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mardi 15 septembre 2009 à 10 heures

Tuesday 15 September 2009 at 10 a.m.

12 The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open, and we shall now hear further presentations in the first round of pleadings of the Argentine Republic. I give the floor to Professor Marcelo Kohen. You have the floor, Sir.

Mr. KOHEN:

VI. THE QUESTION OF SITE SELECTION IS AT THE HEART OF THE DISPUTE

1. Mr. President, Members of the Court, it is a pleasure to appear before you once again, to defend the rights of Argentina. This first pleading will examine one of the questions that lies at the heart of the dispute between our two sister republics. In my presentation I shall endeavour to show

— first, that the sitting of the mills is essential in order to assess whether the projects meet the requirements of applicable law;

— second, that Uruguay's arguments which would ignore the presence of a riparian population and existing uses must be rejected;

— third, that it is CARU that has determined the existence of priority uses, with recreation listed in second place;

— fourth, that Uruguay has never taken the steps necessary to determine whether the site chosen is appropriate, and has obstinately refused to discuss this issue with Argentina; and

— fifth, that the site chosen by Botnia is not appropriate and that the arguments fabricated *ex post facto* by the respondent to justify that choice are unfounded.

A. The choice of site is essential for determining whether the project meets the requirements of applicable law

2. Uruguay contends that studies to assess alternative sites are neither obligatory nor necessary[1]. That is false. For one thing, the choice of site is fundamental for assessing the environmental impact of the project on the ecosystem. For another, the choice of site is also

13 essential for determining whether the Botnia plant, built where it is, represents an "optimum and rational" utilization of the River Uruguay as required under the 1975 Statute, or an "equitable and

[1]Rejoinder of Uruguay (RU), paras. 5.92-5.93. CR 2006/49, para. 6 (Boyle).

reasonable" utilization[2], which are criteria both Parties recognize as founded in general international law and reflected in the United Nations 1997 Convention[3].

3. Moreover, Article 7 of the 1975 Statute enables CARU to determine "whether the plan might cause *significant damage to the other Party*"[4]. A Party may sustain such damage not only if environmental requirements are not complied with but also if existing uses of the river are threatened by plans of the other Party.

4. Uruguay incorrectly asserts that neither the 1975 Statute nor general international law requires alternative sites to be assessed[5]. The 1975 Statute refers to general international law, and international practice and instruments reflecting that law require a site assessment based on existing alternative proposals[6].

5. Uruguay then contends that, in this case, there was no reason to assess alternative sites[7]. This overlooks the fact that this mill is the largest industrial installation in the entire history of the River Uruguay. It is a project which could physically be built at other locations. This is not a project which by its nature or purpose could not be built anywhere other than at the location chosen by Botnia.

6. Lastly, Uruguay has put forward a surprising final argument: that those who apply for building permission can carry out an environmental impact assessment only in relation to sites they already own or control[8]. This is evidence that everything had already been lined up when Botnia

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[2]Art. 1 of the 1975 Statute (Memorial of Argentina (MA), Vol. II, Ann. 2; Counter-Memorial of Uruguay (CMU), Vol. 2, Ann. 4); Art. 5 of the Convention on the Law of the Non-Navigational Uses of International Watercourses (General Assembly Resolution 51/229).

[3]MA, paras. 3.163-3.168; CMU, paras. 4.63-4.65; RU, paras. 5.49-5.51.

[4]Emphasis added. MA, Vol. II, Ann. 2; CMU, Vol. II, Ann. 4. French translation: "si le projet peut causer un préjudice sensible à l'autre Partie".

[5]CMU, para. 6.59; RU, para. 5.93.

[6]"Goals and Principles of Environmental Impact Assessment", adopted by the UNEP Governing Council (Decision 14/25, 17 June 1987), Principle 4 (available at <http://www-penelope.drec.unilim.fr/penelope/library/Libs/Int_nal/unep/unep.htm>); Espoo Convention, App. II, Arts. 4 and 5, and App. III, Art. 1 *(b)*; draft articles on "Prevention of Transboundary Harm from Hazardous Activities", adopted by the International Law Commission in 2001 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10); EIA guidelines adopted by the Conference of the Parties to the Convention on Biological Diversity, Decision VIII/28, paras. 4, 5 *(b)*, 5 *(c)*, 25 *(b)*, 27 *(e)*, 28 and 39, Mar. 2006 (available at <http://www.cbd.int/doc/decisions/cop-08/full/cop-08-dec-en.pdf>) (cf. MA, para. 5.56, and Reply of Argentina (RA), paras. 4.69 and 4.70 (judges' folders, 15 Sep. 2009, tab 5).

[7] RU, paras. 5.91-5.92.

[8] RU, para. 5.92.

made the decision to buy the land on which to build the mill, before it had even obtained building permission.

7. Uruguay's assertion that there was no obligation to consider alternative sites is contradicted by the most important precedent in regard to the application of Articles 7 to 13 of the 1975 Statute, namely the 1981 rejection by CARU of the Argentina-Brazil Garabí dam proposal. That project included an evaluation of alternative sites. Here I quote from the notice of rejection which CARU addressed to the Argentine Government [slide 1]:

> "Numerous possible sites for the proposed works were analyzed in the presented study. This allows presuming that the possibility of relocating the proposed works, as well as others, to other sites along the river is not to be ruled out. This would achieve a more harmonious result on the entire river system in order to eliminate any possible sensible damage."[9] [End of slide 1.]

8. Moreover, in its subsequent attempts to justify the choice of site, Uruguay wound up contending that Botnia had indeed done such comparative studies[10]. These alleged studies were not communicated either to CARU or to Argentina before the project was authorized to proceed.

9. At this stage, we may conclude that an obligation existed to consider a number of sites as part of a genuine environmental impact assessment, that that assessment should have been submitted to CARU and that Uruguay did not fulfil that obligation.

B. Uruguay's arguments for ignoring the presence of a riparian population and existing uses are without foundation

10. Members of the Court, if you will permit me now, I should like to draw your attention to an important fact: neither Ñandubaysal nor Gualeguaychú chose to situate itself next door to the Botnia plant. It was Botnia that deliberately chose to situate its plant in close proximity to the second largest population centre on the banks of the River Uruguay — a place which, moreover, was already home to a beach resort and major fisheries breeding grounds.

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[9]Minutes of CARU meeting 9/81 of 18 Dec. 1981, MA, Vol. III, Ann. 3, p. 25; CMU, Vol. IV, Ann. 68. "De nombreux emplacements possibles pour les ouvrages envisagés ont été analysés dans l'étude présentée. Ceci permet de supposer que la possibilité de relocaliser les ouvrages proposés, ainsi que d'autres, à d'autres endroits du fleuve, ne serait pas à écarter. Ce que aboutira à un résultat plus harmonieux sur l'ensemble du fleuve, dans le but d'éliminer toute possibilité de préjudices sensibles." (CMU, Vol. IV, Ann. 68.) (judges' folders, 15 Sep. 2009, tab 6). *[Translation by the Registry.]*

[10]CMU, para. 4.118; RU, para. 5.90.

15 11. Uruguay is trying to use two arguments in order to avoid examining the impact on the presence of a riparian population and existing uses in the area where the mills were established. The first is to assert that air pollution, visual pollution and sound pollution are not covered by the Statute of the River Uruguay[11]. Plainly, air pollution has an impact on the ecosystem of an international watercourse. To borrow the terminology used in Article 36 of the 1975 Statute, it is a "harmful factor in the river and the areas affected by it". Visual pollution and sound pollution, in the particular case before us, threaten the "optimum and rational" utilization, the "equitable and reasonable" utilization of the river, given their inherent contradiction with existing uses of the river at the site chosen.

C. The false dilemma put forward by Uruguay opposing "existing use" against "equitable and reasonable utilization"

12. Uruguay's second argument consists of asserting that existing uses of the river have no priority over possible new uses. As Uruguay puts it, "tourism and fishing must compete with other equitable claims, including industrial and domestic uses resulting in higher levels of phosphorus in the river"[12].

13. I should draw your attention to President Jiménez de Aréchaga's position on the issue. [Slide 2.] To sum up the quotation that you see on the screen, which may be found at tab 7 in your folders, it may be said that treaties are in general based on respect for existing uses, and that respect would seem to be the point of departure for any analysis. The fundamental rule would therefore be *prior in tempore*, *potior in jure*, without prejudice to other solutions that would always take account of existing uses[13]. So there you have the thinking of someone whose influence on his country's positions in matters concerning rivers need no longer be in any doubt. [End of slide 2.]

16 14. Mr. President, the issue is not one of choosing between "existing use" and "equitable and reasonable utilization", as Uruguay contends. To assess whether the construction of the Botnia mill at the site where it is operating constitutes an equitable and reasonable utilization, an optimum and

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[11]CMU, para. 1.23; RU, para. 1.12.

[12]RU, para. 5.51: "le tourisme et la pêche sont concurrencés par d'autres utilisations équitables revendiquées, notamment les utilisations industrielles et domestiques, qui donnent lieu à un accroissement des niveaux de phosphore dans le fleuve". *[Translation by the Registry.]*

[13]Jiménez de Aréchaga, Eduardo, "International Legal Rules Governing Use of Waters from International Watercourses", *Inter-American Law Review*, 1960, Vol. II, pp. 335-336.

rational utilization, of the river, two relevant circumstances need to be considered which Uruguay has obstinately refused to take into account: the site chosen for the mill, and existing uses at that site. This is what is required under the Statute and general international law[14]. Article 8 of the Helsinki Rules[15] reflects international practice, and as an eminent voice in this area has said,

> "without reverting to a traditional practice, which consisted of granting them the quality of acquired rights, the uses in question are assumed to have priority, unless it can be established that the reasons justifying the continuation of those uses are less pertinent, in the light of circumstances, than the reasons arguing in favour of a new activity"[16].

D. It is CARU that identified the existence of priority uses

15. Let us look at yet another important element in site evaluation. In its digest, CARU classified the waters of the river based on their use. [Slide 3.] You see the two relevant articles on the screen, and in your folders at tab 10[17]. In Article 1, you see an initial list of "legitimate" uses of the river's water. In Article 2, you see a second list which sets out a classification of the waters of the river on the basis of their legitimate and "predominant" uses: in that list, waters used for recreational activities are listed as "Use 2". [End of slide 3.]

16. From this perspective, CARU on 11 February 2000 approved the so-called "zoning scheme" of the River Uruguay, that is, the identification of the zones of the river destined for the
17 four uses classified as "predominant". You will see this at tab 11[18]. The Ñandubaysal beach resort is shown as a zone identified for Use 2. [Slide 4.] You can see on the screen a sketch prepared by CARU in August 2003, showing the Use 1 and Use 2 zones very close to the site chosen by

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[14]Art. 6, para. 1 *(e)*, of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (judges' folder, 15 Sep. 2009, tab 8).

[15]Rules on the Uses of the Waters of International Rivers, *ILA, Report of the Fifty-Second Conference, Helsinki, 1966*, London, 1967 (judges' folder, 15 September 2009, tab 9).

[16]Caflisch, Lucius, "Règles générales du droit des cours d'eau internationaux" ["General rules of law of international watercourses"], *Collected courses of The Hague Academy of International Law*, 1989, Vol. 219, p. 159.

[17]*Digest*, Section E3, Title 2, Chap. 4, Arts. 1 and 2; MA, Vol. II, Ann. 12, pp. 276-277; CMU, Vol. IV, Ann. 60.

[18]Ann. 4 to Report 198 of the Water Quality and Pollution Prevention Subcommittee, CARU, Minutes 02/00 of 11 February 2000, and Resolution 3/00 of 11 February 2000, available at <http://mrecic.gov.ar/publicdocuments/>.

Botnia[19]. [End of slide 4.] [Slide 5.] And it was CARU in its "zoning scheme" that established the criterion for priority uses from Use 1 to Use 3[20]. [End of slide 5.]

17. It is worth noting that in CARU's first note to the Uruguayan Government about the pulp mills [slide 6], the Commission explicitly expressed its concern about the existing use for tourism purposes of the area under consideration. Uruguay reproduced this memorandum in Annex 19 of its Rejoinder, but unfortunately, shall we say, "forgot" to include the paragraph you see on the screen. You will find this note in your folders at tab 14[21]. The Uruguayan Government has never replied to this memorandum from CARU. It has not communicated to CARU the slightest information on the choice of site or on any assessment of alternative sites. [End of slide 6.]

E. Uruguay never took the necessary measures to determine the suitability of the selected sites and stubbornly refused to discuss the matter with Argentina

18. Mr. President, I am going to speak plainly: neither Botnia nor Uruguay ever did a serious site selection study for the plant — for the simple reason that Botnia knew all along that the plant would be built just below the General San Martín International Bridge, and knew it even before submitting its project proposal to DINAMA on 31 March 2004. Indeed, Botnia bought the property near the General San Martín Bridge in 2003[22]. On 22 September 2004, Botnia applied to
18 the Uruguayan Government requesting authorization to establish a tax-free zone on the property where the plant was to be built, as well as authorization to build a port facility[23]. All that happened five months before the Uruguayan Government's decision to issue a building permit.

19. Another uncontested fact is that Uruguay has systematically ignored, indeed even rejected, Argentina's request for information regarding the reasons underlying the choice of site and the question of whether the possibility of alternative sites had been examined[24].

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[19]Judges' folder, 15 Sep. 2009, tab 12.

[20]Point 3.1 *(a)* of the proposed zoning scheme of the river, CARU, Minutes 02/00 of 11 February 2000, and Reports made at the Environmental Alert Office of the Municipality of Gualeguaychú to the Compliance Advisor/Ombudsman (CAO), Resolution 3/00 of 11 February 2000, available at <http://mrecic.gov.ar/publicdocuments/>.

[21]CARU, memorandum SET-1413-UR, 17 Oct. 2002. MA, para. 2.5, and Anns., Vol. III, Ann. 12, pp. 79-82. RU, Anns., Vol. II, Ann. R19.

[22]Reply by Argentina (RA), para. 3.75, and Anns., Vol. III, Ann. 43, paras. 1.4.3-1.4.5.

[23]CMU, Vol. II, Ann. 21, p. 2.

[24]RU, paras. 5.91-5.93.

20. We had to wait until September 2006, when the IFC published the final cumulative study, to learn that Botnia had allegedly compared various sites before deciding to locate the mill near the General San Martín International Bridge[25]. [Slide 7.] If we are to believe that study, four sites were identified as potential sites, but the fourth (La Paloma, the only site on the Atlantic coast) was rejected without explanation[26]. [End of slide 7.] The truth is that the impact study that Botnia submitted to DINAMA — as presented by Uruguay in its pleadings — refers in the vaguest of terms, on a single page, to a claimed evaluation of alternative sites[27].

21. Not one document from DINAMA or the ministry responsible indicates that Uruguay did any sort of comparative study of potential alternative sites. A significant point is the fact that Uruguayan legislation was amended in September 2005 by adding a requirement concerning project site evaluation[28]. This requirement did not exist in domestic law when Uruguay authorized construction of the ENCE mail in October 2003 and the Botnia mill in February 2005. The facts are plain to see: Uruguay simply did not do a site selection study or examine the possibility of alternative sites when it issued permits for the mills to be built.

19 22. [Slide 8.] The Hatfield report of April 2006 regarded the information received on the choice of site as unsatisfactory[29]. [End of slide 8.] It was only in its Counter-Memorial of July 2007 that Uruguay sought, for the first time, to explain its position[30].

23. Prior to that time, Uruguay's refusal to discuss the matter was based on its contention that the choice of site was Uruguay's sovereign decision. The Agent of Argentina drew your attention yesterday to the statements by the Foreign Minister, Mr. Opertti, and the head of Uruguay's delegation to CARU in that regard[31].

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[25]MA, Vol. V, Ann. 6, p. 333. CMU, Vol. VIII, Ann. 173. (Sketch, judges' folder, 15 September 2009, tab 15.)

[26]CMU, Vol. VIII, Ann. 173, pp. 2.10-2.11, para. 2.3.2.

[27]Botnia Environmental Impact Assessment submitted to DINAMA, Chap. 3, 31 March 2004, CMU, Vol. X, Ann. 218.

