



**Presentation of Project Loans for Orion (Botnia) and
Celulosas de M'Bopicuá (ENCE)
to IFC Board of Directors:**

**Potential Loan Approval and Subversion of
International Legal Norms**

Brief to IFC / World Bank Legal Department

Executive Summary

Taking into account IFC International Waterways OP 7.50 and Environmental Assessment OP 4.10, threshold requirements for loan presentation to the Board of Directors, the current legal standing of the pulp mills project at international courts and tribunals, and the jurisprudence upon which the operational policies were based, the IFC is unable to meet the alternative threshold requirements necessary to raise project loans to the IFC Board of Directors without subverting international legal norms. The bilateral conflict between Argentina and Uruguay is unresolved and has not reached appropriate arrangements or agreements to allow presentation of loans to the Board (OP 7.50 Art 8a). In addition, other riparians have not given a positive response to the beneficiary state nor to the IFC, in accordance with OP 7.50 Art 8b where the response must include consent, no objection, support to the project, or confirmation that the project will not harm the other riparian interests. Furthermore, the doctrine of 'no appreciable harm' has not been satisfied (OP 7.50 Art 8c) due to the inextricable relationship between the doctrine and the *River Uruguay Treaty 1975*, compliance of the latter is as yet undetermined by the International Court of Justice.

At the Inter-American Commission on Human Rights (IACHR), a submission brought by 40 000 concerned citizens claiming Uruguay has violated its international human rights obligations by permitting the installation of the pulpmills is yet to be considered, further placing in doubt the legality of the host country's actions and the mill permits. The IFC will not finance projects that contravene host country obligations under international law, nor projects that contravene the countries overall policy framework and national legislation (OP 4.01 Article 3). The Uruguayan Prosecutor's voluntary prosecution regarding DINAMA's granting of environmental permits is also unresolved, as is the criminal complaint against Botnia and ENCE executives in Argentina.

Similarly, this will be the first disputed project slated for presentation to the IFC Board since the release of new Performance Standards in April 2006, which emphasize the importance social impacts of project's of projects. Social license allowing the project has been unequivocally revoked by stakeholders and the vast majority of residents in the zone of impact oppose the installation of the mills. If the IFC were to approve financing, it will make certain a regrettable and hypocritical example of project finance ignoring advances in environmental assessment.

If loans for the projects are presented to the Board, Executive Directors must reject approval loans in accordance with OP 7.50 and OP 4.01, as both policies based in project compliance with international and domestic law. Irrespective of any future findings of the Environmental Impact Assessment for the mills, loan approval will subvert international norms, and as such IFC staff and the Board of Directors must wait until the conflict between Uruguay and Argentina is resolved through the appropriate machinery (ICJ, IACHR, National Courts) or risk usurping

the role of national and international tribunals, subverting international legal norms and exacerbating the ongoing international conflict.

Overview

This brief will provide International Finance Corporation (IFC)/World Bank legal advisors and General Counsel with an analysis of Project Orion (IFC project 23817 and MIGA project 5909-Rg 07171) and Project Celusosas de M'Bopicuá (IFC project 23681) with compliance of IFC procedures and international law. Outstanding matters include the submission to the Inter-American Commission on Human Rights (IACHR) and *Argentina v Uruguay (Pulp Mills on the River Uruguay)* at the International Court of Justice (ICJ) are identified as requiring urgent and essential consideration by the IFC **prior** to loan presentation to the IFC Board of Directors so that the approval (or not) of credit lines and MIGA political risks coverage will not subvert international legal norms.

It should be noted that project non-compliance with other IFC Operational Policies such as public consultation, in addition to technical competence of Environmental Impact Assessment, are today outstanding issues remaining to be dealt with by IFC/World Bank legal advisors. These issues have already been the subject of definitive judgment by the Compliance Advisor Ombudsman and comment by Hatfield Consultants, with both institutions providing critical information which has not been adequately resolved in a transparent manner, and must be taken into account by the IFC, World Bank and Board of Directors in the decision making process.

