DISSENTING OPINION OF JUDGE *AD HOC* TORRES BERNÁRDEZ

[Translation]

Agreement and disagreement with the Order — The question of the prima facie jurisdiction of the Court and of the admissibility of the request submitted by Uruguay — Argentina's arguments based on a lack of jurisdiction and on inadmissibility are not justified either by the facts of the case or by the applicable law — Agreement with the Order's conclusion that the Court has jurisdiction to entertain Uruguay's request — The question of the existence of a risk of irreparable prejudice to Uruguay's disputed rights and of the urgency of remedying it — Uruguay's right to build the Orion mill at Fray Bentos — Uruguay's right that the Court determine the dispute — Uruguay's arguments on matters concerning Argentina's international responsibility relate to the merits of the dispute and not to these incidental proceedings — Existence of a "present risk" of irreparable prejudice to Uruguay's rights in issue — The Court's power under Article 41 of the Statute to establish whether the circumstances of the case require the indication of provisional measures — In light of the situation created by the facts underlying Uruguay's request, the Court should have indicated, in the operative part of the Order, two provisional measures; (a) *the first, similar to the first measure requested by Uruguay, indicating that Argentina should end and prevent on its territory the closure, blockading or obstructing of traffic on access roads to the international bridges linking the two countries in order to preserve Uruguay's right to build the Orion mill at Fray Bentos and also the integrity of the pending legal settlement;* (b) *the second based on the content of the second measure requested by Uruguay to avoid the aggravation or extension of the dispute, but addressed to both Parties — Dismissal of the third measure requested by Uruguay.*

1. Argentina having decided to object to the jurisdiction of the Court to entertain the request for provisional measures submitted by Uruguay, on 29 November 2006, in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)* and to the admissibility of Uruguay's request, the Court first had to resolve the question of jurisdiction and admissibility before being able to rule on the merits of the request, in other words on whether or not to indicate the provisional measures requested by Uruguay. I fully share the Court's reasoning and conclusions on jurisdiction and admissibility. On the other hand, I do not wholly share the reasoning, and certainly not the conclusions in the Order on the merits. This is why I voted against the Order.

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2. Uruguay's request for the indication of provisional measures of 29 November 2006 indicates in the introduction that it was submitted pursuant to Article 41 of the Statute of the Court and Article 73 of its Rules and that the provisional measures "are urgently needed to protect the rights of Uruguay that are at issue in these proceedings from imminent and irreparable injury, and to prevent the aggravation of the present dispute". The request goes on to set out the grounds on which it is based, the consequences which would ensue from its dismissal and the three provisional measures requested (Art. 73, para. 2, of the Rules). In paragraph 25, the request also refers to the basis of the jurisdiction of the Court relied on by Argentina in its Application instituting proceedings in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)* of 4 May 2006 and its request for the indication of provisional measures of the same date.

3. It was on the basis of Article 60 of the 1975 Statute of the River Uruguay that the Court concluded, in its Order of 13 July 2006, that it had prima facie jurisdiction to hear the above case and, therefore, to consider the request for the indication of provisional measures which had then been submitted to it by Argentina. At no time has Uruguay disputed the prima facie jurisdiction of the Court in the case and its request for the indication of provisional measures also relies on Article 60 of the Statute of the River Uruguay as basis for the prima facie jurisdiction of the Court. Nor has Uruguay objected to the admissibility of Argentina's Application instituting proceedings. Hence, in the present case, no preliminary question arises as regards the prima facie admissibility of Argentina's Application, just as in the case concerning *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. 21, paras. 32 and 33).

4. However, Argentina now disputes the jurisdiction of the Court to entertain Uruguay's request for the indication of provisional measures and the admissibility of that request. During the oral hearings, its counsel expended much more effort demonstrating the Court's lack of jurisdiction and the inadmissibility of Uruguay's request than on refuting the proof of the existence of a risk of irreparable prejudice to the rights in issue and of urgency. They even went so far as to assert that the Court "manifestly lacked jurisdiction" and to mention examples of cases where the Court manifestly lacked jurisdiction and decided to remove the case concerned from its List.

