DISSENTING OPINION OF JUDGE *AD HOC* VINUESA

1. Although I agree with the first paragraph of the dispositive concerning Uruguay's breaches of procedural obligations under the 1975 Statute, I do not share the views of the majority concerning: (1) the relationship between procedural obligations and substantial obligations; (2) the nonexistence of a "no construction obligation" once the parties to the 1975 Statute failed to reach an agreement under Article 12; and (3) and the reasoning behind the conclusion that satisfaction is a proper means of reparation. For the reasons stated below (see paras. 40 to 99), I fully disagree with the second paragraph of the dispositive.

A. Issues related to Procedural Obligations

I. The Relationship between Procedural Obligations and Substantive Obligations

2. I disagree with the majority in assuming that the dispute concerning substantive obligations is temporally restricted as to only refer to "whether Uruguay has complied with its substantive obligations under the 1975 Statute since the commissioning of the Orion (Botnia) mill in November 2007" (Judgment, para. 46). Substantive obligations under the Statute could have been, and in fact were, breached by Uruguay before the commissioning of the Orion (Botnia) mill.

3. The authorization of the location of the ENCE and Orion (Botnia) mills in a sensitive, vulnerable and environmentally dynamic site is a breach of the substantive obligations prescribed by the Statute. This violation, committed before the commissioning of the Orion (Botnia) mill, breached Uruguay's substantive obligations independently of Uruguay's procedural obligation breaches.

4. I also disagree with the majority's finding that "the procedural obligations are distinct from substantive obligations laid down in the 1975 Statute . . ." (*ibid.*, para. 271). Instead, I strongly support the idea that the procedural obligations are directly interrelated with the substantive obligations. The Statute does not distinguish between different legal effects for each category of obligations. Moreover, the object and purpose of the 1975 Statute concerns the utilization of "the joint machinery necessary for the optimum and rational utilization of the River Uruguay" (Art. 1). The *raison d'être* of the Statute is to achieve the optimum and rational utilization of the river through the implementation of procedural

obligations as established in Articles 1, 7 to 12, and 27. The Statute's irrefutable purpose is to prevent unilateral actions in the determination of the uses of a shared natural resource "which are liable to affect navigation, the régime of the river or the quality of its waters" (Art. 7). Additionally, Article 27 provides that:

> "The right of each party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes shall be exercised without prejudice to the application of the procedure laid down in Articles 7 to 12 when the use is liable to affect the régime of the river or the quality of its waters."

The Court states that it has:

> "already dealt with the obligations arising from Articles 7 to 12 of the 1975 Statute which have to be observed, according to Article 27, by any party wishing to exercise its right to use the waters of the river for any of the purposes mentioned therein insofar as such use may be liable to affect the régime of the river or the quality of its waters" (Judgment, para. 177).

5. The Court is therefore assuming that the breach of Articles 7 to 12 inexorably implies the breach of Article 27. The Court is also of the opinion that:

> "Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development" (*ibid.*, para. 177);

which shows that the Court recognizes that by breaching Articles 7 to 12 the balance required by Article 27 has also been breached.

The Court finds that the:

> "overall procedure laid down in Articles 7 to 12, which is structured in such a way that the parties, in association with CARU [the Administrative Commission of the River Uruguay], are able, at the end of the process, to fulfil their obligation to prevent any significant transboundary harm which might be caused by potentially harmful activities planned by either one of them" (*ibid.*, para. 139).

6. As a consequence of the above, Uruguay has violated not only Articles 7 to 12, as the Court has asserted, but also Article 27 which is substantive in nature. Furthermore, the non-observance by Uruguay of the object and purpose of the Statute itself constitutes a grave substantive breach of the Statute.

II. The "No Construction Obligation" during the Processes Leading to the Settlement of the Dispute

7. The Court deals with the question of Uruguay's obligations following the end of the negotiation period (Judgment, paras. 151 to 158) concluding:

> "that Uruguay did not bear any 'no construction obligation' after the negotiation period provided for in Article 12 expired . . . Consequently the wrongful conduct of Uruguay . . . could not extend beyond that period." (*Ibid.*, para. 157.)

I categorically disagree with this finding.

8. It is true that the "no construction obligation" that Uruguay was supposed to respect between the end of the negotiation period and the delivery of the final judgment of the Court is not expressly laid down by the 1975 Statute, a point stated by the Court (*ibid.*, para. 154). On the contrary, it is wrong to assume, as the Court does, that the above obligation cannot be derived from the Statute's provisions.

9. The Statute only allows parties to carry out or authorize the planned work if the notified party raises no objections or does not respond within the period established in Article 8. Article 9 provides that "If the notified Party raises no objections or does not respond within the period established in Article 8, the other Party may carry out or authorize the work planned." The right to carry on or authorize the planned works could also result from the Parties' agreement at the conclusion of the negotiation period designed under Chapter II of the 1975 Statute.

10. The Court's assertion that "Article 9 only provides for such an obligation during the performance of the procedure laid down in Articles 7 to 12 of the Statute" (*ibid.*, para. 154) is misleading and without legal foundation. Additionally, as I discuss below, the Statute itself links the negotiation and judicial settlement processes, thereby naturally extending the no construction obligation until the end of the proceedings before the Court.

11. In my view, Article 9 is complemented by Article 12 in order to assure that, if no agreement is reached by the parties during negotiations, the procedure indicated in Chapter XV shall be followed. The parties have already assumed the obligation to settle the dispute through the procedures described in Chapter II, Articles 7 to 12. It follows that the parties should perform their treaty obligations in good faith and that they must abstain from embarking on the planned works — the very object of the dispute — until the Court makes its final decision. As a result, the no construction obligation, once triggered, extends until the resolution of the dispute.

12. This interpretation is borne out by the clear language of the Statute. Article 12 states that "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." Article 60 provides that "Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either Party to the International Court of Justice." When paired with Article 60, it is clear that Article 12 overrules the permissive language of Article 60. Even in the authentic Spanish text, where Article 12 provides that: "Si las Partes no llegaren a un acuerdo . . . se observará el procedimiento indicado en el Capítulo XV", it is clear that the procedure indicated in Chapter XV requires recourse to the International Court of Justice. A logical reading of the Statute would also exclude recourse through Article 12 to the additional part of Article 60, which refers to the conciliation procedure of Chapter XIV and is not implicated here.

13. The simple textual interpretation of Article 12 through its context and through the principle of good faith indicates that Article 12 is mandatory for the parties. It obliges both parties to follow the procedure indicated in Chapter XV. Article 12 therefore represents a "compromissory arrangement" to settle any dispute stemming from the parties' failure to reach an agreement on planned works through submission of the dispute to the Court.