[28]Decree 349/005 of 21 Sep. 2005, Chap. V, Arts. 20 *(b)* and 22 (CMU, Vol. II, Ann. 24).

[29]Hatfield Consultants, *Cumulative Impact Study — Uruguay Pulp Mills*, Apr. 2006, para. A23, p. 18, MA, Vol. V, Ann. 9, p. 504.

[30]CMU, para. 4.118.

[31]MA, para. 2.26, and Anns., Vol. VII, Ann. 4; "Opertti declares Uruguay does not need authorization to build pulp mills", Radio Sarandí, Uruguay, 28 May 2008, New Documents Submitted by Argentina, 30 June 2009, Vol. II, Press Articles; MA, paras. 2.27 and 4.21-4.22, and Anns., Vol. VII, Ann. 5; CR 2009/12, pp. 20-21, para. 18 (Ruiz Cerutti).

24. For my part, I should be a little more rigorous in my line of argument than Uruguay has been, Mr. President: a State's decision as to whether or not to comply with its international commitments is a sovereign decision of that State. Uruguay seems "sovereignly" to have overlooked the requirements of the 1975 Statute.

25. Uruguay's negotiators within the GTAN have gone even farther in refusing Argentina's request for information [slide 9]: "the reason the plant was located at a certain place is alien to the Group [the GTAN] and is not one of its competences since, besides being a decision taken prior to the present government, the location of the plants is a fact"[32]. [End of slide 9.]

26. I certainly do not need to spend time on the indefensible argument under international law that the choice of site was the decision of a previous government[33]. I would also note that Uruguay's negative attitude in refusing to discuss the reasons underlying the choice of site has from the outset been combined with Uruguay's clear intention to impose the mills as a fait accompli.

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27. In fact, the thesis put forward by Uruguay, invoking Uruguayan sovereignty as the sole basis for the choice of site, provides a dazzling illustration of the "Harmon doctrine", also known as the "doctrine of absolute sovereignty over watercourses", which no one would dare claim today[34]. If each party were to build projects or use the waters of the river without regard for its neighbour's shore opposite, and even if it claimed that the quality of the waters would not be affected — which is not the case here — we would be following a logic alien to the notion of community of interests which this Court has embraced in characterizing the legal régime of international watercourses[35].

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[32]MA, para. 2.65, and Anns., Vol. IV, Ann. 4: "la raison pour laquelle l'usine s'est installée à un endroit déterminé n'est pas du ressort du Groupe [le GTAN] et elle ne figure pas parmi ses compétences, puisque, outre le fait qu'il s'agit d'une décision antérieure au présent gouvernement, la localisation des usines est déjà un fait". (Judges' folder, 15 Sep. 2009, tab 16.) *[Translation by the Registry.]*

[33]Tinoco Arbitration, *Aguilar-Amory and Royal Bank of Canada claims (Great Britain* v. *Costa Rica)*, 18 October 1923, *RIAA*, Vol. 1, p. 377.

[34]Jiménez de Aréchaga, Eduardo, "International Legal Rules Governing Use of Waters from International Watercourses", *Inter-American Law Review*, 1960, Vol. II, pp. 329-330; Caflisch, Lucius, "Règles générales du droit des cours d'eau internationaux" ["General rules of law of international watercourses"], *Collected courses of The Hague Academy of International Law*, 1989, Vol. 219, pp. 48-50; McCaffrey, Stephen, *The Law of International Watercourses. Non-Navigational Uses*, Oxford, OUP, 2001, p. 111.

[35]*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929*, *P.C.I.J. Series A, No. 23*, p. 27; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment*, *I.C.J. Reports 1997*, p. 56, para. 85.

F. The site chosen is not suitable

28. Professors Sands and Wheater began yesterday, and Professor Colombo will continue tomorrow, to demonstrate that the site chosen is entirely inappropriate from the environmental standpoint. For my part, I shall now address the fact that it is also an improper site from the standpoint of existing tourism and recreational uses.

29. It is important to point out that both Botnia and ENCE claim to have taken account of the need to bear in mind the existing use of tourist areas. [Slide 10.] Indeed, Botnia rejected the La Paloma site on Uruguay's Atlantic coast precisely for that reason! Uruguay even goes so far as to say that Botnia ruled out other sites farther downstream because they were near recreational areas[36]! The argument cited for ruling out Nueva Palmira was also its proximity to recreational and historically significant areas situated on the Uruguayan shore[37].

30. The final cumulative impact study from EcoMetrix puts forward a whole series of speculation as to the claimed absence of any impact from the Botnia mill on tourism. If the mill
21 had no impact on tourism, then why was the La Paloma site rejected precisely on tourism grounds! [End of slide 10.] You will have seen that the company that owns the campground at the Ñandubaysal beach resort brought a case against Botnia before the Argentine courts over the losses incurred by its business as a result of the Botnia mill. In connection with that case, Argentina transmitted letters of request to Uruguay, which Uruguay refused to comply with citing reasons of "security, public order and essential State interests", in violation of its obligations under international law[38]. [Slide 11.] Press reports, of which you see an example on the screen[39], as well as witness statements from campground staff, business people and tourists in Ñandubaysal, are eloquent testimony to the pulp mill's impact on tourism[40]. [End of slide 11.]

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[36]CMU, para. 6.58. (Sketch, judges' folder, 15 September 2009, tab 15.)

[37]CMU, Vol. VIII, Ann. 173, para. 2.3.2.

[38]Uruguayan Ministry of Education and Culture, Note of 10 Feb. 2009, Uruguayan Ministry of Education and Culture, Note of 10 Feb. 2009 (2), Presidency of Uruguay, Resolution 20/52, 9 Dec. 2008; Argentine Ministry of Foreign Relations, International Trade and Worship, Note CGABI No. 097/09, 29 Apr. 2009: New Documents Submitted by Argentina, 30 June 2009, Vol. II, Refusal of Judicial Assistance under Binding Treaties.

[39] "Mal olor y tensión por Botnia", *La Nación*, 28 Jan. 2009, <http://www.lanacion.com.ar/nota.asp?nota_id=1094106> (judges' folder, 15 September 2009, tab 17).

[40] Affidavits from Lisandra Espósito, Carlos María Guidoni, María Gisela Odoná, Gisela Vanesa Rojas, Nicolás Lorenzo Costa and Christián Ariel Barrere, 30 Jan. 2009, available at <http://mrecic.gov.ar/publicdocuments/>; affidavits from Hugo Baus, Christián Quiroz and others, 26 Jan. 2009, Ann. II to the Letter from the Assembly of Gualeguaychú to the CAO — Notarial Proceedings on bad smells at Ñandubayzal, available at <http://mrecic.gov.ar/publicdocuments/> (judges' folder, 15 Sep. 2009, tab 18).

31. The presence of a giant pulp mill has brought great upheaval to the lives of those living in Gualeguaychú. The development of the town in recent years has centred on tourism, and Gualeguaychú has chosen to follow a rigorous policy of protecting the environment by, for example, setting up a model wastewater treatment system[41]. Gentlemen, tourism and the pulp industry cannot be reconciled. A carnival and nauseating odours cannot be reconciled. Beaches, boating and a polluted river cannot be reconciled. Algae and bathing cannot be reconciled. And the smoke from the Botnia mill, which drifts for kilometres, is not the best way to conceal the

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presence of this installation in an environment which was previously natural and pristine. Unfortunately, the local population has been suffering health problems attributable to air pollution from the Botnia mill, and these have become a sad fact of life[42].

G. The arguments developed *ex post facto* to justify the choice of site are unfounded

32. Let us now look at what Uruguay refers to as the "five key factors" in the choice of the Botnia site[43]. The first four factors are purely economic, and there would be nothing to say about them if these considerations were justified and were aligned not only with the company's commercial interests but also with the economic interest of the communities concerned on either side of the river. Here are Uruguay's five "factors", then:

"(1) Accessibility: on a navigable river and near a major [international] bridge over that river"[44]

To be sure, the river is navigable, but not only in the area of Fray Bentos/Ñandubaysal. And there is a certain caustic humour in identifying access to the international bridge as a key criterion: clearly, what that bridge does, in effect, is to give Botnia access to services on the Argentine side.

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[41]Gualeguaychú, "Wastewater treatment plant", RA, Vol. II, Ann. 47.

[42]"Botnia issues apology for odours" (*El País*, 22 Nov. 2007), RA, Vol. III, Ann. 52; "Botnia press release" (17 Aug. 2007), RA, Vol. III, Ann. 48; "District Attorney Enrique Viana: 'Botnia is Inconsistent with Uruguay's Environmental Status'" (*Ipodagua*, 20 Apr. 2009), New Documents Submitted by Argentina, 30 June 2009, Vol. II; "Samples of the Thousands of Affidavits and Records of Patient Examination", New Documents Submitted by Argentina, 30 June 2009, Vol. II; "Botnia: Fray Bentos Residents in Sad Resignation at Smells and Pollution", New Documents Submitted by Argentina, 30 June 2009, Vol. II; "Botnia: To smell, or not to smell, that is the question" (Press Release, 28 Jan. 2009), New Documents Submitted by Argentina, 30 June 2009, Vol. II; "Explosion in gas pipe at Botnia causes alarm. Fray Bentos: Shock wave and smell reach capital of Río Negro" (*El País*), New Documents Submitted by Argentina, 30 June 2009, Vol. II; "Explosion at Botnia causes stink in Fray Bentos" (*Clarín*, 27 Feb, 2009), New Documents Submitted by Argentina, 30 June 2009, Vol. II.

[43]RU, para. 5.90.

[44]"[L]'accessibilité : sur un fleuve navigable et proche d'un pont important [international] sur ce fleuve" *[translation by the Registry]*.

Botnia's aim of taking advantage of the proximity of Gualeguaychú, and its quick and easy connections to Buenos Aires, without taking account of environmental requirements or the economic and social needs of local inhabitants, has inflamed passions.

"(2) Raw materials: proximity to existing plantations of eucalyptus"[45]

This is a respectable argument, one might say, but these forests are plantations established by Botnia itself or by its predecessors, with World Bank support, over a period dating back 20 years!

23 [Slide 12.] In addition, as you can see on the screen, FOSA, one of the Botnia group of companies, owns plantations in various parts of Uruguay, not only near Fray Bentos[46]. [End of slide 12.]

"(3) Manpower: ready availability of labour in Fray Bentos"[47]

The vast majority of workers employed in Fray Bentos during the construction phase are no longer working for Botnia, and most are now unemployed. Today, only 40 inhabitants of Fray Bentos are employed by the Finnish company. The economic and social situation has gone from bad to worse[48]. Here is what elected officials in the Department of Río Negro, where Fray Bentos is situated, have to say: [slide 13] "After construction of the Botnia project was completed, we wound up with the highest unemployment rate in the country"[49]; "Botnia has not been a cure-all for us . . . lots of people said that this was a paradise being established here, but in the end that turned out not to be the case. We have lots of unemployed people here, and we have to keep fighting so that people can fish and protect themselves, because we're in trouble"[50]. The

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[45]"[L]es matières premières : la proximité de plantations d'eucalyptus existantes" *[translation by the Registry]*.

[46]Sketch, judges' folder, 15 Sep. 2009, tab 15.

[47]"[L]a main d'œuvre : la grande disponibilité du personnel à Fray Bentos" *[translation by the Registry]*.

[48]New Documents Submitted by Argentina, 30 June 2009, Vol. II, Press Articles: "La planta de Botnia está que explota", *El País*, Montevideo, 28 Feb. 2009; "District Attorney Enrique Viana: 'Botnia is Inconsistent with Uruguay's Environmental Status'", 20 Apr. 2009; "A media máquina" ["Half speed ahead"], *El País*, Montevideo, 19 Apr. 2008, available at <http://www.elpais.com.uy/Suple/QuePasa/08/04/19/quepasa_341882.asp>; "La pregunta del millón: ¿Cuántos fraybentinos trabajan en Botnia?", *Zona Oeste,* Fray Bentos, 6 May 2008, available at <http://mrecic.gov.ar/publicdocuments/>; "Los empleos invisibles de Botnia en Río Negro: que al menos sirvan de experiencia", Guayubira press release, Montevideo, 28 May 2008, available at <http://www.guayubira.org.uy/> (judges' folder, 15 Sep. 2009, tab 19).

[49]Departmental Councillor Irma Lust, at a special session of the Río Negro Departmental Council, 21 Nov. 2008, Minutes 121, p. 21, available at <http://www.juntarionegro.gub.uy/Actas/Acta121.pdf> (judges' folder, 15 Sep. 2009, tab 20).

[50]Departmental Councillor Marcos Gérez, at a special session of the Río Negro Departmental Council, 27 July 2009, Minutes 143, p. 4, available at <http://www.juntarionegro.gub.uy/Actas/Acta143.pdf> (judges' folder, 15 September 2009, tab 20).

paramount consideration has not been sustainable development, but solely the interests of the investor. [End of slide 13.] The statements of disappointment from the people of Fray Bentos are there to underscore this point, as you can see also in the articles from the Uruguayan press that you will find at tab 19 in your folders. They also illustrate another recurring theme in Botnia's policy:

24 lying as a means of action. Indeed, of the claimed 4023 jobs directly created by Botnia (in the mill, in the plantations and in logistical support functions)[51], only 560 were counted by the company that just bought the bulk of Botnia's Uruguayan business[52].

"(4) Availability of water: it can be extracted and returned to the river without risk to drinking water supply or pollution"[53]

Our scientific experts will examine the issue of water pollution. For now, I would simply point out that Botnia had to provide an alternative water supply intake for the town of Fray Bentos in December 2007, upstream from the effluent discharge site[54].

"(5) Suitability: no likelihood of significant harm to the river environment or Argentina"[55]

33. It is no accident that this factor comes last in Uruguay's list. Later this week, we shall come back to the damage caused to the river and the areas affected by it, and the risks. Uruguay is well aware that the presence of the Botnia mill is harmful to the existing uses of the river for tourism, fishing and recreation, since it claims in its Rejoinder that it has taken measures "to mitigate the impact of the Botnia plant on existing uses"[56]. Even though it claims to have "detailed" them fully in its Counter-Memorial[57], there is no specific information to be found in that text.

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[51]Information available at Botnia Fray Bentos, <http://www.botnia.com/es/default.asp?path=284,1530>.

[52]"UPM and Metsäliitto sign a letter of intent on new ownership structure of Botnia", UPM, Helsinki, 15 July 2009; available at <http://w3.upm-kymmene.com/upm/internet/cms/upmcms.nsf/%20$all/97f7495329b69288c22575f500244019?OpenDocument&qm=menu,0,0,0>. See also "Cayendo en la realidad. Botnia desmiente a Botnia", available at <http://www.guayubira.org.uy.celulosa/desmiente.html>.

[53]"[l]a disponibilité de l'eau : elle peut être extraite et rendue au fleuve sans risque pour la réserve d'eau potable et sans danger de pollution" *[translation by the Registry]*.

[54]RA, paras. 4.80 and 4.180; and Anns., Vol. III, Ann. 53.

[55]"[L]a viabilité : pas de probabilité de dommages significatifs à l'environnement du fleuve ou à l'Argentine" *[translation by the Registry]*.

[56]RU, para. 5.51: "pour atténuer l'impact de l'usine Botnia sur les utilisations actuelles [existantes]" *[translation by the Registry]*.

[57]*Ibid.*

34. Finally, I would add one "detail" which seems to have escaped Uruguay's notice. As

25 you can see on the screen [slide 14], the point where, inter alia, some 13 tonnes of phosphorus and 68 tonnes of nitrogen are discharged every year is situated 237 metres from Argentina. That is less than the distance from this room to the Javastraat. On a shared river[58]. [End of slide 14.]

Conclusion

35. Mr. President, I shall now move on to my conclusions. The facts are simple. The EcoMetrix report of September 2006 plainly states that "[e]nabling people [i.e., Botnia's employees] to live within the city instead of in the rural areas was an important consideration for Botnia"[59]. The focus was solely on maximum profitability and investor convenience: these were in fact the only real reasons why the site was chosen, without concern for the vulnerability of the ecosystem, existing uses or any other economic or social consideration in regard to the riparian populations. And unfortunately, Uruguay caved in completely to the Finnish company's demands.