Pending Litigation

Litigation pending in international courts and tribunals includes the submission to the IACHR for breaches of Uruguay's international obligations regarding regional human rights treaties which is currently under investigation and the case of *Argentina v Uruguay (Pulp Mills on the River Uruguay)* where questions of compliance with international waterway law remain undetermined. Substantive allegations in the submission to the IACHR will not be discussed in this brief, but it is sufficient to acknowledge that compliance of Uruguay's international treaty obligations is in doubt with respect to the permitting of the two pulp mills. In Uruguayan national courts, the Uruguayan prosecutor voluntarily brought a case against DINAMA, the environmental agency assessing and granting operational permits for the two companies, for procedural irregularities in the permitting process. In Argentina, courts have yet to decide on a criminal complaint brought against high executives of Botnia and ENCE for the intent to pollute the Argentinean environment.

Applicable IFC Policy

Both the IFC and an external specialist¹ have advised CEDHA that IFC Operational Policies (OP) current at the time of project proposal are applicable to the project throughout the assessment procedure, regardless of policy updates. Hence the appropriate policy is IFC International Waterways OP 7.50 and IFC Environmental Assessment OP 4.01, which in conjunction with the current legal

¹ Communication between CEDHA and Mr Aidan Davy (ex-CAO compliance specialist), also Lucie Giraud (IFC Environment & Social Development), September 2006.

status of international waterway proceedings of project Orion, form the backbone of this brief.

Argentina has alleged that Uruguay actions regarding the installation of Orion is non-compliant with the *River Uruguay Treaty 1975*, putting forth its case on 8 June 2006 at the International Court of Justice (ICJ). Whilst having denied Argentina's request for precautionary measures in the form of an injunction, Argentina has resolved, in accordance with the ICJ's explicit invitation, to re-solicit its request precautionary measures that takes into account new evidence. The issue of compliance with substantive and procedural requirements inherent in the international waterway agreement has not been determined by the ICJ², the Court postponing this decision following its typical assessment timetable of 1-2 year post complaint. It should also be noted that the Inter-American Commission on Human Rights, the tribunal assessing compliance regional human rights instruments, is yet to rule on alleged violations of norms by Uruguay to the 40 000 applicants, concerned amongst other things, over negative impacts caused to health and environment in relation to the decision permitting the installation of the contaminating industry in their backyard.

Applying Article 3 IFC Environmental Assessment OP 4.01

In this case the application of OP 4.01 Article 3 is a relatively straightforward matter. Referring to host country overall policy framework and national legislation, the Art 3 states the 'IFC does not finance project activities that would contravene such country obligations, as identified during the EA.' The IFC cannot dismiss the outstanding cases (mentioned above in 'Pending Litigation'), since breaches were identified during the EA *process*. Thus, even though the IFC EA documentation ignores the fact that two international fora and two national courts are grappling with legal compliance issue, it can be safely declared that the contravention of host countries obligations were identified during the EA. There is no doubt following the various letters, submissions and protests to the IFC concerning the possibility of finance, that the IFC has also been able to identify these violations and is unable to finance the projects.

² Argentina solicited the World Court to decide on the following: that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that Statute refers, including but not exclusively:

- a. the obligation to take all necessary measures for the optimum and rational use of the River Uruguay;
 - b. the obligation of prior notification to CARU and to Argentina;
 - c. the obligation to comply with the procedures laid down in Chapter II of the 1975 Statute;
 - d. the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full, objective study on environmental impact;
 - e. the obligation to co-operate in regard to the prevention of pollution and the protection of biodiversity and fisheries; and
2. that, by its conduct, Uruguay has engaged its international responsibility to Argentina;
 3. that Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and
 4. that Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it.

Applying Article 3 IFC International Waterways OP 7.50

International Waterways OP 7.50 article 3 states '(the) IFC recognizes that the cooperation and goodwill of riparians is essential for the efficient utilization and protection of the waterway.' To this end, the IFC is no doubt aware of the tense diplomatic conflict between Argentina and Uruguay, the reason to which ENCE alluded to for their decision to relocate the proposed Celulosas de M'Bopicuá pulp factory (IFC Project 23681) in September 2006.

