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Jeudi 24 septembre 2009 à 10 heures

Thursday 24 September 2009 at 10 a.m.

12 The VICE-PRESIDENT, Acting President: Please be seated. The hearing is open, and we shall hear further presentations in the first round of pleadings of the Eastern Republic of Uruguay. I give the floor to Professor Luigi Condorelli. You have the floor, Sir.

Mr. CONDORELLI:

ARTICLE 12 OF THE 1975 STATUTE, AND URUGUAY'S RESPECT FOR ITS PROCEDURAL OBLIGATIONS

I. INTRODUCTION

1. Mr. President, Members of the Court, I am very honoured to take the floor once again before the Court, and I am grateful to the Eastern Republic of Uruguay which has charged me with presenting its point of view to the Court regarding the alleged breaches of procedural obligations under the Statute of the River Uruguay which the Argentine Republic claims the Respondent to have committed. My presentation follows on from that of Mr. Martin, who has shown why Uruguay cannot be accused of any breach of Article 7 of the Statute. For my part, I shall show in particular that the Respondent's conduct in this case has complied with the other procedural provisions contained in Chapter II of the 1975 Statute.

2. For the purposes of my presentation, I shall refrain from reciting yet again the various provisions contained in Chapter II of the Statute that follow Article 7: this Court has already heard a great deal about them, and I certainly do not wish to bore you further by putting Articles 8 to 11 of the Statute up on the screen yet again. Rather, my intention is to draw the Court's attention to the final stages of the procedure governed by Chapter II, and specifically the provisions of Article 12 of the Statute. Curiously, our opponents have largely neglected this poor Article 12, which however is of crucial importance in this case. They have all avoided mentioning it with one exception: Professor Pellet, who valiantly put the view that, yes, Article 12 is certainly very important in principle, but not in the present case. Here, he contends, it has no role to play[1]. This is far from being Uruguay's point of view, as I shall endeavour to show; for, on the contrary, all

13 the contentious points relating to Uruguay's alleged breach of its procedural obligations in this case

[1] CR 2009/13, p. 34, para. 20 (Pellet).

have to do with the interpretation of this Article. [Slide 1 on.] I shall quote this Article in full: "Should the Parties fail to reach agreement within 180 days following the notification referred to in article 11, the procedure indicated in chapter XV shall be followed." It is worth noting that Article 12 does not merely refer to disputes being submitted to this Court as the final stage in the procedure, as our opponents seem to believe; it also refers to a final negotiating period at the end of which, if the Parties fail to reach agreement, disputes may be submitted to the Court. [Slide 1 off.]

II. FOUR POINTS OF CONTENTION IN REGARD TO THE PROCEDURAL ASPECTS

3. Allow me, Mr. President, to try to be of service to the Court in reaching its decision by identifying as clearly and precisely as possible the issues disputed by the Parties regarding the procedural aspects that I have just cited. Distilled from the thousands of pages of pleadings that have been submitted to you and the rivers of words that have been spoken in this Great Hall, there are in fact four key questions.

4. Question 1: At a summit meeting held on 5 May 2005, the countries' Heads of State — Tabaré Vásquez and Néstor Kirchner — in the face of rising tensions between their countries over the pulp mills on the Uruguayan side of the river and the impasse in CARU's work, decided to set up the GTAN (High-Level Technical Group), which subsequently held 12 meetings over a period of six months, from August 2005 to January 2006, without an agreement being reached. The question is this: does this exercise qualify as carrying on the direct negotiations between the Parties referred to in Article 12?

5. Question 2: Did the GTAN effectively function as a forum for consultation and negotiation between the Parties carried on in accordance with the applicable principles of international law?

6. Question 3: Since it is the two States that agreed to use the GTAN as an appropriate forum for direct negotiation to try to settle their opposing points of view regarding the danger posed by the pulp mills, is it admissible, once those direct negotiations failed, to reopen the matter of the obligations which the States ought to have fulfilled vis-à-vis CARU?

7. And finally, Question 4: If the negotiations via the GTAN were indeed those required by Article 12, it goes without saying — given that those negotiations did not result in an agreement between the Parties within 180 days following their commencement — that the path was open from that point onwards for the matter to be submitted to the Court pursuant to Article 60 of the Statute. But in the interim until such time as the Court issued its decision, could the project be built and commissioned, bearing in mind that the Court of course had full jurisdiction subsequently to order that the project be halted, modified, or even dismantled if by some impossible eventuality it should attribute to Uruguay wrongful acts so serious as to justify radical measures of this kind? In other words, how should the 1975 Statute's silence on this question be interpreted?

III. QUESTION 1: DID THE CONSULTATIONS CONDUCTED THROUGH THE GTAN CONSTITUTE DIRECT NEGOTIATIONS PURSUANT TO ARTICLE 12?

8. Let us begin with the first question, which is the simplest: did the consultations conducted through the GTAN constitute direct negotiations pursuant to Article 12 of the Statute? Mr. President, I fully believe that the only possible answer is yes. There are many reasons why the answer can only be yes, but it will be sufficient here to cite just one, which is absolutely decisive: it is Argentina that itself answered this question in the affirmative in a very official way, basing its submission of this case to the Court on it. It is therefore inadmissible that Argentina should now take a contrary position, as it tries to do in certain passages in its most recent submissions, which moreover are rather confused, as well as in its pleadings last week. Indeed, in its Application of 4 May 2006, the Applicant cited as grounds for the Court's jurisdiction the fact that negotiations through the GTAN had failed[2] and documented this point in a footnote referring to a diplomatic Note from the Argentine Minister for Foreign Affairs to the Ambassador of Uruguay in Argentina, which it appended to the Application as Annex II. [Slide 2 on.] In that diplomatic Note, as you can see, the Argentine Government defines the GTAN as "the negotiating body established between both Parties upon the Parties having failed to reach agreement within CARU" and then goes on to say "the Government of the Argentine Republic concludes that, upon the Parties having failed to reach agreement, as specified by Article 12 of the River Uruguay's Statute, this paves the

[2]Application instituting proceedings, 4 May 2006, p. 4, para. 4.

way for the procedure provided for in Chapter XV of the . . . Statute"[3]. It is remarkable that the content of that diplomatic Note is referred to without hesitation in the Memorial of Argentina[4]. But that is not the only Argentine document admitting that negotiations through the GTAN were carried on pursuant to Article 12 of the Statute, as Professor Pellet maintained rather hastily last week[5]. [Slide 2 off. Slide 3 on.] Indeed, the Memorial of Argentina also includes another important document (although failing to highlight the passage that is by far the most significant, or to translate it into French) which had also been annexed to the Application as Annex III: this is the statement by the Argentine Minister for Foreign Affairs to the Argentine Chamber of Deputies on 14 February 2006, in which the Minister explains the position that his country had communicated to Uruguay in its recent diplomatic correspondence in the following terms:

> "*(a)* that the GTAN was the instance of direct negotiation between both countries in relation with the dispute over the construction project for the two industrial cellulose production plants; and
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> *(b)* that, should both countries fail to reach an agreement by 30 January 2006, the 180-day period provided for in the Statute for authorising either of the Parties to resort to the ICJ will have expired."[6]

9. It is worth recalling in this context that during the oral phase concerned with the request for the indication of provisional measures submitted by the Argentine Republic, this Court heard one of Argentina's counsel, Professor Pellet, admit several times, without reservation, with respect to this case that "the Court's intervention forms an integral part of the procedure laid down in
16 Chapter II of the 1975 Statute, Article 12 of which entrusts the task of making a final decision to the Court if the Parties have not been able to reach agreement on a construction planned . . . by one

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[3]Note 149/2005 from the Argentine Minister for Foreign Affairs to the Ambassador of Uruguay in Argentina, 14 Dec. 2005, Application of Argentina instituting proceedings, 4 May 2006, Ann. II. The French translation provided by Argentina in that Annex is slightly different from the French translation which appears in the Memorial of Argentina (MA, Anns., Vol. II, Ann. 27.). The latter translation is preferable, as it matches the original Spanish text of Note 149/2005 more closely.

[4]MA, p. 56, para. 2.72 (see preceding footnote).

[5]CR 2009/13, p. 35, para. 21 (Pellet).

[6]Address by Mr. Jorge Taiana, Minister for Foreign Affairs of Argentina, on 12 February 2006, before the Foreign Affairs Committee of the Chamber of Deputies, Application instituting proceedings, 4 May 2006, Ann. III.

of them"[7]. [Slide 3 off.] I have taken the liberty, Mr. President, of indicating other passages from our opponents' pleadings on this point.

10. Mr. President, I am not going to make my presentation on this question even longer by adding further citations. The two documents to which I have drawn the Court's attention are fully sufficient in themselves. After having officially notified Uruguay by means of a diplomatic Note that the matter could be submitted to the Court because the negotiations pursuant to Article 12 of the Statute had taken place and had not brought forth an agreement, after having repeated the same view publicly through its highest officials and after having reiterated that position before this Court in its Application and the annexes thereto, as well as through the words spoken by its counsel in their pleadings during the oral phase concerned with the request for the indication of provisional measures, Argentina cannot now withdraw that position at the last minute and completely contradict itself. This is why what it has tried to do in its Reply and in its pleadings of last week, contending that in the end it was not "on the basis of Article 12" that the matter was submitted to the Court, since in fact — as it had just discovered — "the remedy under Article 12 was closed"[8]. The Court will remark the Applicant's ham-handed attempt to suggest casually that its Application instituting proceedings was based on the same point of view[9], whereas the documentation I have just cited makes it plain that it was not. But no, Mr. President, the remedy under Article 12 was not closed at all, since the direct negotiations provided under that Article indeed took place and it was following the failure of those negotiations that Argentine submitted the matter to the Court!

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IV. QUESTION 2: DID THE GTAN EFFECTIVELY FUNCTION AS A FORUM FOR CONSULTATION AND DIRECT NEGOTIATION BETWEEN THE PARTIES CARRIED ON IN ACCORDANCE WITH THE APPLICABLE PRINCIPLES OF INTERNATIONAL LAW?

11. I come now to Question 2, whether or not the GTAN effectively functioned as a forum for consultation and direct negotiation between the Parties in accordance with the applicable principles of international law. Here, one must look closely at why and for what purpose the two

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[7]CR 2006/46, p. 63, para. 18 (Pellet). See also CR 2006/46, p. 57, para. 6 (Pellet) ("There can be no doubt that that is the case: the dispute concerns 'the interpretation and the application' of the Treaty concerned and of the rules of international law to which it refers, and it does indeed fall 'within the provisions' of the Treaty and, in particular, of Article 12 thereof which provides . . .") and CR 2006/48, p. 41 (Pellet) ("in the exercise of the functions conferred on it by Article 12 of the 1975 Statute, the Court will reject the Application . . . ").

[8]RA, p. 141, para. 1.173.

[9]*Ibid.*, p. 18, para. 0.18.

countries' Heads of State set up the GTAN. We have already alluded to a piece of evidence which is particularly significant, inasmuch as it concerns one of the most important diplomatic Notes in this case, which was first communicated to Uruguay, as indeed it should be, and then to the Court as one of the main annexes to the Application[10]. As the Court has already heard, this Note of 14 December 2005 describes the GTAN as "the negotiating body established between both Parties upon the Parties having failed to reach agreement within CARU". Mr. President, as Argentina openly admits, the GTAN was charged with the task of doing what it was impossible for CARU to do, as the two delegations within CARU stood at an impasse.

12. To be sure, however, the essential document on this point is the one containing the agreement between the two States, concluded by the two Presidents, setting up the GTAN. That document is the joint press release of 31 May 2005[11], which was drafted through intensive negotiation between the two countries as pointed out in the June 2005 report by Argentina's Chief of the Cabinet Office to the Argentine Senate[12]: its words were therefore weighed, discussed and agreed by the two Parties with the greatest care and merit special attention. I am sure the Applicant would not contest its binding legal value, for I hold its eminent jurists in too high a regard for that. And at least for now, I shall not cite this Court's wealth of jurisprudence concerning the contractual nature of documents of this sort. At this point, I shall limit myself to drawing the Court's attention to the total irrelevance of Professor Kohen's remarks on this subject, pointing out that mere parallel negotiations carried on with a view to settling a dispute between States but failing to reach an

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agreement cannot result "in the rejection or setting aside of the procedure laid down by the treaty at issue in the dispute"[13]. Well, my friend, of course! But here, this is not a case of an aborted negotiation but a negotiation that was well and truly launched on the basis of a genuine international agreement duly concluded by the two countries' Heads of State. Mr. President, the existence of this contractual instrument is a fact, an undeniable fact, and not simply hair-splitting

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[10]Note 149/2005 from the Argentine Minister for Foreign Affairs to the Ambassador of Uruguay in Argentina, 14 Dec. 2005, Application instituting proceedings, 4 May 2006, Ann. II (see footnote 3 above).

[11]MA, Vol. IV, Ann. 3; CMU, Vol. V, Ann. 126.

[12]RU, Vol. II, Ann. R14, p. 620.

[13]CR 2009/14, p. 14, para. 9 (Kohen).

for the purposes of argument: it is an international agreement to which the principle of *pacta sunt servanda* fully applies!