36. Without even mentioning the many other possibilities that existed for siting a mill of this size somewhere other than on the River Uruguay, a glance at a map of the river [slide 15] shows that there are extensive areas on both sides of the river below Fray Bentos where there are no cities or towns and no existing uses[60]. [End of slide 15.]

37. The location of the mill therefore remains an open question. In your Order of 13 July 2006[61], you refer to the possibility of the mill's being dismantled. In addition, the location of the Botnia mill is listed as point A in the group of questions identified by the Parties as a basis for the process of facilitation by the King of Spain[62].

26 38. Thank you, Mr. President, for your kind attention. I would now I ask you to give the floor to my colleague and friend, Mr. Alain Pellet, who will begin the presentation of Uruguay's breaches of its procedural obligations.

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[58]Judges' folder, 15 Sep. 2009, tab 12.

[59]MA, Vol. V, Ann. 6, p. 344: "permettre aux gens [c'est-à-dire les fonctionnaires et les employés de Botnia] de vivre en ville plutôt que dans des endroits ruraux a été un facteur important pour Botnia" *[translation by the Registry]*.

[60]Judges' folder, 15 Sep. 2009, tab 12.

[61]*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports*, p. 133, para. 78 (citing *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 19, para. 31).

[62]Declaration of Madrid, 20 Apr. 2007 (RA, Vol. II, Ann. 38).

The VICE-PRESIDENT, Acting President: Thank you, Professor Kohen. I now give the floor to Professor Alain Pellet.

Mr. PELLET:

VII. THE RESPECTIVE ROLES OF CARU AND THE COURT

1. Mr. President, Members of the Court, Articles 7 to 12 of the 1975 Statute of the River Uruguay establish the procedure to be followed whenever a Party "plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters"[63]. In this procedure the Administrative Commission of the River Uruguay (CARU) — which, by the way, has important and varied responsibilities — and the Court each have a role to play. The former, CARU, is the structure through which the Parties must "ordinarily" consult and keep each other informed, while the latter — pursuant to Article 12 — has the last word where the Parties have been unable to reach agreement within the times specified in these provisions. The respective roles are therefore both different and complementary: while CARU, despite its limited powers to make determinations and take decisions, is essentially a framework for consultation between the Parties, the Court is vested with final decision-making power. But, taken as a whole, this complex mechanism aims at a single objective: to prevent one Party from imposing its views on the other, while ensuring that a definitive solution can be achieved within a reasonable period of time.

2. And I shall put it in the simplest terms, Mr. President: first CARU, then the Court — *last*, but obviously *not least!* — and not only for reasons of prestige, but also because it is you, Members of the Court, who, even within the context of Article 12 of the 1975 Statute, have — or should have . . . — the final say, a power of which you have been deprived by Uruguay. Because, in respect of the Court, there is a crucial difference — which Uruguay stubbornly continues to deny — between its role under Article 12 of the Statute and its role under Article 60 of the Statute. I shall return to this — but first, CARU.

[63] Art. 7; see also Art. 27.

I. CARU's role

3. Uruguay endeavours, with evident great conviction, to pay tribute (lip service would undoubtedly be more accurate . . .) to the "very important" role of CARU[64], carefully describing CARU's various functions pursuant to the Statute[65], only then to deny CARU the powers conferred upon it in the Chapter II procedure, more specifically under Articles 7 to 11. Yet, it is those powers, *and they alone*, which concern us here. Mr. President: by circumventing CARU, Uruguay has breached its treaty commitments. I leave aside for the moment the question of whether the Parties agreed not to abide by them — a question which I already mentioned yesterday morning and to which Mr. Alan Béraud and Professor Marcelo Kohen will return in greater detail. The only problem for the time being is to ascertain what were — what are — the Parties' obligations in this respect.

[Slide No. 1: Article 7, first paragraph, of the Statute.]

4. As Uruguay quite rightly states, "the plain text of Article 7 speaks for itself"[66]. The first paragraph of Article 7 now appears on the screen; it is to be found — together with all of the other articles bearing on the procedure to be followed — at tab 21 of the judges' folder. Let us read this provision — it is a crucial one: the entire procedure to be followed depends upon it:

> "If one Party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters, it shall notify the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days whether the plan might cause significant damage to the other Party."

5. In the case before us:

— the two planned mills — Botnia and ENCE — were inarguably "works . . . liable to affect navigation, the régime of the river or the quality of its waters" — and Uruguay does not deny this, by the way[67]. These are very big industrial projects, in fact the biggest ever planned, or in Botnia's case built, along the river and notification to CARU was therefore obviously mandatory: under Article 27 of the Statute, "[t]he right of each Party to use the waters of the

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[64]See CMU, p. 135, para. 2.191; see also: p. 139, para. 2.199, p. 170, para. 3.33; RU, p. 35, para. 2.12.

[65]See CMU, pp. 133-146, paras. 2.188-1.205, and RU, p. 34-35, paras. 2.10-2.11.

[66]RU, p. 40, para. 2.20.

[67]CR 2006/49, p. 10, para. 2 (Boyle); CMU, pp. 74-75, para. 2.76, p. 80, para. 2.87, p. 175, para. 3.41; RU, p. 77, para 2.83.

river, within its jurisdiction, for . . . industrial . . . purposes shall be exercised without prejudice to the application of the procedure laid down in Articles 7 to 12 when the use is liable to affect the régime of the river or the quality of its waters" — that plainly was the case; (I apologize for having forgotten to include the English version of Article 27; you will therefore only be able to find it at tab 1 from yesterday morning);

— nor does Uruguay deny that it failed to notify CARU in accordance with this provision[68] (ample proof of this is moreover seen our opponents' zeal in arguing that the Parties agreed to waive this formal requirement[69]).

6. Now, Mr. President, in no way is notification optional: whenever a project (or, *a fortiori*, two of them) falls (fall) within the scope of the first paragraph, the Party planning the project(s) MUST notify the Commission ("deberá comunicarlo"); this is a legal duty. Thus, Uruguay's first obligation — and first violated obligation: to notify CARU. Had that been done — it was not — but *if* it had been, what would have or should have taken place?

7. It would then have been for the Commission to "determine" — all I am doing is reading
29 Article 7, Mr. President — to *determine* "on a preliminary basis and within a maximum period of 30 days whether the plan might cause significant damage to the other Party". Obviously, the Commission was unable to determine anything at all because it had not been notified. But, had it been, what it would have had to make was indeed a decision, whether or not our Uruguayan friends like it[70] — no matter that such a determination is made "on a preliminary basis": to determine means to take a position and in the circumstances the rest of the procedure should have been conditioned by that position.

[End of slide No. 1 — slide No. 2: Article 7, second and third paragraphs, of the Statute.]

8. What is more, the second paragraph of Article 7 leaves no doubt: "If the Commission *finds* this to be the case or if a *decision* cannot be reached in that regard, the Party concerned shall notify the other Party of the plan through the said Commission." Uruguay waxes indignant: "Reading Article 7 in context, it is clear that the isolated words Argentina relies on are *not* meant to

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[68]RA, p. 155, para. 2.14. See also, e.g., CMU, p. 153, para. 3.7, or RU, p. 47, para. 2.34.

[69]CMU, pp. 172-195, paras. 3.35-3.73; RU, pp. 43-46, paras. 2.27-2.33 and pp. 120-168, paras. 3.8-3.71.

[70]RU, p. 128, para. 3.23. See also CMU, p. 144, para. 2.205.

confer on the Commission the power to authorize or reject projects."[71] Undoubtedly, Mr. President! But that is not at all what Argentina argues . . . The question is not whether the Commission has the power to authorize or reject a project: it does not; BUT it is the body that *must* be notified of any plan liable to cause significant damage to the other Party and that is empowered to *determine* (i.e., to *decide*) quickly (and initially on a preliminary basis) whether such is the case. There is no question but that CARU is part of the process leading up to the authorization — or not — of a plan submitted by one of the riparian States.

9. This, Mr. President, is an obligatory step which, as I said, determines the entire remainder of the procedure. And it falls squarely within the general spirit of the 1975 Statute, which makes the Commission the linchpin, the key body for co-ordination between the Parties in virtually all areas covered by the Statute. In failing to carry out this crucial step, Uruguay put itself at odds in respect of the entire remainder of the procedure. Despite Argentina's efforts, Uruguay never made any attempt "to put CARU back in the picture" by complying with the subsequent provisions of Chapter II, which also assign the Commission a role that cannot be reduced to that of a mere letterbox[72].

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10. What must happen — what should have happened — next? If, as was inevitable, CARU had determined that there was a risk of the type referred to in the first paragraph of Article 6, Uruguay, as it is obliged to do under the second paragraph of that article, would have had to notify Argentina of the two plans "*through* . . . the Commission", by complying with the requirements of the third paragraph — it refrained from doing so and confined itself to furnishing uninformative documents, largely bypassing CARU in the process. My colleagues will return to this.

[End of slide No. 2.]

11. And it is through the Commission that the Party planning to carry out the works — Uruguay here — must furnish the notified Party — Argentina — with the additional documentation necessary to enable it to make a judgment within 180 days. "This period", according to the last paragraph of Article 8, "may be extended at the discretion of the Commission if the complexity of the plan so requires". That, Mr. President, is another *decision* that CARU may take under

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[71]RU, p. 38, para. 2.17.

[72]RA, p. 102, para. 1.109. See also CMU, p. 82, para. 2.90; RU, pp. 40-42, paras. 2.22-2.24.

Article 8 — and clearly it can only take it if it has been notified and if the rules governing the provision of the required documentation have been observed.

[Slide No. 3: Article 9 of the Statute.]

12. Pursuant to Article 9, it is possible that matters might go no further: the notified Party may, either expressly or tacitly, come to the conclusion that the building of the works should not cause significant damage to navigation, the régime of the river or the quality of its waters; if so, the works may be built *or* the planned work *authorized*. But please allow me a brief pause here, Mr. President.

31 13. Against all reason (but doggedly[73]), Uruguay contends that the obligation to notify the Commission under Article 7 may be performed at any point provided it is "timely". I am not going to revisit the fact that the language itself of Article 7 cannot be reconciled with such a lax interpretation[74]: a "plan" is plainly something not yet realized. Moreover, the wording of Article 9 confirms that the obligation to notify must be satisfied *before* authorization: "If the notified Party raises no objections or does not respond within the period established in article 8, *the other Party may carry out* <u>*or authorize*</u> the work planned". This means — and this is unquestionable — that it is only at the Article 9 stage at the earliest that the authorization to build may be given, and therefore certainly not before the information required under Article 7 has been given. In acting otherwise, Uruguay attempted to present CARU with a fait accompli — rather, Uruguay presented it with nothing because it did not notify it . . .

[End of slide No. 3.]

14. By the same token, there was of course no chance of arriving at the situation described in Article 11 of the Statute, which also requires the notified Party to inform the other Party, within the 180-day period, of its conclusion that the execution of the planned work "might significantly impair navigation, the régime of the river or the quality of its waters".

15. Mr. President, it was indeed the entire machinery for co-operation under Articles 7 to 11 of the Statute of the River Uruguay which was disabled — all the CARU-related obligations laid down in Chapter II which were breached:

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[73]CMU, pp. 62-71, paras. 2.52-2.70; RU, pp. 47-59, paras. 2.34-2.52.

[74]MA, pp. 157-158, paras. 4.12; RA, pp. 82-85, paras. 1.89-1.94.

— CARU was neither notified of nor furnished information on Uruguay's plans;

— as a result, it was deprived of its power to determine the risk the plans posed to the river and areas affected by it, and to Argentina of course;

32 — subsequently, it was systematically bypassed by Uruguay, which did not fulfil its obligations, acting "through the Commission", to notify Argentina and to provide to it the documents required by the Statute,

— even though here also the Commission could have exercised the limited, but nevertheless real, decision-making power it holds in regard to time-limits.

16. In a few moments my colleagues will describe in greater detail the procedural breaches ascribable to Uruguay. Before turning to the role of the Court in this procedural mechanism, I would simply like to add a general comment: one might consider these violations to be rather trivial all in all — and Uruguay does its utmost to try to make you think so, Members of the Court; just one example, among others, of its attempts: "With respect to both ENCE and Botnia, Uruguay notified, exchanged information and consulted with Argentina over an extended period of time. Even if these steps did not precisely track the tidy, step-wise process set forth in Articles 7 to 12, there can be no honest dispute that the "régime complet d'obligations procedurales" Argentina describes was nonetheless fulfilled in all meaningful respects. The law can require no more."[75] Of course. After all, why take umbrage that the Party planning to build two enormous pulp mills did not provide the information it was its duty to give to CARU and through it, if it did so otherwise? This reasoning is wrong, first because the Party planning the mills did *not* otherwise provide this information, as my distinguished colleagues and friends are going to show. And also because, in bypassing the Commission, Uruguay eviscerates the 1975 Statute in respect of a part of its very core — a part by which Argentina lays great store: that being that the Statute is not merely a bilateral treaty imposing synallagmatic obligations on the Parties; it establishes an institutional

33 framework for extensive ongoing co-operation of which CARU is the centrepiece and key element. By failing to fulfil its obligations to CARU, Uruguay calls the entire Statute into question. As the Court observed in paragraph 81 of its Order of 13 July 2006:

[75] RU, p. 388, para. 7.9.

> "the establishment of CARU, a joint mechanism with regulatory, executive, administrative, technical and conciliatory functions, entrusted with the proper implementation of the rules contained in the 1975 Statute governing the management of the shared river resource; . . . the Statute requires the parties to provide CARU with the necessary resources and information essential to its operations; . . . the procedural mechanism put in place under the 1975 Statute constitutes a very important part of that treaty régime". (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006,* p. 133, para. 81).

Needless to say, I could not have put it any better.

II. The roles of the Court

17. Mr. President, the Court plays an important role in this procedural mechanism, which has been designed to allow for the harmonious, balanced use of the shared resource of the River Uruguay. Article 12 of the 1975 Statute makes the Court the final "decision-maker" where the Parties have failed to reach agreement within 180 days following the notification referred to in Article 11. In addition, and in much more traditional fashion, the Court has jurisdiction under Article 60 to settle any dispute concerning the interpretation or application of the Statute which cannot be settled by direct negotiations. That is the basis on which this case has come before it — precisely because Uruguay by its conduct prevented the case from being referred to the Court pursuant to Article 12.

[Slide No 4: Article 12 of the Statute.]

18. I return, Mr. President, to a favourite refrain of Uruguay — which would like us to say that the notified Party holds a veto over the other Party's plans which it (the notified Party) feels

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are liable to cause significant damage to navigation, the régime of the river or the quality of its waters[76]. Uruguay would like this because it would be an error which Uruguay hopes would exonerate it from responsibility. But, and I am firm in reiterating this, we are saying nothing of the sort. What we are saying — and what follows merely from observing the sequence of Articles 7 to 12 of the Statute — is that, if the Parties are not in agreement either at the Article 9 stage or at the Article 11 stage, neither Party may impose its views on the other — but without this meaning that the process grinds to a halt or that the plan must necessarily be abandoned. But in such a situation it is neither for Argentina nor for Uruguay to decide: all they can do is, in accordance with the clear provisions of Article 12, follow "the procedure indicated in Chapter XV".

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[76]CMU, pp. 89-90, paras. 2.110; RU, p. 80, para. 2.87.

[End of slide No. 4 — slide No. 5: Article 60 of the Statute.]

19. Chapter XV has only one article — Article 60 — providing for a unilateral referral to the Court in the event of dispute concerning the interpretation or application of the Statute. But it is clear just from the face of the article that, while Article 12 does refer to this "procedure", Article 60 forms a separate basis of jurisdiction concerning a specific subject: the question (on which, by definition in this context, the two Parties have been unable to agree) of whether or not the plan is harmful within the meaning of Articles 7 *et seq*. And one element proving that this is indeed a separate basis for the Court's jurisdiction is that, in this case, the second paragraph of Article 60, which makes reference to Articles 58 and 59, plainly does not apply.

[End of slide No. 5 — slide No. 6: paragraph 3 of the Application.]

