INTERNATIONAL COURT OF JUSTICE

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Summary
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Pulp Mills on the River Uruguay (Argentina v. Uruguay)

Request for the indication of provisional measures

Summary of the Order of 13 July 2006

Application and request for the indication of provisional measures

The Court recalls that, by an Application filed in the Registry of the Court on 4 May 2006, the Argentine Republic (hereinafter "Argentina") instituted proceedings against the Eastern Republic of Uruguay (hereinafter "Uruguay") for the alleged breach by Uruguay of obligations under the Statute of the River Uruguay, which was signed by Argentina and Uruguay on 26 February 1975 and entered into force on 18 September 1976 (hereinafter the "1975 Statute"). In its Application, Argentina claims that that breach arises from "the authorization, construction and future commissioning of two pulp mills on the River Uruguay", with reference in particular "to the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river". Argentina explains that the 1975 Statute was adopted in accordance with Article 7 of the Treaty defining the boundary on the River Uruguay between Argentina and Uruguay, signed at Montevideo on 7 April 1961 and which entered into force on 19 February 1966, which provided for the establishment of a joint régime for the use of the river.

Argentina bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on the first paragraph of Article 60 of the 1975 Statute, which provides as follows: "Any dispute concerning the interpretation or application of the [1961] Treaty and the [1975] Statute which cannot be settled by direct negotiations may be submitted by either Party to the International Court of Justice". Argentina claims that direct negotiations between the Parties have failed.

According to Argentina, the purpose of the 1975 Statute is "to establish the joint machinery necessary for the optimum and rational utilization" of that part of the River Uruguay which is shared by the two States and constitutes their common boundary. In addition to governing "activities such as conservation, utilization and development of other natural resources", the 1975 Statute deals with "obligations of the Parties regarding the prevention of pollution and the liability resulting from damage inflicted as a result of pollution" and sets up an "Administrative Commission of the River Uruguay" (hereinafter "CARU", in its Spanish acronym) whose functions include regulation and co-ordination. Argentina submits, in particular, that Articles 7 to 13 of the Statute provide for an obligatory procedure for prior notification and consultation through CARU for any party planning to carry out works liable to affect navigation, the régime of the river or the quality of its waters.

Argentina states that the Government of Uruguay, in October 2003, "unilaterally authorized the Spanish company ENCE to construct a pulp mill near the city of Fray Bentos", a project known as "Celulosa de M'Bopicuá" (hereinafter "CMB"), and claims that this was done without complying with the above-mentioned notification and consultation procedure. It maintains that, despite its repeated protests concerning "the environmental impact of the proposed mill", made both directly to the Government of Uruguay and to CARU, "the Uruguayan Government has persisted in its refusal to follow the procedures prescribed by the 1975 Statute", and that Uruguay has in fact "aggravated the dispute" by authorizing the Finnish company Oy Metsä-Botnia AB (hereinafter "Botnia") in February 2005 to construct a second pulp mill, the "Orion mill", in the vicinity of the CMB plant. According to Argentina the "Uruguayan Government has further aggravated the dispute" by issuing authorization to Botnia in July 2005 "for the construction of a port for the exclusive use of the Orion mill without following the procedures prescribed by the 1975 Statute".

Argentina concludes its Application by requesting the Court to

"adjudge and declare:

1. that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that instrument refers, including but not limited to:

   (a) the obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay;

   (b) the obligation of prior notification to CARU and to Argentina;

   (c) the obligation to comply with the procedures prescribed in Chapter II of the 1975 Statute;

   (d) the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study;

   (e) the obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries; and

2. that, by its conduct, Uruguay has engaged its international responsibility to Argentina;

3. that Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and

4. that Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it."

The Court recalls that, after filing its Application on 4 May 2006, Argentina also submitted a request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and to Article 73 of the Rules of Court, in which it refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out therein. At the conclusion of its request for the indication of provisional measures Argentina asks the Court to indicate that:

"(a) pending the Court's final judgment, Uruguay shall:

(i) suspend forthwith all authorizations for the construction of the CMB and Orion mills;

(ii) take all necessary measures to suspend building work on the Orion mill; and

(iii) take all necessary measures to ensure that the suspension of building work on the CMB mill is prolonged beyond 28 June 2006;

(b) Uruguay shall co-operate in good faith with Argentina with a view to ensuring the optimum and rational utilization of the River Uruguay in order to protect and preserve the aquatic environment and to prevent its pollution;

(c) pending the Court's final judgment, Uruguay shall refrain from taking any further unilateral action with respect to construction of the CMB and Orion mills which does not comply with the 1975 Statute and the rules of international law necessary for the latter's interpretation and application;

(d) Uruguay shall refrain from any other action which might aggravate or extend the dispute which is the subject-matter of the present proceedings or render its settlement more difficult."

