# Annex 64

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# RESPONSIBILITIES AND OBLIGATIONS OF STATES SPONSORING PERSONS AND ENTITIES WITH RESPECT TO ACTIVITIES IN THE AREA (REQUEST FOR ADVISORY OPINION SUBMITTED TO THE SEABED DISPUTES CHAMBER)

**List of cases: No. 17**

**ADVISORY OPINION OF 1 FEBRUARY 2011**

# 2011

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# RESPONSABILITÉS ET OBLIGATIONS DES ETATS QUI PATRONNENT DES PERSONNES ET DES ENTITÉS DANS LE CADRE D'ACTIVITÉS MENÉES DANS LA ZONE (DEMANDE D'AVIS CONSULTATIF SOUMISE À LA CHAMBRE POUR LE RÈGLEMENT DES DIFFÉRENDS RELATIFS AUX FONDS MARINS)

**Rôle des affaires : No. 17**

**AVIS CONSULTATIF DU 1ER FÉVRIER 2011**

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1 FEBRUARY 2011
ADVISORY OPINION

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1ER FÉVRIER 2011
AVIS CONSULTATIF

# SEABED DISPUTES CHAMBER OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

**YEAR 2011**

1 February 2011

List of cases:
No. 17

## RESPONSIBILITIES AND OBLIGATIONS OF STATES SPONSORING PERSONS AND ENTITIES WITH RESPECT TO ACTIVITIES IN THE AREA

## ADVISORY OPINION

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**ADVISORY OPINION**

*Present:* *President* TREVES; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, WOLFRUM, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN; *Registrar* GAUTIER.

On Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area,

THE SEABED DISPUTES CHAMBER,

composed as above,

*gives the following Advisory Opinion:*

## Introduction

## I. The Request

1. The questions on which the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (hereinafter "the Chamber") has been requested are set forth in decision ISBA/16/C/13 adopted by the Council of the International Seabed Authority (hereinafter "the Council") on 6 May 2010 at its sixteenth session. By letter dated 11 May 2010, transmitted electronically to the Registry of the Tribunal on 14 May 2010, the Secretary-General of the International Seabed Authority (hereinafter "the Secretary-General") officially communicated to the Chamber the decision taken by the Council. The original of that letter was received in the Registry on 17 May 2010. Certified true copies of the English and French versions of the Council's decision were forwarded by the Legal Counsel of the International Seabed Authority (hereinafter "the Legal Counsel") on 8 June 2010 and received in the Registry on the same date. The decision of the Council reads:

*The Council of the International Seabed Authority,*

*Considering* the fact that developmental activities in the Area have already commenced,

*Bearing in mind* the exchange of views on legal questions arising within the scope of activities of the Council,

*Decides*, in accordance with Article 191 of the United Nations Convention on the Law of the Sea ("the Convention"), to request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, pursuant to Article 131 of the Rules of the Tribunal, to render an advisory opinion on the following questions:

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?
2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?
3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

2. The Request was entered in the List of cases as No. 17 and the case was named "Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area".

3. In his letter of 11 May 2010, the Secretary-General informed the Chamber of the appointment of the Legal Counsel as the representative of the International Seabed Authority (hereinafter "the Authority") for the proceedings.

## II. Events leading to the Request

4. The Chamber considers it necessary to describe the events that led to the request for an advisory opinion:

- On 10 April 2008, the Authority received two applications for approval of a plan of work for exploration in the areas reserved for the conduct of activities by the Authority through the Enterprise or in association with developing States pursuant to Annex III, article 8, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"). These applications were submitted by Nauru Ocean Resources Inc. (sponsored by the Republic of Nauru) and Tonga Offshore Mining Ltd. (sponsored by the Kingdom of Tonga);
- These applications were submitted to the Legal and Technical Commission of the Authority. On 5 May 2009, the applicants submitted to the Authority a request that consideration of the applications should be postponed. At the fifteenth session of the Authority, held from 25 May to 5 June 2009, the Legal and Technical Commission decided to defer further consideration of the item;
- On 1 March 2010, the Republic of Nauru transmitted to the Secretary-General a proposal, set out in document ISBA/16/C/6, to seek an advisory opinion from the Chamber on a number of specific questions regarding the responsibility and liability of sponsoring States;
- In support of its proposal, Nauru submitted, inter alia, the following considerations:

> In 2008 the Republic of Nauru sponsored an application by Nauru Ocean Resources Inc. for a plan of work to explore for polymetallic nodules in the Area. Nauru, like many other developing States, does not yet possess the technical and financial capacity to undertake seafloor mining in international waters. To participate effectively in activities in the Area, these States must engage entities in the global private sector (in much the same way as some developing countries require foreign direct investment). Not only do some developing States lack the financial capacity to execute a seafloor mining project in international waters, but some also cannot afford exposure to the legal risks potentially associated with such a project. Recognizing this, Nauru's sponsorship of Nauru Ocean Resources Inc. was originally premised on the assumption that Nauru could effectively mitigate (with a high degree of certainty) the potential liabilities or costs arising from its sponsorship. This was important, as these liabilities or costs could, in some

> circumstances, far exceed the financial capacities of Nauru (as well as those of many other developing States). Unlike terrestrial mining, in which a State generally only risks losing that which it already has (for example, its natural environment), if a developing State can be held liable for activities in the Area, the State may potentially face losing more than it actually has. (ISBA/16/C/6, paragraph 1);
>
> Ultimately, if sponsoring States are exposed to potential significant liabilities, Nauru, as well as other developing States, may be precluded from effectively participating in activities in the Area, which is one of the purposes and principles of Part XI of the Convention, in particular as provided for in article 148; article 150, subparagraph (c); and article 152, paragraph 2. As a result, Nauru considers it crucial that guidance be provided on the interpretation of the relevant sections of Part XI pertaining to responsibility and liability, so that developing States can assess whether it is within their capabilities to effectively mitigate such risks and in turn make an informed decision on whether or not to participate in activities in the Area. (ISBA/16/C/6, paragraph 5);

– Nauru's proposal was included in the agenda for the sixteenth session of the Council of the Authority, during which intensive discussions on this agenda item were held at the 155th, 160th and 161st meetings;
– The Council decided not to adopt the proposal as formulated by Nauru. In view of the wishes of many participants in the debate, it decided to request an advisory opinion on three more abstract but concise questions;
– These questions were formulated in decision ISBA/16/C/13, adopted by the Council at its 161st meeting on 6 May 2010. As indicated by the Authority in its written statement and at the hearing, the decision adopted by the Council on 6 May 2010 was taken "without a vote" and "without objection" (written statement of the Authority, paragraph 2.4; ITLOS/PV.2010/1/Rev.1, p. 10, lines 16-21).

## III. Chronology of the procedure

5. Pursuant to article 133, paragraph 1, of the Rules of the Tribunal (hereinafter "the Rules"), the Registrar, by Note Verbale dated 17 May 2010, notified all States Parties to the United Nations Convention on the Law of the Sea (hereinafter "States Parties") of the request for an advisory opinion.

6. By letter dated 18 May 2010, pursuant to article 4 of the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the request for an advisory opinion.

7. By Order dated 18 May 2010, pursuant to article 133, paragraph 2, of the Rules, the President decided that the Authority and the organizations invited as intergovernmental organizations to participate as observers in the Assembly of the Authority (hereinafter "the Assembly") were considered likely to be able to furnish information on the questions submitted to the Chamber for an advisory opinion. Accordingly, the President invited the States Parties, the Authority and the aforementioned intergovernmental organizations to present written statements on those questions. By the same Order, in accordance with article 133, paragraph 3, of the Rules, the President fixed 9 August 2010 as the time-limit within which written statements on those questions might be submitted to the Chamber. In the Order, in accordance with article 133, paragraph 4, of the Rules, the President further decided that oral proceedings would be held and fixed 14 September 2010 as the date for the opening of the hearing. States Parties, the Authority and the aforementioned intergovernmental organizations were invited to participate in the hearing and to indicate to the Registrar, not later than 3 September 2010, their intention to make oral statements.

8. Article 191 of the Convention requires the Chamber to give advisory opinions "as a matter of urgency". In the present case, the time-limits for the submission of written statements and the date of the opening of the hearing, as set out in the Orders of the President, were fixed with a view to meeting this requirement.

9. By Order dated 28 July 2010, in light of a request submitted to the Chamber, the President extended the time-limit for the submission of written statements to 19 August 2010.

10. By letter dated 30 July 2010, pursuant to article 131 of the Rules, the Legal Counsel transmitted to the Chamber a dossier containing documents in support of the Request. The dossier was posted on the Tribunal's website.

11. Within the time-limit fixed by the President, written statements were submitted by the following 12 States Parties, which are listed in the order in which their statements were received: the United Kingdom, Nauru, the Republic of Korea, Romania, the Netherlands, the Russian Federation, Mexico, Germany, China, Australia, Chile, and the Philippines. Within the same time-limit, written statements were also submitted by the Authority and two organizations, namely, the Interoceanmetal Joint Organization and the International Union for Conservation of Nature and Natural Resources.

12. Upon receipt of those statements, in accordance with article 133, paragraph 3, of the Rules, the Registrar transmitted copies thereof to the States Parties, the Authority and the organizations that had submitted written statements. On 19 August 2010, pursuant to article 134 of the Rules, the written statements submitted to the Chamber were made accessible to the public on the Tribunal's website.

13. On 17 August 2010, the Registry received a statement submitted jointly by Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature. The statement was accompanied by a petition from these two non-governmental organizations in which they requested permission to participate in the advisory proceedings as *amici curiae*. At the request of the President, by separate letters dated 27 August 2010, the Registrar informed those organizations that their statement would not be included in the case file since it had not been submitted under article 133 of the Rules; it would, however, be transmitted to the States Parties, the Authority and the intergovernmental organizations that had submitted written statements, which would be informed that the document was not part of the case file and that it would be posted on a separate section of the Tribunal's website. By communication dated 27 August 2010, the States Parties, the Authority and the intergovernmental organizations in question were so informed.

14. On 10 September 2010, the Chamber, having considered a petition from Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature requesting permission to participate in the advisory proceedings as *amici curiae*, decided not to grant that request. The decision was communicated to the two organizations on the same day by a letter from the President.

15. By e-mail dated 26 August 2010, the Legal Counsel transmitted to the Registrar, at the latter's request, a note containing a summary of potential environmental impacts of seabed mining. This document was posted on the Tribunal's website.

16. By letter dated 1 September 2010, after the expiry of the time-limit for the submission of written statements, the United Nations Environment

Programme submitted a written statement that was received by the Registry on 2 September 2010. The President nevertheless decided that the statement should be included in the case file. Accordingly, on 3 September 2010, the Registrar transmitted an electronic copy of that document to the States Parties, the Authority and the intergovernmental organizations that had submitted written statements. The document was also posted on the Tribunal's website.

