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Summary 2010/1
20 April 2010

Pulp Mills on the River Uruguay (Argentina v. Uruguay)

Summary of the Judgment of 20 April 2010

1. History of the proceedings and submissions of the Parties (paras. 1-24)

On 4 May 2006, the Argentine Republic (hereinafter "Argentina") filed in the Registry of the Court an Application instituting proceedings against the Eastern Republic of Uruguay (hereinafter "Uruguay") in respect of a dispute concerning the breach, allegedly committed by Uruguay, of obligations under the Statute of the River Uruguay (United Nations, Treaty Series (UNTS), Vol. 1295, No. I-21425, p. 340), a treaty signed by Argentina and Uruguay at Salto (Uruguay) on 26 February 1975 and having entered into force on 18 September 1976 (hereinafter the "1975 Statute"); in the Application, Argentina stated that this breach arose out of "the authorization, construction and future commissioning of two pulp mills on the River Uruguay", with reference in particular to "the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river".

In its Application, Argentina, referring to Article 36, paragraph 1, of the Statute of the Court, seeks to found the jurisdiction of the Court on Article 60, paragraph 1, of the 1975 Statute.

On 4 May 2006, immediately after the filing of the Application, Argentina also submitted a request for the indication of provisional measures based on Article 41 of the Statute and Article 73 of the Rules of Court.

Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case. Argentina chose Mr. Raúl Emilio Vinuesa, and Uruguay chose Mr. Santiago Torres Bernárdez.

By an Order of 13 July 2006, the Court, having heard the Parties, found "that the circumstances, as they [then] present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

By another Order of the same date, the Court, taking account of the views of the Parties, fixed 15 January 2007 and 20 July 2007, respectively, as the time-limits for the filing of a Memorial by Argentina and a Counter-Memorial by Uruguay; those pleadings were duly filed within the time-limits so prescribed.

On 29 November 2006, Uruguay, invoking Article 41 of the Statute and Article 73 of the Rules of Court, in turn submitted a request for the indication of provisional measures.

By an Order of 23 January 2007, the Court, having heard the Parties, found "that the circumstances, as they [then] present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

By an Order of 14 September 2007, the Court, taking account of the agreement of the Parties and of the circumstances of the case, authorized the submission of a Reply by Argentina and a Rejoinder by Uruguay, and fixed 29 January 2008 and 29 July 2008 as the respective time-limits for the filing of those pleadings. The Reply of Argentina and the Rejoinder of Uruguay were duly filed within the time-limits so prescribed.

By letters dated 16 June 2009 and 17 June 2009 respectively, the Governments of Uruguay and Argentina notified the Court that they had come to an agreement for the purpose of producing new documents pursuant to Article 56 of the Rules of Court. By letters of 23 June 2009, the Registrar informed the Parties that the Court had decided to authorize them to proceed as they had agreed. The new documents were duly filed within the agreed time-limit.

On 15 July 2009, each of the Parties, as provided for in the agreement between them and with the authorization of the Court, submitted comments on the new documents produced by the other Party. Each Party also filed documents in support of these comments.

Public hearings were held between 14 September 2009 and 2 October 2009. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, one of the Parties submitted written comments on a written reply provided by the other and received after the closure of the oral proceedings.

At the oral proceedings, the following final submissions were presented by the Parties:

<u>On behalf of the Government of Argentina,</u>

At the hearing of 29 September 2009:

"For all the reasons described in its Memorial, in its Reply and in the oral proceedings, which it fully stands by, the Argentine Republic requests the International Court of Justice:

1. to find that by authorizing

— the construction of the ENCE mill;

— the construction and commissioning of the Botnia mill and its associated facilities on the left bank of the River Uruguay,

the Eastern Republic of Uruguay has violated the obligations incumbent on it under the Statute of the River Uruguay of 26 February 1975 and has engaged its international responsibility;

2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:

(i) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;

(ii) cease immediately the internationally wrongful acts by which it has engaged its responsibility;

(iii) re-establish on the ground and in legal terms the situation that existed before these internationally wrongful acts were committed;

(iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;

(v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty."

On behalf of the Government of Uruguay,

At the hearing of 2 October 2009:

"On the basis of the facts and arguments set out in Uruguay's Counter-Memorial, Rejoinder and during the oral proceedings, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed."

2. Legal framework and facts of the case (paras. 25-47)

The Court recalls that the dispute before the Court has arisen in connection with the planned construction authorized by Uruguay of one pulp mill and the construction and commissioning of another, also authorized by Uruguay, on the River Uruguay.

The boundary between Argentina and Uruguay in the River Uruguay is defined by the bilateral Treaty entered into for that purpose at Montevideo on 7 April 1961 (UNTS, Vol. 635, No. 9074, p. 98). Articles 1 to 4 of the Treaty delimit the boundary between the Contracting States in the river and attribute certain islands and islets in it to them. Articles 5 and 6 concern the régime for navigation on the river. Article 7 provides for the establishment by the parties of a "régime for the use of the river" covering various subjects, including the conservation of living resources and the prevention of water pollution of the river. Articles 8 to 10 lay down certain obligations concerning the islands and islets and their inhabitants.

The "régime for the use of the river" contemplated in Article 7 of the 1961 Treaty was established through the 1975 Statute. Article 1 of the 1975 Statute states that the parties adopted it "in order to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties".

The first pulp mill at the root of the dispute was planned by "Celulosas de M'Bopicuá S.A." (hereinafter "CMB"), a company formed by the Spanish company ENCE (from the Spanish acronym for "Empresa Nacional de Celulosas de España", hereinafter "ENCE"). This mill, hereinafter referred to as the "CMB (ENCE)" mill, was to have been built on the left bank of the River Uruguay in the Uruguayan department of Río Negro opposite the Argentine region of Gualeguaychú, more specifically to the east of the city of Fray Bentos, near the "General San Martín" international bridge. On 9 October 2003, MVOTMA (the Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs) issued an initial environmental authorization to CMB for the construction of the CMB (ENCE) mill.

On 28 November 2005, Uruguay authorized preparatory work to begin for the construction of the CMB (ENCE) mill (ground clearing). On 28 March 2006, the project's promoters decided to halt the work for 90 days. On 21 September 2006, they announced their intention not to build the mill at the planned site on the bank of the River Uruguay.

The second industrial project at the root of the dispute before the Court was undertaken by "Botnia S.A." and "Botnia Fray Bentos S.A." (hereinafter "Botnia"), companies formed under Uruguayan law in 2003 specially for the purpose by Oy Metsä-Botnia AB, a Finnish company. This second pulp mill, called "Orion" (hereinafter the "Orion (Botnia)" mill), has been built on the left bank of the River Uruguay, a few kilometres downstream of the site planned for the CMB (ENCE) mill, and also near the city of Fray Bentos. It has been operational and functioning since 9 November 2007.

3. Scope of the Court's jurisdiction (paras. 48-66)

The Court observes that the Parties are in agreement that the Court's jurisdiction is based on Article 36, paragraph 1, of the Statute of the Court and Article 60, first paragraph, of the 1975 Statute of the River Uruguay. The latter reads: "Any dispute concerning the interpretation or application of the Treaty[1] and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice." The Parties differ as to whether all the claims advanced by Argentina fall within the ambit of the compromissory clause.

The Court notes that only those claims advanced by Argentina which are based on the provisions of the 1975 Statute fall within the Court's jurisdiction ratione materiae under the compromissory clause contained in Article 60. Although Argentina, when making claims concerning noise and "visual" pollution allegedly caused by the pulp mill, invokes the provision of Article 36 of the 1975 Statute, the Court sees no basis in it for such claims. The plain language of Article 36, which provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it", leaves no doubt that it does not address the alleged noise and visual pollution as claimed by Argentina. Nor does the Court see any other basis in the 1975 Statute for such claims; therefore, the claims relating to noise and visual pollution are manifestly outside the jurisdiction of the Court conferred upon it under Article 60.

Similarly, no provision of the 1975 Statute addresses the issue of "bad odours" complained of by Argentina. Consequently, for the same reason, the claim regarding the impact of bad odours on tourism in Argentina also falls outside the Court's jurisdiction.

The Court then turns to the issue of whether its jurisdiction under Article 60 of the 1975 Statute also encompasses obligations of the Parties under international agreements and general international law invoked by Argentina and to the role of such agreements and general international law in the context of the present case.

Examining Article 1 of the 1975 Statute, the Court takes the view that it sets out only the purpose of the Statute, and that the reference to "the rights and obligations arising from treaties and other international agreements in force for each of the parties" does not suggest that the Parties sought to make compliance with their obligations under other treaties one of their duties under the 1975 Statute; rather, the reference to other treaties emphasizes that the agreement of the Parties on the Statute is reached in implementation of the provisions of Article 7 of the 1961 Treaty and "in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties" (emphasis added).

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[1]The Montevideo Treaty of 7 April 1961, concerning the boundary constituted by the River Uruguay (UNTS, Vol. 635, No. 9074, p. 98; footnote added).

The Court notes that the purpose of the provision in Article 41 (a) of the 1975 Statute is to protect and preserve the aquatic environment by requiring each of the parties to enact rules and to adopt appropriate measures. Article 41 (a) distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible with those guidelines and recommendations. However, Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay. Under Article 41 (b) the existing requirements for preventing water pollution and the severity of the penalties are not to be reduced. Finally, paragraph (c) of Article 41 concerns the obligation to inform the other party of plans to prescribe rules on water pollution.

The Court concludes that there is no basis in the text of Article 41 of the 1975 Statute for the contention that it constitutes a "referral clause". Consequently, the various multilateral conventions relied on by Argentina are not, as such, incorporated in the 1975 Statute. For that reason, they do not fall within the scope of the compromissory clause and therefore the Court has no jurisdiction to rule whether Uruguay has complied with its obligations thereunder.

Lastly, the Court notes that it had recourse, in interpreting the 1975 Statute, to the customary rules on treaty interpretation as reflected in Article 31 of the Vienna Convention on the Law of Treaties. Accordingly the 1975 Statute is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the [Statute] in their context and in light of its object and purpose". That interpretation will also take into account, together with the context, "any relevant rules of international law applicable in the relations between the parties". The Court points out that, in the interpretation of the 1975 Statute, taking account of relevant rules of international law applicable in the relations between the Parties nevertheless has no bearing on the scope of its jurisdiction, which remains confined to disputes concerning the interpretation or application of the Statute.

4. The alleged breach of procedural obligations (paras. 67-158)

The Court notes that the Application filed by Argentina on 4 May 2006 concerns the alleged breach by Uruguay of both procedural and substantive obligations laid down in the 1975 Statute.

(a) The links between the procedural obligations and the substantive obligations (paras. 71-79)

The Court notes that the object and purpose of the 1975 Statute, set forth in Article 1 of that instrument, is for the Parties to achieve "the optimum and rational utilization of the River Uruguay" by means of the "joint machinery" for co-operation, which originates in the procedural obligations and the substantive obligations under the Statute.

The Court has observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of "the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States" (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 133, para. 80).

The Court observes that it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute. However, whereas the substantive obligations are frequently worded in broad terms, the procedural obligations are narrower and more specific, so as to facilitate the implementation of the 1975 Statute through a process of continuous consultation between the parties concerned. The Court has described the régime put in place by the 1975 Statute as a "comprehensive and progressive régime" (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 133, para. 81), since the two categories of obligations mentioned above complement one another perfectly, enabling the parties to achieve the object of the Statute which they set themselves in Article 1.

The Court notes that the 1975 Statute created CARU (the Administrative Commission of the River Uruguay) and established procedures in connection with that institution, so as to enable the parties to fulfil their substantive obligations. However, nowhere does the 1975 Statute indicate that a party may fulfil its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones. Likewise, the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied ipso facto with their procedural obligations, or are excused from doing so. Moreover, the link between these two categories of obligations can also be broken, in fact, when a party which has not complied with its procedural obligations subsequently abandons the implementation of its planned activity.

Consequently, the Court considers that there is indeed a functional link, in regard to prevention, between the two categories of obligations laid down by the 1975 Statute, but that link does not prevent the States parties from being required to answer for those obligations separately, according to their specific content, and to assume, if necessary, the responsibility resulting from the breach of them, according to the circumstances

(b) The procedural obligations and their interrelation (paras. 80-122)

The Court notes that the obligations to inform CARU of any plan falling within its purview under the Statute, to notify the other party of the plan and to negotiate with the other party constitute an appropriate means, accepted by the Parties, of achieving the objective which they set themselves in Article 1 of the 1975 Statute. These obligations are all the more vital when a shared resource is at issue, as in the case of the River Uruguay, which can only be protected through close and continuous co-operation between the riparian States.

The Court examines the nature and role of CARU, and then considers whether Uruguay has complied with its obligations to inform CARU and to notify Argentina of its plans.

The nature and role of CARU (paras. 84-93)

The Court notes, first, that CARU, in accordance with Article 50 of the 1975 Statute, was endowed with legal personality "in order to perform its functions" and that the parties to the 1975 Statute undertook to provide it with "the necessary resources and all the information and facilities essential to its operations". Consequently, far from being merely a transmission mechanism between the parties, CARU has a permanent existence of its own; it exercises rights and also bears duties in carrying out the functions attributed to it by the 1975 Statute.

The Court observes that, like any international organization with legal personality, CARU is entitled to exercise the powers assigned to it by the 1975 Statute and which are necessary to

achieve the object and purpose of the latter, namely, "the optimum and rational utilization of the River Uruguay" (Article 1).

Since CARU serves as a framework for consultation between the parties, particularly in the case of the planned works contemplated in Article 7, first paragraph, of the 1975 Statute, neither of them may depart from that framework unilaterally, as they see fit, and put other channels of communication in its place. By creating CARU and investing it with all the resources necessary for its operation, the parties have sought to provide the best possible guarantees of stability, continuity and effectiveness for their desire to co-operate in ensuring "the optimum and rational utilization of the River Uruguay".

That is why CARU plays a central role in the 1975 Statute and cannot be reduced to merely an optional mechanism available to the parties which each may use or not, as it pleases. CARU operates at all levels of utilization of the river and furthermore has been given the function of drawing up rules in many areas associated with the joint management of the river and listed in Article 56 of the 1975 Statute.

