DISSENTING OPINION OF JUDGE *AD HOC* VINUESA

Partial agreement with certain of Court's considerations and findings — The dispute does not concern a confrontation between environmental protection of shared natural resources and the right of sustainable development — Objective and purpose of the 1975 Statute of the River Uruguay — Requirements for the indication of provisional measures — Rights claimed to be preserved — Urgency — Imminent threat of irreparable damage — Precautionary principle — The Court's power to indicate other provisional measures than the ones requested by the Parties — Need to guarantee commitments affirmed before the Court.

I regret to fully disagree with the decision of the majority of the Court in the operative part of the present Order. Even if the majority of the Court was not persuaded to indicate the provisional measures as requested by the Republic of Argentina, the "circumstances, as they now present themselves to the Court" (Order, para. 87), and as argued by both Parties, are such that the Court should have considered the indication of alternative provisional measures in order to preserve the rights of each Party until final judgment.

However, I partially agree with several of the considerations and findings of the majority of the Court, as follows:

I do agree with the majority of the Court on the existence of prima facie jurisdiction under Article 60 of the 1975 Statute.

I do agree with the majority of the Court that the decision given in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves.

I do agree with the majority's finding that the evidence presented by Argentina at this stage is not sufficient to prove that the authorization and subsequent construction of the plants, in themselves, and just in themselves, have already caused irreparable harm to the environment.

However, I strongly disagree with the Court's finding that the construction of the plants constitutes a neutral or innocent step without legal consequences that shall not affect the future preservation of the environment. As things stand today, and taking into account the evidence provided by both Parties, the uncertainty of a risk of an imminent threat of irreparable harm is inexorably linked to the present and continuing construction of the mills.

I do agree with the majority of the Court when it "recognizes the con-

cerns expressed by Argentina for the need to protect its natural environment and, in particular, the quality of the water of the River Uruguay" (Order, para. 72).

I do agree with the majority of the Court when it recalls that the Court has had occasion in the past to stress the great significance it attaches to respect for the environment, and when it refers in this respect to the relevant paragraphs of the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (*I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29) and the Judgment in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case (*I.C.J. Reports 1997*, p. 78, para. 140).

I do agree with the majority of the Court that, in proceeding with the authorization and construction of the mills, Uruguay necessarily bears all risks relating to any finding on the merits that the Court might later make.

I do agree with the majority of the Court that the construction of the mills at the current site cannot be deemed to create a fait accompli.

I do agree with the majority of the Court that it is not disputed between the Parties that the 1975 Statute establishes a joint machinery for the use and conservation of the River Uruguay and that the procedural mechanism provided for in the Statute constitutes a very important part of the treaty régime.

I do agree with the finding by the majority of the Court that the Parties are required to fulfil their obligations under international law, stressing the necessity for Argentina and Uruguay to implement in good faith the consultation and co-operation procedures provided for by the 1975 Statute, and that CARU constitutes the envisaged forum for that purpose.

I do agree with the intention expressed by the majority of the Court to encourage both Parties to refrain from any actions which might render more difficult the resolution of the present dispute.

I do agree with the majority of the Court on the legal effects attributed to the commitments, made by the Agent of Uruguay before the Court, to comply in full with the 1975 Statute.

I do agree with the finding of the majority of the Court that the decision leaves unaffected the right of Argentina to submit in the future a new request for the indication of provisional measures under Article 75, paragraph 3, of the Rules of Court.

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To my regret, I could not agree with the assessment by the majority of the Court that the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing sustainable economic development.

Neither of the two Parties has addressed the present dispute as a confrontation between environmental protection rights, on the one hand, and the right of States to pursue sustainable development, on the other

hand. As a matter of fact, such a confrontation does not exist even in abstract terms.

To my understanding, and taking into account what both Parties have argued at the stage of provisional measures, there is no doubt that the present dispute concerns the scope of rights and duties established by the 1975 Statute of the River Uruguay, which is binding upon Argentina and Uruguay since its entry into force on 18 September 1976.

Uruguay has not denied the duty of the Parties to protect the environment of the River Uruguay, and Argentina, for its part, has not denied the right of the Parties to sustainable development.

Both Parties agreed on the need for the 1975 Statute to be fully applied, but differed on the scope of the respective rights and duties with regard to the implementation of

> "the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the Parties" (Article 1 of the Statute).

It is important to take into account that the Preamble of the 1975 Statute of the River Uruguay proclaimed that the Governments of Uruguay and Argentina were "motivated by the fraternal spirit inspiring the Treaty concerning the Río de la Plata and the Corresponding Maritime Boundary signed in Montevideo on 19 November 1973".

Under Article 1 of the 1975 Statute, the Parties also recognized that this Statute was the result of the implementation of Article 7 of the Treaty concerning the Boundary of the River Uruguay, signed in Montevideo on 7 April 1961. The latter provision established the main objectives and purposes of the 1975 Statute, which are no other than the joint regulation of a régime for the navigation of the river, the conservation of its living resources and the avoidance of pollution of the river waters.

