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CR 2006/55 (traduction)

CR 2006/55 (translation)

Lundi 18 décembre 2006 à 15 heures

Monday 18 December 2006 at 3 p.m.

8 Le PRESIDENT : Veuillez vous asseoir. La Cour est réunie aujourd'hui pour entendre l'Argentine en ses observations orales, et je donne la parole à Son Exc. Madame Susanna Ruiz Cerutti, l'agent de la République argentine.

Ms RUIZ CERUTTI:

1. Thank you. Madam President, Members of the Court, it is a great honour to appear before your distinguished Court as Agent of the Argentine Republic in connection with the Uruguayan request for the indication of provisional measures filed in the Court on 30 November last.

2. Uruguay filed this request in the context of the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)* initiated by Argentina by means of the Application instituting proceedings filed on 4 May 2006.

3. I shall refer to the situations and facts mentioned by Uruguay in order to make matters clearer and to correct certain distortions or falsehoods. It should be understood that this does not imply any acceptance of those situations or those facts or any others, including the requests and pleadings of Uruguay. These references entail no acceptance of jurisdiction or of the admissibility of the request.

4. Despite the oral fireworks we heard this morning, the question raised by the Uruguayan request for the indication of provisional measures is still a very simple one. There is no connection between this issue and the merits of the case brought before the Court on the basis of the 1975 Statute of the River Uruguay.

5. I shall deal with three aspects: first, the Court's lack of jurisdiction; secondly, the lack of a link between the request for the indication of provisional measures and the *Pulp Mills* case; thirdly, I shall comment on certain allegations by Uruguay concerning intentions falsely attributed to the Argentine Government.

6. In its request and in the Memorial which it has just finished drafting, Argentina has presented the substance of the case to the Court. It has asked that its rights under the 1975 Statute of the River Uruguay be recognized and effectively protected by the Court. Faced with Uruguay's
9 granting of unilateral authorization to build pulp mills and related installations on the River Uruguay, Argentina has requested the Court to ensure that Uruguay conforms to the norms of the

Statute concerning information and prior consultations, so that it can have sufficient information to evaluate, under the Treaty mechanism, the impact of these mills on the River Uruguay and the areas affected by it and its ecosystem, in accordance with the substantive rules imposed on the parties by the same 1975 Statute.

7. Argentina has submitted a request for the indication of provisional measures aimed at the suspension of construction of these mills and related installations pending a decision by the Court on the merits of the case. The Argentine request for provisional measures was not granted by the Court.

8. Both the Application instituting proceedings and the request for the indication of provisional measures submitted by Argentina were based on the Statute of the River Uruguay, which is the only instrument establishing the Court's jurisdiction in this case.

9. Recognition of the Court's jurisdiction over the case brought before it by Argentina does not imply that the Court has jurisdiction to deal with any procedural incident such as the request for the indication of provisional measures submitted by Uruguay. You should not be deceived by this approach.

10. What is the purpose of the incidental request submitted today by Uruguay? Judging by what is stated in the "reasons for this request" section, Uruguay complains that "organized groups of Argentine citizens have blockaded a vital international bridge over the Uruguay River, shutting off commercial and tourist travel from Argentina to Uruguay"[1].

11. Madam President, Members of the Court, the filing of Uruguay's request has altered the Court's schedule on the eve of the end-of-year holidays and has drawn Argentina into this incidental procedure at a time when it should be completing its Memorial, in order to defend alleged rights that are not even at issue and cannot be at issue in this dispute.

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12. Indeed, neither freedom of movement, nor freedom of commerce or tourism are rights governed by the Statute of the River Uruguay.

13. Madam President, Members of the Court, I should like to draw your attention to the real subject matter of the Uruguayan request. The only issue is the blockade of roads in Argentine

[1]Case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Request for the indication of provisional measures submitted by Uruguay, 30 November 2006, para. 2.

territory, not that of an international bridge or an international river. The road blockades complained of by Uruguay are nothing new for Uruguay or for Argentina.

14. As I have just noted, the road blockades in Argentina are nothing new. Why? Because, in relation to the same acts (but on the basis of the Treaty of Asunción[2] establishing Mercosur), Uruguay also instituted proceedings before an *ad hoc* arbitral tribunal of Mercosur, under an instrument known as the Olivos Protocol[3]. The tribunal handed down its decision in the case on 6 September last.

15. In the proceedings before the Mercosur *ad hoc* tribunal, Uruguay contended that there was no connection between the road blockades on Argentina territory and the construction of the mills which are the subject matter of the case brought by Argentina before this Court. In its memorial to the arbitral tribunal of Mercosur, Uruguay stated:

> "In the first place, the construction of the above-mentioned plants and the possible environmental considerations related to them have absolutely nothing to do with the dispute [before the *ad hoc* arbitral tribunal — that is, the dispute concerning the blocking of roads]. They cannot form part of the facts or the legal basis of the dispute.[4] *[Translation by the Registry.]*

This means that Uruguay said the opposite, before the Mercosur arbitral tribunal, of what it claims today before the Court.

16. The least that can be said is that it is not acting in good faith. One cannot blow hot and cold at the same time.

11 17. Uruguay described the road blockades as follows: "they were announced in advance and widely publicized" in its request for provisional measures. But these are the same facts that were already raised before the Mercosur *ad hoc* tribunal. In other words, to defend its interests on the question of the road blockades in Argentina, Uruguay decided to use the dispute settlement system of Mercosur, which exercised its jurisdiction and rendered a decision on the subject.

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[2]Treaty establishing a common market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, 26 March 1991, *UNTS*, Vol. 2140, p. 319. Document No. 1 submitted by Argentina on 18 December 2006.

[3]Olivos Protocol for the Settlement of Disputes in Mercosur, 18 February 2002, *UNTS*, Vol. 2251, p. 288. Document No. 2 submitted by Argentina on 18 December 2006.

[4]First written Uruguay submission before the *ad hoc* Tribunal of Mercosur, 3 July 2006 (extract) (para. 159). Document No. 4 submitted by Argentina on 18 December 2006.

18. The Treaty of Asunción and the Olivos Protocol rule out the possibility of applying to any other forum once a specific course of action has been selected. It is Uruguay that chose to seise the *ad hoc* tribunal of Mercosur, and the latter handed down its decision in September last.

19. Uruguay cannot today come before the Court to obtain a new decision on the same facts that have already been decided by the *ad hoc* tribunal.

20. The Court has no jurisdiction to that effect. There is no lack of a forum to which Uruguay may submit its case, there is an abuse of forum on the part of Uruguay whose forum shopping cannot be accepted by the Court.

21. Uruguay claims that the blockading of roads in Argentine territory has had effects on trade and tourism between the two countries, as well as on the relocation of the ENCE plant and the construction of the Orion plant, and that all this has been encouraged by the Argentine Government. None of these assertions is valid and they contradict the reality.

Regarding trade and tourism between the two countries, the overall figures, contrary to what is asserted by Uruguay today, show fairly substantial growth as regards both the movement of persons in both directions and the movement of export and import goods between the two countries, and this is true of the periods during which the roads have been blockaded.

22. Data obtained by my country's Secretariat of Tourism show a steady and continuous increase in the number of Argentine citizens selecting Uruguay as their holiday destination. In the first three quarters of this year, the percentage variation was almost five percent compared with the

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same period of last year. Similarly, the number of Uruguayan tourists entering Argentina increased during the same period[5].

23. In this connection, it is not surprising that the present main concern for tour operators in Uruguay (who met with the Uruguayan President on Friday 15 December, just three days ago) is the problem of security in the town of Punta del Este, Uruguay's largest beach resort[6], not the road blockades, but the problems of security.

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[5]Tourism data. Uruguay citizens in Argentina and Argentine citizens in Uruguay (2005/2006). Document No. 13 submitted by Argentina on 18 December 2006. www.indec.gov.ar.

[6]Press article, "Vazquez meets tour operators", *El País* Digital, 15 December 2006, Document No. 11 submitted by Argentina on 18 December 2006. http://elpais.com.uy/06/12/15/ultmo_253496.asp.

24. Concerning bilateral trade, the data in my possession confirm fairly conclusively that such trade has increased. Indeed, Uruguayan exports to Argentina have increased by more than 17 per cent, while at the same time Argentine sales to Uruguay have grown by more than 50 per cent over the same period.[7]

25. With your permission, I can illustrate the fact that there are three road links between Argentina and Uruguay on a 150 km stretch of their frontier. In addition, on the River Uruguay and the Rio de la Plata, there are passenger boat services, ferry boats, hovercraft and sea cats, not to mention the numerous daily air services and the availability of numerous ports along both countries' river banks.

26. Argentina nevertheless stresses that neither the blockades on certain roads, nor their possible impact on tourism or international trade fall under the jurisdiction of this Court.

It is quite clear that aspects relating to traffic, tourism and trade are portrayed to the Court by Uruguay as a consequence of the road blockades for the sole purpose of establishing a link with the construction of the pulp mills.

27. In paragraph 4 of its request, Uruguay asserts that the inhabitants of the town of Gualeguaychú have organized road blockades "exactly as happened in the recent past when similar blockades were imposed". These and other similar blockades in Argentine territory have had not

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the slightest effect on the construction of the pulp mills near Fray Bentos, opposite the town of Gualeguaychú.

28. On the contrary, the two industrial projects, the names of which — I would remind you — are CMB and Orion, seem to be in excellent health, despite the tendentious and totally false claims made by Uruguay in its request for the indication of provisional measures, which we heard this morning.

29. In order to convince the Court that Uruguay's alleged rights in relation to the Orion project are threatened, Uruguay gave a deceptive description of the reason for which ENCE, which is developing the CMB project, decided not to build its plant at the planned location in Fray

[7]Bilateral trade data. Imports and exports (2005/2006). Document No. 14 submitted by Argentina on 18 December 2006. http://cei.mrecic.gov.ar, www.indec.gov.ar.

Bentos: "in the face of Argentina's pressure, ENCE decided not to complete construction of its plant. Thus, only the Botnia plant remains under construction".

30. To refute this accusation of Argentine pressure, let us refer to the words of the President of ENCE, Mr. Juan Arreghi. At the press conference announcing his decision, held at the headquarters of the Presidency of the Eastern Republic of Uruguay, Mr. Arreghi explained the reason for relocating the M'Bopicuá plant near Fray Bentos in unambiguously clear terms: "We are not going to relocate because there is a conflict; we are going to relocate because from an industrial perspective it is impossible to build two plants like the planned ones in Fray Bentos"[8]. And this was said by Mr. Arreghi at the Presidency of the Republic, in a press conference in Uruguay.