14. Following general customary international law as codified by Article 31 of the Vienna Convention of the Law of Treaties of 1969, it is my view that the Court's interpretation of Article 12 does not comport with the clear and precise meaning of the text and its context, as is required by customary international law and this Court's jurisprudence. (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 645, para. 37; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 174, para. 94; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8; *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336; *Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J., Series B, No. 11*, p. 39; *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, pp. 69-70, para. 48 and see dissenting opinion of Judge Weeramantry, pp. 135-137; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, pp. 582-583, paras. 373-374; see also *Commentary (Treaties), Yearbook of the International Law Commission*, 1966, Vol. II, p. 220, para. 9.)

The Court's interpretation also contradicts the very object and purpose of the 1975 Statute which is "to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay" (Art. 1), which again contradicts settled rules of treaty interpretation based on the agreement's object and purpose (*Oil Platforms (Islamic Republic of Iran*

v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 812-814, paras. 23, 28; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 136-137, paras. 272-273; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 652, para. 51; *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 196; *Asylum (Colombia/Peru), Judgment, I.C.J. Reports 1950*, p. 282; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, pp. 50-51, paras. 26-28; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 26, para. 52; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 48, para. 85). Such interpretation deprives Article 12 of its *effet utile*, vitiating the Statute's text and again violating established rules of treaty interpretation (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 25-26, paras. 51-52; *Lighthouses case between France and Greece, Judgment, 1934, P.C.I.J., Series A/B, No. 62*, p. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 35, para. 66; *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 22, para. 52).

15. In my view, the Court fails to recognize: first, that when negotiations came to an end, the "disputed activities" — mentioned at paragraph 143 of the Judgment — continued to be unsettled; and second, that recourse to the International Court of Justice as expressed in Article 12 was an essential step contained within the procedure considered necessary by the Parties to ensure the Statute's object and purpose: the optimum and rational utilization of the river. The Court also fails to acknowledge that through Article 12 the Parties have assumed an explicit obligation, if no agreement is reached, to follow the procedure indicated in Chapter XV. The reading of this provision by the Court deprives Article 12 and Chapter XV of their substance and enforces an illogical reading of the mandates of Article 12 and Chapter XV.

16. The obligation to negotiate — which was accompanied by the no construction obligation in this case — is just one of the methods for the peaceful settlement of disputes. The 1975 Statute, as a *lex specialis*, provides that if the parties fail to reach an agreement, they must submit to litigation before the Court. In that sense, the obligation to negotiate is linked to the obligation to refer the dispute to the International Court of Justice to form a non-severable course of action. Both treaty obligations must be performed in good faith, as is required by international law. The Court has already recognized that:

> "the mechanism for co-operation between States is governed by the principle of good faith. Indeed, according to customary international law, as reflected in Article 26 of the 1969 Vienna Convention of the Law of Treaties, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. That applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States." (Judgment, para. 145.)

17. Taking that into account, the Court recognizes that:

> "as long as the procedural mechanism for co-operation between the parties to prevent significant damage to one of them is taking its course, the State initiating the planned activity is obliged not to authorize such work and, *a fortiori,* not to carry it out" (*ibid.*, para. 144).

Then the Court concludes in paragraph 147 that Article 12 is within the joint mechanism provided by the Statute; based on this finding, the Court then concludes that "[c]onsequently, Uruguay disregarded the whole of the co-operation mechanism provided for in Articles 7 to 12 of the 1975 Statute" (*ibid.*, para. 149). It is my view that the Court could not ignore that the Parties must perform their obligations under Article 12 in good faith, and that the no construction obligation that was in force during the negotiations should have continued until the Court's judgment. This conclusion comports with the proper interpretation of these provisions; unfortunately, the Court's conclusions do not.

18. The Court holds that "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith" (*ibid.*, para. 145) and that "Trust and confidence are inherent in international co-operation", drawing on the Court's decision in the *Nuclear Tests (Australia* v. *France)* case (*Judgment, I.C.J. Reports 1974*, p. 268, para. 46). I cannot agree with the Court's finding that a party's obligation to stay construction on the planned works ends before a final settlement of the dispute is reached by the Court under Chapter XV (Judgment, paras. 154 and 157). Even more, there is a bizarre juxtaposition of the Court's conclusion that "Uruguay failed to comply with the obligation to negotiate laid down in Article 12 of the Statute" (*ibid.*, para. 149) with the Court's decision that the no construction obligation in this case ended along with the negotiations. This confusing conclusion shows that the Court ignores that Article 12 — in addition to mandating negotiations — also mandates recourse to the procedure of Chapter XV of the Statute once negotiations come to an end.

19. The majority also fails to explain why the obligation to settle the dispute through recourse to the International Court of Justice, as seen in Articles 12 and 60, puts an end to the "no construction obligation". In

my own view, under Article 12, the obligation to negotiate — when exhausted — is replaced by the obligation to settle the dispute at the International Court of Justice. As a result, the no construction obligation extends until the dispute is settled by the Court.

20. This is supported in part by the Judgment, which finds that during negotiations the parties are bound by the no construction obligation as a consequence of their obligation to negotiate in good faith (Judgment, para. 145). However, the majority fails to explain how the direct effect of the lack of good faith in negotiations by Uruguay — as was the case here — results in a right to resume construction of the planned works as the case awaits a final decision by the International Court of Justice. This reading is contrary to the text of Article 12, it has no support within its context and it is opposed to the object and purpose of the 1975 Statute as expressed in Article 1. As a result, the Court seems to reward parties who negotiate in bad faith by allowing them to continue construction of the works even if they have not fulfilled their procedural obligations in good faith.

21. As a consequence of the above reasoning, I completely disagree with the Court's finding that:

> "Article 12 does not impose an obligation on the parties to submit a matter to the Court, but gives them the possibility of doing so, following the end of the negotiation period. Consequently, Article 12 can do nothing to alter the rights and obligations of the party concerned as long as the Court has not ruled finally on them. The Court considers that those rights include that of implementing the project, on the sole responsibility of that party, since the period for negotiation has expired." (*Ibid.*, para. 155.)

22. The Court also contradicts itself when it concludes that:

> "while the 1975 Statute gives it jurisdiction to settle any dispute concerning its interpretation or application, it does not however confer on it the role of deciding in the last resort whether or not to authorize the planned activities. Consequently, the State initiating the plan may, at the end of the negotiation period, proceed with the construction at its own risk." (*Ibid.*, para. 154.)

23. Any failure of the parties to agree at the end of the Chapter II procedures constitutes a dispute concerning the interpretation and application of the Statute. The Court cannot ignore its responsibility to resolve the dispute arising out of the parties' disagreement on the sole basis that the Statute does not confer the power to authorize or forbid the planned activities because that is simply not correct.