20. Under Article 12, the Court is called upon to authorize or refuse to authorize the carrying out of a project planned by one of the Parties and considered by the other to pose a threat to navigation, the régime of the river or the quality of its waters. That is not the case here:

— Argentina has seised the Court on the basis of Article 60, not Article 12, as expressly stated in paragraph 3 of the Application, now on the screen;

35 — As Uruguay completely disregarded the Chapter II procedure, no such procedure can be put to an end by referral to the Court under Article 12: a procedure never begun cannot be ended . . .

— Finally — and perhaps most importantly — it would be ludicrous for the Court now to confine itself to determining whether a plan is potentially harmful for the purpose of either allowing or forbidding its execution, meaning the construction or authorization to build (the only object of Article 12), whereas the authorizations were issued (unlawfully), on 9 October 2003 for the ENCE mill and on 15 February 2005 for Botnia, the construction work on the latter was carried out in haste from April 2005 and the mill has been in service (when it sees fit to operate . . .) since 9 November 2007.

21. But Uruguay persists and, in the rather obscure passage of the Rejoinder devoted to the role of the Court[77], it tries to mislead us into believing that, notwithstanding the unambiguous terms of the Application, the Court has been seised on the basis of Article 12. As evidence of this, the

[77]RU, pp. 109-113, paras. 111-113.

only evidence[78], it cites a diplomatic note of 14 December 2005 in which the Argentine Secretary for Foreign Affairs concluded that, given the Parties' failure to reach agreement, "as specified by Article 12 of the River Uruguay Statute, this paves the way for the procedure provided for in Chapter XV of the said Statute"[79]. The facts nevertheless remain, Mr. President, that the note of 14 December 2005 "corrects itself" and at the end cites Article 60 of the Statute as the basis for jurisdiction in the case then being contemplated for submission to the Court, and that Argentina did not rely in its Application on Article 12; it — properly — founded the Court's jurisdiction on Article 60 of the Statute.

[End of slide No. 6.]

22. Does this matter, Mr. President? Unsurprisingly, Uruguay strives to minimize the importance of this: "That is not to say that the Court lacks the competence to render a decision concerning the meaning of Articles 7 to 12, or whether either of the Parties has violated those procedural provisions."[80] So acknowledged . . . But three comments all the same:

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— first, in so recognizing, Uruguay (rightly) relies, expressly, on Article *60* of the Statute, *not* Article 12;

— secondly, Uruguay itself is no longer sure whether the Court does or does not need to rule on the question of whether the ENCE plant was liable to cause, and whether the Botnia plant causes and is liable to cause, "significant damage to the other Party" or "affect . . . the régime of the river or the quality of its waters", because sometimes it gives one answer[81] and sometimes the other[82]; citations to the chapters in the Rejoinder will be found in the written verbatim record . . . Actually, Mr. President, there can be no doubt that the answer is in the affirmative: of course, the Court needs to rule on this point! But, while the only effect of the Court's decision had it been rendered under Article 12 would have been to authorize or not the building of the disputed mills, in the present case it is for the Court to find that Uruguay has

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[78]See RU, p. 110, para. 2.134.

[79]MA, Ann. 27.

[80]RU, p. 111, para. 2.136.

[81]RU, p. 109, para. 2.132.

[82]RU, p. 399, para. 7.24.

incurred responsibility for all of its violations of the 1975 Statute, as I said yesterday, and to draw the inferences from that; and it is in order to avert this that,

— thirdly, Uruguay nevertheless returns again to Article 12 later on in the same paragraph — namely, paragraph 2.136 of its Rejoinder:

> "Yet, the fact that the case has come to the Court through Article 12 nonetheless has important implications for the issue of remedies" since "if the Court finds that a project will not cause significant harm, the situation should be no different than it would have been if, as under Article 9, the notified State had come to the conclusion that the project did not threaten harm; i.e., the initiating State may proceed with its project without any further procedural obligations."[83]

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23. Perhaps that would be true, Mr. President, *if* we were in the "Article 12" phase of the procedure described in Chapter II of the Statute. But the point is that we are not! In attempting to confront Argentina and the Court with a fait accompli, Uruguay has kept the procedure from operating as it should and, even leaving aside the "substantive" violations of the Statute represented by the construction and commissioning of the Botnia plant, Uruguay must answer for the complete disregard of the Chapter II procedure, which in itself is a violation giving rise to its responsibility and calling for appropriate reparation.

24. Members of the Court, I have now completed this "introduction to the procedural violations committed by Uruguay". I thank you for your attention and ask you, Mr. President, to give the floor to the Mr. Alan Béraud, who will point out the many contradictions characterizing Uruguay's arguments.

The VICE-PRESIDENT, Acting President: Thank you, Mr. Pellet; I now give the floor to Mr. Béraud. Mr. Béraud, you have the floor.

VIII. URUGUAY'S MANY CONTRADICTIONS

1. Mr. President, Members of the Court, it is a real privilege and honour for me to appear before the Court for the first time to defend the rights of Argentina, my country.

2. Throughout this case, Uruguay has given us contradictory versions of its attitude to the 1975 Statute. This tactic makes it difficult to determine what the argument is which Uruguay seeks to invoke against Argentina.

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[83] RU, p. 111, para. 2.136.

3. I would like to draw the Court's attention to the various different arguments given by Uruguay with respect to its position on Articles 7 to 12 of the 1975 Statute, as well as on its desperate attempts to try and conceal the decision announced in 2003 by the Minister for Foreign

38 Affairs, Mr. Opertti, before his country's senate[84]: to proceed at all cost and without let up with the construction of the pulp mills on the left bank of the River Uruguay without any concern for the 1975 Statute.

First version: Uruguay claims that it has fully complied with the obligations laid down by Articles 7 to 12 of the Statute, in particular the obligation to notify CARU and Argentina laid down by Article 7

[Slide 1.]

4. In the hearing concerning Argentina's request for the indication of provisional measures, Uruguay stated that "It is already apparent prima facie that Uruguay has complied with its international obligations under the Statute."[85] Uruguay reiterated this in its Rejoinder (text at tab 22 in your folders): "It has fully satisfied the obligations incumbent on it under Articles 7-12 with respect to the Botnia plant, as well as the ENCE plant."[86]

5. In particular, Uruguay has stressed the fact that it allegedly notified CARU and Argentina of the pulp mill projects "Both CARU and Argentina were notified before construction began on the plants, and far in advance of the time when any irreversible steps were taken."[87] Alas, this has not been the case. Uruguay has never explained when or how it satisfied its obligations under Articles 7 to 12 of the Statute. It has never notified CARU.

[End of Slide 1.]

39 **Second version. Uruguay notified neither CARU nor Argentina but claims that it was able to postpone the notification until the commissioning of the plants, so has not breached the 1975 Statute**

[Slide 2.]

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[84]See *infra*, footnote 24.

[85]CR2006/47, p. 43, para. 28 (Condorelli).

[86]RU, para. 1.10.

[87]CMU, para. 1.32.

6. This version highlights the fact that Uruguay is systemically seeking to reinterpret as it chooses the scope of the obligations laid down by Articles 7 to 12 of the Statute in order to minimize its violations. The key expression in its Rejoinder on this subject is "implementation of a project". For Uruguay, "the implementation of a project must be the initiation of activities that are capable of harming to the river. In this case, that is not the *construction* of the ENCE and Botnia plants . . . but only their *operation*"[88]. It adds (the text may also be found at tab 22 in your folders)

> "Uruguay was not obligated to notify the Commission or await its 'summary determination' under Article 7 before issuing initial environmental authorisations to either ENCE or Botnia, or proceeding with the implementation of the Botnia project. Thus, Uruguay did not violate Article 7."[89]

Uruguay seeks to empty the obligations laid down by Articles 7 to 12 of the Statute of any substance and real meaning by replacing them with the obligation to conduct post-operational monitoring, as laid down in the Statute, to check for pollution[90]. Uruguay is trying to shift its position from the claim that it has notified CARU and Argentina about the Botnia project to the contrary version: "we did not notify, but we have not breached the Statute".

[End of Slide 2.]

Third version. According to Uruguay, it did not notify because the mere knowledge of the mill projects by CARU and Argentina satisfied the obligation to notify laid down by the 1975 Statute

[Slide 3.]

40 7. Uruguay seeks to reduce the obligation to notify to a simple informal exercise of informing, as though the mere fact that CARU and Argentina knew of the projects sufficed for Uruguay to have complied with the obligation laid down by the Article 7 of the Statute. Uruguay states that (the text is at tab 22)

> "Argentina was aware of the Botnia project beginning in or around November 2003, and by April 2004 (10 months before the AAP was issued) CARU had taken cognizance of the project. In other words, . . . both Argentina and CARU were well informed about the Botnia project."[91]

[End of slide 3. Slide 4.]

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[88]RU, para. 2.121; original italics. See also CMU, para. 2.181.

[89]RU, para. 3.5.

[90]RU, para. 1.2.

[91]CMU, para. 3.62.

8. For Uruguay, the mere knowledge of the existence of the mill projects planned by foreign companies was supposed to suffice for CARU and Argentina, for both of them, to consider that they had been notified, in accordance with Article 7 of the Statute. But it also denies what it has said:

> "It must also be pointed out that, as a matter of logic, the Article 7 notification cannot occur at the earliest moments of planning because there will not be sufficient information at that stage to enable CARU to render an opinion about whether or not the project will cause significant harm to the other State."[92]

Mere knowledge is therefore insufficient and, from the formal standpoint, let us remember that it is the President of the Uruguayan delegation to CARU who denies this version before the Senate of her own country: "according to Article 7, it is the State which must make the submission"[93]. Mere knowledge of the mills planned cannot take the place of compliance with the obligations in the Statute.

41 [End of slide 4. Slide 5.]

9. Uruguay goes even further. It states that this mere knowledge had a twofold effect: not only did it replace the obligation to notify, it also sufficed for Argentina to have accepted "the construction" of two mills in 2003/2004 — in the plural, as Uruguay is fond of repeating — : "first, in 2003/2004, when the Parties' Foreign Ministers agreed that the plants would be built"[94]. But in view of the information Uruguay had on 9 October 2003, the date the meeting of the Presidents and Ministers for Foreign Affairs at Anchorena and the date the initial environmental authorization — AAP — was issued for the ENCE plant, that country was not in a position to authorize "construction", not even in accordance with its own internal law. It is Uruguay which states that "Uruguay granted Botnia its AAP on 14 February 2005. Botnia's AAP was merely the first stage in the permitting process and did not, itself, allow Botnia to engage in any construction, or related activities"[95]. Mere knowledge of this was also manifestly inadequate for Argentina to give its assent to the "construction" of the plants in full knowledge of the facts — which it did not

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[92]CMU, para. 2.53.

[93]See above, footnote 25, MA, Anns., Vol. VII, ann. 5, p. 88. See also, MA, p. 38, para. 2.27.

[94]CMU, para. 3.85.

[95]RU, para. 4.10.

possess — and for it to abandon its claims regarding the application of the Statute and the impact of the mills on the River Uruguay and its ecosystem.

[End of slide 5.]

Fourth version. Uruguay claims that it has complied with its obligations under the Statute — in Articles 7-12 — unilaterally and outside the Statute

[Slide 6.]

10. According to Uruguay, as Professor Alain Pellet pointed out (you will find the text at tab. 22 in your folders) "With respect to both ENCE and Botnia, Uruguay notified, exchanged of
42 information and consulted with Argentina over an extended period of time. Even if these steps did not precisely track the tidy, step-wise process set forth in articles 7-12"[96]. Uruguay endeavours to show that it allegedly set itself up as guardian and judge of the significant harm which the two immense plants might cause to the river and its ecosystem.

[End of slide 6. Slide 7.]

But while Uruguay was not unaware that

> "[i]n order to ensure that each Party's right to make optimum use of the river is not unfairly impaired by the other, the Statute creates a system of notification, information sharing, consultation . . . when one Party is planning a project of sufficient scope to affect the river and thus potentially harm it or the other State"[97],

it boasts that it acted purely unilaterally.

[End of slide 7. Slide 8.]

In fact, "Uruguay has authorized these plants, and approved the operation of the Botnia plant, only because it is convinced that they pose no risk of harm to the Uruguay river or the aquatic environment. And the evidence, . . . fully supports Uruguay's decisions."[98] It adds, with respect to the Botnia plant and Argentina that: "[i]n the absence of any significant risk to
43 Argentina, when authorizing a site for the plant Uruguay is fully entitled to rely on its sovereign right. . . "[99]. By itself, Uruguay also "decides" the risks and harm for Argentina.

[End of Slide 8. Slide 9.]

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[96]RU, para. 7.9.

[97]CMU, para. 1.27.

[98]RU, para. 2.131.

[99]CMU, para. 4.61.

11. After unilaterally making these assessments, Uruguay seeks to have us believe that it was under no obligation to inform Argentina and that it transmitted information, but outside the Statute. It also considered that information adequate and even if it should prove inadequate, too bad for Argentina! Uruguay confirms this: "But Argentina cannot simultaneously argue both (i) that it lacked sufficient information to assess the plants' effects and (ii) that they will 'manifestly' cause significant harm."[100] Uruguay also seeks to spirit away any obligation to consult, as openly admitted by Minister Opertti: "national construction work . . . there is no obligation to consult"[101]. Only to inform, but it is for Uruguay to decide, how and on what.

[End of slide 9.]

Fifth version. Uruguay did not notify or consult in accordance with the Statute because the Parties had agreed to set aside the application of the Statute

[Slide 10.]

12. To dispense with the Statute, Uruguay does what it can to try and reduce the case to an agreement reached in 2003/2004[102]. For Uruguay (see texts at tab 22):

> "the question of exactly when notice is due to CARU under Article 7 is largely academic in the circumstances of this case. Whenever that notice might have been due, the fact is that the Parties specifically agreed to dispense with that step here. There is thus no need for the Court to resolve what is largely an abstract debate."[103]

44 So, Uruguay unambiguously admits that from now on it is not going to submit the projects to CARU "the fact that Uruguay never subsequently submitted the projects to CARU for a preliminary determination under Article 7 of the 1975 Statute . . ."[104]. Even if there was no notification, it does not matter.

[End of slide 10. Slide 11.]

13. Without the slightest embarrassment, Uruguay also maintains that, following that claimed agreement, it is no longer obliged to consult Argentina in accordance with the Statute

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[100]CMU, para. 3.106.

[101]See *infra* footnote 27.

[102]See *supra* footnote 11.

[103]RU, para. 2.34.

[104]RU, para. 3.95.

(tab 6 in your folder) "Since Argentina had previously agreed that the plant would be built . . . Uruguay was under no obligation to participate in additional consultations under the Statute."[105]

[End of slide 11. Slide 12.]

However, referring to the same stated approach, Uruguay blithely proclaims the precise opposite before the Court:

> "there is no serious argument that the ability of CARU or Argentina to review the projects and have their concerns considered and addressed was impaired in any way when the AAPs to ENCE and Botnia were issued in October 2003 and February 2005, respectively . . . There was still more than enough time for CARU to review the project and for Argentina's concerns to be addressed before the projects were carried out."[106]

45 My colleague and friend Professor Kohen will come back to the real significance of the 2003/2004 arrangements later.

[End of slide 12.]

14. Mr. President, the circle of contradictory versions is closed. Had Uruguay immediately complied in full with its obligations under Articles 7 to 12 of the Statute, why would it have needed to conclude an agreement with Argentina in order to circumvent CARU? Either it complied with its obligations or it circumvented them. Uruguay cannot rely on both at the same time. If Uruguay had not breached the obligations laid down by Articles 7 to 12 of the Statute, it would have had no need to come up with other versions. It had to modify its versions of the case for the purposes of the present proceedings, as though one could choose the most "fitting" version regardless of the reality. But no, Mr. President, Members of the Court, the reality cannot be ignored. I now come to the question of the decision taken by Uruguay, but perhaps it is a suitable moment for the coffee break, or shall I continue?

The VICE-PRESIDENT, Acting President: No, Mr. Béraud, you may continue. I think you still have 15 minutes at the most; it would be best if you finished your presentation, after which the Court will take the break.

Mr. BERAUD: Thank you, Mr. President, I will continue then.