All the above considerations are vital for the application of the 1975 Statute in deciding the merits of the present dispute, as well as in determining the possibility for the Court to indicate provisional measures in order to preserve the respective rights of the Parties.

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Article 41, paragraph 1, of the Statute of the International Court of Justice provides that:

> "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

It follows from this provision that, once the Court has satisfied itself of the existence of its prima facie jurisdiction, it has to consider the viability

of the alleged rights that need to be preserved, pending a final decision on the merits, and determine whether provisional measures are necessary to prevent irreparable harm to the rights that are in dispute, and that there is a degree of urgency in indicating them. I will address these matters in turn.

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With regard to the rights claimed, it should be recalled that the provisional measures requested by Argentina were intended to preserve its rights under the 1975 Statute from alleged violations by Uruguay of procedural and substantive obligations imposed on it by the Statute.

The so-called procedural obligations under the 1975 Statute alleged by Argentina to have been violated by Uruguay concerned the non-implementation by Uruguay of the joint machinery that is required by Chapter II (Arts. 7 to 12) when one party plans to carry out works (the pulp mills) which are liable to affect navigation, the régime of the river or the quality of its waters.

What Argentina calls the substantive obligations under the 1975 Statute concerned the obligation not to allow any construction before the requirements of the 1975 Statute have been met, and the obligation not to cause environmental pollution or consequential economic or social harm.

Within the 1975 Statute, the relationship of obligations of a procedural and of a substantive character is essential in the implementation of the precautionary principle. Indeed, as clearly stated by Article 1, the joint mechanism envisaged by the 1975 Statute is the necessary venue to obtain an optimum and rational utilization of the River Uruguay. As explained above, the main objectives and purposes of the 1975 Statute were predetermined by Article 7 of the 1961 Montevideo Treaty, which conditioned the establishment of the future Statute to regulate the navigation of the river, the achievement of agreements on fisheries and the achievement of agreements to avoid water pollution. The Statute is a clear example of the new boundary river régimes that have developed a detailed procedure of co-operation among riparian States, in order to implement substantial rights and obligations for the use and conservation of a shared natural resource. The 1975 Statute constitutes the institutional expression of a community of interests in which substantive norms and principles are interwoven with procedural norms. Procedures and substantive rules are melded in the accomplishment of the objective and purpose of the 1975 Statute.

A clear distinction must be made between requests for provisional measures which aim at preserving an alleged right, and those which, in a sense, aim at repairing an alleged violation of a treaty obligation. In the latter case, there is no chance to repair an alleged breach through the

indication of a provisional measure without prejudging the merits. It is obvious that such a question remains to be solved at that later stage.

However, that does not apply for the actual and future implementation of a joint mechanism pre-established by Chapter II of the 1975 Statute. In this regard, the indication of provisional measures would be appropriate to preserve the said procedural right, as well as the substantive right that is intrinsically associated with it under the Statute, pending a final solution on the merits.

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Turning now to the question of urgency, the Court, in previous cases, has determined that it is only empowered to indicate provisional measures if there is an urgent need to prevent irreparable harm to rights that are the subject of the dispute, before the Court has had the opportunity to render its decision (see *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17, para. 23; *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003*, p. 107, para. 22).

In the present proceedings, the precedent of the *Passage through the Great Belt (Finland* v. *Denmark)* case has been invoked to allege that the Court should deny the indication of provisional measures, given the absence of urgency. It is true that, in that case, the Court found that the circumstances were not such as to require the exercise of its power under Article 41. The Court considered that if the construction works contemplated by Denmark on the East Channel Bridge, which, it was claimed, would obstruct Finland's right of passage, had been expected to be carried out prior to the decision of the Court on the merits, this might have justified the indication of provisional measures. However, the Court, placing on record the assurances given by Denmark that no physical obstruction of the East Channel would occur before the end of 1994, and considering that the proceedings on the merits in the case would, in the normal course, be completed before that time, found that it had not been shown that the claimed right of passage would have been infringed by those construction works during the pendency of the proceedings (*Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 18, paras. 26-27).

To my understanding, the simple and straightforward application of this same criterion should have led the Court to conclude that the requisite of "urgency" is fulfilled in the present case and that the Court should proceed to indicate provisional measures.

It is a fact that, at the very least, the construction and operation of the Orion project, as confirmed by Uruguay, is expected to be carried out by the middle of 2007, obviously prior to any decision of this Court on the merits. Inasmuch as there are no assurances by Uruguay that the mills

will not be in operation before the completion of the proceedings on the merits in the present case, it follows that the rights the preservation of which is requested by Argentina will be infringed by the construction works and by the operation of the mills during the pendency of the proceedings.