31. And he went on to complain about the fact that Uruguay had granted authorization for the construction of the Orion mill at Botnia, a short distance away from his own, and that ENCE should have had a preferential right[9].

32. The most recent developments concerning the ENCE project in Uruguay should also be mentioned. The enterprise decided to relocate its project further southwards, still in Uruguay, on the Rio de la Plata, under a new project which provides for an investment of almost double the amount planned for Fray Bentos (the figure of US$1,250 million is mentioned), as well as the

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doubling of production compared with the plan for Fray Bentos (1 million tonnes of cellulose pulp a year).

33. We wonder what is meant by the Argentine pressure mentioned by Uruguay in its written pleadings, which is said to have led ENCE to decide not to build its plant. This Uruguayan assertion, as contained in its request, would appear to be totally inconsistent with good faith and totally divorced from reality[10].

34. For its part, Botnia is constantly announcing that the mill will be ready by the final quarter of 2007, which is what was planned for the project from the outset. As I speak to you now,

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[8]Presidency. Eastern Republic of Uruguay, 21 September 2006, "ENCE stays; it studies relocation of its pulp mill". Document No. 5 submitted by Argentina on 18 December 2006. http://www.presidencia.gub.uy/_web /noticias/2006/09/2006092109.htm

[9]*Ibid.*

[10]Press article, "ENCE will make an investment of US$1,250 million", *El País* Digital, 13 December 2006. Document No. 9 submitted by Argentina on 18 December 2006. http://www.elpais.com.uy/06/12/13/ultmo_253051.asp.

the Orion mill is at 70 per cent of the planned construction[11]. I remind you that in June when we came here for the request for the indication of provisional measures submitted by Argentina, the Orion mill had been only 25 per cent constructed. Today, six months on, it is already 70 per cent complete. This therefore means that construction has proceeded normally, and I would even say at an accelerated pace, in recent months.

35. It is not correct to say, as the Agent of Uruguay did, that the roadblocks have adversely affected the construction of the mills. The facts speak for themselves. The construction of the mills has continued at its own pace. There is no prejudice, there is no "new trend" which might lead to a prejudice, there is no escalation, there is no total blockade of Uruguay, and there is no economic strangulation of Uruguay as a result of the roadblocks. None of those assertions is true.

36. The roadblocks are sporatic, partial and geographically localized; they have taken place "in the recent past", as Uruguay affirms, and have not prevented the construction of Botnia's Orion mill from continuing to advance rapidly, as I have said, in the last six months. Construction is even ahead of schedule despite a workers' strike lasting nearly three weeks.

37. The roadblocks and the construction of the mill are two quite different events, without there being any cause-and-effect relationship between them, without any link of objective causality

15 and without any relationship with the norms of the 1975 Statute, and consequently without any relationship with the jurisdiction of the Court.

38. And I venture to repeat what I have already noted: the roadblocks in Argentina are not a new circumstance for Uruguay. Uruguay has already obtained an award from a Mercosur *ad hoc* arbitral tribunal, which ruled on all the matters submitted in the case on 6 September last.

As I have already said, Uruguay affirmed before that *ad hoc* tribunal that there was no relationship between the roadblocks in Argentine territory and the construction of the mills which are the subject of the case submitted by Argentina to the Court. In its Memorial to the Mercosur arbitral tribunal, Uruguay stated:

> "In the first place, the construction of the above-mentioned plants and the possible environmental considerations related to them have absolutely nothing to do

[11]Press article, "Botnia has already completed 70% of the works", *El Espectador*, 30 November 2006. Document No. 8 submitted by Argentina on 18 December 2006. http://www.espectador.com.uy/nota.php?idNota=84329.

> with the dispute [before the *ad hoc* arbitral tribunal]. They cannot form part of the facts or the legal basis of this dispute.[12]"

And I insist, Uruguay denied before the Mercosur arbitral tribunal what it is arguing today before the Court. This is clear evidence of inconsistency. It is clear evidence of Uruguay's need to invent an artificial link for use before the Court. It is a travesty of reality.

39. With regard to Uruguay's offensive allegations in its request and its oral pleadings, I wish to voice my indignation at the tone and, in particular, at the content of the allegations we have heard this morning from counsel for Uruguay, namely that my country is seeking to obtain through coercion what it cannot obtain through the Court. This type of insulting statement is hardly in keeping with the serenity which should prevail in this Great Hall of Justice. Madam President, Members of the Court, I reaffirm the absolute confidence of the Argentine Republic in this distinguished Court that Argentina itself has seised.

16 40. In its request for the indication of provisional measures, Uruguay maintains that the Argentine Government encouraged the roadblocks in the Gualeguaychú area and it went so far as to attribute this attitude to the President of Argentina, Mr. Néstor Kirchner.

41. Argentina regrets having to take issue with one of the citations that Uruguay includes in its request for the indication of provisional measures, and which was recalled this morning. In paragraph 22 of the request, Uruguay makes this reference:

> "President Kirchner publicly declared that [the] Government of Argentina will not take any action to interfere with the blockades: 'there will be no restraint against our brothers from Gualeguaychú'."

42. The words attributed to the Argentine President which appear in Annex 23 to the Uruguayan request, to which footnote 28 refers the reader, do not correspond to a genuine document. The Internet site to which it refers contains no such document. What is there, at the same date and in the same periodical, is another article reproducing completely different statements by President Kirchner in which he expresses the position of the Argentine Government. That position does not support the roadblocks and applies an active policy of persuasion but not of repression to discourage that type of social movement. Nobody is threatened with or targeted by

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[12]First Uruguayan written submission for the Mercosur *ad hoc* tribunal, 3 July 2006 (extract) (para. 159). Document No. 4 submitted by Argentina on 18 December 2006.

coercive action. In short, the argument of Uruguay is not only groundless but also insulting to Argentina.

43. The Argentine Minister for Foreign Affairs, Mr. Jorge Taiana, has on many occasions spoken in the same vein, most recently on the occasion of the meeting of Mercosur ministers held in Brasilia last Friday, 15 December. This same policy was recognized in the arbitral award of the Mercosur *ad hoc* tribunal on 6 September:

> "142. Good faith must be presumed, and the evidence produced does not show that Argentina promoted or encouraged the attitude assumed by the citizens. Moreover, their attitude was to call the attention of the Argentine Government [to] the problem. Consequently, it does not appear that the Argentine authorities had the intent of preventing the free traffic and mock the commitment under Article 1 of the Treaty of Asunción, since the policy of tolerance adopted by the Argentine Government in connection with the demonstrations of the citizens of Gualeguaychú, seems not to differ from that adopted in connection with the other conflicts that occurred in the cities or the roads of the interior of Argentina. This makes the tribunal conclude that the Argentine Government did not intend to discriminate in order to damage the commercial traffic with Uruguay.
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> 180. This tribunal concludes that the Argentine Government did not have a discriminatory intent to damage the commercial traffic with Uruguay. Good faith must be presumed and the evidence produced does not show that the Government of the Respondent Party [Argentina] promoted or encouraged the attitude of the citizens."[13]

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44. To conclude, Madam President, Members of the Court, from a reading of the Uruguayan request it emerges clearly that the Court lacks jurisdiction on the basis of Article 60 of the Statute of the River Uruguay to rule on the provisional measures requested by Uruguay.

45. The submission of Uruguay is also not admissible since it is unrelated to the case concerning *Pulp Mills on the River Uruguay* brought by Argentina on the basis of violation by Uruguay of the rules of the 1975 Statute.

46. Nor has the Uruguayan request any link with the merits of the dispute submitted by Argentina to your distinguished Court.

47. Madam President, Members of the Court, Professors Marcelo Kohen and Alain Pellet will subsequently be developing the arguments that I have just laid before you succinctly.

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[13]Case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Request for the indication of provisional measures submitted by Uruguay, 30 November 2006, Ann. 2.

I thank you very much for your attention and I request you to give the floor to Professor Marcelo Kohen. Thank you very much.

Le PRESIDENT : Je vous remercie, Excellence. Je donne la parole à M. Kohen.

Mr. KOHEN:

II. THE URUGUAYAN REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES HAS NO LINK WITH THE STATUTE OF THE RIVER URUGUAY

1. Madam President, Members of the Court, it is a great honour to appear once more before your distinguished Court, even if the occasion is not justified since it is obvious that the Uruguayan request for the indication of provisional measures fails to fulfil any of the conditions laid down by the Statute of the Court and developed in your case law, and in particular that your Court manifestly lacks jurisdiction in the case.

2. It falls to me to show that the request for the indication of provisional measures submitted by the Eastern Republic of Uruguay on 30 November 2006 has no link with the Statute of the River
18 Uruguay, the only international instrument serving as a basis for the Court's jurisdiction to hear the case concerning *Pulp Mills on the River Uruguay*.

3. The basic principle regarding provisional measures was made clear very early on by the Permanent Court in the *Polish Agrarian Reform* case: "according to [Article 41 of the Statute of the Court], the essential and necessary condition for provisional measures to be requested, should the circumstances so require, is that such measures should tend to safeguard the rights which are the subject of the dispute before the Court" (*Polish Agrarian Reform and German Minority, Order of 29 July 1933, P.C.I.J., Series A/B, No. 58,* p. 177. See previously to the same effect, *Legal Status of the South-Eastern Territory of Greenland, Order of 3 August 1932, P.C.I.J., Series A/B, No. 48,* p. 285. And subsequently: *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951,* p. 93; *Interhandel (Switzerland* v. *United States of America), Interim Protection, Order of 24 October 1957, I.C.J. Reports 1957, p. 111; Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972,* p. 15, para. 12; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972,* p. 33, para. 12;

Aegean Sea Continental Shelf (Greece v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976,* p. 11, para. 34; *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. 19, para. 36; *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990,* p. 69, para. 24; *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 16, para. 16; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* p. 19, paras. 34-35; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993,* p. 342, paras. 35-36; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I),*

19 pp. 21-22, para. 35; *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998,* p. 257, paras. 35-36; *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999,* pp. 14-15, paras. 22-23; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000,* p. 127, paras. 39-40; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000,* p. 201, para. 69; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002,* p. 241, para. 58; *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003,* pp. 107-108, paras. 22-29; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003,* p. 89, para. 49; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay),Provisional Measures, Order of 13 July 2006,* paras. 61-62).

