# SEPARATE OPINION OF JUDGE *AD HOC* TORRES BERNÁRDEZ

*[Translation]*

*The opinion only focuses on certain conclusions in the Judgment relating to the procedural obligations borne by the Respondent — I. Preliminary considerations:* (a) *CARU and its role in the prior consultation process under the Statute of the River Uruguay;* (b) *the matter of the initial characterization of the project by the Party planning to carry out the work;* (c) *the practice in national industrial projects — II. Points of agreement between the Parties in the present case — III. Stage of the procedure at which Uruguay was obliged to inform CARU about the works it was planning to carry out — IV. The scope and content of the Parties' agreements as substitute procedures for the Statute procedure:* (a) *the Agreement of 2 March 2004 between the Ministers for Foreign Affairs;* (b) *the Presidents' Agreement of 5 May 2005 establishing the GTAN;* (c) *the procedure for the pulp mills in Fray Bentos established by those agreements — V. Uruguay's obligations during the period of direct negotiations — General conclusion.*

1. I endorse many of the conclusions reached by the Court in its Judgment. Indeed, I fully support those concerning the scope of the Court's jurisdiction and the applicable law, the burden of proof and expert evidence, the rejection of the Applicant's claims that the Respondent breached its substantive obligations, and the dismantling of the Orion (Botnia) mill in Fray Bentos.

2. In respect of the procedural obligations borne by the Respondent, I also fully endorse the conclusions in the Judgment relating to the rejection of the supposed "strict link" between the procedural and substantive obligations, and the alleged "no construction obligation" said to be borne by the Respondent between the end of the negotiation period and the decision of the Court; I also agree that satisfaction is appropriate reparation. However, I do not support the conclusions on the breaches found in the Judgment concerning certain procedural obligations of the Respondent. It is for this reason that I am appending a separate opinion to the Judgment.

3. In this opinion, I would like to present some observations and clarifications, in order to explain where and why, to my great regret, I disagree with the Court's decision regarding the Respondent's breach of certain procedural obligations, said in the Judgment to be borne by it. My own analysis of the pertinent elements of fact and law leads me to a completely different conclusion to that of the majority on three related issues, namely, (1) the stage of the procedure at which Uruguay was obliged to inform CARU about the works it was planning to carry out; (2) the scope and content of the agreements made by the Parties on 2 March 2004

and 5 May 2005 as substitute procedure for that of the Statute; (3) Uruguay's obligations during the period of direct negotiations.

4. I therefore voted in favour of points 2 and 3 of the operative clause and against point 1. As far as point 3 is concerned, I agree with the Judgment that Uruguay's claim is without any practical significance, since Argentina's claims in relation to breaches by Uruguay of its substantive obligations and the dismantling of the Orion (Botnia) mill have been rejected (paragraph 280 of the Judgment). All the more so since the *res judicata* of the decision in the Judgment applies not only to what is actually written in the operative clause, but also to the grounds in so far as these are inseparable from the operative part (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 35, para. 10).

## I. Preliminary Considerations

### *1. CARU and Its Role in the Prior Consultation Process under Articles 7 to 12 of the Statute of the River Uruguay*

5. The way counsel for the Applicant presented the "Comisión administradora del Río Uruguay" (CARU) (linchpin; key body) proved influential. For my part, I do not have the slightest reservation on the importance or central role of CARU in the administration of the River Uruguay, first acknowledged by the Court in its Orders for the indication of provisional measures, but this is no reason to mistake its nature or role in the consultation process under Articles 7 to 12 of the Statute.

6. CARU is a joint river commission, a shared instrument, which functions on a permanent basis and has its own secretariat (Art. 52 of the Statute). The Parties have made it a legal entity in order to perform its functions (Art. 50). The functions of CARU are defined in paragraphs *(a)* to *(k)* of Article 56 of the Statute, paragraph *(l)* of which states that the Commission performs any other functions assigned to it by the Statute and those which the Parties may entrust to it through an exchange of notes or any other form of agreement.

7. CARU's State members are Argentina and Uruguay. It is made up of an equal number of members from each Party (Art. 49), who are appointed by their Minister for Foreign Affairs. The members make up two delegations, one Argentine and the other Uruguayan, each of which has one vote for the adoption of decisions (Art. 55). Decisions must be unanimous, including those on procedural issues. A delegation's vote against a decision precludes its adoption by CARU. In addition, the

Commission's activities can be brought to a standstill by the absence of a delegation or by failure to appoint members of a delegation, which occurred in the circumstances surrounding the present case. *CARU's "decision-making" is strictly dependent on the desire of the two delegations to act in concert*.

8. Although it has been made a legal entity in order to perform its functions, this does not mean that CARU is a body independent of the Parties, or that the Parties cannot agree to dispense with procedures or other measures falling within CARU's ambit: ultimately, the Commission is an instrument of the two Ministries of Foreign Affairs for facilitating co-operation between the Parties as riparian States along the River Uruguay, through ongoing and regular joint management on site. In any case, in the present proceedings it has not been shown that CARU is a subject of international law independent of the Parties.

9. CARU's mandate is essentially administrative and technical; it also has the power to draw up "rules" relating to the conservation and preservation of living resources and the prevention of pollution (see Subjects E.3 and E.4 of the CARU *Digest*). However, CARU's mandate is much more limited in respect of the procedure relating to works. In this area, the Commission has neither the power to authorize or reject projects notice of which has been given by the Parties pursuant to Article 7 of the Statute, nor the power to lay down rules for "national" works or installations as is the case for the CMB (ENCE) and Orion (Botnia) mills, because Article 56 *(i)* of the Statute only applies to "binational" works and installations.

10. In the Statute's "prior consultation process", CARU only has the power to carry out the initial review under Article 7 aimed at determining on a preliminary basis within thirty days whether or not the plan needs to be brought to the attention of the other Party; to extend the time-limit applicable under Article 8 of the Statute; and to serve as an intermediary for communications between the Parties.

11. The Judgment is informed by an "institutional understanding" of CARU which I do not endorse — far from it. Consequently, on a number of issues, it offers a portrayal of CARU's general powers and of its role in the prior consultation process under Articles 7 to 12 of the 1975 Statute of the River Uruguay which I do not support. In my opinion, this understanding had some bearing on the method used in the Judgment to interpret the Statute's rules relating to the procedural obligations, and that method has given precedence to the relevant rules of international law applicable in the relations between the Parties to the detriment of other constituent elements of the general rule of interpretation applied.

12. Naturally, I agree with the statement in the Judgment that, in order to interpret the 1975 Statute, the general rule of interpretation codified by Article 31 of the Vienna Convention on the Law of Treaties (which is declaratory of customary law in this area) must be applied. But that rule incorporates various interpretive elements which must also be weighed in the process of interpreting the treaty, such as the text and the context laid down in the rule, the object and purpose of the treaty, the subsequent agreements reached between the parties on the subject of the interpretation and application of the provisions of the treaty, as well as any subsequent practice in the application of that treaty which manifests the agreement of the parties as to its interpretation.

13. In effect, the method of interpretation adopted by the Court in this case facilitates an "evolutionary interpretation" of the provisions of the Statute of the River Uruguay of which I approve unreservedly in so far as the *Statute's rules relating to substantive obligations* are concerned, in light of the wording of Article 41 of the Statute relating to the obligation to protect and preserve the aquatic environment and prevent the pollution of the river water. The developments which have taken place over recent years in general international law, referred to in paragraph 204 of the Judgment, are irrefutable. The positive attitude shown in the present proceedings by both Parties, with their general acceptance of these developments in international law, is quite remarkable. On the other hand, I do not believe that the methods of interpretation leading to such an evolutionary conclusion are justified in this case in respect of the *Statute's rules relating to procedural obligations*. In my opinion, neither the wording of these rules in their context, nor the subsequent agreements between the Parties, nor the subsequent practice of the Parties in their interpretation and application of the treaty justify the application of methods leading to evolutionary interpretations. This affects the territorial sovereignty of the State, i.e., an area where limits on the territorial sovereignty of a State are not to be presumed, as the Permanent Court of International Justice stated in 1923 in its Judgment in the case concerning *S.S. "Wimbledon"* (*P.C.I.J., Series A, No. 1*, p. 24). These limits must be expressly stated or by necessity underlie the terms used by the treaty.

### *2. The Application of the Obligation to Inform CARU as Laid Down by Article 7, Paragraph 1, of the Statute Raises a Preliminary Issue relating to the Initial Characterization of the Project*

14. Article 7, paragraph 1, of the Statute lays down two procedural obligations, one borne by the Party planning the work and the other borne by CARU. The first of these obligations in effect plays the role of determinative factor in respect of the second, because if the Party planning the work does not inform CARU of it, the project has not been referred to the Commission and the Commission will therefore be unable

to determine on a preliminary basis within thirty days whether the project is liable to cause significant damage to the other Party.

15. However, the obligation of the Party planning the work to inform CARU does not apply to all projects. CARU only has to be informed of those projects which are of sufficient size ("entidad suficiente" in the authentic Spanish text) to make them "liable" to affect the navigation, the régime of the river or the quality of its waters. Therefore, the language itself of Article 7, paragraph 1, introduces *a precondition*, having to do with the characterization of the project, into the *modus operandi* of the rule: before informing CARU of it, it must be determined whether or not the project in question falls within the scope of the obligation to inform CARU laid down by the said provision of the Statute.