5. But these efforts were fruitless because Uruguay's request is not a principal request, in other words, an application introducing a new case, nor is it a sort of would-be counter-claim not directly connected with the object of Argentina's Application instituting proceedings in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*.

6. Counsel of Argentina forcefully asserted that the first provisional

measure requested by Uruguay, namely the one calling upon the Court to indicate to Argentina that it

> "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" (Application, para. 28 (i)),

would be tantamount to calling upon the Court to rule not on the initial dispute regarding the Statute of the River Uruguay as set out by Argentina's Application of 4 March 2006, but on a dispute relating to freedom of transport and freedom of commerce between the two countries covered by substantive law and the settlement procedures of Mercosur (Treaty of Asunción and Protocol of Olivos).

7. Further, it has been argued by Argentina that the fact that Uruguay had called for an *ad hoc* Mercosur Arbitral Tribunal to rule on previous blockades of bridges and roads, under the provisions of the relevant Mercosur instruments, created a situation of estoppel which rendered the request for the indication of provisional measures submitted to the Court by Uruguay inadmissible (see the Award of the *ad hoc* Mercosur Tribunal of 6 September 2006, Annex 2 of Uruguay's request for the indication of provisional measures). The present Order replies to this argument, and rightly so, that the rights relied on by Uruguay before the *ad hoc* Mercosur Tribunal are different from those whose protection it is calling for in the present case (Order, para. 30).

8. Uruguay's request for the indication of provisional measures was described by counsel for Argentina as a request totally unconnected with the Statute of the River Uruguay, and also with the respective rights of the Parties to the dispute submitted to the Court by Argentina. It allegedly concerns other problems, another treaty, another court. These arguments, I regret to say, overlook the nature, content and purpose of Uruguay's request as well as the purpose of Argentina's Application instituting proceedings. Uruguay's request sits perfectly well with the subject of the case brought before the Court by Argentina's Application.

9. All Uruguay is asking for, in its first submission, is for the Court to indicate to Argentina, as territorial sovereign, to take what it considers to be all reasonable and appropriate steps at its disposal, as a Party to the present proceedings, to prevent or end, *pendente lite*, the interruption of transit between Uruguay and Argentina (including the blockading of bridges and roads between the two States) and to do so in order to preserve rights under the 1975 Statute of the River Uruguay which, according to Uruguay, are at issue in the dispute, in particular the right to build the Orion mill on the Uruguayan bank of the River Uruguay at Fray Bentos and the right for the Court to determine the dispute submitted to it by Argentina. Hence, the request asks the Court to indicate to Argentina, the Applicant in this case, a measure consisting of an injunction on

acting in a certain way in order to preserve the rights claimed by Uruguay as Respondent in the same case. By no means is it a question of obtaining a provisional or final ruling on the merits of the claims of either of the Parties to the case, or on unrelated claims, but of protecting *pendente lite* the substance of the rights claimed by Uruguay in the case.

10. Uruguay's request also adds nothing new to the subject-matter of the dispute as set out in Argentina's Application instituting proceedings. By no means is it a counter-claim in disguise. The disputed rights which Uruguay requests the Court to safeguard by indicating the provisional measure concerned form part of the subject-matter of the dispute as determined by Argentina's Application, its legal grounds and submissions. In paragraph 2 of Argentina's Application, the subject-matter of the dispute is set out in the following terms:

> "The dispute concerns the breach by Uruguay of obligations under the Statute of the River Uruguay . . . in respect of the authorization, construction and future commissioning of two pulp mills on the River Uruguay, having regard in particular to the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river."

As for the legal grounds invoked by Argentina, paragraph 24 of the Application indicates that:

> "The law applicable to the present dispute is the 1975 Statute and the conventional and customary principles and rules relevant to its interpretation and application, and in particular the treaties and other international obligations in force for either party to which the Statute refers. By virtue of these provisions, Uruguay is in breach of the following international obligations: . . ."