24. As a result, the Court must exercise its jurisdiction to settle the dispute arising out of the Chapter II procedures, even if in doing so it will

also judge the viability of the planned works. That is so, in particular, taking into account that the Court attributes to itself the role of being "the ultimate guarantor of [the parties'] compliance with the 1975 Statute" when deciding on the merits of the dispute (Judgment, para. 156).

25. Even were it accepted, again for the sake of argument, that "the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk" (*ibid.*, para. 154), it does not follow that either State may commission works which prematurely begin using the protected shared resource before the dispute is settled. In other words, even if sovereign rights would allow a riparian State to construct in its own territory at its own risk, this sovereign right must not be extended to allow the unilateral use or disposition of a shared natural resource until the final resolution of the dispute.

26. It is noteworthy that the Court in its Order on Provisional Measures of 13 July 2006 stated that "in proceeding with the authorization and construction of the mills, Uruguay necessarily bears all risks relating to any finding on the merits that the Court might later make" (*I.C.J. Reports 2006*, p. 133, para. 78). This Order, while it did not forbid continued construction of the mill, could not and did not give a green light to Uruguay to commission the mill which would allow the mill to use the shared resource of the river.

27. In fact, the Court, after emphasizing that:

> "the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development . . . in particular [it is] necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development" (*ibid.*, p. 133, para. 80),

then proceeded to state that:

> "the Parties are required to fulfil their obligations under international law; . . . the Court wishes to stress the necessity for Argentina and Uruguay to implement in good faith the consultation and co-operation procedures provided for by the 1975 Statute, with CARU constituting the envisaged forum in this regard; and . . . the Court further encourages both Parties to refrain from any actions which might render more difficult the resolution of the present dispute" (*ibid.*, p. 134, para. 82).

28. The commissioning of the plant without CARU's authorization, without consultation of Argentina, without regard for Uruguay's international environmental obligations and without any attention to the exacerbation of the dispute indicates a flouting of the Court's

direct request. The Court fails to hold Uruguay accountable for these actions.

29. This interpretation of Article 12 will validate an "in limbo" situation, allowing each of the Parties to unilaterally exploit a shared natural resource as if it were its own exclusive resource while a dispute over this utilization is pending before the International Court of Justice.

III. Satisfaction as the Proper Means of Reparation of Uruguay's Repeated Breaches of the 1975 Statute

30. The Court acknowledges that Argentina requested the Court "to adjudge and declare that Uruguay must 'provide adequate guarantees that it will refrain in future from preventing the 1975 Statute from being applied'" (Judgment, para. 277).

31. Although I disagree with the Court's assessment that there are no "special circumstances in the present case requiring the ordering of a measure [requiring non-repetition] such as that sought by Argentina" (*ibid.*, para. 278), I arrive at the Court's overall conclusion concerning reparation through different reasoning.

32. On the issue of special circumstances, the Court fails to consider that Uruguay's conduct — in preventing the Statute's joint machinery from functioning — amounts to a substantive violation of the 1975 Statute, as embodied in the object and purpose of the Statute as set out in Article 1. This violation of Article 1, as well as Articles 7 to 12 and 27, may not in principle be remedied just through the mere recognition of such a violation. Assuming, for the sake of argument, that the violation of substantive obligations as described above remains inchoate during the construction process, including the site selection process, it still means that after the construction of the mill it is still violative of the Statute for a riparian State to use the river waters as its own.

33. It is critical to take into account many facts in order to determine whether the Court should find that special circumstances exist. First, different proposals to establish new mills in the area are constantly under consideration by Uruguay. Second, Uruguay's violations of procedural obligations were the direct consequence of its own will to avoid compliance with the 1975 Statute. Third, Uruguay lacked good faith in the negotiations. Fourth, there was public recognition by Uruguayan authorities of its lack of interest in complying with the Statute's procedural obligations.

In particular as to the fourth point, the former Minister of Foreign Affairs of Uruguay, when addressing the Senate in November 2003 expressed:

> "To recognize that the Commission has specific jurisdiction at this

> stage of the procedure would amount to accepting the presumption that Articles 7 and 8 apply. The presumption is that this project will affect or might affect — I believe the expression used in the Statute is 'is liable to'— the quality or navigability of the waters. Given that these two elements are absent, it is clear that the Government of Uruguay is not in a position where it is obliged to refer this matter to the Commission. That would represent a renunciation of its powers that the Government of the Republic has no intention of making; nothing could be more simple." (Minutes, statement by the Minister for Foreign Affairs, Mr. Didier Opertti, to the Uruguayan Senate (November 2003).)" *[Translation by the Registry.]*

From the above facts there is only one conclusion: that Uruguay's actions may not be disregarded, as the Court does here. Instead, these actions represent the special circumstances that justify the imposition of an obligation of non-repetition in order to ensure that Uruguay will not take steps to wilfully obstruct the application of the 1975 Statute in the future.

34. The Court in paragraph 278 recognizes that it has observed:

> "'[w]hile 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.
>
> As 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 in the future, since its good faith must be presumed (see *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 63; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para 101). There is thus no reason, except in special circumstances . . . to order [the provision of assurances and guarantees of non-repetition].' (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150.)"

35. While the Court quotes from its own precedents, as it does here, it avoids taking into consideration as a special circumstance the fact, recognized by the Court, that Uruguay has breached its procedural obligations, in respect to the ENCE project and in respect to the Orion (Botnia) mill and its adjacent port (see Judgment, paras. 105 to 122). The Court has the evidence before it that there was already a repetition by Uruguay

of procedural breaches of identical obligations under the 1975 Statute. Furthermore, the Court has already concluded that Uruguay has breached its obligations to negotiate in good faith (see Judgment, para. 149). In spite of that factual evidence, the Court considers that Uruguay's good faith in future applications of the 1975 Statute "must be presumed". I am at odds with such reasoning.

36. The evidence on the record and the findings of the Court concerning procedural violations confirm that special circumstances are present in the present case so as to justify the express imposition in the dispositive of an obligation of non-repetition upon Uruguay, particularly given the bad faith conduct of Uruguay in the past.

37. Despite this belief, it is my understanding that the obligation of non-repetition exists, in the present case, in the Court's finding:

> "that both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the 1975 Statute, including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the Orion (Botnia) mill on the aquatic environment. Uruguay, for its part, has the obligation to continue monitoring the operation of the plant in accordance with Article 41 of the Statute and to ensure compliance by Botnia with Uruguayan domestic regulations as well as the standards set by CARU. The Parties have a legal obligation under the 1975 Statute to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment." (*Ibid.*, para. 266.)

38. As the Court has found that Uruguay alone breached its procedural obligations under the 1975 Statute, it is incumbent upon Uruguay to conform its conduct in order to duly comply with its treaty obligations and the Court's recognition of the role of CARU as noted above.

