill that it had requested.\textsuperscript{43} Finally, as further proof that no agreement had been reached on March 2, Argentina pointed to the fact that it continued to ask Uruguay to abide by section 7 of the 1975 Statute even after the attempted settlement negotiations took place, asking the Court rhetorically "[w]hy if Argentina had given such

\textsuperscript{34} Malamud, \textit{supra} note 6, ¶ 14.
\textsuperscript{35} July Order, \textit{supra} note 1, at 11.
\textsuperscript{37} Argentina's First Round of Oral Hearings for May Request, \textit{supra} note 33, at 18.
\textsuperscript{38} July Order, \textit{supra} note 1, at 11.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
consent, did it continue to urge Uruguay to comply with Article 7?"

C. THE APPLICATION: ARGENTINA'S CLAIMS

On May 4, 2006, Argentina initiated proceedings by filing an application with the ICJ and a request for provisional measures. Argentina claimed that Uruguay had violated the 1975 Statute in a number of ways stemming from its unilateral authorization of the construction of two pulp mills on the River Uruguay by two separate European corporations. Argentina first complained that Uruguay had disregarded the 1975 Statute by failing to notify and consult through CARU. Because the construction of the mills was liable to affect the waters, Argentina said that Uruguay had no choice but to follow the steps laid out in the 1975 Statute, which included the obligatory notification of CARU. Argentina claimed that even after continued protests to both CARU and the Uruguayan government concerning "the environmental impact of the proposed mill," Uruguay not only disregarded its complaints but made the situation worse, "aggravat[ing] the dispute" by authorizing the construction of the Botnia plant in February 2005.

Argentina also expressed outrage over Uruguay's lack of consideration for the environment, pointing in its application to the environmental studies done for each of the mills. The National Directorate for the Environment of the Uruguayan Government (DINAMA) labeled the two projects near the River Uruguay "as projects presenting a risk of major negative environmental impact." Specifically, DINAMA pointed to the aquatic life and the dangers presented to one of Argentina's most important resources: fishing. In its report, DINAMA stated that "the process envisioned by [both] projects . . . is inherently polluting" and if looking solely at the area of the river that would likely be affected by the mills, "90 per cent of fish production" is located there - "over 4,500 tonnes per year," as well as a major area for migratory breeding. Argentina also had serious concerns with the amount of effluent expected to be released into the River Uruguay, the mill's distance from major cities, and "the inadequacy of the measures proposed for the prevention and reduction of the potential impact of liquid effluent, gas emissions and solid waste."

In its application Argentina asked for a number of declarations from the Court, including a finding that Uruguay engaged in wrongful conduct, that Uruguay must make amends for the injuries caused by Uruguay, and

44. Id.
45. Argentina Application, supra note 2.
46. July Order, supra note 1, at 2.
47. Id.
48. Id.
49. July Order, supra note 1, at 3.
50. Id.
51. Id.
52. Id.
that Uruguay breached a number of its obligations, ranging from the notification process of the 1975 Statute to the protecting of the wildlife and natural resources. Uruguay refutes all of the charges brought against them and states that the ICJ does not have jurisdiction over some of the claims brought by Argentina.

D. Argentina's Request for Provisional Measures

With no decision expected for at least three years from the time the application was submitted, Argentina requested, along with its application, that the ICJ grant immediate provisional measures. The tone of the request was similar to the application, noting both procedural and substantive issues. At the outset, the debate between the countries centered on what the ICJ could rule on.

1. Jurisdiction

Neither Argentina nor Uruguay disputed the fact that the ICJ had jurisdiction over the part of the dispute governed by the 1975 Statute. But Argentina believed that the 1975 Statute governed not only the direct impact the mills might have on the environment and natural resources but also covered the "obligations of the parties regarding the prevention of pollution and the liability resulting from damage inflicted as a result of pollution." In sum, Argentina believed that the 1975 Statute would cover any economic damage done to Argentina by way of the mill's pollution, including tourism.

Uruguay countered that the 1975 Statute, and therefore the ICJ's jurisdiction, does not cover "dispute[s] relating to the possible effects of the mills other than those relating to any impairment of the quality of the river waters, or . . . those stemming directly from such impairment by cause and effect." Uruguay expressly stated that the Court's jurisdiction does not cover the mill's impact on tourism unless the effect flowed directly from the alleged pollution of the water. On the second day of oral hearings, Argentina responded to Uruguay's jurisdictional claim by pointing to Article 42 of the 1975 Statute and "established international principles" and stating that the 1975 Statute did cover "economic and social consequences of the mills." In its decision regarding Argentina's request for provisional measures, the Court found that the dispute over what the 1975 Statute covered was inconsequential to its ruling.

53. July Order, supra note 1, at 3-4.
54. Id. at 10.
56. Id. at 10.
57. Id.
58. Article 42 states that "[e]ach Party shall be liable to the other for damages inflicted as a result of pollution caused by its own activities or by those carried out in its territory by individuals or legal entities." 1975 Statute, supra note 3, at 342, art. 42.
60. Id. at 15.
nouncing its judgment the Court stated that it only needed prima facie evidence that the Court would have jurisdiction, and it could withhold answering the more difficult questions until it ruled on the merits.61

2. Argentina’s Specific Request

It is difficult to tell what bothered Argentina most regarding Uruguay’s decisions, the lack of respect they felt Uruguay showed by disregarding the 1975 Statute, or the concerns for the country’s economic well being. Regardless, the request for provisional measures included charges related to both. As discussed, in order for a country to have its request for provisional measures granted, a showing of urgency is needed. Argentina’s request is filled with words such as “irreparable,” “irreversible,” and “inevitable” – words attempting to show the Court that if action is not taken immediately, harm will be done that cannot be repaired. Argentina noted in its request that the Court would need to find “a serious risk that irreparable prejudice or damage might occur.”62

