SEPARATE OPINION OF JUDGE GREENWOOD

Procedural obligations under the Statute of the River Uruguay — Whether Uruguay has violated those obligations — Duty to inform CARU of proposed works — Duty to notify Argentina — Duty to negotiate in good faith — Whether steps taken or authorized by Uruguay violate those obligations — Evidence before the Court — Burden of proof — Standard of proof — Relationship between experts, witnesses and counsel — Continuing obligations of the Parties

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1. I agree with most of the Judgment in the present case, in particular, with its treatment of what I regard as the most important issue before the Court, namely, whether Uruguay has violated its substantive obligations under the Statute of the River Uruguay. I agree that, on the evidence before the Court, Argentina has not established that there has been such a violation and I concur in the Court's reasoning on this issue. I also agree that Uruguay has violated its procedural obligations under the Statute. Nevertheless, while I have voted for operative paragraph 1 of the Judgment, I consider that the violation is not as extensive as that set out in the reasoning of the Court. In this separate opinion, I wish briefly to explain why I consider that Uruguay's procedural breach is more limited. I also wish to add a few remarks concerning the evidence which the Parties have placed before the Court, the treatment of that evidence by the Court and the continuing nature of the obligations of the Parties under the Statute.

A. Uruguay's breach of the Procedural Obligations under the Statute

1. The Procedure created by Articles 7 to 12 of the Statute

2. Articles 7 to 12 of the Statute create a machinery of notification and consultation which must be followed in respect of "any works which are liable to affect navigation, the régime of the river or the quality of its waters". That machinery operates in four stages. First, the party proposing to carry out or authorize the works must inform CARU, which has to take a decision on a preliminary basis as to whether or not the works might cause significant damage to the other party. If CARU decides that they will not cause such damage, then it is implicit in Article 7 that the procedure comes to an end and the party concerned may proceed with the works. This capacity

to give a favourable preliminary decision is the only sense in which CARU may be said to "authorize" works (although the Statute does not describe CARU's role in those terms).

3. Secondly, if CARU does not take a favourable decision under Article 7 (either because its preliminary conclusion is that the works might cause significant damage, or because CARU is unable to reach a decision at all), then Article 7 (2) requires the party proposing the works to notify the other party of its plans through CARU. Article 7 (3) stipulates what information must be supplied. Under Article 8, the other party then has 180 days in which to acquiesce in, or object to, the proposed works. That period may be extended by CARU. Under Article 9, if the notified party has not objected by the end of this period, then the notifying party may carry out or authorize the works planned. On the other hand, if the notified party does object within this period, then the parties must move to the third stage of the procedure.

4. Thirdly, if the notified party does object within the 180 days allowed in the second stage of the procedure, then Articles 11 and 12 provide that the parties have another 180 days in which to try to reach agreement. It is implicit in the Statute that, during this third stage, each party is under an obligation to negotiate in good faith in an attempt to reach such an agreement.

5. Lastly, if the parties fail to reach agreement during the 180 days of the third stage, Article 12 provides that the "procedure indicated in chapter XV shall be followed". This last provision is not entirely straightforward. Chapter XV contains only one provision — Article 60 — which gives jurisdiction to the Court in respect of disputes concerning the interpretation or application of the Statute. It is plain, therefore, that, if the parties are unable to agree, the matter can be referred to the Court. Article 60, however, gives the Court jurisdiction only to resolve disputes regarding the interpretation or application of the Statute and the earlier Treaty of 1973. Consequently, where a party commences proceedings following a failure to agree during the third stage of the procedure, the Court has to determine whether the proposed works will, if carried out, contravene any of the substantive obligations in the Statute. It is here that the procedural obligations under Articles 7 to 12 are clearly linked to the substantive standards in other provisions (most noticeably Article 41 *(a)*).

6. Two further observations need to be made. The first is that the procedure is essentially designed to achieve agreement between the two parties. The role of CARU is secondary. Although CARU supplies the mechanism through which the notification and provision of information is to take place, its decision-making role is limited to taking a preliminary decision under Article 7. If that preliminary decision is negative, then the second stage of the procedure comes into operation and the matter is one for bilateral dealings between the parties. In the second stage of the procedure, CARU's role is merely to provide a channel for communication and to take decisions on whether or not to grant an extension of time under Article 8 (4). Similarly, in the third stage, it is for the parties to negotiate directly with one another.

