*CR 2006/47*

**Cour internationale de Justice**

**LA HAYE**

**International Court of Justice**

**THE HAGUE**

**ANNÉE 2006**

***Audience publique***

***tenue le jeudi 8 juin 2006, à 15 heures, au Palais de la Paix,***

***sous la présidence de Mme Higgins, président,***

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

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**COMPTE RENDU**

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**YEAR 2006**

***Public sitting***

***held on Thursday 8 June 2006, at 3 p.m., at the Peace Palace,***

***President Higgins presiding,***

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

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**VERBATIM RECORD**

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*Présents :* Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Koroma
Parra-Aranguren
Buergenthal
Owada
Simma
Abraham
Keith
Sepúlveda
Bennouna
Skotnikov, juges
MM. Torres Bernárdez
Vinuesa, juges *ad hoc*

M. Couvreur, greffier

| | | |
|---|---|---|
| *Present:* | President | Higgins |
| | Vice-President | Al-Khasawneh |
| | Judges | Ranjeva |
| | | Koroma |
| | | Parra-Aranguren |
| | | Buergenthal |
| | | Owada |
| | | Simma |
| | | Abraham |
| | | Keith |
| | | Sepúlveda |
| | | Bennouna |
| | | Skotnikov |
| | Judges *ad hoc* | Torres Bernárdez |
| | | Vinuesa |
| | Registrar | Couvreur |

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

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

*comme agent;*

S. Exc. M. Horacio A. Basabe, ambassadeur, directeur général de l'Institut du service extérieur de la nation, ancien conseiller juridique du ministère des relations extérieures, du commerce international et du culte, membre de la Cour permanente d'arbitrage,

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

*comme coagents;*

M. Alain Pellet, professeur de droit international public à l'Université de Paris X-Nanterre, membre de la Commission du droit international des Nations Unies,

M. Philippe Sands, Q.C., professeur de droit international, University College, Londres,

M. Marcelo Kohen, professeur de droit international à l'Institut universitaire de hautes études internationales, Genève,

Mme Laurence Boisson de Chazournes, professeur de droit international à la faculté de droit, Genève,

*comme conseils et avocats;*

S. Exc. M. Raúl Estrada Oyuela, ambassadeur, représentant spécial pour les affaires environnementales internationales au ministère des affaires étrangères, du commerce international et du culte,

*comme conseil et expert;*

S. Exc. M. Julio Barboza, ambassadeur, professeur de droit international public à l'Université de Buenos Aires, ancien membre de la Commission du droit international des Nations Unies,

Mme Silvina González Napolitano, professeur de droit international public à l'Université de Buenos Aires,

Mme Claudia Mónica Mizawak, procureur de la province argentine d'Entre Rios,

Mme Romina Picolotti, présidente du Centre des droits de l'homme et l'environnement (CEDHA),

M. Daniel A. Sabsay, président de la *Fundación Argentina para los Recursos de la Naturaleza* (FARN),

M. Juan Carlos Vega, avocat spécialisé dans la protection internationale des droits de l'homme,

*comme conseils et experts juridiques;*

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

H.E. Ms Susana Ruiz Cerutti, Ambassador, Legal Counsel for the Ministry of Foreign Affairs, International Trade and Religious Worship,

*as Agent*;

H.E. Mr. Horacio A. Basabe, Ambassador, Director of the Argentine Institute for Foreign Service, former Legal Counsel to the Ministry of Foreign Affairs, International Trade and Religious Worship, Member of the Permanent Court of Arbitration,

H.E. Mr. Santos Goñi Marenco, Ambassador of the Argentine Republic to the Kingdom of the Netherlands,

*as Co-Agents;*

Mr. Alain Pellet, Professor of Public International Law, University of Paris X-Nanterre, Member of the United Nations International Law Commission,

Mr. Philippe Sands, Q.C., Professor of International Law, University College, London,

Mr. Marcelo Kohen, Professor of International Law, Graduate Institute of International Studies, Geneva,

Ms Laurence Boisson de Chazournes, Professor of International Law, Faculty of Law, University of Geneva,

*as Counsel and Advocates;*

H.E. Mr. Raúl Estrada Oyuela, Ambassador, Special Representative for International Environmental Affairs, Ministry of Foreign Affairs, International Trade and Religious Worship,

*as Counsel and Expert;*

H.E. Mr. Julio Barboza, Ambassador, Professor of Public International Law, University of Buenos Aires, former Member of the United Nations International Law Commission,

Ms Silvina González Napolitano, Professor of Public International Law, University of Buenos Aires,

Ms Claudia Mónica Mizawak, Public Prosecutor, Entre Rios Province,

Ms Romina Picolotti, President of the Centre for Human and Environmental Rights (CEDHA),

Mr. Daniel A. Sabsay, President, *Fundación Argentina para los Recursos de la Naturaleza* (FARN),

Mr. Juan Carlos Vega, international human rights lawyer,

*as Legal Advisers and Experts;*

M. Elias Matta, ingénieur, directeur du centre de technologie de la cellulose, *Univerisdad Nacional del Litoral* (UNL),

M. Lucio Janiot, chef du département de chimie du service d'hydrographie de la marine,

M. Alberto Espinach Ross, chercheur à l'Institut argentin pour la recherche et le développement de la pêche (INIDEP),

*comme conseils et experts scientifiques;*

M. Ariel W. González, conseiller d'ambassade, bureau du conseiller juridique du ministère des affaires étrangères, du commerce international et du culte,

Mme Mariana Alvarez Rodríguez, secrétaire d'ambassade, bureau du représentant spécial pour les affaires environnementales internationales au ministère des affaires étrangères, du commerce international et du culte,

Mme Florencia Colombo, direction de la presse au ministère des affaires étrangères, du commerce international et du culte,

M. Daniel Müller, chercheur, Centre de droit international de Nanterre (CEDIN),

Mme Ursula Zitnik,

*comme délégués*.

***Le Gouvernement de la République orientale de l'Uruguay est représenté par :***

S. Exc. M. Héctor Gros Espiell, ambassadeur de la République orientale de l'Uruguay auprès de la République française,

S. Exc. M. Carlos Gianelli, ambassadeur de la République orientale de l'Uruguay auprès des Etats-Unis d'Amérique,

*comme agents;*

M. Alan E. Boyle, professeur de droit international, directeur du Centre écossais pour le droit international, Université d'Edinburgh,

M. Luigi Condorelli, professeur à la faculté de droit de l'Université de Florence,

M. Paul S. Reichler, avocat, cabinet Foley Hoag LLP, Washington D.C., membre du barreau de la Cour suprême des Etats-Unis d'Amérique, membre du barreau du district de Columbia,

*comme avocats;*

S. Exc. M. Carlos Mora Medero, ambassadeur de la République orientale de l'Uruguay auprès du Royaume des Pays-Bas,

M. Gonzalo Fernández, secrétaire de la présidence de la République orientale de l'Uruguay,

S. Exc. M. José Luis Cancela, secrétaire général du ministère des relations extérieures,

M. Alberto Pérez Pérez, professeur à l'Université de la République de l'Uruguay, Montevideo,

Mr. Elias Matta, Engineer, Director of the Centre for Cellulose Technology, *Universidad Nacional del Litoral* (UNL),

Mr. Lucio Janiot, Director of the Chemistry Department, Naval Hydrographic Service,

Mr. Alberto Espinach Ross, Researcher, National Fisheries Research and Development Institute (INIDEP),

*as Scientific Advisers and Experts;*

Mr. Ariel González, Embassy Counsellor, Legal Adviser's Office, Ministry of Foreign Affairs, International Trade and Religious Worship,

Ms Mariana Alvarez Rodríguez, Embassy Secretary, Office of the Special Representative for International Environmental Affairs, Ministry of Foreign Affairs, International Trade and Religious Worship,

Ms Florencia Colombo, Press Directorate, Ministry of Foreign Affairs, International Trade and Religious Worship,

Mr. Daniel Müller, Researcher, Centre de droit international de Nanterre (CEDIN),

Ms Ursula Zitnik,

*as Delegates;*

***The Government of the Eastern Republic of Uruguay is represented by:***

H.E. Mr. Héctor Gros Espiell, Ambassador of the Eastern Republic of Uruguay to the French Republic,

H.E. Mr. Carlos Gianelli, Ambassador of the Eastern Republic of Uruguay to the United States of America,

*as Agents;*

Mr. Alan E. Boyle, Professor of International Law and Director of the Scottish Centre for International Law, University of Edinburgh,

Mr. Luigi Condorelli, Professor at the Faculty of Law, University of Florence, Florence,

Mr. Paul S. Reichler, Attorney at Law, Foley Hoag LLP, Washington D.C., Member of the Bar of the United States Supreme Court, Member of the Bar of the District of Columbia,

*as Advocates;*

H.E. Mr. Carlos Mora Medero, Ambassador of the Eastern Republic of Uruguay to the Kingdom of the Netherlands,

Mr. Gonzalo Fernández, Secretary to the Presidency of the Eastern Republic of Uruguay,

H.E. Mr. José Luis Cancela, Secretary-General, Ministry of Foreign Affairs,

Mr. Alberto Pérez Pérez, Professor, University of the Republic of Uruguay, Montevideo,

M. Edison González Lapeyre, professeur à l'Université de la République de l'Uruguay, Montevideo,

M. Roberto Puceiro Ripoli, professeur à l'Université de la République de l'Uruguay, Montevideo,

M. Gustavo Alvarez, ministre conseiller, directeur de la direction des affaires multilatérales, ministère des relations extérieures,

M. Marcelo Cousillas, conseiller juridique à la direction nationale de l'environnement, ministère du logement, de l'aménagement du territoire et de l'environnement,

Mme Nienke Grossman, avocat, cabinet Foley Hoag LLP, Washington D.C., membre du barreau du district de Columbia, membre du barreau de la Virginie,

M. Adam Kahn, avocat, cabinet Foley Hoag LLP, Boston, Massachusetts, membre du barreau du Massachusetts,

M. Lawrence H. Martin, avocat, cabinet Foley Hoag LLP, Washington D.C., membre du barreau de la Cour suprême des Etats-Unis d'Amérique, membre du barreau du Massachusetts, membre du barreau du district de Columbia,

*comme conseillers;*

M. Martin Ponce de Leon, ingénieur, sous-sécretaire d'Etat au ministère de l'industrie, de l'énergie et des mines,

Mme Alicia Torres, ingénieur, directrice nationale de l'environnement au ministère du logement, de l'aménagement du territoire et de l'environnement,

M. Eugenio Lorenzo, ingénieur, conseiller technique de la division de l'évaluation des impacts sur l'environnement, ministère du logement, de l'aménagement du territoire et de l'environnement,

M. Adriaan van Heiningen, professeur, titulaire de la chaire J. Larcom Ober au département d'ingénierie chimique à l'Université du Maine, Orono, Maine,

*comme experts.*

Mr. Edison Gonzalez Lapeyre, Professor, University of the Republic of Uruguay, Montevideo,

Mr. Roberto Puceiro Ripoli, Professor, University of the Republic of Uruguay, Montevideo,

Mr. Gustavo Alvarez, Minister Counsellor, Director, Multilateral Relations Directorate, Ministry of Foreign Affairs,

Mr. Marcelo Cousillas, Legal Counsel, National Directorate for the Environment, Ministry of Housing, Territorial Planning and Environment,

Ms Nienke Grossman, Attorney at Law, Foley Hoag LLP, Washington D.C., Member of the Bar of the District of Columbia, Member of the Virginia Bar,

Mr. Adam Kahn, Attorney at Law, Foley Hoag LLP, Boston, Massachusetts, Member of the Massachusetts Bar,

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, Washington D.C., Member of the Bar of the United States Supreme Court, Member of the Massachusetts Bar, Member of the Bar of the District of Columbia,

*as Advisers;*

Mr. Martin Ponce de Leon, Engineer, Under-Secretary of State at the Ministry of Industry, Energy and Mines,

Ms Alicia Torres, Engineer, National Director, Environmental Impact Assessment Division, Ministry of Housing, Territorial Planning and Environment,

Mr. Eugenio Lorenzo, Engineer, Technical Consultant for the Environmental Impact Assessment Division, Ministry of Housing, Territorial Planning and Environment,

Mr. Adriaan van Heiningen, Professor, J. Larcom Ober Chair, Department of Chemical Engineering, University of Maine, Orono, Maine,

*as Experts.*

The PRESIDENT: Please be seated. The sitting is now open and the Court meets this afternoon to hear the first round of oral observations on behalf of Uruguay.

I now give the floor to His Excellency Mr. Gros Espiell, the Agent of Uruguay.

M. GROS ESPIELL : Madame le président, Messieurs les juges, en me présentant devant la Cour internationale de Justice à l'occasion de cette audience relative aux mesures conservatoires demandées par le Gouvernement argentin dans l'affaire relative à des *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, je tiens, en ma qualité d'agent de la République orientale de l'Uruguay à saluer et à rendre un hommage respectueux et confiant à la Cour internationale de Justice, principal organe judiciaire des Nations Unies, ainsi qu'à tous ses membres qui représentent, dans leur ensemble, les grandes civilisations et les principaux systèmes juridiques du monde.

L'Uruguay, conscient de l'indépendance de jugement et de l'objectivité intellectuelle et morale des juges qui la composent, a pleinement confiance dans la décision de cette Cour. Il est certain qu'aujourd'hui, dans le cas qui nous intéresse et notamment en ce qui concerne les mesures conservatoires demandées, la Cour agira en se basant sur le droit, fidèle à sa mission qui est de juger selon le droit international dans le respect de la justice.

L'Uruguay possède une large et constante tradition d'observance du droit international.

Toute sa politique, internationale et intérieure, repose sur ce respect du droit. Pour illustrer cette conduite dont l'Uruguay s'enorgueillit il convient de rappeler, ce qui est tout pertinent dans cette circonstance, qu'il a été le premier pays du monde à reconnaître en 1921, la compétence de la Cour internationale de Justice, en vertu des dispositions de l'article 36, paragraphe 2, de son Statut. Cela atteste l'ancienneté de la bonne foi et de la confiance ininterrompue de l'Uruguay envers le droit international et la résolution judiciaire des différends internationaux, et en particulier envers la Cour internationale de Justice. Dans la longue tradition des rapports qui unissent l'Uruguay à la Cour, je me dois de rappeler la contribution de deux illustres juges de nationalité uruguayenne qui en furent membres dans le passé : Enrique C. Armando Ugon et Eduardo Jiménez de Aréchaga.