13. [Slide 4 on.] Allow me to put up on the screen once again, as Mr. Martin did yesterday, the central passage in the press release of 31 May 2005, this time in the French translation supplied by Argentina:

> "Suivant ce qui a été accordé par MM. les présidents de la République argentine et de la République orientale de l'Uruguay, les ministères des affaires étrangères des deux pays constituent, sous leur supervision, un groupe de techniciens, pour complément d'études et d'analyses, d'échanges d'information et de suivi des conséquences que sur l'écosystème du fleuve Uruguay qu'ils partagent aura le fonctionnement des usines de pâte à papier que l'on construit dans la République orientale de l'Uruguay."[14]

14. If I may, given that this is an agreement for which the authentic language is Spanish, I should like to make one tiny clarification. The original Spanish phrase "las plantas de celulosa *que se están construyendo . . .*" has been rendered in French as "usines de pâte à papier *que l'on construit . . .* ". Here, the English translation provided by Uruguay reflects the original Spanish more faithfully: "the cellulose plants, *that are being constructed . . .*". The sense of this agreement is clear: the two Parties are recognizing as an accepted fact at that point that pulp mills are being built in Uruguay and are deciding, because of the impasse in CARU, that it is through the GTAN that additional studies and analyses are to be carried out, and that information and follow-up *(seguimiento)* on the effects *(consecuencias)* which the mills' operation will have on the ecosystem of the river will take place.

15. Why was such a decision made? The reasons for the decision are well known to you: yesterday Mr. Martin recalled the growing problems the Argentine Government was facing in public opinion, which was being mobilized more and more strongly against the pulp mill project, together with the reasons that led the Uruguayan Government, in spite of its firm conviction that it had already exchanged all the information necessary, to agree to proceed with new in-depth consultations. Those consultations, as stated in the text of the agreement itself, were to consist of complementary studies and analyses and subsequent exchanges of information and data on "the

[14]MA, Vol. IV, Ann. 3. [Note by the Registry: English translation by Uruguay: "In conformity with what was agreed to by the Presidents of Argentina and Uruguay, the Foreign Ministries of both our countries constitute, under their supervision, a Group of Technical Experts for complementary studies and analyses, exchange of information and follow up on the effects that the operation of the cellulose plants, that are being constructed in the Eastern Republic of Uruguay will have on the ecosystem of the shared Uruguay River."]

effects that the operation of the cellulose plants . . . will have on the ecosystem of the shared Uruguay River". The consultations were to proceed through the GTAN, that is, in the framework of direct negotiations under Article 12 of the Statute. One will also note in this context the make-up of the GTAN, consisting not only of senior political officials but also of technical experts (inasmuch as each Party effectively appointed to the GTAN both senior diplomats and renowned experts, including delegates to CARU)[15], which attests to the eminent role ascribed to it.

16. Mr. President, the May 2005 agreement between the two Heads of State followed on perfectly from the March 2004 arrangements of which Mr. Martin spoke yesterday, and is the clearest possible evidence of the friendly understanding that had developed between the two Parties that the dispute between them over the installation of the pulp mills was "closed", and that it was taken as an accepted fact that the mills were under construction when the GTAN was set up. By common consent, from that point forward the crux of the dispute was limited to the environmental risks which might result from their "operation" (as the two Heads of State said explicitly): the negotiation provided for under Article 12 of the Statute, to be conducted through the GTAN, was therefore to be concerned with the precise identification of the risks in question following a full exchange of information, and on steps to be taken to offset such risks if need be. [Slide 4 off.]

17. During the 180-day period established for the negotiations under Article 12 of the 1975 Statute, Uruguay, like Argentina, was unquestionably bound to act in good faith in the sense that it could not present the other Party with faits accomplis while — within the process of building the mills — implementing unilateral decisions on matters which were the subject of the negotiations: indeed, such behaviour would have rendered the negotiations pointless. Uruguay fully respected that obligation. To be sure, an entire series of preparatory activities for the construction of the project had been carried out, but none of the steps taken by Uruguay before the expiry of the time period provided for in Article 12 resulted in a fait accompli which was capable *per se* of preventing the negotiations from reaching a conclusion. Indeed, each and every one of the preparatory activities approved by Uruguay and carried out before that date left entirely open the possibility of choosing one technical solution or another in order, in the best way possible, to

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[15]CMU, Vol. V, Ann. 127.

prevent environmental risks that might result from the operation of the mill, for example in regard to the bleaching technology to be used, wastewater treatment facilities and methods, the type and location of discharge points in the river and so forth. The direct negotiations carried on through the GTAN were to deal with all of these questions, on all of these issues. And indeed, within the framework of the GTAN, Uruguay shared with Argentina all the information and all the analyses relating to these questions, including production processes and technologies relating to them[16], the environmental impact of waterborne discharges in view of the hydrodynamics of the river, and particularly in view of the phenomena of reverse flow[17], the impact of air emissions[18] and monitoring programmes[19], not to mention the issue of the impact on communities on both sides of the river[20] and so forth[21].

The VICE-PRESIDENT, Acting President: Professor Condorelli, I can see that you are passionate in presenting the case but, if I may, I would ask you to speak a little more slowly to facilitate the work of the interpreters. You do have sufficient time to present your arguments. Thank you.

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Mr. CONDORELLI: Please accept my apologies, Mr. President. I shall slow down.

18. The extensive nature of the consultations carried on through the GTAN, based on an impressive array of documentation, does not merit the strange silence reserved for it by Professor Sands who stated that in his view "the consultations required by Articles 9 to 11 did not take place"[22], but did not say a single word about the consultations under Article 12.

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[16]CMU, para. 3.100; GTAN/DU/6/19-08-05, CMU, Vol. V, Ann. 154, Ann. B; GTAN/DU/9/14-09-05, CMU, Vol. V, Ann. 129; GTAN/DU/10/14-09-05, CMU, Vol. V, Ann. 131; GTAN/DU/11/14-09-05, CMU, Vol. V, Ann. 132; GTAN/DU/17/30-09-05, CMU, Vol. V, Ann. 136; GTAN/DU/18/30-09-05, CMU, Vol. V, Ann. 137; GTAN/DU/30/09-12-05, CMU, Vol. V, Ann. 148.

[17]CMU, para. 3.100; GTAN/DU/12/14-09-05, CMU, Vol. V, Ann. 154, Ann. B; GTAN/DU/24/07-11-05, CMU, Vol. V, Ann. 143; GTAN/DU/25/21-11-05, CMU, Vol. II, Ann. 144; GTAN/DU/33/21-12-05, CMU, Vol. V, Ann. 151.

[18]CMU, para. 3.100; GTAN/DU/22/07-11-05, CMU, Vol. V, Ann. 141; GTAN/DU/32/16-12-05, CMU, Vol. V, Ann. 150; GTAN/DU/35/18-01-06, CMU, Vol. V, Ann. 152.

[19]CMU, para. 3.100; CMU, Vol. II, Ann. 20; CMU, Vol. II, Ann. 21; GTAN/DU/15/14-09-05, CMU, Vol. V, Ann. 135; GTAN/DU/27/25-11-05, CMU, Vol. II, Ann. 146.

[20]CMU, para. 3.100; CMU, Vol. II, Ann. 20; GTAN/DU/6/19-08-05, CMU, Vol. V, Ann. 154, Ann. B; GTAN/DU/24/07-11-05, CMU, Vol. II, Ann. 143; GTAN/DU/31/16-12-05, CMU, Vol. V, Ann. 149.

[21]For the list of documents communicated to Argentina within the framework of the GTAN, see CMU, pp. 211 *et seq*,. para. 3.100.

[22]CR 2009/13, p. 69, para. 18 (Sands).

19. Moreover, Uruguay's pleadings have shown that, in fact, whilst the authorization to build the plant was certainly preceded by authorizations relating to a variety of preparatory works, the authorization to build was itself only issued after the acknowledged failure of the negotiations carried on through the GTAN, that is, on 18 January 2006. In these circumstances, the accusations against Uruguay as to alleged violations of the letter and spirit of Article 12 of the 1975 Statute are clearly lacking any basis from that perspective as well.

V. QUESTION 3: FOLLOWING THE FAILURE OF DIRECT NEGOTIATIONS THROUGH THE GTAN, SHOULD THE NEGOTIATIONS THROUGH CARU PURSUANT TO ARTICLE 7 HAVE BEEN REOPENED?

20. Mr. President, Members of the Court, as I have just shown, there is no question that direct negotiations pursuant to Article 12 of the Statute did indeed take place. You might well ask, then, why Argentina suddenly decided, very late in the process, to deny the evidence by executing a perilous sort of double somersault. This may appear incomprehensible at first, but in the end it can be understood very well. It is because, after reading the Counter-Memorial of Uruguay, the Applicant no doubt recognized a series of implications, which were very negative for its case, which inevitably ensued from admitting that before the matter was submitted to the Court, the dispute between the two States over the pulp mills had reached the stage of direct negotiations pursuant to Article 12. What I am doing is coming to the third of the four central questions, and I present it in the light of the answers to Questions 1 and 2. It is an established fact that the two States agreed to use and effectively did use the GTAN as a forum for direct negotiation under

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Article 12 of the Statute, in an effort to settle their opposing views in regard to the danger posed by the pulp mills. Is it then admissible, once those negotiations failed, to reopen the matter of the obligations that the States should have discharged vis-à-vis CARU, and particularly on the basis of Article 7?

21. I am inclined to let Argentina's own words answer that question. As I have just pointed out, the Applicant refuses in its Reply to recognize what seemed self-evident up to that point, namely that the matter had been placed before the Court "on the basis of Article 12". That is not so, Argentina maintains! And why not? I quote, "For it to have done so, the procedure under Articles 7 to 11 would have had to be duly followed and completed, i.e., the conclusion reached

that an agreement was impossible."[23] Inasmuch as the matter was placed before the Court, as Argentina now argues, not "under Article 12" but on the basis of Article 60 of the Statute, it follows that "the role which the Court is required to play in this case is not to provide the final assessment under Article 12 of the Statute . . ."[24]. Last week, counsel for our opponents relentlessly repeated this notion[25]. But Mr. President, the most elementary logic turns this argument on its ear: as we have seen, there can be no question that the matter was submitted to this Court by Argentina "under Article 12", that is, following the failure of the direct negotiations provided for pursuant to that article. Consequently, that means that the role of the Court in this case has to be recognized as being precisely that of "providing the final assessment under Article 12 of the Statute . . .", that is, deciding whether or not the works under discussion risk doing significant damage to the quality of the waters of the River Uruguay. It also follows that, following the failure of the direct negotiations undertaken pursuant to Article 12, the next step could only be as indicated in that article, namely submitting the matter to the Court, not going back to CARU.

22. But it is not only logic that leads straight to this conclusion. The entire history of this
23 dispute, as retraced by Professor McCaffrey, Mr. Martin and me, confirms its validity. It shows clearly that no return to CARU with a view to a hypothetical belated application of Article 7 was envisaged. Of course not! What possible sense could it have made, at this advanced stage, for CARU to do a *preliminary* assessment of the project in accordance with Article 7, whereas what was called for at this point was a comprehensive in-depth political and technical evaluation that explored all possible aspects and examined every last detail of the issue? Mr. President, the thesis advanced by the Applicant whereby the press release of 31 May 2005 implied, even anticipated, returning to CARU and Article 7 truly does not stand up. Moreover, that thesis is in flagrant contradiction with what that accord spells out: that all the additional information necessary in order for the Parties to assess the environmental compatibility of the mills' operation, that all exchanges in that regard should be done henceforth in the framework of direct negotiations under Article 12 of the Statute, that is, through the GTAN and not through CARU. In short, the stage of

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[23]RA, p. 141, para. 1.173.

[24]*Ibid.*, p. 142, para. 1.174.

[25]See, for example, CR 2009/13, p. 33, paras. 17 *et seq.* (Pellet).

preliminary examination referred to in Article 7 of the Statute was entirely left behind once the process had moved on and a mechanism able to satisfy environmental risk analysis requirements in much more complete fashion was set up.

23. Nevertheless, I have one final observation to make, still in regard to this third question. Even without taking into account the bilateral accord of March 2004 of which Mr. Martin spoke yesterday, one cannot seriously suggest that the absence of an evaluation by CARU under Article 7 implies a breach of the 1975 Statute. Indeed, the accord of 31 May 2005 setting up the GTAN is sufficient to refute such an allegation. It has to be borne in mind that by that accord the two Parties organized how to go about a complete examination of the matter through direct negotiations between them, thereby rendering superfluous a hypothetical return to the stage of a preliminary examination within CARU, which is a forum for technical negotiations. The fact that the direct negotiations did not in the end reach an agreement does not change that: the failure of the negotiations in fact opened the way for the next stage provided for in Article 12, that is, the possibility for the matter to be submitted to this Court — of which Argentina availed itself — and could not justify going back to CARU.

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VI. QUESTION 4: IN THE EVENT OF THE MATTER BEING SUBMITTED TO THE COURT FOLLOWING THE FAILURE OF DIRECT NEGOTIATIONS, IS IT PERMITTED OR PROHIBITED FOR THE PROJECT TO BE BUILT AND COMMISSIONED BEFORE THE COURT ISSUES ITS FINAL DECISION?

24. And now, Mr. President, it is time to look at the fourth and final question: Following the failure of the direct negotiations, does the Statute permit Uruguay to build and commission the project after the matter had been submitted to the Court, or should Uruguay have waited until the Court issued its final decision permitting the project to proceed?