7. Only if CARU takes a favourable preliminary decision (i.e., if it decides that the proposed works will not cause significant damage to the other party) will its decision have a substantive effect. In such a case, the effect of the CARU decision is to terminate the procedure and leave the notifying party free to proceed with the works. Even in that case, however, it needs to be remembered that CARU works on the basis of a consensus between the two parties. Under Article 55 of the Statute, each of the delegations of Argentina and Uruguay has one vote. Since there is no mechanism for breaking a deadlock, CARU can take a decision only if the two delegations (and thus the two States) are agreed. It follows that CARU cannot take a favourable preliminary decision on a party's proposed works if the other party objects. The procedure for

consent and negotiation created by Articles 7 to 12 is thus essentially bilateral, rather than institutional (although other aspects of CARU's role — in particular, in relation to monitoring — have more of an institutional character).

8. The second consideration is that the procedural obligations in Articles 7 to 12 do not give either party a power of veto. If the party wishing to carry out the works cannot secure the agreement (or, at least, the acquiescence) of the other party (either through the summary first stage procedure in Article 7 or at either of the second or third procedural stages), then it may nevertheless proceed with the works. If it does so, it will not be violating the procedural provisions, although it runs the risk that the other party will refer the matter to the Court under Article 60 and that the Court will hold that the works violate the substantive provisions of the Statute and require it either to restore the status quo or to pay damages.

9. The characterization of these provisions as procedural should not be taken as in any way minimizing their importance. On the contrary, they are an important feature of the system for ensuring the optimum and rational utilization of the resources of the river through co-operation between the parties. It follows that a breach of these procedural obligations is a serious matter. Moreover, while the parties can agree to depart from all or part of the procedures laid down in Articles 7 to 12, it is not open to either party unilaterally to bypass those procedures or to declare them inapplicable.

2. Uruguay's failure to comply with Article 7

10. In the present case, I agree with the Court that Uruguay failed to inform CARU of the proposed works at the time when it was required by Article 7 (1) of the Statute to do so. In my opinion, a party is obliged to inform CARU of proposed works once two conditions are met. First, that party must have in its possession the information necessary to enable CARU to make the preliminary assessment provided for in Article 7 (1). That assessment is far more limited than the assessment envisaged in Article 7 (3). Whereas Article 7 (3) speaks of an assessment of the *probable* impact of the proposed works, Article 7 (1) envisages only an assessment of whether those works "might cause significant damage to the other party", i.e., it is concerned only with the *possible* impact of the works. Moreover, the assessment envisaged by Article 7 (1) is to be carried out within a period of only thirty days. Accordingly, less information is required for the Article 7 (1) assessment than for that under Article 7 (3), and it is likely to be available at an earlier stage in the planning process. Secondly, a party cannot be under an obligation to notify CARU of proposed works until that party plans to carry out those works; in other words it must have formed an intention, however provisional, that the work should proceed beyond the drawing board. Once those two conditions are met, the party concerned is obliged to inform CARU of the plans in accordance with Article 7 (1).

11. I agree that that stage was reached in the case of both the CMB (ENCE) and Orion (Botnia) proposals before there was any agreement between Argentina and Uruguay to engage in bilateral discussions and that Uruguay nevertheless did not inform CARU. Uruguay was, therefore, in breach of its obligations under Article 7 (1) of the Statute.

12. I also agree that Uruguay was in breach of its obligations to notify Argentina under Articles 7 (2) and (3). The Judgment concludes, in paragraph 121, that Uruguay violated these provisions because, in each case, it issued the initial environmental authorization before it supplied Argentina with the information required by Article 7 (3). In the case of the Orion (Botnia) mill, the initial environmental authorization was granted some six months before Uruguay began to transmit

the required information. The grant of an initial environmental authorization presupposes, if the State concerned is conscientious in its application of the requirements of the Statute, that it has at that stage the information necessary to make an assessment of the probable environmental impact of the proposed works. The duty to notify the other party is, therefore, applicable no later than this stage.

3. The absence of any other procedural violation

13. I do not agree, however, with the conclusion, in paragraphs 143 to 150 of the Judgment, that Uruguay violated its obligations under the Statute by the steps which it took to authorize work on the two mills before the end of the third, negotiation, stage of the procedure in Articles 7 to 12. There is no doubt that the Statute limits what steps a party may lawfully take in respect of proposed works during that stage. First, Article 9 provides that "[i]f the notified party raises no objections or does not respond within the period established in Article 8, the other party may carry out or authorize the work planned". It is implicit in that provision that the party may not carry out or authorize the work planned during the period established in Article 8 (the second stage) or, if the notified party does object within that period, during the period reserved for negotiations under Articles 11 and 12 (the third stage). Secondly, as the Court points out, the parties have a duty to negotiate in good faith during the third stage of the procedure and for one party to take steps to carry out or authorize the carrying out of the proposed works while the negotiations of which those works are the subject are taking place may be contrary to that duty. I will consider each of those limitations in turn.