17. Within the time-limit fixed in the Order of the President of 18 May 2010, nine States Parties expressed their intention to participate in the oral proceedings, namely, Argentina, Chile, Fiji, Germany, Mexico, Nauru, the Netherlands, the Russian Federation and the United Kingdom. Within the same time-limit, the Authority and two organizations, namely, the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Union for Conservation of Nature and Natural Resources also expressed their intention to participate in the oral proceedings.

18. Prior to the opening of the oral proceedings, the Chamber held initial deliberations on 10, 13 and 14 September 2010.

19. At four public sittings held on 14, 15 and 16 September 2010, the Chamber heard oral statements, in the following order, by:

| | |
|---|---|
| *For the International Seabed Authority:* | Mr Nii Odunton, Secretary-General,<br>Mr Michael Lodge, Legal Counsel,<br>Mr Kening Zhang, Senior Legal Officer, and<br>Ms Gwenaëlle Le Gurun, Legal Officer; |
| *For the Federal Republic of Germany:* | Ms Susanne Wasum-Rainer, Legal Adviser, Director-General for Legal Affairs, Federal Foreign Office; |
| *For the Kingdom of the Netherlands:* | Ms Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign Affairs; |
| *For the Argentine Republic:* | Ms Susana Ruiz Cerutti, Ambassador, Legal Adviser, Ministry of Foreign Affairs International Trade and Worship; |

| | |
|---|---|
| *For the Republic of Chile:* | Mr Roberto Plaza, Minister Counsellor, Consul General of Chile in Hamburg; |
| *For the Republic of Fiji:* | Mr Pio Bosco Tikoisuva, High Commissioner of Fiji to the United Kingdom of Great Britain and Northern Ireland; |
| *For the United Mexican States:* | Mr Joel Hernández G., Ambassador, Legal Adviser, Ministry of Foreign Affairs; |
| *For the Republic of Nauru:* | Mr Peter Jacob, First Secretary, Nauru High Commission in Suva (Fiji), and Mr Robert Haydon, Advisor; |
| *For the United Kingdom of Great Britain and Northern Ireland:* | Sir Michael Wood KCMG, Member of the English Bar and Member of the International Law Commission; |
| *For the Russian Federation:* | Mr Vasiliy Titushkin, Deputy Director, Legal Department, Ministry of Foreign Affairs; |
| *For the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO):* | Mr Ehrlich Desa, Deputy Executive Secretary; |
| *For the International Union for Conservation of Nature and Natural Resources:* | Ms Cymie R. Payne, Member of the Bar of the State of California, the Commonwealth of Massachusetts, and the Supreme Court of the United States of America, Counsel,<br>Mr Robert A. Makgill, Barrister and Solicitor of the High Court of New Zealand, Counsel, and |

Mr Donald K. Anton, Barrister and Solicitor of the Supreme Court of Victoria, the Supreme Court of New South Wales and the High Court of Australia; Member of the Bar of the State of Missouri, the State of Idaho, and the Supreme Court of he United States; and Senior Lecturer in International Law at the Australian National University College of Law, Counsel.

20. The hearing was broadcast over the internet as a webcast.

21. By letter dated 13 September 2010, pursuant to article 76, paragraph 1, of the Rules, the Registrar transmitted to the Authority, prior to the hearing, a list of the following points that the Chamber wished the Authority to address:

1. With reference to article 153, paragraph 4, of the Convention, how has the Authority been exercising control over activities in the Area for the purpose of securing compliance with the relevant provisions of the Convention and what experience has the Authority accumulated over the years in this regard?

2. In what form has assistance been provided so far to the Authority by sponsoring States, including the case of various States sponsoring one contractor, for the purpose of securing compliance with provisions referred to in article 153, paragraph 4, and what experience has the Authority accumulated over the years in this regard?

3. What are the activities in the Area, including activities associated with exploration and exploitation, which so far have been controlled by the Authority?

4. Would it be possible for the Authority to provide the certificates of sponsorship regarding the contracts it has concluded with contractors, as well as copies of the sponsorship agreements if available?

22. Responses to points 1 to 3 of this list were provided in the oral statements made on behalf of the Authority during the sitting held on 14 September 2010. By letter dated 17 September 2010, the Legal Counsel communicated information on point 4 of the list. This letter was posted on the Tribunal's website.

23. At the request of the President, by letter dated 13 October 2010, the Registrar asked the Legal Counsel to provide the Chamber with information

on the various phases of the process of exploration and exploitation of resources in the Area (collection, transportation to the surface, initial treatment, etc.), as well as information on the technology available. The Legal Counsel provided this information by letter dated 15 November 2010. The information was posted on the Tribunal's website.

24. As indicated by the President at the opening of the oral proceedings, one Member of the Chamber, Judge Chandrasekhara Rao, was prevented by illness from sitting on the bench during the hearing. However, with the approval of the Chamber, he participated in the subsequent deliberations on the advisory opinion.

## IV. Role of the Chamber in advisory proceedings

25. The Chamber is a separate judicial body within the Tribunal entrusted, through its advisory and contentious jurisdiction, with the exclusive function of interpreting Part XI of the Convention and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area.

26. The advisory jurisdiction is connected with the activities of the Assembly and the Council, the two principal organs of the Authority. The Authority is the international organization established by the Convention in order to "organize and control activities in the Area" (article 157, paragraph 1, of the Convention and section 1, paragraph 1, of the Annex to the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (hereinafter "the 1994 Agreement")). In order to exercise its functions properly in accordance with the Convention, the Authority may require the assistance of an independent and impartial judicial body. This is the underlying reason for the advisory jurisdiction of the Chamber. In the exercise of that jurisdiction, the Chamber is part of the system in which the Authority's organs operate, but its task within that system is to act as an independent and impartial body.

27. According to article 159, paragraph 10, and article 191 of the Convention, the advisory function of the Chamber concerns legal questions submitted by the Assembly and by the Council. Advisory opinions requested under article 159, paragraph 10, of the Convention serve to assist the Assembly during its decision-making process. The Chamber's advisory jurisdiction under article 191 of the Convention concerns "legal questions arising within the scope" of the activities of either the Assembly or the Council.

28. As provided in article 187 of the Convention, the Chamber also has contentious jurisdiction to settle different categories of disputes referred to in that article with respect to activities in the Area.

29. The functions of the Chamber, set out in Part XI of the Convention, are relevant for the good governance of the Area. The Secretary-General made this point at the hearing: "The Chamber has a high responsibility to ensure that the provisions of Part XI of the Convention and the 1994 Agreement are implemented properly and the regime for deep seabed mining as a whole is properly interpreted and applied" (ITLOS/PV.2010/1/Rev.1, p. 5, lines 16-19).

30. The Chamber is mindful of the fact that by answering the questions it will assist the Council in the performance of its activities and contribute to the implementation of the Convention's regime.

## V. Jurisdiction

31. The Chamber will first determine whether it has jurisdiction to give the advisory opinion requested by the Council. The conditions to be met in order to establish the jurisdiction of the Chamber are set out in article 191 of the Convention which reads as follows:

> The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

32. As regards the present proceedings, the conditions to be met are: (a) that there is a request from the Council; (b) that the request concerns legal questions; and (c) that these legal questions have arisen within the scope of the Council's activities.

33. As to the first condition, the Chamber observes that article 191 of the Convention confers on the Assembly and the Council the power to request advisory opinions from the Chamber. In the present case, the decision to request an advisory opinion from the Chamber was adopted by the Council.

34. Rule 56, paragraph 1, of the Rules of Procedure of the Council provides that, as a general rule, decision-making in the Council should be by consensus. Section 3, paragraph 2, of the Annex to the 1994 Agreement states that "[a]s a general rule, decision-making in the organs of the Authority should be by consensus". According to article 161, paragraph 8 (e), of the Convention and rule 59 of the Rules of Procedure of the Council, "consensus" means the absence of any formal objection.

35. In its written statement, the Authority declared that "[t]he decision of the Council to request the Chamber for an advisory opinion was taken without objection and can thus be regarded as having been taken by consensus". The information provided by the Authority also shows that the Council's decision was taken in accordance with the internal rules of procedure of the Authority.

36. The Chamber thus concludes that there is a valid request by the Council.

37. With respect to the second condition, the Chamber must satisfy itself that the advisory opinion requested by the Council concerns "legal questions" within the meaning of article 191 of the Convention.

38. In examining this requirement, the Chamber observes that the three questions before it relate, *inter alia*, to "the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area"; "the extent of liability of a State Party for any failure to comply with the provisions of the Convention . . . by an entity whom it has sponsored"; and the "measures that a sponsoring State must take in order to fulfil its responsibility under the Convention".

39. The questions put to the Chamber concern the interpretation of provisions of the Convention and raise issues of general international law. The Chamber recalls that the International Court of Justice (hereinafter "the ICJ") has stated that "questions 'framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law'" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, 22 July 2010, paragraph 25; *Western Sahara, Advisory Opinion, I.C.J. Report 1975*, p. 12, at paragraph 15).

40. For these reasons, the Chamber concludes that the questions raised by the Council are of a legal nature.

41. As to the third condition, article 191 of the Convention also requires that an advisory opinion must concern legal questions "arising within the scope of [the] activities" of the Assembly or the Council. In the present case, it is for the Chamber to determine whether the legal questions submitted to it arose within the scope of the activities of the Council. Therefore, it is pertinent to examine the provisions of the Convention and of the 1994 Agreement that define the Council's competence.

42. The powers and functions of the Council are set out in Part XI, section 4, of the Convention and, in particular, article 162 thereof, read together

with the 1994 Agreement. Article 162, paragraphs 1 and 2 (a), of the Convention reads as follows:

> 1. The Council is the executive organ of the Authority. The Council shall have the power to establish, in conformity with this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.
> 2. In addition, the Council shall:
> (a) supervise and coordinate the implementation of the provisions of this Part on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance.

43. Section 3, paragraph 11 (a), read together with section 1, paragraphs 6 to 11, of the 1994 Agreement, entrusts the Council with the function of approving plans of work in accordance with Annex III, article 6, of the Convention. Article 162, paragraph 2 (l), of the Convention confers on the Council the power to "exercise control over activities in the Area in accordance with article 153, paragraph 4, and the rules, regulations and procedures of the Authority".

44. In light of these provisions, the Chamber concludes that the legal questions before it fall within the scope of the activities of the Council, since they relate to the exercise of its powers and functions, including its power to approve plans of work.

45. For the aforementioned reasons, the Chamber finds that it has jurisdiction to entertain the request for an advisory opinion submitted to it by the Council.