25. Mr. President, Members of the Court, the first comment I would make on this subject is that the text of the 1975 Statute is silent on this point. Nowhere do its provisions explicitly say one way or the other. Article 12 does provide that if the period established for direct negotiations elapses without an agreement being reached, the matter may be submitted to the Court; but it does not say whether in the meantime the project is permitted to go ahead. One must therefore turn to an interpretation going beyond the letter of the Treaty, using all appropriate methods suggested by the relevant principles enshrined in Articles 31 and 32 of the Vienna Convention on the Law of

Treaties. There is an agreement in principle between the Parties that that is the approach which should be taken, although they disagree profoundly as to the conclusions reached by that means.

26. A great many pages have been written on this subject in the Parties' pleadings, of which the Court has taken note. At this point, in the oral phase of proceedings, it would not be appropriate to review in detail all the arguments that have been extensively laid forth in writing: that would be pointless, and contrary to the Court's instructions. I shall therefore try to identify the core of the dispute between the two Parties and the key points of their divergent positions, in the hope of helping the Court discharge its high task.

27. In essence, Argentina's position is based on what is traditionally known as *argumentum a contrario*. Put as simply as possible, its reasoning runs as follows. As we know, when a disagreement arises between the Parties as to the environmental compatibility of a project under Article 7, the Party wishing to carry out the project must notify the other Party and, in accordance with Article 8, must wait 180 days for a determination by the latter. If finally the Party notified raises no objections or does not respond, Article 9 provides that the Party wishing to carry out the project may go ahead with it. However, should there be an objection, the Party wishing to carry

25 out the project is notified of the same (Article 11), and a new period of 180 days then begins for negotiations to take place. At the end of that second 180-day period, in accordance with Article 12, either the Parties reach an agreement or the procedure for the dispute to be settled by judicial means becomes applicable. For Argentina, inasmuch as Article 9 expressly provides that the project may be executed if there is an agreement (or in the absence of a disagreement) following the first 180 days, this would include *a contrario*, "implicitly but inevitably"[26], that if there is a disagreement, and if that disagreement continues after the second period of 180 days has elapsed, the project may not be carried out until the Court has made a favourable decision following the judicial procedure governed by Article 60. In short, in the Applicant's view, a project covered by Article 7 can only be carried out either on the basis of prior agreement between the Parties to the dispute or on the basis of a favourable judgment on the merits from the International Court of Justice.

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[26]RA, p. 120, para. 1.138.

28. As the Court knows, this view is vigorously criticized by Uruguay. Certainly, the Respondent agrees that the Statute establishes a procedure consisting of various stages aimed at enabling a prior agreement to be reached, and even encouraging that result in so far as possible. But the Statute does not stop there: it also sets out how to overcome any impasse should it be found, once all the stages of the procedure of direct negotiation have been exhausted, that it is impossible to reach an agreement. However, the Statute does not state in this case that the position of the Party opposing the agreement should be given precedence over the position of the other Party: indeed, why should the Party wishing to carry out a project be forbidden from running the risk of an unfavourable outcome resulting from the judicial dispute-settlement procedure if it is convinced in good faith that carrying out the project is perfectly in accordance with the Statute and that its opponent's case cannot be justified? Argentina's thesis seems unacceptable to Uruguay in that it implies that the Statute would recognize for each of the High Contracting Parties a veritable right of veto over any project that the other Party might wish to undertake under Article 7 *et seq.*, and that such a situation would prevail until the Court had taken all the time necessary (several years, as we are in a position to know well!) to make its decision on the basis of Article 60 concerning the judicial settlement of disputes. Such a right of veto would continue — and I must
26 stress this point — even if the Party on whose territory the project is to be carried out is convinced that it has in good faith discharged all its substantive and procedural obligations under the Statute as regards prevention, information and negotiation (which is effectively the case here, as Uruguay's counsel have just demonstrated), and even if it is convinced that the other Party's opposition is based in substance on prejudices or insufficient or questionable motives and is in fact explained by pressure of public opinion that is poorly informed and hostile in principle.

29. It is true, Mr. President, that Argentina challenges this terminology. No right of veto exists, it exclaims, since the Court is empowered to make the final decision, which may be unfavourable to the State opposing a project. However, regardless of whether the term "right of veto" is used (if the expression "no construction rule", so dear to Professor Sands, is used instead[27]), Argentina's thesis would have extremely onerous consequences. In effect, this thesis

[27]CR 2009/13, p. 70, para. 19 (Sands).

would give each Party a sort of highly discretionary power which could be used without a valid reason and, since it would not be rooted in the marketplace, at no cost — the power to block a project that is environmentally impeccable and vital to the other Party's sustainable development for years on end, doing the other Party unfair, grave and perhaps irreparable harm, which no one would be required to undo subsequently, even if upon the conclusion of the judicial proceeding it should be found that the veto (my apologies, the "blocking") was unjustified.

30. To be sure, as the classic jibe would suggest, "adducere inconvenientes non est solvere argumentum": that is, the difficulties which are of grave concern deriving from Argentina's thesis would not be sufficient in themselves to refute its validity in law if such a thesis were clearly set forth in the provisions of the 1975 Statute. But that is not the case here: the Statute is silent on the subject. It must be said in passing that this is not a factor in Argentina's favour, as Argentina is insisting on the idea that the Statute would spell out detailed, precise obligations, whereas by all evidence that is not the case here. As for *argumentum a contrario*, it would appear if not simplistic then at the very least unpersuasive if it is not validated within the framework of a satisfying and complete interpretation of the relevant provisions, achieved on the basis of all applicable interpretive principles. The thesis that Uruguay puts before the Court is based on the objective interpretation of the Statute in the light of its objective and purpose, and takes into account all the pertinent considerations deriving from Article 31, paragraph 3, of the 1969 Vienna Convention:

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> "*(a)* any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> *(b)* any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> *(c)* any relevant rules of international law applicable in the relations between the parties."

31. So far as subsequent agreement and subsequent practice are concerned, it can readily be seen that through 2004 and 2005 the Parties did agree on one aspect — a limited aspect, to be sure, but a precise one — of the application of Articles 7 *et seq.* of the Statute in this case. After the arguments presented to the Court by Mr. Martin yesterday and by me today, I do not have to say a great deal to show this. It is sufficient to recall, on the one hand, the agreement between the two

countries' Foreign Ministers of 2 March 2004[28]. And, on the other hand, the agreements between the two Presidents recorded in the press release of 31 May 2005[29]. These two agreements indicate clearly and in a perfectly consistent way that the Parties to the 1975 Statute were agreed in regard to the application of Article 7 *et seq.* in the sense of considering closed the dispute between them regarding the "establishment" of the mills: within this frame of reference, in particular, the two Heads of State affirmed that the pulp mills were "being constructed" at the moment the GTAN was set up, and agreed on the need to monitor their "operation" by exchanging all appropriate information to evaluate the "effects" of such operation[30]. To be sure, there were still divergences over whether or not the information already exchanged was complete and how additional information should be provided, as well as over the precise evaluation of the environmental risks that could be brought about as a result of the mills' activities and how to offset those risks,

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divergences that the consultations carried on through the GTAN were unable to reconcile. From the Respondent's standpoint, that is the dispute on which the Court should focus and which it is called upon to resolve.

32. The elements of subsequent practice followed in the application of the Statute, which I have just cited, play an important role in Uruguay's opinion for settling the dispute now before the Court because they show that the Parties were in agreement as to how the procedural provisions of the Statute were to be applied. That practice, however, says nothing decisive regarding the overall interpretation that should be given to the relevant provisions of the Statute, particularly Article 12. What remains to be sorted out, in effect, is the question of whether — once the period allowed for reaching an agreement through direct negotiation had elapsed — the Party wishing to carry out the project was authorized to proceed without having to wait for the decision of the Court. What interpretation should be given to Article 12 in light of the rules of international law applicable to relations between the Parties, as discussed in Article 31, paragraph 3, subparagraph *(a)*, of the Vienna Convention?

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[28]CMU, Vol. IV, Ann. 99.

[29]RU, Vol. II, Ann. R14.

[30]*Ibid.*

33. That is the point of contention which has perhaps been the point most extensively debated by the two sides, as the Court can attest from the written pleadings and oral arguments. Here, even more than elsewhere, it is appropriate that I limit myself to highlighting the key point in dispute. For Uruguay, two sub-questions must be asked in order to reveal the appropriate response. The first may be put this way: since the 1975 Statute, like any international treaty, creates a *jus speciale* linking the Parties, which is in principle (subject to the norms of *jus cogens*) appropriate for departing from the *jus generale* represented by the principles of general international law, to what degree and under what conditions is it justified to resort to general international law to fill in lacunae in the treaty? The second sub-question is this: does general international law contain a principle in regard to international watercourses which offers elements that can be used to answer the question?

34. The first sub-question highlights an issue of methodology on which the jurisprudence of the Court offers a wealth of information. Particularly apt to my mind is the 1989 Judgment by the Chamber of the Court in the case of *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy)*. The part that interests us is the passage in which the Chamber addresses the question of whether the rule of general international law regarding the exhaustion of local remedies could apply to a case brought under a bilateral treaty giving the Court jurisdiction for the settlement of disputes relating to the treatment given by one party to citizens of the other party, under a dispute-resolution clause "categorical in its terms" and not making access to the Court subject to any sort of condition. The Chamber's finding is worth citing:

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> "The Chamber has no doubt that the parties to the treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so." (*Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, p. 42, para. 50.)"

35. The principle highlighted by the Court seems very relevant to this case. Indeed, it is clear that the Parties which negotiated the 1975 Statute could freely have agreed that "important" principles of general international law governing this question would not apply to cases covered by the Statute. But — to borrow the words of the Chamber — it could not be accepted that these

principles should be held to have been tacitly dispensed with by the Statute without such an intention having explicitly been stated. In the Statute, no such intention that they be dispensed with is stated in "any words" or by any other means. It follows, then, that it is perfectly legitimate to resort to general international law to interpret the Statute in order to resolve the question of whether, when the matter is submitted to the Court on the basis of Article 12 following the failure of direct negotiations, the Party concerned may immediately build and commission the planned project, or must wait for the favourable decision of the Court before doing so.

36. What of the principles of international law? Do they offer useful considerations for answering this question? This is the second of the two sub-questions I mentioned. The answer is not difficult to determine, for the very simple reason that there is actually no real disagreement between the Parties on this subject. From their pleadings and oral arguments it is clear that ultimately both Parties see the great principles set forth in the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses as faithfully codifying the principles of
30 international general law in this area. It is remarkable that this substantial agreement between the two sides is not rejected by Argentina, even on principle, by reason of Article 17, paragraph 3, or Article 19 of the 1997 Convention, which provide that once the reasonable period of time allowed for consultations and negotiations between the Parties regarding the project's environmental compatibility has elapsed, the interested party may proceed to implement its project even if no agreement has been reached (provided that certain time-frames and conditions are complied with), and without its decision being subject to the completion of dispute-settlement procedures. To be sure, Argentina is careful not to proclaim that loudly. Nevertheless, however much one reads and rereads its pleadings and listens to its counsel, nowhere do we find Argentina challenging the notion that this principle enshrined in the Convention (and confirmed in the 2001 draft principles of the International Law Commission on the allocation of loss in the case of transboundary harm arising out of hazardous activities) is also a principle of general international law. The only thing that Argentina contests, and relentlessly so, is the use of this principle in interpreting the 1975 Statute; that is all.

37. Why should such an unquestionably important principle of general international law not be applicable for appropriately interpreting a provision of the Statute in which there is a lacuna,

such as Article 12, despite the fact that the principle in question is not dispensed with in "any words" in the Statute? For Argentina, the reason is that it would be fundamentally incompatible with the agreed régime established by the Statute. But why would it be incompatible? If one examines in depth the reasoning put forward by the Applicant to demonstrate this alleged incompatibility, one finds that in the end everything comes down to a single argument which Argentina propounds by underscoring the "major difference" between Article 12 of the Statute and the principles set forth in the 1997 Convention (which, as we have seen, reflect those of general international law). This "major difference" is that the Statute "establishes compulsory machinery which guarantees that the situation will be resolved", whereas the 1997 Convention (following the example of general international law, I might add) leaves

> "the possibility of an impasse entirely open, the result of which would be that the Party wishing to carry out an operation which, objectively, caused no significant damage to the other State, would not be able to do so because, in those systems, there is nothing to guarantee that the stalemate could be overcome"[31].

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(I would mention in passing that I have corrected a few minor typographical errors in the original passage quoted from the Applicant's Reply.)