14. In order to understand the scope of the implied prohibition in Article 9, it is necessary to consider the purpose of the procedures established by Articles 8 to 12. These are designed to ensure that one party to the Statute does not carry out works the probable impact of which will be to cause significant adverse effects (as defined elsewhere in the Statute) upon navigation, the régime of the river or the quality of its waters without first engaging in the information and negotiation process prescribed by the Statute. It would defeat that purpose if that party were to take steps which themselves had such a probable impact while the process was still running its course. The implied restriction in Article 9 is designed to prevent that from occurring. However, engaging in preliminary steps such as clearing vegetation from a proposed site, levelling the land or preparing foundations is unlikely in itself to have any adverse impact on navigation, the régime of the river or the quality of its waters and, if it does not do so, then I cannot see how it would run counter to the purpose of this part of the Statute. Nor would taking such steps naturally be considered as "carrying out" the proposed works, since that term suggests a far more extensive and complete operation. Of course, the party which takes such preliminary steps runs the risk that they may prove to have been wasted if the proposed works are not, in the end, carried out, but that does not mean that the taking of those steps is itself a violation of the Statute.

15. The implied requirement not to "authorize the work planned" must, in my view, be read in the same way. As the history of the Orion (Botnia) mill demonstrates, the process of authorization will frequently have many different steps. What Article 9 seems to me to prohibit, during the second and third stages of the procedure laid down by the Statute, is granting the authorization actually to carry out the work planned. That, again, would exclude the authorization of preparatory steps, provided that those steps did not themselves involve the risk of one or more of the effects described in the Statute.

16. Secondly, the duty to negotiate in good faith, as paragraphs 145 and 146 of the Judgment point out, is firmly rooted in general international law. While that duty does not amount to a requirement that the negotiations lead to any particular outcome, it does require that the parties to

the negotiations must conduct themselves in such a way that the negotiations are meaningful (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85). In the context of negotiations under Article 12 of the Statute, I agree with what is said in paragraph 147 of the Judgment, that

> "there would be no point to the co-operation mechanism provided for by Articles 7 to 12 of the 1975 Statute if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the consultations and negotiations between the parties would no longer have any purpose."

However, I do not agree that taking preparatory steps, such as clearing vegetation from the proposed site of a mill, amounts to the "implementation" of the planned activity. The conclusion, in paragraph 148 of the Judgment, that such preparatory action constitutes "an integral part of the construction of the planned mills" and therefore must necessarily be seen as incompatible with the duty to negotiate in good faith is unjustified. If both parties are negotiating in good faith, the outcome may well be an agreement that the proposed works can proceed (albeit, perhaps, with modifications). Moreover, if the negotiations do not result in agreement within the prescribed 180-day period, then, as paragraphs 151 to 158 of the Judgment make clear, the party which has proposed those works may proceed subject to the risk that the other party may bring the matter to the Court which may conclude that the works contravene the substantive provisions of the Statute. In my opinion, a party can engage in good faith in negotiations which are meaningful while still taking preparatory steps to ensure that it is ready to proceed with the works if the negotiations result in agreement that they may be carried out, or if no agreement is reached within the prescribed period. To take such steps is not, in itself, contrary to the duty to negotiate in good faith. Only if the negotiating record as a whole shows that the party concerned did not intend to engage in meaningful negotiations would the Court be justified in concluding that that duty had been breached.

17. The question, therefore, is whether the steps which Uruguay authorized before the end of the period for negotiation contravened the prohibition implicit in Article 9 or the duty to negotiate in good faith. In my opinion, they did not.

18. In the case of the CMB (ENCE) mill, construction never took place. Neither the initial environmental authorization, issued on 9 October 2003, nor the environmental management plan approval, granted on 28 November 2005, was an authorization to "carry out" the project. The initial environmental authorization did not permit construction of the mill. Further permits were required before that could be done. The lengthy process followed in the case of the Orion (Botnia) mill, which — unlike CMB (ENCE) — was completed, is a reminder of how many further authorizations were required by Uruguay before construction of the mill itself could begin. The 28 November 2005 approval was limited to clearing the ground of vegetation and did not permit construction (as paragraph 36 of the Judgment makes clear). In my opinion, the steps authorized by Uruguay were too limited in scope to amount to a breach of Article 9 or to demonstrate that Uruguay was not negotiating in good faith.