16. However, Article 7 leaves this initial characterization to the Party planning the work, namely, the territorial sovereign, without prejudice to the other Party's right to dispute this initial characterization. For instance, in light of the documents submitted to the Court, it is clear that, between the initial environmental authorization (AAP) of the CMB (ENCE) mill on 9 October 2003 and the Bielsa-Opertti Agreement of 2 March 2004 (see below), there was undoubtedly a disagreement between the Parties as to the interpretation and application of Article 7, paragraph 1, resulting from Uruguay's initial characterization of the CMB (ENCE) project.

17. The Applicant's own conduct in this matter also provides striking confirmation that Argentina has always believed that it has the right to make the initial characterization of its own projects and industrial installations. In point of fact, it has never informed CARU of any of its own projects or industrial installations (whether or not large or polluting): some 170 firms according to the material in the record, including some producing waste material which is highly polluting to the river and aquatic environment. Moreover, during the oral proceedings of the present case, Argentina reaffirmed its right to make the initial characterization of its own industrial projects. In this connection, it should be remembered that the condition laid down in Article 7 *(entidad suficiente)* does not refer to a solely quantitative criterion, but to a qualitative/quantitative one, and that Article 28 of the Statute states that every six months the Parties are supposed to submit a detailed report to CARU of the developments they undertake or authorize in the parts of the river under their jurisdictions, in order that the Commission may verify whether *the developments taken together may cause significant damage*.

18. Argentina's affirmation that it has the right to make the initial characterization of its own planned works is certainly in keeping with the terms of Article 7, paragraph 1, of the Statute. But then, how can it be denied that Uruguay has the same right in respect of its own industrial projects? The Applicant is not in a legal position to be able to contest that in October 2003, Mr. Opertti, then Uruguay's Minister for Foreign Affairs, had the right to make the initial characterization of the CMB

(ENCE) project for the purposes of informing CARU, because *allegans contraria non audiendus est* and Argentina's unwavering practice has been to build industrial plants without informing CARU (see the separate opinion of Vice-President Alfaro in the case concerning *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 40).

### *3. The Practice relating to the Obligation to Inform CARU under Article 7, Paragraph 1, of the Statute in the Case of National Industrial Projects*

19. The CARU minutes, for example those from 1996 relating to the Transpapel pulp mill, offer a good illustration of how the issue of the "initial characterization" of planned works by the territorial State, which arises whenever the obligation to inform CARU under Article 7, paragraph 1, of the Statute applies, has always been kept in mind in situations involving plans for national industrial plants by one or other of the Parties on their respective side of the river (and not on the river itself). CARU members have in fact raised this matter on numerous occasions in the past and their responses have been far from consistent.

20. The exchanges between Julio C. Carasales (Argentina) and Edison González Lapeyre (Uruguay) during the Transpapel project are very telling in this regard. Moreover, they show that the main concern in CARU in this connection has always been to preserve the quality of the waters of the river and not for CARU to intervene, in one form or another, in the national industrial projects of either country. Ambassador Carasales (Argentina) could not have put it in clearer terms when he stated in 1996:

> "the pertinent studies by the appropriate national authorities of Uruguay having been completed, and the authorization for the placement [of the Transpapel plant] having been granted, the Administrative Commission of the Uruguay River does not have competence to express an opinion on a facility in the territory of one of the parties. Once that plant is operating and in production, if it causes contamination problems, the C.A.R.U. will have statutory power to intervene in the matter." (Uruguay's Counter-Memorial, Vol. IV, Ann. 80, p. 203.)

21. The position adopted by Mr. Opertti, Uruguay's Minister for Foreign Affairs, during the early stages of the Parties' exchanges on the CMB (ENCE) project (2003-2004) appears to be in line with or very similar to that of Ambassador Carasales during the Transpapel project. In his responses to questions from the press, included in the record, as well as in his statement to the Uruguayan Sen-

ate[1], Mr. Opertti argued that the CMB (ENCE) paper mill due to be built in Fray Bentos was in fact a "national" concern (also acknowledged by Argentina, at least from the agreement of 2 March 2004) and that the project was therefore subject to Uruguayan law (and not to CARU's regulations on "binational" works).

22. Furthermore, exercising the right of the territorial State to make the initial characterization of the project, implicit in Article 7, paragraph 1, of the Statute, the Minister affirmed that the mill would not cause any significant damage to Argentina and that, under those circumstances, informing CARU of it would imply that there was doubt on Uruguay's part about the mill's environmental viability.

## II. Points of Agreement between the Parties in the Present Case concerning the Interpretation of Article 7, Paragraph 1, and Issues to Be Determined by the Court

23. The initial characterization of the projects in question was clearly an issue when this dispute between Argentina and Uruguay began, but it is no longer so in the present proceedings, because, as stated in paragraph 96 of the Judgment, the Parties are agreed in considering that the two planned mills (the CMB (ENCE) and Orion (Botnia) mills) are planned works of sufficient importance ("entidad suficiente") to fall within the scope of Article 7, paragraph 1, of the 1975 Statute, and that, therefore, in principle, CARU should have been informed of them in accordance with that provision.

24. Furthermore, both Parties acknowledge: (1) that CARU is without power to approve the projects subject to Article 7 of the Statute and of which it is informed by the Party planning the project; and (2) that the rules under Article 7, like all of the Statute's other rules on the "prior consultation" process, do not constitute *jus cogens*, and that, therefore, the Parties are free not to apply them in a given case.

25. This substantially simplified the Court's examination of the question as to whether Uruguay breached its procedural obligations, as Argentina claims. In essence, this question was reduced to: (1) determining when Uruguay should have informed CARU of the plans for the mills so that the Commission could conduct its initial screening; and (2) determining the scope and content of the agreement made on 2 March 2004 by the Ministers for Foreign Affairs, Mr. Bielsa (Argentina) and Mr. Opertti (Uruguay), and that made on 5 May 2005 by the President of Argentina, Mr. Néstor Kirchner, and the President

[1] Official record, statement by the Minister for Foreign Affairs, Mr. Didier Opertti, to the Uruguayan Senate (Nov. 2003), Memorial of Argentina, Vol. VII, Ann. 4, pp. 73-75.

of Uruguay, Mr. Tabaré Vázquez, establishing a high-level technical group (GTAN).

## III. Stage of the Procedure at which Uruguay Was Obliged to Inform CARU about the Works It Was Planning to Carry Out

26. Determining the stage or point at which the State planning a work is obliged to inform CARU raises a question of the interpretation of Article 7, paragraph 1, because the text of the provision does not specify this. Should CARU be informed "during the planning phase of the project"? Or, "after this stage but before authorization is given to carry out the planned construction activity"? And, in the case of the first hypothesis, before or after an initial environmental authorization, known in Uruguayan law as "Autorización Ambiental Previa (AAP)", has been granted by the territorial State?

27. According to the Judgment, the obligation of the State planning activities referred to in Article 7 of the Statute to inform CARU "will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization" (para. 105). I do not agree with the majority's conclusion, because it refers to a stage too early in the planning process. This, in turn, may in part be explained by an institutional understanding of CARU, with which I also disagree, and by the link the Judgment makes between the obligation to inform CARU, laid down by Article 7, paragraph 1, of the 1975 Statute of the River Uruguay, and the principle of prevention, which, as a customary rule, is now part of the corpus of substantive rules of international environmental law. However, this finding introduces limitations on the State's territorial sovereignty during the planning phase of an industrial project, which go well beyond those which are explicit in Article 7 of the Statute or by necessity underlie the text. This may be explained by the shared "evolutionary" intent that the majority attributes to the Parties on this point, of which there is no evidence at all either in Article 7 or in any of the other procedural rules making up the "prior consultation process" of the 1975 Statute, that is to say, that this is based on a presumption. However, as stated earlier in paragraph 13, limitations on a State's territorial sovereignty are not to be presumed.

I believe that the adoption of methods characteristic of "evolutionary" interpretation is not justified in the present context quite simply because the wording of the provisions laying down the "prior consultation process" of the 1975 Statute, including therefore Article 7, does not directly or indirectly permit the interpreter to do so. In fact, by adopting such methods, the majority's recourse to the "relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3 *(c)*, of

the Vienna Convention on the Law of Treaties) is not aimed at determining the stage or point at which the territorial State is obliged to inform CARU pursuant to the obligation set forth in Article 7, paragraph 1, of the Statute, but at determining the best time to do so from the point of view of applying the customary principle of prevention under international environmental law.

As a result, the role of the "relevant rules of international law applicable in the relations between the parties" in the interpretation process is inverted. Instead of having recourse to the customary law as one of several elements in determining the meaning and scope of Article 7, paragraph 1, of the 1975 Statute, the treaty provision is assigned the task of satisfying the requirements of the application of the customary principle of prevention. Consequently, the text, the context and the subsequent agreements or practice become trivial elements in the interpretation process of Article 7 of the Statute, which in effect is aimed at extending the application of the customary obligation of prevention (which derives from a substantive rule) to the procedural rules of the "prior consultation process" of the Statute of the River Uruguay. Moreover, I strongly fear that the decided outcome will become an additional source of difficulty for one or both of the Parties in the future.