38. Members of the Court, the "major difference" between the 1975 Statute and general international law for our purposes is unquestionable: only the Statute, and not general international law, establishes an obligatory judicial dispute-settlement mechanism which can be initiated by either Party and which leads to a binding decision on whether or not the project is in accordance with the applicable rules. But what Argentina does not explain is why the presence of such a mechanism in the Statute should favour the position of the Party opposed to a project rather than the position of the Party wishing to carry it out in a situation such as this where the project is vital for the country's sustainable development and the Party wishing to carry it out is convinced that objectively the project will do no significant harm to the first Party, to borrow the vocabulary used by our opponents. On the contrary, one can very well see the presence of the obligatory dispute-resolution mechanism in the Statute as a consistent complement to a system which permits the Party concerned to carry out the project if the period reserved for consultations and negotiations ends without an agreement being reached, whilst nevertheless refusing that Party the advantage of

[31] RA, p. 128, para. 1.151, and CR 2009/13, p. 70, para. 19 (Sands).

being the sole judge as to whether it is within its rights. In effect, the Party opposing the project, while not being able to prevent its going ahead following the failure of direct negotiations, enjoys under the Statute a very important guarantee for its interests, which the principles of general international law do not grant it: the Statute gives the Party opposing the project the right to obtain a judgment from this Court which is binding and determines whether the Party carrying out the project has acted legally or not, and decides what consequences there ought to be, if applicable, in terms of reparation, *restitutio in integrum* and so forth. Moreover, the Party opposing the project also has the possibility of asking the Court to indicate urgent provisional measures — which are also obligatory — stopping the construction and commissioning of the disputed project if that Party can demonstrate that the project in question risks doing irreparable harm such that it is inadvisable to wait for the final decision of the Court. It is thus a solution that fits perfectly with the major

32 principles of international environmental law, a solution which, in particular, is in accordance with the fundamental principles of the permanent sovereignty of States in regard to their natural resources and sustainable development, but nevertheless a solution which finds an equitable middle ground amongst the interests at stake whilst safeguarding all such interests adequately but not sacrificing any.

39. In short, it is clear that contemporary general international law contains a principle, which is codified both by the 1997 United Nations Convention and by the ILC's 2001 draft articles, according to which, once the period reserved for consultations and negotiations between the Parties regarding the environmental compatibility of the project has elapsed, the Party wishing to carry out the project may decide to go ahead with it even if no agreement has been reached, without its decision having to wait until dispute-settlement procedures have reached their conclusion. Not only has this principle not been dispensed with by the Statute of the River Uruguay either in "any words" or by any other means, but moreover it is not in any way contrary to the provisions of the Statute and is in fact fully consistent with the Statute's objects and aims. It follows that Article 12 of the Statute must be interpreted, and its lacunae resolved, in accordance with this principle and in light of it.

VII. CONCLUSION

40. Mr. President, Members of the Court, my pleading ends here, and I hope I have helped convince you that Uruguay did not breach its procedural obligations under Articles 7 to 12 of the Statute. I shall now leave Mr. Reichler to present the Respondent's conclusions in regard to the role of this Court in settling this dispute, and I would ask you, Mr. President, to give him the floor.

The VICE-PRESIDENT, Acting President: Thank you, Professor Condorelli. And I shall give the floor to Mr. Reichler.

33 M. REICHLER :

LA MANIERE DONT IL CONVIENT DE TRAITER LES ELEMENTS DE PREUVE PRODUITS PAR DES EXPERTS

1. Monsieur le président, Messieurs de la Cour, c'est un honneur que de me présenter de nouveau devant vous. J'aborderai aujourd'hui un sujet qui semble revêtir une pertinence particulière aux fins de la présente instance, à savoir la manière dont il convient de traiter les éléments de preuve invoqués par les Parties qui ont été produits par des experts.

2. De très nombreux documents de ce type ont été présentés à la Cour, extrêmement techniques pour la plupart. Comme il fallait s'y attendre, ils se contredisent en tous points, ou presque. Les rapports d'experts présentés par l'Uruguay concluent que l'usine Botnia respecte les normes internationales les plus strictes et ne cause aucun dommage au fleuve Uruguay, à la qualité de ses eaux, à ses organismes aquatiques ou à son écosystème dans son ensemble. Les rapports d'experts présentés par l'Argentine, quant à eux, affirment le contraire. Dès lors, comment la Cour peut-elle décider lesquels de ces éléments sont les plus crédibles et quel poids il convient de leur accorder ?

3. Permettez-moi de suggérer respectueusement qu'il serait bon de commencer par distinguer les uns des autres les différents experts dont les rapports, déclarations et exposés devant la Cour figurent au dossier de l'affaire. La première distinction qu'il convient d'établir — et la plus importante — consiste peut-être à faire la différence entre les experts indépendants et ceux qui ne le sont pas. Toutes choses égales par ailleurs, les premiers devraient normalement se voir accorder un crédit supérieur, et leurs rapports, davantage de poids. Voilà qui m'amène directement aux

questions qui ont été posées mardi aux Parties par M. le juge Bennouna[32]. Celui-ci a posé deux questions. Si la Cour le permet, je commencerai par donner la réponse de l'Uruguay à la seconde.

4. Le juge Bennouna a demandé : «dans le contexte de l'affaire dont la Cour est saisie, est-ce qu'un expert mandaté par l'une ou l'autre des Parties peut être qualifié d'expert indépendant ?» La réponse de l'Uruguay est «non». Catégoriquement non. Selon l'Uruguay, un expert mandaté ou engagé par l'une des Parties n'est pas, par définition, indépendant. Par conséquent, un rapport établi par un expert engagé aux fins de la présente instance, et qui a été versé au dossier, n'est pas un rapport indépendant. Les déclarations des experts engagés par une Partie pour exercer les fonctions de conseil ou d'avocat ne peuvent pas non plus être considérées comme étant indépendantes. Telle est la position de l'Uruguay depuis le début de la présente instance.
34 L'Uruguay a toujours veillé à ne pas qualifier d'«indépendants» les rapports, déclarations ou exposés des experts engagés par lui. Ils ne le sont pas. L'Argentine a, en revanche, toujours qualifié d'«indépendants» les rapports présentés par les experts qu'*elle* a engagés. Selon l'Uruguay, c'est un non-sens. Un expert engagé par une partie ne peut être indépendant.

5. L'autre question posée par M. le juge Bennouna était la suivante : «[q]u'est-ce que les Parties entendent par un «expert indépendant» auquel elles ont pu avoir recours» ? Cette question appelle une réponse plus longue, sachant que les Parties divergent sur ce point. Dans ses écritures, l'Argentine qualifie d'«indépendants» les experts qu'elle a engagés aux fins de la présente instance et leurs différents rapports. Il s'agit de Latinoconsult[33], de MM. Rabinovich et Tournier[34], de MM. Wheater et McIntyre[35], du «groupe d'étude indépendant argentin sur l'environnement»[36], ainsi que de leurs rapports. Dans son mémoire, l'Argentine a qualifié ces documents de «rapports

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[32] CR 2009/17, p. 59 (Bennouna).

[33] Latinoconsult S.A., Evaluation de l'impact sur l'environnement fluvial de l'usine de pâte à papier que Botnia envisage de construire dans la baie de Fray Bentos sur le fleuve Uruguay en Uruguay, 20 novembre 2006, MA, vol. V, annexe 3.

[34] J. Rabinovich et L. Tournier, Rapport scientifique présenté au ministère argentin des affaires étrangères assorti de réponses au contre-mémoire de l'Uruguay concernant les aspects environnementaux de l'usine de pâte à papier Botnia, près de Fray Bentos, en Uruguay, rapport non daté, RA, vol. III, annexe 43.

[35] H. Wheather et N. McIntyre, Examen de l'étude d'impact cumulé finale de la SFI concernant l'usine de pâte à papier Botnia en Uruguay, 4 décembre 2006, MA, vol. V, annexe 5; H. Wheater et N. McIntyre, Observations techniques sur le contre-mémoire de l'Uruguay en ce qui concerne les usines de pâte à papier sur le fleuve Uruguay, rapport non daté, RA, vol. III, annexe 44.

[36] MA, par. 7.5.

indépendants présentés par l'Argentine»[37]. Dans sa réplique, elle a de nouveau qualifié les experts qu'elle a engagés d'«indépendants»[38]. Dans cette pièce, l'Argentine a par ailleurs évoqué le «réexamen technique» effectué en son nom par «des experts indépendants engagés par l'Argentine»[39], par des experts indépendants engagés par l'Argentine. Toujours dans la réplique, il est indiqué que «[l]e second rapport Wheater est un rapport indépendant [en] lequel l'Argentine a toute confiance», et qu'il a été «établi à la requête de l'Argentine aux fins d'une évaluation indépendante»[40], qu'il a été établi à la requête de l'Argentine aux fins d'une évaluation indépendante.

35 6. Ainsi que l'Uruguay l'a fait observer dans son contre-mémoire[41] et dans sa duplique[42], aucun de ces experts et aucun de ces rapports ne peut être qualifié d'«indépendant». Le rapport scientifique et technique établi par M. Colombo et daté du 30 juin 2009 n'est, lui non plus, nullement indépendant. Le fait que M. Colombo et son équipe aient été engagés par le ministère argentin des affaires étrangères à la seule fin de produire des éléments en vue de la présente espèce n'est pas contesté. De même, les déclarations que M. Colombo a faites devant la Cour la semaine dernière ne sont pas indépendantes. Tout comme M. Wheater, M. Colombo est ici en tant que membre de la délégation de l'Argentine. Lorsqu'ils se sont adressés à la Cour, MM. Colombo et Wheater l'ont fait en tant qu'avocats, et non en tant qu'experts indépendants.

7. Certes, l'Uruguay a, lui aussi, engagé des experts pour établir des rapports techniques aux seules fins de la présente instance. La différence est qu'il n'a pas cherché à qualifier ces experts — ni leurs rapports — d'indépendants. Parmi les experts et auteurs de rapports d'experts engagés par

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[37] MA, par. 5.52.

[38] Voir RA, par. 3.7.

[39] *Ibid.*.

[40] RA, par. 3.12.

[41] CMU, par. 5.7 (dans son contre-mémoire, l'Uruguay précise que

> «l'Argentine a chargé plusieurs «experts» d'établir des rapports aux seules fins de la présente instance. Les auteurs de ces rapports ne sont pas indépendants ; ils sont payés par l'Argentine et agissent pour son compte. Or, la jurisprudence de la Cour est claire sur la nécessité d'accorder moins de poids à de tels rapports… Le scepticisme de la Cour est particulièrement de mise dans le cas des rapports fournis par l'Argentine en l'espèce…»).

[42] DU, par. 6.9 («[L]es auteurs du rapport de l'Argentine ne sont, dans aucun sens du terme, «indépendants». D'ailleurs, le fait que l'Argentine n'ait curieusement fourni aucun *curriculum vitae* et aucune information les concernant s'explique sans doute par le fait que ces «experts» sont en réalité des employés de l'Argentine.»).

l'Uruguay figurent M. Menzie[43], MM. Deardorff et Pryke[44], M. Sheate[45], M. Booth[46], MM. Swanson et Yassuda[47], ainsi que la société Exponent[48]. Quant à M. McCubbin, qui s'est exprimé mardi en tant qu'avocat et membre de la délégation de l'Uruguay (CR 2009/17), il a été engagé par l'Uruguay en août 2009, c'est-à-dire le mois dernier. L'Uruguay ne prétend pas que *l'un quelconque* de ces experts soit indépendant.

8. La Cour ne considère pas que les éléments de preuve émanant d'experts engagés par les parties à une affaire sont irrecevables. Selon leur qualité, ces éléments peuvent en effet l'aider, et elle peut leur accorder un poids considérable. Lorsqu'elle les apprécie, elle ne manque cependant

36 pas de garder à l'esprit qu'ils ont été établis aux fins d'étayer la thèse d'une partie, ce qui impose de les traiter avec prudence. Ainsi qu'elle l'a précisé dans l'affaire des *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*, et rappelé dans l'affaire du *Génocide*, «[l]a Cour traitera avec prudence les éléments de preuve spécialement établis aux fins de l'affaire» (*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie et Monténégro), arrêt, C.I.J. Recueil 2007*, p. 130, par. 213 ; *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005*, p. 201, par. 61). Selon un éminent auteur, «[l]es liens qu'un expert entretient avec une partie peuvent avoir une incidence sur le poids qu'il convient d'accorder aux éléments de preuve en question ; ils sont cependant sans incidence sur leur recevabilité»[49] *[traduction du Greffe]* (les références figureront bien entendu dans les notes de bas de page du

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[43] C. A. Menzie (Exponent, Inc.), Evaluation de l'étude d'impact cumulé finale concernant l'usine de pâte à papier Kraft blanchie de Botnia S.A. (Fray Bentos, Uruguay) sous l'angle des impacts sur la qualité de l'eau et des ressources aquatiques et sous l'angle des commentaires et questions formulés par le Gouvernement argentin, juillet 2007, CMU, vol. X, annexe 213.

[44] T. L. Deardorff et D.C. Pryke (Exponent, Inc.), Techniques disponibles et meilleures pratiques en matière de gestion de l'environnement pour l'usine de pâte kraft blanchie de Botnia S.A., Fray Bentos, Uruguay, 8 juillet 2007, CMU, vol. X, annexe 215.

[45] W. Sheate (Collingwood Environmental Planning), Commentaires sur le processus d'évaluation d'impact sur l'environnement, juin 2007, CMU, vol. X, annexe 216.

[46] P. Booth (Exponent, Inc.), Caractère suffisant des informations de l'évaluation d'impact sur l'environnement et du GTAN pour la détermination des impacts sur l'environnement — Botnia, S.A., Fray Bentos Uruguay, juin 2007, CMU, vol. X, annexe 217.

[47] J. C. Swanson et E. A. Yassuda (Applied Science Associates, Inc.), Analyse hydrologique de l'usine de cellulose envisagée par Botnia sur le fleuve Uruguay, juin 2007, CMU, vol. X, annexe 214.

[48] Exponent, Inc., Réponse à la réplique du Gouvernement argentin — Technologie de conception de l'installation et aspects environnementaux de l'usine de pâte à papier d'Orion, à Fray Bentos sur le fleuve Uruguay en Uruguay, juillet 2008, DU, vol. IV, annexe 83.