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With regard to the imminent threat of irreparable damage as a requirement for the indication of provisional measures, the majority of the Court considered that

> "Argentina has not provided evidence at present that suggests that any pollution resulting from the commissioning of the mills would be of a character to cause irreparable damage to the River Uruguay" (Order, para. 75).

However, as stated above, I consider that the authorization and the construction of the mills, or future authorizations and constructions of other plants on the River Uruguay, are neither neutral nor innocent steps. The constructions are meant to have a direct effect, which is the final implementation and full operation of the mills.

In the present case, the majority of the Court has also found that Argentina has not produced evidence to prove that the future operation of the mills will cause irreparable harm to the environment. I completely disagree. To reach such a conclusion, the majority of the Court should have made explicit reference in the Order to how it evaluated the documentation produced by the Parties. What Argentina has to prove, and what it has proved, is that the work authorizations and the actual execution of the works have generated a reasonable basis of uncertainty on the probable negative effects to the environment of the works. This would be no more than a direct application of the precautionary principle, which indisputably is at the core of environmental law. In my opinion, the precautionary principle is not an abstraction or an academic component of desirable soft law, but a rule of law within general international law as it stands today.

However, there is no need, in the present case, to enquire further into the existence of a general rule of law embodying the precautionary principle, since the said principle has, on a treaty-law basis, already been incorporated by Uruguay and Argentina in the 1975 Statute for the purposes of protecting the environment of the River Uruguay. As clearly stated by Article 1, the objective and purpose of the 1975 Statute was "to establish a joint machinery necessary for the optimum and rational utilization of the River Uruguay". The necessary participation of the Administrative Commission of the River Uruguay (CARU) in the process of assessing environmental impacts on the River Uruguay, as a

recognized shared natural resource, within a pre-established binding joint machinery, constitutes the essential legal and binding guarantee for the proper implementation of the said precautionary principle.

The existence of a reasonable uncertainty as to a risk of irreparable harm to the river environment has been recognized by Uruguay when, at the hearings on provisional measures, it affirmed that there was no final environmental assessment in relation to the operation of the mills and that no authorization had yet been issued for the construction of the CMB plant.

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The Republic of Argentina has requested two different sets of provisional measures. The first set refers, in general terms, to suspension of the construction of the works until a final decision has been reached by the Court. The second set of provisional measures refers in general terms to the full and adequate implementation of rights and obligations under the 1975 Statute.

The majority of the Court has found that, in the present circumstances, there is no need for the Court to indicate the provisional measures requested by Argentina. In the motivation of its decision, the Court found that the construction of the works at the current site could not be deemed to create a fait accompli. It further considered that Uruguay bears all the risks of any subsequent finding on the merits whereby it would be found that the construction of the works breached a legal right of Argentina, and that such works could not be continued or that the mills would have to be modified or dismantled. In addition, in considering the present circumstances of the case, the Court took particular note of the commitments undertaken by Uruguay at the closing session of the hearings on provisional measures. I believe, however, that the Court should have proceeded to guarantee those unilateral commitments by indicating provisional measures alternative to the ones requested by Argentina.

There is no doubt that the Court has the power to indicate provisional measures other than those requested by the parties (see *Anglo-Iranian Oil Co., Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, pp. 93-94; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, pp. 17-18; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, pp. 35-36; *Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 106; *Nuclear Tests (New Zealand* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 142; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 21; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provi-*

sional Measures, Order of 10 May 1984, I.C.J. Reports 1984, p. 187; *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, pp. 12-13; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 24).

As recalled above, in the present case, Uruguay has unilaterally recognized its obligations under the 1975 Statute and assured the Court that it will abide by them. I consider that this unilateral commitment should have been complemented by the indication by the majority of the Court of provisional measures aimed at preserving the procedural and substantial rights of both Parties to full implementation of the joint machinery provided for under Chapter II of the 1975 Statute. For that purpose, the majority of the Court should have indicated, as a provisional measure, the temporary suspension of the construction of the mills until Uruguay notifies the Court of its fulfilment of the above-mentioned Statute obligations. In the event that Argentina might have failed to fulfil its own identical obligations under the 1975 Statute, Uruguay would always have the possibility to ask the Court to set aside the indicated temporary suspension.

In addition, the majority of the Court should have encouraged the Parties, in the spirit of their historical and fraternal relationship, to make an effort to try to solve the present dispute in accordance with the 1975 Statute, pending the final decision on the merits, as it did in the *Passage through the Great Belt (Finland* v. *Denmark)* (*Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 20, para. 35).

Finally, the majority of the Court should have recognized that it is clearly in the interest of both Parties that their respective rights and obligations be determined definitively as early as possible; it would therefore have been appropriate for the majority of the Court, with the co-operation of the Parties, to ensure that the decision on the merits be reached with all possible expedition, as it also did in the *Passage through the Great Belt (Finland* v. *Denmark)* (*Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 20, para. 36).

(Signed) Raúl Emilio VINUESA.