Argentina’s request for provisional measures centers around the charge that Uruguay should never have begun construction in the first place. Now that Uruguay had begun construction, Argentina believed it needed to stop at least until proper environmental measures can be taken. Argentina stated both procedural and substantive obligations that caused such severe damage provisional measures were necessary, and pointed to the 1975 Statute for both. Article 4163 – laid out in the chapter on pollution – stated the substantive rights, while the procedural obligations stem from much of what has already been discussed, mainly the lack of notification.64

Argentina claimed at least two rights from the substantive obligations owed to the country were disregarded by Uruguay. First, Argentina was owed “the right that Uruguay shall prevent pollution.”65 Second, Argentina stated Uruguay had a duty to follow international standards.66 Included in this substantive obligation under the 1975 Statute was “Uruguay’s obligation not to cause environmental pollution or consequential economic losses, for example to tourism.”67

Procedurally, Argentina stressed that the construction of the mills should never have begun in the first place, but just because construction

61. Id.
62. Id. at 9.
63. Article 41(a) states that both parties to the 1975 Statute agreed “[t]o protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies.” 1975 Statute, supra note 3, at 342, art. 41(a).
64. July Order, supra note 1, at 8.
65. Id.
66. Id.
67. Id.
began does not mean that it cannot be ended. The specific rights claimed procedurally through the Statute are those we have seen before: Argentina had a right to be notified prior to Uruguay beginning construction, the views of Argentina must be considered by Uruguay, and the Court must resolve any differences before construction is to begin. In sum, according to Argentina, and incredibly important to the request for provisional measures as stated by the Court, article 9 established a 'no construction' obligation... But what makes the request for provisional measures different than a decision on the merits is the sense of urgency and need for immediate action. In the first round of oral hearings, Argentina stated that its rights from the substantive and procedural obligations discussed above "were under immediate threat of serious and irreparable prejudice." Pointing to the economic activities in the Entre Ríos region and the effects of the mills, Argentina claimed that the mills' construction was already taking its toll on tourism and property values.

Perhaps realizing that the mills' effects on tourism and economic activities, if found to be unlawful, could be fixed years later with monetary payments from Uruguay, Argentina directed the Court towards the fast-paced nature of the construction process and argued that once the Court ruled the mills would be complete. Looking specifically at the substantive rights claimed, Argentina stated that once the mills were built, dismantling them would not "restore" the right the country has to a protected river. Procedurally, Argentina argued that once the mills were complete "there would 'no longer be any obligation to be discharged.'" It is easy to see the argument Argentina was trying to make: what is the point of the 1975 Statute if one country can violate it and essentially be protected by the lengthy ICJ procedural process?

Because the Botnia mill was expected to be completed in August 2007 and the CMB mill completed in June 2008, the decision from the ICJ would come after both plants were completed. In this type of situation Argentina believed that the definition of "urgency" as required for provisional measures was different. The country argued before the ICJ that in a situation such as the one here – where the damage cited has a chance of occurring before the Court's decision on the merits – the term "urgency broadly merges with the condition [of the] existence of a serious

68. Id.
69. July Order, supra note 1, at 8.
70. Article 9 states that "[i]f the notified Party raises no objections or does not respond within the period established in article 8, the other Party may carry out or authorize the work planned." 1975 Statute, supra note 3, at 341, art. 9.
71. July Order, supra note 1, at 8.
72. Id. (internal quotes omitted).
73. Id.
74. Id. at 9
75. Id.
76. July Order, supra note 1, at 9.
risk of irreparable prejudice to the rights in issue.’’

Argentina’s final argument before the Court during the first round of oral hearings was that these conditions were met and the construction of the mills was “advancing at a rapid rate.”

3. Uruguay’s Response

As can be expected, Uruguay denied each claim made by Argentina. The issue of jurisdiction has already been discussed but should be underscored once more, if for nothing more than an understanding of how the case may come out on the merits. Uruguay’s initial argument before the Court was that in addition to the effects on tourism, the 1975 Statute does not cover the effects on property values, unemployment levels (the importance of fishing), and other professional activities.

After making its jurisdictional argument, Uruguay began arguing the basis of Argentina’s claims. In front of the Court Uruguay used its time to explain that the environmental impact studies and “strict licensing conditions imposed by Uruguayan law” made it nearly impossible for any harm to be caused to Argentina and the River Uruguay.

Uruguay first pointed to the Hatfield Report, a report prepared for the International Finance Corporation (IFC), which Argentina once used to bolster its claims. Argentina also attempted to use the Hatfield Report during oral hearings to show that Uruguay had not acted in accordance with the procedural obligations imposed by the 1975 Statute. When Uruguay’s turn came in front of the ICJ the country pointed to the conclusions reached by the Hatfield consultants. The independent report stated that “[c]omments expressing concern that the mills will cause catastrophic environmental damage are unsupported, unreasonable and ignore the experience in many other modern bleached kraft pulp mills.”

Additionally, the IFC commissioned a 221-page, extensive cumulative impact study (CIS) before deciding to lend money for the construction of the facilities. The CIS was incredibly favorable to Uruguay and included many important conclusions, two of which are specifically relevant. First, as to the pulp mill’s effect on tourism in Argentina, the CIS reported that any odors emanating from the plants will have no effect on tourism.