## VI. Admissibility

46. The Chamber now turns to questions of admissibility.

47. Some of the participants in the proceedings have drawn attention to the wording of article 191 of the Convention, which states that the Chamber "shall give" advisory opinions, and have compared it to article 65, paragraph 1, of the Statute of the ICJ, which states that the Court "may give" an advisory opinion. In light of this difference, they have argued that, contrary to the discretionary powers of the ICJ, the Chamber, once it has established its jurisdiction, has no discretion to decline a request for an advisory opinion.

48. While noting the difference between the wording of article 191 of the Convention and article 65 of the Statute of the ICJ, the Chamber does not

consider it necessary to pronounce on the consequences of that difference with respect to admissibility in the present case.

49. The Chamber deems it appropriate to render the advisory opinion requested by the Council and will proceed accordingly.

## VII. Applicable law and procedural rules

50. The Chamber will now proceed to indicate the applicable law.

51. Article 293, paragraph 1, of the Convention and article 38 of the Statute of the Tribunal (hereinafter "the Statute") set out the law to be applied by the Chamber.

52. Article 293, paragraph 1, of the Convention, reads:

> A court or tribunal having jurisdiction under this section [section II of Part XV of the Convention] shall apply this Convention and other rules of international law not incompatible with this Convention.

53. Article 38 of the Statute reads:

> In addition to the provisions of article 293, the Chamber shall apply:
>
> a) the rules, regulations and procedures of the Authority adopted in accordance with the Convention; and
> b) the terms of contracts concerning activities in the Area in matters relating to those contracts.

54. It should be noted that, in accordance with article 2, paragraph 1, of the 1994 Agreement, the provisions of that Agreement and Part XI of the Convention "shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail".

55. The procedural rules applicable during advisory proceedings before the Chamber are set out in article 40, paragraph 2, of the Statute and section H ("Advisory proceedings") of the Rules, in particular article 130, paragraph 1, thereof.

56. Article 40, paragraph 2, of the Statute reads:

> In the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this Annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable.

Article 130, paragraph 1, of the Rules reads:

> In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.

## VIII. Interpretation

*In general*

57. Among the rules of international law that the Chamber is bound to apply, those concerning the interpretation of treaties play a particularly important role. The applicable rules are set out in Part III, Section 3 entitled "Interpretation of Treaties" and comprising articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (hereinafter "the Vienna Convention"). These rules are to be considered as reflecting customary international law. Although the Tribunal has never stated this view explicitly, it has done so implicitly by borrowing the terminology and approach of the Vienna Convention's articles on interpretation (see the Tribunal's Judgment of 23 December 2002 in the *"Volga" Case* (*ITLOS Reports 2002*, p. 10, at paragraph 77). The ICJ and other international courts and tribunals have stated this view on a number of occasions (see, for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at paragraph 41; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at paragraph 23; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12, at paragraph 83; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010*, paragraphs 64-65*; Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Arbitral Tribunal, Award of 14 February 1985, UNRIAA, vol. XIX,* pp. 149-196, 25 ILM (1986), p. 252, at paragraph 41; *United States-Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body* (WT/DS2/AB/R), adopted by the Dispute Settlement Body of the World Trade Organization on 20 May 1996, *DSR 1996:I*, p. 3, at pp. 15-16).

58. In light of the foregoing, the rules of the Vienna Convention on the interpretation of treaties apply to the interpretation of provisions of the Convention and the 1994 Agreement.

59. The Chamber is also required to interpret instruments that are not treaties and, in particular, the Regulations adopted by the Authority, namely, the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area of 2000 (hereinafter "the Nodules Regulations"), and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area of 2010 (hereinafter "the Sulphides Regulations").

60. The fact that these instruments are binding texts negotiated by States and adopted through a procedure similar to that used in multilateral conferences permits the Chamber to consider that the interpretation rules set out in the Vienna Convention may, by analogy, provide guidance as to their interpretation. In the specific case before the Chamber, the analogy is strengthened because of the close connection between these texts and the Convention. The ICJ seems to have adopted a similar approach when it states in its advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, that the rules on interpretation of the Vienna Convention "may provide guidance" as regards the interpretation of resolutions of the United Nations Security Council (ICJ, 22 July 2010, paragraph 94).

*Multilingual international instruments*

61. In interpreting the provisions of the Convention, it should be borne in mind that it is a multilingual treaty: the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic (article 320 of the Convention). It should also be noted that these six languages are also official languages of the Council and that the Regulations of the Authority, as well as the decision of the Council containing the questions submitted to the Chamber, were adopted in those languages with the original in English.

62. The relevant provision to be considered in the present context is article 33, paragraph 4, of the Vienna Convention. According to this provision, where no particular text prevails according to the treaty and where "a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

63. An examination of the relevant provisions of the Convention reveals that the terminology used in the different language versions corresponds to the objective stated by the Drafting Committee of the Third United Nations

Conference on the Law of the Sea, namely, "to improve linguistic concordance, to the extent possible, and to achieve juridical concordance in all cases" (Report of the Chairman of the Drafting Committee, 2 March 1981, A/CONF.62/L.67/Rev.1, in Third United Nations Conference on the Law of the Sea, Official Records, vol. XV, p.145, at paragraph 8). There are certain inconsistencies in the terminology used within the same language version and as between language versions. In the view of the Chamber, there is, however, no difference of meaning between the authentic texts of the relevant provisions of the Convention. A comparison between the terms used in these provisions of the Convention is nonetheless useful in clarifying their meaning.

*Meaning of key terms*

64. The meaning of the term "responsibility" as used in the English text of article 139, paragraphs 1 and 2; article 235, paragraph 1; and Annex III, article 4, paragraph 4, of the Convention ("States Parties shall have the responsibility to ensure"; "States are responsible for the fulfilment"; "States shall . . . have the responsibility to ensure") does not correspond to the meaning of the same term in article 304 of the Convention ("responsibility and liability for damage") and Annex III, article 22, of the Convention ("responsibility or liability for any damage").

65. In article 139, article 235, paragraph 1, and Annex III, article 4, paragraph 4, of the Convention, the term "responsibility" means "obligation". This emerges not only from the context of the aforementioned articles, but also from a comparison with other linguistic versions. The Spanish text uses the expression "*estarán obligados*" and the French text uses the more indirect but equally explicit expression "*il incombe de*". Similarly, the Arabic text uses the expression "تكون ملزمة". The Chinese text uses the term "义务" and the Russian text the term "обязательство".

66. In the view of the Chamber, in the provisions cited in the previous paragraph, the term "responsibility" refers to the primary obligation whereas the term "liability" refers to the secondary obligation, namely, the consequences of a breach of the primary obligation. Notwithstanding their apparent similarity to the English term "responsibility", the French term "*responsabilité*" and the Spanish term "*responsabilidad*", respectively, indicate also the consequences of the breach of the primary obligation. The same applies to the Arabic term "مسؤولية", the Chinese term "责任" and the Russian term

"ответственность". The fact that the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "the ILC Articles on State Responsibility"), adopted in 2001, give the term "responsibility" a meaning corresponding to "*responsabilité*", "*responsabilidad*", "مسؤولية", "责任" and "ответственность" may create confusion, which can be avoided by comparing the English text of article 139, article 235, and Annex III, article 4, paragraph 4, of the Convention with the other language versions.

67. It should be further observed that in article 235, paragraph 3, and Annex III, article 22, of the Convention, the English version of which uses the terms "responsibility and liability" together, the term "responsibility" has the same meaning as in the ILC Articles on State Responsibility. This is clear from a comparison of the English version with the French and Spanish versions, which use only the term "*responsabilité*" and "*responsabilidad*". Similarly, the Arabic, Chinese and Russian versions use the term "مسؤولية", "责任" and "ответственность", respectively.

68. This analysis of the terms used in the provisions of the Convention provides a basis for determining their meaning as used in the three Questions.

69. Thus, in Question 1, the expression "legal responsibilities and obligations" refers to primary obligations, that is, to what sponsoring States are obliged to do under the Convention.

70. In Question 2, the English term "liability" refers to the consequences of a breach of the sponsoring State's obligations.

71. In Question 3, as in Question 1, "responsibility" means "obligation". The terms "*responsabilité*" and "*responsabilidad*", used, respectively, in the French and Spanish versions of Question 3, are translations of the English term "responsibility" and were apparently introduced for the sake of uniformity. However, in light of the English version and of the terminology used in the French and Spanish versions of article 139 of the Convention, the meaning intended is that of "obligation". Similarly, the Arabic, Chinese and Russian versions of Question 3 use the term "مسؤولية", "义务" and "обязательство", respectively.

## Question 1

72. The first question submitted to the Chamber is as follows:

*What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?*

73. This question concerns the obligations of sponsoring States. Before examining the provisions of the Convention, the 1994 Agreement as well as the Nodules Regulations and the Sulphides Regulations (hereinafter "the Convention and related instruments"), the Chamber must determine the meaning of two of the terms used in the Question, namely: "sponsorship" and "activities in the Area".

## I. Sponsorship

74. The notion of "sponsorship" is a key element in the system for the exploration and exploitation of the resources of the Area set out in the Convention. Article 153, paragraph 2, of the Convention describes the "parallel system" of exploration and exploitation activities indicating that such activities shall be carried out by the Enterprise, and, in association with the Authority, by States Parties or state enterprises or natural or juridical persons. It further states that, in order to be eligible to carry out such activities, natural and juridical persons must satisfy two requirements. First, they must be either nationals of a State Party or effectively controlled by it or its nationals. Second, they must be "sponsored by such States". Article 153, paragraph 2(b), of the Convention makes the requirement of sponsorship applicable also to state enterprises.

75. The purpose of requiring the sponsorship of applicants for contracts for the exploration and exploitation of the resources of the Area is to achieve the result that the obligations set out in the Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of domestic legal systems. This result is obtained through the provisions of the Authority's Regulations that apply to such entities and through the implementation by the sponsoring States of their obligations under the Convention and related instruments.

76. The role of the sponsoring State, as set out in the Convention, contributes to the realization of the common interest of all States in the proper application of the principle of the common heritage of mankind which requires faithful compliance with the obligations set out in Part XI. The common-interest role of the sponsoring State is further confirmed by its obligation, set out in article 153, paragraph 4, of the Convention, to "assist" the Authority, which, as stated in article 137, paragraph 2, of the Convention, acts on behalf of mankind.

77. The connection between States Parties and domestic law entities required by the Convention is twofold, namely, that of nationality and that of effective control. All contractors and applicants for contracts must secure and maintain the sponsorship of the State or States of which they are nationals. If another State or its nationals exercises effective control, the sponsorship of that State is also necessary. This is provided for in Annex III, article 4, paragraph 3, of the Convention and confirmed in regulation 11, paragraph 2, of the Nodules Regulations and of the Sulphides Regulations.