28. For example, under Uruguayan law, the fact that a request for initial environmental authorization is submitted by a third party, or that DINAMA considers that request, or even makes a favourable recommendation to the higher authorities, does not mean that the planned activity in question can be described at any stage in this process as a planned activity of the Uruguayan State. Indeed, throughout this whole process, the State has not approved anything and, as a result, it cannot be said that "Uruguay is planning to carry out the work". It is only once the initial environmental authorization (AAP) required by Uruguayan law has been issued that the Uruguayan State can be said to have agreed to the project and then *only in respect of its environmental viability, because, in order to undertake activities or works relating to the construction of a project, further permits or authorizations are required, in particular an Environmental Management Plan ("PGA" in Spanish)*.

29. Under Uruguayan law, initial environmental authorizations (AAPs) do not authorize construction activities or works of any sort: the holder of an AAP only has the right to request a construction authorization or permit (see the affidavit of Alicia Torres, Director of DINAMA). Construction authorizations or permits, with their corresponding PGA, come much later in the administrative process, sometimes even years later, and only if the AAP for the project has not expired beforehand. In all events, in order to start the construction or later commissioning phase (known as the "operational" phase), further authorizations from the competent Uruguayan authorities are

required *after the initial AAP* under the terms of the Uruguayan law in force.

30. Furthermore, specifying the stage or point at which CARU must be informed by reference to the provisions or rules of the law of the State concerned, as the Judgment does, is not a good idea, since this subordinates the operation of the obligation under international law to inform CARU to the national law of one or other of the Parties. National law can vary from country to country and may be modified at any time without the consent of the other Party, with the regrettable result that one Party may be obliged to inform CARU of its plans earlier than the other. However, I do not believe that such intent can be attributed to the drafters of the 1975 Statute of the River Uruguay.

31. My position on this issue is based on the text of Article 7, paragraph 1, and on Article 28 of the Statute, as well as on the object and purpose of informing CARU, on the relevant provisions of the CARU *Digest* elaborating on the Statute (Subject E.3, title 2, Chap. 3, Sec. 1, Art. 2 and Chap. 1, Sec. 1, Art. 1 *(a)*) and on the practice of the Parties in CARU in such cases as the *Transpapel mill, the M'Bopicua port, the Botnia port and the Nueva Palmira freight terminal*. These interpretative elements do not endorse the theory that informing CARU for the purposes of Article 7, paragraph 1, of the Statute must precede "any authorization".

32. It is clear from the wording of the Article that the obligation to inform is tied to the "carrying out" of the planned "work" (the authentic Spanish text is unambiguous: *"La Parte que proyecte la construcción de nuevos canales . . . o la realización de cualesquiera otras obras . . ."*). That the State is only planning the "work" is not sufficient for the obligation to inform CARU to become applicable. According to the text of the provision, the State must also be "planning the carrying out of the work", because it is only during the carrying out or implementation of the plan that activities or works relating thereto could affect the navigation, the régime of the river or the quality of its waters and thereby cause significant damage to the other State, since the river is a shared natural resource.

33. It is also essential not to lose sight of the fact that the object and purpose of informing CARU, pursuant to Article 7, paragraph 1, of the Statute, is simply to allow the Commission to determine on a preliminary basis within thirty days whether the project is liable to affect the navigation, the régime of the river or the quality of its waters and thereby cause significant damage to the other State. This refers to activities or works which could cause damage *of a physical nature* to the river or its waters. The mere granting by a public administrative body of an "authorization" is not an act or an activity which is likely to cause such effects.

34. In the present case, Argentina does not claim to have suffered any significant damage solely as a result of Uruguay granting the AAPs for

the CMB (ENCE) or Orion Botnia mills, or as a result of the "preliminary works" to the construction of the mills which Uruguay authorized. At the start of the case, Argentina spoke of "risks", because at the time there had been no construction works. In the oral phase, the supposed significant damage did not for the most part relate to the "construction" works, preliminary or otherwise, of the Orion (Botnia) mill, but rather to the negative effects on the river and its waters of the mill's "operation", that is, the effects of its commissioning from 9 November 2007 onwards.

35. In light of the foregoing, I consider that, where the text of Article 7, paragraph 1, is silent, the issue should be resolved by the interpreter by looking to the rule of general international law (Art. 31, para. 3 *(c)*, of the Vienna Convention on the Law of Treaties). And what does international law have to say on the matter? It says that the information must be "timely" ("en temps utile") or communicated "in a timely manner" ("opportun") (see, for example, Art. 12 of the 1997 Convention on the Law of the Non-Navigational Uses of Watercourses).

36. Applied to Article 7, paragraph 1, of the Statute, this simply means that the State must inform CARU sufficiently in advance of the main aspects of the work, how it is to be carried out and the other technical data on the project (Art. 7, para. 3), in order to enable the procedures provided for in Articles 7 to 12 to be carried out as laid down by the Statute.

37. In any case, logically, Article 7, first paragraph, has meaning only if construed as requiring that the information be communicated at a stage when solid technical information is available on the project, but before the project is so far advanced in its construction that any assessment of the potential damage from the industrial facility would come too late to offer any remedy, which would undoubtedly be contrary to that provision of the Statute.

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38. As stated earlier, a Uruguayan AAP is a necessary but by no means sufficient authorization for its holder to carry out construction works or commissioning activities. In the case of ENCE, the company obtained its AAP on 9 October 2003 and had only carried out ground-clearing works before the project was abandoned in 2006; and in that of Botnia, after its AAP of 14 February 2005, the company also carried out other preparatory works (such as constructing the concrete foundations and the plant's chimney) before Uruguay granted it the authorizations to build the actual mill; these were followed much later by the authorization to commission the mill. The case of Botnia is telling in this respect: construction works for the mill did not begin until approximately one year

after its AAP of 14 February 2005. Moreover, between that AAP and the commissioning of the mill on 9 November 2007, the company received the following approvals:

— on 12 April 2005, of its Environmental Management Plan ("PGA" in Spanish) for the removal of vegetation and earth moving;

— on 22 August 2005, of its PGA for the construction of concrete foundations and the chimney;
— on 18 January 2006, of its PGA for the construction phase of the works;
— on 10 May 2006, of its PGA for the construction of the wastewater treatment plant;
— on 9 April 2007, of its PGA for the creation of an industrial non-hazardous waste landfill;
— on 9 April 2007, of its PGA for the construction of a solid industrial waste landfill;
— on 31 October 2007, of its PGA for operations;
— on 8 November 2007, of the actual operation of the plant (Uruguay's Rejoinder, para. 2.48, CR 2009/22, p. 13).

39. It follows that on the date of conclusion of the agreements which will be examined below, (the "understanding" between the Ministers for Foreign Affairs (Bielsa-Opertti) of 2 March 2004 and the agreement establishing the GTAN between the Presidents (Kirchner-Vázquez) of 5 May 2005, both of which, in my view, render the provision set forth in Article 7, paragraph 1, of the Statute of the River Uruguay inapplicable in this case) the respective time-limits for informing CARU *timely* or *in a timely manner* about the implementation of the CMB (ENCE) mill project and the Orion (Botnia) mill project had not expired, as Uruguay still had the opportunity to do this in a timely or appropriate manner for the purposes of the aims to be achieved through the information process.

40. Therefore, on the date of the agreements, Uruguay could not have breached the obligation to inform CARU under Article 7, paragraph 1, of the Statute, because "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs" and "[t]he breach of an international obligation by an act of a State not having continuing character occurs at the moment when the act is performed, even if its effects continue" (Art. 13 and Art. 14, para. 1, Articles on Responsibility of States for Internationally Wrongful Acts).

41. There was, therefore, no "wrongful delay" by Uruguay in respect of the obligation to inform CARU under Article 7, paragraph 1, of the Statute of the River Uruguay before the conclusion of the above-mentioned subsequent agreements between the Parties. I would add that the Parties are agreed that the acts amounting to any procedural breaches involving Articles 7 to 12 of the Statute are to be categorized as being

"instantaneous" in nature (Argentina's Memorial, paras. 8.12 *et seq.*; CR 2009/19, p. 45, para. 3).

## IV. The Scope and Content of the Parties' Agreements of 2 March 2004 and 5 May 2005

42. In the case of both ENCE and Botnia, the Parties jointly decided to dispense with the preliminary review by CARU provided for in Article 7 of the Statute and to proceed immediately to the direct consultations and negotiations referred to in Article 12. In both cases, Argentina was the Party which sought to hold direct consultations with Uruguay at times when CARU did not offer a viable framework, either because the Commission had halted its sessions, or because it was deadlocked.

43. As the rules laid out in Articles 7 to 12 of the Statute of the River Uruguay are not peremptory norms *(jus cogens)*, there is nothing to prevent the Parties from deciding by "joint agreement" to proceed immediately to direct consultation or negotiations without having to adhere to the procedures under the Statute. And that is precisely what they did. This "joint agreement" does indeed exist: it is manifest in the two abovementioned agreements which Uruguay invoked in the present proceedings and which Argentina has acknowledged exist, although it disputes the content and the scope which Uruguay affords them.

44. The Judgment recognizes that there is an "understanding" (Bielsa-Opertti agreement) and an "agreement" (Presidents' agreement establishing the GTAN) which are binding on the Parties since they have entered into them (paras. 128 and 138 of the Judgment), but rejects that in the present case their effect was to depart from the Statute's procedures (Arts. 7-12). For the reasons set out below, I disagree with this.