Le PRESIDENT : M. Kohen, comme vous le savez, ces textes n'ont été remis aux interprètes qu'il y a quelques instants seulement. Pourriez-vous les aider et aider la Cour en parlant lentement ?

M. KOHEN : Oui, bien sûr.

Le PRESIDENT : Je vous remercie.

Mr. KOHEN :

4. Your Order of 8 April 1993 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* is especially relevant to the present request by Uruguay. It states that,

> "with respect to the measures requested both by Bosnia-Herzegovina and by Yugoslavia, the Court is . . . confined to the consideration of such rights under the Genocide Convention as might form the subject-matter of a judgment of the Court in the exercise of its jurisdiction under Article IX of that Convention" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 20, para. 38).

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5. We find ourselves here in an identical situation. The Court is confined to the consideration of such rights under the Statute of the River Uruguay as may form the subject-matter of a judgment in the exercise of its jurisdiction under Article 60 of that Statute.

6. Despite the legal acrobatics performed this morning by our opponents in a desperate attempt to link their request to the 1975 Statute, their efforts have clearly not been successful. It could not be otherwise. Their request has nothing to do with the Statute of the River Uruguay nor, *a fortiori*, with the Argentine Application.

7. I intend to address the question in three stages. *Firstly*, I shall determine what are the actual alleged "rights" that Uruguay is seeking to "protect", again allegedly, with its request for the indication of provisional measures. *Secondly*, I shall examine the "garb" in which Uruguay is attempting to disguise these alleged rights, using garments too big for the occasion which it sought — unsuccessfully — in the cloakroom of the Statute of the River Uruguay. *Thirdly*, I shall compare the provisional measures requested by the Respondent with the Statute of the River Uruguay, in order to demonstrate that they can in no way be aimed at protecting rights stemming from the only instrument that affords you a basis of jurisdiction in the present case.

A. The alleged rights that Uruguay is seeking to protect are unrelated to the Statute of the River Uruguay

8. A cursory perusal of the Uruguayan request for the indication of provisional measures suffices to show the absence of any clearly established link between the Statute of the River Uruguay and this request.

9. According to Uruguay, the alleged blockade of the bridges — which incidentally, as the Agent for Argentina said, are not blocked — is a wrongful Argentine act depriving Uruguay of hundreds of millions of dollars. In its request, Uruguay cited the decision of a tribunal set up in the framework of Mercosur, which referred to freedom of transport and commerce under the Treaty of Asunción establishing Mercosur. That Award in fact stands out as the central feature of their argument, coupled with considerations totally alien to the *Pulp Mills* case, such as the question whether or not Argentina can take countermeasures.

21 10. The Uruguayan protest notes are clear as to the presumed rights at issue. That of 11 October 2006 presents them thus:

> "It should be noted that these road blockades constitute a violation of the principle of free circulation established in the Treaty of Asunción. This concept was clearly taken up in the Award of the Ad Hoc Mercosur Arbitral Tribunal of 6 September 2006.[14]"

Not a word on the Statute of the River Uruguay.

11. The second note repeats just about the same thing, except that it adds that

> "the omission of the Argentine Government in taking necessary measures constitutes an aggravation of the dispute today pending before the International Court of Justice, in violation of paragraph 82 of the Order on provisional measures of 13 July past, and the obligations imposed on all the litigants before the Court, and consequently considers that its rights are being threatened by the omission of Argentina of compliance with its international obligations"[15]

12. Despite this initial attempt to bring the matter into closer relation with this case, there is still no word on the Statute of the River Uruguay. There is a reference to the alleged aggravation of the dispute — but of what dispute? This is followed by the simple remark that the rights of Uruguay — but which rights? — are threatened by the Argentine omission, concluding with the

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[14]Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Request for the indication of provisional measures submitted by Uruguay, 30 November 2006, Ann. 3.

[15]Note of Uruguay to Argentina of 30 October 2006, *ibid.*, Ann. 4.

alleged Argentine violation of its obligations as party to the dispute. As we shall see, this is not the case.

13. In substance, Madam President, Uruguay, whatever it says, invokes the defence of alleged rights which are in no way at issue in this dispute and cannot be. Neither freedom of transport nor freedom of commerce is a right governed by the Statute of the River Uruguay. It is also clear that the alleged effects of the Argentine roadblocks on tourism and business earnings — which, it may be added, Uruguay has by no means proved — do not remotely concern the Statute of the River Uruguay.

14. Furthermore, as the Agent has just explained, this tourist flow is continuing and thousands of Argentines are travelling or preparing to travel right now to the sister country to spend their holidays there in what once more promises to be a successful tourist season. However that may be, all that has nothing to do with the Statute of the River Uruguay. Let us put it simply: that

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treaty, concluded between Argentina and Uruguay in 1975 and which constitutes the only basis of your jurisdiction, in no way governs the tourist flow between the two countries.

15. On one point, my friend Luigi Condorelli was certainly right in his oral statement of 8 June last:

> "thus, Article 60 of the Statute does not give the Court jurisdiction to settle any international dispute whatever between Uruguay and Argentina! As the wording indicates with the utmost clarity, the only disputes covered *ratione materiae* by the compromissory clause concerned are those relating "to the interpretation or application . . . of the Statute". It follows that any dispute relating to claims not based on the Statute falls outside the scope of the compromissory clause, and hence the Court lacks jurisdiction to rule on it."[16]

16. My colleague Alan Boyle this morning cited your Order regarding the request for the indication of provisional measures submitted by Guinea-Bissau in the *Arbitral Award of 31 July 1989* case. It is true that Uruguay is not in the same procedural situation as that of Guinea-Bissau. But my colleague has forgotten something: Uruguay is in a worse procedural situation than that of Guinea-Bissau in that case. For Guinea-Bissau was claiming that the same conflicts of interest existed in the main dispute submitted to the Court (namely the inexistence or nullity of the Arbitral Award of 31 July 1989) and in a subsidiary dispute linked to the first (the

[16]CR 2006/47, 8 June 2006, pp. 33-34, para. 6.

control, exploration and exploitation of maritime areas delimited in the arbitral award) (*Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1990*, pp. 69-70, para. 25). The dispute that Uruguay is seeking surreptitiously to bring before you cannot even be presented as a subsidiary dispute relating to the Uruguayan authorizations for construction of the pulp mills. Their content is different, the rights supposedly involved are different, and the dispute settlement means provided for by the parties in the framework of their bilateral relations are different. Uruguay knows this perfectly well since it has already chosen another course of action, that of jurisdictional settlement within Mercosur.

17. On 6 September last a Mercosur arbitral tribunal ruled on the question[17]. And barely three days ago Uruguay sought — unsuccessfully — within the Mercosur Common Market
23 Council exactly the same thing that it is pursuing by means of this procedural incident: to obtain what in the view of Uruguay would be the implementation of that arbitral award[18]. The referral of the matter by Uruguay to a Mercosur arbitral tribunal on the basis of the Olivos Protocol to the treaty establishing Mercosur (Treaty of Asunción) of the road blockade dispute is very clear evidence both of the Court's lack of jurisdiction and of the fact that Uruguay is convinced of that lack of jurisdiction. For one thing, it is assuredly *the same dispute* as that which Uruguay is today improperly trying to bring before you through its request for the indication of provisional measures, and a dispute that Uruguay had acknowledged then to be unrelated to that referred to the Court by Argentina — my colleague Alan Pellet will be coming back to this. For another thing, under the terms of the second sub-paragraph of Article 1, paragraph 2, of the Olivos Protocol itself, "[o]nce a dispute settlement procedure pursuant to the preceding paragraph has begun, none of the parties may request the use of the mechanisms established in the other fora . . ."[19]. This means that it is not permissible for the parties to embark on this path and then withdraw. Furthermore, in accordance with Article 26, paragraph 1, of the same protocol, "[a]ll awards of the Ad Hoc Arbitration Courts

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[17]Case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Request for the indication of provisional measures submitted by Uruguay, 30 November 2006, Ann. 2

[18]MERCOSUR/CMC/ACT No.°2/06 — XXXI Ordinary Meeting of the Council of the Common Market — 15 December 2006, doc. No. 10 submitted by Argentina on 18 December 2006.

[19]*UNTS*, Vol. 2251, A-37341, p. 288.

shall be binding on the States involved in the dispute as from the time of their notification and they shall be in the nature of res judicata"[20] in the absence of a motion for review.

18. I well know, Madam President, that, in connection with the dispute of which it is indeed properly seised, the Court is not required to *apply* the Treaty of Asunción and the Olivos Protocol since the 1975 Statute is the only relevant legislation. With regard to the dispute before it, in common with the award of the *Ad Hoc* Tribunal of 6 September 2006 itself, they are, as it were, "simple facts". But they are highly revealing facts; they show:

— first, that Uruguay took the view that the Mercosur peaceful settlement mechanisms constituted the natural framework for resolving the dispute between the Parties regarding the roadblocks;

— second, that the Tribunal recognized and exercised its jurisdiction to deal with the dispute; and

24 — third, that its decision is final and binding and constitutes *res judicata* with respect to the Parties.

19. Argentina and Uruguay accepted those obligations. Uruguay had recourse to that procedure. It cannot today back down. Whether one describes this as acquiescence, *estoppel*, acceptance or anything else, a State cannot blow hot and cold. As explained by Judge Alfaro in a well-known passage of his separate opinion attached to the second Judgment of the Court in the *Temple of Preah Vihear* case,

> "the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right *(venire contra factum proprium non valet)*" (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 40).

20. This is a general principle of law that the Court is obviously entitled to — and must — apply to the present dispute as to any other.

21. The upshot of this is quite clear. The free movement of persons and goods, tourist flows and other economic considerations advanced by Uruguay to justify its request are not relevant. To use your form of words from the *Arbitral Award of 31 July 1989* case, "the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case; and . . . any such measures could not be subsumed by the Court's

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[20] *Ibid.*, p. 295.

judgment on the merits" (*Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, p. 70, para. 26).

22. As you also held in your Order of 13 September 1993 in the *Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)* case regarding provisional measures, "the Court cannot make definitive findings of fact or of imputability, and the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments in respect of the merits, must remain unaffected by the Court's decision" (*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 13 September 1993, I.C.J. Reports 1993*, p. 347, para. 48).