78. No provision of the Convention imposes an obligation on a State Party to sponsor an entity that holds its nationality or is controlled by it or by its nationals. As the Convention does not consider the links of nationality and effective control sufficient to obtain the result that the contractor conforms with the Convention and related instruments, it requires a specific act emanating from the will of the State or States of nationality and of effective control. Such act consists in the decision to sponsor.

79. As subjects of international law, States Parties engaged in deep seabed mining under the Convention are directly bound by the obligations set out therein. Consequently, there is no reason to apply to them the requirement of sponsorship. Article 153, paragraph 2(b), of the Convention as well as the identical regulation 11, paragraph 1, of the Nodules Regulations and the Sulphides Regulations confirm that the requirement of sponsorship does not apply to States. This point is further supported by Annex III, article 4, paragraph 5, of the Convention which reads as follows: "The procedures for assessing the qualifications of States Parties which are applicants shall take into account their character as States".

80. The practice of the Authority, however, indicates that at least two contractor States, when applying for a contract, considered it necessary to submit to the Authority documents of sponsorship.

81. It may also be noted that all but one of the existing contractors, as "registered pioneer investors" under the provisional system set out in Resolution II of the Third United Nations Conference on the Law of the Sea,

obtained their contracts for exploration through the simplified procedure set out in section 1, paragraph 6(a)(ii) of the Annex to the 1994 Agreement. As "certifying States" under paragraph 1(c) of Resolution II, they stand in the same relationship to a pioneer investor as would a sponsoring State stand to a contractor pursuant to Annex III, article 4, of the Convention.

## II. "Activities in the Area"

82. Question 1 concerns the responsibilities and obligations of sponsoring States in respect of "activities in the Area". This expression is defined in article 1, paragraph 1 (3), of the Convention as "all activities of exploration for, and exploitation of, the resources of the Area". According to article 133 (a) of the Convention, for the purposes of Part XI, the term "resources" means "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules". The two definitions, however, do not indicate what is meant by "exploration" and "exploitation". It is important to note that according to article 133 (b), "resources, when recovered from the Area, are referred to as 'minerals'".

83. Some indication of the meaning of the term "activities in the Area" may be found in Annex IV, article 1, paragraph 1, of the Convention. It reads as follows:

> The Enterprise is the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2(a), as well as the transporting, processing and marketing of minerals recovered from the Area.

84. This provision distinguishes "activities in the Area" which the Enterprise carries out directly pursuant to article 153, paragraph 2(a), of the Convention, from other activities with which the Enterprise is entrusted, namely, the transporting, processing and marketing of minerals recovered from the Area. Consequently, the latter activities are not included in the notion of "activities in the Area" referred to in Annex IV, article 1, paragraph 1, of the Convention.

85. Article 145 of the Convention, which prescribes the taking of "[n]ecessary measures . . . with respect to activities in the Area to ensure

effective protection for the marine environment from harmful effects which may arise from such activities", indicates the activities in respect of which the Authority should adopt rules, regulations and procedures. These activities include: "drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities". In the view of the Chamber, these activities are included in the notion of "activities in the Area".

86. Annex III, article 17, paragraph 2(f), of the Convention, which sets out the criteria for the rules, regulations and procedures concerning protection of the marine environment to be drawn up by the Authority gives further useful indications of what is included in the notion of "activities in the Area". The provision reads as follows:

> Rules, regulations and procedures shall be drawn up in order to secure effective protection of the marine environment from harmful effects directly resulting from activities in the Area or from shipboard processing immediately above a mine site of minerals derived from that mine site, taking into account the extent to which such harmful effects may directly result from drilling, dredging, coring and excavation and from disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents.

87. The provisions considered in the preceding paragraphs confirm that processing and transporting as mentioned in Annex IV, article 1, paragraph 1, of the Convention are excluded from the notion of "activities in the Area". They set out lists of activities whose harmful effects are indicated as directly resulting from such activities. These lists may be seen as an indication of what the Convention considers as included in the notion of "activities in the Area". These activities include: drilling, dredging, coring, and excavation; disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents; and construction and operation or maintenance of installations, pipelines and other devices related to such activities.

88. Under Annex III, article 17, paragraph 2(f), of the Convention, "shipboard processing immediately above a mine site of minerals derived from that mine site" is to be considered as included in "activities in the Area". As the aforementioned list of activities refers without distinction to the harmful effects resulting directly from "activities in the Area" and from "shipboard processing", the two are to be seen as part of the same kind of activities.

89. The Nodules Regulations and the Sulphides Regulations define "exploration" and "exploitation" in the context of polymetallic nodules and polymetallic sulphides, respectively. According to regulation 1, paragraph 3(b) and (a), of the Nodules Regulations:

> "Exploration" means searching for deposits of polymetallic nodules in the Area with exclusive rights, the analysis of such deposits, the testing of collecting systems and equipment, processing facilities and transportation systems, and the carrying out of studies of the environmental, technical, economic, commercial and other appropriate factors that must be taken into account in exploitation.
>
> "Exploitation" means the recovery for commercial purposes of polymetallic nodules in the Area and the extraction of minerals therefrom, including the construction and operation of mining, processing and transportation systems for the production and marketing of metals.

90. The same definitions are set out in regulation 1, paragraph 3(b) and (a), of the Sulphides Regulations.

91. These provisions of the Nodules Regulations and the Sulphides Regulations include in the notion of exploration the testing of processing facilities and transportation systems and in that of exploitation the construction and operation of processing and transportation systems.

92. The scope of "exploration" and "exploitation" as defined in the Regulations seems broader than the "activities in the Area" envisaged in Annex IV, article 1, paragraph 1, and in article 145 and Annex III, article 17, paragraph 2 (f), of the Convention. Processing and transportation are included in the notion of exploration and exploitation of the Regulations, but not in that of "activities in the Area" in the provision of Annex IV of the Convention, which has just been cited.

93. The difference in scope of "activities in the Area" in the provisions of the Convention and in the Nodules Regulations and the Sulphides Regulations makes it necessary to examine the relevant provisions within the broader framework of the Convention. It would seem preferable to consider that the meaning of "activities in the Area" in articles 139 and Annex III, article 4, paragraph 4, of the Convention is consistent with that of article 145 and Annex III, article 17, paragraph 2(f), and Annex IV, article 1, paragraph 1, rather than with that of "exploration" and "exploitation" in the two Regulations. The aforementioned articles of the Convention and of Annexes III and IV, all

belong to the same legal instrument. They were negotiated by the same parties and adopted at the same time. It therefore seems reasonable to assume that the meaning of an expression (or the exclusion of certain activities from the scope of that expression) in one provision also applies to the others. The Regulations are instruments subordinate to the Convention, which, if not in conformity with it, should be interpreted so as to ensure consistency with its provisions. They may, nevertheless be used to clarify and supplement certain aspects of the relevant provisions of the Convention.

94. In light of the above, the expression "activities in the Area", in the context of both exploration and exploitation, includes, first of all, the recovery of minerals from the seabed and their lifting to the water surface.

95. Activities directly connected with those mentioned in the previous paragraph such as the evacuation of water from the minerals and the preliminary separation of materials of no commercial interest, including their disposal at sea, are deemed to be covered by the expression "activities in the Area". "Processing", namely, the process through which metals are extracted from the minerals and which is normally conducted at a plant situated on land, is excluded from the expression "activities in the Area". This is confirmed by the wording of Annex IV, article 1, paragraph 1, of the Convention as well as by information provided by the Authority at the request of the Chamber.

96. Transportation to points on land from the part of the high seas superjacent to the part of the Area in which the contractor operates cannot be included in the notion of "activities in the Area", as it would be incompatible with the exclusion of transportation from "activities in the Area" in Annex IV, article 1, paragraph 1, of the Convention. However, transportation within that part of the high seas, when directly connected with extraction and lifting, should be included in activities in the Area. In the case of polymetallic nodules, this applies, for instance, to transportation between the ship or installation where the lifting process ends and another ship or installation where the evacuation of water and the preliminary separation and disposal of material to be discarded take place. The inclusion of transportation to points on land could create an unnecessary conflict with provisions of the Convention such as those that concern navigation on the high seas.

97. One consequence of the exclusion of water evacuation and disposal of material from "activities in the Area" would be that the activities conducted by the contractor which are among the most hazardous to the environment would be excluded from those to which the responsibilities of the sponsoring State apply. This would be contrary to the general obligation of States Parties, under article 192 of the Convention, "to protect and preserve the marine environment".

## III. Prospecting

98. "Prospecting", although mentioned in Annex III, article 2, of the Convention and in the Nodules Regulations and the Sulphides Regulations, is not included in the Convention's definition of "activities in the Area" because the Convention and the two Regulations distinguish it from "exploration" and from "exploitation". Moreover, under the Convention and related instruments, prospecting does not require sponsorship. In conformity with the questions submitted to it, which relate to "activities in the Area" and to sponsoring States, the Chamber will not address prospecting activities. However, considering that prospecting is often treated as the preliminary phase of exploration in mining practice and legislation, the Chamber considers it appropriate to observe that some aspects of the present Advisory Opinion may also apply to prospecting.

## IV. Responsibilities and obligations

*Key provisions*

99. The key provisions concerning the obligations of the sponsoring States are: article 139, paragraph 1; article 153, paragraph 4 (especially the last sentence); and Annex III, article 4, paragraph 4, of the Convention (especially the first sentence).

100. These provisions read:

> Article 139, paragraph 1
> States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

Article 153, paragraph 4
The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3. States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.

Annex III, article 4, paragraph 4
The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention. A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

101. A perusal of these three provisions reveals that article 139 plays a central role, as it is referred to both in article 153, paragraph 4, and in Annex III, article 4, paragraph 4, of the Convention. While Annex III, article 4, paragraph 4, of the Convention refers to sponsoring States, articles 139, paragraph 1, and 153, paragraph 4, of the Convention do not do so explicitly. However, since the entities which conduct activities in the Area mentioned in article 139, paragraph 1, of the Convention can do so only when there is a State Party sponsoring them, all three provisions must be read as referring to sponsoring States.

102. It is important to note that the last sentence of article 153, paragraph 4, of the Convention places the obligation of the sponsoring State in relationship with the obligations of the Authority by stating that the former has the obligation to "assist" the latter. As will be seen in the reply to Question 2, the subordinate role of the sponsoring State is reflected in Annex III, article 22, of the Convention, in which the liability of the contractor and of the Authority is mentioned while that of the sponsoring State is not (see paragraph 199).

*Obligations of the contractor whose compliance the sponsoring State must ensure*

103. The three provisions mentioned in paragraph 100 specify that the obligation (responsibility) of the sponsoring State is "to ensure" that the "activities in the Area" conducted by the sponsored contractor are "in conformity" or in "compliance" with the rules to which they refer.