39. In my opinion, the imposition of such obligations of conduct, in the light of the general rule that a State whose acts or conduct have been declared wrongful by the Court will not repeat the acts or conducts in the future — assuming the State's good faith in following the Court's decision — makes a declaration of the obligation of non-repetition by the Court redundant.

B. Substantive Obligations under the 1975 Statute

40. Whereas in the context of procedural violations, the Court has before it firm evidence on which to base its conclusions — namely, the 1975 Statute and a record of the steps taken by the Parties — the same

evidential certainty does not exist in the context of Uruguay's alleged substantive violations, thereby severely hampering the Court's ability to make appropriate determinations of fact and law based on sound scientific findings.

I. Determination of the Burden of Proof

41. The Judgment notes that Argentina has itself generated much factual information and it adds that materials produced by Uruguay have been available at various stages of the proceedings or have been available in the public domain (Judgment, para. 226). The Court thus finds that Argentina has not been placed at a disadvantage in terms of the production of evidence relating to the discharges of effluent from the mill. However, such a finding is contradicted by the fact that Argentina was only able to collect scientific data from the Argentine side of the River Uruguay, because it was prevented from collecting samples on the Uruguayan side of the river, particularly where discharges from the Orion (Botnia) mill occur. Argentina was also banned from collecting samples from the mill itself. In addition, no evidence was collected in common through CARU. Therefore Argentina was not in a position to obtain evidence at the source itself. This critical fact should have been acknowledged in the Judgment.

42. In terms of the burden of proof, I agree with the finding of the Court that:

> "in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle which has been consistently upheld by the Court . . . applies to the assertions of fact both by the Applicant and the Respondent." (*Ibid.*, para. 162.)

I disagree however with the Court's assessment that: "that there is nothing in the 1975 Statute itself to indicate that it places the burden of proof equally on both Parties" (*ibid.*, para. 164).

43. First, Article 12 imposes upon both Parties an obligation to refer their dispute concerning any lack of agreement on the viability of planned works to the International Court of Justice. Second, a finding by the Court that Uruguay has breached its procedural obligations under the Statute necessarily implies that Uruguay has not complied with its obligations to produce all relevant evidence to CARU and to Argentina so as to allow for an assessment as to whether or not the planned works are "liable to affect navigation, the régime of the river or the quality of its waters" (Art. 7). In my view, a direct consequence of Uruguay's procedural breaches is that Uruguay should have provided the missing evidence to the Court.

44. I agree that any breach of Chapter II obligations does not necessarily justify a reversal of the burden of proof, but such a finding does reaffirm the basic principle stated by the Court in paragraph 162 with reference to the *onus probandi* of both the Applicant and the Respondent. It follows from the Court's finding that, "while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute", in interpreting and applying Article 12 an "equal onus to prove under the 1975 Statute" (Judgment, para. 164) should be binding upon both Parties. In my view there is a clear contradiction between this statement and the following assertion by the Court:

> "It is of course to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it." (*Ibid.*, para. 163.)

It is difficult to follow the Court's reasoning when, on the one hand, it states that Uruguay has breached its procedural obligations (among which is the obligation to produce information) and, on the other hand, it merely exhorts Uruguay, as the Respondent, to co-operate. The Court is thus transforming a previous binding obligation to produce evidence into a mere goodwill gesture to co-operate by providing evidence to the Court.

II. The Object and Purpose of the 1975 Statute and the Uses of the Waters

45. Article 1 not only informs the interpretation of the substantive obligations, as the Court finds at paragraph 173 of its Judgment, but also lays down specific rights and obligations for the Parties. It is true that optimum and rational utilization is to be achieved through compliance with the obligations prescribed by the 1975 Statute for the protection of the environment and the joint management of the River Uruguay as a shared resource. However, it is also true that optimum and rational utilization creates specific obligations for both riparian States to prevent any use liable to affect navigation, the régime of the river or the quality of the waters. In that context, any planned works and any use of the river must be analysed jointly to evaluate the potential damage to the river as a shared resource and any transboundary damage to the other party, particularly given that the river serves as an important source of water for the local communities and also sustains a thriving tourism industry.

46. In keeping with earlier comments on the relationship between pro-

cedural and substantive obligations, under Article 27 of the Statute the "status" of the River Uruguay as a shared natural resource is reflected in the fact that national use of the river for domestic, sanitary, industrial and agricultural purposes is subject to the procedural obligations laid down in Articles 7 to 12, where such utilization is significant enough to affect the régime of the river or the quality of its waters. The right of each State to use the river within its domestic jurisdiction is subject to the strict co-operation mechanism established under the 1975 Statute.

47. I strongly believe that Article 1 should be considered as an umbrella clause establishing joint machinery for the observance of substantial obligations to accomplish the optimum and rational utilization of the river. Meanwhile, the content of Article 27, considered by the Court as "the essence of sustainable development" (Judgment, para. 177), constitutes in itself a substantial obligation.

48. To my understanding, the Court, by declaring that Uruguay has breached its procedural obligations under Articles 7 to 12 of the 1975 Statute, has confirmed: (i) the non-observance of the joint machinery prescribed under Article 1 in order to accomplish the optimum and rational utilization of the river; and (ii) the non-observance of Article 27 under which the Parties are obliged to apply "the procedure laid down in Articles 7 to 12 when the use is liable to affect the régime of the river or the quality of its waters".

49. In light of the above, the Court should have declared that Uruguay had breached its substantive obligations under Articles 1 and 27 of the 1975 Statute before proceeding to an evaluation of adequate reparation. I regret that the Court has not done so.

III. The Obligation to Co-ordinate Measures to Avoid Changes in the Ecological Balance of the River and Areas Affected by It (Art. 36)

50. In my view, the Court states incorrectly at paragraph 189 that "Argentina has not convincingly demonstrated that Uruguay has refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision". It is also stated at paragraph 185 that "the purpose of Article 36 . . . is to prevent any transboundary pollution liable to change the ecological balance of the river by co-ordinating, through CARU, the adoption of the necessary measures". According to the Court, those measures were adopted through the promulgation of standards by CARU.

51. But this reading by the Court limits the Statute to CARU standards. However, CARU standards were agreed upon to control and prevent pollution arising from pre-existing uses of the river waters. As a result, the Court's position is at odds with the weight of the evidence. The

Court's reading does not allow for pre-emptive regulation of planned future uses. The CARU Digest itself refers to the joint machinery and the necessary intervention of CARU resulting from Articles 7 to 12 for future planned uses of the river waters. It follows that for any planned uses of the river, the co-ordination envisaged in Article 36 should be channelled through CARU according to Articles 7 to 12. Any other interpretation of Article 36 implies that the Parties and CARU would not have the chance to assess the effects of planned uses of the river waters but would simply have to wait until the industrial facility became operational in order to verify at that point whether it polluted the river or not. This is not the object and purpose of the Statute as stated in Article 1.