[49] A. Zimmermannn *et al*., *The Statute of the International Court of Justice: A Commentary*, p. 120.

CR). Sir Arthur Watts a formulé une observation intéressante au sujet d'une situation qui nous est devenue familière depuis deux semaines en la présente instance. Il s'est intéressé au

> «choix qui doit être fait par la partie souhaitant recourir à des opinions d'experts. Doit-elle appeler ces experts à la barre en tant que témoins, les soumettant ainsi à un contre-interrogatoire mené par l'autre partie, ou doit-elle les inclure dans son équipe juridique, en tant qu'avocats ou conseils, auquel cas ils ne sont pas soumis à un contre-interrogatoire mais sont naturellement, quel que soit leur renom, considérés comme étant clairement partisans. [Et la citation se poursuit] Du point de vue de la tactique de plaidoirie, il s'agit là pour les Etats d'un équilibre difficile à trouver.»[50] *[Traduction du Greffe.]*

9. «Du point de vue de la tactique de plaidoirie.» Monsieur le président, sir Arthur ne pouvait pas mieux résumer la question. La tactique de l'Argentine est claire. Elle a choisi de ne pas exposer MM. Colombo et Weather — car, ne nous y trompons pas, ce sont bel et bien des dépositions qu'ils ont faites — à un contre-interrogatoire des conseils de l'Uruguay et aux questions de la Cour et ce, en habillant les intéressés d'une robe d'avocat. Ce nonobstant, alors même qu'il est privé de la faculté de mener un contre-interrogatoire, l'Uruguay a le sentiment d'avoir démontré qu'il n'était pas opportun que la Cour se fonde sur un quelconque élément produit par MM. Colombo ou Weather.

10. Fort heureusement, la Cour a d'autres solutions que de s'appuyer sur les rapports, déclarations, dépositions et exposés présentés par les experts mandatés par les Parties. Elle peut en
37 effet choisir de se fonder sur les déclarations et opinions d'experts publiées par une organisation internationale compétente, ainsi que sur les rapports d'experts établis par les consultants indépendants engagés par cette organisation aux fins d'apprécier et d'évaluer la performance environnementale de l'usine Botnia. L'organisation internationale en question n'est autre que la Société financière internationale, ou SFI, l'une des institutions du groupe de la Banque mondiale. Il s'agit de la principale institution multilatérale qui finance des projets du secteur privé dans les pays en développement. Son indépendance par rapport aux Parties est incontestable. Son expertise en matière d'évaluation du risque environnemental et de surveillance de la performance environnementale ne peut pas non plus être mise en doute. De surcroît, personne ne saurait

[50] Sir Arthur Watts, *Burden of Proof, and Evidence before the ICF*, in Friedl Weiss, *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals*, p. 299.

aujourd'hui, en ce début du XXI[e] siècle, contester sérieusement son engagement en faveur de la «durabilité sociale et environnementale»[51], pour reprendre ses propres termes.

11. La Cour connaît bien désormais les conclusions solidement documentées que la SFI a formulées au sujet de l'usine Botnia. Mes collègues, MM. Boyle et McCaffrey, les ont rappelées devant vous. Selon l'Uruguay, trois raisons devraient conduire la Cour à accorder une très grande importance aux conclusions de la SFI et de ses experts consultants.

Monsieur le président, je sais que l'heure habituelle de la pause approche ; me permettez-vous tout de même de poursuivre encore quelques minutes ?

Le VICE-PRESIDENT, faisant fonction de président : Oui, je pense qu'il est préférable que vous poursuiviez et terminiez votre exposé.

M. REICHLER : Je vous remercie.

12. Comme je l'ai dit, il y a trois raisons pour lesquelles la Cour devrait accorder le plus grand crédit aux conclusions de la SFI et de ses consultants experts. Premièrement, elle a accordé un traitement similaire aux éléments de preuve, en particulier ceux d'ordre technique, recueillis par des enquêteurs indépendants et désintéressés ou par des organisations internationales, telles que la SFI. Ensuite, la SFI a apprécié les faits à l'aune de ses propres normes environnementales, qui sont très rigoureuses et directement liées à la question centrale en l'espèce, à savoir : l'usine Botnia causera-t-elle un préjudice sensible au fleuve Uruguay et à son milieu aquatique ? Troisièmement, la SFI a mené un examen particulièrement approfondi en effectuant des évaluations à de multiples
38 niveaux et en consultant des experts triés sur le volet et particulièrement pointus sur les questions à l'examen. Je vais analyser successivement chacune de ces trois raisons.

13. Prenons la première raison d'accorder un poids spécial aux conclusions de la SFI. Dans l'affaire *République démocratique du Congo c. Ouganda*, la Cour a fait observer que les «éléments de preuve obtenus» par des personnes indépendantes «rompu[e]s à l'examen et à l'appréciation de grandes quantités d'informations factuelles, parfois de nature technique» méritaient «une attention

[51] Voir CMU, par. 5.8-5.9.

particulière [je dis bien, une attention particulière]» (*op. cit.*, p. 201, par. 61)[52]. Dans l'affaire du *Génocide*, la Cour a conclu que le rapport du Secrétaire général de l'Organisation des Nations Unies intitulé «La chute de Srebrenica» devait se voir conférer «une autorité considérable» en raison du «soin avec lequel [il] a[vait] été établi, [de] la diversité de ses sources et [de] l'indépendance des personnes chargées de son élaboration» (*op. cit.*, p. 135-137, par. 228-230). Et la Cour d'indiquer, dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, que les «dépositions … de témoins désintéressés — qui ne sont pas parties au litige et n'ont rien à y gagner ni à y perdre» sont «considérées comme ayant *a priori* une valeur probatoire élevée», par rapport à celles qui sont préparées pour le compte d'une partie (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 43, par. 69). L'Uruguay considère que l'aval donné par la SFI au projet de Botnia et la performance environnementale de l'usine constituent précisément le type d'élément de preuve auquel une importance considérable doit être accordée.

14. Venons-en à la deuxième raison d'accorder du poids aux rapports de la SFI et de ses experts : si ses conclusions sont spécialement pertinentes à l'égard des questions de fond dont la Cour est saisie, c'est parce que la SFI a constaté que l'usine respectait ses normes, qui sont très strictes en matière d'environnement. La SFI a pour politique de traiter les craintes pour l'environnement avec le plus grand sérieux[53]. Ses activités de financement doivent être menées

[52] Le rapport concerné dans cette affaire-là était celui de la commission Porter, qui a entendu des personnes impliquées dans les actes opposant les parties.

[53] Les instituts financiers multilatéraux tels que la SFI et l'Agence multilatérale de garantie des investissements (AMGI) sont tenus, en droit international général, de faire en sorte que leurs activités protègent l'environnement de manière adéquate. Pour reprendre les termes d'un commentateur, les «banques de développement multilatérales» jouissent «d'une personnalité internationale suffisante pour être subordonnées à certains devoirs dictés par le droit international, y compris des devoirs nés par l'effet des règles générales et particulières du droit international relatif à l'environnement», Philippe Sands, *Principles of International Environmental Law*, 2e éd., Cambridge University Press, 2003, p. 1024-1025 *[traduction du Greffe]*. Par suite, «[l]es banques de développement multilatérales ont l'obligation de se conformer aux principes généraux du droit international qui se rapportent à la protection de l'environnement, et tout manquement en la matière est susceptible d'engager leur responsabilité internationale, ainsi que leur responsabilité pour les dommages pouvant être causés», *ibid., [traduction du Greffe]*.

39 «de manière «non préjudiciable» aux populations ou à l'environnement»[54]. Ainsi, la SFI a pour principe de refuser de financer de «nouvelles activités commerciales non susceptibles de respecter» l'ensemble de ses normes en matière de performance environnementale[55], et quiconque lui soumet un projet doit produire une «évaluation» rigoureuse des «risques et impacts … environnementaux» et mettre en œuvre des «mesures pour satisfaire aux exigences» de ses normes de résultats[56]. La SFI examine ensuite l'évaluation de l'emprunteur, l'aide à élaborer des «mesures destinées à éviter, réduire, atténuer ou indemniser les impacts…environnementaux», et surveille sa «performance … environnementale … pendant toute la durée de l'investissement»[57]. Les normes de résultats que je viens d'évoquer visent l'évaluation et la gestion environnementales, la prévention et la réduction de la pollution, la santé et la sécurité des communautés, la biodiversité et la gestion durable des ressources naturelles. Les normes de la SFI prévoient également l'examen des obligations découlant du droit international de l'environnement. En d'autres termes, elles couvrent des aspects qui occupent une place centrale dans le règlement des questions de fond qui nous réunissent ici.

15. Passons maintenant à la troisième raison de respecter les conclusions de la SFI : ces conclusions sont toutes étayées par l'évaluation détaillée de consultants techniques indépendants. La Cour a déjà entendu le nom de ces consultants : il s'agit du cabinet Hatfield, de l'AMEC et d'EcoMetrix, le bureau canadien qui a établi l'étude d'impact cumulé finale, ainsi que des rapports de suivi rendant compte des résultats concrets de l'usine. L'Argentine a souvent qualifié les experts du cabinet Hatfield d'«indépendants»[58] et, dans son mémoire, elle s'est très souvent

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[54] Société financière internationale (ci-après la «SFI»), *Politique en matière de durabilité sociale et environnementale*, par. 8 (30 avril 2006), dont le texte peut être consulté à l'adresse suivante : http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006_French/$FILE/SustainabilityPolicy_French.pdf (dernière visite le 24 septembre 2009). La SFI se distingue depuis longtemps par l'action qu'elle mène en faveur du développement durable en ne participant qu'à des projets dans lesquels elle ne décèle aucune atteinte à l'environnement. Même avant l'adoption de son actuelle *Politique en matière de durabilité sociale et environnementale*, les politiques de la SFI en la matière figuraient dans ses *Politiques opérationnelles* relatives à l'évaluation environnementale, et notamment dans la politique opérationnelle 4.01, qui codifiait l'évaluation environnementale, et la politique opérationnelle 7.50, qui codifiait les projets sur les cours d'eau internationaux. Aujourd'hui remplacées par la *Politique en matière de durabilité sociale et environnementale*, ces politiques opérationnelles imposaient des conditions strictes dans le domaine de l'évaluation des impacts possibles sur l'environnement, y compris ceux de nature transfrontière.

[55] *Ibid.*, par. 17.

[56] *Ibid.*, par. 10.

[57] *Ibid.*, par. 11.

[58] MA, par. 5.58, 7.1.

réclamée de leurs travaux, pas moins de 13 fois[59]. La SFI a présenté l'AMEC comme un «consultan[t] extern[e] indépendan[t]»[60]. Elle a indiqué qu'EcoMetrix avait été choisi parmi d'autres «bureaux de consultants indépendants qui n'avaient jamais eu auparavant de relations

40 avec» Botnia[61]. La SFI a sélectionné EcoMetrix au sein d'un «grand groupe de consultants» en raison de son «expérience et de ses compétences éprouvées dans l'évaluation de l'impact sur l'environnement des projets de fabrication de pâte et de papier»[62]. Les travaux accomplis par ces experts constituent un gage du fait que, pour parvenir à ses constatations et conclusions, la SFI s'est systématiquement fondée sur un examen technique approfondi et impartial.

16. Monsieur le président, Messieurs de la Cour, MM. Boyle et McCaffrey vous ont déjà exposé les conclusions des experts que la SFI a *elle-même* qualifiés d'«indépendants», mais, si vous me le permettez, à l'approche de la clôture du premier tour de plaidoiries de l'Uruguay, je vais les résumer très brièvement. En octobre 2006, une fois l'étude d'impact cumulé achevée par EcoMetrix et revisée par Hatfield, la SFI a déclaré que le projet de Botnia «sera[it] source d'avantages économiques importants pour l'Uruguay», «sans nuire à l'environnement»[63].

17. Comme condition au financement, la SFI a exigé de Botnia qu'elle «[engage] des consultants acceptables par [elle] pour [p]rocéder à un suivi indépendant de la performance environnementale et de la sécurité de l'usine ainsi que de son impact sanitaire et social sur les populations»[64]. Botnia s'est exécutée et, le 13 novembre 2007, la SFI a publié deux rapports, préparés par ses fameux «consultants externes indépendants», qu'elle avait chargés d'examiner les derniers préparatifs réalisés dans l'usine avant sa mise en service[65]. Ces rapports, l'un d'EcoMetrix et l'autre de l'AMEC, indiquaient que Botnia était en passe de répondre à toutes les attentes. Telle

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[59] MA, par. 4.78, 5.17, 5.34, 5.39, 5.58, 5.59, 5.71, 7.5, 7.7, 7.42, 7.96, 7.107, 7.108.

[60] DU, vol. III, annexe R80.

[61] Site Internet de la SFI, Amérique latine et Caraïbes, «Usine de pâte à papier Orion, en Uruguay», DU, vol. III, annexe R80.

[62] Le cabinet EcoMetrix a été choisi pour reviser l'étude d'impact cumulé des usines de pâte à papier en Uruguay, juillet 2006, disponible à l'adresse http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_PulpMills_Ecometrix_Background (dernière visite le 24 septembre 2009).