11. Paragraph 24 of Argentina's Application later goes on to list no fewer than eight obligations which Uruguay is said to have breached, these being:

> "*(a)* the obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay;
> *(b)* the obligation to provide prior notification to CARU and to the Government of Argentina in respect of the construction of two pulp mills on the left bank of the River Uruguay;
> *(c)* the obligation to comply with the procedures prescribed by Chapter II of the 1975 Statute in regard to the carrying out of 'any . . . works which are liable to affect navigation, the régime of the river or the quality of its waters';
> *(d)* the obligation not to authorize construction of the proposed

works without having first followed the procedure prescribed by the 1975 Statute;

(e) the obligation to preserve the aquatic environment and to prevent its pollution, by adopting appropriate measures, including recourse to best environmental practice and best available technology, in accordance with applicable international agreements and in keeping with the guidelines and recommendations of international technical bodies;

(f) the obligation not to cause transboundary environmental damage to the opposing bank of the river, or to areas affected by the river;

(g) the obligation not to prevent use of the river for lawful purposes; and

(h) other obligations deriving from the procedural and substantive provisions of general, conventional and customary international law which are necessary for the application of the 1975 Statute."

12. Finally, "[o]n the basis of the foregoing statement of facts and law", the submissions in paragraph 25 (1) of Argentina's Application request the Court to adjudge and declare:

"1. 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, 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."

13. The subject-matter of the dispute and the submissions of the Application are thus defined in the Application in very broad general terms covering the rights and duties of the Parties set out in a number of the provisions of the Statute of the River Uruguay. The rights of which Uruguay requests protection through the indication of provisional measures fall within that subject-matter and sit perfectly well with it. The resolution of the dispute on the merits will necessarily involve the interpretation or application by the Court of several provisions of the

Statute of the River Uruguay. This probably explains why the submissions of both Argentina's Application and Uruguay's request avoid any reference to particular articles of the Statute of the River Uruguay.

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14. As regards provisional measures, the Court exercises a basic, purely statutory jurisdiction defined in Article 41 of its Statute and that remedial jurisdiction of the Court is not limited or conditioned in any respect by either the substantive law applicable to the merits of the dispute or by the scope of the jurisdictional title or titles governing the Court's jurisdiction on the merits in the case concerned. By virtue of that power, the Court may, in the cases submitted to it, provisionally indicate all manner of protective measures, when it considers that circumstances require the adoption of the measure concerned in order to safeguard *pendente lite* the rights of either of the Parties at issue in the dispute at hand. As the Permanent Court of International Justice stated in 1933 in the case concerning the *Polish Agrarian Reform and the German Minority (Interim Measures of Protection)*, according to the text of Article 41 of the Statute, the essential condition which must necessarily be fulfilled in order to justify a request for the indication of provisional measures, should circumstances so require, is that such measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court (*P.C.I.J., Series A/B, No. 58*, p. 177).

15. Thus, for example, in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, the applicable jurisdictional title was a special agreement granting a Chamber of the Court jurisdiction only to determine the frontier line between the two countries in a disputed area defined by the special agreement, the law applied by the Chamber to settle the dispute being the principles and rules of international law concerning land delimitations. When the case was in deliberation, serious incidents occurred between the armed forces of the two countries and the Chamber was asked to indicate provisional measures. In so doing, it was not at all limited in this task either by the scope of its jurisdiction on the merits or by the substantive law applicable to the boundary dispute concerned, as is clearly apparent from the measures set out in the operative part of the Order of 10 January 1986 (*I.C.J. Reports 1986*, pp. 11-12). The Chamber's jurisdiction to do so, on the sole basis of Article 41 of the Statute of the Court, was, moreover, never challenged.

16. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, the Court's jurisdiction was founded upon the declarations made by the two States under Article 36, paragraph 2, of the Statute of the Court, whereas the object of the dispute submitted by Cameroon was defined by that country's claims as solely a delimitation of the land and maritime boundary between the two countries. When, *pendente lite,* serious armed incidents took place in one of the territories forming the subject of the proceedings

before the Court, Cameroon requested the indication of the following provisional measures:

> "(1) the armed forces of the Parties shall withdraw to the position they were occupying before the Nigerian armed attack . . .;
> (2) the Parties shall abstain from all military activity along the entire boundary until the judgment of the Court takes place;
> (3) the Parties shall abstain from any act or action which might hamper the gathering of evidence in the present case" (*I.C.J. Reports 1996*, p. 18, para. 20).

The fact that the subject-matter of the provisional measures requested by Cameroon did not correspond to the definition of the subject-matter of the dispute on the merits of the case was not regarded as a ground of the inadmissibility of the request for provisional measures, as the purpose of the measures sought was the interim protection of Cameroon's rights on the merits. And there are many other examples.

17. Thus the substantive admissibility of a request for the indication of provisional measures as a general rule depends solely on the Court's appraisal of whether the purpose of the measure sought really is the interim protection of the right or rights at issue in the dispute, as the exercise by the Court of the power conferred on it by Article 41 of the Statute is aimed solely at safeguarding the rights at issue before the Court pending a final decision on the merits. This conclusion is borne out by the case law. For example, in the case concerning the *Polish Agrarian Reform and the German Minority (Interim Measures of Protection)*, the German Government's request was dismissed because the measures sought were not aimed solely at the protection of the subject-matter of the dispute or the subject-matter of the principal Application itself, as they had been submitted to the Court by Germany's Application instituting proceedings. Before the present Court, the request for the indication of provisional measures by Guinea-Bissau in the case concerning the *Arbitral Award of 31 July 1989* was dismissed because "the alleged rights sought to be made the subject of provisional measures [were] not the subject of the proceedings before the Court on the merits of the case" (*I.C.J. Reports 1990*, p. 70, para. 26). For other examples, see also the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1976*, p. 11, para. 34) and the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (*I.C.J. Reports 1993*, p. 19, para. 35).

18. The situation described above simply does not arise in these incidental proceedings. The necessary link between the request for the indication of provisional measures by Uruguay and the substance of the case submitted by Argentina is clear. Since there is no other substantive issue of connection, of law or of fact, to prevent the admissibility of a request such as Uruguay's, all that remains is to address Argentina's argument concerning the formal "connection", based on an "alleged" lack of precision in the Uruguayan request regarding "the rights to be protected and

the interim measures of which the indication is proposed". It need only be noted in this respect that this phrase, included in the Rules of 1936, 1946 and 1972, no longer features in Article 73, paragraph 2, of the current Rules, in which it was purposely replaced by the expression "[t]he request shall specify the reason therefor", which the Uruguayan request certainly does in paragraphs 2 to 23.

19. The legal contentions on which Argentina's oral arguments concerning the Court's lack of jurisdiction and/or the inadmissibility of the Uruguayan request are based do not seem to us acceptable either, as they would ultimately entail partitioning the power held by the Court under Article 41 of the Statute, with no apparent advantage for States overall, or for the Court in the exercise of its protective or emergency jurisdiction.

20. In light of all the aforementioned considerations, as well as the relevant reasons in the Order, I wholly concur with the Court on the question of jurisdiction, including admissibility, as stated in paragraph 30 of the Order.

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21. The Court's dismissal of Argentina's objections to its jurisdiction and to the admissibility of Uruguay's request for the indication of provisional measures clearly implies that the rights claimed by Uruguay, as a party to the 1975 Statute of the River Uruguay — and for which it requested protection through the indication of provisional measures by the Court — are not prima facie non-existent rights or rights not germane to the dispute. They are rights in dispute, very plausible, sufficiently important and serious to warrant potentially being the object of protective measures against conduct by a party which could prejudice them. I therefore consider that Uruguay's request for the indication of provisional measures meets the criterion of *fumus boni juris* or *fumus non mali juris* (see the separate opinion of Judge Abraham appended to the Order of 13 July 2006 in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), I.C.J. Reports 2006*, p. 24).