### *1. The Understanding of 2 March 2004 between the Ministers for Foreign Affairs*

45. On 9 October 2003, at a meeting between Presidents Kirchner (Argentina) and Battle (Uruguay) in Anchorena, (Colonia, Uruguay), the subject of the paper pulp mills in Fray Bentos appears to have come up. But nowhere in the material submitted to the Court is there any reference to the Presidents' conversations on the subject. However, the Ministers for Foreign Affairs, Messrs. Bielsa (Argentina) and Opertti (Uruguay), did refer to the "M'Bopicuá Plant" at a press conference of which a transcript does appear in the record. Minister Bielsa said:

> "We talked about the M'Bopicuá plant. The idea is that when the company issues its environmental assessment plan, that report can be made known. From the point of view of Argentina, if the report is satisfactory regarding the environmental issues, something that Uruguay is also pursuing in its capacity as the sixth leading nation in

> the world in terms of environmental protection, then we shall be in agreement.
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> The position of the two nations is absolutely in harmony *[sic]*. We . . . want to see that this plant is actually installed, that these jobs can actually be created, that the investment can actually go forward and that this does not involve any deterioration for the environment." (Uruguay's Counter-Memorial, Vol. II, Ann. 14.)

And Minister Opertti (Uruguay) said:

> "La opinión oficial del Gobierno es muy sencilla y muy clara: esto se trata de una inversión en territorio uruguayo sujeta a ley uruguaya. Naturalmente que es una inversión importante y si de esa inversión pudieren directa o indirectamente derivar efectos que pudieran de alguna manera poner en riesgo valores ambientales, que tanto la Argentina como el Uruguay defienden porque los dos tenemos el mismo credo en esa materia, naturalmente que los dos trataremos de evitar que eso suceda. Y para ello ya existen mecanismos . . . hay una Comisión Administradora del Río Uruguay y a ella llegaremos si es preciso."[2] *(Ibid.)*

46. But, also on 9 October 2003, MVOTMA (Ministerio de Vivienda Ordenamiento Territorial y Medio Ambiente) granted the AAP to ENCE ("Gabenir S.A." at the time) for the "Celulosa de M'Bopicuá" (CMB) paper pulp mill on the left bank of the River Uruguay at Fray Bentos, near the international bridge and opposite the Argentine region of Gualeguaychú, where the population had demonstrated against the building of the plant. Argentina considered this a breach of Article 7 of the Statute of the River Uruguay and protested against the granting of that AAP to ENCE, notably by ceasing to attend CARU meetings (that situation continued until the conclusion of the agreement of 2 March 2004).

47. The Parties, however, continued their discussions on the CMB (ENCE) project at a higher level — through ministers and Ministers for Foreign Affairs —, in other words, outside CARU, whose work had come to a halt. Thus, by a diplomatic Note dated 27 October 2003, for example, Uruguay's Ministry of Foreign Affairs transmitted to Argentina: (1) the environmental impact assessment for ENCE; (2) DINAMA's

[2] "The Government's official position is very simple and very clear: this is an investment on Uruguayan territory, subject to Uruguayan law. It is, of course, a substantial investment and, were there a risk of this investment, directly or indirectly, in any way jeopardizing the environmental values to which both Argentina and Uruguay subscribe — our approaches being the same in that respect — both countries would naturally endeavour to prevent such a risk from materializing. Mechanisms to that end are already in place . . . there is an Administrative Commission of the River Uruguay, to which we could turn should the need arise."

2 October 2003 technical report on the environmental impact assessment; and (3) the AAP of 9 October 2003. Further, on 7 November 2003, Uruguay transmitted to Argentina, at the latter's request, a complete copy of the MVTOMA file on the ENCE project (totalling 1,683 pages). Argentina therefore received all the information relating to the CMB (ENCE) project only a few days after Uruguay granted the AAP to ENCE on 9 October 2003.

48. Argentina has admitted these facts in the present proceedings and also did so at the time they occurred. For example, in the report to the Argentine Senate on 2004 (prepared in 2005) by the Head of the Argentine Cabinet Office, Dr. Alberto Angel Fernández, the following response appears from the Argentine Ministry of Foreign Affairs to a question posed:

> *"As a consequence of this grave situation, and not finding within the ambit of CARU the necessary consensus to resolve the matter, CARU halted its sessions and consideration of the matter was left to both Foreign Ministries.*
>
> . . . . . .
>
> *II. In this context and by virtue of the impasse at CARU, the Argentinean Foreign Ministry requested the technical information corresponding to Uruguay. In November 2003, in accordance with the proposal by the Argentinean Foreign Ministry, the Uruguayan Foreign Ministry sent the documentation related to the Cellulose project in M'Bopicuá . . . to the Argentinean Embassy in Montevideo."* (Uruguay's Rejoinder, Vol. II, Ann. R14, p. 616; emphasis added.)

In his statement on the dispute with Uruguay, made to the Foreign Affairs Commission of the Argentine Chamber of Deputies on 14 February 2006, the Argentine Minister for Foreign Affairs, Mr. Taiana, made similar comments on the workings of the information and prior consultation process of the Statute of the River Uruguay:

> "It may occur, however, that the parties may not reach an agreement within the sphere of CARU over the impact of the projected works on the ecosystem associated with the Uruguay River. In this last situation, the matter leaves the orbit of competence of the Commission and is turned over to be considered at the level of the Governments." (*Ibid.*, Vol. II, Ann. R16; Argentina's Application instituting proceedings, Ann. III, p. 4.)

49. Using the information transmitted by Uruguay, outlined above, Argentina's technical advisers to CARU studied the CMB (ENCE) project and *produced a report for their authorities in February 2004*. They concluded that "there would be no significant environmental impact on the Argentine side" (Uruguay's Counter-Memorial, Vol. III, Ann. 46). Argentina's delegates to CARU also supported this conclusion (Uruguay's

Counter-Memorial, Vol. IV, Ann. 99). This report reassured Argentina about the possible effects of building and operating the disputed mill and opened the way to further meetings of the Parties and, eventually, to the conclusion of the agreement between Ministers Bielsa and Opertti on 2 March 2004.

50. Argentina has argued in these proceedings that the agreement of 2 March 2004 did not render Article 7 of the Statute inapplicable in this case, and the Judgment concurs with the Applicant on this point. But, the actual text of the agreement, recorded in the CARU minutes of 15 May 2004, and other pieces of documentary evidence from official Argentine sources, have convinced me to the contrary. In my view, these various factors tip the balance resolutely in favour of Uruguay's version of the facts as presented in its written pleadings and during the oral proceedings, that is, that the Ministers agreed at the time that the CMB (ENCE) pulp mill would be built in Fray Bentos on condition: (1) that CARU maintained a certain level of control over technical aspects, as described in the agreement, relating to the construction of the mill (which is in no way connected to the preliminary review under Article 7, paragraph 1, of the Statute); and (2) that, once the mill had entered into operation, a system would be established for CARU's monitoring of the quality of the river's waters throughout the area of the mill site.

51. Following the meeting of the Ministers for Foreign Affairs, Bielsa and Opertti, on 2 March 2004 in Buenos Aires, Argentina's Ambassador, Mr. Sguiglia, and that of Uruguay, Mr. Sader, exchanged drafts with a view to committing the Ministers' oral agreement *to writing*. These exchanges, between March and April 2004, confirm the existence of the agreement and its content. The last draft exchanged on the subject of the content of the agreement reads as follows:

> "VIII. On 2 March 2004 the Foreign Ministers of Argentina and Uruguay reached an understanding with respect to the course of action that this matter will take, that is, to have the Uruguayan government provide the information relating to the construction of the plant, and with respect to the operational phase, to have CARU undertake the monitoring of the water quality in conformity with its Statute." (*Ibid.*, Vol. IX, Ann. 200.)

52. This text echoes the statements made to the press on 3 March 2004 both by Mr. Opertti and by Messrs. Bielsa and Sguiglia, as well as, for the most part, the content of a memorandum of 1 April 2004 sent to the Ambassador, Mr. Volonté Berro (Uruguay) by his Minister-Counsellor, Mr. Castillo. This confirms that the Bielsa-Opertti agreement *took place after the* "planning" *phase for the mill, to which the obligation to inform CARU relates under Article 7, paragraph 1, of the Statute*. That phase occurred well before the agreement, which itself looked ahead to the future, that is, to the construction and commissioning phases of the mill.

53. The wording of the Bielsa-Opertti agreement *was also ratified in the minutes of CARU's extraordinary meeting on 15 May 2004* (first

meeting of the Commission since October 2003) *and duly authenticated by the signatures of the head of the Argentine delegation to CARU, Mr. Roberto García Moritán, and the head of the Uruguayan delegation, Mr. Walter M. Belvisi, as well as by that of CARU's Administrative Secretary, Mr. Sergio Chave* (Uruguay's Counter-Memorial, Vol. IV, Ann. 99). Those minutes, in their entirety, read as follows:

"*General Agreed Matters:*

I. Both parties pointed out that the environmental protection of the Uruguay River is a matter in which both parties share interest and sensitivity; that has materialized in concrete actions pursuant to the Statute of the Uruguay River and in the Environmental Protection Plan of the Uruguay River signed by both countries on 29 October 2002 in the city of Paysandú.