Arguments of the Parties at the hearings

The Court observes that at the hearings, which took place on 8 and 9 June 2006, Argentina reiterated the arguments set out in its Application and its request for the indication of provisional measures, and claimed that the conditions for the indication of provisional measures had been fulfilled.

Argentina inter alia argued that its rights under the 1975 Statute arose in relation to two interwoven categories of obligations: "obligations of result that are of a substantive character, and obligations of conduct that have a procedural character". With respect to substantive obligations, Argentina observed that Article 41 (a) of the 1975 Statute created for it at least two distinct rights: first, "the right that Uruguay shall prevent pollution" and, second, "the right to ensure that Uruguay prescribes measures 'in accordance with applicable international standards'", and Argentina claimed that Uruguay had respected neither of these obligations. Argentina further asserted that the substantive obligations under the Statute included "Uruguay's obligation not to cause environmental pollution or consequential economic losses, for example to tourism". It added that Articles 7 to 13 of the 1975 Statute and Article 60 thereof give it a number of procedural rights: "first, the right to be notified by Uruguay before works begin; secondly, to express views that are to be taken into account in the design of a proposed project; and, thirdly, to have th[e] Court resolve any differences before construction takes place". Argentina emphasized that, according to Articles 9 and 12 of the 1975 Statute, Uruguay had the obligation "to ensure that no works are carried out until either Argentina has expressed no objections, or Argentina fails to respond to Uruguay's notification, or the Court had indicated the positive conditions under which Uruguay may proceed to carry out works". It submitted that none of these three conditions had yet been met, despite the fact that the above-mentioned procedures are mandatory and "admit of no exception". Argentina further emphasized that, in its view, Article 9 of the 1975 Statute "established a 'no construction' obligation . . . of central importance to this phase of the proceedings".

Argentina maintained that its rights, derived from both substantive and procedural obligations, were "under immediate threat of serious and irreparable prejudice", contending that the site chosen for the two plants was "the worst imaginable in terms of protection of the river and the transboundary environment" and that environmental damage was, at the least, "a very serious probability" and would be irreparable. It submitted that economic and social damage would also

result and would be impossible to assess, and further contended that the construction of the mills "[was] already having serious negative effects on tourism and other economic activities of the region", including suspension of investment in tourism and a drastic decline in real estate transactions. Argentina asserted that there was no doubt that the condition of urgency necessary for the indication of provisional measures was satisfied, since "when there is a reasonable risk that the damage cited may occur before delivery of judgment on the merits, the requirement of urgency broadly merges with the condition [of the] existence of a serious risk of irreparable prejudice to the rights in issue". Moreover, it observed that the construction of the mills was "underway and advancing at a rapid rate" and that the construction itself of the mills was causing "real and present damage" and noted that the mills "would patently be commissioned before [the Court] [would be] able to render judgment" since commissioning was scheduled for August 2007 for Orion and June 2008 for CMB. Argentina claimed that the suspension of both the authorizations for the construction of the plants and of the construction work itself was the only measure capable of preventing the choice of sites for the plants becoming a fait accompli and would avoid aggravating the economic and social damage caused by the construction of the plants.

The Court then considers the arguments put forward by Uruguay. It notes that Uruguay stated that it "had fully complied with the 1975 Statute of the River Uruguay throughout the period in which this case has developed" and argued that Argentina's request was unfounded and that the requisite circumstances for a request for provisional measures were entirely lacking.