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[105]CMU, para. 3.71.

[106]CMU, para. 3.13.

The reality is the decision taken by Uruguay not to comply with the obligations laid down by the 1975 Statute

15. Uruguay's successive, contradictory versions have only one purpose: to seek to conceal the decision expressed by the then Minister for Foreign Affairs, Mr. Opertti, before his country's Senate on 26 November 2003 (you will find this quotation on the screen and at tab 23 in your folders):

[Slide 13.]

> "it is natural that the Government of Uruguay is not required to place that issue within the Commission's jurisdiction that would involve waiving jurisdiction which the Government of the Republic is not disposed to waive: it is as simple as that"[107].

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Mr. Opertti is clear: for Uruguay the question of the pulp mills fell solely within Uruguayan sovereignty and would not be submitted to CARU or to the Statute.

[End of slide 13. Slide 14.]

16. The President of the Uruguay delegation to CARU, Ms Martha Petrocelli, confirmed before the Environment Committee of her country's senate, two years later, on 12 December 2005, her country's desire to deliberately evade submitting the mill projects to CARU. (You will find this statement at tab 24.) Indeed, the President of the senate committee noted Uruguay's "ruse": "One of the arguments put forward is that if consultations had taken place, the answer would have been no." And lastly, he asks Ms Petrocelli:

— "What would have happened if the answer had been no?"

— Ms Petrocelli: "The works would not have been carried out."[108]

This is stating the obvious. Since then, Uruguay has unhesitatingly and unwaveringly acted in accordance with this strategy.

[End of slide 14. Slide 15.]

17. This decision to place the construction of the pulp mills on the River Uruguay outside the ambit of CARU and the 1975 Statute was confirmed by the President of Uruguay, in May 2006 (you will find the text at tab 25):

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[107]Senate of the Eastern Republic of Uruguay, Foreign Affairs Committee, meeting of 26 November 2003. Statement by the Minister for Foreign Affairs, Mr. Didier Opertti, MA, Anns., Vol. VII, Ann. 4, p. 74 and RA, p. 69, para. 1.73. See also MA, p. 37, para. 2.26 and RA, p. 148, para. 2.4.

[108]Senate of the Eastern Republic of Uruguay, Environment Committee, meeting of 12 Dec. 2005, statement by the Uruguayan delegates to CARU, MA, Anns., Vol. VII, Ann. 5, p. 89. See also MA, p. 39, para. 2.27.

47 "The Estatuto further establishes a procedure . . . to ensure that each party is informed by the other party about the works it intends to carry out and that each party has the opportunity to make observations. Uruguay met this obligation … however it did not do so by means of the procedure established in the Estatuto."[109]

[End of slide 15. Slide 16.]

18. In March 2008, Mr. Opertti again confirmed that Uruguay had never intended to hold consultations with Argentina under the pretext that there was no obligation to do so, these being national projects carried out in national territory (tab 26):

"According to Opertti, all this time, information has been misconstrued as consultation . . . Opertti emphasized that, insofar they [the celullose plants] are Uruguayan national construction works, carried out within Uruguayan territory, there is no obligation to consult."[110]

[End of slide 16. Slide 17.]

19. Mr. Luis Hierro, Vice-President of Uruguay when this decision was taken in 2003, stated on 2 June 2009 that Mr. Vázquez, President of Uruguay, had not kept his word to the Argentine President that the pulp mill would not be built (see tab 27):

"Mr. Hierro maintained that President Vázquez did not keep his word to former Argentine President Néstor Kirchner, since he had promised not to build cellulose plants. He said so all throughout 2004 . . . Anyway, he subsequently changed his mind and that turned Argentina against Uruguay."[111]

48 [End of slide 17.]

20. Minister Opertti's words do actually reflect Uruguay's position — the other statements confirm them — since the case has developed in accordance with this decision from the outset: no statute, no notification, no consultations, evading any negative reply to CARU and, on Argentina's part, following a wholly and exclusively Uruguayan decision-making process, conforming solely to its own sovereignty and setting aside the obligations of international law, even if the River Uruguay is a watercourse shared with Argentina and even if this river is governed by a special régime under international law — the 1975 Statute. Uruguay knew perfectly well that its pharaonic projects were "liable" to affect the river and the areas affected by it and to cause significant harm to Argentina

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[109]Eastern Republic of Uruguay, Presidency, Uruguay gave information on construction of pulp mills, 29 May 2006, MA, Anns., Vol. VI, Ann. 13, p. 79. See also RA, para. 2.3.

[110]Radio Sarandi, Interview given by Former Uruguayan Foreign Affairs Minister Didier Opertti: "Opertti stated that Uruguay needs no permission to establish cellulose plants", 28 Mar. 2008. New Documents submitted by Argentina, Vol. II Other Documents, Press Articles. Uruguayan Officials' Acknowledgements.

[111]Espectador.com, "Hierro criticized Uruguay's Foreign Policy" (2 June 2009). New Documents submitted by Argentina, Vol. II Other Documents, Press Articles. Uruguayan Officials' Acknowledgements.

and to the ecosystem. But Uruguay preferred to take risks and bear all the consequences of them. This country preferred to ensure the foreign investment in the Botnia plant on the precise site chosen by the latter, spurning the rights and interests of the riverine populations concerned, even if they are the principal beneficiaries of the régime of protection and preservation of the river, placed by the Statute under the responsibility of the two riparian States and CARU.

[Slide 18.]

21. Uruguay's effort — utterly vain in fact — to try and avoid, before the Court, the inescapable reality of its decisions must be saluted if it is accepted that "the Botnia plant necessary falls within the notification and information-sharing obligations laid down by the 1975 Statute" (tab 28):

> "In his 26 November 2003 remarks, Minister Opertti articulated his view that the ENCE plant did not fall within the competencies of CARU . . . As Uruguay stated on the record at the oral hearings on Argentina's provisional measures request, the ENCE plant (and the Botnia plant) do fall within the notification and information-sharing obligations of the 1975 statute. This is not in dispute in these proceedings."[112]

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This admission speaks for itself.

[End of slide 18.]

Conclusion

22. *First*, Uruguay decided from 2003 onwards that the pulp mills planned on the left bank of the River Uruguay would be built without reference to the machinery in the Statute of the River Uruguay. Mr. Opertti, Minister for Foreign Affairs, said as much in his country's Senate: "it is as simple as that". The President of the Uruguayan delegation to CARU, Ms Petrocelli, gave the reason for this: "the works would not have been carried out". This decision of 2003 fixed *ne varietur* the single, unwavering line of conduct followed since then by Uruguay.

Second, once the Argentine Application had been submitted to the Court, Uruguay sought to conceal this decision by stating — solely for the purposes of this case — that the ENCE and Botnia plants on the River Uruguay "do fall" within the scope of application of the Statute. *Ex post* and as the proceedings developed, Uruguay concocted the various contradictory versions I have just

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[112]CMU, para. 3.41 ; original italics.

described to you. First, it claimed that it had fully complied with the obligations laid down by Articles 7 to 12 of the Statute, in particular with the obligation to notify CARU and Argentina of the pulp mill projects. Then it admits that it did not make that notification. But it claims that that does not constitute a breach of the Statute because it could comply with that obligation later or because mere knowledge of the projects would have been sufficient for CARU and Argentina to consider themselves notified. Then it claims that it complied with its statutory obligations, but this time outside the Statute. Lastly, it seeks to have us believe that the question of compliance with the Statute does not have the slightest importance because it had agreed with Argentina not to use the machinery of the Statute.

Third, all these versions are mutually exclusive. There is no question of choosing one of
50 them. The contradictory and indefensible arguments cannot obscure the fact that Uruguay's actions resoundingly confirm its decision not to submit the projects to construct the gigantic ENCE and Botnia plants to CARU and not to comply with its obligations of information, notification, consultation and prior agreement laid down by the Statute. Responsibility and its legal consequences follow therefrom; and

Fourth, Uruguay's attempts to minimize its breaches of the rules of the Statute and to reduce the case solely to the obligation of post-operational monitoring of the Botnia plant — which, moreover, it did not comply with — merely seek to divert the Court's attention from the real issues raised by this case.

23. Thank you, Mr. President, Members of the Court, for your attention. May I, Mr. President, ask you to give the floor to my colleague, Professor Laurence Boisson de Chazournes, after the coffee break perhaps? Thank you.

The VICE-PRESIDENT, Acting President: Thank you, Minister, for your oral argument. The time has come for us to take our traditional coffee break, of 15 minutes this time. The meeting is suspended.

The Court adjourned from 11.40 a.m. to 11.55 a.m.

The VICE-PRESIDENT, Acting President: The hearing is resumed and I give the floor to Professor Laurence Boisson de Chazournes. You have the floor, Professor.

Ms BOISSON de CHAZOURNES:

IX. URUGUAY HAS BREACHED ITS OBLIGATIONS TO NOTIFY

1. Mr. President, Members of the Court, you have just heard my colleague Alan Béraud describe and enumerate to you the various strategies deployed by Uruguay in an attempt to justify its breaches. The description of these various strategies may perhaps have reminded you of dance steps, perhaps even of a tango. But these strategic steps — or dance steps — tango steps, must not obscure the fact that Uruguay has breached its obligations to notify as set out in Articles 7 and 8 of the Statute.

51 2. Moreover, Uruguay is well aware of the consequences of failure to comply with these obligations since it stated that: "The non-compliance with the rules stated in those provisions plainly gives rise to international responsibility."[113] It could not be put better and applies absolutely to our case.

3. I will show:

(1) that Uruguay was under an obligation to inform CARU and to notify Argentina of the ENCE and Botnia mill projects through CARU, which it did not do;

(2) that Uruguay was under an obligation to provide the Party notified with complete documentation prior to of any authorization to construct, which it did not do;

(3) and that informal contacts can in no event serve as a substitute for informing CARU and notifying Argentina of the projects through CARU;

(4) by failing to comply with its obligations to notify, Uruguay has breached the object and purpose of the Statute.

[113] DU, para. 2.72.

(1) Uruguay should have informed CARU and notified Argentina of the for the ENCE and Botnia mill projects through CARU

4. Mr. President, the ENCE and Botnia pulp mills are projects "which are liable to affect navigation, the régime of the river or the quality of its waters"[114]. Argentina should therefore have been notified of them through CARU under the terms of Articles 7 and 8 of the Statute. Moreover, Uruguay itself does not deny that the two projects are works which "might affect" the quality of the river's water and fall within the scope of application of Articles 7 *et seq*. of the Statute[115].

5. Uruguay also accepts that the obligations to notify did apply since, during the 2006 hearings, a counsel stated that "Uruguay has discharged the obligations imposed upon it by Articles 7 *et seq*. in good faith"[116].

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6. The ENCE and Botnia projects should therefore indeed have been submitted to CARU. The quibbles of Uruguay's then Minister for Foreign Affairs, Mr. Opertti, some of whose comments have already been referred to, before the Uruguayan Senate in 2003 to the effect that, as the pulp mill projects were not bi-national and did not entail joint use of a shared natural resource, they should be submitted "exclusively to Uruguayan legislation"[117], are, if I may say so, completely irrelevant to the Statute of the River Uruguay.

7. The application of the Statute of the River Uruguay has absolutely nothing to do with the national or bi-national character of an activity, to borrow Mr. Opertti's terminology. The application of the Statute relates to the object and purpose of the Statute, namely, the management and protection of the River Uruguay and the areas affected by it. In this case, the planned mills were situated on the left bank of the River Uruguay and used its waters. The river and the areas affected by it were liable to suffer significant harm caused by the plants. Compliance with the Statute was therefore at issue and still is.

8. To claim, as Mr. Opertti does, that the only competent body for deciding whether the pulp mills posed a threat to the quality of the waters of the river was Uruguay's Ministry of the

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[114]Art. 7, para. 1, of the Statute.

[115]CMU, para. 2.87.

[116]CR 2006/47, para. 15 (Condorelli). See also CR 2006/49, p. 10, para. 2 (Boyle) and p. 20, para. 11 (Condorelli). See also CMU, para. 3.4; DU, para. 1.10.

[117]Minutes, statement by the Minister for Foreign Affairs, Mr. Didier Opertti, to the Uruguayan Senate (November 2003), MA, Anns., Vol. VII, Ann. 4, p. 71, tab 3.

Environment is equally incorrect[118]. This interpretation, in flagrant breach of the 1975 Statute, seeks to circumvent the rules laid down by Articles 7 and 8 of the Statute. This desire to circumvent the rules of the Statute is even more clearly apparent in another remark by the same Mr. Opertti, when he said: "Recognizing that the Commission has specific competence at this stage in the procedure would amount to acknowledging the presumption that Articles 7 and 8 apply."[119]

53 9. Here is the admission. Articles 7 and 8 of the 1975 Statute were to be set aside if the ENCE and Botnia plants were to be built. Moreover, the same Mr. Opertti, confirmed his comments in an interview given in May 2008[120].

10. The comments by Ms Petrocelli, which have also already been referred to, and who is the former President of Uruguay's delegation to CARU, are similar in tone. Before the Environment Committee of the Uruguayan Senate, Ms Petrocelli acknowledged that the pulp mill projects had been neither communicated to CARU nor notified to Argentina[121].

11. Members of the Court, the obligation to inform CARU and notify Argentina of the ENCE and Botnia projects should have been complied with. This obligation stems from both Articles 7 and 27 of the Statute. Article 7 applies to "works which are liable to affect navigation, the régime of the river or the quality of its waters" and Article 27 concerns the uses of the water of the River Uruguay. According to Article 27, a Party envisaging the use of the waters for industrial purposes "when the use is liable to affect the régime of the river or the quality of its waters" — I would point out that Botnia extracts no less than 60 million cubic metres of water per year[122] — must inform CARU and notify the affected Party of such use. Uruguay has not done so.

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[118] *Ibid*., tab 3 of the judges' folders.

[119] RA, para. 1.73.

[120] Radio Sarandi, Interview given by former Uruguayan Minister Didier Opertti: "Opertti stated that Uruguay needs to permission to establish cellulose plants" (28 May 2008). New documents submitted by Argentina, 30 June 2009, Vol. II.

[121] Minutes, speech by the President of the Uruguayan delegation to CARU, Ms Martha petrocelli, to the Uruguayn Senate (12 September 2005), MA, Anns., Vol. VII, Ann. 5, p. 7, tab. 4.

[122] Resolution by the Uruguayan Minister for Transport and Public Works (12 September 2006), MA, Anns., Vol. VII, Ann. 16, p. 381.

12. Uruguay cannot allege that Article 27 of the Statute grants it a claimed right to "the discharge of potentially harmful substances"[123] into the River Uruguay, a natural resource, I would point out, shared by Argentina and Uruguay. The ENCE and Botnia projects entailed sufficiently large uses "liable to affect the régime of the river and the quality of its waters" and thus prompted the application of Article 27 as well as Chapter II of the Statute. There was no provision in the

54 Statute permitting Uruguay to exonerate itself from the application of the obligations to inform CARU and notify the Party affected[124]. There was no provision in the Statute which gave Uruguay a licence to pollute or a right to pollute the River Uruguay. It should have complied with these obligations.

13. Uruguay has also sought to evade its obligations by claiming that Argentina did not require compliance with the obligations to notify laid down by the 1975 Statute as regards the ENCE and Botnia projects[125]. This is obviously wrong. The authorization issued to ENCE on 9 October 2003 was given despite the fact that CARU had already requested information about the project on 17 October 2002 and 21 April 2003[126]. The information transmitted by DINAMA to CARU on 14 May 2003 only contained information already known to the public at large, which certainly did not meet the requirements of Article 7 and 8 of this Statute[127].

14. At the extraordinary meeting of CARU on 17 October 2003, scarcely eight days after Uruguay had given ENCE authorization, the Argentine delegation to CARU also called for compliance with Article 7 of the Statute. The President of CARU, the Argentine Ambassador, García Moritán, made the following declaration — the text may be consulted in your folders at tab 24: "The Argentine delegation had been surprised precisely because all the previous statements up to then had underlined the fact that, before a decision was taken, the question would be referred to CARU for consideration. The delegation did not see how this resolution by [the Ministry of Environmental Affairs of Uruguay] . . ., authorizing the construction of the pulp mill at M'Bopicuá,

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[123]CMU, para. 4.10.