Consequently, the Court considers that, because of the scale and diversity of the functions they have assigned to CARU, the Parties intended to make that international organization a central component in the fulfilment of their obligations to co-operate as laid down by the 1975 Statute.

Uruguay's obligation to inform CARU (paras. 94-111)

The Court notes that the obligation of the State initiating the planned activity to inform CARU constitutes the first stage in the procedural mechanism as a whole which allows the two parties to achieve the object of the 1975 Statute, namely, "the optimum and rational utilization of the River Uruguay". This stage, provided for in Article 7, first paragraph, involves the State which is initiating the planned activity informing CARU thereof, so that the latter can determine "on a preliminary basis" and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

To enable the remainder of the procedure to take its course, the parties have included alternative conditions in the 1975 Statute: either that the activity planned by one party should be liable, in CARU's opinion, to cause significant damage to the other, creating an obligation of prevention for the first party to eliminate or minimize the risk, in consultation with the other party; or that CARU, having been duly informed, should not have reached a decision in that regard within the prescribed period.

The Court notes that the Parties are agreed in considering that the two planned mills were works of sufficient importance to fall within the scope of Article 7 of the 1975 Statute, and thus for CARU to have been informed of them. The same applies to the plan to construct a port terminal at Fray Bentos for the exclusive use of the Orion (Botnia) mill, which included dredging work and use of the riverbed.

However, the Court observes that the Parties disagree on whether there is an obligation to inform CARU in respect of the extraction and use of water from the river for industrial purposes by the Orion (Botnia) mill.

The Court also points out that while the Parties are agreed in recognizing that CARU should have been informed of the two planned mills and the plan to construct the port terminal at Fray Bentos, they nonetheless differ as regards the content of the information which should be provided to CARU and as to when this should take place.

The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation "is now part of the corpus of international law relating to the environment" (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29).

In the view of the Court, the obligation to inform CARU allows for the initiation of co-operation between the Parties which is necessary in order to fulfil the obligation of prevention. This first procedural stage results in the 1975 Statute not being applied to activities which would appear to cause damage only to the State in whose territory they are carried out.

The Court observes that with regard to the River Uruguay, which constitutes a shared resource, "significant damage to the other party" (Article 7, first paragraph, of the 1975 Statute) may result from impairment of navigation, the régime of the river or the quality of its waters. Moreover, Article 27 of the 1975 Statute stipulates 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 Articles 7 to 12 when the use is liable to affect the régime of the river or the quality of its waters".

The Court notes that, in accordance with the terms of Article 7, first paragraph, the information which must be provided to CARU, at this initial stage of the procedure, has to enable it to determine swiftly and on a preliminary basis whether the plan might cause significant damage to the other party. For CARU, at this stage, it is a question of deciding whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the quality of its waters.

The Court considers that the State planning activities referred to in Article 7 of the Statute is required to inform CARU as soon as it is in possession of a plan which is sufficiently developed to enable CARU to make the preliminary assessment (required by paragraph 1 of that provision) of whether the proposed works might cause significant damage to the other party. At that stage, the information provided will not necessarily consist of a full assessment of the environmental impact of the project, which will often require further time and resources, although, where more complete information is available, this should, of course, be transmitted to CARU to give it the best possible basis on which to make its preliminary assessment. In any event, the duty to inform CARU will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization.

The Court observes that, in the present case, Uruguay did not transmit to CARU the information required by Article 7, first paragraph, in respect of the CMB (ENCE) and Orion (Botnia) mills, despite the requests made to it by the Commission to that effect on several occasions, in particular on 17 October 2002 and 21 April 2003 with regard to the CMB (ENCE) mill, and on 16 November 2004 with regard to the Orion (Botnia) mill. Uruguay merely sent CARU, on 14 May 2003, a summary for public release of the environmental impact assessment for the CMB (ENCE) mill. CARU considered this document to be inadequate and again requested further information from Uruguay on 15 August 2003 and 12 September 2003. Moreover, Uruguay did not transmit any document to CARU regarding the Orion (Botnia) mill. Consequently, Uruguay issued the initial environmental authorizations to CMB on 9 October 2003 and to Botnia on 14 February 2005 without complying with the procedure laid down in Article 7, first paragraph.

Uruguay therefore came to a decision on the environmental impact of the projects without involving CARU, thereby simply giving effect to its domestic legislation.

The Court further notes that on 12 April 2005 Uruguay granted an authorization to Botnia for the first phase of the construction of the Orion (Botnia) mill and, on 5 July 2005, an authorization to construct a port terminal for its exclusive use and to utilize the riverbed for industrial purposes, without informing CARU of these projects in advance.

With regard to the extraction and use of water from the river, the Court takes the view that this is an activity which forms an integral part of the commissioning of the Orion (Botnia) mill and therefore did not require a separate referral to CARU.

Further, the Court considers that the information on the plans for the mills which reached CARU via the companies concerned or from other non-governmental sources cannot substitute for the obligation to inform laid down in Article 7, first paragraph, of the 1975 Statute, which is borne by the party planning to construct the works referred to in that provision. Similarly, in the case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), the Court observed that

> "[i]f the information eventually came to Djibouti through the press, the information disseminated in this way could not be taken into account for the purposes of the application of Article 17 [of the Convention on Mutual Assistance in Criminal Matters between the two countries, providing that '[r]easons shall be given for any refusal of mutual assistance']" (Judgment of 4 June 2008, para. 150).

The Court concludes that Uruguay, by not informing CARU of the planned works before the issuing of the initial environmental authorizations for each of the mills and for the port terminal adjacent to the Orion (Botnia) mill, has failed to comply with the obligation imposed on it by Article 7, first paragraph, of the 1975 Statute.

Uruguay's obligation to notify the plans to the other party (paras. 112-122)

The Court notes that, under the terms of Article 7, second paragraph, of the 1975 Statute, if CARU decides that the plan might cause significant damage to the other party or if a decision cannot be reached in that regard, "the party concerned shall notify the other party of this plan through the said Commission". It adds that, under the terms of Article 7, third paragraph, of the 1975 Statute, the notification must describe "the main aspects of the work" and "any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters".

In the opinion of the Court, the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause.

Article 8 stipulates a period of 180 days, which may be extended by the Commission, for the notified party to respond in connection with the plan, subject to it requesting the other party, through the Commission, to supplement as necessary the documentation it has provided.

If the notified party raises no objections, the other party may carry out or authorize the work (Article 9). Otherwise, the former must notify the latter of those aspects of the work which may cause it damage and of the suggested changes (Article 11), thereby opening a further 180-day period of negotiation in which to reach an agreement (Article 12).

The obligation to notify is therefore an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects.

The Court notes that the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause significant transboundary harm to another State must be notified by the party concerned to the other party, through CARU, pursuant to Article 7, second and third paragraphs, of the 1975 Statute. This notification is intended to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts (Article 8 of the 1975 Statute).

The Court observes that this notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it.

In the present case, the Court observes that the notification to Argentina of the environmental impact assessments for the CMB (ENCE) and Orion (Botnia) mills did not take place through CARU, and that Uruguay only transmitted those assessments to Argentina after having issued the initial environmental authorizations for the two mills in question.

The Court concludes that Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7, second and third paragraphs, of the 1975 Statute.

(c) Whether the Parties agreed to derogate from the procedural obligations set out in the 1975 Statute (paras. 123-150)

The "understanding" of 2 March 2004 between Argentina and Uruguay (paras. 125-131)

The Court notes that while the existence of the "understanding" which the Foreign Ministers of the two States came to on 2 March 2004 has not been contested by the Parties, they differ as to its content and scope. Whatever its specific designation and in whatever instrument it may have been recorded (the CARU minutes), this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement. The Court recalls that the Parties disagree on whether the procedure for communicating information provided for by the "understanding" would, if applied, replace that provided for by the 1975 Statute. Be that as it may, such replacement was dependent on Uruguay complying with the procedure laid down in the "understanding".

The Court finds that the information which Uruguay agreed to transmit to CARU in the "understanding" of 2 March 2004 was never transmitted. Consequently, the Court cannot accept Uruguay's contention that the "understanding" put an end to its dispute with Argentina in respect of the CMB (ENCE) mill, concerning implementation of the procedure laid down by Article 7 of the 1975 Statute.

Further, the Court observes that, when this "understanding" was reached, only the CMB (ENCE) project was in question, and that it therefore cannot be extended to the Orion (Botnia) project, as Uruguay claims. The reference to both mills is made only as from July 2004, in the context of the PROCEL plan. However, this plan only concerns the measures to monitor and control the environmental quality of the river waters in the areas of the pulp mills, and not the procedures under Article 7 of the 1975 Statute.

The Court concludes that the "understanding" of 2 March 2004 would have had the effect of relieving Uruguay of its obligations under Article 7 of the 1975 Statute, if that was the purpose of the "understanding", only if Uruguay had complied with the terms of the "understanding". In the view of the Court, it did not do so. Therefore the "understanding" cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations laid down by the 1975 Statute.

The agreement setting up the High-Level Technical Group (the GTAN) (paras. 132-150)

The Court notes that, in furtherance of the agreement reached on 5 May 2005 between the Presidents of Argentina and Uruguay, the Foreign Ministries of the two States issued a press release on 31 May 2005 announcing the creation of the High-Level Technical Group, referred to by the Parties as the GTAN.

The Court points out that there is no reason to distinguish, as Uruguay and Argentina have both done for the purpose of their respective cases, between referral on the basis of Article 12 and of Article 60 of the 1975 Statute. While it is true that Article 12 provides for recourse to the procedure indicated in Chapter XV, should the negotiations fail to produce an agreement within the 180-day period, its purpose ends there. Article 60 then takes over, in particular its first paragraph, which enables either Party to submit to the Court any dispute concerning the interpretation or application of the Statute which cannot be settled by direct negotiations. This wording also covers a dispute relating to the interpretation or application of Article 12, like any other provision of the 1975 Statute.

The Court notes that the press release of 31 May 2005 sets out an agreement between the two States to create a negotiating framework, the GTAN, in order to study, analyse and exchange information on the effects that the operation of the cellulose plants that were being constructed in the Eastern Republic of Uruguay could have on the ecosystem of the shared Uruguay river, with "the group [having] to produce an initial report within a period of 180 days".

The Court recognizes that the GTAN was created with the aim of enabling the negotiations provided for in Article 12 of the 1975 Statute, also for a 180-day period, to take place. Under Article 11, these negotiations between the parties with a view to reaching an agreement are to be held once the notified party has sent a communication to the other party, through the Commission, specifying

> "which aspects of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations".

The Court is aware that the negotiation provided for in Article 12 of the 1975 Statute forms part of the overall procedure laid down in Articles 7 to 12, which is structured in such a way that the parties, in association with CARU, are able, at the end of the process, to fulfil their obligation to prevent any significant transboundary harm which might be caused by potentially harmful activities planned by either one of them.

The Court therefore considers that the agreement to set up the GTAN, while indeed creating a negotiating body capable of enabling the Parties to pursue the same objective as that laid down in Article 12 of the 1975 Statute, cannot be interpreted as expressing the agreement of the Parties to derogate from other procedural obligations laid down by the Statute.

Consequently, the Court finds that Argentina, in accepting the creation of the GTAN, did not give up, as Uruguay claims, the other procedural rights belonging to it by virtue of the

1975 Statute, nor the possibility of invoking Uruguay's responsibility for any breach of those rights. Nor did it consent to suspending the operation of the procedural provisions of the 1975 Statute. Indeed, under Article 57 of the Vienna Convention on the Law of Treaties of 23 May 1969, concerning "[s]uspension of the operation of a treaty", including, according to the International Law Commission's commentary, suspension of "the operation of . . . some of its provisions" (Yearbook of the International Law Commission, 1966, Vol. II, p. 251), suspension is only possible "in conformity with the provisions of the treaty" or "by consent of all the parties".

The Court further observes that the agreement to set up the GTAN, in referring to "the cellulose plants that are being constructed in the Eastern Republic of Uruguay", is stating a simple fact and cannot be interpreted, as Uruguay claims, as an acceptance of their construction by Argentina.

The Court finds that Uruguay was not entitled, for the duration of the period of consultation and negotiation provided for in Articles 7 to 12 of the 1975 Statute, either to construct or to authorize the construction of the planned mills and the port terminal. It would be contrary to the object and purpose of the 1975 Statute to embark on disputed activities before having applied the procedures laid down by the "joint machinery necessary for the optimum and rational utilization of the [r]iver" (Article 1). However, Article 9 provides that: "[i]f the notified party raises no objections or does not respond within the period established in Article 8 [180 days], the other party may carry out or authorize the work planned".

Consequently, in the opinion of the Court, as long as the procedural mechanism for co-operation between the parties to prevent significant damage to one of them is taking its course, the State initiating the planned activity is obliged not to authorize such work and, a fortiori, not to carry it out.

The Court notes, moreover, that the 1975 Statute is perfectly in keeping with the requirements of international law on the subject, since the mechanism for co-operation between States is governed by the principle of good faith. Indeed, according to customary international law, as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". That applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States.

In the view of the Court, there would be no point to the co-operation mechanism provided for by Articles 7 to 12 of the 1975 Statute if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the negotiations between the parties would no longer have any purpose.

In this respect, contrary to what Uruguay claims, the preliminary work on the pulp mills on sites approved by Uruguay alone does not constitute an exception. This work does in fact form an integral part of the construction of the planned mills.

The Court concludes that the agreement to set up the GTAN did not permit Uruguay to derogate from its obligations of information and notification under Article 7 of the 1975 Statute, and that by authorizing the construction of the mills and the port terminal at Fray Bentos before the expiration of the period of negotiation, Uruguay failed to comply with the obligation to negotiate laid down by Article 12 of the Statute. Consequently, Uruguay disregarded the whole of the co-operation mechanism provided for in Articles 7 to 12 of the 1975 Statute.

(d) Uruguay's obligations following the end of the negotiation period (paras. 151-158)

Article 12 refers the Parties, should they fail to reach an agreement within 180 days, to the procedure indicated in Chapter XV.