Uruguay stated that it did not dispute that Article 60 of the 1975 Statute constituted a prima facie basis for the jurisdiction of the Court to hear Argentina's request for the indication of provisional measures, but that this provision establishes the Court's jurisdiction only in relation to Argentina's claims concerning the 1975 Statute and not for disputes falling outside the Court's jurisdiction, such as those concerning "tourism, urban and rural property values, professional activities, unemployment levels, etc." in Argentina, and those regarding other aspects of environmental protection in transboundary relations between the two States. It contended that Argentina's request for the indication of provisional measures must be rejected because the breaches of the Statute of which Uruguay is accused "prima facie lack substance" and, in "applying both the highest and the most appropriate international standards of pollution control to these two mills", Uruguay had "met its obligations under Article 41 of the Statute". Uruguay further stated that it had "discharged the obligations imposed upon it by Articles 7 et seq. [of the 1975 Statute] in good faith". In particular, it contended that those Articles did not give either party a "right of veto" over the implementation by the other party of industrial development projects, but were confined to imposing on the parties an obligation to engage in a full and good-faith exchange of information under the procedures provided by the Statute or agreed between them. Uruguay noted that it had complied fully with that obligation by "inform[ing] Argentina — through CARU or through other channels — of the existence of th[e] [pulp mill] projects, describing them in detail with an impressive amount of information", and by "suppl[ying] all the necessary technical data to make Argentina aware of the absence of any risk in regard to their potential environmental impact on the River Uruguay". It further asserted that it was the first time "in the 31 years since the [1975] Statute came into being" that Argentina had claimed it had "a procedural right under the Statute, not only to receive notice and information and to engage in good faith negotiations, but to block Uruguay from initiating projects during [the] procedural stages and during any litigation that might ensue". Uruguay moreover stated that the dispute between Uruguay and Argentina over the pulp mills had in reality been settled by an agreement entered into on 2 March 2004 between the Uruguayan Minister for Foreign Affairs and his Argentine counterpart, by which the two Ministers had agreed, first, that the CMB mill could be built according to the Uruguayan plan, secondly, that Uruguay would provide Argentina with information regarding its specifications and operation and, thirdly, that CARU would monitor the quality of the river water once the mill became operational in order to ensure compliance with the Statute. According to Uruguay, the existence of this agreement had been confirmed a number of times, inter alia, by the Argentine Minister for Foreign Affairs and by the Argentine President, and its terms had been extended so as to apply also to the projected Orion mill.

Moreover, according to Uruguay there is no current or imminent threat to any right of Argentina, so that the conditions of risk of irreparable harm and urgency are not fulfilled. In support of its position, Uruguay inter alia explained that the environmental impact assessments so far undertaken, as well as those to come, and the regulatory controls and strict licensing conditions imposed by Uruguayan law for the construction and operation of the mills, guaranteed that the latter would not cause any harm to the River Uruguay or to Argentina, and that they would abide by the strict requirements imposed by "the latest European Union 1999 International Pollution Prevention and Control (IPPC) recommendations, with which compliance is required by all pulp plants in Europe by 2007". Uruguay pointed out that the mills would not be operational before August 2007 and June 2008 respectively, and that a number of further conditions would have to be met before that stage was reached. Uruguay concluded that, even if it were to be considered that the operation of the mills might lead to "the contamination of the river", the gravity of the "alleged peril to Argentina" was not "sufficiently certain or immediate as to satisfy the Court's requirement that it be 'imminent' or urgent".

Lastly, Uruguay argued that suspending constructions of the mills would cause such economic loss to the companies involved and their shareholders that it would be highly likely to jeopardize the entire two projects. Uruguay contended that the provisional measures sought by Argentina would therefore irreparably prejudice its sovereign right to implement sustainable economic development projects in its own territory. It pointed out in this connection that the pulp mill projects represented the largest foreign investment in Uruguay's history, that construction in itself would create many thousands of new jobs and that, once in service, the mills would have "an economic impact of more than $350 million per year", representing "an increase of fully 2 per cent in Uruguay's gross domestic product".

In its second round of oral observations Argentina inter alia maintained that, according to Article 42 of the 1975 Statute and established international principles, the 1975 Statute covered not only the pollution of the river, as claimed by Uruguay, but also pollution of all kinds resulting from the use of the river as well as the economic and social consequences of the mills. Argentina strongly disputed Uruguay's assertion that it had prima facie fulfilled its obligations under the 1975 Statute; it observed that the projects had never been formerly notified to CARU by Uruguay, and that Uruguay had not provided adequate information regarding the pulp mills. Argentina further asserted that there was no bilateral agreement of 2 March 2004 to the effect that construction of the CMB mill could proceed as planned. It contended that the arrangement reached at the meeting of that date between the Ministers for Foreign Affairs of the two States was simply that Uruguay would transmit all the information on CMB to CARU and that CARU would begin monitoring water quality in the area of the proposed site, but that Uruguay had failed to supply the information promised.