25 23. Madam President, Members of the Court, the most striking evidence of your lack of jurisdiction to order the provisional measures requested by Uruguay is that any decision ordering provisional measures on the basis of the facts alleged against Argentina would not leave unaffected its right to dispute them, its right to reject their legal characterization, its right to dispute their imputability, and its right to dispute responsibility. Indeed, quite simply, all these questions relating to the roadblocks cannot be and will not on any account be discussed in the present case since they are completely unrelated to the Statute of the River Uruguay. The purpose of the Uruguayan request is nothing more or less than to obtain by means of incidental proceedings a judgment of the Court on facts which are totally unrelated to the 1975 Statute. My friend Alan Pellet will develop this question in greater detail, from the angle of the absence of any link between the measures requested by Uruguay and the subject-matter of the dispute as defined by the application instituting proceedings.

24. Our Uruguayan friends are of course aware of the intrinsic weakness of their request and have thus sought to dress up — disguise, I would say — these rights totally unrelated to the Statute of the River Uruguay with any rights derived from that Statute. We shall see that this foolhardy exercise has not borne fruit and could not do so.

B. The clothing of the ostensible rights at issue with rights possibly derived from the 1975 Statute

25. What remains of the massive propaganda campaign deployed by Uruguay this morning that might be remotely pertinent to an adversarial discussion of provisional measures? Not a great deal. Only two points might deceptively appear to have a connection with the Statute of the River Uruguay: (1) Uruguay's right to construct the Orion plant and (2) that it is the Court that rules on the dispute between Uruguay and Argentina. It is manifestly clear that the facts presented by Uruguay have no bearing on either point. As we have seen, Uruguay's own previous conduct attests to this: in connection with the same facts now being invoked in support of its request for provisional measures, Uruguay brought proceedings before a Mercosur Arbitral Tribunal, and not before the Court, alleging an ostensible Argentine violation of Uruguayan rights under the Asunción Treaty and not under the Statute of the River Uruguay. Uruguay had never before claimed that the acts attributed to the social movement in the Argentine province of Entre Ríos

26 constituted a violation of its rights under the Statute of the River Uruguay. A brief examination of these two Uruguayan disguises will suffice to demonstrate how poorly they conceal the real subjects behind them.

(a) The right to construct the "Orion" plant

26. The ostensible right at issue in this request is, according to Uruguay, "the right pending a final decision of the Court, to carry on building the Botnia plant without Argentina's prior consent, in conformity with the 1975 Statute of the River Uruguay and the Order made on July 13th"[21].

27. Members of the Court, you will recall Uruguay's enthusiastic presentation of its idea of the *fumus boni juris* requirement during the first round of pleadings on 8 June 2006:

> "the Court cannot grant provisional measures to preserve rights in cases where the alleged rights relied on would already at first sight appear to be based on clearly inadequate legal grounds, or if the allegations relating to the violation of the rights concerned are based on arguments whose inconsistency can easily be verified; in that case it is apparent that the principal claim *prima facie* has no serious prospect of success"[22].

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[21]Oral argument of Alan Boyle of 18 December 2006. See also case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Request for the indication of provisional measures submitted by Uruguay, 30 November 2006, para. 3.

[22]CR 2006/47, p. 32, para. 2 (Condorelli).

28. We would have liked our friends on the other side of the Bar to have shown some consistency regarding this requirement and to have delved a little deeper in their analysis. We have been waiting all morning in vain for some mention of the specific articles of the Statute of the River Uruguay which, according to Uruguay, are at issue in this request for provisional measures. We have heard nothing. No concrete analysis whatsoever of the rights of the Parties under the 1975 Statute.

29. If a request for provisional measures was being seriously contemplated, one would have expected our opponents to address the indispensable task of linking the request for provisional measures to Uruguay's rights under the 1975 Statute that are supposed to be threatened by alleged Argentine conduct. Let us attempt to perform the exercise that Uruguay neglected to perform, since it contented itself with a vague reference to "the right to continue with the construction of the Botnia plant".

27 30. The provisions concerning the construction of works are contained in Chapter II of the Statute (entitled "Navigation and Works"). Are the acts that Uruguay attributes to Argentina likely to infringe the right of the Party planning to carry out works "which are liable to affect navigation, the régime of the river or the quality of its waters" to notify CARU under the terms of Article 7? Or its right under the same article to have CARU determine whether the plan might cause significant damage to the other Party? Or again the right of Uruguay under Article 9 "[i]f the notified Party raises no objections or does not respond within the period established . . . to carry out or authorize the work planned"?

31. I take it that Uruguay will not claim that it has been unable to exercise its rights under Chapter II of the Statute because the inhabitants of Entre Ríos province (including Uruguayan nationals) blocked Argentine roads. Clearly, there is no danger of the acts to which Uruguay refers causing irreparable prejudice to its continuing ability to exercise its rights under the Chapter of the Statute entitled "Navigation and Works". Let us recall the evidence: not only is Argentina not jeopardizing the exercise of those rights; on the contrary, it would actually like Uruguay to exercise them!

32. We know that the Parties are divided on how Article 9 of the 1975 Statute should be interpreted. In its Request of 30 November 2006, Uruguay's interpretation of your Order of

13 July 2006 is somewhat odd, to say the least. It argues that "[t]he order left Uruguay free to oversee the construction and operation of the plants in a manner consistent with its obligations under the Estatuto pending the Court's adjudication on the merits"[23]. This morning my colleague Alan Boyle also insisted on this interpretation, claiming that the Order of 13 July 2006 left Uruguay free to continue authorizing the construction of the Orion plant[24]. Clearly, the Court did not create any new right for Uruguay in its Order. The Court actually held that at the provisional measures stage it did not have the consider the issue of whether Uruguay could implement its project in the absence of agreement between the Parties or, failing such agreement, pending settlement of the dispute by the Court. The Court was not convinced that any violation of the 1975 Statute would not be capable of being remedied at the merits stage (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Provisional Measures, Order of 13 July 2006*, para. 71).

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33. It is true that Uruguay claims that it has the right to build the Orion plant without following the Chapter II procedure and that it is for the Court to settle this issue on the merits. Yet regardless of how one interprets Article 9, the issue does not arise in connection with social movements, since — to put it simply — such movements do not impede the continued construction of the Orion plant. Thus, the roadblocks, even supposing that they are attributable to Argentina — which we dispute, entail no serous risk of irreparable prejudice to Uruguay's ostensible right to build the plant, even where the procedure envisaged under the Statute of the River Uruguay has not been completed. Clearly also, Argentina has no practical steps in mind aimed at preventing Uruguay from continuing the construction of the Orion plant, contrary to what my colleagues Condorelli and Boyle intimated this morning. Whatever one might think of the Argentine roadblocks, they neither pose a threat nor do they in any way prevent Uruguay from pursuing whatever policy it sees fit in any area, including on the matter that is the subject of this dispute.

34. This being the case, it is totally unrealistic to seek to draw parallels between the situation described in Uruguay's request and the case concerning *United States Diplomatic and Consular Staff in Tehran.* It is obvious that the demonstrators — whether Argentine or Uruguayan

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[23]Case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay),* Request for the indication of provisional measures submitted by Uruguay, 30 November 2006, para. 5.

[24]CR 2006/54, p. 20, para. 7.

nationals — erecting the blockades on Argentine roads are neither occupying the worksite nor blocking it!

35. There is no basis for the argument that if the Court failed to order provisional measures, Uruguay's right to build the Botnia plant would be illusory or risk suffering irreparable prejudice. This argument is used as a screen to conceal the fact that the Court manifestly lacks jurisdiction to hear the dispute between Argentina and Uruguay regarding certain actions undertaken by the social movement in Entre Ríos province.

29 36. Botnia has repeatedly announced that its plant will be ready by the last quarter of 2007. As I speak, 70 per cent of the Orion plant has been constructed[25]. Nobody has suggested that there is any risk of the project being abandoned. Quite the contrary. The work is proceeding at an accelerated pace and statements abound to the effect that the plant will be completed on its current site. The social movement in Entre Ríos province in no way interferes with the ostensible right invoked by Uruguay. In the absence of an internal social movement, the staff at Botnia are continuing to go to work each day. The only work stoppage at Orian was due to a three-week strike by employees in September[26]. As I speak, materials continue to be transported as usual by road and river. Even the port of Botnia, whose commissioning was unlawfully authorized a few weeks after your Order of 13 July 2006, is working at full capacity and no measure attributable to Argentina or anyone else has been taken to prevent it from doing so. Not one word was uttered to the contrary during the three hours used by our Uruguayan friends this morning. Clearly, the roadblocks referred to by Uruguay do not constitute and cannot constitute an impediment to the continued construction of Orion. By the same token, all the rest of Uruguay's arguments fall by the wayside.

37. Let us try nevertheless to sum up the position of our opponents. Their argument may be broken down into eight steps. While an eight-step argument may suit the Argentines' and Uruguayans' shared passion for the tango, it is an unduly long-drawn-out movement for anyone

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[25]"Botnia has already completed 70 per cent of the works", *El Espectador*, 30 November 2006. http://www.espectador.com.uy/nota.php?idNota=84329. Document No. 3 filed by Argentina on 18 November 2006.

[26]Press release by BOTNA, "Botnia forced to suspend works at Fray Bentos", 22 September 2006, http:www.metsabotnia.com/es/default.asp?path=284;292;439;440;1093;1368. Document No. 6 filed by Argentina on 18 December 2006.

seeking to establish some kind of connection between the points our opponents are making today and the Statute of the River Uruguay.

38. In essence their reasoning amounts to a claim that: (1) Argentine citizens are blocking a road; (2) this road leads to a bridge across the River Uruguay; (3) sometimes, but not continuously, other Argentine citizens block another road that leads to another bridge; (4) the Argentine government is doing nothing to prevent them; (5) as a consequence of this, the flow of Argentine tourists to Uruguay is reduced; (6) less Argentine tourism in Uruguay has unfortunate consequences for the country's economy; (7) these consequences would be so damaging to the Uruguayan economy that the Uruguayan Government would be compelled to order Botnia to stop building the Orion plant and to abandon its project; (8) consequently, Argentina is violating Uruguay's right to build the Orion plant pursuant to the Statute of the River Uruguay and Uruguay's right to have the Court rule on the dispute over the pulp mills on the basis of Article 60 of the 1975 Statute.