104. These rules are referred to as "this Part" (Part XI) in article 139 of the Convention, as "the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3" in article 153, paragraph 4, of the Convention, and as "the terms of its contract and its obligations under this Convention" in Annex III, article 4, paragraph 4, of the Convention.

105. The difference between the references contained in articles 139 and 153 of the Convention, cited in the previous paragraphs, is only one of drafting. The reference to Part XI in article 139 of the Convention includes Annexes III and IV. In the view of the Chamber, this reference also includes the rules, regulations and procedures of the Authority and the contracts (or plans of work) for exploration and exploitation, which are based on Part XI and the relevant Annexes thereto.

106. The reference to the contractor's "obligations under this Convention" in Annex III, article 4, paragraph 4, would seem to be broader than the references in articles 139 and 153 of the Convention. This difference would be relevant if there were obligations of sponsored contractors set out in parts of the Convention other than Part XI and the annexes thereto, the rules, regulations and procedures of the Authority, or the relevant contracts. As this is not the case, it would appear that the scope of the obligations of sponsored contractors, although indicated differently in the three key provisions of the Convention referred to in paragraph 100, is in fact substantially the same.

*"Responsibility to ensure"*

107. The central issue in relation to Question 1 concerns the meaning of the expression "responsibility to ensure" in article 139, paragraph 1, and Annex III, article 4, paragraph 4, of the Convention.

108. "Responsibility to ensure" points to an obligation of the sponsoring State under international law. It establishes a mechanism through which the rules of the Convention concerning activities in the Area, although being treaty

law and thus binding only on the subjects of international law that have accepted them, become effective for sponsored contractors which find their legal basis in domestic law. This mechanism consists in the creation of obligations which States Parties must fulfil by exercising their power over entities of their nationality and under their control.

109. As will be seen in greater detail in the reply to Question 2, a violation of this obligation entails "liability". However, not every violation of an obligation by a sponsored contractor automatically gives rise to the liability of the sponsoring State. Such liability is limited to the State's failure to meet its obligation to "ensure" compliance by the sponsored contractor.

110. The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence".

111. The notions of obligations "of due diligence" and obligations "of conduct" are connected. This emerges clearly from the Judgment of the ICJ in the *Pulp Mills on the River Uruguay:* "An obligation to adopt regulatory or administrative measures . . . and to enforce them is an obligation of conduct. Both parties are therefore called upon, under article 36 [of the Statute of the River Uruguay], to exercise due diligence in acting through the [Uruguay River] Commission for the necessary measures to preserve the ecological balance of the river" (paragraph 187 of the Judgment).

112. The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1).

113. An example may be found in article 194, paragraph 2, of the Convention which reads: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment . . .".

114. The nature of the obligation to "ensure" in article 139 of the Convention and in the other provisions mentioned in paragraph 100 appears even more clearly in light of the French and Spanish texts of article 139 of the Convention. They use respectively the expression "il incombe aux Etats Parties de veiller à . . ." and "los Estados Partes estarán obligados a velar". "Veiller à" and "velar" point out, even more clearly than "ensure", the idea of exercising diligence. The Arabic text uses the expression "بضمان تكون الدول الأطراف ملزمة", the Chinese text uses the expression "缔约国应有责任确保" and the Russian text uses the expression "Государства-участники обязуются обеспечивать", which point in the same direction.

115. In its Judgment in the *Pulp Mills on the River Uruguay case*, the ICJ illustrates the meaning of a specific treaty obligation that it had qualified as "an obligation to act with due diligence" as follows:

> It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators . . . (Paragraph 197)

116. Similar indications are given by the International Law Commission in its Commentary to article 3 of its Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted in 2001. According to article 3, the State of origin of the activities involving a risk of causing transboundary harm "shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof". The Commentary states:

> The obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not

possible to do so. In that eventuality, the State of origin is required . . . to exert its best possible efforts to minimize the risk. In this sense, it does not guarantee that the harm would not occur. (Paragraph 7)

*The content of the "due diligence" obligation to ensure*

117. The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. As regards activities in the Area, it seems reasonable to state that prospecting is, generally speaking, less risky than exploration activities which, in turn, entail less risk than exploitation. Moreover, activities in the Area concerning different kinds of minerals, for example, polymetallic nodules on the one hand and polymetallic sulphides or cobalt rich ferromanganese crusts on the other, may require different standards of diligence. The standard of due diligence has to be more severe for the riskier activities.

118. Article 153, paragraph 4, last sentence, of the Convention states that the obligation of the sponsoring State in accordance with article 139 of the Convention entails "taking all measures necessary to ensure" compliance by the sponsored contractor. Annex III, article 4, paragraph 4, of the Convention makes it clear that sponsoring States' "responsibility to ensure" applies "within their legal systems". With these indications the Convention provides some elements concerning the content of the "due diligence" obligation to ensure. Necessary measures are required and these must be adopted within the legal system of the sponsoring State.

119. Further light on the expression "measures necessary to ensure" is shed by the Convention if one considers article 139, paragraph 2, last sentence, and Annex III, article 4, paragraph 4, last sentence, of the Convention. The main purpose of these provisions is to exempt sponsoring States that have taken certain measures from liability for damage. The description of the measures to be taken by that State may also be used to clarify its "due diligence" obligation. This description remains in general terms in article 139, paragraph 2, of the Convention which mentions "all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4". The latter provision is more specific as it requires the sponsoring State to adopt "laws and regulations" and to take "administrative

measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction".

120. More specific indications concerning the content of these measures, including aspects relating to their enforcement, with respect to the contents of these measures will be provided in the reply to Question 3. As regards Question 1, it has been established that the "due diligence" obligation "to ensure" requires the sponsoring State to take measures within its legal system and that the measures must be "reasonably appropriate".

## V. Direct obligations of sponsoring States

121. The obligations of sponsoring States are not limited to the due diligence "obligation to ensure". Under the Convention and related instruments, sponsoring States also have obligations with which they have to comply independently of their obligation to ensure a certain behaviour by the sponsored contractor. These obligations may be characterized as "direct obligations".

122. Among the most important of these direct obligations incumbent on sponsoring States are: the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments. These obligations will be examined in paragraphs 124-150.

123. It must nevertheless be stated, at the outset, that compliance with these obligations can also be seen as a relevant factor in meeting the due diligence "obligation to ensure" and that the said obligations are in most cases couched as obligations to ensure compliance with a specific rule.

*The obligation to assist the Authority*

124. Pursuant to the last sentence of article 153, paragraph 4, of the Convention, sponsoring States have the obligation to assist the Authority in its task of controlling activities in the Area for the purpose of ensuring compliance with the relevant provisions of Part XI of the Convention and related instruments. This obligation is to be met "by taking all measures necessary to ensure such compliance in accordance with article 139". The obligation of the sponsoring States is a direct one, but it is to be met through compliance with the "due diligence obligation" set out in article 139 of the Convention.

*Precautionary approach*

125. The Nodules Regulations and the Sulphides Regulations contain provisions that establish a direct obligation for sponsoring States. This obligation is relevant for implementing the "responsibility to ensure" that sponsored contractors meet the obligations set out in Part XI of the Convention and related instruments. These are regulation 31, paragraph 2, of the Nodules Regulations and regulation 33, paragraph 2, of the Sulphides Regulations, both of which state that sponsoring States (as well as the Authority) "shall apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration" in order "to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area".

126. Principle 15 of the 1992 Rio Declaration on Environment and Development (hereinafter "the Rio Declaration") reads:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

127. The provisions of the aforementioned Regulations transform this non-binding statement of the precautionary approach in the Rio Declaration into a binding obligation. The implementation of the precautionary approach as defined in these Regulations is one of the obligations of sponsoring States.

128. It should be noted that while the first sentence of Principle 15 seems to refer in general terms to the "precautionary approach", the second sentence limits its scope to threats of "serious or irreversible damage" and to "cost-effective" measures adopted in order to prevent "environmental degradation".

129. Moreover, by stating that the precautionary approach shall be applied by States "according to their capabilities", the first sentence of Principle 15 introduces the possibility of differences in application of the precautionary approach in light of the different capabilities of each State (see paragraphs 151-163).

130. The reference to the precautionary approach as set out in the two Regulations applies specifically to the activities envisaged therein, namely, prospecting and exploration for polymetallic nodules and polymetallic sulphides. It is to be expected that the Authority will either repeat or further develop this approach when it regulates exploitation activities and activities concerning other types of minerals.

131. Having established that under the Nodules Regulations and the Sulphides Regulations, both sponsoring States and the Authority are under an obligation to apply the precautionary approach in respect of activities in the Area, it is appropriate to point out that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations. The due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor. This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligation of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach.

132. The link between an obligation of due diligence and the precautionary approach is implicit in the Tribunal's Order of 27 August 1999 in the *Southern Bluefin Tuna Cases (New Zealand* v. *Japan; Australia* v. *Japan*). This emerges from the declaration of the Tribunal that the parties "should in the circumstances act with prudence and caution to ensure that conservation measures are taken . . ." (*ITLOS Reports 1999*, p. 274, at paragraph 77), and is confirmed by the further statements that "there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna"

(paragraph 79) and that "although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency" (paragraph 80).

133. It should be further noted that the Sulphides Regulations, Annex 4, section 5.1, in setting out a "standard clause" for exploration contracts, provides that:

> The Contractor shall take necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area as far as reasonably possible applying a precautionary approach and best environmental practices.

Thus, the precautionary approach (called "principle" in the French text of the standard clause just mentioned) is a contractual obligation of the sponsored contractors whose compliance the sponsoring State has the responsibility to ensure.

134. In the parallel provision of the corresponding standard clauses for exploration contracts in the Nodules Regulations, Annex 4, section 5.1, no reference is made to the precautionary approach. However, under the general obligation illustrated in paragraph 131, the sponsoring State has to take measures within the framework of its own legal system in order to oblige sponsored entities to adopt such an approach.

135. The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the "standard clause" contained in Annex 4, section 5.1, of the Sulphides Regulations. So does the following statement in paragraph 164 of the ICJ Judgment in *Pulp Mills on the River Uruguay* that "a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute" (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties). This statement may be read in light of article 31, paragraph 3(c), of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but "any relevant rules of international law applicable in the relations between the parties".

*Best environmental practices*

136. Moreover, regulation 33, paragraph 2, of the Sulphides Regulations supplements the sponsoring State's obligation to apply the precautionary approach with an obligation to apply "best environmental practices". The same obligation is established as a contractual obligation in section 5.1 of Annex 4 (Standard Clauses for exploration contracts) of the Sulphides Regulations. There is no reference to "best environmental practices" in the Nodules Regulations; their standard contract clause (Annex 4, section 5.1), merely refers to the "best technology" available to the contractor. The adoption of higher standards in the more recent Sulphides Regulations would seem to indicate that, in light of the advancement in scientific knowledge, member States of the Authority have become convinced of the need for sponsoring States to apply "best environmental practices" in general terms so that they may be seen to have become enshrined in the sponsoring States' obligation of due diligence.