[124]MA, para. 4.64.

[125]RU, paras. 38.85-3.90.

[126]Notes SET-10413-UR of 17 October 2002 and SET-10617-UR of 21 April 2003, MA, Anns., Vol. III, Ann. 12, p. 81 and Ann. 16, p. 99.

[127]Note SET-10706-UR of 15 August 2003, MA, Anns., Vol. III, Ann. 18, p. 109.

could be in accordance with the provisions of Article 7 of the Statute of the River Uruguay."[128]

55 The statement by Ambassador García Moritán confirms that the authorization to construct the ENCE plant was granted without CARU being informed and without Argentina being given prior notification of this project through CARU.

15. The reply by the President of the Uruguayan delegation to CARU at the same extraordinary meeting in October 2003 also says a lot about the circumvention of the rules of the Statute of the River Uruguay. The President of the Uruguayan delegation to CARU admits not being "in a position to put forward or express any other kind of views"[129]. He also says: "This plan had not arrived here yet"[130]. Members of the Court, there is really nothing to add: Uruguay has displayed admirable consistency in seeking to exonerate itself from the obligations arising from Article 7 of the Statute.

16. In 2005, a similar situation to the one I have just described arose relating to the authorization issued on 14 February 2005 by the Uruguayan Ministry of the Environment for the Botnia pulp mill project. Argentina, which had learned of this authorization through the media, sought, through its delegation to CARU, to bring the matter before the Commission to achieve compliance with the obligations stemming from Chapter II of the Statute.

17. At the meeting of CARU on 11 March 2005, the Vice-President of the Argentine delegation to CARU, Mr. Rodríguez, made the statement which you will find in your folder at tab 25: "[the] delegation had learned unofficially through the media . . . that Uruguay had granted initial environmental authorization to the Finnish company Botnia for the construction of a pulp mill in the vicinity of Fray Bentos"[131] and that "there were precedents in this respect"[132]. As in the

56 case of the ENCE plant, the Uruguayan delegation to CARU said that it did not have any information on the Botnia mill project. On a proposal from the Uruguayan delegation, CARU submitted a further request for information to DINAMA, the Uruguayan institution responsible for

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[128]CARU, Minutes 11/03, 17 October 2003, MA, Anns., Vol. III, Ann. 5, p. 36, tab 24 in the judges' folders.

[129]*Ibid.*, p. 39, tab 24 in the judges' folder.

[130]*Ibid.*, tab 24 in the judges' folder.

[131]CARU, Minutes 3/05, 11 March 2005. MA, Anns., Vol. III, Ann. 31, p. 257, tab 25 in the judges' folder.

[132]*Ibid.*, tab 25 of the judges' folder.

protection of the environment — this time in relation to the Botnia project — a request which elicited no response from Uruguay[133].

18. Subsequently, Uruguay behaved in an unlawful way similar to what it had done in the case of the ENCE and Botnia mills, authorizing the construction of the Botnia port terminal on 5 July 2005 without first informing CARU or notifying Argentina of this project[134]. Again, Argentina learned of this project through the Uruguayan media. Whereupon, Argentina again formally called upon Uruguay to comply with its obligations under Article 7 of the 1975 Statute, by a Note dated 27 June 2005, in other words, before Uruguay had given authorization for the port terminal[135]. Once this authorization had been granted by Uruguay, the Argentine request was twice made again formally in CARU, this request by Argentina even being coupled with the request for the suspension of the works until CARU had made a decision on the project[136]. Nothing happened.

19. Pursuing its systematic policy of unilateral authorization, Uruguay on 12 September 2006 authorized Botnia to extract and use the waters of the river for industrial purposes for the production of pulp[137]. On 16 November 2007, Uruguay further authorized the commissioning of the Ontur port terminal at Nueva Palmira[138]. Members of the Court, these authorizations for facilities associated with the Botnia plant were all given in breach of the procedure of Articles 7 and 8 of the Statute.

20. Showing great imagination, Uruguay uses yet another diversion by claiming that the practice of Argentina and Uruguay with respect to Article 7 of the 1975 Statute showed that the

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authorizations had been notified to CARU "after the fact"[139]. This does not conform either to the requirements of the 1975 Statute or the practice of the two States.

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[133] *Ibid*., pp 257-258, tab 25 in the judges' folder.

[134] Resolution TO 39/2005 by the Uruguayan Ministry of Transport and Public Works (5 July 2005), MA, Anns., Vol. VII, Ann. 6, p. 101.

[135] Note MREU 165/05 from the Argentine Embassy of Uruguay to the Ministry of Foreign Affairs of Uruguay of 27 June 2005, MA, Anns., Vol. II, Ann. 7, p. 145.

[136] CARU, Minutes 08/05 and 09/05, MA, Anns., Vol. III, Ann. 34, pp. 302-303 and Ann. 35, pp. 315-316.

[137] Resolution by the Ministry of Transport and Public Works of 12 September 2006, MA, Anns., Vol. VII, Ann. 16.

[138] Note CARU-ROU 069/07 (16 Nov. 2007), RA, Anns., Vol. II, Ann. 34.

[139] RU, para. 2.42.

21. The practice followed by the Parties is illuminating however. In 2001, CARU adopted a decision concerning the M'Bopicuá port, which explicitly refers to Articles 7 *et seq.* of the Statute stating that the two Parties undertook "to prepare the necessary documents on the project, in accordance with the provisions of Article 7 *et seq.* of the Statute of the River Uruguay"[140]. In 2004, Uruguay submitted the project for the development of the Nueva Palmira port installations. CARU approved it on 27 January 2006 in application of the requirements of the 1975 Statute[141]. Argentina was notified by Uruguay of these much smaller-scale projects than the pulp mills through CARU, even before any authorization had been given.

22. Recent practice relating to the Cartisur port terminal project confirms the scope and meaning of the obligations laid down in Articles 7 and 8 of the 1975 Statute. At the CARU meeting of 19 December 2008, the Uruguayan delegation communicated information on the Cartisur project under Article 7 of the 1975 Statute[142]. Subsequently, by a note of 22 January 2009, Uruguay notified Argentina of this project through CARU[143]. Then, by a note of 18 February 2009, the Argentine delegation to CARU announced that, under Article 8 of the 1975 Statute, it considered that the information provided by Uruguay was incomplete[144]. And again, through CARU on 30 April 2009, Uruguay provided Argentina with additional information on this project[145]. Mr. President, Members of the Court, an examination of the practice followed by the States — the two States, Argentina and Uruguay — confirms the interpretation given by Argentina
58 of Articles 7 and 8 of the Statute. In no event is it possible to speak of any "modifying", or even "abrogative" practice, even were such practices to exist in international law. It is a practice which confirms compliance with the treaty and the interpretation of it given by Argentina.

23. In order to justify its breaches of the obligation to inform CARU of the ENCE and Botnia plant projects, Uruguay also submitted a list of some 170 small-scale industrial projects,

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[140]CARU, Minutes 4/2001, 27 Apr. 2001, MA, Anns., Vol. III, Ann. 2, p. 13.

[141]CARU, Minutes 1/2006, 27 Jan. 2006, RA, Anns., Vol. II, Ann. 12.

[142]CARU, Minutes 15/08, 19 Dec. 2008, new documents submitted by Argentina, 30 June 2009, Vol. II.

[143]Note CARU-ROU 002/09 of 22 Jan. 2009, Minute 02/09, 23 Jan. 2009, new documents submitted by Argentina, 30 June 2009, Vol. II.

[144]Note CARU 57/09 of 18 Feb. 2009, Minute 3/09, 20 Feb. 2009, new documents submitted by Argentina, 30 June 2009, Vol. II.

[145]Note CARU-ROU 059/09 of 7 May 2009, Minute 06/09, 22 May 2009, new documents submitted by Argentina, 30 June 2009, Vol. II.

which Argentina had allegedly authorized, without communicating them to CARU or notifying Uruguay of them via the Commission[146]. Members of the Court, these projects were not large enough to affect the régime of the river or the quality of its waters within the meaning of Article 27 of the Statute and did not constitute a use of the waters of the river liable to affect the régime of the river or the quality of its waters within the meaning of Article 27 of the Statute. Moreover, Uruguay has never claimed in CARU that these were violations of the 1975 Statute. The ENCE and the Botnia projects are in no way comparable with the projects listed by Uruguay in the above-mentioned documents. The two mills which concern us are obviously projects covered by Articles 7 and 27 of the Statute and should therefore be notified.

(2) Uruguay did not transmit complete documentation on the projects to Argentina through CARU

24. The strategies deployed by Uruguay to circumvent compliance with its obligations do not stop at what I have just described. Uruguay also uses a plethora of arguments to undermine the scope of the obligation to notify CARU and in order to empty the decision-making power conferred on it under the 1975 Statute of all meaning. Hence, after saying that "Uruguay . . . has fully satisfied the obligations incumbent on it under Articles 7 to 12 with respect to the Botnia plant, as well as the ENCE plant"[147], Uruguay stated that "Uruguay was not obligated to notify the

59 commission or await its 'summary determination' under Article 7 before issuing [initial environmental authorizations] to either ENCE or Botnia, or proceeding with implementation of the Botnia project"[148]. Uruguay appears to forget its obligation under Article 7. The obligation under Article 7 is to supply Argentina with complete documentation through the Commission of the River Uruguay prior to any authorization.

25. In point of fact, the Statute requires complete documentation to be given not only to CARU but also to the Party notified through CARU. All the information envisaged in Article 7(3) of the Statute is indispensable to enable the State notified to evaluate the possibility of harm to the river and the areas affected by it. However, Mr. President, none of the information relating to the

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[146]CMU, Vol. X, Ann. 224.

[147]DU, para. 1.10.

[148]DU, para. 3.5.

essential aspects of the ENCE and Botnia works was ever notified to Argentina through CARU in application of the 1975 Statute. None . . .

26. An environmental impact study (EIS) also indicates the necessary information supposed to be transmitted. Of course, this presupposed that the EIS had been properly conducted, so as to enable the assessment within the meaning of Article 7 of the 1975 Statute to be made. This is an aspect I will come back to.

(3) Informal contacts can in no event serve as a substitute for informing CARU and notifying Argentina of the projects through CARU

27. Uruguay also attempts to reinterpret the content of the obligations to notify by asserting that "Argentina was aware of the Botnia project at least as early as November 2003 when its officials met with corporate representatives from Botnia, and CARU itself had taken cognizance of the project as early as April 2004 when it first met representatives of the company"[149]. Members of the Court, this assertion has nothing to do with the obligation to notify laid down by the 1975 Statute. It is for the State planning a work on the River Uruguay to transmit the project

60 through CARU to the other Party and provide it with complete documentation as part of the notification. The fact that a project is run by private companies does not absolve the competent State from officially communicating the project to the other State by means of the notification. In no event can contact made by a private company replace the obligation to officially communicate the complete documentation through CARU. Mr. González Lapeyre, who negotiated the Statute for Uruguay and was Uruguay's representative on CARU, did indeed emphasize this important aspect of a formal communication between two States, noting that Article 7 "is very clear" in laying down "a procedure under which *each country* must communicate [any project of any size] to the Commission"[150]

28. The former president of the Uruguayan delegation to CARU, Ms Petrocelli, acknowledged this fact in the clearest possible way in her statement to the Uruguayan Senate on 12 December 2005. Ms Petrocelli said: "According to Article 7, it is the State which must make the submission . . . The party — diplomatically speaking — is the one which must make the

[149]DU, para. 3.66.

[150]CARU, minute 8/81, 13 Nov. 1981, para. 2.4, p. 450. MA, Anns., Vol. III, Ann. 7, p. 57 (italics added).

submission and give notification that it is going to carry out a work — private or public — and announce it in sufficient good time."[151] Contacts between Botnia and members of CARU cannot in any event not be a substitute for Uruguay's obligation to inform CARU and notify Argentina.

29. Members of the Court, the information on the ENCE and Botnia plant projects transmitted by informal contacts and by the press cannot be taken into account for the purposes of the application of Articles 7 and 8 of the Statute. In the context of the case concerning *Certain Questions on Mutual Assistance in Criminal Matters*, your Court pointed out that even if Djibouti had come by certain information through the press and had learned of the relevant documents many months later, that situation did not meet the requirements laid down by the 1986 Convention between France and Djibouti[152]. The same is true in this case.

61 **4. By failing to comply with its obligations to notify, Uruguay has breached the object and purpose of the Statute**

30. Lastly, allow me to point out that Uruguay's many strategies and quibbles aimed at distorting the scope of Articles 7 and 8 breach the object and purpose of the co-operation machinery put in place by the Statute.

31. The purpose of the co-operation procedure described in detail by Professor Pellet is to prevent the possibility of significant harm arising to navigation, the régime of the river or the quality of its waters. To this end, any project for a work liable to affect the latter (Art. 7), or which presupposes use of the waters liable to affect the régime of the river or the quality of its waters (Art. 27) must be notified to CARU and the other party *in advance*.

32. Not notifying anything or notifying a project after the authorization for construction has been issued nullifies the raison d'être of the obligations laid down by the 1975 Statute. This means that the State which is planning to construct a work should itself determine the harm caused or the harm liable to be caused by a project, before CARU has been able to make a determination, before the procedure laid down is able to produce its effects as regards protecting the environment of the River Uruguay and the areas affected by it.

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[151]Minute, statement by the president of the Uruguayan delegation to CARU, Ms Martha Petrocelli, to the Uruguayan Senate (12 September 2005), MA, Anns., Vol. VII, Ann. 5, p. 79.

[152]Case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, 4 June 2008, paras. 150-151.

33. If the Botnia project had been notified, as it was supposed to be, the serious environmental problems caused by the plant would have been detected. The questions of the particular geomorphology of the river and weak currents during the summer months, the serious problems of the eutrophication of the river and air pollution, as well as the question of the use of polluting substances nevertheless prohibited by the international community could have been identified[153].

Conclusion

34. Members of the Court, allow me, if you will, to point out by way of conclusion that the obligations to notify incumbent upon Uruguay have been breached. Despite the announcement of the relocation of the ENCE plant away from the region of the river and the areas affected by it[154], Uruguay, by authorizing the construction of the ENCE plant on 9 October 2003 breached the 1975 Statute and committed an internationally wrongful act. The authorization given by Uruguay
62 for the construction of the Botnia plant in 2005 also constitutes a further breach of the obligations to notify laid down by the 1975 Statute.

35. The authorizations given for the facilities associated with the Botnia plant also constitute breaches of the requirements of Articles 7 and 8 of the Statute.

36. The commissioning of the Botnia plant clearly also constitute breaches of the Statute.

37. Members of the Court, thank you for your attention. Mr. President, may I ask you to give the floor to my colleague, Professor Philippe Sands.

The VICE-PRESIDENT, Acting President: Thank you for your statement, Madam. Je donne maintenant la parole à M. Sands.

M. SANDS :

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[153]CR 2009/12, pp. 45-50, paras. 19-27 (Sands).

[154]RA, paras. 0.13 and 2.10.

X. L'URUGUAY A VIOLÉ SES OBLIGATIONS DE CONSULTATION (ARTICLES 9-12 DU STATUT)

1. Monsieur le président, Messieurs de la Cour, un ancien éminent président de la Cour mentionnait, dans un écrit assez récent, l'importance croissante de ce qu'elle appelait «le droit procédural de la coopération» et l'extraordinaire «entrelacs» qu'il forme avec les normes de fond[155]. Cette observation reflétait une réalité importante : face aux difficultés croissantes des Etats et parties à des accords internationaux à s'entendre sur la nature et la teneur d'obligations de fond, il devient de plus en plus nécessaire aux parties concernées de s'appuyer sur les obligations procédurales pour pouvoir exprimer officiellement leur point de vue sur les normes requises. Et au cœur même de ces obligations procédurales figure l'obligation de consultation, qui est étroitement liée à l'obligation de notification dont vient de vous parler mon amie le professeur Boisson de Chazournes, et la complète.