For its part, Uruguay noted that "Argentina [did] not deny obtaining from Uruguay a substantial amount of information through a variety of machinery and channels", and that the measures taken by Uruguay in this regard were "fully supported by the CARU minutes". It reiterated its contention that the 1975 Statute does not confer a "right of veto" upon the parties and argued that, in order to resolve any "difficulties of interpretation caused by an incomplete text", it was necessary to turn to Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties and, in particular, to consider "any subsequent practice from which important inferences can be drawn, making it possible to identify the agreement between the parties on how to interpret the treaty in question". According to Uruguay, "the subsequent verbal agreement between the two countries of 2 March 2004 made by their Foreign Ministers" constituted a specific example of such subsequent practice excluding any interpretation which would recognize a right of veto. Uruguay further reiterated that the bilateral agreement of 2 March 2004, whose existence had been acknowledged by the President of the Argentine Republic, clearly authorized construction of the mills. In concluding its second round of oral observations, Uruguay expressly reiterated "its intention to comply in full with the 1975 Statute of the River Uruguay and its application", and repeated "as a concrete expression of that intention . . . its offer of conducting continuous joint

monitoring with the Argentine Republic" regarding the environmental consequences of the mills' future operations.

The Court's reasoning

The Court begins by observing that, in dealing with a request for provisional measures, it need not finally satisfy itself that it has jurisdiction on the merits of the case, but will not indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established.

The Court notes that Uruguay does not deny that the Court has jurisdiction under Article 60 of the 1975 Statute. It explains that Uruguay, however, asserts that such jurisdiction exists prima facie only with regard to those aspects of Argentina's request that are directly related to the rights Argentina is entitled to claim under the 1975 Statute, and that Uruguay insists in this regard that rights claimed by Argentina relating to any alleged consequential economic and social impact of the mills, including any impact on tourism, are not covered by the 1975 Statute.

The Court, taking account of the fact that the Parties are in agreement that it has jurisdiction with regard to the rights to which Article 60 of the 1975 Statute applies, states that it does not need at this stage of the proceedings to address this further issue raised by Uruguay. It concludes, therefore, that it has prima facie jurisdiction under Article 60 of the 1975 Statute to deal with the merits, and thus may address the present request for provisional measures.

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The Court then recalls that the object of its power to indicate provisional measures is to permit it to preserve the respective rights of the parties to a case "[p]ending the final decision" in the judicial proceedings, provided such measures are necessary to prevent irreparable prejudice to the rights in dispute. The Court further states that this power is to be exercised only if there is an urgent need to prevent irreparable prejudice to the rights that are the subject of the dispute before the Court has had an opportunity to render its decision.

The Court begins by addressing Argentina's requests directed at the suspension of the authorization to construct the pulp mills and the suspension of the construction work itself. As regards the rights of a procedural nature invoked by Argentina, the Court leaves to the merits stage the question of whether Uruguay may have failed to adhere fully to the provisions of Chapter II of the 1975 Statute when it authorized the construction of the two mills. The Court adds that it is not at present convinced that, if it should later be shown that Uruguay had failed, prior to the present proceedings or at some later stage, fully to adhere to these provisions, any such violations would not be capable of being remedied at the merits stage of the proceedings.

The Court takes note of the interpretation of the 1975 Statute advanced by Argentina to the effect that it provides for a "no construction" obligation, that is to say that it stipulates that a project may only proceed if agreed to by both parties or that, lacking such agreement, it shall not proceed until the Court has ruled on the dispute. The Court, however, takes the view that it does not have to consider that issue for current purposes, since it is not at present convinced that, if it should later be shown that such is the correct interpretation of the 1975 Statute, any consequent violations of the Statute that Uruguay might be found to have committed would not be capable of being remedied at the merits stage of the proceedings.

As regard the rights of a substantive nature invoked by Argentina, the Court recognizes the concerns expressed by Argentina for the need to protect its natural environment and, in particular,

the quality of the water of the River Uruguay. It recalls that it has had occasion in the past to stress the great significance it attaches to respect for the environment, in particular in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons and in its Judgment in the case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia).

In the Court's view, there is, however, nothing in the record to demonstrate that the actual decision by Uruguay to authorize the construction of the mills poses an imminent threat of irreparable damage to the aquatic environment of the River Uruguay or to the economic and social interests of the riparian inhabitants on the Argentine side of the river.