II. *On 2 March 2004 the Foreign Ministers of Argentina and Uruguay reached an understanding with respect to the proper course of action that this matter will take, that is, to have the Uruguayan Government provide the information relating to the construction of the plant, and with respect to the operational phase of the pulp mill, to have CARU undertake the monitoring of water quality in conformity with its Statute.*

*Specific Agreed-Upon Matters:*

I. Both delegations reasserted that the Foreign Ministers of the Republic of Argentina and the Republic of Uruguay agreed on 2 March 2004 that Uruguay shall communicate the information related to the construction of the pulp mill including the Environmental Management Plan. In this sense, *CARU shall receive* the Environmental Management Plans for the construction and operation of the plant provided by the company to the Uruguayan government via the Uruguayan delegation. Within the framework of its competency, CARU will consider those, *taking into account the terms* included in the aforementioned Ministerial Resolution 342/2003, particularly those terms expressly established by the Ministry of Housing, Land Use Planning and the Environment, such as actions which require additional implementation and additional assessment by the company before approval of those, formulating its observations, comments and suggestions, which shall be transmitted to Uruguay, to be dismissed or decided with the company. Once said issues are considered, CARU shall again be informed.

II. In relation to the operational phase, we will proceed to monitor environmental quality. This monitoring shall be carried out in conformity with the provisions of the Statute of the Uruguay River, especially Chapter X, Articles 40 to 43. Both delegations agree that in view of the scope of the undertaking and its possible effects, *CARU*

*shall adopt procedures in conformity with the current minutes*. On the other hand, the sampling already done by CARU should be taken into account as the baseline for the monitoring (these show no acute toxicity and compliance of almost 100 per cent with the quality standards as compared to the reference values). CARU's decision to add two new water sampling stations in the work area shall make monitoring more effective.

III. Both parties take note of the next meeting of a technical nature between national authorities of both countries to exchange viewpoints on this issue. Likewise, both parties agreed to invite the presidents of both delegations to CARU to attend the meeting.

*Decision:*

Based on the preceding statements and agreements of the Parties, it is decided to send all documentation that CARU has in relation to the M'Bopicuá project to the Subcommittee of Water Quality and Prevention of Environmental Pollution for its consideration, analysis, and evaluation in accordance with the points mentioned *(I and II — Specific Agreed-Upon Matter . . .)*. Likewise, it is agreed to request all the information related to the construction phase of the plant as agreed by the Uruguayan Foreign Ministry. In this context, and in compliance with the Environmental Protection Plan, it is agreed to convene a Technical Advisory Committee for the related matters." *(Emphasis added.) [Translation by the Registry.]* (CARU, Minutes 01/04 (15 May 2004) (Excerpt), Uruguay's Counter-Memorial, Vol. IV, Ann. 99, pp. 108-110.)

54. There is not a single passage, nor even a single word, in the text of this CARU decision that could support the contention that it implied a return to the Commission for purposes of Article 7, paragraph 1, of the Statute of the River Uruguay. On the contrary, CARU gives effect to the entire content of the agreement entered into by Ministers Bielsa and Opertti on 2 March 2004. Ministerial Resolution 342/2003 cited in paragraph I of the "Specific Agreed-Upon Matters" of the CARU minutes is MVOTMA's Ministerial Resolution of 9 October 2003 granting the AAP for the CMB (ENCE) project.

55. The following comments, made before the wording of the minutes was adopted, by the President of Argentina's delegation to CARU, Mr. Moritán, are easily understood. After recalling that Uruguay had "failed to comply" with the "procedure set forth in Article 7", he admits, however, that "an important limiting factor in our position is the agreement executed by the Foreign Ministers on 2 March 2004, which was referenced previously" and "the fact is that we have to go forward on the basis of the reports that we have and the agreement reached by the Foreign Ministers" (Uruguay's Counter-Memorial, Vol. IV, Ann. 99, pp. 18 and 19).

56. Therefore, the statements made by the CARU delegates at the time fully confirm the scope of the 2 March 2004 agreement between the Ministers for Foreign Affairs, which is evidenced by the documents in the record. Indeed, the content of the statements of those involved shows that they were no longer expecting CARU to exercise the general powers conferred on it under Articles 7 to 11 of the Statute in respect of the CMB (ENCE) plant, rather that it would carry out only certain tasks agreed on in the Bielsa-Opertti agreement.

57. Other documents submitted to the Court confirm the scope of the agreement of 2 March 2004, as explained above. I shall not dwell on this, except in respect of three official Argentine documents from the time which are of particular note: (1) a statement by the Argentine Ministry of Foreign Affairs in a report on 2004 to the Senate (published in 2005); (2) a statement by the Argentine Ministry of Foreign Affairs from the time in a report on 2004 to the Chamber of Deputies; and (3) a statement in the 2004 Annual Report on the State of the Nation, prepared by the Office of Argentina's President.

58. In the first of these documents (already cited in para. 48 above), the Argentine Ministry of Foreign Affairs states that:

> "On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding on the course of action to give to this subject. That is, for the Government of Uruguay to facilitate information relative to the construction of the plant, and in regard to the operational phase, instruct the CARU to proceed to carry out a monitoring of the water quality of the Uruguay River in conformity with the provisions of the Statute for the River Uruguay, especially its Chapter X, Articles 40 to 43. This decision coincides with the request of the Governor of Entre Ríos Province . . . The understanding of the Foreign Ministers, the note from the Governor of Entre Ríos and the report of the technical experts coincide in that the CARU should concentrate its activity on the subject of mechanisms of control." *[Translation by the Registry.]* (Uruguay's Rejoinder, Vol. II, Ann. R14, p. 617.)

59. The statement by the Argentine Ministry of Foreign Affairs in a report presented to the Chamber of Deputies for 2004 reads as follows:

> "In June of that same year [2004], a Bilateral Agreement was signed through which Argentina's Government put an end to the controversy.
>
> Said agreement respects, on the one hand, the Uruguayan national character of the project, and on the other hand, the regulations in force that regulate the waters of the Uruguay River through the CARU.

> Likewise, it includes a work methodology for the three phases of construction of the project: the project, the construction and the operation.
>
> *Thus, inclusive control procedures were carried out on the Uruguay River which means they will continue after the plants are in operation*.
>
> Controls *on both plants will be more extensive than those our own country has on its plants on the Paraná River*, which were nevertheless accepted by Uruguay (the technologies that the province of Entre Ríos questions Uruguay about are the same ones that are used in our country)." (Uruguay's Counter-Memorial, Vol. III, Ann. 46; emphasis added.)

60. According to the statement made in Argentina's 2004 Annual Report on the State of the Nation prepared by the Head of the Argentine Cabinet Office (dated 1 March 2005):

> "That same month [i.e., June 2004 *(sic)*], both countries signed a bilateral agreement which put an end to the controversy over the pulp mill installation in Fray Bentos.
>
> This agreement respects, on the one hand, the Uruguayan and national character of the work, which was never under discussion, and on the other hand, the regulation in force that regulates the Uruguay River waters through the CARU.
>
> It also provides for a working procedure for the three phases of construction of the work: project, construction and operation." (*Ibid.*, Vol. III, Ann. 48, p. 28.)

It adds further on:

> "In view of the *'specific agreements of both Delegations at CARU'* regarding the *possible installation of pulp mill plants on the Uruguay River bank*, a 'Monitoring Plan for Environmental Quality of the Uruguay River in the Areas of the Pulp Mill Plants' was designed, which together with the 'Plan of Environmental Protection of the Uruguay River' helps to maintain water quality. *The 'water quality' standards were also reviewed and updated, considering they remain to be included in the Digest of Uses of the Uruguay River*." (*Ibid.*, Vol. III, Ann. 48, p. 28; emphasis added.)

61. This text also confirms Uruguay's theory that the procedure agreed to on 2 March 2004 by Ministers Bielsa and Opertti for the ENCE project was also later applied to the Botnia project by the two Governments. Argentina knew of the Botnia project by November 2003 at the latest, when its official representatives had their first meeting with Botnia representatives in Buenos Aires, and CARU itself learned of it in April 2004, when it first met representatives of the company. The joint press release of 31 May 2005 on the occasion of the GTAN's establishment also makes reference to "the cellulose plants that are being con-

structed in the Eastern Republic of Uruguay" (see below). CARU and its Subcommittee on Water Quality and Prevention of Pollution did the same. For example, PROCEL's full title is "Plan for Monitoring Water Quality of the River Uruguay in the Area of the Pulp *Mills*" (emphasis added).

62. The Court's Judgment accepts that the understanding of 2 March 2004 is a procedure replacing that under the Statute, but it dismisses its application in the present case on the — to me, rather surprising — basis that Uruguay failed to adhere to it. In point of fact, in paragraphs 129 and 131 of the Judgment, the Court states that the information which Uruguay was obliged under the "understanding" to transmit to CARU was never transmitted. Therefore, the Court concluded that it could not accept Uruguay's contention that the "understanding" put an end to its dispute with Argentina in respect of the CMB (ENCE) mill, concerning the implementation of the procedure laid down by Article 7 of the Statute. The Court further notes that, when the understanding was drawn up, it covered only the CMB (ENCE) project; it rejects Uruguay's contention that the scope of the understanding was later extended by the parties to the Orion (Botnia) project, with the argument that reference to "the two mills" is made only as from July 2004 in the context of the PROCEL plan. However, the Court adds, that plan concerns only the measures to monitor the environmental quality of the river waters, not the procedures under Article 7 of the 1975 Statute. And, thus, the Court concludes that since the "understanding" was never applied by Uruguay, it cannot be considered as a derogation from the procedural obligations laid down by Article 7 of the 1975 Statute.