2. L'obligation de consulter est à l'heure actuelle l'un des pivots du système moderne d'obligations internationales. Elle trouve son expression dans un grand nombre d'accords internationaux, ainsi que dans d'autres instruments, tels que le principe 19 de la déclaration de Rio
63 sur l'environnement et le développement[156] et l'article 9 des articles de la Commission du droit international sur la prévention des dommages transfrontières. L'importance de l'obligation de consultation a été affirmée à plusieurs reprises par la Cour dans plusieurs grandes affaires — je songe notamment aux affaires de la *Compétence en matière de pêcheries*, dans le cadre desquelles la Cour a affirmé avec force l'existence d'une obligation générale incombant aux Etats de «tenir pleinement compte de leurs droits réciproques» (affaire de la *Compétence en matière de pêcheries (Royaume-Uni c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 31).

3. La logique sous-tendant l'obligation de consultation est claire : dans un monde toujours plus complexe, la consultation constitue *le* moyen pour les Etats de communiquer entre eux, partager leurs vues et affiner leurs positions, afin — dans le meilleur des cas — de trouver une manière de résoudre, à leur satisfaction mutuelle, les questions les opposant. Sans l'échange de vues approfondi et de bonne foi que suppose toute consultation, sans ce moyen pour un Etat de

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[155] Rosalyn Higgins, *Problems and Process* (OUP, 1994), p. 136.

[156] Le principe 19 prévoit que «[l]es Etats doivent prévenir suffisamment à l'avance les Etats susceptibles d'être affectés et leur communiquer toutes informations pertinentes sur les activités qui peuvent avoir des effets transfrontières sérieusement nocifs sur l'environnement et mener des consultations avec ces Etats rapidement et de bonne foi».

prendre connaissance des préoccupations d'un autre, sans cette possibilité donnée à chacun de modifier sa position pour prendre en compte les inquiétudes légitimes de l'autre — sans tout cela, le dialogue international est voué à l'échec.

4. Et c'est pourquoi, dans leur sagesse, les auteurs du statut de 1975 ont placé l'obligation de consultation au cœur même de cet instrument — essentiellement à l'article 9, mais également dans le cadre des articles 10 et 11. Les Parties ont exhaustivement traité de ces dispositions dans leurs écritures[157] — je ne répéterai donc pas tout ce qui a déjà été dit sur l'article 9. Ce qui est clair, c'est que des divergences de vue considérables subsistent entre les Parties quant aux obligations imposées par l'article 9 et les dispositions connexes — et c'est ce sur quoi je vais me pencher à présent. C'est à la Cour qu'il échet de donner une interprétation autorisée de ces articles, puis d'appliquer ceux-ci aux faits. Nous l'invitons à conclure que les articles 9, 10 et 11 — et, ainsi que Mme Boisson de Chazournes l'a dit, les articles 7 et 8 — étaient applicables au projet Botnia ; qu'ils imposaient des obligations spécifiques que l'Uruguay n'a pas respectées ; et que l'Uruguay a commis une grave erreur du point de vue juridique en procédant à la délivrance d'une autorisation de construction, et à la mise en service de l'usine, sans avoir observé ces dispositions — autant de raisons pour lesquelles les conséquences de ses actes engagent à présent sa responsabilité internationale. Et, affirmons-nous — à la suite de Mme Boisson de Chazournes —, si l'obligation

64 de consultation avait été honorée comme il se devait, les caractéristiques du fleuve auraient pu être débrouillées, et comprises, et des leçons auraient pu en être tirées, et le type de situations dont je vous ai montré hier des images évité.

5. M. Pellet a déjà résumé l'ensemble des dispositions pertinentes du statut. Mais je ne doute pas que vous brûliez d'en savoir plus sur cet instrument. Vous pouvez donc voir projeté à nouveau, sur vos écrans, le libellé de l'article 9. Comme vous pouvez le constater, l'article 9 (lu conjointement avec l'article 8) laissait à l'Argentine — après la notification requise — un délai de 180 jours, à compter du jour où elle aurait reçu la documentation complète, pour répondre à l'Uruguay. Or, l'Uruguay n'a pas informé l'Argentine par l'intermédiaire de la CARU, il ne lui a pas davantage transmis la documentation complète au moment où le processus de délivrance de

[157] MA, par. 3.62-3.70, 3.80-3.93, 3.94-3.100, 4.80-4.89 ; CMU, par. 2.166-2.187 et 3.108-3.127 ; RA, par. 1.132-1.155 et chap. 2, notamment par. 2.44-2.70 ; DU, par. 2.86-2.124.

l'autorisation était en cours, et l'Argentine n'a toujours pas, à ce jour, reçu cette documentation. L'Uruguay ne nous a toujours pas fait savoir, par exemple, sur quelle base il avait conclu que le fleuve s'écoulait constamment d'amont en aval et que l'inversion du courant était un phénomène rare. Il ne nous a pas indiqué avec précision les quantités de polluants toxiques — dont certains ont été mentionnés hier et dont nous parlerons plus en détail demain — qu'il était prévu d'employer, ni les quantités effectivement utilisées. Sur tous ces points, l'Uruguay a refusé de coopérer.

6. Le délai de 180 jours n'a jamais commencé à courir. Si l'Uruguay avait fourni les informations requises et si l'Argentine n'avait pas formulé d'objections ni omis de répondre, alors — et alors *seulement* — l'Uruguay aurait été fondé, en droit, à «construire ou autoriser la construction de l'ouvrage projeté». Le texte de l'article 9 ne souffre aucune ambiguïté : si l'Argentine avait reçu la documentation complète et avait soulevé des objections, l'Uruguay n'aurait pas pu «construire ou autoriser la construction de l'ouvrage projeté». Cette disposition ne peut tout simplement se lire d'aucune autre manière. En ce sens, le droit de procéder aux travaux, ou d'autoriser ceux-ci, peut être considéré comme subordonné à la communication préalable d'informations que prévoit le statut. La formule est claire : pas d'informations, pas de droit d'engager les travaux. C'est aussi simple que cela, n'en déplaise à l'Uruguay, qui déploie des efforts herculéens pour faire dire autre chose au libellé exprès de l'article 9. Dès lors, l'Uruguay n'ayant pas fourni les informations requises et, partant, ayant dénié à l'Argentine toute possibilité de répondre conformément au statut, nous affirmons que l'Uruguay n'avait nullement le droit de procéder aux travaux. Si l'on suit la logique de l'Uruguay, il suffit à une partie, pour échapper à ses obligations, de ne pas procéder à la notification, et là voilà alors, comme par magie, dispensée de tous ses autres engagements. Pour dire les choses autrement, l'Uruguay revendique de fait le droit de se prévaloir de ses propres manquements pour se soustraire à l'importante obligation de consultation. La lecture que donne l'Uruguay de l'article 9 prive celui-ci de toute valeur pratique,

65 faisant du mécanisme établi par les articles 9 à 11 une coquille vide, sans pertinence aucune. Je suppose que la Cour est libre d'adopter cette interprétation, mais une telle interprétation, si — par extraordinaire — elle était en effet adoptée, aurait pour conséquence de vider de leur sens toutes les obligations internationales de consultation prévues dans tous les accords internationaux — et chacun d'entre nous, dans cette salle, a bien conscience du nombre d'accords qui traitent de cours

d'eau internationaux communs et autres aspects pour lesquels l'obligation de consultation est, de façon tout à fait justifiée, absolument cruciale. [Fin de la projection de l'article 9.]

7. [Article 10 à l'écran.] L'article 10 traite des droits d'inspection, dans la situation telle qu'elle aurait été si l'Argentine *avait* été notifiée et *ne* s'était *pas* opposée au projet. Dans ces conditions, l'Argentine aurait été fondée à «inspecter les ouvrages en construction pour vérifier s'ils sont conformes au projet présenté». Cette disposition n'a bien évidemment jamais été appliquée, parce qu'il n'y a pas eu de notification ni de consultation. Selon l'interprétation de l'Uruguay, l'absence de notification et de consultation signifie que la construction pouvait avoir lieu et que l'Argentine n'aurait aucun droit à faire valoir en vertu de l'article 10. La manière de procéder de l'Uruguay a selon nous de très fâcheuses conséquences : il ne peut être juste que l'Argentine soit, par suite d'une absence de notification de l'Uruguay, dans une situation pire que si l'Uruguay avait suivi la procédure prévue par le statut. Ce serait là ce que les tribunaux anglais appellent une «conclusion perverse», parce que cela incite une partie à éviter de se conformer au texte en vigueur. [Fin de la projection de l'article 10.]

8. [Article 11 à l'écran.] Si les droits que confère le statut à l'Argentine avaient été respectés et si celle-ci avait eu l'occasion de présenter une objection en application de l'article 11, je peux vous assurer qu'une telle objection aurait très certainement été présentée, compte tenu de l'insuffisance manifeste de l'évaluation environnementale faite par l'Uruguay et des informations qui auraient été communiquées à l'Argentine, en particulier en ce qui concerne le débit du fleuve. Les éléments qui vous ont été présentés ne laissent aucun doute : nous savons à présent que l'Uruguay a mal compris le phénomène de l'inversion du courant, nous savons qu'il n'a pas tenu compte des conditions éoliennes et nous savons à présent, depuis que la procédure écrite est close, qu'il rejette de grandes quantités de nutriments et d'autres polluants, bien que nous ignorions lesquels au juste — tout cela dans un fleuve qui, de son propre aveu, est gravement menacé par une détérioration de l'environnement. Dans ces conditions, il est remarquable que Botnia ait tout récemment confirmé sur son site internet que «les rejets de phosphore au cours des premiers mois
66 d'exploitation [de l'usine] sont supérieurs … à ceux des usines de Botnia en Finlande»[158].

[158] Botnia, *Monitoring results of mill's effluent from start-up to April 2009*, http://www.botnia.com/en/default.asp?path=204;1490;2203;2229;2230.

Assurément, comme l'a bien précisé hier M. Wheater, aucune usine de Botnia en Finlande ne rejette ne serait-ce qu'une fraction des quantités massives de phosphore — quelque 13 tonnes — qui sont continuellement déversées dans le fleuve Uruguay. Il est important de relever le libellé de l'article 11 — les termes : «peut causer un préjudice sensible» sont utilisés, et non «causerait un préjudice sensible». Ainsi, l'obligation et le droit d'objection qui lui correspond comportent un élément de précaution intégré. Dans ces conditions, l'Argentine a le droit de notifier à l'autre partie ses préoccupations, répétons-le dans un délai de 180 jours, par l'intermédiaire de la commission. Et cette notification ne peut être d'ordre général, elle doit préciser la source de préoccupation, ainsi que «les modifications [que la partie considérée] suggère d'apporter au projet ou au programme d'opérations». C'aurait été pour les Parties l'occasion de dialoguer sur le fond, par exemple sur les questions relatives au débit du fleuve. Bien sûr, cela n'a jamais pu avoir lieu. Mais pendant cette période — et ensuite, le cas échéant — la construction et l'exploitation ne sont pas autorisées. L'autre interprétation, que défend l'Uruguay[159], est tout simplement incompatible avec le droit conditionnel, défini à l'article 9, de construire ou d'autoriser la construction de l'ouvrage projeté, comme je viens de l'exposer. [Fin de la projection de l'article 11.]

9. Tel est le mécanisme prudent envisagé par les rédacteurs de ce statut particulier, et il a très manifestement été violé par l'Uruguay, qui a procédé à la construction et à l'exploitation du projet au mépris des dispositions pertinentes. Les consultations requises en vertu de l'article 9 et des dispositions suivantes n'ont pas été engagées (et encore moins menées à bonne fin), en ce qui concerne tant l'usine ENCE que l'usine Botnia, avant que la construction de ces deux usines et la mise en service de la seconde soient autorisées. L'Uruguay a émis un permis d'exploitation pour l'usine Botnia le 8 novembre 2007 en violation flagrante de ces dispositions.

10. Il semble que les autorités uruguayennes avaient pris conscience des difficultés qui se seraient présentées si elles avaient honoré leur obligation prévue par le statut d'engager des consultations, comme l'ont rappelé nombre de mes collègues et nous pourrions parler du 15 septembre comme du «jour Petrocelli». Mme Petrocelli était, pendant cette période, la
67 présidente de la délégation de l'Uruguay à la CARU. Le 12 décembre 2005, elle a présenté des

[159] CMU, par. 2.174-188 et 3.108-127 ; DU, par. 2.94-1.119.

éléments à la commission de l'environnement du Sénat uruguayen. Elle a clairement indiqué que son gouvernement avait cherché délibérément à ne pas porter la question des usines de pâte à papier devant la CARU afin de se soustraire au processus de consultation prévu par le statut. [Planche IX-2 à l'écran — texte du dialogue.] Le président de la commission lui a posé la question suivante :

> «L'un des arguments évoqués est que s'il avait été consulté on lui aurait dit non. C'est une astuce. Que serait-il arrivé si on lui avait dit non ?»

La réponse de Mme Petrocelli est édifiante :

> «On n'aurait pas fait les ouvrages. Nous aurions dû saisir un tribunal international [la Cour] pour connaître quel préjudice entraînait un refus d'arbitrage.»[160]

11. Ce sont là des mots assez révélateurs : «On n'aurait pas fait les ouvrages.» En tant que présidente de la délégation de l'Uruguay à la CARU, Mme Petrocelli savait de quoi elle parlait. Elle savait qu'il s'agissait d'une «astuce», et elle a confirmé deux points fondamentaux : 1) il n'y a pas eu de consultations, et 2) s'il y en avait eu, et si l'Argentine avait émis des objections, la question aurait dû être portée devant la Cour avant qu'aucun ouvrage ne soit réalisé. L'Uruguay n'a absolument rien à répondre à cela. Mme Petrocelli et son gouvernement avaient compris que la tenue des consultations requise par le statut aurait empêché l'Uruguay de délivrer des autorisations pour les deux usines et de permettre la poursuite de leur installation ou leur exploitation, face à une opposition de l'Argentine. Mme Petrocelli et son gouvernement avaient compris que l'obligation de consulter prévue par le statut n'est pas une simple formalité. C'est au contraire un élément central du mécanisme créé par le statut pour sauvegarder les intérêts des deux parties lorsque l'une d'elles estime qu'un projet suscite des préoccupations. La tenue de consultations est déterminante pour atteindre l'objectif de l'utilisation rationnelle et optimale du fleuve, selon les termes de l'article premier du statut. C'est pourquoi l'Uruguay a délibérément pris l'initiative de se soustraire aux dispositions du statut. [Fin de la projection de la planche IX-2.]

12. C'est également la raison pour laquelle M. Didier Opertti, alors ministre des affaires étrangères de l'Uruguay, a indiqué à la commission des affaires étrangères du Sénat, en

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[160] MA, par. 2.27 ; Sénat de la République orientale de l'Uruguay, commission de l'environnement, séance du 12 décembre 2005, déclaration du délégué uruguayen à la CARU, p. 4 du texte espagnol original, annexes, vol. VII, annexe 5.

novembre 2003, que les projets d'usines ne seraient pas soumis à la CARU au motif qu'ils étaient
68 «exclusivement assujetti[s] à l'ordre juridique uruguayen» et ne constituaient pas un risque pour la qualité des eaux du fleuve[161]. Tout comme Mme Petrocelli, M. Opertti savait que, si les consultations prévues par le statut avaient lieu, et si l'Argentine soulevait des objections, la saisine de la Cour était inévitable.

13. Face à cette réalité, l'Uruguay affirme à présent que cette manière de concevoir le mécanisme de consultation prévu aux articles 9 à 11 revient à enfermer celui-ci dans ce qu'il appelle «un cadre rigide qui ne souffre aucune dérogation»[162]. C'est tout simplement faux, et l'article 12 prévoit des dispositions à cet effet, comme l'a reconnu Mme Petrocelli et comme l'a dit M. Pellet. Les articles 9 à 11 reflètent l'application spécifique d'un principe général de droit international imposant à deux Etats de mener de bonne foi les consultations prévues par le statut. Ces Etats ne sont pas, toutefois, tenus de parvenir à tel ou tel résultat et, s'ils ne parviennent pas à un accord, c'est à la Cour qu'il revient en dernier ressort de trancher.

14. Permettez-moi à présent d'aborder brièvement certains points sur lesquels les Parties s'entendent ou sont en désaccord.