Article 3 continues 'therefore, (the IFC) attaches great importance to riparians' making appropriate agreements or arrangements for these purposes for the entire waterway or any part thereof.' In this case, 'great importance' is to be attached the agreement covering the use of River Uruguay between Argentina and Uruguay, that of the *River Uruguay Treaty 1975*. Continuing, article 3 declares '(i)n cases where differences remain unresolved between the beneficiary state and the other riparians, prior to financing the project IFC normally would urge the beneficiary state to offer to negotiate in good faith with the other riparians to reach appropriate agreements or arrangements.' Argentina, in the case *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* at the ICJ, has alleged that Uruguay did not and have not fulfilled notification requirements for CARU, and that Uruguay has not negotiated the installation of Botnia's Orion factory in a manner corresponding with actions in good faith.

The framework is in place for the two countries to negotiate on projects and it is clear the necessary agreements or arrangements to this end have not been reached as the conflict continues between the two countries, and questions regarding compliance with international waterway law are awaiting resolution by the ICJ. In OP 7.50, discretion created by words such as 'normally' and 'urge' must be clarified with reference to previous disputes, standard practice, bank policies and IFC obligations imposed on the Board of Directors.

In line with international norms and Bank Policy, the President of the World Bank Mr Paul Wolfowitz has on no fewer than three occasions made strong public comments requesting resolution to the international conflict before the Bank is enable finance the projects. On these occasions, the president and CEO of the Bank has addressed the President of Uruguay, the European Union Trade Commissioner Mr Mendelsohn, and the Argentinean Government with the veiled ultimatum that the two countries must resolved the conflict or financing will not be given.

The Role of World Bank Policy 7.50

In the case of protest by a riparian, *Bank Policy 7.50* offers the option to appoint one or more independent experts for their opinion to enable it to decide on further processing of the project.³ Bank Policy generally applies IBRD and IDA projects,

³ Krishna R, *The Evolution and Context of the Bank Policy for Projects on International Waterways*, appearing in Salman S, *International Watercourses: Enhancing Cooperation and Managing Conflict*, 1998, World Bank Technical Paper No. 414, p40

but is the tool which the World Bank's legal advisors may consult to resolve riparian conflict, and considering the appropriateness of involvement by the World Bank to advisors it is worth discussion with reference to Orion. Appointment of an independent panel has not occurred in response to protest by Argentina, however the IFC proposed that a panel of three experts, one independent and the others representing Uruguay and Argentina, to review criticisms to the Cumulative Impact Statement (CIS) released for public comment. This action was perceived as illegitimate by both Argentina and Uruguay who refused to consent to the panel, leaving the independent expert to address the CIS criticisms, but not directly the Argentina's protest to the project. The result was the famous 'Hatfield Report' which identified technical shortcomings in the CIS, but did not address the dispute between the neighboring countries, neither did it address shortcomings in other IFC OPs, such as the requirement to consult stakeholders highlighted by concerned Argentinean stakeholders and already confirmed by the CAO prior to the appointment of the experts.

Applying Article 8 IFC International Waterways OP 7.50

Article 8 of IFC OP 7.50 is the definitive point of reference for legal advice concerning reporting requirements on presentation of loans to the IFC's Board of Directors, setting out three alternative thresholds that must be reached in order for the IFC Board to consider loan proposals.

OP 7.50 Article 8

Presentation of Loans to the Members of IFC's Board of Directors

8. For every project on an international waterway, the IFC Board Report will deal with the international aspects of the project, and state that IFC staff have considered these aspects and are satisfied that

a) the issues involved are covered by an appropriate agreement or arrangement between the beneficiary state and the other riparians; or

It is clear that the appropriate agreement, as mentioned before, is the River Uruguay Treaty 1975, the overall objective of which is 'to establish ... joint machinery necessary for the optimum and rational utilization of the River Uruguay'.⁴ The Statute has created machinery by which to cover any issues that may arise between the beneficiary state and other riparians, and in case of dispute, the responsible for resolution of contentious issues is the International Court of Justice.⁵ The requirement for 'coverage' of relevant issues, as it appears in Article 8a of OP 7.50 does not only include the existence of a mechanism to resolve these issues, of which the IFC can certainly be satisfied does in fact exist, but also the procedural resolution of these issues which are stipulated within the accord. To this end, the conflict over the compliance with River Uruguay Treaty remains unresolved by the International Court of Justice, and the issues involved have not been 'covered' simply by the existence of a general

⁴ *River Uruguay Treaty 1975*, Article 1

⁵ *Argentina v Uruguay (Pulp Mills on the River Uruguay)*, International Court of Justice, Argentina oral submission, 8 June 2006, p36

agreement or arrangement between the beneficiary state and the other riparians on the use of the shared water course. Given that the agreement is under dispute, and that no other arrangement exists that deals with outstanding issues, the IFC cannot be satisfied that these issues have been 'covered'.