22. All that remains now is to ascertain whether, in view of the circumstances of the case as they now present themselves based on the information in the Court's possession, the safeguarding of the rights invoked by Uruguay in its request does or does not require the indication of the provisional measures sought or, possibly, other provisional measures.

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23. The Court has many times declared that its power to indicate provisional measures under Article 41 of its Statute presupposes that "irreparable prejudice" should not be caused to the rights which are the subject

of judicial proceedings and that it follows that "the Court must be concerned to preserve by such measures the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent" (see, for example, the Order of 8 April 1993 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Provisional Measures, I.C.J. Reports 1993*, p. 19, para. 34). Yet the prejudice itself clearly does not need to have already occurred for provisional measures to be indicated, as the purpose of such measures is essentially "preventative".

24. There need only be a serious "risk" of irreparable prejudice to the rights in dispute, in the particular circumstances of the case — including the situation of the State in danger of suffering such prejudice — for the Court to act. This is why it is well established in the case law of the Court that the purpose of provisional measures is not to address "irreparable prejudice" *per se*, but the "risk of irreparable prejudice" to the rights in dispute. And it is indeed this "risk" and the "urgency" of remedying it which must be demonstrated when either of the parties to the proceedings seeks such measures.

25. Before turning to the central issue of the existence or not of a "risk of irreparable prejudice" in the present case, it should be noted that counsel of Uruguay sometimes raised questions of international responsibility which, in my opinion, relate to the substance of the dispute. For example, regarding the imputability of certain acts to Argentina or the characterization of a particular conduct of Argentina as an internationally wrongful act. I do not therefore consider those observations and declarations in my discussion below on the existence in the present case of a "risk of irreparable prejudice" to Uruguay's disputed rights. In these incidental proceedings, it is the facts which count. I will therefore try to answer the question of the existence of the risk essentially on the basis of factual elements.

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26. The notion of "irreparable prejudice" has not been given an abstract definition by the Court. However, it emerges from the case law and definitions can also be found in the oral pleadings and doctrine (see, for example, CR 2006/54, pp. 46 *et seq.*). As far as the "irreparability" of the prejudice is concerned, I concur with the general conclusion of Professor Higgins in her statement on behalf of the United Kingdom in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* to the effect that "the preservation of the integrity and efficacy of the judgment would certainly seem to be the central element in the Court's consideration of whether circumstances require the indication of interim measures" (*ibid.*, CR 92/3 of 26 March 1992). As for the "prejudice", in the Court's case law the term has been used in a fairly broad and elastic manner. It

can certainly not be limited to economic injury or loss alone.

27. For the majority of the judges in this case, Uruguay has not demonstrated the risk of irreparable prejudice to the rights in dispute and/or the imminence, that is to say urgency, of that risk. This is the ground on which the Court relies in the present Order to dismiss the first interim measure requested by Uruguay outright (paras. 40-43 of the Order). I disagree with this finding. The events described in the Order in my view entail a present and serious risk of irreparable prejudice not just to particular rights claimed by Uruguay, but also to the sound administration of international justice. In this case, the "circumstances" referred to in Article 41 of the Statute of the Court are really unique. They require the indication of measures tailored to the case, that is to say highly specific. It is rare for a respondent State to find itself exposed, as a litigant, to economic, social and political injury as a result of measures aimed at coercion adopted by nationals of the applicant State inside the latter's territory. The avowed purpose of those coercive actions in the present case is to put an end to construction of the Orion mill or have it relocated, that is, to prejudice the principal right at issue for Uruguay in the case.