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77. Id.
78. Id.
79. Id. at 12.
81. Argentina’s First Round of Oral Hearings for May Request, supra note 33, at 42.
82. Uruguay’s First Round of Oral Hearings for May Request, supra note 80, at 18.
83. Id.
But the construction of the mills will be anything but aesthetically pleasing, and the report admitted that the mills will be seen as tourists cross over the International Bridge; however, it included many examples of tourism and pulp mills co-existing while stating its belief that the visuals will not pose harm.\textsuperscript{85} Second, the report stated that water quality should not be an issue due to the size of the River Uruguay.\textsuperscript{86} Because of the river depth, the effluent will be diluted by the water in all relevant places and, according to the report, should not cause problems to the citizens or aquatic life.\textsuperscript{87} After discussing the CIS, Professor Alan Boyle stated that "[n]one of the assessments . . . by the IFC has provided objective evidence that would meet even this threshold of potential harm, let alone one focused on irreparable damage."\textsuperscript{88}

Uruguay stated during oral hearings that its first priority is the maintenance and preservation of the environment as well as the health of the citizens of both Argentina and Uruguay.\textsuperscript{89} The country stressed that protecting the environment was a constitutional duty.\textsuperscript{90} To make sure that duty was performed, Uruguayan law created the Dirección Nacional de Medio Ambiente (DINAMA), an environmental agency to monitor construction projects that could potentially harm the environment.\textsuperscript{91} Before construction began on both plants and during the actual construction process, DINAMA required — as they do of all industrial projects — that the applicants meet a number of requirements: (1) the applicant must have an environmental impact study done and approved by DINAMA before construction can begin; (2) related to requirement one, no approval will be given by DINAMA to the applicant if the agency finds that the industrial facility will result in unacceptable harm to water quality, water resources, or the environment; (3) after construction but before operation the plant operator must obtain from DINAMA further approval, at which time the agency can require adjustments never before mentioned during the process; and (4) once the industrial facility is operational DINAMA will continue to monitor the environmental impact and must re-approve the facility every three years "in order to ensure [its] operating procedures [are] state of the art and provide the highest standard of environmental protection."\textsuperscript{92}

Uruguay argued that the Court must look at Argentina's request for provisional measures in the context of the DINAMA approval process.

\textsuperscript{85} \textit{Id.} According to the CIS "[t]he change to the landscape is permanent, however the public's response to these new industrial features is subjective and may evolve over time." \textit{Id.}
\textsuperscript{86} \textit{Id.} at 147.
\textsuperscript{87} \textit{Id.} at 147-48.
\textsuperscript{88} Uruguay's First Round of Oral Hearings for May Request, \textit{supra} note 80, at 24.
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.;} July Order, \textit{supra} note 1, at 12.
\textsuperscript{92} Uruguay's First Round of Oral Hearings for May Request, \textit{supra} note 80; See generally DINAMA homepage, http://www.dinama.gub.uy/.
At oral hearings, Uruguay's arguments mainly centered on the claim that for provisional measures to be ordered there must be current irreparable harm being done. 93 Therefore, Uruguay argued that the Court can only look at the harm (if any) currently being done by the construction process since harm done once the facilities were operational could be taken care of at a later time and by way of another request by Argentina. 94 Further, and relating to DINAMA, Uruguay noted that the agency would have to approve both plants before operations were to begin and the agency was currently monitoring the quality of the water during the construction process and had not found any problems as a result of the construction process. 95 As stated by Professor Boyle during oral hearings, "Argentina is in no position today to demonstrate an immediate and grave risk of irreparable harm due to pollution or the risk of pollution from plants whose completion and operation is far from imminent." 96

While Uruguay asserts that no violations to any of Argentina's rights have occurred, it certainly does not feel any harm has been done that warrants provisional measures. The 1975 Statute expressly allows for Argentina and/or Uruguay to use the River Uruguay for industrial purposes. 97 Describing Argentina's substantive right as one that consists of the right to "hold Uruguay to its obligation not to allow the cellulose plants that are now under construction to contaminate the river in violation of the Statute and the regulations promulgated by the Commission," Uruguay attempted to show how it was impossible that any urgent, irreparable harm was taking place. 98

Uruguay again pointed to the long list of requirements that must be met in order for the plants to become operational, including its own country's requirements concerning the water quality. 99 It then hypothetically asked the Court how it would be possible for Argentina's right to have been violated before answering it would not be possible unless the plants were operational. 100 This point was one which Uruguay relied on heavily during oral hearings and once again stresses the importance of urgency and the limiting circumstances in which provisional measures will be ordered. It also provides a glimpse at why Argentina stressed during oral

93. See July Order, supra note 1; Uruguay's First Round of Oral Hearings for May Request, supra note 80.
94. Uruguay's First Round of Oral Hearings for May Request, supra note 80.
95. Id.
96. Id. at 22.
97. 1975 Statute, supra note 3, art. 27. Article 27 states that "[t]he right of each Party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes shall be exercised without prejudice to the application of the procedure laid down in article 7 to 12 when the use is liable to affect the regime of the river or the quality of its waters." Id. (emphasis added).
98. Uruguay's First Round of Oral Hearings for May Request, supra note 80.
99. Id.
100. Id. Uruguay's exact answer to the hypothetical question posed above regarding when potential harm could occur was that "[t]his could occur – if at all – only after the plants start operating. It could not occur – not even hypothetically – while the plants are still under construction, as they are now, because during construction they are not discharging chemicals of any kind into the river." Id. at 45-46
hearings that urgency should be looked at differently in this situation. Argentina admits that no substantive harm has been done by the construction of the pulp mills and, as Uruguay states, if this was not true Argentina surely would have included such information in its application. Argentina feels that urgency in this situation should be looked at in the context of when a potential decision will be reached on the merits by the Court. By then, Argentina claims, both mills would be operational. Therefore, according to Argentina, urgency in this context should be determined by taking into consideration when the plants will become operational and when a possible decision will be announced by the ICJ.

To support its position that preparatory action in and of itself is not an offense, Uruguay pointed to a previous case before the ICJ involving Hungary and Slovakia. In a somewhat similar fact pattern, the Court stated:

A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act.'

Applying the ICJ’s ruling above, the wrongful act would be the contamination of the River Uruguay while the preparatory action would be the construction of the pulp mills. While the Hungarian/Slovakian dispute did not involve a request for provisional measures, the Court’s opinion is helpful. In addition to differentiating between a wrongful act and the events leading up to that act, the same Court discussed its definition of imminence, an important term in deciding a request for provisional measures. "Imminence," the Court said, "is synonymous with ‘immediacy’ or ‘proximity’ and goes far beyond the concept of ‘possibility.’" Based on this definition it is not difficult to understand Uruguay's tendency to point out previous environmental studies in hopes of proving to the Court no environmental damage is likely.