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39. I leave aside whether the facts are true and whether these Uruguayan speculations are relevant, which Argentina disputes. Even assuming that all the Uruguayan allegations were true, for which Uruguay has adduced no evidence, these facts and speculations provide no basis whatever for the assertion that there is a direct legal link between the facts alleged and the rights of Uruguay derived from the Statute.

40. A comparison with the cases concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* and *(Federal Republic of Germany* v. *Iceland)* may be useful. In those cases the Applicants took the view that the extension of Iceland's fisheries jurisdiction was not valid. In their requests for provisional measures they were seeking to protect the right of their vessels to continue fishing in the 50-nautical-mile area declared by the Respondent. In the Court's view, this right was one element in the subject-matter of the dispute submitted to the Court, because the United Kingdom and Germany were asking the Court to declare that the measures excluding foreign fishing vessels envisaged by Iceland could not be invoked against fishing vessels registered in the United Kingdom or in Germany (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 15, paras. 13-14; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of*

17 August 1972, I.C.J. Reports 1972, p. 33, paras. 13-14). Uruguay would be happy to be in the position of those two States. But it is far from being in that position. Iceland was actually taking steps to prevent British and German vessels from fishing in waters within 50 nautical miles. Argentina is doing nothing to prevent the Orion works from continuing normally — even if this is completely illegal.

31 41. After all, it was Uruguay that stated with perfect clarity in its memorial to the Mercosur *ad hoc* tribunal that there was no relationship between the road blockades in Argentine territory and the construction of the plants which form the subject-matter of the dispute before the Court. I quote:

> "In the first place, the construction of the above-mentioned plants and the possible environmental considerations related to them have absolutely nothing to do with the dispute [brought before the ad hoc arbitral tribunal]. They cannot form part of the facts or the legal basis of the dispute."[27] *[Translation by the Registry]*

42. The converse, Madam President, is equally true: the road blockades and the free movement of traffic have absolutely nothing to do with the dispute brought before this Court.

(b) The right to have the dispute resolved by the Court (Art. 60)

43. Uruguay, knowing that there was no substantive rule in the River Statute supporting its request for provisional measures, finally succeeded only in specifically invoking a single article of the Statute, Article 60, which contains the compromissory clause. According to the Respondent:

> "Uruguay has a right to have this dispute resolved by the Court pursuant to Article 60, rather than by Argentina's unilateral acts of an extrajudicial and coercive nature, which are intended to force Uruguay to abandon its right under the Estatuto to a judicial resolution of its claims and defences."[28]

44. Lacking a firm basis to support their argument, our opponents could only, this morning, resort to accusations as serious as they were unfounded, claiming that Argentina was undermining the proper administration of justice, preventing the Court from giving judgment on the merits and depriving Uruguay of its right to obtain a decision. Nothing is further from the truth.

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[27]First written submission by Uruguay to the *ad hoc* arbitral tribunal, para. 159. Document No. 13 submitted by Argentina on 18 December 2006.

[28]Case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Request for the indication of provisional measures submitted by Uruguay, 30 November 2006, para. 25.

45. Argentina is patiently and respectfully continuing with the present proceedings before your distinguished Court. It is doing so although it has to face fresh violations by Uruguay of its obligations under the Statute of the River Uruguay, some weeks after your Order of 13 July 2006: for example, the authorization given to Botnia on 24 August 2006 to bring a port on the River Uruguay into service, or the authorization of 13 September 2006 for the same company to extract 60 million litres of water from the river, in both cases without following the procedure in

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Articles 7 *et seq*. of the Statute of the River Uruguay. Argentina does not intend to discuss these issues today. It is keeping to the procedural timetable set by the Court, and will raise the matter in its Memorial, which it is to file in a few days. Nothing in its conduct infringes Uruguay's procedural rights.

46. Let us now turn to Article 60 of the 1975 Statute, the first paragraph of which reads: "Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either Party to the International Court of Justice."

47. Uruguay invokes the Article not only as the basis of the Court's prima facie jurisdiction, but also as the source of the only specific right that it considers to be at issue in its request for provisional measures: the right of Uruguay to have its dispute with Argentina over the pulp mills settled by the Court.

48. Once again, nothing and no one is endangering Uruguay's rights to continue the present proceedings, to deploy all its grounds of defence and to obtain a decision of this Court with binding force.

49. Uruguay's argument to justify its request for provisional measures was presented as follows:

> "The Argentine blockades are expressly intended to be so painful to Uruguay that it is forced to terminate the Botnia project in advance of the Court's ruling. Accordingly, they indisputably threaten grave and irreparable injury to the right to build and operate the plant that Uruguay seeks to defend in this case."[29]

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[29]Case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Request for the indication of provisional measures submitted by Uruguay, 30 November 2006, para. 25.

50. However, the constant repetition of this circular argument does not make it a right. No one in the Río de la Plata region would believe what Uruguay alleged this morning: "practically total blockade", "stifling or strangling the Uruguayan economy", etc. They have not adduced one iota of evidence, and for good reason. All this is simply not credible. Judging by what our opponents write and say, one would picture a real blockade, a rampant economic crisis of such magnitude as to force the State to renounce its right in order to escape from it. Madam President, Members of the Court, this quite simply cannot be taken seriously. The Agent has already

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demonstrated this, and as far as I know, Uruguay is not cut off from the world, or even from Argentina.

51. It is obvious, Madam President, that we are also not faced with a situation like the one in the *Burkina Faso/Republic of Mali* and *Cameroon/Nigeria* disputes, in which the Court ordered provisional measures in the context of an outbreak of armed conflict and where the Court held that there was a danger of loss of evidence concerning the cases before it (*Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 3; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 13).

52. There is something paradoxical about the fact that, today, Uruguay is relying on Article 60 of the Statute as the sole basis of both prima facie jurisdiction and its *fumus boni juris*. It is Argentina, not Uruguay, that has sought a legal settlement of the dispute, on the basis of the relevant provisions of the 1975 Statute. And when Argentina reminded Uruguay that the conditions for seising the Court would be met if the parties could not reach a settlement of the dispute within the GTAN framework, Uruguay quite simply claimed during the last days of 2005 that there was no dispute and that the Chapter XV procedure — that of Article 60 — was not open[30]. It was also Argentina, not Uruguay, which asked the Court to set short time-limits for the written proceedings, so that a decision based exclusively on the law would finally settle this dispute, which is embittering relations between the two countries. Argentina is the Party that is scrupulously observing the Court's exhortations in its Order of 13 July 2006.

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[30]Note from the Foreign Minister of Uruguay to the Ambassador of Argentina in Montevideo, 27 December 2005, document No. 3 submitted by Argentina on 18 December 2006.

53. By invoking Article 60 of the River Statute and the rights and duties of the parties to proceedings before this Court, Uruguay has actually sought to bring the dispute between the two countries concerning the road blockades before you, analysing it in every detail as if we were already dealing with the merits of a case that is not before you at all.

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C. The measures requested by Uruguay have no connection with the Statute of the River Uruguay

54. Let us now examine the provisional measures requested by Uruguay in the light of the Statute of the River Uruguay.

55. The first provisional measure requested by Uruguay has no relation to any right prescribed by the Statute. There is no mention of the Statute in it, and one can understand why! Alain Pellet will show that for Uruguay this amounts to bringing before this Court exactly what Uruguay had unsuccessfully requested from the Mercosur arbitral tribunal.

56. The second provisional measure requested by Uruguay leaves us puzzled, even after hearing our opponents for three hours. The Respondent asks that "Argentina . . . shall abstain from any measure that might aggravate, extend or make more difficult the settlement of this dispute"[31]. Which dispute? It is not clear whether Uruguay is referring to the dispute concerning the alleged interruption of traffic between the two countries or that relating to the pulp mills. If the first hypothesis is correct, the question finds no support in the sole instrument that gives you jurisdiction in this case, the Statute of the River Uruguay. My friend Alain Pellet will refer to the second hypothesis when he examines the Uruguayan requests relating to the dispute submitted by the Argentine request.

57. The third measure requested by Uruguay is without foundation, even if it could fall within the provisions of the 1975 Statute, because it refers exclusively to the "rights of Uruguay in dispute before the Court". To set out before you the reasons why such a request, so isolated and abstract, does not meet the requirements of Article 41 of the Statute of the Court would nevertheless be an abuse of your patience.

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[31]Case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Request for the indication of provisional measures submitted by Uruguay, 30 November 2006, para. 28.

D. The Court manifestly lacks jurisdiction to entertain the Uruguayan request

58. It is clear from these remarks that the Uruguayan requests do not fall within the scope of the 1975 Statute, the sole instrument that gives you jurisdiction to entertain the case submitted by Argentina.

35 59. The fact remains that even so there is something spectacular in what Uruguay has done: the Respondent specifically invoked the rules in the Treaty of Asunción allegedly violated by Argentina, the Memorandum of Understanding for the Free Movement of People between Argentina and Uruguay, the Argentine Constitution, the Argentine Law on Transit, the Constitution of Entre Ríos Province, the Penal Code of Argentina[32], the American Convention on Human Rights[33], but with regard to the Statute of the River Uruguay it has been able to invoke only the compromissory clause!

60. Applicant States requesting provisional measures are often accused of seeking by this means to obtain an early decision on the merits. Madam President, Members of the Court, in the present case the Respondent is seeking something more. It is seeking to obtain a decision on the merits on an issue that is neither within the jurisdiction of the Court nor part of the case that Argentina has submitted to you, and which consequently you will not address in your judgment on the merits.

61. In the *LaGrand* case you clearly stated that provisional measures were binding, with all the consequences that ensue from this. We should therefore ask ourselves what would happen, not only if the Court does not order the provisional measures requested, but also what would happen if it does. If you ordered the provisional methods requested by Uruguay you would quite simply be imposing fresh obligations on Argentina — fresh obligations that in no sense derive from the legal instrument that gives you jurisdiction to entertain this case.

62. The basic principle that governs your jurisdictional function is that of consent (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 27; *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 22; *Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports*

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[32]Case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Request for the indication of provisional measures submitted by Uruguay, Observations of Uruguay, s.d., Exhibit 29, 30, 31, 32 and 33.

[33]CR 2006/54 (Boyle).