[63] Société financière internationale, communiqué de presse intitulé «Les conseils d'administration de la SFI et de l'AMGI approuvent le projet d'usine de pâte à papier Orion en Uruguay : 2500 emplois à la clé, aucune nuisance pour l'environnement», p. 1, 21 novembre 2006, CMU, vol. IX, annexe 206.

[64] Voir DU, vol. III, annexe R50, p. 10.1-10.16.

[65] Site Internet de la SFI, Amérique latine et Caraïbes, «Usine de pâte à papier Orion, en Uruguay», DU, vol. III, annexe R80.

a aussi été la conclusion de la SFI elle-même qui, lors de la publication des rapports, a déclaré y voir la preuve «qu[e] l'usine de pâte à papier Orion de Botnia, en Uruguay, [était] prête à fonctionner en conformité avec les exigences environnementales et sociales de la SFI et les normes … MTD (meilleures technologies disponibles) à l'échelle internationale»[66]. La SFI a conclu que ces rapports «confirm[ai]ent que l'usine Orion produira[it] d'importantes retombées économiques pour l'Uruguay *et ne nuira[it] pas à l'environnement*»[67].

41 18. La SFI a chargé les mêmes experts indépendants de continuer à assurer un suivi permanent de la performance de l'usine. Le 10 juillet 2008, la SFI — je dis bien, la SFI — a publié un rapport d'EcoMetrix évaluant la performance environnementale de l'usine Botnia durant son premier semestre d'exploitation[68]. Voici ce qu'EcoMetrix concluait dans ce rapport :

> «tout indique qu[e] … l'activité de l'usine satisfait aux normes environnementales strictes prévues dans l'évaluation d'impact sur l'environnement et l'étude d'impact cumulé, ainsi qu'aux normes de l'Uruguay et de la SFI. Ces résultats correspondent par ailleurs aux mesures effectuées pour d'autres usines modernes»[69].

19. Vous le savez, EcoMetrix a établi un autre rapport, qui couvre toute l'année 2008. Ce rapport contient des conclusions tout aussi tranchées. Ainsi qu'indiqué publiquement par la SFI en mars 2009, à propos du bilan de l'usine pour toute l'année 2008 :

> «la performance de l'usine est conforme aux normes de qualité de l'air et de l'eau figurant dans l'étude d'impact cumulé et dans l'évaluation d'impact sur l'environnement, comme l'exigeait la SFI, et respecte amplement les limites prescrites par les permis environnementaux délivrés par l'instance de réglementation uruguayenne, la DINAMA»[70].

20. Bien entendu, c'est à la Cour qu'il appartient de déterminer lesquels des éléments soumis par les Parties «revêtent une valeur probante à l'égard des faits allégués», et c'est à elle de «se prononce[r] … sur le poids, la fiabilité et la valeur qu'elle juge devoir leur être reconnus» (pour citer l'arrêt en l'affaire *République démocratique du Congo c. Ouganda*, *op. cit.*, p. 200,

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[66] *Ibid.*

[67] *Ibid.* (les italiques sont de nous).

[68] DU, vol. IV, annexe R98, p. ES.i.

[69] *Ibid.*, p. ES.ii.

[70] Société financière internationale, «Usine de pâte à papier Orion, en Uruguay», disponible à l'adresse http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_Pulp_Mills (dernière visite le 24 septembre 2009).

par. 58-59)[71]. Dans la présente affaire, la Cour ne dispose pas uniquement de l'appréciation des faits livrée par les Parties elles-mêmes. Elle bénéficie également d'évaluations techniques très poussées émanant de la SFI et de ses consultants — considérés par celle-ci comme des experts véritablement indépendants et impartiaux — qui ont conclu sans réserve que l'usine satisfaisait en tous points aux normes internationales les plus strictes et qu'elle n'avait aucune incidence sur l'environnement : aucune incidence sur le fleuve Uruguay ni sur la qualité de ses eaux, aucune incidence sur la santé des organismes aquatiques et des poissons, et aucune incidence sur l'écosystème.

21. Monsieur le président, permettez-moi de revenir à présent sur la question du juge Bennouna pour boucler la boucle. L'Uruguay considère que, parmi les nombreux rapports d'experts dont dispose la Cour, seule une catégorie de rapports méritent, en fait, le qualificatif
42 d'indépendants. Il s'agit des rapports établis par la SFI et sous sa direction. Partant, et conformément à sa jurisprudence, c'est aux rapports de *ces experts-là* que la Cour devra attacher la plus grande valeur lorsqu'elle examinera les aspects factuels des questions environnementales relevant du fond de la présente affaire.

22. Monsieur le président, le prochain orateur de l'Uruguay, et le dernier à intervenir lors de ce tour, sera mon collègue M. Condorelli, qui traitera ce qui constitue pour l'Uruguay une question purement théorique, à savoir celle de la réparation demandée par l'Argentine. Avec tout le respect dû à l'Argentine, l'Uruguay soutient qu'elle n'a apporté aucune preuve — ni même le commencement d'une preuve — à l'appui de son prétendu droit à réparation, puisqu'elle n'est pas parvenue à établir que l'Uruguay avait violé l'une quelconque des obligations lui incombant en vertu du statut de 1975. M. Condorelli répondra néanmoins à la présentation que notre ami commun M. Pellet a faite sur cette question.

23. Monsieur le président, un seul remède s'impose dans les circonstances de la présente affaire. C'est celui que l'Uruguay a demandé dans les conclusions de sa duplique, en priant la Cour de lui reconnaître le «droit de continuer à exploiter l'usine Botnia conformément aux

[71] Voir également l'arrêt rendu en l'affaire du *Génocide*, *op.cit.*, par. 212 («La Cour doit déterminer elle-même les faits qui sont pertinents au regard des règles de droit que, selon le demandeur, le défendeur aurait transgressées»).

dispositions du statut de 1975»[72]. L'Uruguay a exposé les fondements de sa demande dans la duplique[73], de sorte que je n'ai pas à les répéter tous ici. Je me bornerai à appeler respectueusement l'attention de la Cour sur un point essentiel, à savoir qu'une occasion unique s'offre à elle d'apporter une contribution très précieuse au règlement pacifique des différends, d'aider à clore toute cette affaire inutile et fâcheuse, et de favoriser un retour rapide aux rapports fraternels et harmonieux qu'ont toujours connus ces deux pays frères d'Amérique du Sud, en publiant une déclaration qui énoncerait de la manière la plus claire possible les droits et obligations respectifs des Parties.

24. La Cour n'est assurément pas sans savoir que, depuis plus de trois ans, des manifestants argentins barrent quasiment sans arrêt la principale voie de circulation entre l'Uruguay et l'Argentine, sur le pont du General San Martín. Ces barrages ont infligé à l'Uruguay des pertes économiques qui se chiffrent en centaines de millions de dollars. La semaine dernière, M. Kohen s'est inquiété à plusieurs reprises du taux de chômage à Fray Bentos[74]. S'il en cherche la cause, je lui conseille de se tourner vers les barrages. Les manifestants ont menacé de maintenir ces
43 barrages à l'avenir, au moins aussi longtemps que durera la présente affaire. Quant à savoir s'ils se poursuivront par la suite, ou si on les laissera se poursuivre, cela dépendra peut-être de ce que la Cour décidera et de ce qu'elle dira.

25. Ainsi que M. l'ambassadeur Gianelli l'a relevé dans son discours d'ouverture, l'absence de mesures prises par l'Argentine pour rouvrir le pont à la circulation a déjà été déclarée contraire au droit international par un tribunal arbitral du Mercosur[75]. Cette inaction est d'autant plus remarquable que, dans sa décision, le tribunal avait expressément mis en demeure l'Argentine d'aligner son comportement sur le droit. Ainsi avait-il indiqué à l'unanimité :

> «Fixer des règles non ambiguës que devront respecter les pays après qu'il aura été statué dans cette procédure, règles qui ont fait défaut jusqu'ici parce que ces types de circonstances ne sont pas régies au Mercosur, tracera clairement la frontière entre ce qui est permis et ce qui ne l'est pas, de sorte que l'on puisse compter que ces types de conflits ne se reproduiront plus.»[76]

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[72] DU, conclusions.

[73] DU, par. 7.30-7.40.

[74] Voir, par exemple, le CR 2009/15, p. 63-64, par. 23-29 (Kohen).

[75] CR 2009/16, p. 16, par. 29 (Gianelli).

[76] CR 2009/16, note 1, sentence, par. 192.

Les conflits se sont reproduits, et ils perdurent.

26. Compte tenu des faits pour le moins extraordinaires dont nous débattons ici, qui distinguent radicalement la présente affaire de celles dans lesquelles la Cour a pu envisager une telle forme de réparation, l'Argentine n'ayant d'ailleurs jamais cherché à nier ces faits extraordinaires, le risque de voir persister le conflit — sans parler d'une situation d'illicéité manifeste —, même après la décision de la Cour sur le fond, est bien réel. Face à cette situation sans précédent, l'Uruguay estime que la Cour ferait grandement avancer la cause que nous défendons tous dans ce prétoire, à savoir de mettre une fois pour toutes un point final au présent différend, qui n'a que trop duré, et de faciliter le rétablissement des relations particulièrement amicales entre l'Argentine et l'Uruguay — en affirmant expressément le droit invoqué par l'Uruguay en l'espèce, à savoir celui d'exploiter l'usine Botnia conformément au statut de 1975[77]. Laisser subsister la moindre ambigüité sur cette question serait tout simplement par trop risqué.

27. Monsieur le président, ainsi s'achève mon exposé de la matinée. Je vous remercie encore infiniment de la courtoisie et de la patience avec laquelle vous m'avez écouté. Je vous prie de rappeler M. Condorelli à la barre, peut-être après la pause.

44 Le VICE-PRESIDENT, faisant fonction de président : Je vous remercie, Monsieur Reichler. Effectivement, après avoir plaidé pendant soixante-sept minutes ce matin, M. Condorelli mérite une pause et un café, de même que les membres de la Cour. L'audience est suspendue pendant quinze minutes.

L'audience est suspendue de 11 h 40 à 11 h 55.

The VICE-PRESIDENT, Acting President: Please be seated. The hearing is resumed and you again have the floor, Professor Condorelli.

Mr. CONDORELLI:

[77] Ordonnance rendue le 23 janvier 2007 dans la présente affaire, par. 29.

THE REMEDIES REQUESTED BY ARGENTINA: WHY THE COURT SHOULD REJECT THEM

I. INTRODUCTION

1. Thank you very much, Mr. President. Mr. President, Members of the Court, the purpose of this oral argument is to examine what the consequences should be of the internationally wrongful acts which Uruguay allegedly committed in breach of the obligations laid down by the 1975 Statute, thereby incurring its international responsibility with respect to Argentina. It goes without saying that, as Uruguay has already several times demonstrated to you, it has not breached any of its obligations, my comments to you now are purely subsidiary — or academic as we have been told — it is fine for a professor to make academic comments: in other words, the Court should take them into account only in the unlikely event that it should become convinced that Uruguay has acted in a way which does not comply with the Statute.

2. Argentina is asking the Court to recognize that it is supposedly entitled to four types of remedy[78]. Firstly, cessation of the continued breaches attributable to Uruguay and the resumption of the performance of the obligations breached. Secondly, reparation in the form of *restitutio in integrum*. Thirdly, reparation in the form of compensation. Fourthly, guarantees and assurances of non-repetition.

45 3. I would emphasize at the outset that my following remarks will focus exclusively on Argentina's second, third and fourth requests, and for obvious reasons: for Uruguay does not have the slightest difficulty in accepting that, were the Court hypothetically ever to recognize its international responsibility for conduct constituting continued breaches of obligations laid down by the Statute, it would then undeniably have to cease that conduct and return to compliance with the rules breached, and without any need for the operative paragraph in the judgment to state this explicitly. As your Court has pointed out just recently,

> "[i]t is not necessary, and it serves no useful purpose as a general rule, for the Court to recall the existence of this obligation in the operative paragraphs of the judgments it renders: the obligation incumbent on the State concerned to cease such conduct derives by operation of law from the very fact that the Court establishes the existence of a violation of a continuing character" (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, Judgment of 13 July 2009, para. 148).

[78] CR 2009/15, p. 45, para. 3 (Pellet).

In this context, Uruguay notes the fact that Argentina states in its Memorial: the (alleged) procedural breaches relating to Articles 7 to 12 of the Statute ought supposedly to be characterized as of an immediate nature[79]. The obligation of cessation would thus allegedly not be appropriate to these, whereas it might perhaps be relevant in the event of conduct considered to be contrary to substantive obligations and continuing in time.

4. Moreover, it is understood that where the obligation of cessation might be relevant — namely, should the Court decide that Uruguay has rendered itself responsible for breaches of substantive requirements in the Statute continuously — such an obligation of cessation might very well mean that Uruguay must adopt new measures with a view, for example, to better prevention of pollution. Uruguay in no way disputes the power of your Court, if need be, to order the implementation of measures of that kind as an element of the cessation, in the unlikely event that it were to find that the Respondent's conduct has not complied with the Statute.