137. In the absence of a specific reason to the contrary, it may be held that the Nodules Regulations should be interpreted in light of the development of the law, as evidenced by the subsequent adoption of the Sulphides Regulations.

*Guarantees in the event of an emergency order by the Authority for protection of the marine environment*

138. Another obligation which is directly incumbent on the sponsoring State is set out in regulation 32, paragraph 7, of the Nodules Regulations and in regulation 35, paragraph 8, of the Sulphides Regulations. This obligation arises where the contractor has not provided the Council "with a guarantee of its financial and technical capability to comply promptly with emergency orders or to assure that the Council can take such emergency measures". In such a case, under regulation 32, paragraph 7, of the Nodules Regulations:

> the sponsoring State or States shall, in response to a request by the Secretary-General and pursuant to articles 139 and 235 of the Convention, take necessary measures to ensure that the contractor provides such a guarantee or shall take measures to ensure that assistance is provided to the Authority in the discharge of its responsibilities under paragraph 6.

Regulation 35, paragraph 8, of the Sulphides Regulations contains an identical provision.

*Availability of recourse for compensation*

139. Another direct obligation that gives substance to the sponsoring State's obligation to adopt laws and regulations within the framework of its legal system is set out in article 235, paragraph 2, of the Convention. This provision reads as follows:

> States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

140. This provision applies to the sponsoring State as the State with jurisdiction over the persons that caused the damage. By requiring the sponsoring State to establish procedures, and, if necessary, substantive rules governing claims for damages before its domestic courts, this provision serves the purpose of ensuring that the sponsored contractor meets its obligation under Annex III, article 22, of the Convention to provide reparation for damages caused by wrongful acts committed in the course of its activities in the Area.

## VI. Environmental impact assessment

141. The obligation of the contractor to conduct an environmental impact assessment is explicitly set out in section 1, paragraph 7, of the Annex to the 1994 Agreement as follows: "An application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities . . . ". The sponsoring State is under a due diligence obligation to ensure compliance by the sponsored contractor with this obligation.

142. Regulation 31, paragraph 6, of the Nodules Regulations and regulation 33, paragraph 6, of the Sulphides Regulations establish a direct obligation of the sponsoring State concerning environmental impact assessment, which can also be read as a relevant factor for meeting the sponsoring State's due diligence obligation. This obligation is linked to the direct obligation of assisting the Authority considered at paragraph 124. The abovementioned provisions of the two Regulations read as follows: "[c]ontractors, sponsoring States and other interested States or entities shall cooperate with the Authority in the

establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment". This provision is designed to clarify and ensure compliance with the sponsoring State's obligation to cooperate with the Authority in the exercise of the latter's control over activities in the Area under article 153, paragraph 4, of the Convention, and of its general obligation of due diligence under article 139 thereof. The sponsoring State is obliged not only to cooperate with the Authority in the establishment and implementation of impact assessments, but also to use appropriate means to ensure that the contractor complies with its obligation to conduct an environmental impact assessment.

143. Contractors and sponsoring States must cooperate with the Authority in the establishment of monitoring programmes to evaluate the impact of deep seabed mining on the marine environment, particularly through the creation of "impact reference zones" and "preservation reference zones" (regulation 31, paragraphs 6 and 7, of the Nodules Regulations and regulation 33, paragraph 6, of the Sulphides Regulations). A comparison between environmental conditions in the "impact reference zone" and in the "preservation reference zone" makes it possible to assess the impact of activities in the Area.

144. As clarified in paragraph 10 of the Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, issued by the Authority's Legal and Technical Commission in 2002 pursuant to regulation 38 of the Nodules Regulations (ISBA/7/LTC/1/Rev.1 of 13 February 2002), certain activities require "prior environmental impact assessment, as well as an environmental monitoring programme". These activities are listed in paragraph 10 (a) to (c) of the Recommendations.

145. It should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.

146. As regards the Convention, article 206 states the following:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the

> marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.
> [Article 205 refers to an obligation to publish reports.]

147. With respect to customary international law, the ICJ, in its Judgment in *Pulp Mills on the River Uruguay*, speaks of:

> a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works. (Paragraph 204)

148. Although aimed at the specific situation under discussion by the Court, the language used seems broad enough to cover activities in the Area even beyond the scope of the Regulations. The Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind. Thus, in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to "resource deposits in the Area which lie across limits of national jurisdiction".

149. It must, however, be observed that, in the view of the ICJ, general international law does not "specify the scope and content of an environmental impact assessment" (paragraph 205 of the Judgment in *Pulp Mills on the River Uruguay*). While article 206 of the Convention gives only few indications of this scope and content, the indications in the Regulations, and especially in the Recommendations referred to in paragraph 144, add precision and specificity to the obligation as it applies in the context of activities in the Area.

150. In light of the above, the Chamber is of the view that the obligations of the contractors and of the sponsoring States concerning environmental impact assessments extend beyond the scope of application of specific provisions of the Regulations.

## VII. Interests and needs of developing States

151. With respect to activities in the Area, the fifth preambular paragraph of the Convention states that the achievement of the goals set out in previous preambular paragraphs:

> will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.

152. Accordingly, it is necessary to examine whether developing sponsoring States enjoy preferential treatment as compared with that granted to developed sponsoring States under the Convention and related instruments.

153. Under article 140, paragraph 1, of the Convention:

> Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States . . .

154. According to article 148 of the Convention:

> The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special needs of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.

155. These provisions develop, with respect to activities in the Area, the statement in the fifth preambular paragraph of the Convention.

156. For the purposes of the present Advisory Opinion, and in particular of Question 1, it is important to determine the meaning of article 148 of the Convention. According to this provision, the general purpose of promoting the participation of developing States in activities in the Area taking into account their special interests and needs is to be achieved "as specifically provided for" in Part XI (an expression also found in article 140 of the Convention). This means that there is no general clause for the consideration of such interests and needs beyond what is provided for in specific provisions of Part XI of the Convention. A perusal of Part XI shows immediately that there are several provisions designed to ensure the participation of developing States in activities in the Area and to take into particular consideration their interests and needs.

157. The approach of the Convention to this is particularly evident in the provisions granting a preference to developing States that wish to engage in mining in areas of the deep seabed reserved for the Authority (Annex III, articles 8 and 9, of the Convention); in the obligation of States to promote international cooperation in marine scientific research in the Area in order to ensure that programmes are developed "for the benefit of developing States" (article 143, paragraph 3, of the Convention); and in the obligation of the Authority and of States Parties to promote the transfer of technology to developing States (article 144, paragraph 1, of the Convention and section 5 of the Annex to the 1994 Agreement), and to provide training opportunities for personnel from developing States (article 144, paragraph 2, of the Convention and section 5 of the Annex to the 1994 Agreement); in the permission granted to the Authority in the exercise of its powers and functions to give special consideration to developing States, notwithstanding the rule against discrimination (article 152 of the Convention); and in the obligation of the Council to take "into particular consideration the interests and needs of developing States" in recommending, and approving, respectively, rules regulations and procedures on the equitable sharing of financial and other benefits derived from activities in the Area (articles 160, paragraph 2(f)(i), and 162, paragraph 2(o)(i), of the Convention).

158. However, none of the general provisions of the Convention concerning the responsibilities (or the liability) of the sponsoring State "specifically provides" for according preferential treatment to sponsoring States that are developing States. As observed above, there is no provision requiring the consideration of such interests and needs beyond what is specifically stated in Part

XI. It may therefore be concluded that the general provisions concerning the responsibilities and liability of the sponsoring State apply equally to all sponsoring States, whether developing or developed.

159. Equality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. The spread of sponsoring States "of convenience" would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.

160. These observations do not exclude that rules setting out direct obligations of the sponsoring State could provide for different treatment for developed and developing sponsoring States.

161. As pointed out in paragraph 125, the provisions of the Nodules Regulations and the Sulphides Regulations that set out the obligation for the sponsoring State to apply a precautionary approach in ensuring effective protection of the marine environment refer to Principle 15 of the Rio Declaration. As mentioned earlier, Principle 15 provides that the precautionary approach shall be applied by States "according to their capabilities". It follows that the requirements for complying with the obligation to apply the precautionary approach may be stricter for the developed than for the developing sponsoring States. The reference to different capabilities in the Rio Declaration does not, however, apply to the obligation to follow "best environmental practices" set out, as mentioned above, in regulation 33, paragraph 2, of the Sulphides Regulations.

162. Furthermore, the reference to "capabilities" is only a broad and imprecise reference to the differences in developed and developing States. What counts in a specific situation is the level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical fields.

163. It should be pointed out that the fifth preambular paragraph of the Convention emphasizes that the achievement of the goals of the Convention will "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked". As noted above, article 148 of the Convention speaks about the promotion of the effective participation of developing States in activities in the Area. What is more important is that Annex III,

article 9, paragraph 4, of the Convention specifically refers to the right of a developing State or any natural or juridical person sponsored by it and effectively controlled by it, to inform the Authority that it wishes to submit a plan of work with respect to a reserved area. These provisions have the effect of reserving half of the proposed contract areas in favour of the Authority and developing States. Together with those provisions mentioned in paragraph 157, they require effective implementation with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States. Developing States should receive necessary assistance including training.

## Question 2

164. The second question submitted to the Chamber is as follows:

*What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2(b), of the Convention?*

## I. Applicable provisions

165. In replying to this question, the Chamber will proceed from article 139, paragraph 2, of the Convention, read in conjunction with the second sentence of Annex III, article 4, paragraph 4, of the Convention.

166. Article 139, paragraph 2, of the Convention reads:

> Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all

necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

167. Annex III, article 4, paragraph 4, second sentence, of the Convention states:

> A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

168. The Chamber will further take into account articles 235 and 304 as well as Annex III, article 22, of the Convention. Lastly, it will consider, as appropriate, the relevant rules on liability set out in the Nodules Regulations and the Sulphides Regulations. In this context, the Chamber notes that the Regulations issued to date by the Authority deal only with prospecting and exploration. Considering that the potential for damage, particularly to the marine environment, may increase during the exploitation phase, it is to be expected that member States of the Authority will further deal with the issue of liability in future regulations on exploitation. The Chamber would like to emphasize that it does not consider itself to be called upon to lay down such future rules on liability. The member States of the Authority may, however, take some guidance from the interpretation in this Advisory Opinion of the pertinent rules on the liability of sponsoring States in the Convention.