1947-1948, p. 27; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory*

36 *Opinion, I.C.J. Reports 1949*, p. 178; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 103; *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Judgment, I.C.J. Reports 1954*, p. 32; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 22, para. 34; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 189, para. 31; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 133, para. 94; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 260, para. 53; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 456, para. 55; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 157, para. 47). Here, what Uruguay is seeking to obtain with its request is neither more nor less than to impose conduct on a State in relation to issues that fall within its reserved domain, for acts which the Court cannot assess as either lawful or unlawful and which it will have no opportunity to consider, and which in any event do not affect rights derived from the Statute of the River Uruguay.

63. What we see here is in fact a bid by Uruguay to subvert legal proceedings. Argentina will certainly not go before a Mercosur tribunal to request provisional measures to protect the rights that are at issue in the dispute concerning *Pulp Mills on the River Uruguay*. We regret that Uruguay has come before your Court in a bid to safeguard alleged rights that have already been considered in arbitral proceedings in Mercosur and which relate to a different case.

64. In their dissenting opinion appended to the Order by the Court on 5 July 1951 in the case concerning the *Anglo-Iranian Oil Co.*, Judges Winiarski and Badawi stated:

> "In international law it is the consent of the parties which confers jurisdiction on the Court; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties. The power given to the Court by Article 41 is not

> unconditional; it is given for the purposes of the proceedings and is limited to those proceedings. If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection. Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State. For this reason, too, the Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court to be nevertheless reasonably probable." (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 97.)

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And the two judges concluded their reasoning as follows: "if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated" (*ibid*.).

65. In the present request for provisional measures, not only are there "serious doubts or weighty arguments against the jurisdiction of the Court"; its lack of jurisdiction is obvious. It is inconceivable that, on the basis of the Statute of the River Uruguay, the Court should entertain the dispute between Argentina and Uruguay concerning the action of social movements.

66. I have finished, Madam President, and I do not know whether you are going to give the floor to my colleague Mr. Alain Pellet, or whether you prefer to take a break.

Le PRESIDENT : Je vous remercie, M. Kohen. L'audience sera brièvement suspendue.

L'audience est suspendue de 16 h 30 à 16 h 40.

Le PRESIDENT : Veuillez vous asseoir. M. Pellet, vous avez la parole.

Mr. PELLET: Thank you, Madam President. Madam President, Members of the Court,

III. THE PROVISIONAL MEASURES REQUESTED BY PARAGUAY ARE ENTIRELY UNRELATED TO THE APPLICATION BY ARGENTINA

1. As Professor Kohen has just demonstrated, Uruguay's requests are entirely unrelated to the 1975 Statute of the River Uruguay, Article 60 of which constitutes the sole basis for the Court's jurisdiction in respect of relations between Argentina and Uruguay, which are otherwise governed by separate instruments and dispute settlement arrangements. Moreover, its requests are also devoid of any legal connection with the Application filed by the Argentine Republic with the Court

38 on 4 May 2006, which also constitutes an absolute impediment to the requests being entertained. That is the substance of my pleading.

2. I shall first show that the Court cannot rule on the request for the indication of provisional measures filed by Uruguay because, legally speaking, the request bears no legal relationship to the Application to which it is adjoined (I); second, I propose to demonstrate that in the present circumstances the provisional measures requested by Uruguay, which, as shown by Ms Ruiz Cerruti, are by no means urgent, are likewise clearly in no way liable to cause irreparable prejudice to the rights that Uruguay may invoke in the context of the case before the Court (II.).

1. Lack of any legal relationship between the request for the indication of provisional measures and the Application

3. Madam President, although it is not spelt out in Article 41 of the Statute, the Rules leave no room for doubt: a request for the indication of provisional measures is an *incidental* proceeding adjoined to the main proceedings introduced by the applicant. According to the Court's own definition, "[i]ncidental proceedings by definition must be those which are incidental to a case which is already before the Court or Chamber. An incidental proceeding cannot be one which transforms that case into a different case with different parties . . ." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 134, para. 98). Provisional measures cannot, any more than intervention — the subject-matter of the 1990 Chamber Judgment just cited — have been intended to be employed as a substitute for contentious proceedings (*ibid*., p. 134, para. 99). As Ambassador Rosenne put it,

> "[t]he implication of the term incidental is firstly that the court must have been duly seized of a case, and secondly that there must be a connection between the subject matter concerned and the mainlined proceedings . . . Provisional measures must relate directly to the rights claimed by the parties in the mainline proceedings."[34]

4. It follows that "a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective
39 rights of either party" (*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. 16,

[34]Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, Nijhoff Publishers, Leiden/Boston, 2006, p. 1381; see also Karin Oellers-Frahm, "Article 41" *in* Andreas Zimmermann, ed. and ass. eds., *The Statute of the International Court of Justice —A Commentary*, Oxford University Press, 2006, p. 939, para. 18.

para. 28)[35]. To cite the standard language used by the Court when stating its concern that Parties should refrain from transforming the substance of a case of which it is seised by a request for the indication of provisional measures, "the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings . . ." (*Fisheries Jurisdiction (United Kingdom* v. *Iceland*; *Federal Republic of Germany* v. *Iceland*) *Orders of 17 August 1972*, *I.C.J. Reports 1972*, p. 16, para. 21, and p. 34, para. 22; see also *Aegean Sea Continental Shelf (Greece* v. *Turkey), Provisional Measures, Order of 11 September 1976*, *I.C.J. Reports 1976*, p. 9, para. 25; *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. 19, para. 36; *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991*, *I.C.J. Reports 1991*, p. 16, para. 16; *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 1992*, *I.C.J. Reports 1993*, p. 19, para. 34; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996*, *I.C.J. Reports 1996*, pp. 21-22, para. 35; *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, *I.C.J. Reports 1998*, p. 257, para. 35; *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, pp. 14-15, para. 22; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 127, para. 39; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 201, para. 69; *Avena and other Mexican Nationals*

40 *(Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 89, para. 49, or *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003*, p. 107.

[35]See also the separate opinion of Judge Bennouna appended to the Order of 13 July 2006, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, para. 1.

para. 22; and, for similar language, see: *Legal Status of Eastern Greenland, Orders of 2 and 3 August 1932, P.C.I.J. Series A/B No. 48,* p. 285, or *Polish Agrarian Reform and the German Minority, Order of 29 July 1933, P.C.I.J. Series A/B No. 58,* p. 177; and *Ango-Iranian Oil Co. (United Kingdom* v. *Iran), Provisional Measures, Order of 5 July 1951, I.C.J. Reports 1951,* p. 93; *Interhandel (Switzerland* v. *United States of America), Provisional Measures, Order of 24 October 1957, I.C.J. Reports 1957,* p. 111, or *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006,* para. 62) — meaning, of course, a dispute in the mainline judicial proceedings.

5. As was so pertinently noted by Professor Condorelli at the hearing of 8 June this year — though it must have been in a previous existence: "The rights to be preserved by provisional measures can only be those that are the subject of the principal claim"[36]; "these are the only rights [the source on this occasion being the Permanent Court] which might enter into account" (*Legal Status of the South-Eastern Territory of Greenland, Orders of 2 and 3 August 1932, P.C.I.J., Series A/B, No. 48,* p. 85). There must be a direct link — not just a factual link but a direct *legal* link — between, on the one hand, the provisional measures requested and, on the other, the claims filed in the Application, which define the subject of the case (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* pp. 266-267, para. 69; see also *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52,* p. 14). As was pointed out by the Permanent Court in the *Polish Agrarian Reform* case, the sole intention must be to "protect the subject of the dispute and the actual object of the principal claim, as submitted to the Court by the Application instituting proceedings" (*Polish Agrarian Reform and German Minority, Order of 29 July 1933, P.C.I.J., Series A/B, No. 58,* p. 178; see also

41 p. 177). It is quite true, as Professor Alan Boyle noted this morning, citing the most venerable authorities, and you are unlikely, Madam President, to disagree, provisional measures are designed to prevent irreparable damage from being caused to the Court's judgment and the rights at issue for the parties. There is certainly no risk of that occurring in the present case. Of course, should the Uruguayan Government decide by some divine favour to halt construction of the Botnia plant and

[36]CR 2006/47, p. 35, para. 10 : on the same vein CR 2006/46, 8 June 2006, pp. 60-61, para. 13 (Pellet).

withdraw the authorization that is the subject of the dispute, that decision, whatever its motive, would have an impact on your judgment. Though it would not necessarily bring the present dispute to an end, since, despite what appears to be an extremely limited interpretation of Argentina's submissions on the part of Professor Boyle, it is not true that such a renunciation would eliminate "the very subject-matter of the litigation in advance of the Court's ruling on the merits". It is not true either that the judgment would be "an empty gesture because there will be no plant". It should be borne in mind that one — and not the least important — object of Argentina's Application is to preserve the arrangements for coordination and cooperation under the Statute of the River Uruguay. At all events, it is absurd to talk about irreparable damage under those circumstances. Moreover, the situation would be attributable to a sovereign decision by the Uruguayan Government and not to the partial blockade of roads which is the subject of its request to the Court.

6. With regard to the irreparable damage to its rights, its rights being those at issue in the case that was referred to you, Members of the Court, by Argentina, Uruguay is well aware that it is on very shaky ground here, even though this morning its representatives sought to circumvent the difficulty. Broadly speaking, their argument may be described as a two-step — I am not a very good dancer, Madam President, and a two-step tango is fine for my purposes:

— first step: we are well aware that the road blockades raise issues that do not fall within the jurisdiction of the Court in the present case: Professor Condorelli was particularly clear on this point: "such breaches — though they undeniably exist — fall outside the jurisdiction of this
42 Court inasmuch as they are not covered by the Statute of the River Uruguay; it follows that the arbitration clause in Article 60 of the Statute simply cannot be invoked in that regard"[37];

— second step: but as a Party to the dispute, Uruguay would be entitled to have the Court indicate provisional measures.

The problem is that there is a break in continuity between the two constituent steps of the reasoning of our Uruguayan friends and that the measures requested actually relate to the rights that Uruguay is thus seeking to protect, the very rights which, as it has itself conceded, fall outside the Court's jurisdiction. Provisional measures are not "an end in themselves"; they relate and must

[37] CR 2006/54, p. 30, para. 4 (Condorelli).

relate, as I have said, to the rights that can be invoked by the States parties to the dispute before the Court.