Chapter XV contains a single article, Article 60, according to which:

> "Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice.
>
> In the cases referred to in Articles 58 and 59, either party may submit any dispute concerning the interpretation or application of the Treaty and the Statute to the International Court of Justice, when it has not been possible to settle the dispute within 180 days following the notification referred to in Article 59."

The Court observes that the "no construction obligation", said to be borne by Uruguay between the end of the negotiation period and the decision of the Court, is not expressly laid down by the 1975 Statute and does not follow from its provisions. Article 9 only provides for such an obligation during the performance of the procedure laid down in Articles 7 to 12 of the Statute.

Furthermore, in the event of disagreement between the parties on the planned activity persisting at the end of the negotiation period, the Statute does not provide for the Court, to which the matter would be submitted by the State concerned, according to Argentina, to decide whether or not to authorize the activity in question. The Court points out that, while the 1975 Statute gives it jurisdiction to settle any dispute concerning its interpretation or application, it does not however confer on it the role of deciding in the last resort whether or not to authorize the planned activities. Consequently, the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk.

In its Order of 13 July 2006, the Court took the view that the "construction [of the mills] at the current site cannot be deemed to create a fait accompli" (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 133, para. 78). Thus, in pronouncing on the merits in the dispute between the Parties, the Court is the ultimate guarantor of their compliance with the 1975 Statute.

The Court concludes that Uruguay did not bear any "no construction obligation" after the negotiation period provided for in Article 12 expired on 3 February 2006, the Parties having determined at that date that the negotiations undertaken within the GTAN had failed. Consequently the wrongful conduct of Uruguay could not extend beyond that period.

5. Substantive obligations (paras. 159-266)

Having established that Uruguay breached its procedural obligations to inform, notify and negotiate to the extent and for the reasons given above, the Court turns to the question of the compliance of that State with the substantive obligations laid down by the 1975 Statute.

Burden of proof and expert evidence (paras. 160-168)

Before taking up the examination of the alleged violations of substantive obligations under the 1975 Statute, the Court addresses two preliminary issues, namely, the burden of proof and expert evidence.

To begin with, the Court considers that, in accordance with the well-established principle of onus probandi incumbit actori, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle which has been consistently upheld by the Court applies to the assertions of fact both by the Applicant and the Respondent.

The Court observes that it is of course to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it.

Regarding the arguments put forward by Argentina on the reversal of the burden of proof and on the existence, vis-à-vis each Party, of an equal onus to prove under the 1975 Statute, the Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof. The Court is also of the view that there is nothing in the 1975 Statute itself to indicate that it places the burden of proof equally on both Parties.

The Court next turns to the issue of expert evidence. Both Argentina and Uruguay have placed before the Court a vast amount of factual and scientific material in support of their respective claims. They have also submitted reports and studies prepared by the experts and consultants commissioned by each of them, as well as others commissioned by the International Finance Corporation in its quality as lender to the project. Some of these experts have also appeared before the Court as counsel for one or the other of the Parties to provide evidence.

The Parties, however, disagree on the authority and reliability of the studies and reports submitted as part of the record and prepared, on the one hand, by their respective experts and consultants, and on the other, by the experts of the IFC, which contain, in many instances, conflicting claims and conclusions.

The Court states that it has given most careful attention to the material submitted to it by the Parties, as shown in its consideration of the evidence with respect to alleged violations of substantive obligations. Regarding those experts who appeared before it as counsel at the hearings, the Court observes that it would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.

As for the independence of such experts, the Court does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties. It needs only to be mindful of the fact that, despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.

Alleged violations of substantive obligations (paras. 169-266)

(a) The obligation to contribute to the optimum and rational utilization of the river (Article 1 of the 1975 Statute) (paras. 170-177)

The Court observes that Article 1, as stated in the title to Chapter I of the 1975 Statute, sets out the purpose of the Statute. As such, it informs the interpretation of the substantive obligations, but does not by itself lay down specific rights and obligations for the parties. Optimum and rational utilization is to be achieved through compliance with the obligations prescribed by the 1975 Statute for the protection of the environment and the joint management of this shared resource. This objective must also be ensured through CARU, which constitutes "the joint machinery" necessary for its achievement, and through the regulations adopted by it as well as the regulations and measures adopted by the Parties.

The Court recalls that the Parties concluded the treaty embodying the 1975 Statute, in implementation of Article 7 of the 1961 Treaty, requiring the Parties jointly to establish a régime for the use of the river covering, inter alia, provisions for preventing pollution and protecting and preserving the aquatic environment. Thus, optimum and rational utilization may be viewed as the cornerstone of the system of co-operation established in the 1975 Statute and the joint machinery set up to implement this co-operation.

The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other. The need for this balance is reflected in various provisions of the 1975 Statute establishing rights and obligations for the Parties, such as Articles 27, 36, and 41. The Court concludes that it will therefore assess the conduct of Uruguay in authorizing the construction and operation of the Orion (Botnia) mill in the light of those provisions of the 1975 Statute, and the rights and obligations prescribed therein.

Regarding Article 27, it is the view of the Court that it embodies the interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.

(b) The obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters (Article 35 of the 1975 Statute) (paras. 178-180)

The Court is of the view that Argentina has not established its contention that Uruguay's decision to carry out major eucalyptus planting operations, to supply the raw material for the Orion (Botnia) mill, has an impact not only on management of the soil and Uruguayan woodland, but also on the quality of the waters of the river.

(c) The obligation to co-ordinate measures to avoid changes in the ecological balance (Article 36 of the 1975 Statute) (paras. 181-189)

The Court recalls that Article 36 provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it".

It is the opinion of the Court that compliance with this obligation cannot be expected to come through the individual action of either Party, acting on its own. Its implementation requires

co-ordination through the Commission. It reflects the common interest dimension of the 1975 Statute and expresses one of the purposes for the establishment of the joint machinery which is to co-ordinate the actions and measures taken by the Parties for the sustainable management and environmental protection of the river. The Parties have indeed adopted such measures through the promulgation of standards by CARU. These standards are to be found in Sections E3 and E4 of the CARU Digest. One of the purposes of Section E3 is "[t]o protect and preserve the water and its ecological balance". Similarly, it is stated in Section E4 that the section was developed "in accordance with . . . Articles 36, 37, 38, and 39".

In the view of the Court, the purpose of Article 36 of the 1975 Statute is to prevent any transboundary pollution liable to change the ecological balance of the river by co-ordinating, through CARU, the adoption of the necessary measures. It thus imposes an obligation on both States to take positive steps to avoid changes in the ecological balance. These steps consist not only in the adoption of a regulatory framework, as has been done by the Parties through CARU, but also in the observance as well as enforcement by both Parties of the measures adopted. As the Court emphasized in the Gabčíkovo-Nagymaros case:

> "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 78, para. 140).

The Court considers that the obligation laid down in Article 36 is addressed to both Parties and prescribes the specific conduct of co-ordinating the necessary measures through the Commission to avoid changes to the ecological balance. An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river.

This vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil. The obligation to co-ordinate, through the Commission, the adoption of the necessary measures, as well as their enforcement and observance, assumes, in this context, a central role in the overall system of protection of the River Uruguay established by the 1975 Statute. It is therefore of crucial importance that the Parties respect this obligation.

The Court concludes that Argentina has not convincingly demonstrated that Uruguay has refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision.

(d) The obligation to prevent pollution and preserve the aquatic environment (Article 41 of the 1975 Statute) (paras. 190-219)

Article 41 provides that:

> "Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:
>
> (a) to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and [adopting appropriate] measures in accordance with applicable international agreements and in keeping, where

relevant, with the guidelines and recommendations of international technical bodies;

(b) not to reduce in their respective legal systems:

1. the technical requirements in force for preventing water pollution, and

2. the severity of the penalties established for violations;

(c) to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems."

Before turning to the analysis of Article 41, the Court recalls that:

"the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29).

First, in the view of the Court, Article 41 makes a clear distinction between regulatory functions entrusted to CARU under the 1975 Statute, which are dealt with in Article 56 of the Statute, and the obligation it imposes on the Parties to adopt rules and measures individually to "protect and preserve the aquatic environment and, in particular, to prevent its pollution". Thus, the obligation assumed by the Parties under Article 41, which is distinct from those under Articles 36 and 56 of the 1975 Statute, is to adopt appropriate rules and measures within the framework of their respective domestic legal systems to protect and preserve the aquatic environment and to prevent pollution. This conclusion is supported by the wording of paragraphs (b) and (c) of Article 41, which refer to the need not to reduce the technical requirements and severity of the penalties already in force in the respective legislation of the Parties as well as the need to inform each other of the rules to be promulgated so as to establish equivalent rules in their legal systems.

Secondly, it is the opinion of the Court that a simple reading of the text of Article 41 indicates that it is the rules and measures that are to be prescribed by the Parties in their respective legal systems which must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies".

Thirdly, the obligation to "preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures" is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction. The obligation of due diligence under Article 41 (a) in the adoption and enforcement of appropriate rules and measures is further reinforced by the requirement that such rules and measures must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies". This requirement has the advantage of ensuring that the rules and measures adopted by the parties both have to conform to

applicable international agreements and to take account of internationally agreed technical standards.

Finally, the Court notes that the scope of the obligation to prevent pollution must be determined in light of the definition of pollution given in Article 40 of the 1975 Statute. Article 40 provides that: "For the purposes of this Statute, pollution shall mean the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects." The term "harmful effects" is defined in the CARU Digest as:

> "any alteration of the water quality that prevents or hinders any legitimate use of the water, that causes deleterious effects or harm to living resources, risks to human health, or a threat to water activities including fishing or reduction of recreational activities" (Title I, Chapter I, Section. 2, Article 1 (c) of the Digest (E3)).

In the view of the Court, the rules by which any allegations of breach are to be measured and, more specifically, by which the existence of "harmful effects" is to be determined, are to be found in the 1975 Statute, in the co-ordinated position of the Parties established through CARU (as the introductory phrases to Article 41 and Article 56 of the Statute contemplate) and in the regulations adopted by each Party within the limits prescribed by the 1975 Statute (as paragraphs (a), (b) and (c) of Article 41 contemplate).

The functions of CARU under Article 56 (a) include making rules governing the prevention of pollution and the conservation and preservation of living resources. In the exercise of its rule-making power, the Commission adopted in 1984 the Digest on the uses of the waters of the River Uruguay and has amended it since. In 1990, when Section E3 of the Digest was adopted, the Parties recognized that it was drawn up under Article 7 (f) of the 1961 Treaty and Articles 35, 36, 41 to 45 and 56 (a) (4) of the 1975 Statute.

The standards laid down in the Digest are not, however, exhaustive. As pointed out earlier, they are to be complemented by the rules and measures to be adopted by each of the Parties within their domestic laws.

The Court will apply, in addition to the 1975 Statute, these two sets of rules to determine whether the obligations undertaken by the Parties have been breached in terms of the discharge of effluent by the mill as well as in respect of the impact of those discharges on the quality of the waters of the river, on its ecological balance and on its biodiversity.

Environmental Impact Assessment (paras. 203-219)

The Court notes that in order for the Parties properly to comply with their obligations under Article 41 (a) and (b) of the 1975 Statute, they must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment. As the Court has observed in the case concerning the Dispute Regarding Navigational and Related Rights,

> "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009, para. 64).

In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance

among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment. It points out moreover that Argentina and Uruguay are not parties to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context. Finally, the Court notes that the other instrument to which Argentina refers in support of its arguments, namely, the UNEP Goals and Principles, is not binding on the Parties, but, as guidelines issued by an international technical body, has to be taken into account by each Party in accordance with Article 41 (a) in adopting measures within its domestic regulatory framework. Moreover, this instrument provides only that the "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance" (Principle 5) without giving any indication of minimum core components of the assessment. Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

Next, the Court deals with the specific points in dispute with regard to the role of this type of assessment in the fulfilment of the substantive obligations of the Parties, that is to say, first, whether such an assessment should have, as a matter of method, necessarily considered possible alternative sites, taking into account the receiving capacity of the river in the area where the plant was to be built and, secondly, whether the populations likely to be affected, in this case both the Uruguayan and Argentine riparian populations, should have, or have in fact, been consulted in the context of the environmental impact assessment.

The siting of the Orion (Botnia) mill at Fray Bentos (paras. 207-214)

Regarding the question of whether Uruguay failed to exercise due diligence in conducting the environmental impact assessment, particularly with respect to the choice of the location of the plant, the Court notes that under UNEP Principle 4 (c), an environmental impact assessment should include, at a minimum, "[a] description of practical alternatives, as appropriate". It is also to be recalled that Uruguay has repeatedly indicated that the suitability of the Fray Bentos location was comprehensively assessed and that other possible sites were considered. The Court further notes that the IFC's Final Cumulative Impact Study of September 2006 (hereinafter "CIS") shows that in 2003 Botnia evaluated four locations in total at La Paloma, at Paso de los Toros, at Nueva Palmira, and at Fray Bentos, before choosing Fray Bentos. The evaluations concluded that the limited amount of fresh water in La Paloma and its importance as a habitat for birds rendered it unsuitable, while for Nueva Palmira its consideration was discouraged by its proximity to residential, recreational, and culturally important areas, and with respect to Paso de los Toros insufficient flow of water during the dry season and potential conflict with competing water uses, as well as a lack of infrastructure, led to its exclusion. Consequently, the Court is not convinced by Argentina's argument that an assessment of possible sites was not carried out prior to the determination of the final site.

The Court further notes that any decision on the actual location of such a plant along the River Uruguay should take into account the capacity of the waters of the river to receive, dilute and disperse discharges of effluent from a plant of this nature and scale.

The Court sees no need to go into a detailed examination of the scientific and technical validity of the different kinds of modelling, calibration and validation undertaken by the Parties to characterize the rate and direction of flow of the waters of the river in the relevant area. The Court notes however that both Parties agree that reverse flows occur frequently and that phenomena of low flow and stagnation may be observed in the concerned area, but that they disagree on the implications of this for the discharges from the Orion (Botnia) mill into this area of the river.