After discussing the requirement of urgency, Uruguay next discussed the requirement of irreparability. While much of the oral hearings concerning irreparable harm consisted of Uruguay giving specific examples of members of Argentina's political cabinet specifically saying no irreparable harm will occur as a result of the pulp mills, Uruguay began its argument by mentioning the high quality of the mills. Although the quality of the mills does not seem to be aligned entirely with irreparable

101. Id.; See Argentina Application, supra note 2. Paragraph 22 of Argentina's application states "in conclusion, in spite of the non-compliance by Uruguay of the procedures set forth by the 1975 Statute, the information available to Argentina clearly establishes that the placing in service of the CMB and Orion pulp mills will cause, . . ." Id. (emphasis added).


103. Id.
harm, Uruguay made an effort whenever possible to show the Court how advanced the two mills were going to be.\footnote{104}

Paul Reichler of Washington D.C. law firm Foley Hoag began his argument by stating that "this case is \textit{not} about a [s]tate that is exploding nuclear weapons in the atmosphere" but instead about a country building two pulp mills that will meet the standards of countries in Europe.\footnote{105} The fact that the pulp mills were expected to meet European requirements is important: according to a World Economic Forum study the European countries of Finland and Norway rank first and second respectively in protecting the environment.\footnote{106} In fact, according to the same study, no country in the Western Hemisphere protects the environment better than Uruguay.\footnote{107}

But it is questionable what this information means in relation to causing irreparable harm. Instead of showing how the Uruguayan plants, when operational, will perform to the highest European standards, it would have been more helpful to know whether industrial facilities in Finland, Germany, Norway, and the United Kingdom have ever caused harm to the environment that was not curable. This is what the requirement of irreparable harm means in the context of provisional measures. There is no doubt Uruguay is concerned about environmental protection, but this does not guarantee that the rights of Argentina will end up unharmed, even with Uruguay meeting the Best Available Techniques (BAT) and following the 1999 recommendations of the European Union.\footnote{108}

Uruguay's argument concerning irreparable harm picked up force when Reicher pointed to specific examples of prominent Argentine politicians stating the lack of irreparable harm. Uruguay first pointed to a statement made on behalf of Argentina by Dr. Armando Garin, Argentina's official member of the CARU. Garin stated to the CARU that "[i]t must be pointed out, with complete and absolute emphasis that none of the different technical reports evidence that the activity in question causes an irreversible and unavoidable damage to the environment . . . ."\footnote{109} Garin went on to state that at the very least there was no reason to end construction of the two plants.

Then Garin made an interesting remark, stating that the process must go forward based on the scientific evidence available \textit{and the agreement}

\begin{itemize}
  \item 104. \textit{See generally} Uruguay's First Round of Oral Hearings for May Request, \textit{supra} note 80; July Order, \textit{supra} note 1.
  \item 105. Uruguay's First Round of Oral Hearings for May Request, \textit{supra} note 80, at 53 (emphasis original).
  \item 109. Uruguay's First Round of Oral Hearings for May Request, \textit{supra} note 80, at 55.
\end{itemize}
reached by the Foreign Ministers.\textsuperscript{110} The agreement mentioned was indeed the attempt to compromise that took place in 2004, one Argentina states never happened.\textsuperscript{111} It is interesting to note that in Argentina’s first round of hearings it failed to mention any agreement being reached in 2004, instead referring to the discussions as nothing more than Uruguay agreeing to provide Argentina with information concerning the plants.\textsuperscript{112} In fact, in Uruguay’s response it quoted then Argentine President Nestor Kirchner referring to the March 2004 discussions as a bilateral agreement.\textsuperscript{113}

Before moving on, Uruguay attacked the fact that Argentina had ten operational industrial facilities, including one that discharged effluents into the Panama River, the river bordering Argentina and Panama. Uruguay stated, almost mockingly, that an “environmentally responsible Government” such as Argentina would not allow the discharge of the aforementioned effluents if it would cause irreparable harm or damage to Panama.\textsuperscript{114} Reicher went on to state that because Argentina continued to operate a plant that is clearly inferior with regards to environmental friendliness, and the country would not operate a plant that caused such grave damage, that must mean that Uruguay’s plants cannot logically cause irreparable harm to Argentina.\textsuperscript{115}

Uruguay did, however, believe irreparable harm could be done; it just thought that such harm would be done to its country if the ICJ ruled in favor of Argentina. The final argument Uruguay made in the first round of oral hearings relied on its proclaimed sovereign right to sustain an “economic development project in its own territory that does not violate Uruguay’s obligations under the statute... or [under] CARU.”\textsuperscript{116} While Uruguay admitted this right would be given serious weight when the Court reached a decision on the merits, it believed a granting of provisional measures would consequently disregard that right and make the decision on the merits meaningless.\textsuperscript{117} The country felt this way because of what it believed would happen if construction of the mills was sus-

\textsuperscript{110.} Id.
\textsuperscript{111.} See Argentina’s Application, supra note 2; July Order, supra note 1; Id.
\textsuperscript{112.} See July Order, supra note 1, at 11; Argentina’s First Round of Oral Hearings for May Request, supra note 33, at 18
\textsuperscript{113.} Uruguay’s First Round of Oral Hearings for May Request, supra note 80, at 55. Kirchner is quoted as stating that the meeting was “a bilateral agreement which put an end to the controversy over the cellulose plant installation in Fray Bentos.” Id. Kirchner went on to say that the 2004 agreement respected the importance of the project to Uruguay as well as the continued need to monitor the regime of the waters through CARU. Id.
\textsuperscript{114.} Id. at 57.
\textsuperscript{115.} Id.
\textsuperscript{116.} Id. at 58.
\textsuperscript{117.} In this regard Uruguay’s claim is the mirror opposite of Argentina’s. Argentina previously claimed that the definition of urgency needed to be looked at in the context of when a decision on the merits would be made since at that time the plants would be operational and then could cause irreparable harm. On the other hand, Uruguay is arguing that a decision to suspend construction of the mills would cause present irreparable harm.
pended, mainly that the mills would be built in a different country.\textsuperscript{118} According to Uruguay, the investors of both plants stated that if the Court were to grant provisional measures—therefore delaying construction until a decision on the merits can be reached—it would result in the investments being moved solely out of business sense.\textsuperscript{119} Reicher finished his argument by pointing to section 41 of the 1975 Statute and stating that the Court has previously ruled that the Court must look at the potential irreparable harm done to \textit{both} countries, not just the one asking for provisional measures.\textsuperscript{120}