28. Nor does an applicant State often "tolerate" such a situation by relying on a domestic policy of persuasion rather than repression as regards social movements, for that reason refraining from adopting the measures of due diligence imposed by international law on the territorial sovereign in that domain, including first and foremost the obligation not to allow its territory to be used for acts contrary to the rights of other States (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 22). The fact that, in the present case, the rights claimed by Uruguay, which are the target of the demonstrators of Gualeguaychú and the surrounding area, are "rights in dispute" before the Court, does not alter the aforementioned obligations of Argentina at all.

29. Further, as a Party to the proceedings, Argentina is procedurally bound to conduct itself towards the other Party so as not to anticipate the final decision of the Court on the "rights in dispute" in the case which Argentina itself referred to the Court. In any event, the situation is deteriorating too fast by the day for the Court to be able to end the present incidental proceedings by simply declaring — as it did in the Order of 13 July 2006 —that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. Since the end of November 2006 the circumstances have been very different. They call for the Court to exercise its power to indicate provisional measures in order to preserve Uruguay's disputed rights and

to reverse the clear slide towards the aggravation and extension of the dispute.

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30. Despite the foregoing considerations, the Court, in paragraph 43 of the Order, has found that the circumstances of the present case are not such as to require the indication of the first provisional measure requested by Uruguay, to "prevent or end the interruption of transit" between the two States and particularly "the blockading of [the] bridges and roads" linking them.

31. The reasoning behind this finding is set out in paragraphs 40 to 42 of the Order as follows:

(1) notwithstanding the blockades, the construction of Botnia mill progressed significantly since the summer of 2006 and is now well advanced;
(2) it has also been shown that other routes have been used for the transit of tourists and goods, including the supplies required for the Botnia mill's installations;
(3) the construction of the plant is continuing;
(4) the Court — without addressing whether the roadblocks may have caused or may continue to cause damage to the Uruguayan economy — is not convinced, in view of the foregoing, that the blockades risk prejudicing irreparably the rights which Uruguay claims in the present case from the 1975 Statute as such; and

(5) it has not been shown that, were there such a risk of prejudice to the rights claimed by Uruguay in the case, that risk is imminent.

32. These points do not cast any doubt on the substance of the facts as such concerning the blockading of the access roads to the international bridges. However, the Court does not see in this "an imminent risk" of irreparable prejudice to Uruguay's right *pendente lite* to construct the Orion mill in Fray Bentos. I disagree with this conclusion of the Order, as it is based on a "reductionist" approach to the concept of "imminent *risk* of irreparable prejudice" and to the scope of "Uruguay's rights in dispute" in this case.

33. This "reductionism" is explained by the fact that the Court has refrained — wrongly in my view — from considering the issue of whether the roadblocks have caused and/or may continue to cause economic and social prejudice to Uruguay. Yet that was the raison d'être of Uruguay's request for the indication of provisional measures. Uruguay requested the indication of provisional measures precisely to protect itself from the considerable harm caused to its trade and tourist industry inherent in the situation created by the blockades. Why do I say wrongly? Because

the aim of those responsible for the blockades was to make Uruguay pay a price for being able to continue the building of the Orion mill in Fray Bentos, in other words a "toll". Through these events — tolerated by Argentina — Uruguay is faced with the following dilemma: either it halts construction of the mill or it pays an economic and social "toll" to continue building it.

34. Things being as they are, the fact that the construction of the mill is continuing is not of itself apt to dispel the "risk of prejudice" to Uruguay's rights which are affected by the blockades. On the contrary, the prejudice represented by the so-called "toll" grows with every passing day. Further, there is an undoubtable and acknowledged relationship between the facts which have objectively created the "toll" and the "right" claimed by Uruguay to build the mill in Fray Bentos pending the final decision by the Court. In no way is the defence of this right by Uruguay subject to the imposition of any form of "toll" by virtue of the 1975 Statute of the River Uruguay or of the procedure of the Court. Also, the "toll" raises a security problem, as the acts of the protestors are a source of alarm and social tension, which could trigger border or transborder incidents.