The Court considers that in establishing its water quality standards in accordance with Articles 36 and 56 of the 1975 Statute, CARU must have taken into account the receiving capacity and sensitivity of the waters of the river, including in the areas of the river adjacent to Fray Bentos. Consequently, in so far as it is not established that the discharges of effluent of the Orion (Botnia) mill have exceeded the limits set by those standards, in terms of the level of concentrations, the Court finds itself unable to conclude that Uruguay has violated its obligations under the 1975 Statute.

Consultation of the affected populations (paras. 215-219)

The Court is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina. In any case, it finds that such a consultation by Uruguay did indeed take place.

Question of the production technology used in the Orion (Botnia) mill (paras. 220-228)

The Court observes that the obligation to prevent pollution and protect and preserve the aquatic environment of the River Uruguay, laid down in Article 41 (a), and the exercise of due diligence implied in it, entail a careful consideration of the technology to be used by the industrial plant to be established, particularly in a sector such as pulp manufacturing, which often involves the use or production of substances which have an impact on the environment. This is all the more important in view of the fact that Article 41 (a) provides that the regulatory framework to be adopted by the Parties has to be in keeping with the guidelines and recommendations of international technical bodies.

The Court finds that, from the point of view of the technology employed, and based on the documents submitted to it by the Parties, particularly the December 2001 Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry of the European Commission (hereinafter "IPPC-BAT"), there is no evidence to support the claim of Argentina that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced. This finding is supported by the fact that, as shown below, no clear evidence has been presented by Argentina establishing that the Orion (Botnia) mill is not in compliance with the 1975 Statute, the CARU Digest and applicable regulations of the Parties in terms of the concentration of effluents per litre of wastewater discharged from the plant and the absolute amount of effluents that can be discharged in a day.

The Court notes that, taking into account the data collected after the start-up of the mill as contained in the various reports, it does not appear that the discharges from the Orion (Botnia) mill have exceeded the limits set by the effluent standards prescribed by the relevant Uruguayan regulation or the initial environmental authorization issued by MVOTMA (MVOTMA, Initial Environmental Authorization for the Botnia Plant (14 February 2005)), except for a few instances in which the concentrations have exceeded the limits. The only parameters for which a recorded

measurement exceeded the standards set by Decree No. 253/79 or the initial environmental authorization by MVOTMA are: nitrogen, nitrates, and AOX (Adsorbable Organic Halogens). In those cases, measurements taken on one day exceeded the threshold. However, the initial environmental authorization of 14 February 2005 specifically allows yearly averaging for the parameters. The most notable of these cases in which the limits were exceeded is the one relating to AOX, which is the parameter used internationally to monitor pulp mill effluent, sometimes including persistent organic pollutants (POPs). According to the IPPC-BAT document of the European Commission submitted by the Parties, and considered by them as the industry standard in this sector, "the environmental control authorities in many countries have set severe restrictions on the discharges of chlorinated organics measured as AOX into the aquatic environment". Concentrations of AOX reached at one point on 9 January 2008, after the mill began operations, as high a level as 13 mg/L, whereas the maximum limit used in the environmental impact assessment and subsequently prescribed by MVOTMA was 6 mg/L. However, in the absence of convincing evidence that this is not an isolated episode but rather a more enduring problem, the Court is not in a position to conclude that Uruguay has breached the provisions of the 1975 Statute.

Impact of the discharges on the quality of the waters of the river (paras. 229-259)

The Court notes that it has before it interpretations of the data provided by experts appointed by the Parties, and provided by the Parties themselves and their counsel. However, in assessing the probative value of the evidence placed before it, the Court will principally weigh and evaluate the data, rather than the conflicting interpretations given to it by the Parties or their experts and consultants, in order to determine whether Uruguay breached its obligations under Articles 36 and 41 of the 1975 Statute in authorizing the construction and operation of the Orion (Botnia) mill.

The Court observes that a post-operational average value of 3.8 mg/L for dissolved oxygen would indeed, if proven, constitute a violation of CARU standards, since it is below the minimum value of 5.6 mg of dissolved oxygen per litre required according to the CARU Digest (E3, title 2, Chap. 4, Sec. 2). However, the Court finds that the allegation made by Argentina remains unproven.

The Court finds that, based on the evidence before it, the Orion (Botnia) mill has so far complied with the standard for total phosphorus in effluent discharge. The Court notes that the amount of total phosphorus discharge into the river that may be attributed to the Orion (Botnia) mill is insignificant in proportionate terms as compared to the overall total phosphorus in the river from other sources. Consequently, the Court concludes that the fact that the level of concentration of total phosphorus in the river exceeds the limits established in Uruguayan legislation in respect of water quality standards cannot be considered as a violation of Article 41 (a) of the 1975 Statute in view of the river's relatively high total phosphorus content prior to the commissioning of the plant, and taking into account the action being taken by Uruguay by way of compensation.

The Court notes that it has not been established to its satisfaction that the algal bloom episode of 4 February 2009 to which Argentina refers was caused by the nutrient discharges from the Orion (Botnia) mill.

Based on the record, and the data presented by the Parties, the Court concludes that there is insufficient evidence to attribute the alleged increase in the level of concentrations of phenolic substances in the river to the operations of the Orion (Botnia) mill.

The Court recalls that the issue of nonylphenols was included in the record of the case before the Court only by the Report submitted by Argentina on 30 June 2009. Although testing for nonylphenols had been carried out since November 2008, Argentina has not however, in the view of the Court, adduced clear evidence which establishes a link between the nonylphenols found in the waters of the river and the Orion (Botnia) mill. Uruguay has also categorically denied before

the Court the use of nonylphenolethoxylates for production or cleaning by the Orion (Botnia) mill. The Court therefore concludes that the evidence in the record does not substantiate the claims made by Argentina on this matter.

The Court considers that there is no clear evidence to link the increase in the presence of dioxins and furans in the river to the operation of the Orion (Botnia) mill.

Effects on biodiversity (paras. 260-262)

The Court is of the opinion that as part of their obligation to preserve the aquatic environment, the Parties have a duty to protect the fauna and flora of the river. The rules and measures which they have to adopt under Article 41 should also reflect their international undertakings in respect of biodiversity and habitat protection, in addition to the other standards on water quality and discharges of effluent. The Court has not, however, found sufficient evidence to conclude that Uruguay breached its obligation to preserve the aquatic environment including the protection of its fauna and flora. The record rather shows that a clear relationship has not been established between the discharges from the Orion (Botnia) mill and the malformations of rotifers, or the dioxin found in the sábalo fish or the loss of fat by clams reported in the findings of the Argentine River Uruguay Environmental Surveillance (URES) programme.

Air pollution (paras. 263-264)

As regards air pollution, the Court is of the view that if emissions from the plant's stacks have deposited into the aquatic environment substances with harmful effects, such indirect pollution of the river would fall under the provisions of the 1975 Statute. Uruguay appears to agree with this conclusion. Nevertheless, in view of the findings of the Court with respect to water quality, it is the opinion of the Court that the record does not show any clear evidence that substances with harmful effects have been introduced into the aquatic environment of the river through the emissions of the Orion (Botnia) mill into the air.

Conclusions on Article 41 (para. 265)

Following a detailed examination of the Parties' arguments, the Court ultimately finds that there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia) mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007. Consequently, on the basis of the evidence submitted to it, the Court concludes that Uruguay has not breached its obligations under Article 41.

Continuing obligations: monitoring (para. 266)

The Court is of the opinion that both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the 1975 Statute, including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the Orion (Botnia) mill on the aquatic environment. Uruguay, for its part, has the obligation to continue monitoring the operation of the plant in accordance with Article 41 of the Statute and to ensure compliance by Botnia with Uruguayan domestic regulations as well as the standards set by CARU. The Parties have a legal obligation under the 1975 Statute to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment.

6. The claims made by the Parties in their final submissions (paras. 267-281)

The Court considers that its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina. As Uruguay's breaches of the procedural obligations occurred in the past and have come to an end, there is no cause to order their cessation.

The Court, not having before it a claim for reparation based on a régime of responsibility in the absence of any wrongful act, deems it unnecessary to determine whether Articles 42 and 43 of the 1975 Statute establish such a régime. But it cannot be inferred from these articles, which specifically concern instances of pollution, that their purpose or effect is to preclude all forms of reparation other than compensation for breaches of procedural obligations under the 1975 Statute.

Examining Argentina's claim that the Orion (Botnia) mill should be dismantled on the basis of restitutio in integrum, the Court recalls that customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both.

The Court notes that like other forms of reparation, restitution must be appropriate to the injury suffered, taking into account the nature of the wrongful act having caused it.

As the Court has shown, the procedural obligations under the 1975 Statute did not entail any ensuing prohibition on Uruguay's building of the Orion (Botnia) mill, failing consent by Argentina, after the expiration of the period for negotiation. The Court has however observed that construction of that mill began before negotiations had come to an end, in breach of the procedural obligations laid down in the 1975 Statute. Further, as the Court has found, on the evidence submitted to it, the operation of the Orion (Botnia) mill has not resulted in the breach of substantive obligations laid down in the 1975 Statute. As Uruguay was not barred from proceeding with the construction and operation of the Orion (Botnia) mill after the expiration of the period for negotiation and as it breached no substantive obligation under the 1975 Statute, ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations.

As Uruguay has not breached substantive obligations arising under the 1975 Statute, the Court is likewise unable, for the same reasons, to uphold Argentina's claim in respect of compensation for alleged injuries suffered in various economic sectors, specifically tourism and agriculture.

Moreover, the Court fails to see any special circumstances in the present case requiring it to adjudge and declare, as Argentina requests, that Uruguay must provide adequate guarantees that it "will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty".

The Court further finds that Uruguay's request for confirmation of its right "to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute" is without any practical significance, since Argentina's claims in relation to breaches by Uruguay of its substantive obligations and to the dismantling of the Orion (Botnia) mill have been rejected.

Lastly, the Court points out that the 1975 Statute places the Parties under a duty to co-operate with each other, on the terms therein set out, to ensure the achievement of its object and purpose. This obligation to co-operate encompasses ongoing monitoring of an industrial facility, such as the Orion (Botnia) mill. In that regard the Court notes that the Parties have a long-standing and effective tradition of co-operation and co-ordination through CARU. By acting jointly through

CARU, the Parties have established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment.

7. Operative clause

For these reasons,

THE COURT,

(1) By thirteen votes to one,

Finds that the Eastern Republic of Uruguay has breached its procedural obligations under Articles 7 to 12 of the 1975 Statute of the River Uruguay and that the declaration by the Court of this breach constitutes appropriate satisfaction;

IN FAVOUR: Vice-President Tomka, Acting President; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge ad hoc Vinuesa;

AGAINST: Judge ad hoc Torres Bernárdez;

(2) By eleven votes to three,

Finds that the Eastern Republic of Uruguay has not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay;

IN FAVOUR: Vice-President Tomka, Acting President; Judges Koroma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge ad hoc Torres Bernárdez;

AGAINST: Judges Al-Khasawneh, Simma; Judge ad hoc Vinuesa;

(3) Unanimously,

Rejects all other submissions by the Parties.

Judges AL-KHASAWNEH and SIMMA append a joint dissenting opinion to the Judgment of the Court; Judge KEITH appends a separate opinion to the Judgment of the Court; Judge SKOTNIKOV appends a declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge YUSUF appends a declaration to the Judgment of the Court; Judge GREENWOOD appends a separate opinion to the Judgment of the Court; Judge ad hoc TORRES BERNÁRDEZ appends a separate opinion to the Judgment of the Court; Judge ad hoc VINUESA appends a dissenting opinion to the Judgment of the Court.

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Joint dissenting opinion Judges Al-Khasawneh and Simma

Judges Al-Khasawneh and Simma begin their joint dissenting opinion by highlighting their concurrence with the Judgment of the Court in so far as Uruguay's procedural obligations to inform and to notify Argentina of the construction of the pulp mills are concerned. However, because they consider that the Court has evaluated the scientific evidence brought before it by the Parties in a methodologically flawed manner, they dissent on the finding by the Court that there has been no breach of Uruguay's substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay.

Judges Al-Khasawneh and Simma emphasize the exceptionally fact-intensive nature of the case, which for them raises serious questions as to the role that scientific evidence can play in international judicial disputes. They consider that the traditional methods of evaluating evidence are deficient in assessing the relevance of such complex, technical and scientific facts, and that in the present case the assessment of scientific questions by experts is indispensable, as such experts possess knowledge and expertise to evaluate the increasingly complex nature of the facts put before courts such as the International Court of Justice. Judges Al-Khasawneh and Simma argue that the Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties. They disagree with the decision of the Court to adhere to its traditional rules on the burden of proof and to oblige Argentina to substantiate claims on issues which they claim the Court cannot fully comprehend without recourse to expert assessment.

Judges Al-Khasawneh and Simma present two alternatives. Firstly, they argue that one route for the Court, under Article 62 of its Rules, would have been to call upon the Parties to produce evidence or explanations that it considered necessary for understanding the matters in issue. Secondly, they argue that the Court, under Article 50 of its Statute, could have entrusted an individual, body, bureau, commission, or other organization with the task of carrying out an enquiry or giving an expert opinion. Without expressing a preference for either of these options, they consider that it would have behoved the Court to have made recourse to at least one of the sources of external expertise which it is empowered to consult. In this regard, Judges Al-Khasawneh and Simma point out that in both the Corfu Channel and Delimitation of the Maritime Boundary in the Gulf of Maine Area cases, the Court exercised its powers under Article 50 of the Statute and appointed technical experts to assist it in the resolution of the dispute before it.

Next, the joint dissenting opinion turns to a summary review of recent scholarly criticism of the Court's practice of persisting, when faced with sophisticated scientific and technical evidence in support of the legal claims made by States before it, in resolving these issues purely through the application of its traditional legal techniques. Judges Al-Khasawneh and Simma conclude that, in a scientific case such as the present dispute, the insights needed to make sound legal decisions necessarily emanate from experts consulted by the Court; they emphasize that it remains for the Court to discharge the exclusively judicial functions, such as the interpretation of legal terms, the legal categorization of factual issues, and the assessment of the burden of proof.