4. \textit{The Court's Ruling}

On July 13, 2006, the ICJ ruled by a fourteen-to-one margin that provisional measures were not appropriate in this case. In so doing, the Court again showed the very limited circumstances in which provisional measures will be granted, instead deciding that all issues could be put off until discussion on the merits. The Court’s order began by dividing Argentina’s request for provisional measures into sections: one relating to the actual suspension of the mills and the second relating to cooperation and “non-aggravation of the dispute.”\textsuperscript{121}

First, discussing the procedural rights claimed by Argentina to be violated, the Court did not find any irreparable harm that demanded provisional measures. Specifically, the Court stated that it “is not at present convinced that” any procedural violations could not be handled at the merits stage of the proceedings.\textsuperscript{122} If it later determined that Uruguay did violate the 1975 Statute, the Court thought it could be remedied at the merits stage.

The Court then discussed one of the more curious claims by Argentina—the alleged “no construction” obligation contained in the 1975 Statute. Uruguay had stated during oral hearings that over the thirty years since the 1975 Statute had been enacted, no country had claimed that they were allowed the unilateral opportunity to block the other country’s plans until the Court ruled on the dispute.\textsuperscript{123} But the Court again deferred deciding the proper interpretation of the 1975 Statute until the merits phase of the case because it believed “if it should later be shown that [Argentina’s stance] is the correct interpretation of the 1975 Statute,” there is no reason not to believe that it could be remedied at that time.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{118} See July Order, \textit{supra} note 1.
\item \textsuperscript{119} Uruguay’s First Round of Oral Hearings for May Request, \textit{supra} note 80, at 59.
\item \textsuperscript{120} Criminal Proceedings in France (Congo v. Fr.), 2003 I.C.J. 102 (June 17), \textit{available} at http://www.icj-cij.org/docket/files/129/8204.pdf. The Court stated in paragraph 22 that “the Court must concern itself with the preservation by such measures of the rights which may subsequently be adjudged by the Court to belong \textit{either to the Applicant or to the Respondent}.” \textit{Id.} (emphasis added).
\item \textsuperscript{121} July Order, \textit{supra} note 1, at 17.
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.}; Uruguay’s First Round of Oral Hearings for May Request, \textit{supra} note 80.
\item \textsuperscript{124} July Order, \textit{supra} note 1, at 18.
\end{itemize}
Focusing on the substantive rights, mainly the potential impact on the environment, the Court noted that Argentina’s claims lacked both signs of imminence and irreparability. Looking at the record, the Court determined that there was no sign that Uruguay’s authorization to construct the mills "constitutes a present threat of irreparable economic and social damage" to Argentina or of "damage to the aquatic environment." Switching from irreparability to imminence, the Court noted that no threat of pollution could be possible until one of the two plants became operational, years in the future. Obviously, Argentina’s definition of "urgency" was not accepted by the Court.

Before entering its final judgment on the request, the Court stated that its decision regarding provisional measures in no way implies how the case will be determined on the merits. This is important, especially when one looks at the fourteen-to-one margin, because it would appear as though the Court dismissed Argentina’s claims rather easily. But it is perhaps more a sign of the limiting circumstances in which provisional measures will be granted. The requirements of irreparable harm and imminence are conjunctive, and the Court’s final order often found one of the requirements but not the other. Thus, instead of believing that Uruguay is clearly victorious in the dispute concerning the pulp mills, it might be better to look at the Court’s decision with a grain of salt.

VI. ARGENTINE CITIZENS RESPOND

While oral arguments were taking place in front of the ICJ, in Argentina voices were being heard in a much different way. Beginning in 2005 and heating up at the end of 2006, citizens of Gualeguaychú and protesters from a number of environmental groups including Greenpeace began blocking the bridges leading from Argentina to Uruguay in an attempt to force the cancellation of the construction of the mills. According to Uruguay, the goal of the protests was not only to halt construction but to strike at the heart of the Uruguayan economy by, among other things, making it more difficult for tourists to cross from Argentina into Uruguay.

A. TREATY OF ASUNCION

On March 26, 1991, Argentina, Brazil, Paraguay, and Uruguay signed the Treaty Establishing a Common Market (Treaty of Asuncion). The agreement set up Mercosur, the common market of the southern cone, in

125. *Id.*
126. *Id.*
127. *Id.*
order to ensure the free-trade goals of the countries are met.\textsuperscript{130} For the settlement of disputes within Mercosur, the Olivos Protocol created an ad hoc tribunal, empowered to rule on potential violations of the Treaty of Asuncion.\textsuperscript{131} The Treaty of Asuncion calls for "[t]he free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures."\textsuperscript{132}

B. \textbf{Uruguay Claims Argentina Violated Treaty of Asuncion}

When the blockades continued, Uruguay informed Argentina that they were going to ask the Mercosur tribunal to rule on whether Argentina was at fault. The gist of Uruguay’s claim was that the blockades prevented what the Treaty of Asuncion was meant to provide: the free circulation of goods between the member states.\textsuperscript{133} Uruguay told the Mercosur tribunal that Argentina was in violation of the Treaty of Asuncion because the Argentine government had done little to nothing to end the blockades.\textsuperscript{134} Uruguay, wanting Argentina to account for the situation and prosecute those blockading the bridges, phrased the issue before the tribunal as the "[o]mission of the Argentine [s]tate to adopt suitable measures to prevent and/or eliminate the impediments to free circulation stemming from the blocking of the access roads to international bridges. . . ."\textsuperscript{135}

On September 6, 2006, with the blockades somewhat diminishing, the three-person tribunal reached a unanimous decision that placed fault partially with Argentina, but not enough to award Uruguay monetary damages.\textsuperscript{136} The tribunal announced that Argentina was at fault for its lack of due diligence by not attempting to prevent or resolve the road blockades on its side of the River Uruguay.