169. Since article 139, paragraph 2, and article 304 of the Convention refer, respectively, to the "rules of international law" and to "the application of existing rules and the development of further rules regarding responsibility and liability under international law", account will have to be taken of such rules under customary law, especially in light of the ILC Articles on State Responsibility. Several of these articles are considered to reflect customary international law. Some of them, even in earlier versions, have been invoked as such by the Tribunal *(The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at paragraph 171) as well as by the ICJ (for example, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at paragraph 160).

## II. Liability in general

170. At the outset, the Chamber would like to state its understanding of the system of liability in regard to sponsoring States as set out in the Convention and related instruments.

171. Article 139, paragraph 2, of the Convention and the related provisions referred to above, prescribe or refer to different sources of liability, namely, rules concerning the liability of States Parties (article 139, paragraph 2, first sentence, of the Convention), rules concerning sponsoring State liability (article 139, paragraph 2, second sentence, of the Convention), and rules concerning the liability of the contractor and the Authority (referred to in Annex III, article 22, of the Convention). The "without prejudice" clause in the first sentence of article 139, paragraph 2, of the Convention refers to the rules of international law concerning the liability of States Parties and international organizations. A reference to the international law rules on liability is also contained in article 304 of the Convention. The Chamber considers that these rules supplement the rules concerning the liability of the sponsoring State set out in the Convention.

172. From the wording of article 139, paragraph 2, of the Convention, it is evident that liability arises from the failure of the sponsoring State to carry out its own responsibilities. The sponsoring State is not, however, liable for the failure of the sponsored contractor to meet its obligations (see paragraph 182).

173. There is, however, a link between the liability of the sponsoring State and the failure of the sponsored contractor to comply with its obligations, thereby causing damage. An examination of article 139 of the Convention and Annex III, article 4, paragraph 4, second sentence, of the Convention will establish more precisely the link between the damage caused by the contractor and the sponsoring State's liability (see paragraph 181).

174. Whereas the first sentence of article 139, paragraph 2, of the Convention covers the failure of States Parties, including sponsoring States, to carry out their responsibilities in general, the second sentence deals only with the liability of sponsoring States.

## III. Failure to carry out responsibilities

175. The Chamber will now turn to the interpretation of the elements constituting liability as set out in article 139, paragraph 2, of the Convention, read in conjunction with Annex III, article 4, paragraph 4, of the Convention.

176. The wording of article 139, paragraph 2, of the Convention clearly establishes two conditions for liability to arise: the failure of the sponsoring State to carry out its responsibilities (see paragraphs 64 to 71 on the meaning of key terms); and the occurrence of damage.

177. The failure of a sponsoring State to carry out its responsibilities, referred to in article 139, paragraph 2, of the Convention, may consist in an act or an omission that is contrary to that State's responsibilities under the deep seabed mining regime. Whether a sponsoring State has carried out its responsibilities depends primarily on the requirements of the obligation which the sponsoring State is said to have breached. As stated above in the reply to Question 1 (see paragraph 121), sponsoring States have both direct obligations of their own and obligations in relation to the activities carried out by sponsored contractors. The nature of these obligations also determines the scope of liability. Whereas the liability of the sponsoring State for failure to meet its direct obligations is governed exclusively by the first sentence of article 139, paragraph 2, of the Convention, its liability for failure to meet its obligations in relation to damage caused by a sponsored contractor is covered by both the first and second sentences of the same paragraph.

## IV. Damage

178. As stated above, according to the first sentence of article 139, paragraph 2, of the Convention, the failure of a sponsoring State to carry out its responsibilities entails liability only if there is damage. This provision covers neither the situation in which the sponsoring State has failed to carry out its responsibilities but there has been no damage, nor the situation in which there has been damage but the sponsoring State has met its obligations. This constitutes an exception to the customary international law rule on liability since, as stated in the *Rainbow Warrior Arbitration (Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, UNRIAA, 1990, vol. XX*, p. 215, at paragraph 110), and in paragraph 9 of the Commentary to article 2 of the ILC Articles on State Responsibility, a State may be held liable under customary international law even if no material damage results from its failure to meet its international obligations.

179. Neither the Convention nor the relevant Regulations (regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations) specifies what constitutes compensable damage, or which subjects may be entitled to claim compensation. It may be envisaged that the damage in question would include damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment. Subjects entitled to claim compensation may include the Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States.

180. No provision of the Convention can be read as explicitly entitling the Authority to make such a claim. It may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act "on behalf" of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility, which provides:

> Any State other than an injured State is entitled to invoke the responsibility of another State . . . if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.

*Causal link between failure and damage*

181. Article 139, paragraph 2, first sentence, of the Convention refers to "damage caused", which clearly indicates the necessity of a causal link between the damage and the failure of the sponsoring State to meet its responsibilities. The second sentence of article 139, paragraph 2, of the Convention does not mention this causal link. It refers only to a causal link between the activity of the sponsored contractor and the consequent damage. Nevertheless, the Chamber is of the view that, in order for the sponsoring State's liability to arise, there must be a causal link between the failure of that State and the damage caused by the sponsored contractor.

182. Article 139, paragraph 2, of the Convention establishes that sponsoring States are responsible for ensuring that activities in the Area are carried out in conformity with Part XI of the Convention (see paragraph 108). This means

that the sponsoring State's liability arises not from a failure of a private entity but rather from its own failure to carry out its own responsibilities. In order for the sponsoring State's liability to arise, it is necessary to establish that there is damage and that the damage was a result of the sponsoring State's failure to carry out its responsibilities. Such a causal link cannot be presumed and must be proven. The rules on the liability of sponsoring States set out in article 139, paragraph 2, of the Convention and in the related instruments are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility). As explained in the present paragraph, the liability regime established in Annex III to the Convention and related instruments does not provide for the attribution of activities of sponsored contractors to sponsoring States.

183. In the event that no causal link pertaining to the failure of the sponsoring States to carry out their responsibilities and the damage caused can be established, the question arises whether they may nevertheless be held liable under the customary international law rules on State responsibility. This issue is dealt with in paragraphs 208 to 211.

184. For these reasons, the Chamber concludes that the liability of sponsoring States arises from their failure to carry out their own responsibilities and is triggered by the damage caused by sponsored contractors. There must be a causal link between the sponsoring State's failure and the damage, and such a link cannot be presumed.

## V. Exemption from liability

185. The Chamber will now direct its attention to the meaning of the clause "shall not however be liable for damage" in article 139, paragraph 2, second sentence, and in Annex III, article 4, paragraph 4, second sentence, of the Convention.

186. This clause provides for the exemption of the sponsoring State from liability. Its effect is that, in the event that the sponsored contractor fails to comply with the Convention, the Regulations or its contract, and such failure results in damage, the sponsoring State cannot be held liable. The condition for exemption of the sponsoring State from liability is that, as specified in article 139, paragraph 2, of the Convention, it has taken "all necessary and appropriate

measures to secure effective compliance" under article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.

187. It may be pointed out that Annex III, article 4, paragraph 4, of the Convention does not give sponsoring States unlimited discretionary powers concerning the measures to be taken in order to avoid liability. This matter is dealt with in detail in the reply to Question 3.

## VI. Scope of liability under the Convention

188. The Chamber will now deal with the scope of liability under article 139, paragraph 2, second sentence, of the Convention. This requires addressing several issues, namely, the standard of liability, multiple sponsorship, the amount and form of compensation and the relationship between the liability of the contractor and of the sponsoring State.

### *Standard of liability*

189. With regard to the standard of liability, it was argued in the proceedings that the sponsoring State has strict liability, i.e., liability without fault. The Chamber, however, would like to point out that liability for damage of the sponsoring State arises only from its failure to meet its obligation of due diligence. This rules out the application of strict liability.

### *Multiple sponsorship*

190. According to Annex III, article 4, paragraph 3, of the Convention, in certain situations, applicants for contracts of exploration or exploitation may require the sponsorship of more than one State Party. This occurs when the applicant holds more than one nationality or where it holds the nationality of one State and is controlled by another State or by nationals of another State.

191. Neither article 139, paragraph 2, nor Annex III, article 4, paragraph 4, of the Convention, indicates how sponsoring States are to share their liability. The Nodules Regulations and the Sulphides Regulations also do not provide guidance in this respect, with an exception as far as the certification of financial viability of the contractor is concerned. Such certification as required under regulation 12, paragraph 5(c), of the Nodules Regulations and under

regulation 13, paragraph 4(c), of the Sulphides Regulations must be provided by the State that controls the applicant. Consequently, in this case, a failure of that State to comply with its obligations entails liability.

192. Apart from the exception mentioned in paragraph 191, the provisions of article 139, paragraph 2, of the Convention and related instruments dealing with sponsorship do not differentiate between single and multiple sponsorship. Accordingly, the Chamber takes the position that, in the event of multiple sponsorship, liability is joint and several unless otherwise provided in the Regulations issued by the Authority.

*Amount and form of compensation*

193. As regards the amount of compensation payable, it is pertinent to refer again to Annex III, article 22, of the Convention, which states, with respect to the Authority and the sponsored contractor, that "[l]iability in every case shall be for the actual amount of damage." In this context, note should be taken of regulation 30 of the Nodules Regulations, the identical regulation 32 of the Sulphides Regulations, and the identical section 16.1 of the Standard Clauses for exploration contracts (Annex 4 to the said Regulations).

194. The obligation for a State to provide for a full compensation or *restituto in integrum* is currently part of customary international law. This conclusion was first reached by the Permanent Court of International Justice in the *Factory of Chorzów* case (*P.C.I.J. Series A, No. 17*, p. 47). This obligation was further reiterated by the International Law Commission. According to article 31, paragraph 1, of the ILC Articles on State Responsibility: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". The Chamber notes in this context that treaties on specific topics, such as nuclear energy or oil pollution, provide for limitations on liability together with strict liability.

195. In the light of the foregoing, it is the view of the Chamber that the provisions concerning liability of the contractor for the actual amount of damage, referred to in paragraph 193, are equally valid with regard to the liability of the sponsoring State.

196. As far as the form of the reparation is concerned, the Chamber wishes to refer to article 34 of the ILC Articles on State Responsibility. It reads:

> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either

singly or in combination, in accordance with the provisions of this chapter.

197. It is the view of the Chamber that the form of reparation will depend on both the actual damage and the technical feasibility of restoring the situation to the *status quo ante*.

198. It should be noted that, according to regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations, the contractor remains liable for damage even after the completion of the exploration phase. In the view of the Chamber, this is equally valid for the liability of the sponsoring State.