Qu'il me soit permis de souligner en tout premier lieu la volonté permanente de l'Uruguay de respecter et de préserver l'environnement. Telle a été sa conduite, non seulement par souci

d'appliquer scrupuleusement le droit international mais aussi en obéissant à un concept expressément inscrit dans sa Constitution, sa législation et ses dispositions normatives réglementaires et administratives.

L'Uruguay est un exemple en matière de respect de l'environnement. Cette affirmation n'est pas un simple fait oratoire ou une déclaration politique. C'est une réalité que de nombreux rapports d'experts ont constaté, ce qui place mon pays au premier rang, parmi les autres pays américains, sur le plan du respect de l'environnement, et au troisième au niveau mondial. Cette donnée est dûment attestée par l'*Index d'environnement durable* de 2005, présenté au forum économique mondial par le Yale Center for Environmental Law and Policy de l'Université de Yale et le Center for International Earth Science Information Network de l'Université de Columbia.

Dans ce rapport, la Finlande occupe la première place au niveau mondial, suivie de la Norvège et de l'Uruguay.

Parmi les pays membres de l'Organisation des Etats américains, l'Uruguay est situé au premier rang.

Nous sommes fiers de cette réalité parce qu'elle met au grand jour la véritable image de l'Uruguay et qu'elle oppose un démenti formel à une version erronée, de pure propagande, totalement dénuée de fondement, qui a été diffusée.

A cette affirmation radicale du respect de l'Uruguay pour l'environnement et le droit individuel et collectif à un environnement sain et écologiquement équilibré, se joint la volonté de préserver, de façon harmonieuse et cohérente, son droit au développement, qui lui aussi fait partie des droits de l'homme, afin d'assurer sa croissance économique et sociale et son développement humain.

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C'est au nom du respect qu'il porte au droit à l'environnement, poursuivant une ligne politique constante, que l'Uruguay, dans une attitude de transparence et d'ouverture, s'est engagé,

dans ce projet de construction de deux usines de pâte à papier sur son territoire, sur la rive du fleuve Uruguay :

— à ce que les usines, lorsqu'elles entreront en phase opérationnelle, ne génèrent pas de pollution;

— à prendre toutes les mesures de protection et garanties pour qu'il ne puisse y avoir de pollution;

— à soumettre le fonctionnement future des usines, comme condition inéluctable à la réalisation du projet, à un processus de contrôle et de garanties maximales tout au long de leur existence;

— à exiger l'observation des plus hauts standards existant dans le monde;

— à imposer le respect scrupuleux de la législation uruguayenne, qui est l'une des plus strictes du monde en la matière;

— à garantir l'application des dispositions pertinentes adoptées par la commission du fleuve Uruguay (CARU);

— à réaliser un monitorage constant et permanent des conséquences environnementales du futur fonctionnement des usines. L'Uruguay a proposé, et je le réitère aujourd'hui d'une manière expresse, son offre de réaliser un monitorage conjoint avec l'Argentine;

— à tenir l'Argentine informée de façon continue et complète par un dialogue constructif;

— à toujours prendre en considération les préoccupations de l'Argentine dans le cadre du droit international;

— à retirer l'autorisation de fonctionnement des usines par des mesures radicales inflexibles si une quelconque violation des conditions imposées par l'Uruguay et des standards maximaux requis était constatée.

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Le droit uruguayen est très strict en matière de protection de l'environnement.

C'est la Constitution elle-même, c'est-à-dire la plus haute hiérarchie du droit uruguayen, qui, dans son article 47, établit que la «la protection de l'environnement est d'intérêt général» et que tous doivent «s'abstenir de tout acte qui causerait une grave déprédation, destruction ou pollution de l'environnement».

Diverses lois ont développé et réglementé cette norme constitutionnelle et ont imposé rigoureusement à l'Etat uruguayen le devoir de sauvegarder et de protéger l'environnement, d'éviter la pollution et d'interdire toute forme d'impact environnemental négatif.

L'Uruguay doit respecter son propre droit afin de sauvegarder l'environnement. Il l'a toujours fait et restera inflexible sur cette position.

Mais il a le droit d'exiger la reconnaissance de ce devoir, de la présomption, de celui-ci, de sa bonne foi avérée et constante dans la conduite de sa politique environnementale en ce qui concerne ces usines de pâte à papier.

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La CARU, c'est-à-dire la commission administrative du fleuve Uruguay, a été créée par le statut du fleuve Uruguay, souscrit par l'Argentine et l'Uruguay le 26 février 1975 et entré en vigueur après ratification des deux parties.

Il s'agit d'un organisme binational à caractère intergouvernemental. Selon le traité de 1975, la prévention contre la pollution est l'une de ses compétences. L'Uruguay s'engage à agir dans le cadre des compétences de la CARU en toute bonne foi, ainsi qu'à respecter et exécuter ses décisions légitimes.

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Les usines en construction seront de qualité semblable, voire supérieure, à celle des usines les plus modernes récemment construites et opérationnelles en Europe, et bénéficieront de la technologie la plus avancée, conformément aux exigences établies par l'Union européenne.

Tout comme les usines européennes répondent aux exigences et aux standards de l'Union européenne, celles en construction en Uruguay devront, elles aussi, respecter scrupuleusement ces mêmes exigences et standards.

Il n'y aura donc aucun risque de pollution. Et il serait de mauvaise foi d'arguer, aujourd'hui, l'éventualité d'un danger futur.

Rien n'indique qu'il y ait un risque de danger à venir. Et il n'y en aura pas non plus quand les usines commenceront à opérer.

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La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.

Il faut qu'il y ait préjudice irréparable et urgence de la situation pour que soit prise une décision immédiate.

Rien, dans la situation actuelle, n'autorise à considérer que les travaux de construction en cours affectent un droit de la Partie demanderesse, ni que ces travaux porteront atteinte *pendente litis* au droit revendiqué.

Il n'y a, dans les présentes circonstances, aucune menace actuelle, ni imminente, ni à caractère irréversible envers aucun droit.

Il n'y en aura pas non plus lors des travaux de construction, période pendant laquelle les usines ne tourneront évidemment pas, tout comme cela ne risque pas de se produire ultérieurement grâce aux spécificités techniques des deux usines, à leur modernité et à leurs garanties de sécurité maximale qui les placent au plus haut niveau scientifique, technologique et industriel du monde.

Pour l'Uruguay, il est donc clair que rien ne justifie, dans le cas présent et dans les circonstances actuelles, l'adoption par la Cour d'une décision qui ordonnerait la suspension des ouvrages en cours de construction.

Dans les circonstances qui entourent le cas présent, l'ordre de suspendre les travaux dans les deux usines signifierait, dans les faits, décider sur le fond et porterait un préjudice immédiat et très grave, irréparable et irréversible, du fait que ladite suspension empêcherait un investissement de mille cinq cents millions de dollars qui est essentiel pour le développement productif et humain de l'Uruguay, avant même que la Cour ne dicte pas sa sentence sur le fond.

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L'Uruguay, premier pays d'Amérique en matière de respect de l'environnement et troisième dans le classement mondial, est le principal intéressé par la garantie de la qualité et l'absence de pollution des eaux du fleuve Uruguay.

Non seulement au nom du droit international et de la garantie d'un droit qui appartient à tous les êtres humains, que ce soit en Argentine, en Uruguay ou partout ailleurs dans le monde, mais aussi parce que les habitants de l'Uruguay, en particulier dans la zone de construction des usines sur la rive du fleuve Uruguay, sont les premiers et les plus directement concernés.

Il existe un droit de l'homme à un environnement sain, expression concrète du droit à la vie, du droit à vivre.

L'Uruguay, Etat de droit, dont la vocation démocratique est aussi profonde que indéfectible, prône le respect et la garantie de la pleine et intégrale jouissance de tous les droits de l'homme, à commencer par le droit à la vie, qui est le fondement de tous les autres droits et, notamment, du droit à vivre dans un environnement sain et non pollué. C'est un pays, mon pays, qui vit la réalité des droits de l'homme, non pas seulement comme une expression normative, mais comme un sentiment profond, respecté par le peuple et par le gouvernement qui, par ailleurs, lutte efficacement contre la corruption, qui est marginale et minime, condamnée et punie.

Au nom de ces droits et pour la reconnaissance de leur existence et des bénéfices qu'ils apporteront à tous, aussi argentins que uruguayens, l'Uruguay s'engage sans aucune réticence et avec une absolue bonne foi.

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Si les ouvrages en construction étaient suspendus, cela affecterait de façon grave et injustifiée, avec des conséquences vraiment catastrophiques, le droit de l'Uruguay à construire sur son territoire, sous réserve des plus hautes garanties environnementales, des usines modernes et

techniquement les plus avancées, qui sont absolument nécessaires à son développement économique et humain.

Une mesure conservatoire de suspension des travaux en construction, prise en contradiction avec le droit, serait un acte d'une extrême gravité, réellement catastrophique, qui porterait atteinte à l'avenir du pays et aux droits humains de ses habitants.

C'est pourquoi l'Uruguay s'oppose fermement à la demande de l'Argentine d'une mesure de suspension des ouvrages en construction pendant le déroulement de la procédure concernant ce cas soumis à la décision de cette illustre Cour.

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Regrettablement, le Gouvernement argentin n'a pas empêché le blocage des ponts internationaux qui relient l'Argentine à l'Uruguay, ce qui a interrompu la libre communication et la circulation entre les deux pays.

Ces actions ont causé à l'économie uruguayenne des dommages énormes, dont l'évaluation préliminaire est de quatre cents à cinq cents millions de dollars.

Ce blocage, conséquence de l'omission par le Gouvernement argentin en violation du droit international, a aggravé le différend existant et a des projections sur la considération par la Cour des mesures conservatoires de suspension des ouvrages demandées par l'Argentine.

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Pour terminer, je tiens à réitérer que l'Uruguay continuera, comme il l'a toujours fait, à respecter scrupuleusement l'environnement, en adoptant et en faisant adopter toutes les mesures pertinentes.

Je serai suivi dans l'usage de la parole par mon distingué collègue, le professeur Alan Boyle, qui envisagera la question de l'impact environnemental des deux usines en construction en rapport avec l'usage raisonnable et équitable des eaux du fleuve Uruguay selon le droit international.

Ensuite, le professeur Luigi Condorelli démontrera que l'Uruguay a pleinement respecté le statut du Fleuve Uruguay de 1975 tout au long du développement de cette affaire. En dernier lieu, mon ami et collègue, M. Paul Reichler, prouvera que la demande de mesures conservatoires n'est pas fondée. Les circonstances requises pour demander des mesures conservatoires sont complètement absentes, et, d'autre part, l'adoption de mesures conservatoires demandées causerait des préjudices irréparables et catastrophiques aux droits de l'Uruguay et au futur de ses populations et des êtres humains qui habitent sur son territoire.

Avec ces expressions finales, je vous prie, Madame le président, de donner la parole au professeur Alan Boyle.

Merci beaucoup.

Le PRESIDENT : Je vous remercie, Monsieur l'ambassadeur. I now call Professor Boyle.

Mr. BOYLE:

**Introduction**

1. Madam President, Members of the Court, it is an honour and a privilege to address the Court this afternoon on behalf of the Republic of Uruguay. Argentina presented its case this morning in graphic terms. It alleged a grave and imminent threat of irreparable damage to the health of its people, to their economic welfare, and to the right of Argentina to make reasonable and equitable use of the River Uruguay, a shared natural resource. It claims that the construction of the two cellulose plants at the heart of this case — and I will refer to them for convenience as ENCE and Botnia — has already caused economic loss to its tourist industry, and to property values. It argues that if the plants are allowed to commence operations they will irreversibly pollute the river and damage the environment in Argentina. Madam President, this morning Argentina presented some pretty bogus pictures of dark satanic mills which do not exist; the reality, as I hope to show, will be rather different. Argentina has presented no evidence to

substantiate any of its claims this morning, all of which Uruguay can and will contest at the merits stage of the proceedings. The Court heard reference this morning to the Hatfield Report commissioned by the International Finance Corporation. Let me read out the actual conclusions of that report to which Argentina did not draw attention: "Comments expressing concern that the mills will cause catastrophic environmental damage are unsupported, unreasonable and ignore the experience in many other modern bleached kraft pulp mills"; you can find that Madam President, at page 2 of the Hatfield Report.

2. Madam President, Members of the Court, it is my task this afternoon to show that Uruguay's first priority in the management and operation of these very important plants is to protect the health and welfare of all those who live near the River Uruguay, on both banks, and to preserve the environment in both countries from harm. Although I have no wish to dwell on the ultimate merits of this case, it is necessary to respond to Professor Sand's arguments with regard to imminent and irreparable pollution damage, so I hope you will bear with me if I do say something about the environmental impact assessment and the prevention with pollution. Uruguay will therefore argue that, because of the environmental impact assessments so far undertaken and the regulatory controls and licensing conditions it has already placed on the operation of the two plants, there is no likelihood of imminent, grave or irreparable harm or damage to Argentina.

3. Let me turn first to the geography of the River Uruguay and its surrounding areas, and let me take you, if I may to the map once more — if I may take you to the next map; I think the Court probably knows where Uruguay is!

[Display maps at this point]

First, I will show first the direction of the flow of the river — this is actually quite important — it runs from the north-east to the south-west — but just in case that is not absolutely clear — that is from the top right-hand corner to the bottom left.

Secondly, you will notice the location of the two plants, shown here as CMB, the ENCE plant and Orion, the Botnia plant. You see they are adjacent to the town, around the town of Fray Bentos with its drinking water inlet downstream from the two plants — that probably tells us something. At this point the river remains navigable by ships that are large enough to transport the wood pulp produced by the plants, and they are also close to the international bridge which

provides the main road link between Uruguay and Argentina, and in this location both plants will have ready access to sources of high quality, fast growing, timber in both countries.

Third, you will notice the breadth of the river at this point: the River Uruguay is a substantial navigable river, it is not a mere stream. It is deep, and the flow will quickly disperse the plants' low effluent discharges and minimize any environmental impact. There are no ecologically sensitive areas downstream. You will also see that the largest nearby Argentine town, Gualeguaychu, is some 26 km north-west of the plants. At the merits stage of these proceedings Uruguay will show that the sites that have been chosen are environmentally an excellent choice for the plants.