52. That is why I believe that the object and purpose of the Statute has been violated and this violation has to be sanctioned. Argentina has clearly proven that Uruguay has refused to engage in such co-ordination and thus it is apparent that Uruguay has breached Article 36 of the 1975 Statute.

IV. The Obligation to Preserve the Aquatic Environment and Prevent Its Pollution (Art. 41)

(a) *Environmental impact assessments*

53. My main points of disagreement with the Court's findings on Article 41 are related to issues concerning environmental impact assessments and effluent discharges.

Concerning environmental impact assessments, I do believe that there is sufficient evidence in the record to prove that Uruguay has breached its obligation to "co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it" (Art. 36). That lack of co-ordination has negatively influenced the performance by Uruguay of its obligations under Article 41 *(a)* of the Statute to protect and preserve the aquatic environment and, in particular, to prevent its pollution. Consequently, I disagree with the Court's conclusions on Uruguay's compliance with due diligence requirements on environmental impact assessments in relation to: (i) the chosen site for the Orion (Botnia) mill; and (ii) the consultation of the affected populations. I will address both concerns in turn.

(i) The siting of the Orion (Botnia) mill at Fray Bentos

54. In its consideration as to whether Uruguay carried out an appro-

priate assessment prior to the determination of the final site, the Court should not have satisfied itself with a mere mention in the Final Cumulative Impact Study (hereinafter "CIS") of the International Finance Corporation (hereinafter the "IFC") that Botnia evaluated in 2004 four locations before choosing Fray Bentos. The CIS dates from September 2006, which is more than a year and a half after the authorization in February 2005 for the construction of the Orion (Botnia) mill and came after Argentina's complaints about the lack of alternative site assessment and after proceedings had been instituted before the Court. Secondly, the CIS reference to Botnia's evaluation is a one page referral containing a listing of the four sites and a minimum of substance about the reasons why the alternative sites were discarded.

55. According to the CIS, "logistics" played a key role in the decisions of both Botnia and ENCE not to proceed with any of the alternative sites, even though it was also claimed that "environmental and structural aspects were also important". No information, however, is given as to what those environmental aspects were, neither is there evidence — nor, for that matter, is it claimed — that environmental impact assessments were conducted in relation to those alternative sites.

56. Particularly striking are the reasons provided by Botnia for its decision to discard the other three locations: for La Paloma, it was because of its vicinity to important tourist areas; for Nueva Palmira, it was because of the presence of culturally important sites *(Desembarco de los 33 Orientales)* and the proximity of "high end" residential areas; and for Paso de los Toros, it was because of the limited amount of water available. The other reasons listed are purely of an economic nature related to costs and the availability of fresh water. The "comparative table" found in pages 2.10 and 2.11 of the CIS shows no information as to why Fray Bentos was the safest choice to build the mill from an environment point of view, other than the claim that the nearer the plant from the eucalyptus plantations the less the ecological harm.

57. The assumption made in the Judgment that, "in accordance with Articles 36 and 56 of the 1975 Statute, CARU must have taken into account the receiving capacity and sensitivity of the waters of the river" (Judgment, para. 214) does not nullify the obligation to assess the sensitivity and vulnerability of a pre-determined site with reference to a specific planned use and its particular impact on that site. This is in accordance with a strict observance of Article 27, Articles 7 to 12 and Article 1 of the Statute and with the Digest's referral to Articles 7 to 12 for future planned uses. In that context, the general assumption made in the Judgment cannot overrule the provisions of the Statute, nor can it be relied upon to justify non-compliance with obligations derived from the mandatory implementation of Chapter II of the Statute.

Moreover, the Court admits that the CARU standards were not exhaustive (Judgment, para. 202).

58. Because of Uruguay's procedural violations, both CARU and Argentina were deprived of the possibility to evaluate whether the planned activity was liable to affect the quality of the waters in that particular site of the River Uruguay. If procedural obligations had not been violated by Uruguay, CARU and Argentina would have had the chance to adequately take into consideration the geomorphological and hydrological characteristics of the river at the site and the capacity — more precisely the incapacity — of its waters to disperse and dilute different types of discharges from the projected works. Any inadequacy of the site itself, particularly with respect to certain areas of the river such as Fray Bentos, could have been detected if the obligations under Chapter II had been duly complied with.

(ii) Consultation of the affected populations

59. The Court recognizes that "[t]he Parties disagree on the extent to which the populations likely to be affected by the construction of the Orion (Botnia) mill, particularly on the Argentine side of the river, were consulted in the course of the environmental impact assessment" (*ibid.*, para. 215). The Parties' disagreement concerns the results of the consultation of the affected populations, the extent to which concerns raised were taken into consideration and whether the consultation was meaningful. The Court further recognizes that both Parties agreed on such consultation, although the Court is of the view that "no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina" (*ibid.*, para. 216).

60. The Court omits to refer to the unilateral obligation assumed by Uruguay to comply with established European standards requiring public consultation of local populations liable to be affected by transboundary projects in such a way as to guarantee their effective participation at an early stage (IPPC Directive, 1996).

61. The finding of the Court that the obligation to consult the affected populations does not arise from the instruments invoked by Argentina does not detract from the fact that both Parties were in agreement that consultation of the affected populations should form part of the environmental impact assessment.

62. The Court notes that both before and after the granting of the initial environmental authorization, Uruguay undertook activities aimed at consulting the affected populations (Judgment, para. 217) and that between June and November 2005 further consultations were conducted by the Consensus Building Institute, a non-governmental organization contracted by the IFC (*ibid.*, para. 218). The Court also notes that "[i]n December 2005, the draft CIS and the report prepared by the Con-

sensus Building Institute were released, and the IFC opened a period of consultation to receive additional feedback from stakeholders in Argentina and Uruguay" (Judgment, para. 218). In light of the above, the Court finds, at paragraph 219, "that consultation by Uruguay of the affected populations did indeed take place". I disagree with this conclusion.

63. The Court does not answer the issues raised by the Parties. It does not make any pronouncements on the question of whether or not the concerns of the Argentine population were taken into account or if consultations were meaningful or not.

64. The consultation referred to by the Court at paragraph 217 of its Judgment was characterized by the Ombudsperson of the IFC as irrelevant and meaningless. The IFC ombudsperson presented her preliminary report entitled: "Complaint regarding IFC's proposed investment in Celulosas de M'Bopicuá and Orion Projects" in which it is stated that the construction of the cellulose plants was presented as a *fait accompli* to those who had supposedly been consulted.