The Court observes that Argentina has not persuaded it that the construction of the mills presents a risk of irreparable damage to the environment; nor has it been demonstrated that the construction of the mills constitutes a present threat of irreparable economic and social damage. Furthermore, Argentina has not shown that the mere suspension of the construction of the mills, pending final judgment on the merits, would be capable of reversing or repairing the alleged economic and social consequences attributed by Argentina to the building works.

Moreover, Argentina has not at present provided evidence that suggests that any pollution resulting from the commissioning of the mills would be of a character to cause irreparable damage to the River Uruguay. The Court notes that it is a function of CARU to ensure the quality of water of the river by regulating and minimizing the level of pollution and that, in any event, the threat of any pollution is not imminent as the mills are not expected to be operational before August 2007 (Orion) and June 2008 (CMB).

The Court adds that it is not persuaded by the argument that the rights claimed by Argentina would no longer be capable of protection if the Court were to decide not to indicate at this stage of the proceeding the suspension of the authorization to construct the pulp mills and the suspension of the construction work itself.

The Court finds, in view of the foregoing, that the circumstances of the case are not such as to require the indication of a provisional measure ordering the suspension by Uruguay of the authorization to construct the pulp mills or the suspension of the actual construction works. The Court makes it clear, however, that, in proceeding with the authorization and construction of the mills, Uruguay necessarily bears all risks relating to any finding on the merits that the Court might later make. It points out that their construction at the current site cannot be deemed to create a fait accompli because, as the Court has had occasion to emphasize, "if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded a priori of a judicial finding that such works must not be continued or must be modified or dismantled".

The Court then turns to the remaining provisional measures sought by Argentina in its request. The Court points out that the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development, and that it is in particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development; from this point of view, account must be taken of the need to safeguard the continued conservation of the river environment and of the rights of economic development of the riparian States.

The Court recalls in this connection that the 1975 Statute was established pursuant to the 1961 Montevideo Treaty defining the boundary on the River Uruguay between Argentina and Uruguay, and that it is not disputed between the Parties that the 1975 Statute establishes a joint machinery for the use and conservation of the river. The Court observes that the detailed provisions of the 1975 Statute, which require co-operation between the parties for activities affecting the river environment, created a comprehensive and progressive régime; of significance in this regard is the establishment of the CARU, a joint mechanism with regulatory, executive,

administrative, technical and conciliatory functions, entrusted with the proper implementation of the rules contained in the 1975 Statute governing the management of the shared river resource, and that the procedural mechanism put in place under the 1975 Statute constitutes a very important part of that treaty régime.

The Court declares that the Parties are required to fulfil their obligations under international law and stresses the need for Argentina and Uruguay to implement in good faith the consultation and co-operation procedures provided for by the 1975 Statute, with CARU constituting the envisaged forum in this regard. The Court further encourages both Parties to refrain from any actions which might render more difficult the resolution of the present dispute.

Having regard to all the above considerations and to the commitment affirmed before the Court by Uruguay during the oral proceedings to comply in full with the 1975 Statute of the River Uruguay, the Court does not consider that there are grounds for it to indicate the remaining provisional measures requested by Argentina. The Court concludes by recalling that its decision in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and that it leaves unaffected the right of Argentina and of Uruguay to submit arguments in respect of those questions. The decision also leaves unaffected the right of Argentina to submit in the future a fresh request for the indication of provisional measures under Article 75, paragraph 3, of the Rules of Court, based on new facts.

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The full text of the Order's final paragraph (para. 87) reads as follows:

"For these reasons,

THE COURT,

By fourteen votes to one,

Finds that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Torres Bernárdez;

AGAINST: Judge ad hoc Vinuesa."

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Judge RANJEVA appends a declaration to the Order of the Court; Judges ABRAHAM and BENNOUNA append separate opinions to the Order of the Court; Judge ad hoc VINUESA appends a dissenting opinion to the Order of the Court.

Declaration of Judge Ranjeva

Judge Ranjeva agrees with the Court's decision to dismiss the request for provisional measures. However, he is not entirely satisfied with the approach of the Court, which focuses on urgency and the risk of irreparable prejudice in the event of the non-indication of such measures.

The parties' obligation to comply with provisional measures pursuant to Article 94 of the United Nations Charter requires the Court to ensure that its decision cannot be viewed as a provisional judgment capable of prejudging future scrutiny of and findings on the merits. An examination of the effects of the measures is thus not, in itself, sufficient to prevent such a possibility; that examination must also be supported by an analysis of the very purpose of the measures requested.