This lack of action by Argentina was inconsistent with the Treaty of Asuncion in that the Treaty of Asuncion required free movement of goods between countries.\textsuperscript{137} Argentina’s claim that preventing its citizens

\begin{footnotes}
\item[132] Treaty of Asuncion, supra note 129, at 1045.
\item[133] Institute for the Integration of Latin America and the Caribbean (INTAL), \textit{Mercosur: Argentina and Uruguay’s Dispute Raised Before Mercosur}, http://www.it/iae.org/intal/articulo_carta.asp?tid=5&idioma=eng&aid=30&cid=234&carta_id=166 [hereinafter INTAL Dispute Raised].
\item[135] Tribunal Decision, supra note 134; see INTAL Tribunal Award, supra note 134.
\item[136] See Tribunal Decision, supra note 134.
\item[137] \textit{Id.}; Treaty of Asuncion, supra note 129, at 1045.
\end{footnotes}
from blockading the bridges would be a violation of their human rights – specifically the right to free speech – was not accepted by the tribunal. But the tribunal did side with Argentina in the area of intent, ruling that the Argentine government did not intend to affect trade with Uruguay, pointing to the fact that Argentina was also affected by the blockades.\textsuperscript{138}

Finally, on the topic of remedies, the tribunal refused to award Uruguay money damages, instead explaining that Mercosur "privileges the elimination of commercial barriers to trade instead of imposing a second barrier to trade through retaliation."\textsuperscript{139} At the time the tribunal made a decision, the blockades had begun to cease, and the tribunal stated that penalties are looked at prospectively. If the damage was already diminishing there was no need to penalize Argentina, as long as the country did not refuse to heed the warning of the tribunal to act diligently.\textsuperscript{140}

VII. ENCE CANCELS PULP MILL IN URUGUAY

Late in 2006, the Spanish company ENCE cancelled its plans to build one of the two pulp mills. Although ENCE claimed that the cancellation had nothing to do with the Argentina’s concern and that the company was still looking to construct a mill in Uruguay, the company’s reasoning to move elsewhere seems faulty. ENCE president Juan Luis Arregui claimed that the desire to end construction in Fray Bentos was necessary because it would be impossible for two pulp mills to operate within such a close proximity.\textsuperscript{141}

But ENCE had known that the Botnia mill was going to be located next to it since 2003, yet it never once mentioned the potential problems two Fray Bentos mills could have. ENCE claimed that problems would result when both plants were operational and needing to transport fiber on the same roads. But again, this situation was nothing new to ENCE or Botnia. There is no reason to think, if such a fear was true, that ENCE would disregard the possible road traffic until it began construction of the plant. Further, while the Botnia plant refused to halt construction at the request of Argentina, ENCE had ceased construction of its mill in March 2006. ENCE might have refused to admit Argentina had anything to do with the move of the pulp mill, but many with knowledge of the situation think otherwise.\textsuperscript{142}

VIII. URUGUAY’S TURN WITH THE ICJ

The cancellation of the ENCE pulp mill did little to quiet the protests from Argentina. In fact, protesters made sure Uruguay knew that they

\textsuperscript{138} INTAL, Tribunal Award, supra note 134.
\textsuperscript{139} Tribunal Decision, supra note 134; See also INTAL, Tribunal Award, supra note 134.
\textsuperscript{140} Tribunal Decision, supra note 134.
\textsuperscript{142} See id.
were planning on blocking the International Bridge all summer (approximately December through February). Because this coincided with the South American tourist season, Uruguay had finally had enough. On November 30, 2006, the country submitted a request for provisional measures to the ICJ.

A. REQUEST FOR PROVISIONAL MEASURES

In its written request to the Court, Uruguay claimed that irreparable harm and imminent damage would be done by the blockades during the summer tourist season. The stated purpose of the blockades, Uruguay wrote, was to prevent the construction and later operation of the Botnia pulp mill, the exact topic of the litigation before the ICJ. But while that might be the stated goal of the protesters, Uruguay claimed it would take an enormous economic hit from lost tourists and trade dollars. Because of the economic threat imposed by the blockade, Uruguay claimed that Argentina was attempting to force it to stop the construction of the Botnia mill or face the loss of millions of dollars.

But the Argentine government itself never blockaded the bridges, so why is Uruguay claiming Argentina is responsible for the potential economic impact of the blockades? Uruguay's claim goes back to the Mercosur tribunal and Argentina's willingness to allow the blockades to continue. The lack of effort to prevent previous blockades, Uruguay claimed in its written request for provisional measures, already cost the country millions of dollars. Uruguay views Argentina's lack of action to end the blockades as passive encouragement and implicit agreement with its citizens. Viewed in this way, Uruguay claims that Argentina is exacerbating the situation in violation of the ICJ's July Order regarding Argentina's own request for provisional measures. The July Order requires that neither party make the case at hand more difficult through any action or inaction; Uruguay feels Argentina, by its inaction, has vio-

144. Id. at 2.
145. It is worth pointing out that while Uruguay now claims damages done to its own tourism industry are worthy of provisional measures, in July, Uruguay claimed that the ICJ had no jurisdiction regarding any damages outside the River Uruguay.
147. Uruguay's Written Request, supra note 143, at 2.
149. Uruguay's Written Request, supra note 143, at 3.
150. Id. at 3; Uruguay's First Round of Oral Hearings for Nov. Request, supra note 146, at 10; see also July Order, supra note 1, at 20.
lated this provision.151