65. In my view, all of the consultations mentioned by the Court at paragraph 218 of its Judgment took place after environmental authorizations had been granted, and therefore are all meaningless. This is supported by the Court's acknowledgement that "both Parties agree that consultation of the affected populations should form part of an environmental impact assessment" (*ibid.*, para. 215). This requires that the consultation must have taken place before the environmental impact assessment was issued. Thus, to my understanding, Uruguay has not complied with its due diligence obligation to consult the affected populations prior to the issue of the authorization to build the Orion (Botnia) mill.

66. The permanent protest of the population of Gualeguaychú is additional evidence of the non-fulfilment by Uruguay of its obligation to engage in a reasonable and meaningful consultation of the affected population on the Argentine side of the river.

(b) *Effluent discharges and the Court's role in evaluating scientific data that proves violations of substantive obligations*

67. With regard to discharges of effluents from the Orion (Botnia) mill, I disagree with the Court's conclusions which are based on an inadequate evaluation of data. It is also a matter of deep regret to me that the Court did not address the future cumulative effects of actual pollution generated by the Orion (Botnia) mill in order to assess future harmful effects during the 40-year lifespan of the plant.

68. I was particularly troubled by Uruguay's inability to collect and produce reliable data. Most of the data that Uruguay submitted in its pleadings was provided by Botnia to Uruguay's National Directorate for

the Environment (DINAMA) which passed it on to the Court. My main concern is that the Court attempts to draw solid and justified conclusions on the law — particularly in assessing Uruguay's substantive violations — without the weight of incontrovertible scientific evidence to bolster its conclusions. I believe that a judgment based on disputed data as well as on conclusions which have been reached without any independent scientific evaluation will not be able to withstand scrutiny, and in particular will not provide a solution that takes due account of the realities of the situation on the river.

69. Specific examples of facts that the Court dismisses — and which I will address in further detail below — include: discrepancies in the Adsorbable Organic Halogens (AOX) data collected by the two Parties, including extremely high measurements that were summarily discarded by DINAMA; an unexplained increase in bacteria associated with the pulping process after the commissioning of the Orion (Botnia) mill; discrepancies between data collected on phosphorus in the water; the February 2009 record of an algal bloom of an exceptionally high magnitude, intensity and toxicity, an event which occurred only after the commissioning of the plant; the threefold rise in levels of phenolic substances after the commissioning of the plant in violation of CARU standards for water quality for the river; the baffling existence of nonlyphenols in the water combined with the expert opinion presented by Argentina, according to which Botnia's assurances of the non-use of nonlyphenols at the mill was deeply flawed and inconsistent with the reality of pulp mill operations; the troubling existence of dioxins and furans in the air and aquatic environment. With respect to all of these polluting elements in the water, the Court considers that there is incomplete or disputed evidence establishing their presence and/or a link between their presence and the Orion (Botnia) mill. Basing its legal analysis on this incomplete evidence renders the Judgment itself incomplete.

70. In various key passages, the Court reaches conclusions on alleged substantial violations while acknowledging the lack of scientific certainty underpinning those findings: "Argentina has not convincingly demonstrated that Uruguay" (Judgment, para. 189); "the Court is not in a position to conclude that Uruguay" (*ibid.*, para. 228); it has "not been established to the satisfaction of the Court" (*ibid.*, para. 250); "there is insufficient evidence" (*ibid.*, para. 254); "there is no clear evidence to link" (*ibid.*, para. 259); "a clear relationship has not been established" (*ibid.*, para. 262); "the record does not show any clear evidence" (*ibid.*, para. 264).

71. However, despite the lack of specialized expert knowledge, the

Court sets itself the task of choosing what scientific evidence is best, discarding other evidence, and evaluating and weighing raw data and drawing conclusions. In my view, the specific discrepancies and general inconclusiveness of the data itself undermines the legal pronouncements of the Court. My concerns about the Court's reliance on this scientific data encourage my vigorous dissent.

72. In particular, the Court reflects upon the scientific submissions by the Parties in its discussion of the data. However, throughout this overview of the evidence, there is no discussion about the scientific integrity of the scientific methodologies applied. There is also no discussion about the scientific integrity of the results. This silence on the important issue of credibility of the scientific submissions reflects more than just an accidental oversight. Instead, this silence underscores the Court's lack of scientific competence and throws doubt on the Court's ability to determine whether the data is scientifically viable or credible. The Court does not have the proper expertise or knowledge to draw the expert conclusions that it makes, and this Judgment fully reflects that.

73. I will next address what I consider to be the main inconsistencies of the Court's evaluation process by reference to (i) adsorbable organic halogens; (ii) phosphorus; (iii) the algal bloom of February 2009; (iv) phenolic substances; (v) nonylphenols; (vi) dioxins and furans; and (vii) air pollution.

(i) *Adsorbable Organic Halogens (AOX)*

74. The Court in paragraph 228 notes that the levels of Adsorbable Organic Halogens (AOX) exceeded by more than double the acceptable levels in the river's water. While the Court notes that the initial environmental authorization from almost two years prior to the commissioning of the Orion (Botnia) mill did allow for yearly averaging of this parameter, it does not have the appropriate factual data to draw this conclusion. As the Court says, there is an "absence of convincing evidence" (Judgment, para. 228) proving that this is an isolated episode rather than an enduring problem. However, the Court does not then point to evidence that the yearly parameters themselves were met, nor does it suggest that convincing evidence has been provided to show that this result was just an errant data value. Instead, the Court ignores the potential danger that could stem from prolonged discharge of this persistent organic pollutant, and draws a conclusion that this data value is inconsequential.

(ii) *Phosphorus*

75. The Court turns to phosphorus in paragraph 240. The Court notes that DINAMA stated clearly that the "effluent in the plant will emit [amounts of nitrogen and phosphorus] that are the approximate equivalent of the emission of the untreated sewage of a city of 65,000 people" (Judgment, para. 244). While the Court noted that this amount of the pollutant was a mere fraction of the total amount of nutrients being put into the river, it also referred to a section of the DINAMA Report that required that there be "compensation for any increase over and above the standard value for any of the critical parameters" (*ibid.*, para. 245). Despite this clear requirement, the Orion (Botnia) mill was commissioned and allowed to begin adding its effluent to an already eutrophic river without providing the "compensation" required by DINAMA. The sewage treatment agreement that was concluded between Botnia and Uruguay is still at a project stage, even though the plant began to operate in November 2007. The fact that the river is already eutrophic, meaning that the addition of nutrients could potentially cause serious damage to the ecosystem, is critical.