**Uruguayan environmental law**

4. Now, Madam President, I would now like to give the Court a very short outline of how Uruguay regulates and controls industrial pollution and protection of the environment. Uruguay takes environmental protection seriously. It has a modern and comprehensive system of environmental law. It has an environmental agency — known as DINAMA — which is specifically responsible on behalf of the Ministry of the Environment for ensuring that projects with potentially significant impacts will comply with Uruguay's laws and regulations on the environment. In your folder, at tab 13, you will find an affidavit from the National Director of DINAMA, Engineer Alicia Torres. She testifies that in accordance with its responsibilities, DINAMA will continue its exhaustive review, licensing, monitoring, and oversight programme for the two cellulose plants proposed by Botnia and ENCE. Her affidavit sets out in some detail the law relating to environmental protection in Uruguay and the powers and responsibilities of her agency. I will briefly summarize, if I may, the main points, and they are essentially seven.

5. Most importantly, environmental protection is a constitutional duty in Uruguay. Article 47 of the Constitution is in your folder at tab 17. It provides the basis for regulating and protecting the environment, and it deals specifically with water protection. In furtherance of these constitutional rights and obligations, Uruguay has enacted a series of laws and regulations. Other laws and decrees, about which you will hear more, regulate environmental impact assessment and water pollution. These laws and regulations will be found at tabs 18-21 of your folder. They

include the following requirements relevant to the licensing and operation of the Botnia and ENCE plants.

6. First, the Applicant is required to undertake an environmental impact assessment; I will refer to that for convenience as an EIA. This assessment must be acceptable to DINAMA before an authorization to proceed with construction can be issued (*Reglamento de Evaluacion del Impacto Ambiental y Autorizaciones Ambientales*, Decree 435/994 of 1994, now replaced and extended by Decree 349/005 of 2005, at tab 18).

7. Secondly, no authorization to construct or operate industrial facilities may be issued if DINAMA finds that there will be unacceptable impact on water quality, water resources, or on the environment (Decree 253/79, Arts. 9 and 11 and Art. 17 of Decree 349/005, at tabs 19 and 20).

8. Thirdly, Decree 253 of 1979 establishes water quality standards (Art. 5), and sets maximum effluent discharge limits (Art. 11). Any discharge in excess of those limits is prohibited. The Minister of the Environment is authorized to establish new standards if necessary to protect the quality of the water (Art. 14).

9. Fourthly, Decree 349 of 2005 provides that the plant operator must obtain a further authorization before operations can begin. DINAMA is empowered at this stage to include additional safeguards not contained in previous authorizations if necessary to ensure compliance with applicable standards or to avoid a prohibited environmental impact (Arts. 23 and 24, at tab 20).

10. Fifthly, in order to ensure that operating procedures continue to be state of the art and provide the highest standard of environmental protection, industrial plants must request and obtain a renewal of their authorization to operate every three years. (Decree 349/005) And at each renewal, DINAMA may impose further safeguards if necessary. It may also suspend allegedly dangerous activities while the appropriate investigations are undertaken. (Law 17.283 Art. 14, tab 21.)

11. Sixthly, and finally, a monitoring plan must be approved to ensure compliance with applicable standards and to ensure that the quality of the river itself is maintained. (EIA Reglamento, Art. 12.)

12. Madam President, authorizations approved by the Ministry and the conditions attached to those authorizations are in practice the most important tool for regulating and controlling sources of potential environmental harm including these two plants. I do not in these proceedings wish to take the Court in detail through the authorizations which have so far been granted. They all reflect the information and commitments in each company's environmental impact assessment. As I do hope to show the Court later in my speech, these authorizations contain detailed conditions intended to ensure that the construction and operation of the plants will not harm the River Uruguay or cause air or water pollution.

13. Madam President, it is of the utmost importance to Argentina's demand for provisional measures to appreciate that neither plant has yet applied for or been granted an authorization to operate, nor is either plant on the verge of doing so. Construction of the ENCE plant was authorized in 2003, but on terms which require a further approval for operation following an updated environmental impact assessment and submission of a series of environmental management plans. The matters to be addressed in those plans are specified in similar detail in the authorization for the Botnia plant. The only further approval granted so far in respect of ENCE is an environmental management plan for site preparation — you may bear that in mind when you think of the photos you were shown this morning — and site preparation began only a few months ago. Construction of the Botnia plant was authorized in 2005. And to date the only further approvals have been environmental management plans for the construction phase.

14. The Court should also know that Uruguayan environmental law has recently been strengthened. As I indicated earlier, Decree 349 of 2005 confers powers of further approval on the Ministry of Environment in relation to the operation of both plants. It is quite clear that as a matter of Uruguayan law neither plant may begin operations until DINAMA is convinced that the conditions for that approval can be satisfied.

15. The proposition advanced by Argentina that these plants present an immediate and urgent threat of irreparable harm to the River Uruguay must be seen in this context. Neither plant may commence operations without further approval by DINAMA. The conditions under which they will operate have been well defined, and on any reasonable view are highly protective of the environment, including the river, but they can still be strengthened should that be necessary.

Construction of the Botnia plant will not be completed until at least the middle of 2007, and of ENCE until at least the middle of 2008. Argentina has presented no evidence to suggest that the construction works themselves present any threat to the river: they are not. DINAMA's review of monitoring the river so far — the results of that monitoring — has established that to date the works in progress have caused no adverse impact on the river (DINAMA Affidavit, V.B.2, VI.A.4, and VI.B.3.).

16. Argentina's case on the merits must therefore rest entirely on the environmental risk which she alleges will result from the eventual operation of the plants. Even then, Uruguay's management of this risk could violate Argentina's rights only if it could be shown that Uruguayan controls on pollution emissions did not conform to applicable international standards. Of course, Uruguay believes that they will conform, and independent studies through the International Finance Corporation have corroborated that conclusion. But whatever a hearing on the merits might conclude, Argentina is in no position today to demonstrate an immediate and grave risk of irreparable harm due to pollution or the risk of pollution from plants whose completion and operation is far from imminent.

17. Both the recently updated legislation to which I have already referred (Law 17.283 of 2000 and Decree 349 of 2005) and the authorization process undertaken by DINAMA are evidence of Uruguay's strong commitment to environmental protection. They demonstrate its ability to regulate and control environmental risks in a flexible and precautionary fashion. Uruguay lacks neither the will nor the means to tackle pollution or other environmental problems that might result from the licensing of two pulp mills. Nor should it be suggested that the environmental risks to Argentina have not yet been assessed: they have been.

The PRESIDENT: Professor Boyle, before you turn to your next point, might we have the projector off, if you do not need it.

Mr. BOYLE: With pleasure, Madam President.

**Environmental impact assessment**

18. Madam President, Members of the Court, I know turn to Article 7 of the Statute of the River Uruguay which provides the only basis on which Argentina can substantiate its claims, particularly those with regard to environmental impact assessment.

19. Uruguay will argue that the ENCE and Botnia EIAs show that there is no likelihood of the plants causing any significant harm to Argentina or to the River Uruguay, either now, or in the future.

20. It will also argue that an environmental impact assessment does not allow another State to obstruct development until it can be proved conclusively to its subjective satisfaction that no harm will result or that the controls in place are adequate for that purpose.

21. ENCE and Botnia submitted extensive and detailed environmental impact assessments in 2003 and 2004. Both EIAs were substantially revised until DINAMA was satisfied. It is especially relevant to emphasize that potential transboundary impacts on Argentina were fully considered in accordance with Article 11 of Decree 435 of 1994, the then applicable decree. Representatives from neighbouring towns in Argentina in Entre Rios province made representations at public hearings conducted by DINAMA, or submitted representations in writing. Both EIAs included assessments of possible air and water impacts on Argentina. Most importantly, they included environmental modelling of the whole river, not simply the Uruguayan side. Air quality, noxious smells, and the combined impact of both plants on Argentine towns were also specifically assessed (Ann. DINAMA-10, p.4, 6). Even on a worst case scenario, these assessments showed in the estimation of DINAMA that emissions from the plants would quickly be diluted and remain largely confined to the Uruguayan side of this very large river.

22. Nor was this the end of the environmental assessment process. Both plants are the subject of applications for loans from the International Finance Corporation of the World Bank. IFC regulations require applications of this kind to be supported by a full environmental impact assessment. In the present case the IFC not only reviewed EIAs for each plant, but also commissioned a "Cumulative Impact Study" — which I will refer to as the CIS study and a summary of which you will find in your folder at tab 22. The CIS study extensively assessed the possible combined impact of both plants on Gualeguaychu in Argentina, and on Argentine tourist

resorts (pp. 29, 64, 65). It concludes that odours from the plants should have no significant impact on tourism; that treated waste discharged into the river will rapidly be diluted to undetectable levels; that there will be no cumulative impact on Argentina; and that the impact on the river from vessel traffic will not be significant due to corresponding reductions of log and woodchip exports (p. 71). Annex C of the report assesses potential air pollution on Argentina. Using United States Environmental Protection Agency techniques, it shows that during normal operations the potential cumulative impacts are "well below the most stringent health standards, including World Bank Standards" (pp. 25-29). Annex D provides similarly extensive assessment of water quality impacts, principally in Uruguay, but also in Argentina. The Cumulative Impact Study and the Hatfield Report fully corroborate the conclusions reached independently by DINAMA.

23. It is clear, Madam President, that throughout this very extensive and sophisticated environmental impact assessment (EIA) process potential impacts on the river and on Argentina have been fully considered by DINAMA, by the International Finance Corporation and, indeed, by Argentina itself. As Director Torres's affidavit shows, DINAMA has reviewed all of these assessments and, where appropriate, has modified its response to the applications.

24. Nowhere in any of these assessments is there evidence to support Argentina's claim that the operation of these plants will cause irreversible damage to the ecosystem of the river, or to the quality of its water, or in any other way deny Argentina the ability to make reasonable and equitable use of the river. None of the assessments has provided any objective evidence of possible effects on the health or welfare of the Argentine population. Still less do they show any reason to envisage grave, imminent or irreparable damage to Argentina of a kind that would justify the grant of interim measures.

25. The EIA process undertaken by Uruguay more than meets the requirements of Article 7 of the 1975 Statute. Article 7 requires notice to be given — as we heard this morning — when one Party proposes works that may affect water quality. As Professor Condorelli will argue, that notice was given. It provides that:

> "Such notification shall describe the main aspects of the work and, where appropriate, how it is to be carried out, and shall include any other data that will enable the notified party to assess the probable impact of such works on navigation, the regime of the river, or the quality of its waters."

The obligation envisaged here is not to carry out an environmental impact assessment, but to provide the other Party with enough information to enable it to do its own assessment. Argentina's own evidence demonstrates that Uruguay has indeed provided ample information to enable Argentina to make that assessment, although it has clearly come to the wrong conclusions. But there has been no failure on the part of Uruguay to follow the procedures of the 1975 Statute in that respect.

26. Moreover, the various EIAs undertaken so far more than meet the requirements of international law. Principle 19 of the 1992 Rio Declaration on Environment and Development provides that: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." The International Law Commission interprets the phrase "significant adverse impact" in the following way: They say: "The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards." (ILC Report 2001, p. 388, Draft Articles on Prevention of Transboundary Harm, Commentary to Article 2, para. 4). They did not say by subjective and opinionated views. None of the assessments by DINAMA or by the IFC has provided objective evidence that would meet even this threshold of potential harm, let alone one focused on irreparable damage.

27. Uruguayan law prescribes very fully what should be addressed by an environmental impact assessment. Neither in the Statute of the River Uruguay nor in general international law is there any basis for challenging the adequacy of the environmental impact assessments undertaken by Uruguay. Using the terminology of the *Lac Lanoux* arbitration ((1957) 24 *ILR* 101) under the International Law Commission, Uruguay has given a "reasonable place" to the interests of Argentina when assessing the risks posed by the ENCE and Botnia plants (1997 United Nations Watercourses Convention, Art. 17 (2); 2001 ILC Principles on Prevention of Transboundary Harm, Art. 9 (3)).

**The prevention of pollution**

28. Now, Madam President, let me turn to the prevention of pollution. At the heart of this dispute is the question whether the two plants will operate to the highest standards. If they do so, they will minimize to the greatest possible extent the risk of pollution and environmental damage, not only to Argentina, but even more immediately to Uruguay. Uruguay will show that these are not substandard plants that would not be permitted in Europe or North America. On the contrary, they will operate to the highest international standards. The ENCE and Botnia authorizations contain detailed conditions regarding air pollution. They also require the plants to meet the following water pollution standards:

— firstly, the plants must comply with Uruguayan water law, set out in Decree 253/79. But because cellulose plants *may* produce effluents that are not specifically covered in this Decree, DINAMA has also imposed further conditions on discharges of these pollutants[1] (Botnia AAP, Ann. DINAMA-12, Sec. 2 *(z)*; ENCE's EIA, Ann. DINAMA-9, pp. 15-16);

— secondly, the plants must comply with water quality standards *agreed by Uruguay and Argentina* within the framework of the 1975 Statute on the River Uruguay, referred to for convenience in my speech as "CARU standards"; and

— thirdly, the plants must also comply with the "best available techniques" laid down for similar plants operating in the European Union, and referred to for convenience as "BAT standards". Now, in summary, I do not want to take the Court into the details of BAT, but in summary BAT standards require comprehensive operational and technological controls for a specific site, in order to ensure the smallest environmental impact practicable.

29. Now at this stage of the proceedings I am sure the Court will be relieved to know that it is neither necessary nor appropriate to attempt to give the Court a detailed technical account of these various pollution standards. It is enough simply to remind you that both authorizations require ENCE and Botnia to comply with all of them. Botnia's authorization specifically requires it to build a cellulose mill that will meet BAT standards. The ENCE mill must also do so in accordance with its environmental impact assessment (ENCE authorization, 9 October 2003, Ann. DINAMA-11; Botnia authorization, 14 February 2005, Ann. DINAMA-12).

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[1]Such as absorbable organic matter (AOX — principally chlorinated organic compounds), nitrogen and nitrates.