63. To my great regret, I do not agree with that conclusion. As far as monitoring is concerned, the agreement, with the consent of both delegations to the Commission, was fully implemented by CARU which adopted the PROCEL plan on 12 November 2004 and continued to implement it until the withdrawal of the Argentine delegates. As for the transmission by Uruguay of the technical information relating to the construction of the CMB (ENCE) mill, Uruguay never had the chance to do so because the mill was not built. The only PGA in existence for this mill is for the "removal of vegetation and earth moving", and dates from 28 November 2005. There are no others for the construction of the mill, eventually abandoned by ENCE, in Fray Bentos.

64. In the case of Orion (Botnia), construction works for the mill on the site unfolded after the official end of direct negotiations in the GTAN, which the Judgment fixes at 3 February 2006 (para. 157). Furthermore, Uruguay transmitted to CARU by facsimile on 6 December 2004 "the text of the public file for the Kraft cellulose plant project, application for initial environmental authorization [AAP] filed by Botnia S.A." (Uruguay's Counter-Memorial, Vol. IV, Ann. 111, CARU, Minutes 09/04 (10 December 2004)). Uruguay therefore sent this infor-

mation to CARU before the AAP was granted on 14 February 2005. In the documents submitted to the Court, there are references to the application of the understanding to the "two mills", not only in the CARU documents on the PROCEL plan, but also in official Argentine documents such as the statement by the Argentine Ministry of Foreign Affairs in a report presented to the Chamber of Deputies for 2004 (see paragraph 59 above).

65. The understanding of 2 March 2004 was performed as far as it was physically possible to do so *(impossibilium nulla obligatio est)*.

*2. The Presidents' Agreement of 5 May 2005 Establishing the GTAN*

66. In a diplomatic Note of 12 January 2006 to Uruguay's ambassador in Argentina, the Argentine Ministry of Foreign Affairs described the circumstances leading up to the creation of the GTAN as follows: "The lack of agreement within the Administrative Commission of the River Uruguay (CARU) . . . led the Governments of both countries to deal with the question directly and to establish a High Level Technical Group (GTAN)." (Uruguay's Counter-Memorial, Vol. III, Ann. 59.) See also the 12 February 2006 address by Argentina's Minister for Foreign Affairs, Mr. Taiana, to the Foreign Affairs Committee of the Chamber of Deputies annexed to the Application instituting proceedings in the present case.

67. There were also political motives behind the establishment of the GTAN. There was growing opposition to the construction of the two mills in Fray Bentos among the inhabitants of the Argentine province of Entre Ríos. Mass demonstrations had taken place and international roads and bridges over the River Uruguay had been blockaded, notably the General San Martín bridge, which was closed to traffic as a result of the actions promoted by the "asambleistas" movement of Gualeguaychú. On the other side, on 1 March 2005, a new Uruguayan Government took office following the inauguration of President Tabaré Vázquez.

68. It should be noted that the Presidents' agreement of 5 May 2005 was concluded on Argentina's initiative. In a letter also dated 5 May 2005, Argentina's Minister for Foreign Affairs, Mr. Bielsa, expressly proposed direct discussions on the two mills (ENCE and Botnia) to his Uruguayan counterpart, Mr. Gargano (Uruguay's Rejoinder, Vol. II, Ann. R15). It was thus once again Argentina which suggested that the issue of the paper pulp mills be handled by the two Governments outside CARU. However, the Judgment does not draw any conclusions from this on whether or not Uruguay's conduct at the time accorded with its obligations in the matter, in view of the requirements of the prior consultation process under the Statute of the River Uruguay *and the Bielsa-Opertti understanding of 2 March 2004, which was still in force*

*when the outgoing Uruguayan Government issued the AAP for Botnia on 14 February 2005*.

69. In his letter of 5 May 2005 to the Uruguayan Minister, Mr. Gargano, the Argentine Minister, Mr. Bielsa, wrote:

> "I have the pleasure of addressing this to you with respect to the projected installation of two plants for the production of cellulose in the area of Fray Bentos, in front of the Argentinean city of Gualeguaychú, in the province of Entre Ríos.
>
> In this respect I must convey, once again, the great concern that exists amongst the population and the authorities from the said province — concern that the national Government takes as its own — as a consequence of the environmental impact that the operations of the said plants may produce.
>
> Without prejudice of the water quality control and monitoring procedures by CARU, this situation, due to its potential seriousness, requires a more direct intervention of the competent environmental authorities, with the cooperation of specialized academic institutions."

(This letter from Minister Bielsa goes on to convey to his Uruguayan counterpart the requests made by the government of the Argentine province of Entre Ríos, including a request for reconsideration of the location of the plants.)

70. The text of the agreement between Presidents Vázquez and Kirchner establishing the High-Level Technical Group (GTAN) was the subject of a joint Argentine-Uruguayan press release dated 31 May 2005, approved by the Ministers for Foreign Affairs of the two countries. It reads as follows:

> "In conformity with what was agreed to by the Presidents of Argentina and Uruguay, the Foreign Ministries of both of our countries constitute, under their supervision, a Group of Technical Experts for complementary studies and analysis, 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.
>
> This Group . . . is to produce an initial report within a period of 180 days." (Paragraph 132 of the Judgment.)

71. In light of this text and of the letter from Mr. Bielsa to Mr. Gargano, there can be no doubt that on 5 May 2005 the Parties agreed between themselves to dispense with the procedures set out in Articles 7 to 11 of the Statute in favour of immediate "direct negotiations" in the GTAN; negotiations provided for in Article 12 of the Statute, as Argentina expressly stated in its diplomatic Note of 14 December 2005 and

which paragraph 4 of its Application instituting these proceedings confirms. Moreover, in the third paragraph of Mr. Bielsa's letter to Mr. Gargano, it is stated that the "more direct intervention" of the Governments, sought at the time by Argentina and agreed to by Uruguay, would take place "[w]ithout prejudice of the water quality control and monitoring procedures by CARU", which had been defined in the agreement of 2 March 2004.

72. It follows from the Presidents' agreement of 5 May 2005 that there was absolutely no question at that time of either Argentina or Uruguay reconsidering the procedure agreed to by the Ministers for Foreign Affairs of the two countries in March 2004 for CMB (ENCE) and later extended to Orion (Botnia). According to the text of the Presidents' agreement, the points which were still outstanding between the Parties and which were supposed to be considered by them directly within the GTAN concerned solely *the effects that "the operation" of the paper pulp mills (the two mills) being constructed in the Eastern Republic of Uruguay would have on the ecosystem of the river*. For me, the Applicant's Note of 14 December 2005 registering the failure of the direct negotiations in the GTAN is conclusive proof of this, since, having noted the lack of agreement in the GTAN on the points outstanding, Argentina then views the matter in the context of Article 12 of the Statute of the River Uruguay yet without denouncing the agreement of 2 March 2004.

73. The Judgment accepts that the press release of 31 May 2005 expresses agreement between the two States, *but only* in order to create a negotiating framework — the GTAN — to study, analyse and exchange information on the effects that the operation of the cellulose plants that were being constructed in the Eastern Republic of Uruguay could have on the ecosystem of the river, with the group having to produce an initial report within a period of 180 days (paragraph 138 of the Judgment). The Court also acknowledges that the GTAN was created with the aim of enabling the negotiations provided for in Article 12 of the Statute to take place (paragraph 139 of the Judgment).

74. The Judgment goes on to conclude: (1) that the agreement contained in the press release of 31 May 2005 cannot be interpreted as expressing the agreement of the Parties to derogate from the other procedural obligations laid down by the Statute, in particular Article 7; and (2) that, in this agreement, Argentina did not give up the procedural rights which it clearly and unequivocally holds under the 1975 Statute, or the possibility of invoking Uruguay's responsibility for any breach of those rights (paragraphs 140 and 141 of the Judgment). I do not agree with those conclusions, because they take no account of the agreement of 2 March 2004 between the Ministers for Foreign Affairs which was still in force on the date of conclusion of the Presidents' agreement of 5 May 2005. Further, the agreement of 5 May 2005 did not put an end to the agreement of 2 March 2004; quite the contrary, it confirmed its scope.

75. The agreement of 2 March 2004 was not called into question either by the text or the spirit of the Presidents' agreement establishing the GTAN, or by the terms of the press release of 31 May 2005. Argentina has not proved, to my satisfaction, that by concluding the Presidents' agreement, Uruguay supposedly waived the rights which belonged to it under the March 2004 agreement. If that had been the case, what would it have received in return: The interpretation according to which the May 2005 agreement granted Argentina considerable rights of supervision over the construction of the mills (rights far greater than what is provided for in the relevant articles of the 1975 Statute), without giving Uruguay anything in exchange is not tenable in light of the facts. Nor does the letter from Minister Bielsa of 5 May 2005, which, by virtue of its content, forms part of the "travaux préparatoires" of the Presidents' agreement, confirm the findings in the Judgment on this matter. For me, *pacta sunt servanda*, with the associated good faith, governs the relations between the Parties as regards the interpretation and application of the provisions of the 1975 Statute, but so too does the Ministers' agreement of 2 March 2004, the existence and scope of which are in effect confirmed by the Presidents' agreement of 5 May 2005.

76. The Court also notes in its Judgment that the agreement documented in the press release of 31 May 2005, in referring to "the cellulose plants that are being constructed in the Eastern Republic of Uruguay", is *stating a simple fact* and cannot be interpreted, as Uruguay claims, as an acceptance of their construction by Argentina (paragraph 142 of the Judgment). Regrettably, I cannot endorse the Court's conclusion, because the phrase in question goes far beyond stating a simple fact. In my opinion, it states not just a fact, but *a fact that reflects a legal relationship between the Parties deriving from both the 1975 Statute and the understanding of 2 March 2004, as well as from the Presidents' agreement of 5 May 2005*.