7. In paragraph 28 of its request, Uruguay sets out "the specific measures requested" — presumably the "measures requested" within the meaning of Article 73, paragraph [2], of the Rules of Court. It is in regard to those measures that the question of the relationship with the Application arises, which, as I have shown, constitutes a *sine qua non* for the admissibility of a request for the indication of provisional measures:

8. There are three Uruguayan requests:

> "While awaiting the final judgment of the Court, Argentina
>
> (i) shall take al1 reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States;
>
> (ii) shall abstain from any measure that might aggravate, extend or make more difficult the settlement of this dispute; and
>
> (iii) shall abstain from any other measure that might prejudice the rights of Uruguay in dispute before the Court."[38]

9. Three preliminary remarks are called for on the last two measures (which in any case amount to virtually the same thing):

1. the last is merely a "unilateralized" paraphrase of the text of Article 41 of the Statute and cannot be set out in these general terms ("shall abstain from any other measure that might prejudice the rights of Uruguay");

43 2. the second Uruguayan request calls for the same kind of comment ("shall abstain from any measure that might aggravate, extend or make more difficult the settlement of this dispute"); at first glance, it might seem as though the Court had ruled in favour of this point in advance, since in its Order of 13 July 2006 it encouraged the Parties "to refrain from any actions which might render more difficult the resolution of the present dispute" (para. 82); but this is not in fact the case inasmuch as Uruguay is seeking a Court ruling on a different dispute from that of which you are seised, Members of the Court, a dispute regarding the blockading of roads; nevertheless, and here is my third remark:

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[38] P. 17, para. 28.

3. I note, Members of the Court, that in your wisdom you addressed those words of encouragement to the Parties in the part of your decision setting out your reasoning, and not in the operative part.

10. No doubt you did so because such a measure, which is implicit in every case before the Court, could not have been made the sole subject-matter of the operative part. In the last part of his second pleading this morning, Professor Boyle referred to the Court's longstanding jurisprudence, according to which "measures to prevent the aggravation or extension of the dispute . . . have frequently been indicated by the Court. These measures were designed to be implemented." (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 503, para. 103). True enough. But the Court does not order such measures "out of the blue" or "in the abstract". And the Court's 1986 Order in the *Burkina Faso/Republic of Mali* case, on which my opponent and friend Alan Boyle dwelt at length and exclusively this morning, certainly does not indicate otherwise: not only was there a clear-cut link between the measures requested by the two Parties and the dispute in question (see, in particular, paragraph 16 of the Order), and not only did the serious incidents involved comprise "a resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes", but, in addition, seldom has an Order indicating provisional measures included so many measures spelling out very clearly how the Parties were to comport themselves in order to avoid aggravating the dispute (*ibid.*, para. 32). It is therefore certainly not true to say that "[a]n order can be made to prevent aggravation of the dispute where the Court has found that there is no threat to . . . the rights in dispute"[39].

44 11. But if this is the case, Madam President, there is no call for the application of double standards, and Argentina is convinced that what you denied in July will not be granted to Uruguay in December (or January?) — especially since, and I intend to revert to this, no right that Uruguay could invoke before the Court in respect of the dispute before it has been infringed. In other words, the only measure requested by the Uruguayan Party that raises a real question of admissibility is the first one — since it is crystal clear that the other two are inadmissible: Is it conceivable, in legal terms, that the Court would decide that Argentina must prevent or end the interruption of transit

[39] CR 2006/54, p. 52, para. 21 (Boyle).

between the two countries (which is in any case very limited and geographically confined), even if it was capable of doing so *(quod non)*?

12. Obviously, Madam President, the answer to this question is: "no". It is not legally conceivable because such a request relates to rights, the existence of which Uruguay has not established, which have in any case *nothing to do* with the object of the Application that Argentina filed with the Court.

13. This object is set out very clearly in paragraph 2 of the Application:

> "The dispute concerns the breach by Uruguay of obligations under the Statute of the River Uruguay, a treaty signed by Argentina and Uruguay at Salto (Uruguay) on 26 February 1975 and having entered into force on 18 September 1976 (hereinafter the "1975 Statute"), in respect of the authorization, construction and future commissioning of two pulp mills on the River Uruguay."[40]

This is the basic object of the Argentine Application. My friend Marcelo Kohen has just shown that the provisional measures requested by Uruguay — or rather the first such measure, which, I repeat, is the only one still relevant, is devoid of any link with the 1975 Statute. By the same token, it is clear that "the rights . . . sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case" (*Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, p. 70, para. 26).

14. A comparison of the only "real" provisional measure requested by Uruguay — again, the first one — with the "decision requested" in the Application confirms this. What is Argentina asking for? It is requesting the Court to adjudge and declare, with all legal consequences:

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> "that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that instrument refers, including but not limited to:
>
> *(a)* the obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay;
>
> *(b)* the obligation of prior notification to CARU and to Argentina;
>
> *(c)* the obligation to comply with the procedures prescribed in Chapter II of the 1975 Statute;
>
> *(d)* the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries,

[40] P. 2.

including the obligation to prepare a full and objective environmental impact study;

(e) the obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries."

15. This, Madam President, is the decision requested by Argentina. I took the liberty of rereading it to you verbatim, although it is a specific, long and detailed request, because it becomes clear in the process that this request has absolutely nothing to do with the prevention or termination of partial interruptions of transit between the two countries by demonstrators who sporadically blockade certain roads:

— this request is unrelated to the optimum and rational utilization of the river;

— this request is unrelated to notification of CARU and, more generally, to the procedural obligations flowing from Chapter II of the 1975 Statute;

— this request is furthermore unrelated to preservation of the aquatic environment and prevention of pollution; and

— it is also unrelated to the obligations incumbent on States parties to the Statute to co-operate in those two areas.

Yet it is these rights and obligations, not trade or tourist traffic between the two countries, that constitute "the subject of the proceedings before the Court on the merits of the case".

16. Uruguay is clearly aware of this and is attempting to circumvent the problem — or rather
46 to deny its existence — by stating no less than nine times (admittedly in slightly different ways — but still repeating the same argument nine times in its request) that:

> "Argentina's allowance of a harmful blockade against Uruguay — for the express purpose of compelling it to accede to the very same demands that Argentina is pursuing in this Court — will grievously and irreparably harm Uruguay's rights under the Estatuto to a judicial resolution of the Parties' conflicting claims with regard to the Botnia plan."[41]

17. I shall refrain, Madam President, from ironic commentary on the piquancy of the situation: we have Uruguay complaining of the risk of being deprived of its right to have the dispute settled by the Court, although it is clearly Uruguay which, by failing to seize CARU under Article 7 of the 1975 Statute, has prevented the case from being settled, first through discussions

[41] P. 2, para. 4; see also p. 1, paras. 2-3; p. 3, para. 6; p. 4, para. 7; p. 6, para. 11; p. 10, para. 18; p. 15, para. 24; p. 16, para. 25.

between the two countries and perhaps subsequently by the Court pursuant to Article 12, a mechanism that it has rendered unusable. I shall not dwell either on the fact that the Uruguayan Party attributes to Argentina conduct that is not its own but that of the population of the Gualeguaychú region, which is desperately seeking to attract the attention of the two Governments to a situation that it views as a dramatic threat to its future and its traditional way of life, as noted, moreover, by the Arbitral Tribunal of Mercosur[42].

18. I must, however, draw attention to the utterly artificial method of reasoning — or perhaps I should say self-persuasion? — adopted by Uruguay: even if we were to admit that the objectives sought by the population of Gualeguaychú and its region are the same as those pursued by Argentina when it seised the Court; even if we were to assume that the Argentine Government is capable of putting an end to this movement without taking the politically ill-advised risk of prompting a sharp response from the population, it is certainly not enough to say that the goals pursued by Argentina before the Court and those that the population on the ground claim to pursue are the same in order to establish that *the rights* that the provisional measures are meant to protect are the same as those constituting the requests set out in the Application.

47 19. Uruguay is not at all seeking to protect the rights at issue *in the present dispute*, as it has also repeatedly asserted[43] and as its representatives reiterated here this morning — another example of the "Coué method" — of self-persuasion. Its objective is probably to use the Court solely for publicity purposes — which would be a distinct abuse of procedure; and it is in any case clear, even in the light of the most charitable interpretation of its approach, that it is seeking in this way to make the Court rule on a different dispute, concerning the rights that it claims to derive not from the 1975 Statute but from the Asunción Treaty which "guarantee[s] the freedom of transport and commerce between Mercosur countries"[44]. This is apparent, for example, from the Note Verbale of 30 October last, in which Uruguay complains that

> "the blockades . . . in addition to constituting a violation of the principle of free circulation established in the Treaty of Asunción and other [unspecified] norms of

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[42]Request by Uruguay for the indication of provisional measures, Ann. 2, p. 32, para. 157.

[43]See *ibid.*, and p. 1, para. 1, p. 6, para. 12 (vi) and p. 17, para. 26.

[44]P. 4, para. 8; see also p. 6, para. 12 (iii).

> international law, fail to comply with the Arbitral Award of the Mercosur *Ad Hoc* Tribunal of 6 September 2006"[45].

The same language can be found in all of Uruguay's relevant Notes Verbales[46].

20. What is particularly significant is that *the* provisional measure which Uruguay requests does not concern either the rights and obligations which the Parties derive from the 1975 Statute or the construction and commissioning of the Botnia plant. In fact, it only concerns — aside form the Coué method — "the interruption of transit between Uruguay and Argentina".

21. This is emphatically borne out by a comparison between the measure with which I am concerned and that in respect of which Uruguay seised the *ad hoc* Arbitral Tribunal of Mercosur. Let us compare the two: Uruguay's complaint to Mercosur:

> "*b)* that the Argentine Republic, should the impediments to free traffic be repeated, must adopt the appropriate measures to prevent and/or stop such impediments and guarantee the free traffic with Uruguay."

48 And now the first provisional measure requested by Uruguay from the Court (I will reread it to make everything absolutely clear):

> "While awaiting the final judgment of the Court, Argentina
>
> (i) shall take all reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States".