In a case such as this, IFC actions may be clarified by Article 3 of OP 7.50 (cited above), which states the normal response of the IFC is to request that appropriate agreements between the States are reached before elevating loan proposal to the Board. No evidence of IFC requests exist in the public domain, yet the conflicting riparians have not reached an appropriate agreement and the case remains alive at the World Court. As such, the IFC is unable to elevate loans to the Board under Art 8a.

Article 8b deals enables the presentation of loans to the Board of Directors if responses given by other riparians is a positive one.

b) the other riparians have given a positive response to the beneficiary state or IFC, in the form of consent, no objection, support to the project, or confirmation that the project will not harm their interests; or

The Republic of Argentina, the collective representative of riparian interests on the opposite shores of the River Uruguay as late as September 2006, has expressed to the World Bank, to local stakeholders and to the Government of Uruguay, an overwhelming negative response to the project on all fronts, formally at the World Court where Argentina stated the project will harm their interests, and both diplomatically and publicly, repeatedly declaring to the Argentine people that the Federal Government will continue to actively oppose this issue in high level fora. Argentina has not given a positive response to Uruguay nor the IFC, it has not consented to the project, it has objected, has not supported the project and has confirmed that the project will harm their interests.

In addition, the 'powerful and coherent voice'⁶ of the Citizen's Assembly of Gualaguaychú (the Assembly), a grass-roots community group formed specifically in opposition to the installation of the pulp mills and consisting of 40 000 signed up members, has diligently fought for the relocation of the mills from the current site in the heart a pristine environmental zone where local livelihoods are heavily reliant on tourism. The Assembly has repeatedly stated that the Orion project has never had the social license necessary to construct the mega-pulp facility, and that it will never have it in the future. The magnitude of riparian opposition to the project has been evidenced by the world's largest ever march for an environmental cause when 120 000 people took to the General San Martin bridge alongside the Orion site, and an earlier march saw 50 000 people block the same international causeway in defiance of the mills.

⁶ Compliance Advisor Ombudsman, *Preliminary Assessment Report: Complaint regarding IFC's Proposed Investment in Celulosas de M'Bopicuá and Orion Projects*, Uruguay, 2005, p9

Considering public and legal actions of the two major riparian representatives, both official and community based, loan for Orion cannot be elevated for consideration at board level due for reasoning associated with Art 8b.

Where the previous two thresholds have not been met (as in this case), the IFC proposes that:

c) in all other cases, in the assessment of IFC staff, the project will not cause appreciable harm to the other riparians, and will not be appreciably harmed by the other riparians' possible water use. The Board Report also contains in an annex the salient features of any objection and, where applicable, the report and conclusions of the independent experts.

To better understand and implement the threshold limits imposed by the IFC on presentation of project loans to the boards, it is important to look at the legal norms upon which they are based. In regards to the principles of equitable utilization and the prohibition against causing appreciable harm, the *Trail Smelter Arbitration* and the *Lake Lannoux Arbitration* 'were very relevant' to the revision of OP 7.50.⁷ In *Trail Smelter*, it is worth noting that States 'do not have the right to permit significant injury to the territory of other states through the use of their own territory'. Smelter further declared that 'for an injury to rise to the level of "appreciable" or "substantial" harm, the injury must have significant and consequential effects upon public health, economic productivity, or the environment of another state'.⁸ All these arguments were put forth by Argentina in oral Arguments of June 8 and 9 at the Hague. Further, *Smelter* provided that for harm to be appreciable, there must be a "real impairment of use".⁹ The phrases 'appreciable', 'substantial', 'significant injury' and 'real impairment' may aid the IFC in coming to a decision on appreciable harm, but the IFC assessment cannot rely on interpretation of these words in an isolated, subjective fashion. The IFC must evaluate them in the context of the rights and obligations of the states under the *River Uruguay Treaty* and in conjunction with a determination of compliance by the ICJ.