II. SOME INTRODUCTORY REMARKS

5. Three preliminary remarks are needed before I come to the heart of the matter.

46 6. The first concerns the identification of the international principles which must be called upon for determining the legal consequences of the wrongful acts consisting of breaches of the provisions of the Statute. Of course, Uruguay agrees with Argentina on the need to apply the "secondary" rules of general international law on the responsibility of States, which are transcribed in the text of the associated Articles, elaborated in 2001 by the International Law Commission[80]. However, the concept which the International Law Commission stressed in Article 55 of its 2001 text, relating to "*Lex specialis*", in which it is stated that "these articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law"[81] must not be forgotten here. Yet Argentina appears to simply forget that the Statute contains any number of specific rules relating to the consequences of wrongful acts.

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[79]MA, para. 8.12 *et seq.*

[80]RA, p. 17, para. 0.16.

[81]Art. 55 of the ILC Arts. on the responsibility of States (General Assembly resolution 56/83, 12 Dec. 200l, Ann.).

Articles 42 and 43 explicitly contemplate compensation as an appropriate remedy in the event of harm caused by the pollution of the river in breach of the Statute. The importance of these provisions cannot be underestimated: they clearly indicate that, if harm is caused by polluting the river, according to the Statute, compensation must be envisaged in principle as a perfectly adequate form of reparation. This is an important aspect to which we must return later.

7. The second remark concerns the distinction between the procedural and the substantive obligations. It must be emphasized at the outset that it is certainly not right to deal with the question of the remedies to be applied as regards punishing the breach of these two categories of obligations in the same way. The same remedies cannot be considered appropriate in the two cases indiscriminately. The content of the primary rule at issue must obviously be taken into account in order to identify and quantify the most appropriate remedy in the case. As the commentary by the International Law Commission on the Articles on the responsibility of States pertinently points out, "the primary obligation breached may also play an important role with respect to the form and

47 extent of reparation"[82]. Moreover, these concepts are clearly recognized by your Court. Thus, for example, in the Judgment of 31 March 2004 in the *Avena* case, after quoting that *locus classicus*, the celebrated *Chorzów dictum*, according to which "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form" (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21), your Court stated:

> "What constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury." (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 59, para. 119.)

Likewise in the present case, in order to determine what the adequate form of reparation is which corresponds to the injury, the various contents of the obligations allegedly breached by

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[82]See report of the International Law Commission, Fifth-Third Session, doc. A/56/10, p. 96. See also, along the same lines, for example, J. Combacau and D. Alland, "'Primary' and 'Secondary' Rules in the Law of State Responsibility: Categorizing International Obligations", *16 Netherlands Yearbook of International Law* (1985), p. 108 ("it is above all the consideration of 'content' of the primary obligation in its widest meaning . . . which explains why a certain consequence is attached specifically and *ab initio* to its breach"); I. Brownlie, *State Responsibility*, Oxford, 1983, p. 234 ("the interaction of substantive law and issues of reparation should be stressed"); C. Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", 282, *I.C.J. Reports 1999*, p. 273 ("The actual consequences may not be separated so easily from the substance of the obligation breached"); C. Gray, "The Choice between Restitution and Compensation", *10 European Journal of International Law* (1999), pp. 413 *et seq.*

Uruguay would necessarily would have to be assessed and a distinction drawn between harm arising from procedural or from substantive breaches. These two aspects must therefore be dealt with separately.

8. But I still have one more preliminary remark, the last, to make to the Court. As the Court has read and heard a number of times, for Argentina only one solution to the dispute between itself and Uruguay is acceptable: the one which entails nothing less than the dismantling of Botnia, or at the most its conversion to other industrial uses, without the least consideration being given to the colossal damage in economic and social terms which such a measure would cause Uruguay and its sovereign programmes of sustainable development. Nor would the enormous effort made by Uruguay for the adoption of all measures, including the most sophisticated and costly ones, to fully preserve the river environment merit any consideration: an effort whose remarkable success has

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been unreservedly welcomed by the competent international organizations and by the pick of independent experts. But no matter! The Applicant unreservedly proclaims that the dismantling would be justified in any event, even "if the Orion mill does not damage the River Uruguay"[83], even if "in the unlikely event of the Court deciding that the construction and commissioning of the Orion mill are not likely to cause a risk of significant damage"[84]. Uruguay cannot be surprised at such an attitude, which, on Argentina's part, rather than a genuine concern for the preservation of the river, seems to reveal an incomprehensible animosity towards a brother country, whose commitment and record in the area of sustainable development and environmental protection are nevertheless indisputably recognized throughout the world. Uruguay fervently hopes that the Court's decision will help to place relations between the two countries back on the track of friendship and co-operation.

III. THE QUESTION OF THE REMEDIES FOR THE SUPPOSED BREACHES OF THE PROCEDURAL OBLIGATIONS

9. I now come to the question of the remedies for the supposed breaches of the procedural obligations laid down by the Statute which can allegedly be imputed to Uruguay. In its written pleadings, Argentina constantly stresses the existence of an indissociable link between the

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[83]RA, p. 45, para. 1.41.

[84]RA, p. 141, para. 1.172.

procedural and the substantive links[85]. The purpose — as we know — is to try to show that, even if the Court were to recognize that the construction and operation of the Orion mill are unable to cause risks of significant harm to Argentina, the breach by Uruguay of its procedural commitments would in any event — as a remedy — give rise to the obligation to dismantle the mill. The Applicant's strategy is clear: unable to prove that Botnia causes or risks causing significant environmental harm to the River Uruguay, Argentina pins everything on the alleged breaches of the procedural obligations, hoping to convince your Court that, even if it were to agree with it on this single point, just one remedy would have to be granted: *restitutio in integrum.*

49 10. Argentina's claim clearly lacks any basis. Of course, Uruguay recognizes that the procedural mechanism laid down by the Statute plays an important role in the system created by that instrument. It also recognizes that, if ever the Court were to decide that Uruguay has rendered itself responsible for breaches of the provisions in question, that country should bear the consequences. Uruguay, on the other hand, for various reasons, considers Argentina's argument that the dismantling of the plant would be the only appropriate remedy as a response, even for this order of offence, to be fundamentally unacceptable and baseless.

11. Firstly, Argentina has no ground for invoking Uruguay's international responsibility for conduct which, in the abstract, might perhaps be characterized as breaches of the procedural provisions of the Statute, to the extent that it accepted them, thereby abandoning any demonstration of their unlawfulness. I am not going to go back again over the 2004 and 2005 agreements, which Professor McCaffrey, Mr. Martin and myself have discussed at length yesterday and today. I will confine myself to pointing out that these agreements clearly and unequivocally reveal that Argentina has refrained from invoking any breaches of procedural obligations which Uruguay might have committed previously. As stated by Article 45 of the 2001 text of the ILC Articles on responsibility, "[t]he responsibility of a State may not be invoked if: *(a)* the injured State has validly waived the claim . . ."[86].

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[85]RA, p. 115, para. 1.28, p. 141, para. 1.172 and p. 503, para. 5.40.

[86]Article 45 of the ILC Articles on the Responsibility of States (General Assembly resolution 56/83, 12 Dec. 2001, Ann.).

12. However, even disregarding what has just been said, the fact nevertheless remains that, according to the principles of international law, the remedy of *restitutio* claimed by the Applicant would not be applicable. It would not be so by virtue of the striking disproportion between the gravity of the consequences of the unlawful act of which it is accused and those of the remedy claimed. Thus, restitution would not be based on these "considerations of equity and reasonableness"[87] whose central role in this area is strongly emphasized by the International Law Commission.

13. In its commentary on the draft Articles on the Responsibility of States adopted at first reading, the ILC stressed that: "it would be inaccurate from the theoretical and practical standpoint

50 to define restitution in kind as the form of reparation unconditionally or invariably ideal or most appropriate which must be used in all cases and all circumstances"[88].

14. As regards the possibility of applying the remedy of restitution when it is a matter of breaches of procedural obligations, in 2001 the ILC made the following observations:

> "In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed."[89]

15. These remarks are clearly of great relevance in our case: they unanimously suggest that, by calling for the dismantling of the Botnia mill solely on the basis of the breach of procedural obligations, the Applicant is seeking to obtain — I am again quoting the words of the ILC — "more than it would have been entitled to if the obligation had been performed". The wholly disproportionate nature of the remedy of restitution — particularly in the form indicated by Argentina — is glaringly apparent.

16. This fundamental disproportion is all the more apparent if one takes into account the size of the economic and social burden which dismantling the Botnia mill would impose on Uruguay. The elimination of the plant as a remedy for breaches of procedural obligations would entail an

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[87]See Report of the International Law Commission, Fifty-third session, doc. A/56/10, p. 262.

[88]See *ILC Yearbook*, 1993, Vol. II, part 1, p. 65.

[89]See Report of the International Law Commission, Fifty-third session, doc. A.56/10, p. 254.

extremely high cost, at the same time providing no benefit to the river environment. In a word, it would typically be what Article 35 of the 2001 ILC Articles on the Responsibility of States defines as "a burden out of all proportion to the benefit deriving from restitution instead of compensation"[90]. This is precisely one of the two cases in which, according to Article 35 just quoted, restitution must be excluded.

51 17. But there is another element to be considered, that of identifying the remedy which your Court might deem appropriate in the event of the violation of procedural obligations laid down by the Statute. As I had the honour to show you this morning, it is indisputable that your Court was seised by Argentina "on the basis of Article 12", following the failure of the direct negotiations laid down by that provision. The inevitable consequence is therefore that the Court's role in the present case must be recognized as, precisely, that of final arbiter, a power conferred upon it by Article 12 of the Statute, namely to decide whether the works in question do or do not cause significant harm to the quality of the waters of the River Uruguay.

18. Mr. President, the implications are clear: if, at the end of these proceedings, the Court concludes that Uruguay has not rendered itself responsible for breaches of the substantive provisions of the Statute, it would be left with no basis for considering the remedy of restitution in the form of the dismantling of the plant as appropriate. Admittedly, the fact that the Court was seised on the basis of Article 12, cannot *per se* exclude, during the stages preceding the direct negotiation between the Parties, the fact that breaches of procedural obligations had occurred, and the Court's jurisdiction to verify this is beyond dispute. But in no event could these breaches justify such a radical remedy, which would nullify Uruguay's sovereign right to exploit its natural resources in compliance with its international obligations relating to the protection of the environment of the River Uruguay. The Court's task is to ensure a fair balance between the rights and obligations of the Parties, duly taking into account both Argentina's procedural rights and Uruguay's substantive rights. The remedy requested would completely sacrifice Uruguay's substantive rights on the altar of comprehensive compliance with Argentina's procedural rights, whereas — once again to echo the words of the ILC — "[r]estitution in such cases, if it is available

[90] Article 35 *(b)* of the ILC's Articles on the Responsibility of States (General Assembly resolution 56/83, 12 Dec. 2001, Ann.).

at all, cannot be allowed to give the injured State after the event more than it would have been entitled to if the obligation had been performed".

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IV. THE QUESTION OF THE REMEDIES TO BE APPLIED IN THE EVENT OF THE BREACH BY URUGUAY OF ITS SUBSTANTIVE OBLIGATIONS LAID DOWN BY THE 1975 STATUTE

19. I now come, Mr. President, Members of the Court, to the legal consequences attached to the alleged breaches by Uruguay of substantive obligations laid down by the 1975 Statute. Argentina's demand that the pulp mill should be dismantled as a remedy is essentially based on two arguments, which are attached to the principal object of the Statute: "to prevent damage to the ecosystem of the river, not just to repair any damage"[91]. First, Argentina argues that, as Uruguay has breached its procedural obligations, it is no longer possible to achieve such a substantive objective (prevention) other than by returning to the *statu quo ante*, and to do so, once again, by the dismantling of the plant[92]. Secondly, Argentina excludes the fact that, if harm is done to the ecosystem of the river, it can be repaired by compensation (coupled with cessation, of course): but still because of the essential objective of the Statute, which is to prevent and not to repair.

20. As regards the first argument, Argentina again resorts to the trick of mixing procedural and substantive questions, seeking to have us believe that breaching procedural obligations would necessarily entail the breach of substantive ones. Ultimately, it is the procedural aspects to which the Applicant always gives priority, when the fundamental purpose on which the Statute is based is undoubtedly the — highly substantive one — of protecting and preserving the ecosystem of the river. The Court cannot condone this approach. If actions by one Party breach the Statute by harming the protected environment, then the harm caused must be determined by assessing the damage (or the risk of damage) suffered by the other Party as a result of those actions. As for the remedies, they must patently be chosen precisely in relation to the need to repair the harm caused. Here, the reference to the procedural obligations is quite irrelevant: its sole purpose is to divert the Court's attention from the fact that no serious evidence has been provided by Argentina on the environmental harm which Uruguay has allegedly caused the Applicant.

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[91] RA, p. 486, para. 5.9. See also, p. 497, para. 5.26 and CR 2009/15, p. 48, para. 8 (Pellet).

[92] RA, p. 487, para. 5.10.

53 21. Argentina's second argument is that compensation cannot be seen as an appropriate remedy for the breach of substantive obligations laid down by the Statute because that instrument has created a régime wholly geared to prevention, rather than to reparation[93]. This, Mr. President, is a false syllogism, based on purely abstract *a prioris*, but which ignores the positive givens: Argentina proposes that the Court should do this, glossing over what the Statute explicitly says, when it states in so many words that the usual remedy, in the event of harm caused by pollution of the river, is compensation. [Slide 1.] In this connection, Articles 42 and 43 of the Statute, and more particularly Article 43, need to be looked at again: "The jurisdiction of each Party with regard to any violation of pollution laws shall be exercised without prejudice to the rights of the other Party to obtain compensation for the losses it has suffered as a result of such violation." Undeniably, this provision is of paramount importance when it comes to establishing whether the appropriate remedy, should the Court decide that Uruguay has breached its substantive obligations, is restitution or compensation.