### *3. The Procedure for the Pulp Mills in Fray Bentos Established by the Parties' Agreements*

77. It follows from the scope and substance of the agreements of 2 March 2004 and 5 May 2005 that the Parties decided upon an *ad hoc* procedure to deal with the matter of the pulp mills on the Uruguayan bank of the River Uruguay at Fray Bentos. This procedure retained the system of direct negotiations of the 1975 Statute and, should the Parties fail to reach an agreement, the reference for judicial settlement of the dispute, at the request of one or other of them, as provided for in Articles 12 and 60 of the Statute of the River Uruguay. However, the *ad hoc* procedure dispensed with the procedural methods, under Articles 7 to 11 of the Statute, relating to the carrying out of works.

78. CARU's role in the procedure decided upon by the Parties was defined by the agreement of 2 March 2004 and clearly explained in the

Commission's minutes approving that agreement (points (I) and (II) of the "Specific Agreed-Upon Matters" cited in para. 53 above). It follows that, in the present case, it is not for the Court to judge the conduct of the Parties in respect of the Statute's procedures in relation to CARU, which, in my opinion, are not applicable in this case. In contrast, on the matter of principle, I do not consider that the expression "through the Commission" contained in the Statute must be construed as ruling out exchanges between Heads of State or Foreign Ministers, or through the normal diplomatic channels. It is absurd to imagine that the States intended to deprive themselves of such resources when they concluded the 1975 Statute. In fact, interpretations to the contrary embellish the text, as the Statute does not stipulate that the Parties may communicate through CARU *exclusively*. In any case, according to the information submitted to the Court, on the one hand, Uruguay transmitted information on the planned mills directly to Argentina and Argentina agreed to receive that information and, on the other, Argentina requested information on the mills directly from Uruguay and Uruguay agreed to transmit it to Argentina. It is clear, therefore, that in the present case the Parties agreed to an alternative procedure for transmitting information to that of the Statute, which states that CARU should act as an intermediary.

79. On the other hand, the procedure adopted by the Parties confers powers on CARU in this area, particularly regarding the protection and preservation of the aquatic environment. The agreement of 2 March 2004 did indeed signify a return to the Commission, although not for the purposes of Articles 7 to 11 of the Statute, but for two tasks new to the Statute's procedural provisions. Those tasks relate to the "construction of the mill" and "the operational phase of the mill".

80. As regards the "construction of the mill", Uruguay was to transmit to CARU the environmental management plan (PGA) relating to the construction and operation of the ENCE plant, to enable the Commission to formulate its observations, comments and suggestions "which shall be transmitted to Uruguay, to be dismissed or decided with the company". The 1975 Statute does not give CARU procedural powers in respect of the operational phase of a national industrial project. By contrast, the agreements reached by the parties tasked the Commission with monitoring the environmental quality of the river in accordance with the provisions of the Statute, and Chapter X on "pollution" (Arts. 40-43) in particular. CARU successfully completed that task by drawing up and implementing a "monitoring plan" within the framework of the Commission to check the quality of the waters of the river in the area of the pulp mills (PROCEL).

81. Argentina's agreement, in March 2004, to the actual principle of building the mills is fully confirmed by the 2005 agreement setting up the GTAN, which was concerned only with the effects of the operation of the mills on the ecosystem of the river. It is true that Argentina then tried

partially to reopen the question of the location of the mills (letter from Mr. Bielsa to Mr. Gargano of 5 May 2005, Uruguay's Rejoinder, Vol. II, Ann. R15), but that request met with a flat refusal from Uruguay, in all likelihood on the basis of what had been decided by the Parties in the 2 March 2004 agreement. The 2005 agreement mandated the GTAN, and not CARU, to carry out "complementary studies and analysis, exchange of information and follow up" on the effects that the operation of the cellulose plants that are being constructed on the River Uruguay will have on the ecosystem of the River Uruguay. The issue was no longer the planning or construction of the mills, but the effects of their operation.

82. In the procedure laid down in the Parties' agreements, the consultation procedures between the Parties concerning the pulp mills in Fray Bentos were *far more inclined to favour protection of Argentina's interests in the matter* than were the procedural methods under Articles 7 to 11 of the 1975 Statute. The Statute makes no mention of visits or summit meetings of Heads of State and/or Ministers for Foreign Affairs; nor does it mention the creation of a high-level technical group, such as the GTAN, made up of diplomats, lawyers and experts from the two countries, which met from 3 August 2005 and which discussed the two proposed mills (ENCE had yet to abandon the plan to build the CMB plant). It was thus by these means, the result of diplomacy, that the aim pursued by "notify[ing] the other party", laid down by Article 7, paragraph 2, of the Statute, was achieved by the Parties in the present case.

83. Under the procedure agreed, it was not for Argentina to evaluate alone, or with a perfunctory knowledge of the main features of the plants, either the technical data of the mills and the effects of their operation, or the possible significant harm that they could cause to Argentina or to the River Uruguay as a shared natural resource: it could rely on Uruguay's collaboration.

84. From the earliest stages in the ENCE project, Uruguay transmitted to Argentina all of the documentation it then possessed on the project. Argentina acknowledged that the information on the ENCE mill was adequate, as its experts were able to draft their report of February 2004 on the basis of that information. Furthermore, during the second half of 2005, within the GTAN framework, Uruguay provided Argentina with a great deal more information on that mill and yet more, and more detailed, information on the Botnia mill than it had done for the ENCE mill in both 2004 and 2005.

85. During the meetings of the GTAN, Uruguay supplied Argentina with no fewer than 36 new documents, including DINAMA's entire 4,000-plus-page file on Botnia. According to the information contained in the case file, Uruguay responded to Argentina's requests for information, in the GTAN, even though it had sometimes to undertake research in order to meet them. In any event, during the oral proceedings, the

Applicant did not complain of any lack of information. It therefore appears that the Respondent complied in full with its legal obligation to keep the other State informed *(information sharing obligation)*.

86. It should also be pointed out that in the procedure agreed to by the Parties, Argentina was not subject to the time constraints required by the Statute with its system of time-limits in Articles 7 and 8. Argentina was not, for example, limited by the period of 180 days in which to notify the other Party that the implementation of the work or programme of operations could cause significant damage to the navigation, the régime of the river or the quality of its waters. Over a year, i.e., more than double the period of six months laid down by Article 8 of the Statute, elapsed between March 2004 and May 2005.

87. In sum, whenever the Parties agree to seek mutually acceptable solutions on the basis of direct consultations, in order to resolve a disagreement or dispute relating to the interpretation or application of the 1975 Statute, it cannot be claimed that any failure to apply the relevant time-limits under the Statute constitutes an internationally wrongful act.

88. Finally, it must be borne in mind that, within the framework of the conciliation procedure provided for in Chapter XIV of the 1975 Statute, "any dispute which may arise between the Parties concerning the river" only has to be examined by CARU *at the proposal of either Party*, and if the Commission is unable to arrive at an agreement within 120 days, *the two parties shall attempt to resolve the issue by direct negotiations* (Arts. 58 and 59 of the Statute). In the present case, neither Party asked CARU to resolve their dispute on the interpretation and application of the provisions of Articles 7 to 12 of the Statute by means of conciliation. The Parties proceeded to "direct negotiations" without the Commission's intermediation, creating for this purpose an *ad hoc* framework for negotiation, i.e., the GTAN.

## V. Uruguay's Obligations during the Period of Direct Negotiations

89. As indicated in the introduction to this opinion, I fully support both the Court's conclusion rejecting the "no construction obligation" said to be borne by Uruguay *between the end of the direct negotiation period within the GTAN and the decision of the Court*, and the reasons for its rejection: as the Judgment states, that supposed obligation "is not expressly laid down by the 1975 Statute and does not follow from its provisions" (paragraph 154 of the Judgment).

90. I would only add here that the supposed obligation does not follow from general international law either, since, as the arbitral award in the *Lac Lanoux* case so aptly put it:

> "To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State, *and such restriction could only be admitted if there were clear and convincing evidence*. Without doubt, international practice does reveal some special cases . . . But these cases are exceptional, and international judicial decisions are slow to recognize their existence, especially when they impair the territorial sovereignty of a State, as would be the case in the present matter.
>
> In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In such case, it must be admitted that the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a 'right of assent', a 'right of veto', which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another." (United Nations, *Reports of International Arbitral Decisions*, Vol. XII, p. 306, para. 11; emphasis added.)

91. However, I disagree with the Judgment on establishing whether Uruguay's conduct during the period of direct negotiations within the GTAN was in accordance with its legal obligations to Argentina, in light of the principle of the obligation to negotiate. I am in no doubt whatever that there is such an obligation under international law and it is also my understanding that, given its significance in international relations, the Court must be exacting in ensuring that it is met, because reciprocal trust is an inherent condition of international co-operation (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46). Therefore, it is not the existence or importance of this obligation with which I disagree, but how the Judgment has applied it to the circumstances and facts of the case.

92. Thus, I agree that, during the negotiations within the GTAN, Uruguay was obliged — as indeed was Argentina — to take part in good faith and with an open mind, so as to ensure that the negotiations were meaningful, and to be willing to take reasonable account of the other Party's views, without however being obliged to reach an agreement because, under international law, a commitment to negotiate does not imply an obligation to agree. The GTAN was to produce a report within 180 days and, having begun its work on 3 August 2005, in principle Uruguay would have been obliged to comply with the said obligation until the end of the GTAN negotiations, fixed in the Judgment at 3 February 2006.