30. As part of their review of the EIAs, DINAMA considered whether the plants would meet European BAT standards. It is confident that they will (DINAMA affidavit, IV.A.5 and C.3). Moreover, taking the European Community Directive on Integrated Pollution Prevention and Control as the relevant BAT standard, the Cumulative Impact Study of the International Finance Corporation concludes that both plants would fully meet European requirements for Best Available Techniques (CIS Report, Ann. A.),

31. That is also the affidavit evidence given by Mr. Piilonnen, Director of Botnia South America, which you will find in the judges' folder at tab 16. He points out that as a result of using BAT, the Botnia plant is expected to have less environmental impact than many other mills in North America or Europe, that its emissions will be as low as or lower than Finnish mills — and remember that Botnia is a Finnish company — and much lower than mills currently in use in Argentina. In sum, he says, the Botnia mill has been designed as "a first class state of the art facility". The ENCE mill must meet the same standards and we would expect of it a similarly excellent performance.

32. Now, Members of the Court may wonder why Uruguay would wish to impose on ENCE and Botnia an obligation to meet standards set down by the law of the European Community. But given Uruguay's record of environmental protection that should not be surprising. The European Union has extensive experience in regulating plants of this kind. Both ENCE and Botnia are European companies with existing plants operating in Europe to EU standards. They have the technology to meet this requirement. For all of the reasons affirmed by Mr. Piilonnen in his affidavit, it is Uruguay's belief that these are the highest operational standards for such plants. When ENCE and Botnia apply for final authorization to operate, it will be contingent on confirmation that the plants as designed and constructed will meet European BAT standards.

**Uruguay's pollution obligations under the 1975 Statute**

33. Madam President, now let me consider Argentina's argument that Uruguay is in breach — or will be in breach — of its obligations under the 1975 Statute with respect to pollution.

34. First, it must be noted that the Statute deals only with pollution of the River Uruguay and protection of the aquatic environment. It says nothing about air pollution, or other forms of

environmental damage to Argentine territory. Professor Condorelli will deal with the jurisdictional implications of that point in his speech.

35. Secondly, the 1975 Statute does not itself lay down detailed water pollution standards. Instead, it refers the Parties to pollution standards agreed elsewhere. Article 41 of the Statute is the relevant provision. For the purpose of preventing pollution of the river, Article 41 requires the Parties to prescribe "appropriate rules and measures", but it then goes on to say that these must be "in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies". The principal rules and measures applicable under Article 41 are those adopted by the Administrative Commission of the River Uruguay, known as "CARU" (1975 Statute, Art. 56 *(a)*). Decisions taken by CARU, including the specification of water quality standards, require approval by both Argentina and Uruguay (Statute, Art. 56). CARU regulations represent an agreed standard, therefore, to which both Parties have freely consented and by which they are both legally bound.

36. Thirdly, while Uruguay's water quality standards are similar to CARU's, they are not identical. CARU does not specify effluent limitations for industrial discharges; Uruguay in law does; and in DINAMA's view the effluent limitations currently set out in the Botnia and ENCE authorizations will be more than adequate to ensure that CARU water quality standards agreed by both States and applicable to both States are not exceeded.

37. Finally, by requiring the Parties to prescribe rules that are in accordance with "applicable international agreements", Article 41, as we heard this morning, has the effect of incorporating standards set by the 2001 Stockholm Convention on Persistent Organic Pollutants, otherwise known, as I am sure everyone at the Court is well aware, as the POPS Convention. Madam President, the POPS Convention stringently controls the dioxins and furans to which Professor Sands referred this morning. The technology in use in these mills eliminates these chemicals. They are simply not an issue. Both Argentina and Uruguay are parties to this widely ratified multilateral agreement, which entered into force on 17 May 2004. The Conference of the Parties to the Stockholm Convention met for the first time in Punta del Este, Uruguay, in May 2005. The President of Uruguay, addressing the Conference, assured it of "Uruguay's commitment to complying with the terms of the Stockholm Convention, combining efficient

management of resources with cleaner production and transparent monitoring and controls"[2]. You will not be surprised to learn that compliance with the Stockholm Convention standards is expressly required in the Botnia authorization of 2005. Madam President, those are once again standards to which both Parties have agreed.

38. Madam President, Members of the Court, by its ratification and implementation of the Stockholm Convention, by its insistence on the application of European BAT standards, Uruguay has shown its commitment to applying both the highest and the most appropriate international standards of pollution control to these two mills. In doing so it believes that it has met its obligations under Article 41 of the Statute. Using for guidance the standard set by Article 7 of the 1997 United Nations Convention on the Non-navigational Uses of International Watercourses, we would argue that Uruguay has taken "all appropriate measures to prevent the causing of significant harm to other watercourse States". Uruguay recognizes that it has a duty to regulate and control the risk of pollution from the ENCE and Botnia plants to the highest standard reasonably achievable. It does not have to eliminate all risk, however hypothetical, nor is it bound to legislate for all harm, however insignificant. If it can meet the best standards attained elsewhere in the world in order to minimize the risk to Argentina, and indeed to itself, it will have done as much or more than can be demanded of it in international law or under the 1975 Statute.

39. Nor can it be said that Uruguay's use of the river is either inequitable or unreasonable with regard to Argentina. In contrast to the *Gabčíkovo* case, Uruguay's proposed use of the River Uruguay for industrial purposes will have minimal impact on water quality, or on the ecology of the "riparian area", or on Argentina's claim to sustain existing uses of the river. Article 27 of the Statute recognizes the right of each Party to exploit the waters of the river for domestic, sanitary, industrial and agricultural purposes. Uruguay has pointed out the economic and social benefits which present and future generations of Uruguayans will derive from the operation of these plants. Argentina has not proved that it will suffer any significant countervailing loss or injury sufficient to outweigh these benefits. But that is a matter that can be addressed on the

[2]UNEP, Report of the Conference of the Parties of the Stockholm Convention on Persistent Organic Pollutants on the work of its first meeting, para. 89. Available at:

http://www.pops.int/documents/meetings/cop_1/meetingdocs/en/cop1_31/COP1_REPORT.doc

merits; at this stage it is enough simply to observe once again that there is no urgent risk of irreparable damage to Argentina's right to equitable and reasonable use of the river such as would justify interim measures.

**Monitoring**

40. Madam President, Members of the Court, I will not detain you very much longer, but I should say something about arrangements to monitor pollution and environmental impacts from these two plants. Uruguay takes very seriously the need to ensure that environmental impacts and compliance with its laws are monitored comprehensively. That is why the authorizations issued to both companies require their participation in extensive monitoring schemes, which will be overseen by DINAMA and which we have already started.

41. That is also why, in 2004, the Argentine and Uruguayan delegations to CARU adopted a comprehensive monitoring plan to be carried out jointly. Implementation would ensure enforcement of all pertinent CARU regulations and water quality standards. It would provide Argentina with the capacity to regulate, to monitor, to control water quality by virtue of its representation on the Commission, on all of its sub-commissions, and at the technical level.

42. Moreover, in addition to participation in CARU monitoring and control, the Government of Uruguay has invited Argentina to join Uruguay not only in monitoring water quality but also in monitoring the construction and subsequent operation of the plants. The Government of Uruguay earnestly desires that the two States together ensure that the very strict environmental safeguards already laid down are scrupulously observed.

43. Unfortunately, and to Uruguay's great consternation, shortly before bringing this case Argentina withdrew from CARU's monitoring and control efforts, and it declined all the other invitations made by the Government of Uruguay. This is perhaps not very responsible behaviour for a State that claims to be concerned about maintaining the quality of the River Uruguay.

**Concluding remarks**

44. Madam President, Members of the Court, I come now to my concluding remarks. This is not a dispute in which the Court has to choose between one party seeking to preserve an unspoiled environment and another party recklessly pursuing unsustainable development, without regard to

the environment, or to the rights and interests of neighbouring States. It is a case about balancing the legitimate interests of both parties. It is a case in which Uruguay has sought — without much co-operation from its neighbour — to pursue sustainable economic development while doing everything possible to protect the environment of the river for the benefit of present and future generations of Uruguayans and Argentines alike.

45. Were Argentina to succeed in its attempt to strangle the development of a modern wood pulp industry in Uruguay it would set a precedent for all States everywhere, including itself. It should not be forgotten that Argentina already operates its own wood pulp mills, few of which meet the same high standards as those now under construction in Uruguay, or as others operating in Brazil and Chile. Some of Argentina's mills still use outdated chlorine bleaching technology. The wood pulp industry in Latin America clearly needs to modernize to become less polluting than it is at present. But, Madam President, it is Uruguay which is leading that modernization, not its neighbour Argentina.

46. In a case of this importance the Court would expect me to draw its attention to some of the leading cases. I will do so in one sentence. From the *Trail Smelter* arbitration, via *Gabčíkovo*, to the *MOX* plant case, no international tribunal has ever suspended or found unlawful either the construction or operation of modern industrial facilities, even when they may pose some risk of environmental harm. That should not be surprising. The operation of nuclear power plants, nuclear reprocessing facilities, or the carriage of oil and chemicals in bulk at sea, all pose significant risks to the environment of other States, all are internationally regulated to a very high standard, but they have not been prohibited by international law or constrained by the judgments of international courts. Wood pulp plants do not remotely pose a risk of harm comparable to these ultra-hazardous activities, provided they are properly run and properly regulated, as Uruguay's are and will be.

47. Given the very high standards to which the plants at issue in the present case will be built and operate, Argentina has a very heavy burden of proof. It must establish the existence of an urgent risk of irreparable damage meriting the indication of interim measures. In Uruguay's submission, that burden of proof is nowhere near to being sustained on the evidence before the Court today.

I thank you, Madam President, Members of the Court.

The PRESIDENT: Thank you, Professor Boyle. I now call Professor Condorelli.

M. CONDORELLI :

## LE STATUT DU FLEUVE URUGUAY ET LES MESURES CONSERVATOIRES

### 1. Introduction

Madame le président, Messieurs les juges,

1. C'est un grand honneur pour moi d'apparaître encore une fois devant votre Cour et je suis très reconnaissant au Gouvernement de la République orientale de l'Uruguay de la confiance qu'il m'accorde en m'autorisant à vous soumettre son point de vue sur deux aspects de la demande en indication de mesures conservatoires présentée par l'Argentine.

2. Les aspects sur lesquels porteront mes remarques sont étroitement liés à l'interprétation du traité bilatéral dénommé «statut du fleuve Uruguay» de 1975 : traité sur lequel se fondent tant l'instance principale de l'Argentine que sa demande en indication de mesures conservatoires. Concernant cette dernière demande, l'interprétation du statut joue de toute évidence un rôle essentiel afin de déterminer la présence de deux des conditions nécessaires pour l'octroi de mesures conservatoires. La première condition est celle de la compétence *prima facie* de la Cour à juger au fond le différend qui lui est soumis; la seconde condition est celle dite du *fumus boni juris* : la Cour ne peut accorder des mesures provisoires pour préserver des droits au cas où les prétendus droits invoqués résulteraient déjà à première vue basés sur un fondement juridique clairement insuffisant, voire si les allégations relatives à la violation des droits en cause reposent sur des arguments dont on peut aisément vérifier l'inconsistance, la demande principale se révélant alors *prima facie* dépourvue de perspectives sérieuses de succès. Je ne vais par contre pas m'occuper des autres conditions nécessaires pour que la Cour accorde des mesures conservatoires : des conditions qu'embrasse la notion générale de *«periculum in mora»*. M[e] Reichler les analysera tout à l'heure de manière approfondie, sur la base des éléments factuels et juridiques qu'a exposés le professeur Boyle et que je vais exposer moi-même.

**2. La compétence *prima facie* de la Cour sur la base de l'article 60 du statut et les mesures conservatoires**

3. Madame le président, la vérification *prima facie* de sa compétence à décider du fond du différend qui lui est soumis constitue pour votre Cour une sorte de précondition indispensable pour que des mesures conservatoires puissent être accordées. Depuis au moins les affaires sur la *Compétence en matière de pêcheries*, votre jurisprudence est constante à requérir que l'instrument invoqué comme fondant la compétence de la Cour «se présente comme constituant *prima facie* une base sur laquelle la compétence de la Cour pourrait être fondée» (*Compétence en matière de pêcheries (Royaume-Uni c. Islande), mesures conservatoires, ordonnance du 17 août 1972, C.I.J. Recueil 1972,* p. 16, par. 17).

4. Dans le cas présent la compétence de la Cour à juger au fond le différend qui oppose l'Uruguay à l'Argentine a comme seule base la clause compromissoire de l'article 60 du statut : nos contradicteurs, d'ailleurs, n'en invoquent aucune autre. Il y a donc accord entre les Parties sur ce point et l'article 60, je le rappelle, dans son premier paragraphe, dit que : «Tout différend concernant l'interprétation ou l'application du traité et du statut qui ne pourrait être réglé par négociation directe peut être soumis par l'une ou l'autre des parties à la Cour internationale de Justice.»

5. Madame et Messieurs de la Cour, l'Uruguay n'entend nullement contester que, à ce stade de la procédure, c'est-à-dire aux fins de la décision sur les mesures conservatoires demandées, l'article 60 fonde bien, *prima facie*, la compétence de la Cour, mais exclusivement par rapport à certaines des prétentions avancées par l'Argentine dans sa demande principale. Quant à d'autres prétentions, en revanche, le défaut de compétence de la Cour est manifeste : la Cour se doit donc de refuser maintenant des mesures conservatoires de prétendus droits de l'Argentine dont il apparaît exclu à priori qu'ils puissent être reconnus ensuite, au moment de l'examen au fond du présent différend. L'Uruguay tient par ailleurs à déclarer qu'il se réserve le droit de faire valoir, le cas échéant, à un stade ultérieur, que toutes les conditions ne sont pas remplies pour que la Cour puisse exercer sa compétence sur la base de l'article 60, pour ce qui est du fond du différend qui lui est soumis.

6. Madame le président, il saute aux yeux que sur certains aspects de la demande principale de l'Argentine la Cour est manifestement dépourvue de compétence : l'article 60 du statut, en effet,

n'attribue pas à la Cour la compétence pour régler n'importe quel différend international opposant l'Uruguay et l'Argentine ! Comme l'indique on ne peut plus clairement son libellé, les seuls différends couverts *ratione materiae* par la clause compromissoire en question sont ceux relatifs «à l'interprétation ou l'application … du statut». Il s'ensuit que tout différend relatif à des prétentions ne se fondant pas sur le statut échappe à la sphère d'application de la clause compromissoire : par conséquent, la Cour est dépourvue de la compétence pour en décider.