19. In the case of the Orion (Botnia) mill, the picture is more complicated. I agree with paragraphs 138 to 141 of the Judgment that the agreement between Argentina and Uruguay to establish the High-Level Technical Group, known as the GTAN, was an agreement to create a mechanism to enable the negotiations required by Article 12 of the Statute to take place. It follows that the subsequent exchanges within the GTAN constituted the third stage of the procedure

outlined in paragraph 4 above. I also agree that by establishing this mechanism Argentina neither consented to the construction of the mill nor waived its other procedural rights under the Statute. However, I do not agree that the steps which Uruguay took regarding the Orion (Botnia) mill during the period of negotiations in GTAN amounted to a violation of Article 9 or the duty to negotiate in good faith under Article 12 of the Statute.

20. The initial environmental authorization for the mill, granted on 14 February 2005, was not an authorization to construct and pre-dated the establishment of the GTAN. Since Argentina was well aware of this authorization when it agreed to the establishment of the GTAN, it evidently did not consider that the granting of the authorization precluded meaningful negotiation. Similarly, the environmental management plan approval, given on 12 April 2005, was for preliminary work only and again predated the agreement to establish the GTAN negotiating mechanism.

21. There followed two more significant steps. On 5 July 2005 Uruguay gave authorization for the construction of a port adjacent to the proposed site of the mill. This step occurred after the establishment of the GTAN but before the first of the twelve meetings held as part of the GTAN process took place on 3 August 2005. This action on Uruguay's part scarcely provided an auspicious start to the GTAN meetings but it was the mill, not the port, which was the subject of controversy and I do not think this step constituted a violation of Article 9 or of the duty to negotiate in good faith. More important was the approval, on 22 August 2005, of the construction of a chimney and concrete foundations for the mill. This measure permitted Botnia to take an important step towards the construction of the mill but it still fell far short of authorization to carry out the works as a whole. Even after everything approved by this measure was complete, most of the work of construction remained and several more authorizations still had to be obtained. Nor did the actions approved on 22 August 2005 themselves create a risk of damage to the aquatic environment.

22. Uruguay's approval for the construction of the mill itself, given on 18 January 2006, is of an entirely different character and would be capable of violating Article 9 and the duty to negotiate in good faith had it occurred while the 180-day period for negotiations had not yet expired. In fact, it did not do so. It is true that, as Argentina has argued, the first GTAN meeting occurred only on 3 August 2005, so that, if the 180-day period prescribed by Article 12 of the Statute started to run only on that date, it would have ended on 30 January 2006 (the day on which the final GTAN meeting was held). However, the GTAN process was actually established by the two Foreign Ministries on 31 May 2005 (following an agreement in principle between the two Presidents on 3 May 2005). The press release issued by the foreign ministries on 31 May 2005 recording their agreement expressly stated that the GTAN was to produce its report within 180 days (the period stipulated in Article 12 of the Statute), which strongly suggests that the 180-day period was to run from the date of the agreement, not the (then unknown) date of the first GTAN meeting. If the 180-day period is measured from the date of the establishment of GTAN, then it had already come to an end before the authorization to construct the mill was given. Moreover, even if that interpretation is incorrect, on 14 December 2005 the Foreign Ministry of Argentina handed a Diplomatic Note to the Ambassador of Uruguay in which it stated that the negotiations having failed to produce an agreement, a dispute existed between the two States, thus paving the way for the process in Article 60 of the Statute (i.e., reference to the Court). In the light of this communication, it is clear that Argentina regarded the negotiations as having reached an impasse. Uruguay's authorization of construction on 18 January 2006 cannot, therefore, be seen as undermining a negotiating process which its negotiating partner had already declared to have been unsuccessful.

23. In these circumstances, I cannot agree with the Court's conclusion (at paragraph 149 of the Judgment) that "by authorizing the construction of the mills and the port terminal at Fray Bentos before the expiration of the period of negotiation, Uruguay failed to comply with the obligation to negotiate laid down by Article 12 of the Statute".