22. So we have two requests, Madam President, which are really as alike as two peas in a pod. Clearly, Uruguay is seeking to obtain from the Court, through provisional measures, what it was basically unable to obtain through the arbitral proceedings that it brought in the framework of Mercosur. Yet I would remind you — and my friend Marcelo Kohen has already mentioned it — that in the Mercosur framework our Uruguayan friends firmly stated that "the construction of the plants [CMB and Botnia] and the possible environmental considerations related to them *are completely alien* to the dispute" referred to the Tribunal[47]. It could scarcely be clearer: the roadblocks and the case before the Court are "completely alien" to one another…

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[45]Uruguay's request for the indication of provisional measures, Ann. 4, Note Verbale from the Ministry of Foreign Affairs of Uruguay to the Argentine Embassy in Montevideo, 30 October 2006; see also Request, p. 8, para. 15.

[46]See *ibid*., Anns. 3, 5-7; Notes Verbales from the Ministry of Foreign Affairs of Uruguay to the Argentine Embassy in Montevideo, 11 October 2006, 31 October 2006, 9 November 2006, and 20 November 2006.

[47]Document No. 4 submitted by Argentina, para. 157; emphasis added.

2. The absence of irreparable prejudice to the rights that Uruguay can invoke in the framework of the case before the Court

23. Moreover, Madam President, (and I turn to my second point) it is unreasonable to claim that the acts referred to by Uruguay are capable of causing irreparable prejudice to the rights on which the Court's Judgment will be based or, to use the terms of the Uruguayan request, "to cause irreparable prejudice to the rights of Uruguay that are at issue in this case . . ."[48]. The rights of Uruguay (and Argentina) that are at issue in the present case are those (and are only those) which the two States derive from the 1975 Statute and which Argentina deems to have been violated by Uruguay through its initial authorization of the construction of the CMB and Orion mills and the ongoing construction of the latter and of the related installations.

24. Uruguay contends that the continuation of the demonstrations has a negative impact on the Uruguayan economy[49]. That, if I may say so, is "beside the point": the risk of such a prejudice

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is unrelated to Uruguay's supposed right to construct plants on the River Uruguay. The possible impact of these sporadic protests on the Uruguayan economy and tourist industry, which Ms Ruiz Cerutti has shown to be of very limited scope, has no factual or legal bearing on the River Uruguay, the quality of its water or the construction of the Botnia pulp mill.

25. Uruguay has provided no evidence, either in its Request or this morning, that the disputed construction works have been affected by the partial roadblocks in Argentina. On the contrary, according to the information in Argentina's possession, the construction of the Botnia plant and the related installations is proceeding "normally" (although I hesitate to use the word "normal" to describe unlawful conduct . . .). The demonstrations have in no way prevented the (again unilateral) commissioning of the port terminal and the granting of authorization for the extraction of water from the river. The only interruption of work on the construction site was due to trade union activity by Botnia's own employees at the end of September 2006[50].

26. Hence one cannot but be surprised by the fact that the President of the Eastern Republic of Uruguay felt it necessary to order the army to take up positions around the plant construction

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[48]P. 6, para. 12 (vi); see also p. 5, para. 10.

[49]See *inter alia* the request for the indication of provisional measures, 30 November 2006, p. 4, para. 7; p. 16, para. 26.

[50]See Botnia's press release "Botnia obliged to halt construction work at Fray Bentos", 22 September 2006, document No. 6 submitted by Argentina.

site[51]. This is undoubtedly a "dramatization" of the situation and obviously cannot seriously be a response to the peaceful and sporadic blockage of certain roads in Argentina by Argentine demonstrators. This move surprised many people, and Botnia's management, in particular, protested against such grandstanding. It was at the express request of Botnia's management that only yesterday President Vázquez ordered the withdrawal of the troops that he had dispatched at the end of November[52] — probably in the vain hope, Members of the Court, of convincing you of the dramatic nature of a situation which, at least from Uruguay's standpoint, is by no means dramatic.

27. The economic pressure, which is allegedly due to the roadblocks on Argentine territory and which, according to Uruguay, is being applied with the sole aim of obliging it to halt or

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suspend construction work, is also insufficient to establish the legal link required for the admissibility of a request for the indication of provisional measures under Article 41 of the Court's Statute.

28. First, Uruguay has maintained quite a haughty silence about the core question in this context of whether any prejudice caused by the roadblocks to its economy, and in particular to its tourist industry, is "irreparable". The mere allegation that "[t]he economic damage suffered by Uruguay to date as a result of the blockades has been enormous"[53] fails to fulfil this condition, which is repeatedly mentioned in the Court's jurisprudence (see *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium, Provisional Measures, Orders of 8 January 1927, 15 February and 18 June 1927, P.C.I.J, Series A, No. 8*, p. 7; *The Factory at Chorzów, Order of 21 November 1927, P.C.I.J., Series A, No. 12*, p. 6, or *The Legal Status of the South-Eastern Territory of Greenland, Order of 3 August 1932, P.C.I.J, Series A/B, No. 48*, p. 284; or *Fisheries Jurisdiction, Provisional Measures, Order of 17 August 1972, I.C.J. Reports 1972*, p. 16, paras. 21-22, and p. 34, paras. 22-23; *Aegean Sea Continental Shelf, Provisional Measures, Order of 11 September 1976, I.C.J. Reports 1976*, p. 12, para. 33; *Passage Through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 16,

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[51]Observations of Uruguay of 18-19 December 2006, Exhibits 11, 16, 20 and 25.

[52]"Tabaré Vázquez withdraws the troops from Botnia at the company's request", Infobae.com, 17 December 2006, Document No. 11 submitted by Argentina.

[53]Request for the indication of provisional measures, 30 November 2006, p. 16, para. 26.

para. 16, and pp. 18-19, paras. 27-29; *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, pp. 14-15, para. 22; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 201, para. 69; *Avena and other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 89, para. 49; *Certain Criminal Proceedings in France (Congo* v. *France), Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003*, p. 22, para. 22, or *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006*, para. 61). Even if the damage about which Uruguay complains could be established and found to be enormous — which is far from the case — and even if it was attributable to the conduct of the demonstrators in Entre Rios province — which is even further from the case — Uruguay has

51 signally failed to show — has not even attempted to show — that it was "irreparable" within the meaning of the Court's jurisprudence. Moreover, the *ad hoc* Arbitral Tribunal to which Uruguay referred the same facts and which delivered a ruling in the Mercosur framework made no finding of economic damage to Uruguay[54].

29. Secondly and above all, whatever are the intentions of the population of the Gualeguaychú region, a mystery remains: how could the partial interruption of traffic on certain roads (and of course not of all traffic between the two countries!) and the risk of damage to the Uruguayan economy have any influence whatsoever on the construction of the pulp mills? The acts about which Uruguay is now complaining have taken place ever since work began at Fray Bentos, but this did not prevent the Uruguayan authorities from imperturbably granting the necessary authorizations one by one. Moreover, since the same causes produce the same effects, we cannot see why in the future the (sporadic) roadblocks, even if they were to remain in place, would make it more necessary for Uruguay to abandon the Orion project — if it persists in wishing to pursue it despite the risk highlighted by the Court in its July 2006 Order[55]. Admittedly, the inhabitants of Gualeguaychú, who, I note in passing, are not a party to the dispute which has

[54]Request by Uruguay for the indication of provisional measures, 30 November 2006, Ann. 2, paras. 163-165 and paras. 188-189.

[55]Para. 78.

brought us together here, hope that their action will finally convince the Uruguayan Authorities to relinquish the construction of the Botnia plant at its planned location. But there can be no legal link between their demonstrations and any possible decision to discontinue the project. If it is discontinued, it will either be because Uruguay so decides or the Court so decides. Moreover, it would definitely not constitute a prejudice; on the contrary, everyone stands to gain. Furthermore, discontinuation of the project would not, in legal terms, be a consequence of the roadblocks but of a decision by the Uruguayan Government or by the Court; it would have no legal relationship with the roadblocks. In actual fact, Uruguay has always been free, and is still free, either to continue the building work or to abandon it; it has made that choice — in spite of the roadblocks.

52 30. Madam President, in the *LaGrand* Judgment of 27 June 2001, the Court held that "[t]he context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved" (*(Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* pp. 502-503, para. 102). The measure that Uruguay is requesting you to indicate, Members of the Court, cannot assist in attaining that objective; it is basically devoid of any connection with the respective rights of the Parties to the dispute referred to you by Argentina last May. It relates to a different issue, a different treaty and a different jurisdiction.

31. In fact, a precedent that springs to mind for the present proceedings is the "non-case" that gave rise to the Court's Order of 22 September 1995. Following the submission of a "Request for the Examination of the Situation" by New Zealand after France had resumed nuclear testing in the Pacific, the Court held that the request was unrelated to the situation covered by the 1974 Judgment, paragraph 63 of which afforded the possibility of an examination "if the basis of this Judgment were to be affected" (*Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63). Accordingly, the Court, without any further examination of New Zealand's request for provisional measures, "instructed the Registrar, pursuant to Article 26, paragraph 1 *(b)*, of the Rules, to remove that Request from the General List . . ." (*Request for the Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) *Case (New Zealand* v. *France), Order of 22 September 1995, I.C.J. Reports 1995*, p. 306, para. 66). By the same token, it should

be noted that in the event of a manifest lack of jurisdiction, the Court is of the opinion that "within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice", which you decided twice in 1999 (*Legality of the Use of Force (Yugoslavia* v. *Spain; Yugoslavia* v. *United States of America), Provisional Measures, Orders of 2 June 1999, I.C.J. Reports 1999*, p. 773, para. 35; p. 925, para. 29).

53 32. Of course, in the present instance there can be no question of removing the case from the Court's General List, since both Parties acknowledge its jurisdiction pursuant to Article 60 of the 1975 Statute of the River Uruguay. However, the notion underpinning the 1995 decision is still transposable *mutatis mutandis*: the request for provisional measures filed by Uruguay is so manifestly alien to both the substance and the object of the Application that, in Argentina's view, it could — and doubtless should — have been summarily rejected if the Rules of Court provided for a procedure of that kind.

33. Madam President, that concludes Argentina's arguments. I thank you kindly, Members of the Court, for your attention on behalf of the whole delegation of the Argentine Republic.

Le PRESIDENT : Je vous remercie, M. Pellet.

Cet exposé conclut l'audience de cet après-midi ; les Parties seront de nouveau entendues en leur réplique orale. L'Uruguay aura la parole demain à 10 heures et l'Argentine à 16 h 30. Chacune des Parties disposera d'un maximum de deux heures pour présenter sa réplique, durée qu'elle n'est pas obligée d'utiliser en totalité.

L'audience est levée.

L'audience est levée à 17 h 30.