7. L'Argentine prétend que l'Uruguay aurait violé les articles 7 et suivants du statut. Suivant l'indication donnée à l'article 7, les articles en question portent, d'une part, sur les projets relatifs à la construction de nouveau chenaux ou à la modification des chenaux existants dans le fleuve Uruguay (ce qui n'est de toute évidence pas pertinent aux fins du présent différend); ils portent ensuite, d'autre part, sur «tous autres ouvrages suffisamment importants pour affecter la navigation, le régime du fleuve ou la qualité de ses eaux…». D'après la teneur explicite des dispositions en question, le terme «affecter» doit être interprété comme signifiant que le projet en question «peut causer un préjudice sensible à l'autre partie».

8. Les usines de pâte à papier dont nous discutons ne sont pas susceptibles d'affecter la navigation ou le régime du fleuve : l'Argentine, d'ailleurs, ne le prétend pas. Le statut est donc pertinent exclusivement en vue du «préjudice sensible» que — d'après la partie adverse — ces usines risqueraient de lui causer par l'altération de la «qualité» des eaux du fleuve. Autrement dit, tout différend relatif à des effets éventuels des usines autres que ceux relatifs à une éventuelle altération de la qualité des eaux du fleuve, voire autres que ceux découlant directement par une relation de cause à effet d'une telle altération, n'est clairement pas couvert *ratione materiae* par la clause compromissoire prévue à l'article 60 du statut.

9. Or, il est facile de remarquer que tant dans sa demande principale que dans celle en indication de mesures conservatoires l'Argentine tente d'élargir la sphère de compétence de la Cour d'une manière qui apparaît déjà *prima facie* comme exorbitante par rapport à la portée de la clause compromissoire résultant de l'article 60. Il le fait en demandant à la Cour de prendre en considération les «conséquences négatives considérables sur le plan social et économique» [3], voire

[3] Voir la demande en indication de mesures conservatoires présentée par le Gouvernement de la République argentine, par. 7.

les dommages risquant d'affecter le tourisme, les valeurs immobilières urbaines et rurales, les activités professionnelles, les taux de chômage, etc. J'observe aussitôt qu'aucun début de preuve n'a été administré par la partie adverse quant au sérieux de tels risques. Mais il y a plus, Madame le président. En effet, des deux l'une : soit de tels événements constitueraient l'effet direct de l'altération de la qualité des eaux du fleuve, dont l'Argentine aurait dû alors démontrer le caractère imminent et irréparable (ce qu'elle n'a pas fait et ne saurait pas faire, comme le montrera M[e] Reichler, la mise en service des usines étant entre autres un événement encore bien lointain dans le temps), et ils joueraient alors exclusivement le rôle d'éléments permettant de mesurer le préjudice produit par la pollution des eaux; soit l'Argentine les invoque de manière autonome par rapport à l'altération de la qualité des eaux, à l'appui de sa demande relative aux mesures conservatoires. Mais alors la Cour irait clairement au-delà des limites de sa compétence *ratione materiae* en les prenant en considération, puisqu'ils ne sont pas couverts par le statut.

10. Qu'il me soit permis d'insister sur ce point. Les droits qu'il est question de préserver par des mesures conservatoires ne peuvent être que ceux formant l'objet de la demande principale; et cette protection ne saurait être accordée qu'à certaines conditions, dont celle de la vérification *prima facie* par la Cour de sa compétence à juger de cette demande. Or, dans le cas présent, en alléguant des risques de dommages d'ordre économique et social autres que ceux qui pourraient découler de l'altération des eaux du fleuve, l'Argentine tente d'obtenir la protection à titre provisoire de droits et intérêts que la Cour ne pourrait d'aucune façon reconnaître à l'avenir parce qu'ils ne sont pas octroyés par le statut et ne tombent donc manifestement pas dans la sphère d'application de la clause compromissoire de l'article 60.

11. Madame le président, des remarques du même genre doivent être faites par rapport aux allégations de la partie adverse d'après laquelle les mesures conservatoires se justifieraient également en vue des exigences de préservation de l'écosystème ou de la beauté des sites qui les rend attrayants pour le tourisme, en vue du danger relatif à d'éventuelles émissions gazeuses et, plus en général, en vue de la nécessité d'éviter des «préjudices transfrontaliers»[4]. Ces assertions non étayées n'ont aucune base sérieuse et sont même offensantes pour l'Uruguay qui — ainsi que

[4] *Ibid.*, par. 6.

le professeur Boyle l'a montré — a pris et continue de prendre au sujet des usines toutes les mesures les plus sophistiquées et les plus avancées, existant au niveau mondial, pour éviter tout dommage écologique de quelque sorte que ce soit. Il faut observer de toute façon que d'éventuels dommages transfrontaliers engendrés par les usines qui seraient de nature différente par rapport à ceux découlant de l'altération de la qualité des eaux du fleuve ne sont pas régis par le statut : il saute aux yeux que les différends qui pourraient naître à leur sujet ne sont encore une fois pas couverts par la clause compromissoire de l'article 60.

12. Madame le président, Messieurs les juges, l'Uruguay tient à vous faire noter qu'il se garde bien de contester l'existence d'obligations internationales en matière de protection de l'environnement, notamment concernant les relations transfrontalières, bien plus larges et bien plus nombreuses que celles que prescrit le statut. L'engagement environnemental très fort et tout à fait indiscutable de l'Uruguay, dont l'ambassadeur Gros Espiell a parlé avec éloquence au début de cette séance, a toujours placé cet Etat au premier plan dans la négociation internationale à ce sujet et dans l'acceptation et dans le respect des obligations internationales pertinentes. Mais l'ampleur des obligations primaires pesant sur tous les Etats dans ce domaine, qui heureusement se développent de plus en plus, ne saurait modifier la sphère d'application de la clause compromissoire du statut de 1975. Celle-ci limite précisément la compétence de la Cour aux différends entre les parties — en l'espèce — sur l'altération de la qualité des eaux du fleuve Uruguay. D'éventuels litiges entre les mêmes parties relatifs à d'autres aspects de la protection de l'environnement dans les relations transfrontalières ne sont de toute évidence pas justiciables en vertu de l'article 60 du statut, mais relèvent le cas échéant, soit de la compétence de moyens de règlement des différends prévus par des instruments internationaux distincts liant les parties, soit de celle de mécanismes concordés exprès entre elles dans le cadre du principe du libre choix des moyens de règlement des différends consacré à l'article 33 de la Charte des Nations Unies.

13. Ces concepts ont été mis en évidence de façon extrêmement claire par la jurisprudence de la Cour. Je me limiterai à citer un seul exemple, représenté par un *obiter dictum* exemplaire tiré de l'arrêt en l'affaire *Compétence en matière de pêcheries (Espagne c. Canada)*, du 4 décembre 1998. Aux paragraphes 55 et 56, votre Cour avait dit ceci :

«Il existe une distinction fondamentale entre l'acceptation par un Etat de la juridiction de la Cour et la compatibilité de certains actes avec le droit international. L'acceptation exige le consentement. La compatibilité ne peut être appréciée que quand la Cour examine le fond, après avoir établi sa compétence et entendu les deux parties faire pleinement valoir leurs moyens en droit.

Que les Etats acceptent ou non la juridiction de la Cour, ils demeurent en tout état de cause responsables des actes portant atteinte aux droits d'autres Etats qui leur seraient imputables. Tout différend à cet égard doit être réglé par des moyens pacifiques dont le choix est laissé aux parties conformément à l'article 33 de la Charte.» (*Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 456, par. 55-56. La Cour a répété ces concepts avec des mots presque identiques dans son ordonnance du 2 juin 1999 dans l'affaire relative à la *Liceité de l'emploi de la force (Yougoslavie c. Etats-Unis), C.I.J. Recueil 1999*, p. 921, par. 30-31. Voir aussi *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence de la Cour et recevabilité de la requête*, arrêt du 3 février 2006, par. 127.)

Madame le président, je suis à votre disposition si c'est maintenant que vous souhaitez que je m'interrompe ou si vous préférez que je continue.

The PRESIDENT: I think this would probably be a good moment for afternoon break and we shall resume shortly.

M. CONDORELLI : Thank you.

*The Court adjourned from 4.20 to 4.35 p.m.*

The PRESIDENT: Pleased be seated. Yes, Professor Condorelli.

M. CONDORELLI :

**3. Les allégations argentines relatives aux violations par l'Uruguay des obligations prescrites par le statut apparaissent déjà a première vue dépourvues de fondement : l'Uruguay n'a pas violé ses obligations découlant des articles 7 à 12 du statut**

14. Madame le président, Messieurs les juges, je vais maintenant présenter à la Cour quelques observations concernant les prétendues violations par l'Uruguay de ses obligations découlant des articles 7 à 12 du statut : d'après la Partie adverse, l'Argentine n'aurait pas été correctement informée avant le début de la construction des usines, n'aurait pas pu évaluer les informations pertinentes et n'aurait pas pu exercer son droit d'objecter à une telle construction[5]. Je

[5] Demande en indication des mesures conservatoires, par. 5.

précise *in limine* que je suis pleinement conscient du fait que l'examen analytique de ces prétendues violations relève du fond du différend et devra donc être effectué lors de la prochaine phase de la présente procédure. Mais il est nécessaire d'évoquer dès maintenant cet aspect du dossier dans un but limité qui est celui de mettre en évidence qu'un examen sommaire des faits permettrait à la Cour de constater déjà à ce stade que la demande de l'Argentine manque de perspectives sérieuses de succès, étant donné que les violations du statut dont l'Uruguay est accusé se révèlent *prima facie* dépourvues de consistance : autrement dit, l'Uruguay prie la Cour de relever que la demande de l'Argentine n'a pas — ou du moins, il est fort douteux qu'elle ait — ce *fumus boni juris* qui la rendrait idoine, en présence bien sûr d'autres conditions (par ailleurs absentes elles aussi, comme le montrera toute à l'heure M[e] Reichler), à justifier l'octroi de mesures conservatoires.

The PRESIDENT: Professor Condorelli, I think it would be in your interest if you gave one moment to my neighbour — whom I have inadvertently drowned! And then you will have his entire interest. Please now continue.

M. CONDORELLI : Merci.

15. Un examen cursif du dossier qui est sous les yeux de la Cour, permet de constater aisément qu'en réalité l'Uruguay s'est acquitté de bonne foi des obligations que lui imposent les articles 7 et suivants. Permettez-moi, Madame et Messieurs les juges, d'attirer l'attention de la Cour sur les données principales qui le prouvent.

16. Concernant d'abord le projet ENCE relatif à l'usine CMB, le projet a été formellement porté à l'attention de la CARU — la commission administrative bipartite prévue par le statut — le 8 juillet 2002, lorsque les représentants de l'usine ont fourni à la CARU les informations relatives[6]. Cela s'est passé plus de quinze mois avant que l'Uruguay ne donne son autorisation environnementale préalable qui a permis à l'ENCE de commencer les travaux préparatoires de construction. Pendant ces quinze mois, la CARU a sollicité et reçu des informations supplémentaires importantes et détaillées concernant l'usine, y inclus un rapport sur l'évaluation de

[6] Pièce 2, CARU 1.

l'impact environnemental[7]. Le 21 juillet 2003, lors d'une audience publique organisée à Fray Bentos, l'Uruguay a divulgué officiellement les informations sur le projet et a donné aux participants l'opportunité d'exprimer leurs points de vue. Certains membres de la CARU étaient présents à la réunion. Ceux-ci ont préparé un rapport qui a été soumis à l'ensemble de la CARU[8] et, le 10 octobre 2003, la CARU a approuvé son plan pour le contrôle et l'étude de la construction de l'usine. Le même jour, l'Uruguay a donné son autorisation environnementale préalable pour l'usine et l'a notifiée au président de la délégation argentine à la CARU, qui était à l'époque le président de la CARU[9].

17. Lors de la réunion du 17 octobre 2003 de la CARU, les membres argentins firent valoir leur désaccord quant à l'autorisation que l'Uruguay avait donnée pour le début de construction de l'usine quelques jours auparavant. Les travaux de la CARU furent bloqués jusqu'à ce qu'une décision politique prise au plus haut niveau par les Gouvernements de l'Argentine et de l'Uruguay n'intervienne pour débloquer la situation. En effet, le 2 mars 2004, le ministre des affaires étrangères de l'Uruguay, M. Didier Opertti, et son homologue argentin, M. Rafael Bielsa, ont conclu un accord selon lequel l'usine pourra être construite comme prévu et l'Uruguay devra fournir à l'Argentine les renseignements relatifs à sa construction et à son fonctionnement. D'après l'accord, dès que l'usine sera opérative, la CARU procèdera au contrôle de la qualité de l'eau afin de garantir le respect du statut[10]. Mais je reviendrai en détail sur cet accord dans un instant.

18. J'en viens maintenant à l'usine Botnia. A ce sujet, l'Uruguay s'est entièrement acquitté de ses obligations d'information. Le 29 avril 2004, des représentants de l'usine ont rencontré la CARU en fournissant les informations relatives à l'usine en question[11]. Le 15 juin 2004, la CARU a convoqué une deuxième réunion avec les représentants de la Botnia qui ont présenté des informations supplémentaires[12]. En août 2004, une délégation de la CARU s'est rendue en Finlande pour examiner les usines de cellulose que Metsa-Botnia possède et gère et qui sont

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[7] Pièce 2, CARU 2.

[8] Pièce 2, CARU 3.

[9] Pièce 2, CARU 4 – CARU 5.

[10] Pièce 2, CARU 6.

[11] Pièce 2, CARU 9.

[12] Pièce 2, CARU 10.

semblables quant à leur structure aux usines en construction près de Fray Bentos. La délégation de la CARU a rencontré aussi des fonctionnaires des agences finlandaises chargées de la protection de l'environnement pour discuter des méthodes nécessaires à assurer une réglementation et un contrôle effectifs[13]. En septembre 2004, des membres de la délégation argentine de la CARU, ainsi que des techniciens de la province argentine d'Entre Rios, se sont rendus en Espagne pour examiner l'usine de cellulose de Huelva possédée et gérée par ENCE, qui est semblable pour sa structure à l'usine CMB qui est en projet près de Fray Bentos[14]. Le 19 octobre 2004, la CARU a organisé une autre réunion avec les représentants de l'usine Botnia pour discuter des questions concernant le projet[15].