B. Blockades in More Detail

During oral hearings Uruguay described the strategy of the blockades and why they were successful. After identifying the three bridges one can take to travel between Argentina and Uruguay, Uruguay focused on the International Bridge. The International Bridge connects the Argentine city of Gualeguaychú with Fray Bentos. According to Uruguay, this is the only bridge that remains blockaded at all times.152 But, because it typically is responsible for 91 percent of Uruguay’s exports to Argentina, it is a significant blockade.153 Additionally, the General San Martin Bridge is the one relied on by tourists during the summer seasons. As an example of the havoc caused by the blockades, Professor Boyle described what it would take to travel from Buenos Aires, Argentina to the Punta del Este resort in Uruguay: a trip through Brazil.154

As for imports, Boyle stated that nearly 20 percent of all imports come from Argentina across one of the three main bridges, and imports from other nearby countries must also be transported over one of the three bridges.155 Moreover, the reason Uruguay’s tourist industry is influenced so heavily by the blockade is the amazing number of tourists who come to Uruguay only after they have been to Argentina. According to Boyle, in 2005, almost 58 percent of all tourists visiting Uruguay came from Argentina.156 In finishing his initial argument before the Court, Boyle made an important point: Uruguay relies much more on Argentina than Argentina does on Uruguay.157

After discussing the effect on tourism and trade the blockades may have, Boyle shifted course and stated that the biggest threat to the Uruguayan economy was the potential impact the blockades could have on the Botnia pulp mill.158 Describing the pulp mill as “the single most important foreign investment in Uruguay’s history,” Boyle attempted to show the Court why the blockades posed such an imminent and irrepara-

151. Uruguay points to five other reasons Argentina should be held responsible for not ending the blockades: (1) the protesters announced in advance when such blockades would take place; (2) although Argentinean law does not allow such blockades police activity was limited to ensuring the protests remained peaceful; (3) the Mercosur tribunal had already scolded Argentina for its lack of action in combating the problem; (4) prior to the protests in response to the pulp mills Argentina commonly ended illegal blockades; and (5) Uruguay repeatedly asked Argentina to lift the blockade. Uruguay’s Written Request, supra note 143, at 7.
152. Uruguay’s First Round of Oral Hearings for Nov. Request, supra note 146, at 22.
153. Id.
154. Id.
155. Id.
156. Id. Professor Boyle noted that the Minister of Tourism believed Uruguay would see 120,000 fewer tourists over the summer season due to the blockades. Id.
158. Id. at 23.
ble harm to Uruguay.\textsuperscript{159}

C. Argentina's Response

1. Jurisdiction

Much like Uruguay argued lack of jurisdiction when Argentina requested provisional measures, Argentina did the same when Uruguay submitted a request for provisional measures. Specifically, Argentina argued that the blockades had nothing in common with the case before the ICJ and therefore jurisdiction was lacking.\textsuperscript{160} Moreover, Argentina claimed that the only jurisdictional element before the Court was the 1975 Statute, and because the blockades do not encroach on the 1975 Statute, the ICJ should not be able to rule as a matter of law.\textsuperscript{161} Continuing with the jurisdictional theme, Argentina argued that if Uruguay is claiming that the blockades are impeding tourism and trade, those arguments are out place in front of the ICJ since the 1975 Statute does not cover "freedom of movement," or freedom of commerce or tourism.\textsuperscript{162}

Additionally, if Uruguay's request for provisional measures is unrelated to Uruguay's initial application, the ICJ lacks jurisdiction.\textsuperscript{163} The reason for this is the relationship between a request for provisional measures and the actual application filed. The application should be viewed as the main issue in dispute while requests for provisional measures are disputes related in a significant way to the theme of the application.\textsuperscript{164} As the Court stated, "a request for provisional measures must by its very nature relate to the substance of the case since . . . their object is to preserve the respective rights of either party."\textsuperscript{165} Argentina hoped that the Court would rule that Uruguay's request for an end to the blockades was unrelated to the main dispute and therefore dismissed for lack of jurisdiction.\textsuperscript{166}

2. Uruguay's Inconsistent/Misleading Statements

In front of the Mercosur ad hoc tribunal, Uruguay stated that the blockades were unrelated to the construction and later operation of the Botnia pulp mill.\textsuperscript{167} Uruguay specifically stated to the tribunal that "the construction of the above-mentioned plants and the possible environmental considerations related to them have absolutely nothing to do with the

\textsuperscript{159} Id.
\textsuperscript{161} Id. at 3.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 31.
\textsuperscript{164} Id.
\textsuperscript{166} Argentina's First Round of Oral Hearings for Nov. Request, supra note 160, at 3.
\textsuperscript{167} Id. at 5.
dispute [concerning the blocking of roads].”  

This statement is clearly inconsistent with everything Uruguay said in its first round of oral hearings. In fact, according to Uruguay, the blockading of bridges was a concerted plan of action intended to force the Botnia mill to move elsewhere.

Argentina also focused on the tourism and trade statistics presented by Uruguay. As noted above, Uruguay insisted that the blockades were going to result in decreased tourist income as well as import/export problems. But Argentina, using numbers from its Secretariat of Tourism, argued that the numbers indicate the exact opposite of what Uruguay stated, mainly that tourism is increasing even with the blockades. For example, Argentina claimed that its statistics showed that the number of Argentine citizens vacationing in Uruguay had increased 5 percent compared to last year. Argentina further points to a previous meeting of Uruguayan tour operators in which they claimed that safety was the biggest concern in the resort town of Punta del Este, Uruguay, not the blockades. As for free trade, Argentina’s facts indicated an increase in Uruguayan exports into Argentina as well as a substantial increase in sales from Argentina to Uruguay.


Uruguay stated in the first round of oral hearings that its gravest concern was the potential effect of the blockades on the lone remaining pulp mill being constructed in Fray Bentos. To show the potential adverse impact that the blockades can possibly have on the Botnia pulp mill, Uruguay pointed to the move of the ENCE mill as proof of the power of the blockades. But ENCE announced at the headquarters of the Presidency of Uruguay that the move had nothing to do with the blockades or protests from Argentina.