Judges Al-Khasawneh and Simma claim that, so long as the Court persists in resolving complex scientific disputes without recourse to outside expertise in an appropriate institutional framework such as that offered under Article 50 of the Statute, it willingly deprives itself of the ability fully to consider the facts submitted to it and of several other advantages: the interaction with experts in their capacity of experts and not as counsel; the advantage of giving the Parties a voice in establishing the manner in which those experts would have been used; a chance for the Parties to review the Court's choice of experts (and for which subject-matter experts were needed); and the chance for the Parties to comment on any expert conclusions emerging from that process.

Judges Al-Khasawneh and Simma consider that the Court's unstated practice, particularly in boundary or maritime delimitation cases, of having recourse to internal experts without informing the Parties, is especially unsatisfactory in disputes with a complex scientific component. They consider that adopting such a practice would deprive the Court of the above-mentioned advantages of transparency, openness, procedural fairness, and the ability of the Parties to comment upon or otherwise assist the Court in understanding the evidence before it. The joint dissenting opinion emphasizes the overall duty of the Court to facilitate the production of evidence and to reach the best representation of the essential facts in a case, in order best to resolve a dispute.

The joint dissenting opinion then surveys the Iron Rhine Railway and Arbitration between Guyana and Suriname arbitral awards, and several decisions of the Appellate Body of the World Trade Organization. Judges Al-Khasawneh and Simma observe in this regard that each of these dispute-settlement bodies consulted experts in a comprehensive manner at different points in their work, and conclude accordingly that the Court should have considered pursuing a similar approach, subject of course to the procedures laid out under its Statute. They regret that the Judgment in the present case is a wasted opportunity for the Court to establish itself as a careful, systematic court which can be entrusted with complex scientific evidence in the resolution of international disputes.

The joint dissenting opinion next turns to the question of the jurisdiction of the Court in the present case. Judges Al-Khasawneh and Simma consider that the 1975 Statute provides a dual role for the Court: firstly, under its Article 60, to resolve disputes relating to interpreting and applying rights and obligations under the Statute; and secondly, under its Article 12, as the Court acts as the primary adjudicator on technical and/or scientific matters when the Parties cannot reach agreement. The two judges consider that the latter function is qualitatively different from the role that was embraced by the Court in the present case, especially in so far as the perspective of Article 12 is decisively forward-looking: here, the Court is to step in, before a project is realized, where there is disagreement on whether there are potentially detrimental effects to the environment. Judges Al-Khasawneh and Simma consider that the procedure of Article 12 implies that the Court had to take a forward-looking, prospective approach, engage in a comprehensive risk assessment and embrace a preventive rather than compensatory logic when determining what this risk might entail. They also consider that the Court's proper discharge of its responsibilities under Article 12 would not only have facilitated the recourse to experts for which they earlier argued, but that it also would have entrenched prospective, preventive reasoning at the institutional level in the assessment of risks from the authorization process onwards, taking into account the often irreversible character of damage to the environment.

Judges Al-Khasawneh and Simma conclude with a final observation as to the extreme elasticity and generality of the substantive principles involved in the law relating to environmental protection. They consider that in such a situation, respect for procedural obligations assumed by States takes on additional importance and comes to the forefront as being an essential indicator of whether, in a concrete case, substantive obligations were or were not breached. For this reason, Judges Al-Khasawneh and Simma consider that the Court's conclusion, whereby non-compliance with the pertinent procedural obligations in the 1975 Statute has eventually had no effect on compliance with the substantive obligations also contained therein, is a proposition that cannot be easily accepted. They argue that the Court's recognition of a functional link between procedural and substantive obligations laid down in the Statute is insufficient, as the Court does not give full weight to this interdependence.

Judges Al-Khasawneh and Simma reiterate, by way of conclusion, their regret that the Court in the present case has missed what they consider a golden opportunity to demonstrate to the international community its ability, and preparedness, to approach scientifically complex disputes in a state-of-the-art manner.

Separate opinion of Judge Keith

In his separate opinion Judge Keith, first, addresses certain aspects of the fact-finding process in which the Court engaged in reaching its conclusion that Uruguay was not in breach of its substantive obligations. He summarizes the technical and scientific evidence provided by each Party in support of its pleadings, relating to the impact of the Botnia plant on the river, the information provided by the Parties in a further exchange of documents following the two rounds of written argument, and in the course of the hearing. He does that to emphasize the extent in time and space of the information, covering 50 kilometres of the river and 30 monitoring stations, its quality and its consistency. That consistency may in general be seen in the data collected up and downstream of the plant, before and after it began operating, and from Argentinian and Uruguayan sources. He indicates why he does not consider there would have been any value, in the circumstances of this case, for the Court to have exercised its power to order an enquiry or to seek an expert opinion — actions which neither Party requested. He calls attention to statements made by Argentina which support the Court's evaluation of the extensive data put before it. Judge Keith concludes this part of his opinion by highlighting the continuing obligation of Uruguay to prevent pollution of the river in respect of the operation of the Botnia Plant.

In the second part of his opinion, relating to Uruguay's procedural obligations, Judge Keith states his agreement with the rulings of the Court (1) that Uruguay breached its obligation to notify in proper time the plans for two plants, and (2) that, once the negotiating period of 180 days ended on 30 January 2006, Uruguay was not barred from authorizing the completion and operation of the plants. He gives his reasons for concluding, contrary to the ruling made by the Court, that the actions taken by Uruguay relating to each plant during that period did not breach its procedural obligations. The reasons relate to the course of the negotiations, as they appear in the record before the Court, and to the particular actions, three in total, taken by Uruguay in that period relating to the two plants.

Declaration of Judge Skotnikov

Judge Skotnikov has voted in favour of all the operative paragraphs of the Judgment. However, he does not fully concur with the Court's interpretation of the 1975 Statute of the River Uruguay.

He disagrees with the majority's logic according to which, after the end of the negotiation period, Uruguay, rather than referring its dispute with Argentina to the Court in accordance with Article 12 of the 1975 Statute, was free to proceed with the construction of the Botnia mill. In his view, a "no construction obligation" clearly follows from the provisions of the Statute and from its object and purpose.

The purpose of Articles 7 to 12 of the 1975 Statute is to prevent unilateral action which is not in conformity with the substantive provisions of the Statute, and thus to avoid causing injury to the rights of each Party while protecting their shared watercourse. It is therefore only logical that, if there is still no agreement after negotiations have run their course, the Party initiating the project has the option of either abandoning it altogether or requesting the Court, in accordance with Article 12 of the 1975 Statute, to resolve the dispute. Under this scheme of things, no injury is inflicted on either Party's rights and the shared watercourse remains protected.

By contrast, as follows from the interpretation contained in the Judgment, the Parties, when concluding the 1975 Statute, must have agreed to allow such an injury to occur, with the possibility of it later being rectified by a decision of the Court. The Parties cannot be presumed to have agreed to such an arrangement, since it is incompatible with the object and purpose of the Statute of the River Uruguay as defined in Article 1 ("the optimum and rational utilization of the River Uruguay"). There is nothing "optimum and rational" about including in the Statute a possibility of

causing damage to the river and incurring financial losses, first by constructing new channels and other works (in violation of substantive obligations under the Statute) and then by destroying them.

In Judge Skotnikov's view, Article 12 of the 1975 Statute establishes, on top of what is a classical compromissory clause contained in Article 60, an obligation for each Party to resolve disputes concerning activities mentioned in Article 7 by referral to the Court. This clearly follows from the language of Article 12: "[s]hould the Parties fail to reach agreement within 180 days following the notification referred to in article 11, the procedure indicated in chapter XV [i.e., Article 60] shall be followed".

In the Court's interpretation, Article 12 is deprived of any meaning. There would be no need for this article at all if its only purpose were to activate Article 60, since the Parties could always have direct recourse to the latter.

Judge Skotnikov concludes that Articles 7 to 12 of the Statute of the River Uruguay clearly establish a procedural mechanism which includes not only an obligation to inform, notify and, if there are objections, to negotiate, but also an obligation for both Parties, should the negotiations fail, to settle the dispute by referring it to the Court.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of 16 parts, Judge Cançado Trindade begins by pointing out that the identification itself of the applicable law in the cas d'espèce discloses the Court's own conception of the Law, and ineluctably leads to the consideration of the general theme of the "sources" of law, of international law. Although he accompanied the majority's decision in its findings on the basis of a strict valuation of the evidence produced before the Court, he regretted not to be able to concur with parts of the Court's reasoning, in particular its unfortunate overlooking of the general principles of law.

2. He would have supported reliance to a much greater extent on those legal principles, as, in his view, these latter (encompassing principles of international environmental law), together with the 1975 Statute of the River Uruguay, conform the applicable law in the present case. He pondered that his own personal position is in line with a current of international legal thinking, sedimented along the last nine decades (1920-2010), which, ever since the mid-seventies, has marked presence also in the domain of international environmental law.

3. Judge Cançado Trindade recalls that, already in the origins of the legislative history of Article 38 of the PCIJ/ICJ Statute (in 1920), and in its subsequent developments (from 1945 onwards) there was a trend in legal doctrine — cultivated also in subsequent decades — that sustained that the reference to "general principles of law" in that statutory provision was meant to refer not only to those principles found in foro domestico, but likewise to those identified at international law level. And these latter were not only those of general international law, but encompassed likewise the principles which were proper to a specific domain of international law, such as international environmental law (Parts I-III).

4. Next (Parts IV-VI), Judge Cançado Trindade proceeds to a review of the recourse to principles in the litigation before the ICJ, singling out relevant doctrinal developments on general principles of law to the same effect. He adds that those principles (of domestic as well as international law origin) are endowed with autonomy: the mens legis of the expression "general principles of law", as it appears in Article 38 (1) (c) of the ICJ Statute, indicates that those principles are not to be subsumed under custom or treaties: they constituted an autonomous

"source", encompassing principles of both substantive and procedural law. Furthermore, their scope of application ratione materiae has in recent years been the object of attention of contemporary international tribunals, and he believes that an important role is here to be played by the ICJ, attentive as it ought to be to the role of general principles, of particular relevance in the evolution of the expanding corpus juris of international law in our times.

5. The following Parts VII and VIII of his separate opinion turn attention to the principle of prevention and the precautionary principle, proper to the domain of international environmental law, and invoked and acknowledged in the present case by both contending Parties, Argentina and Uruguay, which dwelt upon their formulation, content and applicability. After examining the key elements of risks, and scientific uncertainties, in the configuration of the precautionary principle, Judge Cançado Trindade singles out the ineluctable long-term dimension of the inter-generational equity (Part IX), which, in his view, should also have been acknowledged in the present Judgment of the Court. The last principle he draws attention to is that of sustainable development, also raised by both Uruguay and Argentina (Part X), in line with the deep-rooted tradition of Latin American international legal thinking of being attentive to the role reserved to general principles of law.

6. Moving to the judicial determination of the facts (Part XI), he would have preferred that the Court's decision would have referred to the possibility open to it to obtain further evidence motu proprio. He reviews the practice of the PCIJ/ICJ in the handling of evidence, and concludes that, in the light of the Court's own experience so far in the handling of conflicting evidence, in the present case of the Pulp Mills not all the possibilities of fact-finding were exhausted. Questions may thus be raised whether, if the Court would have made use of this additional possibility (e.g., by means of in loco fact-finding) — as he thinks it should have — its conclusion as to substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay may have been different: any answer to this question would appear to him to be to a large extent conjectural.

7. The next set of Judge Cançado Trindade's considerations (Part XII) pertained to related aspects of the present case, lying beyond the inter-State dimension, to which he attributes particular importance, namely: (a) the imperatives of human health and the well-being of peoples; (b) the role of civil society in environmental protection; (c) the objective character of (environmental) obligations, beyond reciprocity; and (d) the legal personality of the Administrative Commission of River Uruguay (CARU). Attention to public health and the well-being of peoples — he recalls — was constantly present throughout the recent cycle of United Nations World Conferences, and has been raised on previous occasions before the ICJ itself.

8. The present case of the Pulp Mills, before becoming an inter-State case in October 2003, had originally been brought to the attention of CARU, by the end of 2001, by an Argentine non-governmental organization (NGO). In successive phases of the procedure of the present case, NGOs and other entities of civil society of both countries, Argentina and Uruguay, marked their presence by means of their participation in relation to environmental impact assessment and environmental monitoring. Both Uruguay and Argentina acknowledged the ineluctable partnership between public power and entities of the civil society when it came to matters of general public interest, such as environmental protection. Their indications were that, in the handling of environmental issues, States benefit from the contribution of NGOs and other entities of civil society, to the ultimate benefit of their populations.

9. Judge Cançado Trindade further argues that, in domains of protection, such as that of the environment, it is the objective character of obligations that ultimately matters. He is thus sceptical of any alleged ontological distinction between those obligations (such as, e.g., those of conduct and of

result). This again brings to the fore the relevance of general principles of law (e.g., that of good faith, asserting the principle pacta sunt servanda). In addition, the legal personality of CARU, acknowledged by the Court itself, brought the present case beyond the strict inter-State dimension. Although the implications inferred by Uruguay and Argentina, from such legal personality, were not the same — it was beyond question that the 1975 Statute had established an institutional framework for the fulfilment, thereunder, of the common interests of the States parties. There was a procedure, laid down in Articles 7 to 12 of the 1975 Statute, to be necessarily followed by the Parties; their continued co-operation, through CARU, was intended to enable this latter — as reckoned by the Court itself — to devise the appropriate means to promote the equitable utilization of the River Uruguay, while protecting its environment.

10. The last set of reflections on the part of Judge Cançado Trindade pertained to interrelated issues of juridical epistemology (Parts XIII-XVI), namely: (a) fundamental principles as substratum of the legal order itself; (b) prima principia in their axiological dimension; and (c) general principles of law as indicators of the status conscientiae of the international community. He contends that the general principles of law have inspired not only the interpretation and the application of the legal norms, but also the law-making process itself of their elaboration; they reflect the opinio juris, which, in its turn, lies on the basis of the formation of Law. Such principles mark presence at both national and international levels. There are fundamental principles of law which identify themselves with the very foundations of the legal system, revealing the values and ultimate ends of the international legal order and fulfilling the necessities of the international community.