The Doctrine of No Appreciable Harm

The late Raj Krishna, former International Law Advisor (Operations), comments that basing the World Bank's International Waterways Policy around the doctrine of 'no appreciable harm' was preferred, as the other alternative was to base the policy on the equitable use doctrine, assessment of which would require the Bank to complete 'an analysis of what is equitable for other riparians – a task the Bank cannot accomplish without the agreement of other coriparians as it is

⁷ Krishna R, *The Evolution and Context of the Bank Policy for Projects on International Waterways*, appearing in Salman S, *International Watercourses: Enhancing Cooperation and Managing Conflict*, 1998, World Bank Technical Paper No. 414, p34

⁸ Eckstein G, *Application of International Water Law to Transboundary Groundwater Resources, and the Slovak-Hungarian Dispute Over Gabčíkovo-Nagymaros*, 19 Suffolk Transnat'l L.R. 67 (1995)

⁹ Goldenman quoting Report of the International Law Commission to the General Assembly, GAOR, Supp. No. 10, ch. III, at 45, U.N. Doc. A/43/10 (1988)).

neither a court nor a tribunal.¹⁰ However, as will be shown below, in some projects circumstances the equitable use doctrine cannot be isolated from the appreciable harm policy', and when this occurs, the Bank must distance itself from assessing what is an equitable use. This insight is key to understanding the Bank's desire to decide on simpler projects where conflicting riparians have not involved nor requested resolution of the question of appreciable harm in higher courts. In the current case the question of appreciable harm is embodied in the substantive and procedural requirements of the *River Uruguay Treaty 1975* which govern the rational use of the shared watercourse. The Bank has no mandate nor power to decide upon the issue of appreciable harm and is not permitted to resolve or judge conflicting interpretations of equitable use as the question of international law can only be decided by the ICJ, and the Bank has no option but to take into account this decision to arrive at its own assessment of 'appreciable harm'.

Krishna (1998) in his explanation of the Bank's rationale for adoption of the 'no appreciable harm policy' stated:

'On the other hand, the no harm rule seemed more appropriate for the Bank and simple to apply. Moreover, avoidance of harm as the guiding principle is imbedded in the Bank's practice over the years. Its adoption by the Bank in no way derogates from the significance of the principle of equitable utilization ... At some point the two rules do intersect.'

In response to Krishna's comment in an uncited case, the Bank's General Counsel gave the ruling that 'the Bank will not go into an examination of whether a project will or will not cause appreciable harm, but would instead examine the issue of whether the project would cause damage or adverse effects. If a project was deemed to produce adverse effects the Bank was to stop at that point and not finance the project.'¹¹ This statement from the General Counsel occurred prior to 1984-1985, and as an operational guideline can be dismissed since the revised 1998 OP retains the phrase 'appreciable harm', which has been shown by Krishna to intersect with the equitable use doctrine.

If the Bank did not wish to take into account the question of equitable use, it would have deviated from the use of the phrase 'appreciable harm', instead incorporating terminology such as 'adverse effects' that has been adopted by the International Law Commission with respect to international conflicts arising from planned works.¹² Thus General Counsel is obliged to consider the point where the equitable use doctrine intersects with appreciable harm, and is advised that in this case, where one party has protested to the extent of elevating the case to the International Court of Justice, the spectrum of conflict has advanced

¹⁰ Krishna R, *The Evolution and Context of the Bank Policy for Projects on International Waterways*, appearing in Salman S, *International Watercourses: Enhancing Cooperation and Managing Conflict*, 1998, World Bank Technical Paper No. 414, p34

¹¹ Note 10, p37

¹² Note 10, p37

sufficiently for appreciable harm to surpass the point where equitable use is a necessary and requisite threshold element.

Thus Krishna argues, and argues correctly, that the appreciable harm policy does not ignore the equitable use doctrine, and it follows where this is under dispute, as is clear from the ongoing case of *Argentina v Uruguay*, the IFC must take heed of the countries' preference for the adjudication of ICJ, and base its assessment of appreciable harm upon the eventual judgment of ICJ. It is precisely the doctrine of equitable use that Argentina and The Citizen's Assembly of Gualeguaychú argues has been breached, as the location of the industry directly competes with the equitable use of neighboring beaches, sensitive fisheries and agricultural industries and the tourism industry heavily reliant on the pristine environment.¹³ Here it is necessary to return to Krishna's comment that, "the Bank is neither a court nor a tribunal", and does not have the ability to make a judgment on the equitable use doctrine,¹⁴ such that to avoid infringing upon the wishes of the States, the role of the ICJ and international legal norms, the Bank must take its guidance from the appropriate fora.