19. Sur la base des informations exhaustives fournies par l'Uruguay quant aux usines CMB et Botnia, le sous-comité de la CARU compétent pour les questions de la qualité de l'eau et de la prévention en matière de contamination de l'eau a rédigé un plan pour le contrôle de la qualité environnementale du fleuve Uruguay dans les zones où se trouvent les usines de cellulose. La CARU a officiellement approuvé ce plan pendant la réunion du 12 octobre 2004[16]. Le 10 décembre 2004, le président de la CARU et chef de la délégation argentine a affirmé : «Il est juste de reconnaître que le travail s'est surtout concentré sur l'adoption de procédures visant au contrôle des usines de cellulose, comme il résulte des différents rapports. Et dans ce sens, les responsabilités de la CARU ont été particulièrement importantes dans l'élaboration d'une méthode de travail en plein accord avec les requêtes des ministres des affaires étrangères de nos pays.»[17] Enfin, le 21 décembre 2004, l'Uruguay a organisé une réunion publique concernant cette usine. Un représentant de la CARU était présent et a rédigé un rapport successivement soumis à la CARU[18].

20. Madame le président, je pense qu'il convient de souligner ceci : ce n'est qu'à la suite de toutes ces démarches, de tous ces débats, de tous ces échanges d'informations, de toutes ces précautions que l'Uruguay a donné son autorisation environnementale préalable pour la

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[13] Pièce 2, CARU 11 – CARU 12.

[14] Pièce 2, CARU 8.

[15] Pièce 2, CARU 13.

[16] Pièce 2, CARU 16.

[17] Pièce 2, CARU 17.

[18] Pièce 2, CARU 14.

construction de l'usine Botnia, le 5 février 2005[19]. En somme, sur la base de l'ensemble des faits rapportés, qui sont entièrement confirmés par la documentation soumise à la Cour par les deux Parties, il est évident que l'Uruguay a respecté pleinement ses obligations découlant de l'Estatuto : il a pris toutes les précautions possibles, il a communiqué à l'Argentine — par l'intermédiaire de la CARU ou par d'autres canaux — l'existence de ces projets en les détaillant au moyen d'une quantité impressionnante d'informations et il a fourni toutes les données techniques pour que l'Argentine soit consciente de l'absence de dangers quant à leur impact potentiel sur l'environnement du fleuve Uruguay.

21. Certes, les autorisations relatives au début de construction des usines ont été données par les autorités uruguayennes sans le consentement préalable de l'Argentine, c'est indéniable. Or, la conviction ferme de l'Uruguay est que le statut n'accorde aucun droit de veto à chaque partie quant à la réalisation par l'autre partie de ses projets de développement industriel, lorsque celle-ci s'est acquittée de bonne foi de ses obligations en matière d'échange complet d'informations dans le cadre des procédures prévues par les dispositions du statut ou convenues par les parties. Jusqu'ici, l'Uruguay était d'ailleurs convaincu que cette conception était fondamentalement partagée par l'Argentine, comme le confirme d'ailleurs la pratique de trois décennies d'application du statut. Il apparaît en revanche que l'Etat demandeur ait changé d'idée désormais. A vrai dire, cette nouvelle conviction ne ressortait pas clairement des pièces écrites présentées jusqu'ici devant votre prétoire. Mais maintenant, après le fort discours des plaideurs argentins ce matin, et du professeur Sands en particulier, tout est clair. Une réponse précise de la part de l'Uruguay s'impose. Elle viendra demain. En attendant, cependant, permettez-moi de prier votre Cour de prendre en considération l'accord bilatéral du 2 mars 2004, conclu par les ministres des affaires étrangères des deux pays, auquel j'ai fait allusion il y a un instant. Un accord dont la pertinence et l'incidence sont tout à fait considérables, et qui a pourtant été — c'est étonnant ! — le grand absent dans les propos de l'Argentine, ce matin.

22. L'existence de cet accord ne saurait être mise en doute, d'autant plus qu'elle a été solennellement confirmée à maintes occasions : par exemple, dans les procès-verbaux officiels de

[19] Pièce 2, CARU 15.

la réunion extraordinaire de la CARU du 15 mai 2004, qui figurent dans le dossier des juges (document n° 8); et plus important encore, dans son rapport officiel sur l'état de la nation pour l'année 2004, qui figure dans le dossier des juges (document n° 10), le président argentin s'y est référé en le qualifiant comme «un accord bilatéral mettant fin au différend concernant l'installation d'une usine de pâte à papier à Fray Bentos». Encore, d'autres documents gouvernementaux argentins de haut niveau en font état, comme le rapport à la Chambre des députés du chef de cabinet des ministres argentin de mars 2005, citant des mots tout à fait explicites du ministre des affaires étrangères, M. Rafael Bielsa (document n° 11 dans votre dossier). M^e^ Reichler d'ailleurs reviendra tout à l'heure sur cela.

23. Quant à la signification de l'accord bilatéral, elle est claire et décisive : les deux gouvernements ont convenu de considérer désormais clos le différend relatif à l'autorisation de construction de l'usine, qui sera donc construite conformément à son projet; tant la construction que, ultérieurement, la mise en service feront l'objet d'un flux continu d'informations fournies par l'Uruguay à l'Argentine, alors que la CARU contrôlera la qualité de l'eau afin de garantir le respect des dispositions du statut. Madame le président, il y a de quoi s'étonner grandement de voir l'Argentine demander à votre Cour — au titre des mesures conservatoires — d'ordonner la suspension de la construction de l'usine CMB, alors que l'Argentine s'est justement engagée par un accord international spécifique à considérer clos le différend relatif à l'autorisation donnée par l'Uruguay pour une telle construction !

24. Madame le président, permettez-moi de dire que le principe *pacta sunt servanda* joue aussi en faveur de cet accord. Il est vrai que l'accord bilatéral du 2 mars 2004 est intervenu après l'autorisation de construire relative à CMB, mais avant celle concernant Botnia/Orion, qui est — je l'ai rappelé — de février 2005. Mais, s'il était logique de penser, tout au moins du côté uruguayen, que les deux cas parallèles allaient être soumis au même traitement juridique, en soi l'accord de 2004 ne pouvait pas régler d'avance un différend qui allait naître postérieurement. Ceci étant admis, il faut aussitôt mettre en évidence ce qui ressort clairement du dossier qui est sous les yeux de la Cour : des documents officiels argentins postérieurs au 5 février 2005, d'un poids indiscutable, démontrent que l'Argentine a accepté d'assimiler les deux affaires et d'appliquer aussi au cas Botnia le régime prévu par le même accord bilatéral.

25. En ce sens témoigne le rapport du président Kirchner sur l'état de la nation pour 2004 (qui date du 1er mars 2005), lequel — après avoir fait référence à l'accord bilatéral — couvre explicitement le cas des deux usines, notamment pour ce qui est des modes de contrôle relatifs à leur incidence éventuelle sur la qualité des eaux du fleuve. C'est un point sur lequel reviendra tout à l'heure Me Reichler.

26. Me Reichler parlera aussi des déclarations officielles de mars 2005 du ministre argentin des affaires étrangères, M. Bielsa, qui figurent dans le dossier des juges (documents nos 9 et 11), où il est question à nouveau de l'accord bilatéral de 2004, de la méthodologie de travail qu'il comporte tant quant au projet de construction que de mise en service des usines, s'agissant du contrôle auquel soumettre «les deux usines» : «las dos plantas», dit le document.

27. Une preuve ultérieure de cette assimilation des deux cas, et de leur soumission au même régime mis en place par l'accord bilatéral de 2004, peut être recueillie en se référant à l'expérience du groupe technique de haut niveau (le GTAN) qui a été créé suite à l'accord et dans son sillage afin de poursuivre par ce canal l'échange d'information qu'impose le statut, de manière à surmonter les difficultés et les mésententes qui avaient pesé sur la CARU. Or, il est important de relever que le GTAN (ainsi que le détaillent les déclarations de M. Ponce de León figurant dans le dossier des juges (document no 15) et de ses annexes)[20] a travaillé au même titre sur les deux usines en recueillant à leur sujet une documentation littéralement monumentale.

28. Madame le président, ces remarques montrent bien que, en attendant le règlement au fond de l'affaire qui oppose les Parties, rien ne justifierait que la Cour accorde des mesures conservatoires ordonnant la suspension de travaux relatifs aux usines, au sujet desquelles il apparaît déjà *prima facie* que l'Uruguay s'est acquitté de ses obligations internationales telles que prévues par le statut et par les accords bilatéraux postérieurs relatifs à son application.

29. J'en ai terminé, Madame le président. Je vous prie, en vous remerciant, de bien vouloir donner la parole à Me Reichler.

The PRESIDENT: Thank you, Professor Condorelli. I now call Mr. Reichler.

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[20] Pièce 3, GTAN 1 – GTAN 2.

Mr. REICHLER:

**Provisional measures are not warranted**

1. Madam President, Members of the Court, I am honoured to appear before you today, and proud to represent Uruguay in these proceedings.

2. It is my role to address the Court on the subject of why provisional measures are not warranted in this case, and why Argentina's petition should be denied.

3. Madam President, Members of the Court, there are three separate and independent grounds on which Argentina's request for provisional measures must be denied, and each of them alone is sufficient to warrant denial of Argentina's request.

4. First, Argentina has failed to show that there is presently an imminent or urgent need for the provisional measures it has requested.

5. Second, Argentina has failed to show that its rights are threatened with irreparable injury.

6. Third, the particular provisional measures that Argentina has requested would, if indicated by the Court, irreparably prejudice the rights of Uruguay that will be ultimately adjudged by the Court.

7. I shall take up each of these points in turn.

## I. There is no "imminent" threat to Argentina's rights or "urgent" need for the extraordinary relief it has requested

8. Uruguay disputes that there is *any* threat to Argentina's rights, let alone a threat that is so imminent that there is an urgent need for the provisional measures that have been requested.

9. Article 27 of the Statute of the River Uruguay expressly permits both Uruguay and Argentina to use the river for industrial purposes. At the same time, in Articles 40 to 43, the Statute imposes on both States an obligation to protect the water against contamination, and to pay compensation for any contamination that may occur. In Chapter XII, the Statute establishes the Commission for Administration of the River Uruguay (the CARU), whose principal purposes include, as set forth in Article 56, the "Prevention of pollution" of the river, and the "Conservation and preservation of living resources". As my colleagues have described, CARU has exercised the powers vested in it by the two States by issuing regulations that establish water quality standards

that effectively set limits on the maximum levels of industrial discharges of particular chemicals that may be deposited in the river without contaminating it. Accordingly, Uruguay recognizes that it may not permit any industrial discharges into the river that exceed these jointly established levels. The substantive right that Argentina seeks to vindicate in this case is its right to hold Uruguay to its obligation not to allow the cellulose plants that are now under construction to contaminate the river in violation of the Statute and the regulations promulgated by the Commission. As demonstrated by my colleague Professor Alan Boyle, Uruguay has taken all appropriate and necessary preventative measures — and will continue to take all such measures — to fulfil this obligation.

10. Uruguay learned this morning from Professor Sands that Argentina now claims — for the first time in the 31 years since the Statute came into being — that it has a procedural right under the Statute, not only to receive notice and information and to engage in good faith negotiations, but to *block* Uruguay from initiating projects during these procedural stages and during any litigation that might ensue. Because the argument is new, and appears to contradict the interpretation that both Parties, including Argentina, have previously given to the Statute, Uruguay will reserve its right to reply to Professor Sands's argument until the second round. Today, I will focus my remarks on Argentina's substantive rights under the Statute.

11. As I shall describe later in my presentation, Argentina's own officials and technical experts have repeatedly and publicly acknowledged, on numerous occasions, that the measures taken by Uruguay, and by Uruguay and Argentina together through the CARU, are sufficient to protect the Uruguay river against the contamination proscribed by the Statute. Thus, there is no threat to Argentina's right to protect the river against contamination, and there is certainly not any imminent threat to that right.

12. Nevertheless, assuming for the sake of argument that the cellulose plants now being built in Uruguay could conceivably threaten Argentina's right, how might that occur? It might occur if the cellulose plants were to discharge into the river chemical contaminants that exceed the levels permitted by Uruguay's very strict environmental laws, and in violation of the CARU regulations that protect the quality of the water against contamination. This could occur — if at all — *only* after the plants start operating. It could not occur — not even hypothetically — while the plants

are still under construction, as they are now, because during construction they are not discharging chemicals of any kind into the river.

13. Argentina acknowledges this in its Application. At paragraph 21, Argentina lists the various types of harm it might suffer from the two plants. Every type of harm listed would result — if at all — only from operation of the plants, not from their mere construction. Argentina admits this in the next paragraph, paragraph 22:

> "In conclusion, in spite of the non-compliance by Uruguay of the procedures set forth by the 1975 Statute, the information available to Argentina clearly establishes that *the placing in service* of the CMB and Orion pulp mills will cause considerable prejudice to the water quality of the River Uruguay and a considerable cross-border prejudice to Argentina."

14. The Application speaks only of harm to Argentina caused by "the placing in service" of the two cellulose plants. Argentina's Application does not allege — not anywhere in its 28 paragraphs — that any harm might befall Argentina as a result of the *construction* of the plants. This cannot have been an oversight. If Argentina truly felt that its rights were infringed by the *construction* of the plants, it surely would have said so in its Application. The plants have been under construction since the middle of 2005. The water quality was regularly monitored by the CARU through the end of 2005, and by Uruguay since then. The results confirm that construction of the plants has produced no chemical discharges and no contamination of the river. Argentina has offered no evidence to the contrary.

15. *Operation* of the plants is not imminent. It is *far* from imminent. As shown in the Sworn Declaration of Martín Ponce de Léon, Uruguay's Undersecretary of Industry (tab 15 in the judges' folder), the Orion plant, being constructed by Botnia of Finland, will not be ready to begin operations before August 2007, which is 14 months from now. The CMB plant, being constructed by ENCE of Spain, will not operate before June 2008, which is two years into the future. Moreover, in both cases commencement of operations is conditional. It is subject to significant conditions precedent. As Professor Boyle stated, there are several more approvals required before either plant can operate. The CMB plant currently has only a permit to move earth and prepare the ground; it has not yet been licensed to commence the civil works, or install the machinery, let alone to operate. The Orion plant has been licensed to construct the civil works, but not to install the machinery or operate. Before either plant may proceed to the next stage, it must submit

additional environmental impact data and demonstrate to the satisfaction of Uruguay's environmental regulatory agency, DINAMA, that sufficient protective and preventative measures have been taken to assure that there will be no adverse environmental consequences, including no contamination of the river in violation of Uruguayan law or the CARU regulations. Uruguay has made it clear that only if these strict conditions are met will further approvals be issued.