11. Such principles are, in his view, an expression of an objective "idea of justice", wherefrom they secure the unity of Law, touching on the foundations of the necessary law of nations. In his perception, they emanate from human or juridical conscience, as the ultimate material source of all Law. Judge Cançado Trindade argues that, if the observance of the precautionary principle, for example, had prevailed all the time, in the attitude of the two contending Parties as well as in that of the Court itself, that would have made a difference in the contentious situation now settled by the Court. The two States concerned would in all probability not have reached their so-called "understanding", in the Ministerial Meeting of 2 March 2004, in a way circumventing the procedure laid down in Articles 7 to 12 of the 1975 Statute (in particular Article 7). And the Court, in turn, would have reached a decision distinct from the one it took on 13 July 2006, and would have, in all probability, ordered or indicated the requested provisional measures of protection (to be effective until the present Judgment on the merits of the Pulp Mills case).

12. General principles of law indeed confer to the legal order (both national and international) — he adds — its ineluctable axiological dimension; they lie on the foundations of the jus necessarium, and reveal the reveal the values which inspire the whole legal order. The identification of the basic principles has accompanied pari passu the emergence and consolidation of all the domains of law. Judge Cançado Trindade concludes that international environmental law provides a good illustration in this respect, and could hardly be conceived nowadays without reference to the principles of prevention, of precaution, and of sustainable development with its temporal dimension, together with the long-term temporal dimension underlying inter-generational equity. In his perception, the International Court of Justice, as the World Court, cannot overlook principles.

Declaration of Judge Yusuf

Judge Yusuf, who concurs in the Judgment, appends a declaration in which he expresses his reservations regarding the manner in which the Court decided to handle the factual material presented by the Parties. In his view, the Court should have had recourse to expert assistance, as

provided in Article 50 of its Statute, to help it gain a more profound insight into the scientific and technical intricacies of the evidence submitted by the Parties.

In the opinion of Judge Yusuf, the Court's recourse to an enquiry or to an expert opinion in the handling of the complex technical and scientific material submitted to it, far from undermining its judicial function, could have assisted it to elucidate the facts and to clarify the validity of the methods used to establish the scientific data presented to it. Such recourse would not have affected the role of the judge as the arbiter of fact, since it is ultimately the responsibility of the Court to decide on the relevance and significance of the results of the work of the experts.

Judge Yusuf concludes that, to avoid errors in the appreciation or determination of facts that can substantially undermine the credibility of the Court, and to assure States appearing before the Court that scientifically complex facts related to their cases are fully understood and appreciated by the Court, it would serve the Court well in the future to develop a clear strategy which would enable it to assess the need for an expert opinion at an early stage of its deliberations on a case.

Separate opinion of Judge Greenwood

In his separate opinion, Judge Greenwood states that he agrees with the decision that Uruguay has committed no breach of its substantive obligations under the Statute of the River Uruguay and with the decision that Uruguay failed to comply with its procedural obligations under Articles 7 to 12 of the Statute. He considers, however, that the breach of the procedural obligations was more limited in scope than that found by the Court. In his opinion, the action authorized by Uruguay with regard to the two mills during the period of negotiation were not sufficient to amount to a violation of the obligation under Article 9 of the Statute or the obligation to negotiate in good faith.

Judge Greenwood considers that the burden of proof was on Argentina to establish the facts which it asserted on the balance of probabilities. He agrees with the methodology adopted by the Court and with its conclusion that Argentina had failed to prove its case regarding breaches of the substantive obligations. He adds that it is important that a party appearing before the Court maintain a clear distinction between the functions of witnesses and experts, on the one hand, and those of counsel, on the other. That is important both to assist the Court and to ensure that the right of the other party to put questions to an expert or witness is properly respected. Someone who is going to speak of facts within their own knowledge or offer their own opinion on scientific data should not do so as counsel but should make the declaration required by Article 64 of the Rules of Court and be subject to questioning.

Judge Greenwood concludes by drawing the attention of the Parties to their continuing obligations under the Statute.

Separate opinion of Judge ad hoc Torres Bernárdez

1. As is stated in the introduction to his separate opinion, Judge Torres Bernárdez endorses many of the conclusions reached by the Court in its Judgment, notably those relating: to the rejection of the Applicant's claims that the Respondent breached substantive obligations under the Statute of the River Uruguay; and to the dismantling of the Orion (Botnia) mill in Fray Bentos. He also fully supports the conclusions in the Judgment in respect of the scope of the Court's jurisdiction and the applicable law, the burden of proof and expert evidence, the rejection of the supposed "strict link" between the Statute's procedural and substantive obligations, the rejection of the alleged "no construction obligation" said to be borne by the Respondent between the end of direct negotiations and the decision of the Court; and he agrees that satisfaction is appropriate reparation for the breach of procedural obligations.

2. However, Judge Torres Bernárdez does not agree with certain considerations evoked in the Judgment relating to the Respondent's breach, alleged by Argentina, of the Statute's procedural obligations, which form the basis of the majority's finding on this point. He reaches very different conclusions to those of the majority on this matter. Wishing to explain his reasons for voting against point 1 of the Judgment's operative clause, Judge Torres Bernárdez focuses exclusively on those issues in his separate opinion.

1. Preliminary considerations

3. Firstly, in his opinion, Judge Torres Bernárdez points out that an excessively "institutional understanding" of CARU informs the Judgment and that, as a result, its reasoning gives a picture of the Commission's powers and of its role in the prior consultation process under Articles 7 to 12 of the 1975 Statute of the River Ururguay with which he does not agree. He believes that this understanding has affected the method of interpretation adopted by the majority, which has given precedence to certain interpretative elements to the detriment of others that are equally applicable. Judge Torres Bernárdez is of the opinion that the general rule of interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties is one integrated rule, with each provision forming part of the whole. Granted, that rule incorporates the "relevant rules of international law applicable in the relations between the parties", but it has other components as well, and the interpreter must weigh each of these in an interpretation process where the starting point is to clarify the meaning of the text, not at the outset to ascertain the intent of the Parties.

4. In point of fact, the method of interpretation adopted by the majority facilitates an "evolutionary" interpretation of the provisions of the Statute of the River Uruguay. Judge Torres Bernárdez approves of this in so far as the Statute's rules relating to substantive obligations are concerned. This is indicated by the wording of Article 41 of the Statute concerning the obligation to protect and preserve the aquatic environment and to prevent the pollution of the river water. Furthermore, both Parties in this case accept the irrefutable developments in international environmental law over recent years.

5. On the other hand, Judge Torres Bernárdez does not believe that the methods of interpretation leading to such an evolutionary conclusion are justified in this case in respect of the Statute's rules relating to procedural obligations. Neither the wording of these rules in their context, nor subsequent agreements between the Parties, nor the practice of the Parties in their interpretation and application of the treaty, would warrant the application of methods leading to evolutionary interpretations. According to Judge Torres Bernárdez, this affects the territorial sovereignty of the State, i.e., an area where limits on sovereignty are not to be presumed (see the case concerning S.S. "Wimbledon", P.C.I.J. Series A, No. 1, p. 24).

6. Moreover, Judge Torres Bernárdez points out that the language itself of Article 7, paragraph 1, of the Statute introduces a precondition to the applicability of the rule: before informing CARU, it is first necessary to determine whether the project in question falls within the scope of the obligation laid down by that provision of the Statute. Article 7 leaves this initial characterization to the Party planning the works, namely, the territorial sovereign, without prejudice to the other Party's right to dispute this initial characterization. In the present case, the Applicant has affirmed its right to make the initial characterization of its own projects and, on this basis, its unwavering practice has been, according to the record, to build industrial plants without informing CARU. Judge Torres Bernárdez believes that Argentina cannot deny that Uruguay had the right initially to characterize the CMB (ENCE) project in October 2003, because allegans contraria non audiendus est.

7. Judge Torres Bernárdez also states that the CARU minutes (for example, those concerning the Transpapel project) offer a good illustration of how this question of the initial characterization of planned works has been kept in mind in situations involving plans for national industrial plants by one or other of the Parties on their respective banks of the river, and of how the reactions of Commission members have been far from consistent. They even cross over. For example, the initial characterization, in 2003, of the CMB (ENCE) project by Mr. Opperti, the Minister for Foreign Affairs of Uruguay, appears to be in line with or very similar to that of the head of Argentina's delegation to CARU, Ambassador Carasales, for the Transpapel project.

8. Furthermore, Judge Torres Bernárdez recalls that both Parties acknowledge: (1) that CARU is without the power to approve the projects of which it is informed by the party planning the works; and (2) that the rules of Article 7, like all of the Statute's other rules on the "prior consultation" régime, do not constitute jus cogens and that, therefore, the Parties are free to agree not to apply them in a given case.

2. Stage of the procedure at which Uruguay was obliged to inform CARU about the work it was planning to carry out

9. According to the Judgment, the obligation of the State planning activities specified in Article 7 of the Statute to inform CARU "will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization" (para. 105). Judge Torres Bernárdez does not agree because, in his opinion, the text of Article 7, paragraph 1, of the Statute does not refer to such an early stage in the planning process of the work. The majority's finding may be explained by its institutional understanding of CARU, already noted, and by the link that it makes between the obligation to inform CARU and the principle of prevention, which, as a customary rule, is part of the corpus of rules of contemporary international environmental law.

10. However, Judge Torres Bernárdez believes that the majority by so finding has introduced limitations on the State's territorial sovereignty during the planning phase of an industrial project which go beyond those which are explicit in Article 7 of the Statute or by necessity underlie the text. According to Judge Torres Bernárdez, the majority is attributing a shared "evolutionary" intent to the Parties on this point, of which there is no evidence at all either in Article 7, or in any of the other procedural rules making up the "prior consultation" régime of the 1975 Statute, that is to say, that this is based on a presumption. However, as has been shown, limitations on a State's territorial sovereignty are not to be presumed.

11. Judge Torres Bernárdez believes that the adoption of methods characteristic of "evolutionary" interpretation is not justified in the present context because the wording of the provisions laying down the "prior consultation" régime of the 1975 Statute, including therefore Article 7, does not directly or indirectly permit the interpreter to do so. In fact, by adopting such methods, the Judgment's recourse to the "relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3 (c) of the Vienna Convention on the Law of Treaties) is not aimed at determining the stage or point at which the territorial State is obliged to inform CARU pursuant to Article 7, paragraph 1, of the Statute, but at determining the best time to inform CARU from the point of view of applying the customary principle of prevention under international environmental law, therefore assigning to the treaty provision, the subject of the interpretation, the role of satisfying the requirements of the application of the customary principle of prevention. The result, according to Judge Torres Bernárdez, is that the text, the context and the subsequent agreements or practice become trivial elements in the interpretation process of Article 7 of the Statute. Furthermore, Judge Torres Bernárdez strongly fears that the decided outcome will

become an additional source of difficulty for one or both of the Parties in the future because it does not correspond to the practice they have followed to date.

12. For example, Judge Torres Bernárdez points out that, under Uruguayan law, the fact that a request for initial environmental authorization is submitted by a third party, or that DINAMA considers that request, or even makes a favourable recommendation to the higher authorities, does not mean that the planned activity in question can be described at any stage in this process as a planned activity of the Uruguayan State. Throughout this whole process, the State has not approved anything and, as a result, it cannot be said that "Uruguay is planning to carry out the works", as Article 7, paragraph 1, of the Statute requires. It is only after the initial environmental authorization (AAP) required by Uruguayan law has been issued, that the Uruguayan State can be said to have agreed to the project and then only in respect of its environmental viability. Indeed, under Uruguayan law, AAPs do not authorize construction activities of any sort; the holder of an AAP only has the right to request a construction authorization or permit.

13. Judge Torres Bernárdez also does not think it a good idea to specify, as the Judgment does, the stage at which CARU must be informed by reference to the provisions or rules of the law of the State concerned, since this subordinates the operation of the obligation under international law to inform CARU to the national law of one or other of the Parties. This may have the regrettable result of one party being obliged to inform CARU of its plans earlier than the other. Judge Torres Bernárdez does not believe that such intent can be attributed to the drafters of the 1975 Statute of the River Uruguay.

14. Judge Torres Bernárdez believes it is clear from the wording of Article 7, paragraph 1, of the Statute that the obligation to inform CARU is tied to the "carrying out" of the planned works, because the authentic Spanish text is unambiguous in this respect. That the State is only planning the works is not sufficient. According to the text of the provision, the State must also be "planning the carrying out of the work", because it is only during the carrying out of the work that activities or works of a physical nature relating thereto could affect navigation, the régime of the river or the quality of its waters and thereby cause significant damage to the other State, as the river is a shared natural resource. The mere granting by a public administrative body of an "authorization" is not an activity or an act likely to cause such effects. According to Judge Torres Bernárdez, the interpretative elements which define the general rule of interpretation under Article 31 of the Vienna Convention, as they are present in this case, do not confirm the position that — for the purposes of Article 7, paragraph 1, of the Statute — informing CARU must precede "any authorization", such as, for example, an AAP under Uruguayan law.

15. In light of the preceding considerations, Judge Torres Bernárdez is of the opinion that the interpreter should resolve this issue by looking to the rule of general international law stating that, where the text is silent, the obligation to inform or to notify must be satisfied "timely" ("en temps utile") or "in a timely manner" ("opportun"), that is to say, before the project is so far advanced in its construction that any assessment of the potential damage from the industrial facility would come too late to offer any remedy, which would undoubtedly be contrary to Article 7, paragraph 1, of the Statute. In the Judge's opinion, this would require the State making the communication to have, at the time of informing or notifying, solid technical data on the main aspects of the work.

16. In any case, Judge Torres Bernárdez believes that, at the date of conclusion of the 2 March 2004 and 5 May 2005 agreements, which will be examined below, the period for informing CARU timely or in a timely manner about the implementation of the CMB (ENCE) mill and Orion (Botnia) mill projects had not yet expired: Uruguay still had the opportunity to do this in

a timely or appropriate manner for the purposes of the aims to be achieved through the information process. Therefore, at the date of conclusion of its agreements, Uruguay could not have breached the obligation to inform CARU under Article 7, paragraph 1, of the Statute, because "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs" (Article 13, Articles on Responsibility of States for Internationally Wrongful Acts).