In addressing Argentina's request to the ICJ for provisional measures, an injunction to suspend construction of the Botnia factory, the ICJ delivered a preliminary judgment that denied Argentina's request stating that 'Argentina has not persuaded that the construction of the mills presents irreparable damage to the environment'¹⁵ and that the 'threat of any pollution is not imminent as the mills are not expected to be operational before August 2007 (Orion)'.¹⁶ As such, the ICJ refers solely to the construction of the mill, does not address the issue of contamination nor competing uses in the operational phase, and does not determine the issue of equitable use (nor that of appreciable harm). Despite the decision to deny provisional measures, the Court left open the door for Argentina to resubmit a request for provisional measures pending new evidence, which is currently being gathered by independent environmental experts.¹⁷

In addition, harsh criticism of the ICJ order regarding provisional measures has come from dissenting Judge Vinuesa:

"I strongly disagree with the Court's finding that the construction of the plants constitutes a neutral or innocent step with legal consequences that shall not affect the future preservation of the environment ... the uncertainty of a risk of an

¹³ *Argentina v Uruguay (Pulp Mills on the River Uruguay)*, International Court of Justice, Argentina oral submissions, 8 and 9 of June 2006,

¹⁴ Krishna R, *The Evolution and Context of the Bank Policy for Projects on International Waterways*, appearing in Salman S, *International Watercourses: Enhancing Cooperation and Managing Conflict*, 1998, World Bank Technical Paper No. 414, p36

¹⁵ *Argentina v Uruguay (Pulp Mills on the River Uruguay)*, ICJ Order concerning Request for Provisional Measures, para 74

¹⁶ Note 14, para 75

¹⁷ *Papeleras: Picolotti envió una carta al Banco Mundial para intentar frenar los créditos*, El Once Digital, 6 October 2006, stating that Argentina has recently contracted three independent consultants to assess the environmental impact of the Orion Mill taking into account the negative aspects on local communities
<http://www.eloncedigital.com.ar/politicas/nota.asp?id=50433>

imminent threat of irreparable harm is inexorably linked to the present and continuing construction of the mills.”¹⁸

The Court has yet to make a determination on the question of the existence of harm associated with the operation of the mill, or the question of equitable use as the issue in its entirety is enshrined in the substantive and procedural aspects of the River Uruguay Treaty, of which the legality of Uruguay’s actions concerning the installation of the Orion mill have not yet been addressed by the ICJ.

The Issue of Consent

Returning to the issue of consent (Art 8b) it is standard practice that the Bank seeks coriparian consent when the project will result in appreciable harm to another riparian. It follows that the matter of appreciable harm must be dealt with prior to seeking consent, yet even in cases when projects in question were not expected to have any adverse effects on other riparians, situations have made it appropriate for the Bank to seek some indication of support consent from other riparians.¹⁹ Considering the high level diplomatic dispute, that has precipitated the involvement of Finland, where the Finnish Government has offered its ‘good offices’ to facilitate resolution of the conflict,²⁰ and the intense public opposition, this is an stand-out, high-profile case where circumstances require consent prior to presentation of the project to the IFC Board.

The Bank’s Salient Institutional Practices

It is worth mentioning that OP 7.50 is grounded the Bank’s own salient institutional practices, of which the requirement of notification to other riparians is an essential for project requirement (see Youssef Pasha Project) and reflects the principle of good-neighborliness ‘of which the Bank, as a cooperative international institution, is particularly aware.’²¹ This requirement is incorporated into the *River Uruguay Treaty* between the coriparians, and is disputed by Argentina at the ICJ, and like the issue of appreciable harm and equitable use, will not be decided upon until the final judgment is delivered by the Court.