35. The "toll" in question may essentially be viewed as *lost profit* for the Uruguayan economy, one which carries "a risk of prejudice" for the rights that the country is defending in the instant case on the basis of the Statute of the River Uruguay, particularly the right to continue construction of the Orion mill in Fray Bentos and the right to have the legal dispute between Argentina and Uruguay over the pulp mills decided in accordance with Article 60 of the Statute of the River. As the Court has acknowledged "subsequent events may [in fact] render an application without object" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 66). For example, certain submissions in Argentina's Application of 4 May 2006 have been overtaken by events, ENCE's planned CMB mill having been relocated to Punta Pereyra on the Uruguayan bank of the River Plate. Therein lies the "risk of prejudice" to the rights in dispute for Uruguay in this case. Social peace is much appreciated by industrial concerns. The protestors are well aware of this, as proved by the fact that they began the current road and bridge blockades shortly after Botnia's Orion project was approved by the World Bank and its lending institutions.

36. The prejudice in question is, by its very nature, irreparable, since, as stated by counsel of Uruguay during the hearings, the Court's judgment will not be able to restore the Orion project to Fray Bentos should Botnia decide to leave. Although this is not so for the moment, it is not the point. What matters is the "risk of prejudice" and this risk is a real and present one. Argentina has not taken the measures necessary to put an end to the situation objectively caused by the blockades, or to prevent a repetition of them in future. The "irreparable prejudice" also urgently

needs to be eliminated as there is much more than a "more or less imminent risk". It is indeed a "present risk" for Uruguay, one which exists and has steadily increased since the end of November 2006 with the regrettable consequences that can be readily imagined for the sustainable economic development of the country.

37. This "present risk" also impairs the right relied on by Uruguay to have the dispute settled by the Court in accordance with Article 60 of the Statute of the River Uruguay and not unilaterally. The need to protect that right immediately is not in doubt in my view for the continuation of the prejudice created by the "toll" threatens the very integrity of the legal settlement of the dispute. Nowhere is it stated that the Respondent must tolerate such a situation in order to assert its right in a case before the Court. Moreover, in the practice of the Court, there are examples of provisional measures indicated in accordance with the principle of the sound administration of international justice.

38. I would add that the prejudice caused to Uruguay's economy by the blockades is by no means a prejudice which Uruguay is supposed to suffer under the substantive law applicable to the legal dispute before the Court — in other words, the 1975 Statute of the River Uruguay — nor under the Court's Statute or Rules or a decision of the Court, given that the Order of 13 July 2006 dismissed the request for the indication of provisional measures submitted by Argentina on 4 May 2006 when filing its Application instituting proceedings.

39. Further, this is not prima facie a situation of *damnum sine injuria esse potest*. Uruguay has a right of action to request the cessation of the blockades and actions of the protesters, which are causing the said prejudice to its economy and Argentina has particular obligations here as the State on whose territory the acts in question are being committed, and also as a State party to the present case. It is surprising that, hitherto, these two obligations have not prompted the Argentine authorities to put an end to the blockading of the Argentinian access roads to the international bridges by organized groups of Argentine nationals, who openly state that the object of their action is to halt Uruguay's construction of the Orion mill at Fray Bentos or for it to site the mill elsewhere. Argentina's duties here do indeed objectively exist by virtue of the geographical location of the events which are the cause of the risk of irreparable prejudice in the territory of the Argentine Republic and also by virtue of the nationality of the protesters.

40. The question of the building of the Orion mill at Fray Bentos is one of the elements of the legal dispute on the interpretation and application of the 1975 Statute of the River Uruguay which the Argentine Republic has asked the Court to settle. If, as we should, we view matters in the context of that Statute, which is a bilateral treaty between Argentina and Uruguay, we note prima facie, in Article 1, that the optimum and rational utilization of the river, strictly respecting the rights and obligations deriving from the treaties and other international instruments in

force with respect to either of the Parties, is a basic principle of the treaty and one of the objectives of the Statute of the River.