If ENCE did not move because of the blockades, the only possible way for Uruguay to receive provisional measures would be to show that the construction of the Botnia mill was adversely affected by the road blocks. After all, Argentina’s request months prior for its own provisional measures showed how difficult it was to show imminence and irreparable harm, and Uruguay faced the same difficult test. Only if the blockades

168. Id.; see Tribunal Decision, supra note 134.
169. See Uruguay’s First Round of Oral Hearings for Nov. Request, supra note 146.
170. See id.
172. Id.
173. Id.
174. Id. at 6. The exact numbers show an increase in exports from Uruguay into Argentina of 17 percent while the number of imports from Argentina into Uruguay is up 50 percent over the same period of time. Id.
175. Uruguay’s First Round of Oral Hearings for Nov. Request, supra note 146, at 23.
176. Id. at 27.
177. Argentina’s First Round of Oral Hearings for Nov. Request, supra note 160, at 7; see Chris Lang, supra note 141.
were actually affecting the construction of the pulp mill could Uruguay claim that its biggest foreign investment was in trouble. But Argentina was well aware of this and addressed the Court concerning the constant progress in the construction of the Botnia mill.

Argentina submitted its application in July, nearly five months prior to when Uruguay requested provisional measures. In July, the Botnia plant was at approximately 25 percent completion, while five months later it stood nearly 70 percent complete. Over five months the plant completed nearly half of its construction, but Uruguay still claimed the blockades in Argentina threatened the entire operation. Argentina said this repeatedly to the Court during oral hearings, stating that the pace of the construction has not slowed down and perhaps it has only increased. Therefore, Argentina argued, it was impossible that the blockades were having any affect on the progress of the mills, and certainly not enough influence to warrant provisional measures.

4. Court Rules on Uruguay's Request

By the same margin as it ruled months earlier, the ICJ voted fourteen-to-one in favor of rejecting the country's request for provisional measures. But the Court did find that it had jurisdiction, announcing fairly broadly that anything having to do with the construction or commission of the Botnia mill was related to Argentina's application and therefore fair grounds for provisional measures. Further, the Court stated that the issues raised before the Mercosur tribunal were different than the ones raised in Uruguay's request before the ICJ.

If the Court were to grant provisional measures they would result from Argentina violating the July Order and exacerbating the situation. But the requirements of irreparability and imminence loomed large, and in the end were the reason the Court ruled as it did. Uruguay's substantive request before the Court was for Argentina to at least attempt to put an end to the roadblocks. The Court found, as Argentina had proven earlier, that even with the blockades in place, the construction of the Botnia mill had continued.

It is difficult for Uruguay to argue – much less prove – that its right to continue construction unimpeded are imminently in danger of being irreparably harmed when at no time has the construction process slowed

178. See Argentina Application, supra note 2; Uruguay's Written Request, supra note 143.
180. Id.
181. Id.
182. Id.
184. Id. at 8.
185. Id.
186. Id.
for a moment. Interestingly, but perhaps not unexpectedly, the Court refused to answer whether the blockades had any effect on the construction process, instead stating the requirements for provisional measures were not met. The Court admitted that it had in previous times granted provisional measures "directing the parties not to take any actions which could aggravate or extend the dispute or render more difficult its settlement" but that in this case provisional measures were not necessary for such a reason. The Court seemed to imply in its order that, when such measures were given, they were required to prevent the situation from escalating into one that would lead to irreparable harm. Here that concern was lacking.

IX. PRESENT ANALYSIS

Much has happened since the Court ruled on Uruguay's request for provisional measures. First, the ENCE pulp mill announced that it would indeed build its mill in Uruguay, but at a site south of Fray Bentos. The announcement was made by ENCE president Juan Luis Arregui (in Buenos Aires, Argentina, of all places). At the time of announcement Argentina expressed its thanks to ENCE for its attitude during the entire process, a sign that there was more to ENCE's move from Fray Bentos than just road traffic. But Arregui did make one statement that did not sit well with Argentine citizens: "Personally I don't believe Botnia will pollute at all."

Second, as expected, the Botnia pulp mill was completed and, on November 9, 2007, produced its first load of pulp. More than 20,000 Argentine citizens protested the historic day that had been postponed since September. The fact that the mill became operational prior to the ICJ's ruling on the merits is important. It is hard to imagine the ICJ forcing the closure of an already operational mill for any reason other than environmental issues. But, the fact that the mill is operational also gives the Court, and Argentina and Uruguay, a chance to see whether or not the pollutant levels rise over the coming months. Additionally, the South American tourist season is winding up, and the Court will have a better idea as to the mill's affect on tourism in the coming months.

One thing that has not changed is the harsh sentiment between Argentina and Uruguay. Hopes were high that the two countries could rekindle what was once an important and beneficial relationship when Christina

187. See id. at 10.
188. Id. at 12.
190. Id.
Kirchner was elected Argentina's president in October 2007. She was replacing her husband, whom most people thought had a more aggressive foreign policy than she did, and some expected Kirchner immediately to reach out to Uruguay. Instead, Kirchner used her inauguration speech to mention how Uruguay violated the 1975 Statute; this in front of Uruguayan president Tabare Vazquez, who was there for the celebration.

It will likely be more than a year until the ICJ returns with a decision on the merits. By that time the Botnia mill will have been in operation for at least twelve months, but more likely closer to sixteen. At that point enough time will have passed to at least preliminarily determine whether the mill will run as efficiently and as environmentally friendly as stated. But the larger and more difficult question is how the Court will react if it finds Uruguay violated Argentina's procedural rights. It is irrational for Argentina to expect the Court to order Uruguay to shut down the Botnia plant for a procedural violation; this will only happen if harm is being done to the environment. Instead, the more likely scenario would be for Argentina to recover a monetary award from Uruguay. But Argentina was not after money. It wanted its citizens free from concerns that their water will be polluted or that the fish they catch will be full of toxins. Unfortunately for Argentina, unless there are early signs of pollution, that guarantee seems unlikely.


194. Vazquez later cancelled a dinner scheduled with Kirchner over the remarks mentioned, as well as remarks made days later.