93. It is possible, however, for the consultations between the Parties to become deadlocked before the period allowed for direct negotiations has expired — six months in the present case, as I have just said. In such

circumstances, I believe it to be contrary to the sound administration of justice to oblige the Parties to wait until the official time-limit has elapsed before they are freed of the obligation. Indeed, in situations like this, I believe, in principle, that neither State is obliged to take an action which is clearly futile and pointless, or which has already proved to be in vain (see the separate opinion of Judge Tanaka in *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 145).

94. My first observation therefore concerns the issue of the *temporal scope* of the obligation in this case, since a similar situation arose in the present case. The direct negotiations within the GTAN reached a deadlock towards the end of November 2005, long before 3 February 2006. Argentina's diplomatic Notes of 14 December 2005, 26 December 2005 and 12 January 2006, which form part of the record (Argentina's Memorial, Vol. II, Anns. 27, 28 and 30), confirm the deadlock the GTAN had reached.

95. The diplomatic Note of 14 December 2005, signed by Ambassador Moritán in his capacity as Secretary for Foreign Affairs at the Ministry of Foreign Affairs, International Trade and Worship, concludes as follows:

> "The Government of the Argentine Republic concludes that, upon the parties having failed to reach agreement . . . ['no habiendo llegado las Partes a un acuerdo' in the original note in Spanish], as specified by Article 12 of the River Uruguay Statute, this paves the way for the procedure provided for in Chapter XV of said Statute.
>
> Consequently, the Government of the Argentine Republic hereby notifies the Uruguayan Government of the following:
>
> *(a)* a dispute has arisen in connection with the application and interpretation of the Statute of the River Uruguay; and
> *(b)* the direct negotiations between both Governments, referred to by Article 60 of the Statute, have been taking place since 3 August 2005 (the date of the first GTAN meeting) in respect of the dispute arising out of the unilateral authorizations for construction of the said industrial plants; and since the date hereof as regards the dispute arising out of the unilateral authorization in respect of the port, evidenced in the record of the CARU plenary session of 14 October 2005 and referred to in the Note by the President of the Argentine Delegation before the Commission to the Uruguayan counterpart, submitted at the plenary session of 17 November." (Argentina's Memorial, Vol. II, Ann. 27, p. 432.)

96. As regards the "direct negotiations" referred to in Article 60 of the Statute, this Argentine diplomatic Note draws a distinction between

those relating to the dispute over the construction of the CMB and Orion mills and those concerning the dispute over the construction of the Botnia port, which are said to be taking place "since the date hereof", that is, 14 December 2005, the date of the diplomatic Note. This was confirmed on 12 February 2006 by Argentina's Minister for Foreign Affairs, Mr. Taiana, when he explained to the Foreign Affairs Committee of the Argentine Chamber of Deputies that:

> "in relation with the port construction project, the purpose of the note [of 14 December 2005] was to determine [that] the day of presentation to Uruguay would be the start date from which to compute the period in which to carry out direct negotiations" (Argentina's Application instituting proceedings, Ann. III, p. 19 (Spanish text) and p. 17 (English text)).

97. My second observation concerns the *substantive scope* of the obligation. I do not agree with the findings of the Court on this matter, because the Judgment does not distinguish between the various categories of "administrative acts granting environmental authorization of a work" and "the authorizations or plans for the construction of the work itself", which is essential in my view. On the other hand, the Judgment treats activities or works of "a preparatory character" to the work as though they were the "construction works" prohibited by the obligation. I am disappointed that the sound legal rule on the subject which the Court identified in the case concerning *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* was not applied to the present case: as the Court stated at the time:

> "A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act'." (*Judgment, I.C.J. Reports 1997*, p. 54, para. 79.)

98. In fact, some of Uruguay's actions condemned in the Judgment relating to the CMB (ENCE) and Orion (Botnia) projects are of a "preparatory" character, as opposed to the actual construction works for the mills. This is true, for example, of the removal of vegetation and earth moving for ENCE (Environmental Management Plan (PGA) of 28 November 2005), which is the only authorization granted by Uruguay to ENCE during the period in question and which was modified after the GTAN had come to an end, on 22 March 2006. In the case of Botnia, there is the removal of vegetation and earth moving (PGA of 12 April 2005) before the GTAN, and the construction of concrete foundations and the chimney (PGA of 22 August 2005) during the GTAN. In addition, there is the resolution dated 5 July 2005, with which the com-

petent Uruguayan authorities authorized Botnia to make use of the river bed for the construction of a port adjacent to the Orion mill for the exclusive use of the mill, as well as a PGA relating to the approval of the "Plan de Gestión Ambiental de las Obras Civiles Terrestres Planta de Celulosa Botnia Fray Bentos PGAV Version", dated 18 January 2006, that is, after Argentina's diplomatic Note of 14 December 2005 cited in paragraph 95 above.

99. All that remains, therefore, is the issue of the authorization for the construction of the Botnia port. This merits a moment's attention because it was Argentina and not Uruguay which prevented CARU from carrying out the role attributed to it under the 1975 Statute in this case. It is true that the initial environmental authorization (AAP) for the Orion (Botnia) mill of 14 February 2005 granted by Uruguay was for both the paper pulp mill and its port terminal, and also that the Uruguayan resolution of 5 July 2005, mentioned earlier, authorized Botnia to make use of the river bed for the construction of the terminal. However, approximately one month after this resolution, on 3 August 2005, the Argentine and Uruguayan delegations agreed, at the first GTAN meeting, to refer the Botnia port terminal project to CARU without condition for preliminary review pursuant to Article 7, paragraph 1, of the Statute.

100. Following this understanding, Uruguay transmitted the Uruguayan resolution of 5 July 2005 on the plans for the Botnia port to CARU by diplomatic Note of 15 August 2005 from the President of the Uruguayan delegation to CARU to the President of the Argentine delegation to CARU, in accordance with Article 7 of the Statute ("en cumplimiento del Art. 7 del Estatuto" in the original Spanish). Then, on 13 October 2005, Uruguay supplied CARU with the additional information on the project requested by the Argentine delegation. Thus, by agreement of the Parties, the Botnia port terminal project was not the subject of "direct negotiations" within the GTAN. Nor was it examined by CARU for the purposes of Article 7 of the Statute, because Argentina blocked the preliminary review of the project by the Commission on the basis of Uruguay's refusal to halt construction works on the port. Argentina's decision to do so was communicated at the CARU meeting of 14 October 2005 and reiterated in a Note of 17 November 2005 addressed to the President of the Uruguayan delegation to CARU.

101. In my opinion, it follows that the dispute concerning the port terminal of the Orion (Botnia) mill, which is in effect included in the Application instituting proceedings of 4 May 2006, is inadmissible, because the procedural steps set out in Articles 7 *et seq.* of the Statute were not followed and because this dispute was not the subject of "direct negotiations", in the GTAN or elsewhere, a prerequisite under Article 60 of the Statute to be able to seise the Court of any dispute concerning the interpretation or application of the Statute of the River Uruguay. Furthermore, nor was the 180-day period, which Article 12 of the Statute reserves for "direct negotiations", respected; in point of fact, only some

141 days elapsed between Argentina's diplomatic Note of 14 December 2005 and 4 May 2006, when it filed its Application instituting proceedings (see para. 96 above).

102. As for the substance, it should be pointed out that, in 2001, Uruguay informed CARU of the plan to build the M'Bopicuá port after its AAP had been granted; the two delegations were nevertheless able to come quickly to the conclusion, within the framework of CARU, that the port in question, much larger than the Botnia port, did not represent a threat to navigation, the régime of the river or the quality of its waters. It would appear therefore that objectively there is no dispute between the Parties on the environmental viability of the Botnia port. Also, between 1979 and 2004, Argentina authorized the construction and restoration of ports on its bank of the river in Fédération, Concordia, Puerto Yuqueri and Concepcion del Uruguay, without informing CARU and without notifying or consulting Uruguay. In sum, the Botnia port is not of sufficient scope ("de entidad suficiente") to fall within the provisions of Article 7 of the Statute.

103. In view of the foregoing, I do not share the findings of the Court on Uruguay's failure to comply with its obligation to negotiate laid down by Article 12 of the Statute (paragraph 149 of the Judgment). All the more so since it is my belief that in the present case the agreements reached between the Parties on 2 March 2004 and 5 May 2005 derogated from Uruguay's obligations to inform and notify under Article 7 of the 1975 Statute. However, given that the breaches found in the Judgment to have been committed by Uruguay are in themselves of a procedural nature and minor in gravity — in the sense that not one constitutes a "material breach" — I concur with the Judgment that "satisfaction" is the appropriate redress under international law.

## General Conclusion

104. Bearing in mind all the preceding considerations, I cannot endorse the findings of the Court concerning the breach by Uruguay of its procedural obligations towards Argentina, which is the subject of the present case. All the more so since it is my belief that in the present case the agreements reached between the Parties on 2 March 2004 and 5 May 2005 derogated from Uruguay's obligations to inform and notify under Article 7 of the 1975 Statute; it is also my belief that Uruguay did not breach its obligation to negotiate laid down by Article 12 of the Statute either. That is why I voted against point 1 of the operative clause of the Judgment.

*(Signed)* Santiago Torres Bernárdez.