76. The Court acknowledges that the level of concentration of total phosphorus in the River Uruguay exceeds the very limits established by Uruguayan legislation in respect of water quality standards (*ibid.*, para. 247), standards that become applicable in the absence of CARU standards (*ibid.*, para. 242). The Court also notes that DINAMA recommended in its Environmental Impact Assessment of 11 February 2005 that in light of the heavy load of nutrients (phosphorus and nitrogen) in the river, "it [was] not appropriate to authorize *any* waste disposal that would increase any of the parameters that present critical values" (*ibid.*, para. 245; emphasis added). In addition, Uruguay pledged to abide by the regulations of the European Community, among which is the European Union Water Framework Directive which provides that in a river that is already eutrophic, no additional discharges of phosphorus are allowed. It follows that any additional discharges of phosphorus are contrary to the December 2001 Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry of the European Commission (IPPC-BAT).

(iii) *The algal bloom of February 2009*

77. Uruguay never contested, nor has the Court addressed the issue, that the February 2009 scum was a toxic algal bloom of a magnitude,

intensity and toxicity that has never been recorded in the river before — 1000 times higher than the historic maximum in the river — and that the bloom occurred after the Orion (Botnia) mill started operating.

78. Though the Court dismisses the possibility that nutrient discharges equivalent to a city of 65,000 people could truly be the "tipping point" that leads to toxic algal blooms, this determination is made without a coherent scientific basis. Even if it were true that the Orion (Botnia) mill only adds amounts of phosphorus which, as the Court says, is "insignificant in proportionate terms as compared to the overall total phosphorus in the river from other sources" (Judgment, para. 247), this does not alter the fact that the plant was and is adding phosphorus to the river without proper compensation through removal processes.

79. Claims to the effect that the yearly carnival at Gualeguaychú is the reason for the increase in phosphorus — an event which has not typically been accompanied by algal blooms in the past — merely reinforce the probability that the discharges from the pulp mill had a negative cumulative impact. Therefore, I cannot agree with the Court's position that such a link should be rejected without providing a scientific basis. It is reasonable to consider the likelihood of a link existing between the algal bloom and the Orion (Botnia) mill given that the operation of the plant represents a new circumstance. As with other data, the Court would have benefited greatly from a more detailed and expert evaluation of the scientific facts.

80. I also have difficulty understanding the Court's conclusion that the algal bloom episode of 4 February 2009 may not be linked, in light of the evidence in the record, to nutrient discharges from the Orion (Botnia) mill. During the proceedings, Argentina presented extensive data regarding this phenomenon which pointed to the Orion (Botnia) mill as a significant contributor. The evidence included satellite images showing the vast extent of the bloom, a river flow modelling based on actual data that matched precisely the distribution of the bloom, data indicating the presence in the scum, in addition to algae, of several effluent products coming directly from the Orion (Botnia) mill such as wood fibres, bacteria typically associated with wood pulp, namely, klebsiella, nonylphenol contaminants, and higher levels of sodium and AOX. The presence of those contaminants found in the scum provides clear evidence that the mill effluents contributed to the 4 February 2009 bloom.

(iv) *Phenolic substances*

81. Once again, the question of phenolic substances reveals the great deal of difficulty that the Court has faced in its attempts to resolve the scientific issues at stake in this case, including the difficulty of "identifying" and properly evaluating — among the numerous and complex scientific data produced by the Parties — the evidence and arguments in the record that are relevant.

In dealing with phenolic substances, the Court concluded that "there is insufficient evidence to attribute the alleged increase" (Judgment, para. 254) to the operation of the Orion (Botnia) mill. However, the CARU standard which sets the limit for phenolic substances at one microgramme per litre has been violated in the immediate vicinity of the Orion (Botnia) mill. According to the Uruguayan data submitted by Argentina, in the pre-operational phase of the Orion (Botnia) mill until November 2007, phenolic substances were below that maximum level as shown by Uruguay's State Agency for Sanitary Works (OSE) measurements in the Fray Bentos water intake, located just 3 km south of the Orion (Botnia) mill and 70 metres offshore. In contrast, the latest OSE data, from 13 November 2007 until 13 May 2009, show that since the Orion (Botnia) mill went into operation the average level of phenolic substances rose to three micrograms per litre (the average was three times higher than CARU standards, with peak levels of 20.7 micrograms per litre, which is 20 times higher than CARU standards). As phenols are present in the wood lignin, certain amounts of phenols will necessarily be part of the effluent from the Orion (Botnia) mill. During the proceedings, Argentina compared and contrasted DINAMA's data used by Uruguay, with the data collected by OSE, a government agency that makes ordinary assessments of water quality for the Fray Bentos water intake. However, the Judgment only reflects DINAMA's assessment even though the OSE data seems to be much more relevant to prove the quality and origin of the Orion (Botnia) mill's discharges. Had the Court taken into consideration the OSE data, the Court would have come to a different conclusion: that there is evidence to attribute an increase in the level of concentration of phenolic substances in the river to the operation of the Orion (Botnia) mill.

82. Although the Court hinges its conclusion on the lack of evidence that the Orion (Botnia) mill was responsible, it does not directly address the discrepancies in the data or the credibility of the conclusions. But by determining that some of the Uruguayan data is more reflective of the realities on the river than others, the Court essentially draws conclusions about the scientific viability of the evidence without any scientific competence to do so. The Court would have been better served had it

relied on clearer data and obtained a more convincing analysis of the evidence.

(v) *Nonylphenols*

83. In the case of nonylphenols and nonylphenolethoxylates, the Court again determines that even though the presence of these substances has been detected in areas most affected by the mill's discharged effluents, there is no convincing data that the plant is using these detergents.

84. I find it surprising that the conclusion of the Court is that there is not enough evidence in the record as to the claim made by Argentina that the Orion (Botnia) mill emits or has discharged nonylphenols into the river environment. In its Scientific and Technical Report submitted on 30 June 2009, Argentina presented extensive data showing the presence of nonylphenols in samples of water, sediments, settling particles, Asiatic clams and cyanobacteria found in the River Uruguay in the mill's area of influence (New Documents submitted by Argentina, Vol. I, Scientific and Technical Report, p. 41). The samples were taken during the 4 February 2009 algal bloom, but also during other periods, and all the samples show an increase in the level of nonylphenols. Additionally, during the oral hearings, Argentina presented an analysis of a pulp sample allegedly from the Orion (Botnia) mill that showed that the pulp contained nonylphenols. Uruguay never contested or rebutted these assertions by Argentina as to this sample, and the Court similarly does not address this evidence in the Judgment.

85. In addition to the affidavit from the Botnia official presented by Uruguay, Argentina also presented the Court on 19 October 2009, in response to the same question put forward by a judge, an affidavit prepared by a Canadian expert on pulp mills that confirms Argentina's expert team's findings regarding the use of nonylphenols.