16. Operation of the plants is also far from imminent because the financing for their completion has not been secured, and it is subject to satisfaction of the very strict environmental standards imposed by the World Bank and its related institutions. Both plants have sought financing from the Bank's International Finance Corporation and guarantees from its Multilateral Investment Guarantee Agency. Argentina has brought its concerns about the plants to these agencies. As a result, the financing institutions have been conducting their own comprehensive environmental evaluation of the plants. Last month, they decided to appoint a new set of independent technical experts to evaluate all of the environmental studies that have been made to date, and to make recommendations that would assure that the plants operate in conformity with the Bank's own environmental requirements. Both plants agreed to co-operate with the new technical study, and they are doing so. This is reflected in tab 3 of the judges' folder, a recent press release issued by the IFC. It is therefore possible that additional protective measures will be required by the World Bank and implemented by the plants before they operate. Indeed, just one month ago, on 9 May, the Acting Executive Director of the World Bank wrote to a member of the European Commission, in a letter that can be found at tab 4 of the judges' folder:

> "While we are reassured by the technical competence of Botnia and their strong reputation for environmental performance, IFC's decision must be publicly credible and therefore founded on an independent, fact-based assessment of the combined environmental impacts of the two mills . . . *IFC will finance the projects only if we are certain that they can be operated in an environmentally and socially responsible manner*." (Emphasis added.)

17. The eventual operation of the plants is thus highly contingent — upon the issuance of the additional required permits by Uruguay and the financial commitments of the World Bank. Moreover, any conceivable harm to Argentina is even more contingent — on the *possibility* that the additional measures to protect the environment that Uruguay or the Bank may require before the

works are completed fail to satisfy Uruguay's obligations under its own environmental laws, or its obligations under the Statute and regulations promulgated thereunder by CARU.

18. This situation brings to mind the words of my very eminent colleague and good friend, Professor Alain Pellet, in the case concerning *Certain Criminal Proceedings in France (Republic of the Congo* v. *France)*. Addressing the Court, Professor Pellet argued (CR 2003/21):

> "You have said on a number of occasions: 'the *possibility* of . . . prejudice to rights in issue before the Court does *not*, by itself, suffice to justify recourse to its *exceptional* power under Article 41 of the Statute to indicate interim measures of protection'. *In any event, by definition the existence of a mere possibility, here one which is highly contingent, is incompatible with the very notion of urgency.* Moreover, if the situation were to change, it would always be possible for the Congo to submit a new request for the indication of provisional measures, as expressly provided for in Article 75, paragraph 3, of the Rules of Court . . ." (Emphasis added.)

19. Here, too, *if* the situation were to change — at any time in the next 14 months before the Orion plant might be ready to begin operations — and *if* Uruguay were to eventually issue an operations permit, and *if* that permit were not to incorporate sufficient environmental safeguards, and *if* the World Bank were to finance the plants, and *if* the World Bank were to do so without securing a commitment from them to comply with the Bank's own environmental requirements, *then* it would be possible for Argentina to submit a new request for the indication of provisional measures under Article 75, paragraph 3, of the Rules of Court, based on these new facts. This morning, Professor Pellet suggested a definition of "urgency" that is incompatible with the position he articulated in the case involving Congo and France. Today, he suggested that urgency is demonstrated whenever the damage runs a reasonable risk of occurring before the judgment of the Court. He cited no authority for this proposition, which would all but eviscerate the requirement of urgency that the Court, and Professor Pellet himself, have consistently defended prior to this case.

20. In the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)***,** the Court drew a clear distinction between *construction* of a project which did not in itself violate the rights of another State, and *operation* of the project. At paragraph 79 of its Judgment, the Court observed:

> "between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken . . . Such a situation is not unusual in international law or, for that

> matter, in domestic law. 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'."

21. The situation is analogous here. The wrongful act, if it were to occur, would be the contamination of the river by operation of the plants. In the language of the *Gabčíkovo* Judgment, the construction of the plants, on Uruguay's own territory, can be no more than "preparatory actions which are not to be confused with the act or offence itself". Hence, there is no basis for Argentina's request that the Court order the suspension of construction, and certainly there is no basis at this stage of the proceedings.

22. The *Gabčíkovo* Judgment is also pertinent because of its elucidation of the concept of *imminence* of an alleged harm. To be sure, the Court was faced not with an application for provisional measures, but a claim by Hungary that it was justified in terminating a treaty on grounds that fulfilment of the treaty obligations posed a grave and imminent peril to the environment. In rejecting Hungary's claim, the Court explained at paragraph 54:

> "'Imminence' is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of 'possibility'. As the International Law Commission emphasized in its commentary, the 'extremely grave and imminent' peril must 'have been a threat to the interest at the actual time'."

23. The Court continued in the next paragraph:

> "The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain . . . It follows that, even if it could have been established . . . that the reservoir would ultimately have constituted a 'grave peril' for the environment in the area, one would be bound to conclude that the peril was not 'imminent' at the time at which Hungary suspended and then abandoned the works relating to the dam."

Finally, at paragraph 56 the Court concluded: "However 'grave' it might have been, it accordingly would have been difficult, in light of what is said above, to see the alleged peril as sufficiently certain and therefore 'imminent' in 1989."

24. By the same reasoning, however "grave" the alleged peril to Argentina might be from future operation of the cellulose plants — and I shall address the gravity of the peril in the next section of my speech — it is difficult to see it, in June 2006, as sufficiently certain or immediate as to satisfy the Court's requirement that it be "imminent" or urgent.

25. Argentina has argued in its request for interim measures, at paragraph 15, and again this morning, that "continued construction of the plants" should be suspended in order to avoid a "fait accompli". This is not a persuasive argument. Above all, it is contradicted by the Court's Order on interim measures in the case concerning *Passage through the Great Belt (Finland* v. *Denmark)*. Finland asked the Court to order Denmark to suspend construction of a portion of the Great Belt project, that did not itself threaten Finland's rights on the ground that "completion of any one element would reduce the possibilities of modifying other elements so as to enable effect to be given to a judgment of the Court in Finland's favour on the merits . . ." (para. 30 of the Court's Order).

26. The Court unanimously rejected Finland's request. The Court made it very clear that Denmark's continued construction of the works could not constitute a fait accompli because:

> "no action taken *pendente lite* by a State engaged in a dispute before the Court with another State 'can have any effect whatever as regards the legal situation which the Court is called upon to define', . . . and such action cannot improve its legal position vis-à-vis that other State".

The Court explained that "if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled" (para. 31). Thus, the Court concluded that "it is for Denmark, which is informed of the nature of Finland's claim, to consider the impact which a judgment upholding it could have upon the implementation of the Great Belt project, and to decide whether or to what extent it should accordingly delay or modify that project". Likewise in this case, it should be for Uruguay to decide whether to risk proceeding with the construction of the plants in light of Argentina's claim. If the Court, at the conclusion of the merits phase, were to order the plants closed, or dismantled, Uruguay would have to live with that result. Argentina's counsel have not demonstrated that construction of the plants would create a fait accompli.

27. It has been argued by counsel for Argentina that the *Great Belt* case supports their request for an order suspending construction because of language in the Order suggesting that if construction "*which would obstruct the right of passage claimed* were expected to be carried out prior to the decision of the Court on the merits . . . this *might* justify the indication of provisional

measures" (emphasis added). This is not a persuasive argument either. In the first place, in *Great Belt* it was part of the construction itself that potentially threatened to "obstruct the right of passage claimed" by Finland. In the present case, it is *not* construction of the plants that threatens Argentina's rights, but their eventual *operation* and the *manner* in which they may be operated, which are neither certain nor immediate, and therefore not sufficiently imminent to satisfy the requirements for indication of provisional measures.

28. Moreover, as stated previously, the Court refused to order Denmark to suspend construction work that was appurtenant to and an integral part of the allegedly offensive part of the bridge, because those works would not in themselves threaten Finland's claimed right of passage. By analogy, since construction of the cellulose plants does not in itself threaten Argentina's right to be protected against contamination of the river, there is no basis for the Court to order the suspension of construction.

29. Argentina's request for provisional measures contrasts sharply with its Application. As I stated earlier, the Application makes no claim that *construction* of the plants threatens the environment; its only allegations of environmental harm are based on *operation* of the plants. The request for provisional measures takes an entirely different approach. Its thrust is that Argentina is threatened by *construction* of the plants. This is hardly unintentional. Argentina's very capable counsel recognize that allegations of harm resulting from operation of the plants could not serve as the basis for a request for provisional measures — not when operation is not going to begin for at least another 14 months, and it is subject to significant conditions precedent which are as yet unfulfilled.

30. But what is the harm that Argentina alleges that construction of the plants will cause? This is described in paragraph 7 of the request, which alleges: "Construction of the CMB and Orion plants has already produced considerable negative consequences on a social and economic level. The drop in tourism and real estate, urban and rural property values must be pointed out in particular." This morning, my long-time friend Professor Marcelo Kohen placed great emphasis on these so-called social and economic factors in attempting to show harm caused by construction of the two plants.

31. There are several compelling reasons why allegations such as these cannot serve as the basis for provisional measures. First, these measures are plainly beyond the jurisdiction of the Court. As Professor Condorelli has explained, the jurisdiction of the Court is based exclusively on the Statute, and the Statute protects the Parties against contamination of the water. It has nothing to do with tourism or real estate values. There is no valid argument here even for prima facie jurisdiction with respect to these claims. Second, there is no evidence of real or threatened social or economic harm. Allegations are not evidence. Unsupported opinions by impassioned local residents are not evidence. Here again, the *Great Belt* case is instructive. Finland argued that the construction of the Danish bridge had caused it economic harm, in the form of reduced demand for drill ships and oil rigs built in Finland that would not be able to pass through the Great Belt. The Court rejected this argument because

> "evidence has not been adduced of any invitations to tender for drill ships and oil rigs which would require passage out of the Baltic after 1994, nor has it been shown that the decline in orders to the Finnish shipyards for the construction of drill ships and oil rigs is attributable to the existence of the Great Belt project" (para. 29).

The Court's conclusion in this regard applies with equal force to the circumstances presented here. There is no evidence that actually links the alleged decline in tourism or property values to the construction of the plants.

32. Third, even if the Court had jurisdiction with respect to these claims of social and economic harm, and even if there were tangible proof of harm, the suspension of construction would not be appropriate because it would not alleviate Argentina's stated concerns. If tourism and property values have declined in Argentina because of the *possibility* that the cellulose plants might one day operate in Uruguay, then a suspension of construction will not bring relief because the possibility would still exist that the two plants will eventually operate. This possibility will remain, at least through the merits phase of this case. Judge Oda expressed the same issue in his separate opinion in the *Great Belt* case:

> "[W]hile would-be purchasers of drill ships and oil rigs from the Finnish shipyards must inevitably weigh the risk that in the meantime the Court may give a judgment adverse to the Finnish claim, that risk would have remained undiminished even if the Court had indicated the provisional measures requested, because their indication would in no way have prejudiced the merits."

33. As we have seen, however, it is only the placing in service — that is, the operation — of the plants that could even hypothetically affect the water quality of the river adversely. Construction has not affected and will not affect the river or the quality of its water. Argentina has offered no evidence of harm caused, or likely to be caused, by the *construction* of these plants.

34. For all of these reasons, Argentina has failed to show that there is an imminent or urgent threat to the rights it claims in these proceedings. On this basis alone, its request for provisional measures, and especially its request for a suspension of construction, must be rejected.

**II. There is no threat of irreparable damage to Argentina's rights**

35. This case is *not* about a State that is exploding nuclear weapons in the atmosphere.

36. It is about the construction and operation of industrial facilities that are state-of-the-art replicas of the same facilities that have been operating for years in Europe — in Finland, in Germany, in Spain, in Sweden and in the United Kingdom — in compliance with the very strict European effluent and emissions standards that meticulously regulate the operation of these facilities. As Professor Boyle has demonstrated, the Uruguayan plants are the same as, if not superior to, their European prototypes, and the Uruguayan environmental authorities have required the two cellulose plants to be designed and operated in full compliance with European BAT standards, so that their emissions will meet the same strict requirements that are enforced in Europe. The technical capacity of Uruguayan environmental authorities to regulate and monitor these facilities is well established and not challenged. Likewise, Uruguay's commitment to environmental protection and sustainable development is unchallenged; as shown in tab 23 of the judges' folder, the World Economic Forum study ranks Uruguay first in the Western Hemisphere in environmental protection. In the world at large, only Finland and Norway are considered greener. Uruguay ranks third in environmental sustainability in the entire world. There is no reason to doubt its commitment or its political role to guarantee that these plants will operate in a manner that is environmentally responsible, and in particular, that does not contaminate the River Uruguay or diminish its water quality.

37. Senior officials of the World Bank and the European Union have confirmed this. Tab 5 in the judges' folder is a letter from the Vice-President of Operations for the International Finance

Corporation advising Argentina that these plants are "environmentally responsible" and that they will "comply with the Best Available Techniques (BAT) and the latest European Union 1999 International Pollution Prevention and Control (IPPC) recommendations, with which compliance is required for all pulp plants in Europe by 2007". The IFC further advised Argentina: "World-class safeguards will be required as a pre-condition of any financing IFC may provide. As mentioned above, the plants are being designed to employ state-of-the-art techniques that will meet BAT requirements."

38. To the same effect, tab 6 in the judges' folder is a letter from European Commissioner Peter Mandelson to the President of the World Bank stating: "Argentina should be satisfied with the complete information made available and with the assurances given by Botnia that the highest possible environmental standards will be met, as the World Bank's own assessment also indicates."