It is for the Court to compare in limine the purpose of those measures with that sought through the principal proceedings and thus to dismiss direct, or in some cases indirect, requests that would, in reality, result in a provisional judgment. Such an approach will, first, help to clarify the relationship between the incidental proceedings and the principal proceedings so as to ensure that the Court, when ruling on the merits, is not bound by the provisional measures and, secondly, to limit the incidental proceedings to an examination of only the urgent parts of the request.

Separate opinion of Judge Abraham

While expressing his agreement with the dispositif of the Order, Judge Abraham regrets that the Court did not seize the opportunity presented by this case to clarify the question of principle as to the relationship between the merit, or prima facie merit, of the Applicant's contentions in respect of the right it claims and the ordering of the urgent measures it seeks. According to many commentators, the Court, when ruling on a request for provisional measures, should refrain from any consideration at all of the merit of the parties' arguments as to the existence and scope of the rights in dispute and should confine itself to ascertaining whether, assuming that the right claimed by the applicant is ultimately upheld in the final judgment, that right is threatened with irreparable injury in the meantime. Judge Abraham considers this view to be misguided. He points out that a provisional measure enjoining the respondent to act or to refrain from acting in a particular way necessarily interferes with the fundamental right of all sovereign States to act as they think best provided that their acts comply with international law. He deems it unthinkable that such an injunction could be issued without the Court having first satisfied itself that there is at least an appearance of merit in the applicant's argument. In this regard, Judge Abraham draws a connection between the issue he addresses and the Court's affirmation in its Judgment in LaGrand (Germany v. United States of America) (I.C.J. Reports 2001, p. 466) that measures indicated under Article 41 of the Statute are binding. Since an order by the Court obliges the State to which the indicated measure is directed to comply with it, the Court cannot prescribe such a measure without having conducted some minimum degree of review as to the existence of the rights claimed by the applicant, and without therefore taking a look at the merits of the dispute.

Judge Abraham is of the view that this review must necessarily be limited and closely resemble the standard of fumus boni juris so familiar to other international courts and many domestic legal systems. Regardless of the terminology employed, this amounts in substance to verifying that three conditions have been satisfied to enable the Court to order a measure to safeguard a right claimed by the applicant: there must be a plausible case for the existence of the right; there must be a reasonable argument that the respondent's conduct is causing, or liable to cause, imminent injury to the right; and, finally, urgency in the specific circumstances must justify a protective measure to safeguard the right from irreparable injury.

Separate opinion of Judge Bennouna

Judge Bennouna regrets that the Court did not take the opportunity in the present case to clarify the relationship between the principal proceedings and the request for the indication of provisional measures.

The two Parties engaged in a full-scale debate before the Court as to the very existence of the right claimed by Argentina, whereby authorization to build the pulp mills could not be given, nor work on the sites begun, without the prior agreement of both States. If such a right existed, the indication of provisional measures, namely the withdrawal of that authorization and the suspension of building work, would effectively follow naturally from it.

The Court should have considered whether, in certain circumstances, it is not obliged to examine the prima facie existence of the right at issue — although it must not come to a final decision at that point — when doubt remains due to the possible complexity, ambiguity or silence of the texts concerned.

Judge Bennouna regrets that the Court did not enter into this issue and is of the opinion that there is therefore a link missing in the reasoning of the Order.

Nevertheless, since Judge Bennouna considers that the evidence presented to the Court was insufficient for it to determine prima facie whether the right claimed by Argentina existed, and since he is in agreement with the rest of the Court's reasoning, he voted in favour of the Order.

Dissenting opinion of Judge ad hoc Vinuesa

Judge ad hoc Vinuesa disagrees with the Court's finding that "the circumstances, as they present themselves to the Court, are not such as to require the exercise of its power" to indicate provisional measures.

He insists on the necessity to apply the joint mechanism provided for by the 1975 Statute for the optimum and rational utilization of the River Uruguay, and notes the present uncertainty of a risk of irreparable harm to the environment of the River Uruguay. In his opinion, the rights and duties under the 1975 Statute are an expression of the precautionary principle, which has been conventionally incorporated by Uruguay and Argentina. Taking note of the legal effects of Uruguay's commitments before the Court to fully comply with the 1975 Statute, Judge ad hoc Vinuesa considers that the Court, in order to guarantee those commitments, should have indicated the temporary suspension of the construction of the mills until Uruguay notifies the Court of the fulfilment of its obligations under the 1975 Statute.