41. This being so, I can only conclude prima facie that there is also *a legal relation* between: (1) the facts relating to the blockades of roads and bridges by the protesters, tolerated by the Argentine authorities, (2) the present risk of irreparable prejudice to the rights of Uruguay in issue, (3) the principle of the optimum and rational utilization of the River Uruguay and its waters, including for industrial purposes, respecting the régime of the river or the quality of its waters (Art. 27 of the 1975 Statute), and (4) the legal settlement of disputes arising under the Statute. For me, this legal relation is more than adequate in these incidental proceedings for the Court to be able to indicate provisional measures in order to put an end to the blockades concerned. My conclusion is confirmed by the submissions in the Application instituting proceedings, in which Argentina requests the Court to adjudge and declare 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 . . ." (Order, para. 3).

42. In light of the above considerations, and bearing in mind the arguments of the Parties and the documentation presented by them, I consider that the circumstances of the case are such as to support the indication of the *first provisional measure* requested by Uruguay, namely that Argentina:

> "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".

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43. I therefore disagree with the dismissal in the Order of the first provisional measure requested by Uruguay. And I also disagree with the failure to indicate, in the operative paragraph of the Order, a provisional measure seeking to prevent the aggravation or extension of the dispute or render its settlement more difficult, which is the question posed by the *second provisional measure* requested by Uruguay. In any event, the ground (paras. 49 and 50 of the Order) on which the Order dismisses the indication of the second provisional measure requested by Uruguay does not prevent me from supporting it, for I have just concluded above that the circumstances and conditions for the indication of the first provisional measure requested by Uruguay are satisfied in my view.

44. I consider that the particular circumstances of the case — including those subsequent to the hearings which are in the public domain — urgently call for the indication of provisional measures relating to the non-aggravation and non-extension of the dispute addressed to both Parties. On the latter aspect, I therefore diverge from Uruguay's wording

of the second measure it requests. I do so pursuant to Article 75, paragraph 2, of the Rules of Court.

45. The case law of the Court in recent years has stressed the full importance of the Court's power to indicate provisional measures with a view to preventing the aggravation or extension of a dispute independently of the parties' requests. For example, in 1996 — in other words, before the Judgment in the *LaGrand* case — the reasoning in the Order indicating provisional measures in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* stated:

> "independently of the requests for the indication of provisional measures submitted by the Parties to preserve specific rights, the Court possess by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute (cf. *Frontier Dispute, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 18)" *(I.C.J. Reports 1996 (I)*, pp. 22-23, para. 41).

Similar statements have also been incorporated into the reasoning in other Orders after the *LaGrand* case (see *I.C.J. Reports 2003*, p. 111, para. 39).

46. In any event, as the circumstances of the present case are deteriorating, the Court should have indicated provisional measures for both Parties to avoid the aggravation and extension of the dispute. If the Court's dismissal of the first measure requested by Uruguay created any impediment whatever to the indication of such a measure in the operative paragraph of the present Order, the Court could have relied on international law, namely, on the

> "'principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute' (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199)" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* p. 503, para. 103).

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47. Lastly, I concur with the Order as regards its dismissal of the *third provisional measure* requested by Uruguay, but not for the reason indicated (Order, para. 51). I reject the third measure because it is too vague and insufficiently specific and because I consider that the circumstances

of the case do not currently require the indication of a measure so broad in scope.

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48. In short, I concur with the conclusion in the Order regarding the prima facie jurisdiction of the Court to entertain Uruguay's request for the indication of provisional measures and with the dismissal of the third measure requested. On the other hand, I disagree with the Order as regards its dismissal of the first measure requested and as regards its dismissal of the second measure reformulated so as to be addressed to both Parties. These two points of disagreement have prevented me from voting in favour of the Order.

(Signed) Santiago TORRES BERNÁRDEZ.