17. Judge Torres Bernárdez is therefore of the opinion that there was no "wrongful delay" by Uruguay in respect of the obligation to inform CARU before concluding the above-mentioned subsequent agreements. He also adds that the two Parties are agreed that the acts amounting to any procedural breaches involving Articles 7 to 12 of the Statute are to be categorized as being "instantaneous" in nature.

3. The scope and content of the agreements made by the Parties on 2 March 2004 and 5 May 2005

18. The opinion notes that in the cases of both ENCE and Botnia, the Parties jointly decided to dispense with the preliminary review by CARU provided for in Article 7 of the Statute of the River Uruguay and to proceed immediately to direct negotiations, as referred to in Article 12. Furthermore, in both cases, it was Argentina which sought direct consultations with Uruguay at times when CARU did not offer a viable framework, either because the Commission had halted its sessions, or because it was deadlocked. This is by no means surprising given that when the Parties fail to agree within CARU on the impact of the planned works on the ecosystem of the River Uruguay, the matter "leaves the orbit of competence of the Commission and is turned over to be considered at the level of the Governments" (presentation by the Argentine Minister for Foreign Affairs, Mr. Taiana, to the Foreign Affairs Commission of the Argentine Chamber of Deputies on 14 February 2006).

19. Furthermore, as the rules laid out in Articles 7 to 12 of the Statute are not peremptory norms (jus cogens), there was nothing to prevent the Parties from agreeing to proceed immediately to direct consultation or negotiations without having to adhere to the procedures under the Statute. In Judge Torres Bernárdez's opinion, this is precisely what the Parties did, first with the understanding reached by the Ministers for Foreign Affairs on 2 March 2004 (Bielsa-Opperti agreement), and later with the agreement concluded by the Presidents on 5 May 2005 (Vázquez-Kirchner agreement establishing the GTAN); the effects of these agreements in establishing an exception are fully accepted in the opinion. This is the basis of Judge Torres Bernárdez's difference of opinion with the majority because, despite acknowledging, in paragraphs 128 and 138, that the agreements in question are binding on the Parties since they have consented to them, the Judgment rejects that in the present case their effect is to depart from the Statute's régime.

(a) The 2 March 2004 understanding between the Ministers for Foreign Affairs

20. On 9 October 2003, MVOTMA granted an initial environmental authorization (AAP) to ENCE for the "Celulosas de M'Bopicuá S.A." (CMB) pulp mill on the Uruguayan bank of the River Uruguay at Fray Bentos, near the "General San Martín" international bridge, and opposite the Argentine region of Gualeguaychú, where the population had demonstrated against the mill. Argentina deemed this a breach of Article 7 of the Statute of the River Uruguay and protested against the granting of the AAP in question to ENCE, notably by ceasing to attend CARU meetings, a situation which continued until the conclusion of the 2 March 2004 agreement.

21. In this respect, Judge Torres Bernárdez points out that, in spite of the situation within CARU, the Parties continued their discussions about the CMB (ENCE) project at a higher level — through ministers or Ministers for Foreign Affairs — and that Argentina received from Uruguay all of the information relating to the project just a few days after the granting of the AAP to ENCE, namely, on 27 October and 9 November 2003. This information allowed Argentina's technical advisers to study the CMB (ENCE) project and to produce a report for their authorities in February 2004, in which they concluded that there was no significant environmental impact on the Argentine side of the river, something which was acknowledged in certain Argentine documents, as well as by Argentina's own delegates to CARU. In Judge Torres Bernárdez's view, this report reassured Argentina about the possible effects of building the disputed mill, thus opening the way to further meetings of the Parties and, eventually, to the conclusion of the Bielsa-Opperti agreement on 2 March 2004.

22. Argentina has argued in these proceedings that the 2 March 2004 agreement did not render Article 7 of the Statute of the River Uruguay inapplicable in this case. However, statements made to the press by the Ministers for Foreign Affairs, drafts exchanged by ambassadors Mr. Sguiglia (Argentina) and Mr. Sader (Uruguay) with a view to committing the ministers' oral agreement to writing, even the language of the agreement recorded in the minutes of CARU's meeting on 15 May 2004, as well as other pieces of documentary evidence from official Argentine sources, have convinced Judge Torres Bernárdez to the contrary.

23. In his view, these various factors tip the balance resolutely in favour of Ururguay's version of the facts as presented in its written pleadings and during the oral phase, that is, that the Ministers for Foreign Affairs agreed that the CMB (ENCE) pulp mill would be built in Fray Bentos on the condition: (1) that CARU maintained a certain level of control over technical aspects, as described in the agreement, relating to the construction of the mill (which is in no way connected to the preliminary review under Article 7, paragraph 1, of the Statute); and (2) that, once the mill had entered operation, a system would be established for CARU's monitoring of the quality of the river's waters throughout the area of the mill site. The "planning" phase for the mill, to which the obligation to inform CARU relates under Article 7 of the Statute, occurred before the Bielsa-Opperti agreement, which looked ahead to the future, that is, to the "construction" and "commissioning" phases of the mill.

24. The wording of the Bielsa-Opperti agreement was ratified in the minutes of CARU's extraordinary meeting on 15 May 2004 (first meeting of the Commission since October 2003) and duly authenticated by the signatures of the head of the Argentine delegation to CARU, Mr. Roberto García Moritán, and the head of the Uruguayan delegation, Mr. Walter M. Belvisi, as well as by that of CARU's Administrative Secretary, Mr. Sergio Chave. However, Judge Torres Bernárdez cannot find a single passage, nor even a single word, in these minutes to support the contention that the Bielsa-Opperti agreement implied a return to the Commission for the purposes of Article 7, paragraph 1, of the Statute.

25. It is Judge Torres Bernárdez's belief that the text of these minutes proves the exact opposite. Indeed, in Point I of the Specific Agreed-Upon Matters, it is stated that CARU shall receive and consider, taking into account the terms included in MVOTMA's Ministerial resolution 342/2003 of 9 October 2003 granting the AAP for the CMB project to ENCE, the Environmental Management Plans for the construction and operation of the mill provided by the company to the Uruguayan Government, as soon as the latter has communicated them, as well as the actions requiring additional implementation and assessment by the company before they are approved, while "formulating its observations, comments and suggestions, which shall be transmitted to Uruguay, to be dismissed or decided with the company". Moreover, in respect of the

operational phase mentioned in Point II of the Specific Agreed-Upon Matters, the text states that monitoring of the environmental quality shall be carried out in conformity with the provisions of the Statute of the River Uruguay, especially Chapter X, Articles 40 to 43, and that both delegations agree that, in view of the scope of the undertaking and its possible effects, CARU shall adopt procedures in accordance with the minutes.

26. In his opinion, Judge Torres Bernárdez points out that the relevant extract of the minutes from 15 May 2004 concludes with the decision by the Commission to carry out the content of the agreement reached on 2 March 2004 between Ministers Bielsa and Opperti in its entirety, an agreement which, as was acknowledged at the time by the President of the Argentine delegation to CARU, Mr. Moritán, served as "an important limiting factor in our position" on the procedure provided for in Article 7 of the Statute. Judge Torres Bernárdez believes that the content of the statements of those involved shows that no-one was any longer expecting CARU to exercise the general powers conferred on it under Articles 7 to 18 of the Statute in respect of the CMB (ENCE) plant, rather that it would carry out only certain tasks agreed on in the Bielsa-Opperti agreement. In his separate opinion, Judge Torres Bernárdez also cites passages from certain official Argentine documents from that time which, he thinks, confirm the scope of the 2 March 2004 agreement, notably: (1) a statement from the Argentine Ministry of Foreign Affairs in a report on 2004 to the Senate; (2) a statement from the Argentine Ministry of Foreign Affairs in a report on 2004 to the Chamber of Deputies; and (3) a statement in the 2004 Annual Report on the State of the Nation, prepared by the Office of Argentina's President.

27. In these last two documents, it is expressly stated that the bilateral agreement of 2 March 2004 put an end to the dispute over the construction of a pulp mill in Fray Bentos. It therefore follows from these documents that the Bielsa-Opperti agreement established a substitute procedure for that of the Statute. It also follows that this procedure was later extended to Orion (Botnia) because, in some of these documents, there is mention of "two plants" or "the possible installation of pulp mill plants on the Uruguay river bank". Furthermore, Judge Torres Bernárdez points out that, when the GTAN was created, the joint press release of 31 March 2005 also referred to "pulp mill plants" being built in the Eastern Republic of Uruguay. CARU and its Sub-committee on Water Quality and Pollution Control did the same: the full title of PROCEL is "Plan for Monitoring Water Quality of the River Uruguay in the Area of the Pulp Mills".

28. Judge Torres Bernárdez therefore disagrees with the findings in paragraphs 129 and 131 of the Judgment, whereby the Court — although acknowledging that the understanding of 2 March 2004 is undoubtedly a procedure replacing that under the Statute — concludes: (1) that it cannot accept Uruguay's contention that the understanding put an end to its dispute with Argentina in respect of the CMB (ENCE) mill concerning the implementation of the procedure laid down by Article 7 of the Statute, because the information — which Uruguay was obliged under the Bielsa-Opperti understanding to transmit to CARU — was never transmitted; and (2) that it cannot accept Uruguay's contention that the scope of the understanding was later extended by the Parties to the Orion (Botnia) project, because reference to "the two mills" is made only as from July 2004 in the context of the PROCEL plan, which concerns the measures to monitor the environmental quality of the river waters, not the procedures under Article 7 of the Statute.

29. As far as the findings of the majority of the Court on Uruguay's "non-performance" of the 2 March 2004 understanding are concerned, Judge Torres Bernárdez recalls that Uruguay was fully involved, as was Argentina, in drawing up the PROCEL within CARU, a plan which was definitively adopted by the Commission on 12 November 2004 and which was carried out until the withdrawal of the Argentine delegates. As for the failure to transmit the technical information relating to the construction of the CMB (ENCE) mill, Uruguay never had the chance to do so

because the mill was not built. The only PGA (Environmental Management Plan) in existence for this mill concerned the "removal of vegetation and earth movement" of 28 November 2005. There were no others in relation to the construction of this mill, eventually abandoned by ENCE, in Fray Bentos. As far as Orion (Botnia) is concerned, construction work for the mill on the site was only authorized on 18 January 2006 and unfolded after the official end of direct negotiations within the GTAN, which the Judgment fixes at 3 February 2006 (para. 157). Furthermore, Uruguay transmitted to CARU by facsimile on 6 December 2006 "the text of the public file for the Kraft cellulose plant project, application for initial environmental authorization filed by Botnia S.A.", that is, with the grant by MVOTMA of the AAP to Botnia on 14 February 2005. In light of these facts, Judge Torres Bernárdez believes that the 2 March 2004 understanding was performed as far as it was physically possible to do so (impossibilium nulla obligatio est).

30. As far as the majority's finding on the applicability of the 2 March 2004 understanding to the "two mills" is concerned, Judge Torres Bernárdez points out that references may be found to them not only in CARU documents on PROCEL, but also in other documents in the record. It should not be forgotten that Argentina knew about the Botnia project at the latest by November 2003, when its official representatives met representatives of the company, and CARU itself was aware of it at the latest by April 2004, when it first met representatives of the company.

(b) The Presidents' agreement of 5 May 2005 establishing the GTAN

31. The granting by the outgoing Uruguayan Government of the AAP for the Orion (Botnia) mill project on 14 February 2005 — on which date the Bielsa-Opperti understanding of 2 March 2004 was still in force between the Parties — gave rise to a new dispute within CARU in a political context of growing opposition to the construction of the two mills among the inhabitants of the Argentine province Entre Ríos. Mass demonstrations had taken place and international roads and bridges over the River Uruguay had been blockaded, notably the "General San Martín" bridge, which was closed to traffic as a result of the actions promoted by the "asambleistas" movement of Gualeguaychú. Furthermore, on 1 March 2005 a new Uruguayan Government took office following the inauguration of President Tabaré Vázquez. These events led the Governments of the two countries to look directly into the matter of establishing a high-level technical group (GTAN).

32. In his opinion, Judge Torres Bernárdez recalls that it was Argentina which, once again, took the initiative to suggest that the issue of the paper pulp mills be handled by the two Governments outside CARU. It was in fact the Argentine Minister Mr. Bielsa who suggested in a letter of 5 May 2005 to the Uruguayan Minister Mr. Gargano that the situation called for "a more direct intervention of the competent environmental authorities, with the co-operation of specialized academic institutions" although "without prejudice of the water quality control and monitoring procedures by CARU". This letter from Minister Bielsa also conveyed to his Uruguayan counterpart the requests made by the government of Entre Ríos, including on the issue of the location of the plants.

33. The text of the agreement between Presidents Tabaré Vázquez and Néstor Kirchner establishing the GTAN was the subject of an Argentine-Uruguayan press release dated 31 May 2005, which is quoted in paragraph 132 of the Judgment. In light of this text, and of the letter from Mr. Bielsa to Mr. Gargano, Judge Torres Bernárdez believes that there can be no doubt that the Parties agreed between themselves to dispense with the procedures set out in Articles 7 to 11 of the Statute in favour of immediate "direct negotiations" within the GTAN: negotiations provided for in Article 12 of the Statute, as Argentina expressly stated in paragraph 4 of its Application instituting these proceedings and in its diplomatic note of 14 December 2005 recording the failure of direct negotiations through the GTAN.

34. According to Judge Torres Bernárdez, it follows from the Presidents' agreement of 5 May 2005 that there was no question, at that date, of reconsidering the procedure agreed to on 2 March 2004 for CMB (ENCE) and later extended to Orion (Botnia). This conclusion is based on the fact that the points which were still outstanding and supposed to be examined by the Parties within the GTAN concerned solely — according to the Presidents' agreement — complementary studies and analysis, exchange of information and follow-up on the effects that **the operation of the paper pulp mills** (the two mills) being constructed in the Eastern Republic of Uruguay would have on the ecosystem of the shared river. The issue was no longer the planning or construction of the mills in question but the future, namely, the effects of those mills' operations on the river's ecosystem.