39. But the best evidence that the plants present no threat of irreparable damage to Argentina comes from Argentina itself. Prior to initiating these proceedings, senior Argentine Government officials and technical experts repeatedly issued formal and public statements confirming that the plants present no threat of serious or irreparable injury to the River Uruguay or to Argentina itself. They also confirmed, as Professor Condorelli has demonstrated, that Argentina and Uruguay reached a bilateral agreement allowing for the construction and operation of these plants, and for a monitoring and control system to assure that there would be no contamination of the River Uruguay or harm to the water quality. These statements were made by the President of Argentina, by the Foreign Minister of Argentina, by the Minister of Health and Environment of Argentina, and by the representatives of the Government of Argentina on the CARU. Argentina has chosen not to bring these statements to the attention of the Court. Therefore, it falls on Uruguay to do so. Because of their pertinence to the issue of irreparable harm, I hope the Court will not consider it too burdensome for me to read aloud some of Argentina's most definitive statements on this subject.

40. This is the statement that was made on behalf of Argentina by its official member of the CARU and chief technical adviser, Dr. Armando Darío Garín, at the CARU meeting of 15 May 2004. It is recorded in the formal minutes of the CARU meeting. Argentina has submitted to the Court an extract from these same minutes. Argentina chose not to bring to the Court's

attention the complete minutes, and especially chose not to bring before the Court the portion of the minutes from which I shall read. But this is what Argentina's official representative to the Commission said, and it can be found at tab 8 in the judges' folder:

> "It must be pointed out, with complete and absolute emphasis that none of the different technical reports evidence that the activity in question causes an irreversible and unavoidable damage to the environment, at least of a sufficient level that would warrant the suspension of the plant or opposition to its construction, at least with any scientific basis . . . The truth is that we have to go forward on the basis of the reports that we have and the agreement reached by the Foreign Ministers."

41. The Agreement reached by the Foreign Ministers, to which Argentina's representative to the CARU made reference, was described by the Foreign Minister of Argentina, Dr. Rafael Bielsa, in an official statement to the Argentine Senate, which we have placed at tab 9 in the judges' folder:

> "On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding on a course of action to give to this subject. That is, for the Government of Uruguay to facilitate information relative to the construction of the plant, and in regard to the operational phase, instruct the CARU to proceed to carry out a monitoring of the water quality of the River Uruguay in conformity with the provisions of the Statute for the River Uruguay, especially its Chapter X, Articles 40 to 43."

42. This Agreement between the Foreign Ministers of Argentina and Uruguay was described by the President of Argentina, the Honourable Nestor Kirchner, as:

> "a bilateral agreement *which put an end to the controversy* over the cellulose plant installation in Fray Bentos. The agreement respects on the one hand the Uruguayan national character of the works, which was never challenged, and on the other hand the existing regulations that regulate the waters of the River Uruguay through the CARU. Likewise, it implies a work methodology for the three stages of construction of the project: the planning, the construction and the operation."

The Argentine President's statement that the Foreign Ministers of the two States had reached "a bilateral agreement putting an end to the controversy" was included in his official report on the State of the Nation for the Year 2004, and can be found at tab 10 of the judges' folder. Thus, it is notable that the chronology of events submitted by Argentina to the Court this morning makes no mention whatever of the agreement which put an end to the controversy. Indeed, it characterizes the events of 2 March 2004 as nothing more than a commitment by Uruguay's Foreign Minister to furnish information about the plants to CARU. This suggests that the Court should treat Argentina's chronology with a degree of caution.

43. For Uruguay's chronology of events, I would refer the Court to the sworn declaration of Martha Petrocelli, at tab 14 in the judges' folder. The bilateral agreement reached by the Foreign Ministers on 2 March 2004 was described by the Argentine Foreign Minister, Dr. Bielsa, in his official statement to the Argentine Chamber of Deputies. He reiterated that Argentina and Uruguay had agreed upon the construction and operation of the cellulose plants subject to the regulation, monitoring and control "through the CARU". His statement can be found at tab 11 of the judges' folder. This agreement, he said: "includes a work methodology for the three phases of construction of the project: the planning, the construction and the operation. *In this way, comprehensive procedures of control were developed with regard to the River Uruguay that will continue after the plants are in operation*." The Argentine Foreign Minister concluded: "Controls on *both* plants will be *greater* than those our own country applies to our own plants on the River Paraná, but nevertheless were accepted by Uruguay . . ."

44. In conformity with the Agreement of the Foreign Ministers of Argentina and Uruguay, and over the course of 2004, the CARU developed and adopted a "Plan for Monitoring the Water Quality of the River Uruguay in the Areas of the Cellulose Plants". The Plan was formally adopted by the CARU at its official meeting on 8 November 2004. The adoption of the CARU Monitoring Plan was considered of such significance by Argentina that the President of Argentina highlighted it in his official report on the state of the nation for the year 2004. As shown at tab 10 of the judges' folder, there is a separate heading in the Argentine President's report that reads: "M'Bopicuá Cellulose Plant and Botnia Project". The President reported that:

> "In view of the 'specific agreements of both Delegations at CARU' regarding the possible installation of cellulose plants along the River Uruguay a 'Plan for Monitoring the Water Quality of the River Uruguay in the Areas of the Cellulose Plants' was designed, that together with the 'Plan for Environmental Protection of the River Uruguay' contributes to maintaining water quality of this water resource . . ."

45. The Monitoring Plan was implemented by CARU during 2005. Samples were taken at regular intervals from the areas of the river that could possibly be affected by the cellulose plants. Analyses of the samples found no contamination from the construction of the cellulose plants and no adverse effects on water quality. There was no damage at all, let alone irreparable damage. Thus, in March 2005, the Argentine Minister of Health and Environment reported as follows to the Argentine Senate on the potential impact of the Uruguayan cellulose plants: "Considering the

technology reported, our country *is not likely to be affected*, taking into account distances, the river's diluting capacity and the technologies involved." (Emphasis added.) This is at tab 9 of the judges' folder.

46. In light of all of these statements by the most senior Argentine government officials and technical experts, Argentina's request for provisional measures alleging that continued construction of the plants threatens it with irreparable harm is simply not credible, and it must be rejected. Argentina's request is further undermined by the fact that Argentina itself has at least ten cellulose plants operating in its territory, and at least three of these plants employ an old technology based on chlorine gas that is without a doubt far less friendly to the environment than the state-of-the-art technology employed in the two new Uruguayan plants. Cellulose plants are no longer *built* with the technology employed in these Argentine plants because of environmental concerns. Yet Argentina not only allows all of its obsolete plants to continue operating; it allows them, including the cellulose plant at Puerto Piray in Misiones Province, to discharge their effluents into rivers that form boundaries with other States, in that case into the Paraná River that forms Argentina's boundary with Paraguay. As the environmentally responsible Government that it is, surely Argentina would not allow the cellulose plants in its territory to continue operating — or discharging their effluents into rivers shared by neighbouring States — if they caused or threatened grave or irreversible damage to the environment. Since the Argentine plants are in full operation today, we must assume that Argentina has concluded that they cause no such irreparable harm. And since the Uruguayan cellulose plants are indisputably far friendlier to the environment than the older, obsolete Argentine plants — indeed, the Argentine Foreign Minister has acknowledged that they are subject to stricter environmental controls than the Argentine plants — we can understand why all the responsible Argentine officials, from the President down, have publicly declared that the Uruguayan plants present no risk of harm to Argentina.

47. As Professor Boyle has demonstrated, Uruguayan environmental protection authorities are requiring the plants to meet the very strict emissions standards of the European laws that will go into effect in 2007, which are the strictest in the world. Thus, apart from the protection of the River Uruguay afforded by the CARU and its Monitoring Plan, Uruguay's own laws forbid the plants from discharging chemicals into the river above acceptable levels, and forbid the plants from

adversely impacting the water quality. Further, Uruguayan laws allow DINAMA, the environmental protection agency, to close the plants immediately if they violate these standards. These laws fully protect Argentina's right to be protected against contamination of the river. Argentina does not challenge the existence or content of Uruguay's laws.

48. Under the jurisprudence of this Court, Uruguay is entitled to a presumption by the Court that it will enforce its own laws. This is the argument made by the Agent of France in the case concerning *Certain Criminal Proceedings in France*. France argued that the Republic of Congo's request for provisional measures was unwarranted because, in the words of its Agent — pardon me for reading from the English translation:

> "We have simply stated what French law is; we have promised nothing, we have said that French law does not allow the prosecution of a foreign Head of State; that is not a promise, it is a statement of law. And also that French law subordinates the jurisdiction of the French courts over acts committed abroad to certain conditions. That too is not a promise, it is a statement of law. *At the very most, but it would be somewhat pointless to do so, we might promise that the French courts will respect French law. But I think this might be taken for granted . . .*" (Emphasis added.) (*Order of 17 June 2003*, para. 33.)

49. After quoting this portion of France's argument, the Court concluded: "there is . . . no risk of irreparable prejudice, so as to justify the indication of provisional measures as a matter of urgency" (para. 35). The same argument and the same conclusion apply to these proceedings. It is to be taken for granted that Uruguay will respect and enforce Uruguayan law. Indeed, Uruguay's position is even stronger than that of France because it has done more than simply state what its law is; it has promised both Argentina and this Court to enforce it.

50. For all of these reasons, Argentina has failed to show that the provisional measures it has requested are required to protect it from irreversible harm.

## III. The provisional measures requested by Argentina would irreparably prejudice the rights of Uruguay that will be adjudged in this case

51. There is still another compelling reason to deny Argentina's request. The provisional measures Argentina seeks would irreparably prejudice — indeed they might destroy altogether — the very rights of Uruguay that will be adjudged in this case. Put simply, it is Uruguay's sovereign right to implement a sustainable economic development project in its own territory that does not violate Uruguay's obligations under the Statute, or the anti-pollution standards of the CARU,

which were jointly developed by Uruguay and Argentina. This is the right of Uruguay that will be adjudged by the Court at the merits phase of these proceedings.

52. But this right is likely to be rendered meaningless if the Court were to indicate the provisional measures requested by Argentina. As shown in the declarations of Martín Ponce de Léon and Timo Piilonen (tabs 15 and 16 in the judges' folder), if the Court orders Uruguay to suspend construction of the plants pending its final judgment on the merits, the most likely outcome is that they will never be built — at least not in Uruguay. The foreign investors who own these plants — from Finland and Spain — have made this clear to the Government of Uruguay and to their own shareholders. To them, as private corporations, this is a matter of economics. A suspension of construction and a concomitant delay in commencement of operations would render their investments uneconomical. For reasons of business necessity, the companies have advised Uruguay that they cannot allow their huge investments of capital to lie dormant for the length of time it might take the Court to decide this case. In today's globalized economy, they would simply move their investments elsewhere. Uruguay would be powerless to stop them. This is a simple business reality.

53. The costs to Uruguay of losing these investments would be staggering. They are described in the declaration of Martin Ponce de Leon, at tab 15 of the judges' folder. In sum: the plants represent the largest foreign investment in Uruguay's history. The cost of construction alone is $1.5 billion. The economic impact is dramatic. Construction itself produces a major reduction in unemployment by creating many thousands of new jobs. Once operational, the plants are expected to have an economic impact of more than $350 million per year. This represents an increase of fully 2.0 per cent in Uruguay's GDP. The plants will also positively impact the balance of trade, by adding $600 million in new exports annually. The plants and related projects that they spawn, including laboratories and university-sponsored research, will also bring huge scientific and technological advances to Uruguay. These are critical to Uruguay's hopes of advancing up to the next rung on the economic development ladder. Suspension of the works and termination of these investments will deprive Uruguay and its people of all of these economic and social benefits and opportunities. In these circumstances, it is extremely difficult to understand Professor Kohen's

argument this morning that an order suspending the construction of the plants would be reasonable and balanced, and would best take into account the interests of both Parties.

54. Article 41 is clear, and the jurisprudence of the Court is well established. The rights of the respondent State are entitled to protection from irreparable prejudice as well as those of the applicant State. As the Court explained in the case concerning *Certain Criminal Proceedings in France*:

> "Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings; whereas it follows that the Court must concern itself with the preservation by such measures of the rights which may subsequently be adjudged by the Court *to belong either to the Applicant or to the Respondent*; and whereas such measures are justified solely if there is urgency" (para. 22; emphasis added).

55. In that case, the Court rejected the applicant State's request for provisional measures. It must do the same here.

56. Madam President, Members of the Court, I would be remiss as counsel for Uruguay, and probably never forgiven by my client, if I did not once in the course of my speech make reference to the illustrious former President of the Court, of whose stature and achievements in international law Uruguayans are most proud, Dr. Eduardo Jimenez de Aréchaga. President Jimenez de Aréchaga addressed the extraordinary nature of provisional measures, and the very strict standards that must be met before they can be issued, in his separate opinion in the case concerning the *Aegean Sea Continental Shelf*. He wrote: "before interim measures can be granted *all* relevant circumstances must be present . . . However, to refuse interim measures, it suffices for *only one* of the relevant circumstances to be *absent*." (P. 16). The subsequent jurisprudence of the Court has followed this approach.

57. As applied to the present case, Argentina's request for provisional measures must fail if either the alleged threat to its rights is not urgent, or, alternatively, if the harm allegedly threatened is not irreparable. Argentina's request must also be denied if indication of the requested provisional measures would irreparably prejudice the rights of Uruguay that are central to this dispute. *Any* of these grounds would be in itself sufficient to deny Argentina's request. But as we

have seen, not one but *all* of what President Jimenez de Aréchaga called "the relevant circumstances" are *absent* from this case.

58. First, Argentina has failed to show that there is an urgent threat to its claimed rights.

59. Second, Argentina has failed to demonstrate a threat of irreparable harm.

60. And Third, the provisional measures requested by Argentina would cause irreparable prejudice to the rights of Uruguay that will ultimately be adjudged by the Court.

61. For each and all of these reasons, Uruguay respectfully submits that Argentina's request for provisional measures must be denied.

62. Madam President, Members of the Court, this concludes Uruguay's presentation this afternoon. Thank you for your kind attention to my remarks and to those of my colleagues.

The PRESIDENT: Thank you, Mr. Reichler. This statement concludes this afternoon's hearing. The Parties will be heard again in oral reply. Argentina will take the floor tomorrow morning at 10 a.m. and Uruguay in the afternoon at 4.30 p.m. Each of the Parties will have a maximum of two hours for its reply.

The Court now rises.

*The Court rose at 5.55 p.m.*