15. Je commencerai par certains aspects assez simples sur lesquels — vous serez heureux de l'apprendre — les Parties s'entendent. *Premièrement*, l'Uruguay admet à présent que Mme Petrocelli et M. Opertti avaient tort, et que le chapitre II du statut, et notamment les articles 7 à 12, s'applique bien à l'usine Botnia : au paragraphe 2.87 du contre-mémoire, l'Uruguay affirme sans ambages avoir «désormais indiqué de manière parfaitement claire que, pour lui, les articles 7 à 12 du statut *s'appliquent effectivement* … [à l']usine … Botnia»[163]. Nous saluons donc ce retournement et prions la Cour d'en prendre acte. *Deuxièmement*, l'Uruguay admet que ces dispositions «imposent aux deux Parties l'obligation d'entrer en consultations directes»[164], et de le faire de bonne foi[165]. *Troisièmement*, l'Uruguay semble avoir également reconnu, à présent, que

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[161] MA, par. 2.26.

[162] DU, par. 2.5.

[163] Voir, par exemple, CMU, par. 2.87 et exposés présentés lors des audiences consacrées à la demande en indication de mesures conservatoires (CR 2006/47, p. 38-41 (Condorelli), CR 2006/49, p. 10, par. 2 (Boyle) et p. 20, par. 11 (Condorelli)).

[164] CMU, par. 2.166.

[165] *Ibid.*, par. 2.174-2.178.

ces obligations n'avaient pas été honorées s'agissant des autorisations délivrées dans le cas des deux usines[166].

16. L'Uruguay a donc, semble-t-il, renoncé à soutenir que ces dispositions n'étaient pas
69 applicables à l'usine Botnia. Au lieu de quoi il présente maintenant — et en cascade — une série d'arguments *ex post facto* puisés nul ne sait trop où, et franchement toujours plus difficiles à suivre, en vue de résoudre les réelles — *réelles* — difficultés auxquelles il se trouve à présent confronté en ce qui concerne la question des consultations : *premièrement*, il soutient que ces dispositions ont une portée et un effet plus limités que ceux que l'Argentine leur prête[167] ; *deuxièmement*, il avance que, au fil du temps, les Parties en sont venues à cesser de se conformer strictement aux prescriptions du statut ; et, *troisièmement*, il fait valoir que les Parties ont été amenées à convenir de traiter la question de l'usine ENCE — au moins (et peut-être également de l'autre usine) — en dehors du cadre consultatif prévu, celui de la CARU[168]. L'Uruguay a tout bonnement tort sur chacun de ces trois points. Je me pencherai maintenant sur le premier et le deuxième d'entre eux. M. Kohen examinera demain le troisième — l'argument fallacieux selon lequel le processus du GTAN en serait venu à se substituer à l'obligation de consultation et à la participation de la CARU prescrites par le statut.

1) La portée et l'effet des articles 9 à 11

17. J'examinerai pour commencer la portée et l'effet des articles 9 à 11. L'Uruguay convient que les consultations permettent à l'Etat ayant reçu notification d'apprécier l'effet probable du projet et que de telles négociations doivent être menées de bonne foi ; le désaccord porte sur la question de savoir si l'Etat qui est à l'origine du projet peut le poursuivre durant les processus de consultation et de règlement du différend devant la Cour[169].

18. L'Argentine estime que les consultations prévues aux articles 9 à 11 n'ont pas eu lieu. Supposons, *a contrario*, qu'elles aient eu lieu. L'Uruguay aurait-il pu construire et exploiter l'usine alors qu'il avait connaissance des objections de l'Argentine ? La question de l'existence

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[166] DU, par. 2.2-2.4.

[167] CMU, chap. 3.

[168] *Ibid.*, par. 3.35.

[169] CMU, par. 2.187.

d'un droit d'entamer la construction d'un ouvrage se pose à différents moments. Permettez-moi de les énumérer : premièrement, *avant* que la notification ne soit faite ; deuxièmement, si *aucune* objection n'est formulée, *après* la notification prévue à l'article 8 ; troisièmement, si une objection *est formulée*, *après* la notification prévue à l'article 8, mais *dans le délai* de 180 jours prévu pour les négociations ; quatrièmement, si une objection est formulée par l'Argentine, *après* la notification prévue à l'article 8 et l'expiration du délai de 180 jours prévu pour les négociations, mais *avant* le déclenchement ou la fin de la procédure prévue à l'article 12 ; et, cinquièmement, si une objection est formulée, *après* le déclenchement de la procédure prévue à l'article 12. Tels sont

70 donc les différents stades auxquels la question de la construction et de la mise en service peut se poser. Ainsi que cela ressort clairement des écritures de l'Argentine (voir réplique, par. 1.132-1.155), la seule hypothèse — la seule — dans laquelle l'Uruguay aurait, aux termes du statut, été fondé à autoriser ou mettre en œuvre le projet est la deuxième, à savoir si l'Argentine avait soit expressément indiqué qu'elle ne s'opposait pas aux travaux soit n'avait pas répondu dans le délai prescrit de 180 jours à une notification dûment faite en vertu de l'article 8. Autrement dit — cela vous surprendra peut-être —, nous souscrivons à la position de Mme Petrocelli, président de la délégation uruguayenne auprès de la CARU, position selon laquelle l'usine ne pouvait être construite. Cela découle de l'article 9 du statut, lequel est clairement formulé ; du contexte de l'article 9, y compris des articles 11 et 12, qui énonce la procédure à suivre lorsque l'Etat ayant reçu notification formule *effectivement* des objections à l'égard des travaux ; et, enfin, de l'objet et du but du statut dans son ensemble — de sa raison d'être —, à savoir d'établir les mécanismes communs nécessaires à l'utilisation rationnelle et optimale du fleuve Uruguay et de promouvoir la gestion commune de cette ressource naturelle partagée et fragile. L'Uruguay est donc en désaccord avec son propre représentant, Mme Petrocelli, ce qui explique qu'il l'ait écartée.

19. L'interprétation de l'Argentine — et celle de Mme Petrocelli — est totalement conforme à l'approche adoptée dans le cadre de la convention de 1997 sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation, dont les articles 14, point *b)*, et 17, paragraphe 3, interdisent expressément à l'Etat ayant notifié un projet envisagé de mettre celui-ci en œuvre alors que des consultations et des négociations sont en cours. Certes, l'Argentine reconnaît, et accepte, que, en vertu de la convention de 1997, la règle de «non-construction»,

comme on pourrait la désigner, ne s'applique que pendant une période limitée, mais cela est uniquement dû au fait que ladite convention ne prévoit pas de procédure équivalente ou analogue à celle, mentionnée à l'article 12 du statut de 1975, qui ménage la possibilité d'obtenir le règlement précoce et contraignant d'un litige. La règle de «non-construction» est intimement liée à l'engagement d'assurer une utilisation équitable du fleuve. Comme le précisait la CDI dans son commentaire du projet d'article 14 du texte qui devint ultérieurement la convention de 1997 :

> «Si l'Etat auteur de la notification devait procéder à la mise en œuvre avant que l'Etat à qui a été adressée la notification ait eu la possibilité d'évaluer les effets éventuels des mesures projetées et d'informer l'Etat auteur de la notification de ses conclusions, ce dernier n'aurait pas à sa disposition toutes les informations dont il a besoin pour être à même de se conformer aux articles 5 à 7.»[170]

71 Vous constatez la sagesse de cette position. La CDI reconnaît que ces obligations procédurales sont intimement liées aux obligations de fond. La logique sous-jacente à la règle de «non-construction» prévue par le statut de 1975 est également liée à celle qui sous-tend l'obligation de consultation. Mme Petrocelli l'a bien compris, et c'est pour cette raison qu'elle et M. Opertti ont tenté de contourner l'application du statut. Un éminent exégète a ainsi résumé la logique sous-jacente au raisonnement de Mme Petrocelli : «les consultations et négociations qui doivent être menées de bonne foi ne constituent pas une simple formalité mais une véritable tentative visant à ménager, dans la solution finalement adoptée, une place raisonnable aux intérêts des autres [parties]» *[traduction du Greffe]*[171]. A ce jour, l'Uruguay n'a toujours pas expliqué en quoi son approche — qui a consisté tout d'abord à contourner l'intervention de la CARU, puis à commencer la construction des usines — «ménage[ait] … une place raisonnable aux intérêts des autres [parties]» — en l'occurrence à l'«intérêt raisonnable» de l'Argentine. Nous attendons avec intérêt de voir comment le conseil de l'Uruguay expliquera la semaine prochaine en quoi l'approche adoptée par ce pays peut être qualifiée de conforme à l'obligation d'agir de bonne foi et d'assurer l'utilisation équitable du fleuve de manière à respecter les intérêts des deux Parties en présence dans cette salle.

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[170] Ce commentaire peut être consulté à l'adresse suivante : http://untreaty.un.org/ilc/texts/instruments/francais/commentaires/8_3_1994_francais.pdf.

[171] P. Birnie, A. Boyle, C. Redgwell, *International Law and the Environment*, 3e éd. (2009), p. 569.

20. L'Uruguay déclare maintenant que Mme Petrocelli a tort et que le statut serait en quelque sorte «silencieux» sur la question de l'exécution du projet au cours de la période suivant l'objection de l'Etat ayant reçu notification (DU, par. 2.97). Pourtant, la façon dont l'Argentine interprète les dispositions en question est la seule qui préserve l'intégrité de ce régime procédural dans sa globalité en permettant aux consultations de suivre leur cours pour aboutir à un règlement et d'assurer l'équilibre requis à l'article premier du statut. L'article 9 signifie clairement que l'ouvrage projeté ne pourra être mis à exécution ou autorisé que si, *et seulement si*, l'autre partie n'a pas élevé d'objection. C'est ainsi que nous le comprenons, et c'est ainsi que Mme Petrocelli le comprenait déjà en 2005. Face à la réalité de la présente instance, l'Uruguay a maintenant changé son fusil d'épaule. Son interprétation ne tient aucun compte du fait que le statut de 1975 ne contient rien de semblable — absolument rien — à ce qui est écrit au paragraphe 3 de l'article 17 de la convention de 1997, qui limite expressément la période de «non-exécution» à six mois, ou encore au paragraphe 1 de l'article 19, qui fait primer le droit d'exécution en cas d'«extrême urgence». C'est en cela que le statut de 1975 est différent de la convention de 1997.

72 21. L'Uruguay avance un autre argument qui ne trouve aucun fondement dans le texte même de l'article 9 : il affirme que le libellé de cet article n'interdit pas les «travaux préparatoires»[172]. Telle n'est pas la signification manifeste de l'article 9, ni même l'intention apparente de ses auteurs, cet article permettant de «construire ou autoriser la construction de l'ouvrage projeté». L'expression «ouvrage projeté» utilisée dans le texte est générale, illimitée et elle recouvre assurément le projet en cause. Elle englobe *a priori* tous les aspects de cet «ouvrage» et pas uniquement les travaux qui dépassent le stade pouvant être qualifié de «préparatoire». La seule lecture raisonnable de l'article 9, en l'absence de termes restrictifs, est que celui-ci s'applique à tous les ouvrages de cette ampleur qui sont «projetés». Si l'on veut que le but de ces dispositions ait un sens, que de véritables consultations puissent avoir lieu, alors toute activité, qu'elle soit préparatoire ou non, irait à l'encontre de ce but. Du reste, il serait réellement difficile de faire la distinction entre les travaux «préparatoires» et ceux qui dépassent ce stade. Voilà les raisons pour lesquelles nous invitons la Cour à rejeter cet argument avancé par l'Uruguay.

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[172] CMU, par. 1.30, 2.181, 3.109-3.118 et DU, par. 2.120-2.124.

2) Le comportement de l'Argentine est compatible avec la pratique passée

22. Second point : apparemment en désespoir de cause, supposant que tous les autres arguments seraient rejetés, l'Uruguay a tardivement pris refuge dans le vieux mensonge selon lequel, au fil des ans, de par la conduite qu'elles avaient adoptée, les Parties s'étaient écartées de la procédure prescrite dans le statut[173]. Cela est factuellement inexact. L'Argentine est toutefois reconnaissante à l'Uruguay d'avoir soulevé ce point, en ce qu'il souligne le fossé qui sépare la réalité du produit de l'imagination juridique fertile de l'Uruguay. Combien d'usines de pâte à papier, peut-on se demander, ou autres projets polluants de ce type ont-ils été proposés par l'une ou l'autre des Parties à cet endroit du fleuve Uruguay ? Il s'avère qu'il n'y en a eu aucun. Le projet du barrage de Garabí, qui fut envisagé entre l'Argentine et le Brésil sur le fleuve Uruguay et examiné par les deux Parties, est peut-être pertinent. Celui-ci fut dûment soumis à la CARU en 1981. La CARU identifia d'éventuels effets nocifs sur le fleuve. En 1990, il semble que l'Uruguay ait soulevé des objections. Néanmoins, selon l'Uruguay dans son contre-mémoire, «l'Argentine alla de l'avant (et continue à le faire) dans la mise en œuvre du projet avec le
73 Brésil»[174]. Ce projet a commencé il y a 28 ans, et on peut se poser la question : eh bien, en 28 ans, qu'a-t-il été construit ? La réponse est rien. Il est tout simplement difficile de voir comment on peut «aller de l'avant» dans la mise en œuvre d'un projet alors que rien n'a été construit en 28 ans. En réalité, le projet fut soumis à la CARU conformément aux dispositions envisagées par le statut, il y eut notification et tenue de consultations. L'Uruguay, qui en avait le droit, insista sur l'application en bonne et due forme des articles 7 à 12 du statut, ces mêmes principes qui ont inspiré Mme Petrocelli.

23. Et encore plus récemment, il y eut le cas de l'usine de pâte à papier Traspapel, proposée par l'Uruguay en 1995, de taille beaucoup plus modeste que l'usine Botnia, avec une production de 300 000 tonnes par an, soit trois fois moins que celle-ci. Les Parties suivirent la bonne procédure, dont l'importance avait été soulignée par M. Lapeyre, qui à l'époque, en 1996, était le chef de la délégation uruguayenne auprès de la CARU. M. Lapeyre avait déclaré ce qui suit :

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[173] CMU, par. 2.58-70 et 2.140-155 ; DU, par. 2.41.

[174] *Ibid.*, par. 2.155.

> «Lorsqu'on parle d'une installation industrielle qui peut affecter la qualité des eaux il est nécessaire d'être très prudent dans la gestion de la question et [de] se conformer aux obligations prévues aux articles 7 à 13 du Statut du fleuve Uruguay.»[175]

L'Uruguay suivit ces recommandations à la lettre et dans leur esprit, et le projet fut abandonné. Sur cette question au moins, M. Lapeyre avait saisi l'importance d'être constant !

24. Monsieur le président, Messieurs de la Cour, la question d'une pratique inconstante ne se pose pas ici. Les articles 9 à 11 ayant défini une procédure qui ne convenait pas à l'Uruguay, celui-ci a simplement pris la décision politique de contourner le statut. La Cour ne peut éluder ce fait. Les dispositions du statut sont claires. Elles imposent une obligation de consultation et exigent qu'il n'y ait pas de construction tant que la procédure prévue à l'article 12, et à l'égard de laquelle la Cour est compétente en vertu de l'article 60, n'a pas été menée à terme. Vous n'êtes pas obligés de me croire. Nous vous invitons à «être très prudent» et à suivre ainsi la démarche à laquelle M. Lapeyre était tant attaché en 1996. Les choses sont claires : point de notification, point de consultation ; point de consultation, point de construction.

25. Monsieur le président, ainsi s'achève le dernier exposé de l'Argentine pour aujourd'hui. Demain matin, M. Kohen se penchera sur l'argument plutôt curieux de l'Uruguay selon lequel, d'une certaine manière, les Parties étaient convenues de ne pas tenir compte des prescriptions du statut de 1975. Je vous remercie.

74 Le VICE-PRESIDENT, faisant fonction de président : Je remercie M. Sands pour son exposé. La séance est levée et les audiences reprendront demain à 10 heures.

L'audience est levée à 13 heures.

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[175] MA, par. 3.118.