86. The Court gave weight to the self-serving testimony of the Botnia employee that the mill does not use these detergents over evidence from Argentina that cleaning processes related to the use of this type of wood without detergents is almost impossible. Combined with the data that these detergents have been detected in areas rich with the mill's effluent — where they have already begun to affect the river's fauna — the Court's summary conclusion seems, at the very least, unsupported by the evidence. An independent expert on detergent use in pulp mills could have easily determined the credibility to be given to each Party's claims in this regard, but the Court decided that this amount of certainty was unnecessary.

87. I regret that the Court did not rely on all the relevant data submitted by the Parties in order to conclude that discharges from the Orion (Botnia) mill plant included nonylphenols.

(vi) *Dioxins and furans*

88. With regard to dioxins and furans, the Court again evaluates the scientific viability of the data of Argentina and Uruguay from a lay perspective and without the benefit of an independent expert opinion. The Court does not have the requisite expertise to ascertain what the appropriate method is for measuring dioxins and furans or whether the study by Botnia followed scientific or industry standards and how to link the presence of pollutants to the operation of the Orion (Botnia) mill.

(vii) *Air pollution*

89. The Court, in view of its own findings with respect to water quality, is of the opinion that "the record does not show any clear evidence that substances with harmful effects have been introduced into the aquatic environment of the river through the emissions of the Orion (Botnia) mill into the air" (Judgment, para. 264).

90. In my view, the Court fails to take due consideration of the fact that Article 36 of the 1975 Statute establishes the obligation to co-ordinate through CARU the necessary measures to control "harmful factors in the river and the areas affected by it" and that Article 41 states the obligation to prevent pollution. Recreational and bathing activities take place in the river and in areas affected by it. The Digest of the uses of the River Uruguay, in the Chapter on Pollution, defines "industrial pollution" as "caused by gas emissions stemming from industrial activities" (Digest, Theme E3: Pollution, Title 1, Chap. 1, Sec. 2: Definitions, Art. 1 *(b)*), while the definition of "harmful effects" includes threats to health and reductions in recreational activities (Chap. 1, Sec. 2).

91. In my view, the Court fails to recognize that air pollution linked to the Orion (Botnia) mill may affect not only the River Uruguay but also the areas affected by it, including human health and recreational activities. The Court consequently makes no assessment of the potential impact in this regard.

V. Final Remarks on Substantive Obligations

92. Given the scientific complexity of the case, it is my considered belief that the Court should have availed itself of the provisions in its Rules aimed at enabling the Court to gain a clearer understanding of technical evidence. This approach would have allowed the Court to reach

its conclusions regarding the substantive obligations of Uruguay with scientific certainty.

93. How is the Court to fulfil its "responsibility . . . to determine which facts must be considered relevant, to assess their probative value, and to draw conclusion from them" (Judgment, para. 168) in the face of the volume and complexity of the factual information submitted to it by the Parties? The Judgment states that "in keeping with its practice, the Court will make its own determination of the facts" *(ibid.)*. However, the Court's Statute provides that: "The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion." (Art. 50.) The Court has made use of its powers under Article 50 twice. In the *Corfu Channel* case, it first appointed a committee of three naval experts on a question of fact, contested between the Parties and relevant for the question of Albania's responsibility (*Corfu Channel (United Kingdom* v. *Albania), Order of 17 December 1948, I.C.J. Reports 1947-1948*, p. 124 *et seq.*). Once the committee had submitted its report, the Court decided that it should proceed with an *in situ* examination and submit a second report (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 151). The Court relied on the advice of a second committee in order to assess the amount of compensation owed to the United Kingdom. Moreover, in the *Gulf of Maine* case, the Chamber followed a request by the Parties that it appoint a technical expert in order to assist in the delimitation of the maritime boundary (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Appointment of Expert, Order of 30 March 1984, I.C.J. Reports 1984*, pp. 165 *et seq.* and reference in the Judgment, *I.C.J. Reports 1984*, p. 265, para. 18). Although the appointment was made following a request by the Parties, it came within the scope of Article 50.

94. The PCIJ also decided at the indemnities stage of the *Chorzów Factory* case to seek expert advice before fixing the amount of compensation (*Factory at Chorzów, Merits, Order of 13 September 1928, P.C.I.J., Series A, No. 17*, pp. 99 *et seq.*).

95. In conclusion, seeking an expert opinion to resolve matters of fact in the light of the complexity of the evidence would have been entirely consistent with the practice of the Court. Article 50 of the Statute was conceived precisely for cases like the current one. The Court could and should have called for an expert opinion to assess the scientific and factual evidence presented by the Parties. Whatever delay might have been caused by the additional investigation would have been outweighed by the Court's increased competence to render an effective Judgment. The Court does itself a disservice by not ensuring that its ruling is based on factual certainty.

96. In my view, the Court's own findings raise doubts concerning the presence or absence of pollutive factors in the river associated with discharges from the Orion (Botnia) mill. The Court's conclusions, to my

mind, do not dispel the likelihood of a link between the Orion (Botnia) mill and the unprecedented algal bloom in February 2009, the presence of phenolic substances, and the detection of prohibited nonylphenols in pulp samples and in the aquatic environment, as well as the detection of dioxins and furans in the aquatic environment of the River Uruguay and in the air.

97. Even if these factors are not considered individually by the Court as satisfactorily established, I do strongly believe that if they were taken into account as a whole these polluted discharges from the mill evidence Uruguay's non-compliance with its substantive obligations to ensure the optimum and rational utilization of the River Uruguay.

98. I would finally like to express my disappointment with the Court's approach when dealing with substantive obligations under the 1975 Statute. To my understanding the Court should have taken into account not only the actual impact of the discharges from the Orion (Botnia) mill, but also the cumulative long-term effects of those discharges in light of the 40-year lifespan of the plant. The discharges from the Orion (Botnia) mill over its lifetime are not a mere expectation but a certainty to come. In that context, the Executive Summary of Argentina's Scientific and Technical Report submitted to the Court on 30 June 2009 states that "The main outcome of this study is the detection of changes associated to the pulp mill activities that could act as an *early warning framework* to anticipate future major and more irreversible ecosystem damages." (Emphasis in the original.)

99. As the Court has stated in the past: "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241, para. 29); and also that:

> "The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.
>
> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to

reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development." (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140.)

100. In due consideration to these past findings of the Court, I regret that by not taking into account the long-term effects of the already existing pollution attributable to the Orion (Botnia) mill, the Court, in my opinion, pre-empted its opportunity to apply the precautionary principle to properly prevent pollution and preserve the aquatic environment of the River Uruguay in conformity with the 1975 Statute and general international law.

(*Signed*) Raúl VINUESA.