B. Evidential Issues

24. I agree with the Court's finding that the evidence before it does not establish that Uruguay has violated the substantive provisions of the Statute. I also agree with the Court's reasoning regarding the burden of proof. The nature of the case and of the obligations under the Statute does not alter the fundamental principle that, in proceedings before the Court, the burden of proving any given fact rests on the party asserting that fact. I am also in full agreement with the Court's analysis of the evidence before it and the way in which it went about the assessment of that evidence. On that last matter, I share the views expressed by Judge Keith in his separate opinion. I want only to add two brief comments regarding evidential issues.

1. Standard of proof

25. First, while I agree with what the Court has said about the burden of proof, I think it is also important to have regard to the standard of proof, i.e., what a party must do in order to discharge the burden of proof when that burden rests upon it. International courts and tribunals have avoided the distinction between criminal and civil standards of proof familiar to common law (which requires proof beyond reasonable doubt in criminal cases and proof only on a balance of probabilities in civil cases). The Court has, however, indicated in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, pp. 129-130, paras. 208-210) that charges of conduct as grave as genocide require "proof at a high level of certainty appropriate to the seriousness of the allegation" (para. 210). It is implicit in that statement that a lower standard of proof is acceptable in the case of other, less grave, allegations.

26. The present case seems to me to fall squarely within the category of cases which calls for a lower standard of proof. While allegations that a State has violated environmental obligations under a treaty concerning a shared watercourse are undoubtedly serious, they are not of the same character as the allegations in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case. Moreover, the nature of environmental disputes is such that the application of the higher standard of proof would have the effect of making it all but impossible for a State to discharge the burden of proof. Accordingly, I believe that Argentina was required to establish the facts which it asserted only on the balance of probabilities (sometimes described as the balance of the evidence). I agree, however, that it has not done so.

2. The distinction between Experts, Witnesses and Counsel

27. Secondly, I wish to record my strong agreement with the Court's remarks, at paragraph 167 of the Judgment, regarding the practice of having persons who provide evidence before the Court (based, in this case, upon their research, observations and scientific expertise) address the Court as counsel. The distinction between the *evidence* of a witness or expert and the *advocacy* of counsel is fundamental to the proper conduct of litigation before the Court (as it is before other courts and tribunals). A witness or expert owes a duty to the Court which is reflected in the declaration required by Article 64 of the Rules of Court. The duties of someone appearing as counsel are quite different. Moreover, a person who testifies, whether as an expert, a witness or in both capacities, can be questioned by the other party and by the Court. For a person who is going

to speak of facts within his own knowledge or to offer his expert opinion on scientific data to address the Court as counsel is to circumvent these provisions of the Rules and, in the words of the late Sir Arthur Watts, unacceptably to blur the distinction between evidence and advocacy (Arthur Watts, "Enhancing the Effectiveness of Procedures of International Dispute Settlement" in: J. A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 5, 2001, pp. 29-30). The problem is particularly acute where, as in the present case, some of those who addressed the Court as counsel had been actively and closely involved in the preparation of scientific reports which were part of the evidence before the Court. For those persons to address the Court as counsel, rather than giving evidence as witnesses or experts, was both unhelpful to the Court and unfair to the other Party.

28. In the present case, any unfairness was mitigated by the fact that both Parties engaged in the same practice. The issue of principle, however, remains and I am pleased that the Court has unequivocally indicated that such a practice should not be repeated in future cases.

C. The continuing obligations of the Parties

29. Courts and tribunals are necessarily required to focus for most of the time upon the events of the past. In the present case, the Court has concluded that Uruguay's conduct to date has violated its procedural obligations under the Statute but has not violated its substantive obligations and that the declaration of a procedural breach is the only remedy which it is appropriate for the Court to grant. It should, however, be clearly understood that the Court is not saying that this is the end of the matter. The Statute imposes upon both Parties important obligations of a continuing character (to which the Court has drawn attention in paragraph 266 of the Judgment). Uruguay has a continuing obligation, under Article 41 of the Statute, to prevent pollution in the River Uruguay and thus to maintain a system of monitoring and strict controls in respect of any discharges from the Orion (Botnia) plant. Both Parties have a duty to co-operate, within the framework of CARU, and CARU itself has an important role to play both in setting standards and in monitoring. The Statute which the Parties agreed in 1975 was a remarkably forward-looking instrument. In several respects it was ahead of its time and is a tribute to the determination of the two States to protect an aquatic environment of great importance to them both. As the Court has remarked, in paragraph 281 of the Judgment, until the present case the machinery created by the Statute had worked well without any need to refer matters to the Court. The Parties have a duty to co-operate to ensure that that machinery continues to work well in the future.

(Signed) Christopher GREENWOOD.