22. It is clear that the very presence in the Statute of Articles 42 and 43 deals a strong blow to the credibility of Argentina's argument that the only possible remedy is restitution. Whence the desperate effort by the opposing Party, which last week sought to convince the Court that these provisions would have to be, so to speak, "forgotten"[94]. The argument, a very bold one, is that those provisions did not concern the wrongful acts stemming from breaches of the substantive obligations relating to pollution of the river at all, only cases of "liability", in other words of "objective" responsibility for harm. Mr. Müller, counsel of Argentina, perhaps allowed himself to be carried away by a word, a single word, in the unofficial English translation of the Statute text, where the term "liable" may be found in Article 42: "Each Party shall be liable to the other . . .". Unfortunately for him, the authentic French text of Article 42 refers to the "responsibility" of the Parties: "Chaque partie est responsable envers l'autre des dommages . . .". And the fact that such responsibility covers the harm caused to one Party by the wrongful acts of the other is, moreover,
54 clearly shown in Article 43, in which the reference to the harm caused by "any violation" is found.

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[93]MA, pp.361 *et seq.*, paras.8.28 *et seq.*

[94]CR 2009/15, p. 41, para. 15 (Müller).

Any violation, then, and all types of responsibility, including the international responsibility of one State to another for a wrongful act. [End of slide 1.]

23. The fact that the Statute in so many words assigns the role of ordinary remedy to compensation in the event of pollution of the river patently has major implications.

24. The first of these is obvious: Article 43 indisputably highlights the fact that Argentina is wrong when claiming that compensation should be regarded as a form of reparation which is inadequate *per se*, according to the logic of the Statute, as a response to any breaches of substantive obligations which are laid down by it, since, on the contrary, as we have just seen, the Statute assigns to compensation the role of ordinary remedy to be used in response to breaches of the obligations relating to pollution of the river.

25. The second implication is that the very presence in the Statute of a provision explicitly assigning to compensation the role of ordinary means of reparation suggests that, in general, compensation should be considered as having priority over restitution. Following the logic of the Statute, restitution can only be prescribed when compensation would prove to be manifestly incapable of restoring compliance with the treaty obligations and wiping out the effects of the breaches of them.

26. These considerations further highlight how excessive the claim for restitution submitted by Argentina is. The dismantling of the pulp mill might be seen as an appropriate remedy for repairing the breaches of substantive obligations allegedly applicable to Uruguay in only one case: if, in the unlikely event that the Court were to find that no other form of reparation would be capable of eliminating the harm caused or likely to be caused to the ecosystem of the river, and also able to prevent such harm from continuing to occur in the future. Yet Argentina has not shown (how could it have done so?) that the harm or risk of harm imputable to Uruguay — to the extent that they persist — are of such gravity that the only conceivable solution to remedy it would be the elimination of the Botnia plant. The Applicant is convinced that such an exorbitant claim cannot possibly be taken seriously by the Court.

55 27. Having no doubt realized the irremediably disproportionate nature of its claim seeking the dismantling of the plant, Argentina entrusted Professor Pellet with the task of constructing a completely new argument, which he presented most eloquently in the oral pleadings last week.

The idea which he put forward is that whether restitution is proportionate or not should be measured not in relation to the situation today, but to the one prevailing when the Application was filed, when the plant had not yet been built; however, Professor Pellet also considers the alternative possibility of identifying, as the "critical date", that of your Order of 13 July 2006, by which your Court stated that Uruguay "necessarily bears all risks relating to any finding on the merits that the Court might later make . . ."[95]. In short, everything would be "frozen" on one of these dates or the other, whereas what subsequently occurred, namely the completion of the work, its commissioning, etc., would not be taken into consideration at all.

28. Mr. President, Members of the Court, this new argument cannot possibly convince the Court. First, it should be noted that Uruguay decided to authorize the construction of the plant and its commissioning not in order to confront Argentina and the Court with a fait accompli, but because it was and remains convinced that, once the period set aside for consultations under Article 12 of the Statute had expired without result, it was entitled to do so by that instrument. Of course, under the provisional measures requested by Argentina, the Court could have called a halt to the construction of the plant three years ago; however, the Court did not do so, considering that there was no continued risk of irreparable harm to Argentina and the River Uruguay. The entire matter was thus postponed until the final decision on the merits.

29. It is therefore at the time when the final decision is made that the question of comparing the severity of the burden which would result from restitution as against compensation would arise, in the unlikely event that the Court were ever to decide that Uruguay had rendered itself responsible for grave breaches of its obligations. Yet this cannot be weighed up by going back in time. In point of fact, one must definitely turn to the past, as Article 35 of the Articles on the responsibility of States indicates, but that is solely to determine the situation which existed before
56 the wrongful act was committed, which would have to be restored by means of restitution. However, the cost of such restoration, in order to verify whether it is or not out of proportion to the benefit which would derive from compensation, can only be calculated in the present, in other

[95] CR 2009/15, p. 49, para. 12 (Pellet).

words, at the moment when your Court would have to choose which of the two remedies is the most appropriate in relation to the case concerned.

V. THE QUESTION OF "ANCILLIARY" COMPENSATION

30. I now come to Argentina's third claim. In its Memorial, the Applicant argues that it has the right to obtain from the Court the application for its benefit of an additional reparatory remedy, which I would like to term as ancillary to restitution. Indeed, according to the Applicant, your Court should require Uruguay to compensate the harm caused to Argentina to the extent that the dismantling of the plant is not sufficient to erase all the consequences of the wrongful acts allegedly perpetrated by the Respondent[96]. Argentina has even drawn up a list of damage for which compensation is due: this list includes the financial losses suffered by tourism, the damages resulting from the decline in property values, losses and additional expenditure in the agriculture, apiculture and fisheries sectors, etc.[97]

31. It is obvious that these remarks have no solid legal basis. Indeed, Argentina knows full well that it can only lay claim to such compensation inasmuch as it can prove the existence of a sufficiently direct causal link between the wrongful acts imputable to Uruguay and the harm it refers to. Indeed, the burden of proof undeniably lies with Argentina as regards the fact that, on the one hand, tourism, property values, farming and fisheries have actually suffered losses since the pulp mill was built and commissioned and, on the other hand, that those losses were directly caused by breaches by Uruguay of its treaty obligations not to cause significant harm to the quality of the waters of the River Uruguay. Yet Argentina has offered not one scintilla of proof of the facts it alleges and the existence of an adequate link of causality. This being so, it is hard to see how its claim for compensation could be considered by the Court.

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VI. THE GUARANTEES AND ASSURANCES OF NON-REPETITION CALLED FOR BY ARGENTINA

32. In both its Memorial and its Reply, Argentina called upon the Court to state that Uruguay must provide it with "adequate guarantees that it will refrain in future from preventing the Statute

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[96]MA, pp. 361-362, paras. 8.28-8.31. See also CR 2009/15, p. 53, para. 21 (Pellet).

[97]MA, pp. 361-362, paras. 8.28-8.31.

of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty"[98]. In the Memorial, it is specified that the guarantees and assurances requested must include, firstly, a formal declaration made by a competent authority of Uruguay and giving an undertaking to comply in future with the provisions of Articles 7 *et seq*. of the Statute, and of which the Court would take formal note in the operative part of its judgment; secondly, Uruguay would undertake to establish, in consultation with Argentina, a fund to support the preservation and improvement of the environment of the river, which would be jointly managed[99].

33. Mr. President, Uruguay acknowledges that, in certain cases, assurances of non-repetition may help to restore confidence in relations between two States, upset by a dispute between them. However, as noted by the International Law Commission,

> "assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words 'if circumstances so require' at the end of subparagraph *(b)*."[100]

By these words, the Commission is referring to Article 30 *(b)* of the Articles on the Responsibility of States, which lays down that "The State responsible for the internationally wrongful act is under an obligation: *(b)* to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."[101] As regards this Court here, your recent case-law has made some further interesting remarks on this topic. Hence, your most recent judgment contains the comment that:

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> "while the Court may order, as it has done in the past, a State responsible for internationally wrongful conduct to provide the injured State with assurances and guarantees of non-repetition, it will only do so if the circumstances so warrant, which it is for the Court to assess".

To which your Court immediately added: "[a]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct

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[98]MA, p. 361, para. 9.1; RA, p. 509, para. 6.2. See also CR 2009/15, p. 54, para. 24 (Pellet).

[99]MA, p. 365, para. 8.39.

[100]See report of the International Law Commission, fifty-third session, doc. A/56/10, p. 239-240.

[101]Article 30 *(b)* of the ILC Articles on the Responsibility of States (General Assembly resolution 56/83, 12 Dec. 2001, Ann.).

in the future, since its good faith must be presumed" (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, Judgment of 13 July 2009, para. 150).

34. In the present case, precisely, even in the unlikely event that the Court were to conclude that Uruguay had committed wrongful acts in breach of the Statute, it is clear to the Respondent that the assurances demanded cannot be regarded as either relevant or useful.

35. With respect in particular to the formal declaration requested by Argentina, it must be emphasized that Uruguay has over and over again demonstrated its firm intention to continue to comply with its procedural and substantive obligations under the Statute, and has given assurances that it will scrupulously comply with the Judgment of the Court. Moreover, Uruguay would have greatly preferred to hear the Agent of Argentina express the same firm intention at the beginning of the oral pleadings, but has no doubt that this will be the case at their closure. Of course, there is currently an ongoing dispute relating, in particular, to the interpretation to be given to the various provisions of the Statute. The Court will soon make its decision: the Parties will then have before them a final judgment establishing with binding force what the right interpretation is to be given to the provisions which they have hitherto understood differently. Such a judgment will remove any doubt about the respective rights and obligations of the Parties: both Uruguay and — it goes without saying — Argentina will then know exactly what they are dealing with. Even in the unlikely event that the Court were to reach a decision unfavourable to Uruguay, it would fully comply with it, as it is under an obligation to do and, moreover, of which it has repeatedly given its solemn assurance, for example by official statements by its Agent in this Court. There is nothing to justify the ill-natured doubts expressed by Argentina as to the "seriousness of the commitment thus expressed"[102].

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36. Uruguay is convinced that the Court will reject Argentina's request for assurances, characterizing it as totally unfounded, apart from pointless, inopportune and unjust (to say the least); and this not only because (to echo your recent *dictum*, which I was quoting a few moments ago), Uruguay's good faith "must be presumed", like that of any sovereign State moreover; but above all because, throughout these proceedings, the Court has received incontrovertible evidence

[102]MA, p. 365. para. 8.38.

of this good faith, as well as of the universally acknowledged seriousness of Uruguay's commitment to protection of the environment. This good faith is demonstrated beyond any doubt by the fact — which is common knowledge — that Uruguay has carried out frequent and scrupulous checks on the quality of the water of the river and continues to do so, thereby assuring full compliance both with its own internal law in this field and with all the CARU requirements. Let me reiterate, these checks are currently carried out without the co-operation of CARU, which Argentina persists in preventing from acting. In sum, your Court would certainly attach great importance to the undeniable commitment professed by Uruguay — in words and actions — as regards the prevention of any harm to the river ecosystem and would regard such commitment as a more than adequate guarantee. It is obvious that, this being so, the forms of assurances demanded by Argentina clearly seem inappropriate and superfluous.

37. Mr. President, Members of the Court, I have reached the end of my oral argument. An oral argument which as you will have understood, is purely theoretical — academic — , Uruguay being convinced that it has provided all the necessary proof to enable you to establish that it has not breached its substantive or its procedural obligations laid down by the 1975 Statute, and that, on the contrary, it has acted and continues to act in exemplary compliance with both the Statute and with all the relevant principles of international law. Thank you for your patience and your attention. May I ask you, Mr. President, to regard the first round of oral argument in the present case as closed.

60 The VICE-PRESIDENT, Acting President: Thank you, Professor Condorelli.

This brings today's hearing to a close. I would like to thank each of the Parties for the statements during the first round of oral argument. The Court will meet again on Monday 28 September, from 3 p.m. to 6 p.m. and on Tuesday 29 September, from 10 a. m. to 1 p.m., to hear the Argentine Republic in the second round or oral argument. At the end of Tuesday's hearing, Argentina will present its final submissions.

The Eastern Republic of Uruguay, meanwhile, will present its oral reply on Thursday 1 October, from 3 p.m. to 6 p.m. and on Friday 2 October, from 10 a.m. to 1 p.m. At the end of Friday's hearing, Uruguay will present its own final submissions.

Each of the Parties will therefore have two full three-hour hearings in which to set out its whole oral reply. However, I would stress that, in accordance with Article 60 (l) of the Rules of Court, oral statements must be as succinct as possible. I would add that the purpose of the second round of oral argument is to enable each of the Parties to reply to the arguments put forward orally by the opposing Party, and also to any questions which have not been answered The second round must therefore not be a repetition of the arguments already put forward, and I would be grateful for your co-operation to ensure this. It therefore goes without saying that the Parties are not bound to use all the speaking time allocated to them. Thank you. I look forward to seeing you again this evening in a less formal context on the other side of the Peace Palace.

The hearing is closed.

The Court rose at 12.50 p.m.

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