Abstaining from Finance

Krishna provides a discussion on the Bank’s abstention of finance for projects causing riparian conflict, referring to the Bank policy procedures, which as previously mentioned do not directly bind the IFC, yet in any event have not been followed with respect to the appointment of experts to determine the issue of international conflict. Krishna, in *The Evolution and Context of the Bank Policy for Projects on International Waterways*, puts forth the concern that riparians may

¹⁸ *Argentina v Uruguay (Pulp Mills on the River Uruguay)*, Dissenting Judgment of Ad-hoc Judge Vinuesa regarding provisional measures, p1

¹⁹ Krishna R, *The Evolution and Context of the Bank Policy for Projects on International Waterways*, appearing in Salman S, *International Watercourses: Enhancing Cooperation and Managing Conflict*, 1998, World Bank Technical Paper No. 414, p34

²⁰ *Finnish Government Opens Door to Pulp Mill Case*, CEDHA Press Reslease, available at http://www.cedha.org.ar/en/more_information/finish-government-opens-door.php

²¹ Krishna R, *The Evolution and Context of the Bank Policy for Projects on International Waterways*, appearing in Salman S, *International Watercourses: Enhancing Cooperation and Managing Conflict*, 1998, World Bank Technical Paper No. 414, p33

have the power of veto over projects, taking decision making power away from the Bank. Although to mediate the former comments, Krishna adds that in these cases it is emphasized that the Bank should act 'in the most transparent manner'.²²

The issue of the Bank desiring power above and beyond the wishes of nation-states will not be dealt with here, but regarding transparency, the CAO has made many comments on the lack of consultation with stakeholder groups, arguments to this end appear in an OECD Specific Instance against the proponent Botnia²³, and the mere fact that the revised CIS will not be subject to the regulation 60 day public disclosure period and available for public comment prior to the elevation of the project to the IFC Board, offers a heavy indictment upon the Bank's commitment to transparency in a project at the center of an unresolved international dispute.

Conclusion

If the General Counsel turns a blind-eye to the outstanding questions of international waterway law compliance and the wishes of the riparians to have conflicts settled at the ICJ, it will be placing the Bank in a role that is reserved only for the stipulated machinery to deal with international waterway conflicts. In this case it will exacerbate the conflict between Argentina and Uruguay, in a process which has been non-transparent and involving grave and continuous breaches to its own operational policies. Appreciable harm has long been asserted by representatives of Argentinean riparians, the State of Argentina and The Citizen's Assembly of Gualeguaychú, and the elevation of the case to the ICJ by the State of Argentina extends the circumstances of the case such that the equitable use doctrine must be incorporated into the assessment of appreciable harm, the only remaining avenue that the IFC has to be able to finance the Orion project. In this regard, the IFC is also urged to consider the extent of the diplomatic conflict, the lack of social license, the magnitude of informed public opposition to the project in addition to the possible water uses of the riparians, such as fisheries and tourism, and how these and public health will be negatively impacted by a nearby contaminating industry emitting sulfur based compounds into the atmosphere and chlorine based contaminants into a slow moving river environment.

This is the first disputed project to be decided after the release of the revised Performance Standards which emphasise social assessment and importance of the social license, and is a case where the vast majority of stakeholders in the zone of impact oppose the installation of the two pulp factories. It would be a lamentable precedent if the IFC were to fund such a project, especially considering the advances in international norms and subsequent incorporation

²² Krishna R, *The Evolution and Context of the Bank Policy for Projects on International Waterways*, appearing in Salman S, *International Watercourses: Enhancing Cooperation and Managing Conflict*, 1998, World Bank Technical Paper No. 414, p41

²³ Botnia Specific Instance for Violations to the OECD Guidelines for Multinational Enterprises, available at www.cedha.org.ar/en/initiatives/paper_pulp_mills/oecd-specific-instance-botnia-eng.pdf

into revised IFC Performance Standards that place great importance on social impacts of projects.

The Bank cannot usurp, predict, nor ignore the legal void created by the lack of ICJ determination compliance with the applicable law on international waterways, and is in no position to present the loans to the Board of Directors without the appropriate machinery deciding on the existence of appreciable harm, a concept that envelopes equitable use doctrine which can only be determined by the World Court. If the loans are presented to the Board of Directors, the Board must reject the proposed loan such that the Bank's actions remain consistent with established international legal doctrines and the wishes of the two conflicting riparian nations.

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