35. Judge Torres Bernárdez agrees with the Judgment that the press release of 31 May 2005 manifests an agreement between the two States to create a negotiating framework, the GTAN, with the aim of allowing for the negotiations provided for in Article 12 of the Statute to take place. But, to his mind, the press release is only that. He believes that what is of particular note in the press release is the fact that is does not call into doubt the Bielsa-Opperti agreement of 2 March 2004, an agreement which was still in force at the date of conclusion of the Presidents' agreement of 5 May 2005. Thus, the 31 May 2005 press release confirms, in Judge Torres Bernárdez's opinion, the existence and scope of the 2 March 2004 agreement. In other words, by concluding the May 2005 agreement, Uruguay did not waive its rights under the March 2004 agreement.

36. Judge Torres Bernárdez finds that, in light of the facts, the interpretation is not tenable according to which the May 2005 agreement granted Argentina considerable rights of supervision over the mills (rights far greater than what is provided in the relevant articles of the 1975 Statute), without it giving anything in exchange. Nor does the letter from Minister Bielsa of 5 May 2005, which, by virtue of its content, constitutes part of the "travaux préparatoires" of the Presidents' agreement, confirm the findings in the Judgment on this matter. Judge Torres Bernárdez therefore completely disagrees with the majority's findings in paragraphs 140 and 141 of the Judgment. For him, pacta sunt servanda, with its associated good faith, does of course govern the relations between the Parties in respect of the interpretation of the application of the provisions of the 1975 Statute, but also the subsequent agreements of 2 March 2004 and 5 May 2005.

37. Judge Torres Bernárdez also fails to share the majority's conclusion in paragraph 142 of the Judgment that the press release of 31 May 2005 in referring to "the cellulose plants that are being constructed in the Eastern Republic of Uruguay" is stating a simple fact. He believes that, although this does indeed state a fact, it is a fact that reflects a legal relationship between the Parties deriving from both the 1975 Statute and the understanding of 2 March 2004, as well as from the Presidents' agreement of 5 May 2005.

(c) The procedure for the pulp mills in Fray Bentos established by the agreements

38. In paragraphs 77 to 88 of his separate opinion, Judge Torres Bernárdez describes the salient features of the replacement procedure agreed to by the Parties to deal with the issue of the pulp mills on the Uruguayan bank of the River Uruguay at Fray Bentos, a procedure against which the Parties' conduct must be measured in the present case. This ad hoc procedure retained the régime of direct negotiations and the judicial settlement procedure, but dispensed with the procedural arrangements provided for in Articles 7 to 11 of the 1975 Statute. In these paragraphs, Judge Torres Bernárdez points out, on the one hand, that the procedure adopted by the Parties in this case gave far more substantial powers to CARU than the Statute does and, on the other hand, that the procedure adopted was more favourable to the protection of Argentina's interests than are the provisions of Articles 7 to 11 of the Statute on a significant number of issues (level of

consultations; extension of consultations to the construction and operational phases; extent of the information received; evaluation of the data in co-operation with the other Party; extension of the statutory time-limits). The Judge also points out that neither of the Parties asked CARU to resolve their dispute by means of conciliation.

4. Uruguay's obligations during the period of direct negotiations

39. On the matter of establishing whether Uruguay's conduct during the period of direct negotiations within the GTAN was in accordance with its legal obligations to Argentina, in light of the scope of the principle of the obligation to negotiate, Judge Torres Bernárdez is in no doubt that there is such an obligation under international law and that, given its significance in international relations, the Court must be exacting in ensuring that it is met, because reciprocal trust is an inherent condition of international co-operation. However, Judge Torres Bernárdez does not agree with the way in which the majority has applied it to the circumstances of the present case in respect of the "no construction obligation" during the period of direct negotiations. His disagreement extends to both the temporal and substantive scope of the obligation.

40. In the context of the GTAN, Uruguay was obliged — as indeed was Argentina — to take part in good faith and with an open mind, so as to ensure that the negotiations were meaningful, and to be willing to take reasonable account of the other Party's views, without however being obliged to reach an agreement because, under international law, a commitment to negotiate does not imply an obligation to agree. The GTAN was to produce a report within 180 days: GTAN having begun its work on 3 August 2005, in principle Uruguay would have been obliged to comply with the "no construction obligation" until the end of the GTAN negotiations, fixed in the Judgment at 3 February 2006.

41. Yet, in the light of the evidence submitted to the Court, Judge Torres Bernárdez considers that 3 February 2006 was merely the official end of negotiations: according to this evidence, negotiations had reached a deadlock long before this date. In such circumstances, Judge Torres Bernárdez believes it contrary to the sound administration of justice to oblige the Parties to wait until the official time-limit has elapsed before they are freed of the obligation, because a State cannot be required to take an action which is clearly futile and pointless, or which has already proved to be in vain (see on this subject: the separate opinion of Judge Tanaka in Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 145). To Judge Torres Bernárdez's mind, Argentina's diplomatic notes of 14 December 2005, 26 December 2005 and 12 January 2006, part of the record, confirm the deadlock at which the GTAN process had arrived towards the end of November 2005.

42. For Judge Torres Bernárdez, the diplomatic note of 14 December 2005 is decisive in this respect because, in this official note, the Argentine Republic notified the Eastern Republic of Uruguay of its "conclusion", specifically: (1) that, in accordance with the terms of Article 12 of the Statute of the River Uruguay, since direct negotiations between the Parties within the GTAN had not produced an agreement, the procedure provided for in Chapter XV of the Statute of the River Uruguay (judicial settlement) had become applicable; (2) that a dispute concerning the interpretation and application of the Statute of the River Uruguay had arisen; and (3) that the direct negotiations referred to in Article 60 of the Statute concerning the dispute arising from the unilateral authorizations for the construction of the industrial plants in question (CMB and Orion) had been underway since 3 August 2005 (date of the first GTAN meeting). According to Judge Torres Bernárdez, the date to be used in determining the end of Uruguay's "no construction obligation" in this case is thus the date of Argentina's diplomatic note of 14 December 2005.

43. Moreover, Argentina's diplomatic note of 14 December 2005 states that in relation to the dispute arising from the unilateral authorization of the Botnia port, made official by virtue of the CARU minutes from 14 October 2005 (also mentioned in the note from the President of the Argentine delegation to the Uruguayan party presented at the CARU meeting of 17 November 2005), direct negotiations began "today", i.e., 14 December 2005. This was confirmed by Argentina's Minister for Foreign Affairs, Mr. Taiana, on 12 February 2006, before the Foreign Affairs Committee of the Argentine Chamber of Deputies, where he explained that:

> "in relation with the port construction project, the purpose of the note [of 14 December 2005] was to determine [that] the day of presentation to Uruguay would be the start date from which to compute the period in which to carry out direct negotiations" (Argentina's Application instituting proceedings, Ann. III, p. 17).

44. Judge Torres Bernárdez also disagrees with the majority's findings in the Judgment on the substantive scope of the obligation because, first, no distinction is made therein between "the administrative acts granting environmental authorization of a work" and "the construction authorizations or plans for the work itself" and, second, nor is there any distinction drawn between activities or work of "a preparatory character" to the work and the "construction" of the work, prohibited pursuant to the obligation. Judge Torres Bernárdez is particularly disappointed that the sound legal rule on the subject which the Court identified in the case concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia) was not applied to the present case: as the Court stated at the time:

> "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'." (Judgment, ICJ Reports 1997, p. 54, para. 79.)

45. Judge Torres Bernárdez is of the belief that the actions of Uruguay condemned in the Judgment — relating to the CMB (ENCE) and Orion (Botnia) projects — are of a "preparatory" character, as opposed to the actual construction work itself for the mills and that they fall outside the substantive scope of Uruguay's "no construction obligation" during the GTAN negotiation period. Only the PGA (Environmental Management Plan) entitled "Plan de Gestion Ambiental de las Obras Civiles Terrestres Planta de Celulosa Botnia Fray Bentos PGAV Version", dated 18 January 2006, would, in principle, fall within this scope. But, since this plan postdates Argentina's diplomatic note of 14 December 2005, it does not lie within the temporal ambit of the "no construction obligation" (see paragraph 25 above).

46. The only remaining issue is thus the authorization for the construction of the Botnia port. On this subject, Judge Torres Bernárdez recalls that the initial environmental authorization (AAP) for the Orion (Botnia) mill of 14 February 2005 granted by Uruguay was for both the paper pulp mill and its port terminal, and also that a Uruguayan resolution of 5 July 2005 authorized Botnia to make use of the river bed for the construction of the terminal. However, he also notes that approximately one month after this resolution, on 3 August 2005, the Argentine and Uruguayan delegations agreed, at the first GTAN meeting, to refer the Botnia port terminal project to CARU without condition. Following this understanding, Uruguay transmitted the Uruguayan resolution of 5 July 2005 to CARU by diplomatic note of 15 August 2005, in accordance with Article 7 of the Statute, and, on 13 October 2005, it supplied the Commission with the additional information on the project requested by the Argentine delegation.

47. Thus, by agreement of the Parties, the Botnia port terminal project was not the subject of "direct negotiations" within the GTAN. However, nor was it examined by CARU for the purposes of Article 7 of the Statute because Argentina blocked the preliminary review of the project by the Commission on the basis of Uruguay's refusal to halt construction work on the port. It follows, in Judge Torres Bernárdez's opinion, that the dispute over the port terminal at the Orion (Botnia) mill, which in fact was included in the Application instituting proceedings of 4 May 2006, is inadmissible, because the procedural steps set out in Articles 7 et seq. of the Statute were not followed, and because this dispute was not the subject of "direct negotiations", within the GTAN or elsewhere, a prerequisite under Article 60 of the Statute to be able to seise the Court of any dispute concerning the interpretation or application of the Statute of the River Uruguay. Furthermore, the 180-day period which Article 12 of the Statute reserves for "direct negotiations" was also not respected because, in point of fact, only some 140 days elapsed between Argentina's diplomatic note of 14 December 2005 and 4 May 2006, when it filed its Application instituting proceedings.

48. As for the substance, Judge Torres Bernárdez believes that the Botnia port project is not of sufficient scope ("de entidad suficiente") to make it "liable" to affect navigation, the régime of the river or the quality of its waters and therefore does not fall within the provisions of Article 7, paragraph 1, of the Statute. In 2001, Uruguay informed CARU of the plan to build the M'Bopicuá port after the AAP was granted for it; the two delegations nevertheless were able to come quickly to the conclusion, within the framework of CARU, that the port in question, much larger than the Botnia port, did not represent a threat to navigation, the régime of the river or the quality of its waters. It would appear therefore that objectively there is no dispute between the Parties on the environmental viability of the Botnia port. Furthermore, between 1979 and 2004, Argentina authorized the construction or restoration of ports on its bank of the river in Fédération, Concordia, Puerto Yuqueri and Concepcion del Uruguay, without informing CARU and without notifying or consulting Uruguay.

49. In light of the preceding considerations, Judge Torres Bernárdez cannot endorse the conclusion in paragraph 149 of the Judgment. However, given that the breaches found in the Judgment to have been committed by Uruguay are in themselves of a procedural nature and minor in gravity — in the sense that not one constitutes a "material breach" — Judge Torres Bernárdez concurs with the Judgment that "satisfaction" is the appropriate redress under international law.

General conclusion

50. In view of all of the preceding considerations, Judge Torres Bernárdez does not agree with the findings of the Court concerning the breaches by Uruguay of its procedural obligations towards Argentina, subject of the present case. For this reason, he voted against point 1 of the operative clause of the Judgment.

Dissenting opinion Judge ad hoc Vinuesa

In a dissenting opinion, Judge ad hoc Vinuesa first noted his agreement with the Court's finding that Uruguay had breached the procedural obligations of the 1975 Statute. As to the link between procedural and substantive violations under the Statute, Judge ad hoc Vinuesa disagreed with the Court, finding that the procedural violations themselves constituted substantive violations. Next, Judge ad hoc Vinuesa held that a proper interpretation of the 1975 Statute under customary international law and the 1969 Vienna Convention on the Law of Treaties required an extension of the non-construction obligation imposed on Uruguay which would terminate only after the final resolution of the dispute by the Court. On the issue of reparation for the procedural breaches, Judge ad hoc Vinuesa found that, although the special circumstances of the case — Uruguay's

repetition of breaches and its actions taken in bad faith — justified the imposition by the Court of an obligation of non-repetition upon Uruguay, this non-repetition obligation was implicit in the Court's Judgment and was further required by principles of good faith found in customary international law.

On the issue of substantive obligations, Judge ad hoc Vinuesa dissented from the Court's finding that the violations of these obligations had not been proven, discussing multiple flaws in the Judgment that led to this conclusion. First, Judge ad hoc Vinuesa questioned the Court's reasoning on issues surrounding the burden of proof in the case. Then, Judge ad hoc Vinuesa turned to substantive violations by Uruguay of Articles 1 and 27 and Article 36 of the Statute, finding that these substantive obligations had not been followed by Uruguay. Next, Judge ad hoc Vinuesa held that Article 41 was violated by Uruguay because it had not properly performed an environmental impact assessment. Specifically, Uruguay failed to properly consider the alternative sites for the plant and it had not consulted the affected population in a way that guaranteed their effective participation, as was required.

Finally, Judge ad hoc Vinuesa noted that the lack of scientific certainty in the evidence was particularly troubling. This lack of certainty undermined the conclusions drawn by the Court on all of the alleged violations by Uruguay of its substantive obligations. Noting that the Court often found that there was not enough evidence, or that proper conclusions could not be drawn, Judge ad hoc Vinuesa suggested that the Court would have been better served to request an outside expert's opinion, as has been done in the past, or to otherwise ensure that the Judgment was based on complete information, a clearer view of the state of the river's ecology, and full consideration of the future impact of the pulp mill on the river.

Based on these conclusions, Judge ad hoc Vinuesa held that by bypassing the application of the precautionary principle as required by the 1975 Statute and by general international law, the Court did not properly adjudge Uruguay's violations of the substantive obligations.

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