*Relationship between the liability of the contractor and of the sponsoring State*

199. Concerning the relationship between the contractor's liability and that of the sponsoring State, attention may be drawn to Annex III, article 22, of the Convention. This provision reads as follows:

> The contractor shall have responsibility or liability for any *damage arising out of wrongful acts* in the conduct of its operations, *account being taken of contributory acts or omissions by the Authority*. Similarly, the Authority shall have responsibility or liability for any *damage arising out of wrongful acts in the exercise of its powers and functions*, including violations under article 168, paragraph 2, *account being taken of contributory acts or omissions by the contractor*. Liability in every case shall be for the actual amount of damage. (Emphasis added)

200. No reference is made in this provision to the liability of sponsoring States. It may therefore be deduced that the main liability for a wrongful act committed in the conduct of the contractor's operations or in the exercise of the Authority's powers and functions rests with the contractor and the Authority, respectively, rather than with the sponsoring State. In the view of the Chamber, this reflects the distribution of responsibilities for deep seabed mining activities between the contractor, the Authority and the sponsoring State.

201. In this context, the question of whether the contractor and the sponsoring State bear joint and several liability was raised in the proceedings. Nothing in the Convention and related instruments indicates that this is the case. Joint and several liability arises where different entities have contributed

to the same damage so that full reparation can be claimed from all or any of them. This is not the case under the liability regime established in article 139, paragraph 2, of the Convention. As noted above, the liability of the sponsoring State arises from its own failure to carry out its responsibilities, whereas the contractor's liability arises from its own non-compliance. Both forms of liability exist in parallel. There is only one point of connection, namely, that the liability of the sponsoring State depends upon the damage resulting from activities or omissions of the sponsored contractor (see paragraph 181). But, in the view of the Chamber, this is merely a trigger mechanism. Such damage is not, however, automatically attributable to the sponsoring State.

202. If the contractor has paid the actual amount of damage, as required under Annex III, article 22, of the Convention, in the view of the Chamber, there is no room for reparation by the sponsoring State.

203. The situation becomes more complex if the contractor has not covered the damage fully. It was pointed out in the proceedings that a gap in liability may occur if, notwithstanding the fact that the sponsoring State has taken all necessary and appropriate measures, the sponsored contractor has caused damage and is unable to meet its liability in full. It was further pointed out that a gap in liability may also occur if the sponsoring State failed to meet its obligations but that failure is not causally linked to the damage. In their written and oral statements, States Parties have expressed different views on this issue. Some have argued that the sponsoring State has a residual liability, that is, the liability to cover the damage not covered by the sponsored contractor although the conditions for a liability of the sponsoring State under article 139, paragraph 2, of the Convention are not met. Other States Parties have taken the opposite position.

204. In the view of the Chamber, the liability regime established by article 139 of the Convention and in related instruments leaves no room for residual liability. As outlined in paragraph 201, the liability of the sponsoring State and the liability of the sponsored contractor exist in parallel. The liability of the sponsoring State arises from its own failure to comply with its responsibilities under the Convention and related instruments. The liability of the sponsored contractor arises from its failure to comply with its obligations under its contract and its undertakings thereunder. As has been established, the liability of the sponsoring State depends on the occurrence of damage resulting from the

failure of the sponsored contractor. However, as noted in paragraph 182, this does not make the sponsoring State responsible for the damage caused by the sponsored contractor.

205. Taking into account that, as shown above in paragraph 203, situations may arise where a contractor does not meet its liability in full while the sponsoring State is not liable under article 139, paragraph 2, of the Convention, the Authority may wish to consider the establishment of a trust fund to compensate for the damage not covered. The Chamber draws attention to article 235, paragraph 3, of the Convention which refers to such possibility.

## VII. Liability of sponsoring States for violation of their direct obligations

206. As stated in paragraph 121, the Convention and related instruments provide for direct obligations of sponsoring States. Liability for violation of such obligations is covered by article 139, paragraph 2, first sentence, of the Convention.

207. In the event of failure to comply with direct obligations, it is not possible for the sponsoring State to claim exemption from liability as article 139, paragraph 2, second sentence, of the Convention does not apply.

## VIII. "Without prejudice" clause

208. The Chamber will now consider the impact of international law on the deep seabed liability regime. Articles 139, paragraph 2, first sentence, and 304 of the Convention, state that their provisions are "without prejudice" to the rules of international law (see paragraph 169). It remains to be considered whether such statement may be used to fill a gap in the liability regime established in Part XI of the Convention and related instruments.

209. As already indicated, if the sponsoring State has not failed to meet its obligations, there is no room for its liability under article 139, paragraph 2, of the Convention even if activities of the sponsored contractor have resulted in damage. A gap in liability which might occur in such a situation cannot be

closed by having recourse to liability of the sponsoring State under customary international law. The Chamber is aware of the efforts made by the International Law Commission to address the issue of damages resulting from acts not prohibited under international law. However, such efforts have not yet resulted in provisions entailing State liability for lawful acts. Here again (see paragraph 205) the Chamber draws the attention of the Authority to the option of establishing a trust fund to cover such damages not covered otherwise.

210. The failure by a sponsoring State to meet its obligations not resulting in material damage is covered by customary international law which does not make damage a requirement for the liability of States. As already stated in paragraph 178, this is confirmed by the ILC Articles on State Responsibility.

211. Lastly, the Chamber would like to point out that article 304 of the Convention refers not only to existing international law rules on responsibility and liability, but also to the development of further rules. The regime of international law on responsibility and liability is not considered to be static. Article 304 of the Convention thus opens the liability regime for deep seabed mining to new developments in international law. Such rules may either be developed in the context of the deep seabed mining regime or in conventional or customary international law.

## Question 3

212. The third question submitted to the Chamber is as follows:

*What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?*

## I. General aspects

213. The focus of Question 3, as of Questions 1 and 2, is on sponsoring States. The Question seeks to find out the "necessary and appropriate measures" that the sponsoring State "must" take in order to fulfil its responsibility

under the Convention, in particular article 139 and Annex III, and the 1994 Agreement. The starting point for this inquiry is article 153 of the Convention, since it introduces for the first time the concept of the sponsoring State and the measures that it must take. Article 153 does not specify the measures to be taken by the sponsoring State. It makes a cross-reference to article 139 of the Convention for guidance in the matter.

214. Article 139, paragraph 2, of the Convention provides that the sponsoring State shall not be liable for damage caused by any failure to comply with Part XI of the Convention by an entity sponsored by it under article 153, paragraph 2(b), of the Convention, "if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4".

215. Article 139, paragraph 2, of the Convention does not specify the measures that are "necessary and appropriate". It simply draws attention to article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention. The relevant part of Annex III, article 4, paragraph 4, reads as follows:

> A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

216. Although the terminology used in these provisions varies slightly, they deal in essence with the same subject matter and convey the same meaning. Annex III, article 4, paragraph 4, of the Convention contains an explanation of the words "necessary and appropriate measures" in article 139, paragraph 2, of the Convention.

217. Under these provisions, in the system of the responsibilities and liability of the sponsoring State, the "necessary and appropriate measures" have two distinct, although interconnected, functions as set out in the Convention. On the one hand, these measures have the function of ensuring compliance by the contractor with its obligations under the Convention and related instruments as well as under the relevant contract. On the other hand, they also have the function of exempting the sponsoring State from liability for damage caused by the sponsored contractor, as provided in article 139, paragraph 2, as well as in Annex III, article 4, paragraph 4, of the Convention. The first of these functions has been illustrated in the reply to Question 1, in

connection with the due diligence obligation of the sponsoring State to ensure compliance by the sponsored contractor, while the second has been partially addressed in the reply to Question 2 and will be further addressed in the following paragraphs.

## II. Laws and regulations and administrative measures

218. Annex III, article 4, paragraph 4, of the Convention requires the sponsoring State to adopt laws and regulations and to take administrative measures. Thus, there is here a stipulation that the adoption of laws and regulations and the taking of administrative measures are necessary. The scope and extent of the laws and regulations and administrative measures required depend upon the legal system of the sponsoring State. The adoption of laws and regulations is prescribed because not all the obligations of a contractor may be enforced through administrative measures or contractual arrangements alone, as specified in paragraphs 223 to 226. Support for the enforcement of contractor's obligations under the domestic law of the sponsoring State is an essential requirement in a number of national jurisdictions. But laws and regulations by themselves may not provide a complete answer in this regard. Administrative measures aimed at securing compliance with them may also be needed. Laws, regulations and administrative measures may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor. They may also provide for the co-ordination between the various activities of the sponsoring State and those of the Authority with a view to eliminating avoidable duplication of work.

219. Since the sponsoring State is responsible for ensuring that the contractor acts in accordance with the terms of the contract and with its obligations under the Convention, that State's laws, regulations and administrative measures should be in force at all times that a contract with the Authority is in force. While the existence of such laws, regulations and administrative measures is not a condition precedent for concluding a contract with the Authority, it is a necessary requirement for compliance with the obligation of due diligence of the sponsoring State and for its exemption from liability.

220. It may be observed in this regard that the Nodules Regulations were approved after the pioneer investors had been registered. In view

of this, certifying States are required, if necessary, to bring their laws, regulations and administrative measures in keeping with the provisions of the Regulations.

221. The national measures to be taken by the sponsoring State should also cover the obligations of the contractor even after the completion of the exploration phase, as provided for in regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations.

222. As already indicated, the national measures, once adopted, may not be appropriate in perpetuity. It is the view of the Chamber that such measures should be kept under review so as to ensure that they meet current standards and that the contractor meets its obligations effectively without detriment to the common heritage of mankind.

## III. Compliance by means of a contract?

223. It is the requirement in Annex III, article 4, paragraph 4, of the Convention, that the measures to be taken by the sponsoring State should be in the form of laws and regulations and administrative measures. This means that a sponsoring State could not be considered as complying with its obligations only by entering into a contractual arrangement, such as a sponsoring agreement, with the contractor. Not only would this be incompatible with the provision referred to above but also with the Convention in general and Part XI thereof in particular.

224. Mere contractual obligations between the sponsoring State and the sponsored contractor may not serve as an effective substitute for the laws and regulations and administrative measures referred to in Annex III, article 4, paragraph 4, of the Convention. Nor would they establish legal obligations that could be invoked against the sponsoring State by entities other than the sponsored contractor.

225. The "contractual" approach would, moreover, lack transparency. It will be difficult to verify, through publicly available measures, that the sponsoring State had met its obligations. A sponsorship agreement may not be publicly available and, in fact, may not be required at all. Annex III of the Convention, and the Nodules Regulations and the Sulphides Regulations contain no requirement that a sponsorship agreement, if any, between the sponsoring States and the contractor should be submitted to the Authority or made publicly available. The only requirement is the submission of a certificate of sponsorship issued by the sponsoring State (regulation 11, paragraph 3(f), of the Nodules Regulations and of the Sulphides Regulations), in which the

sponsoring State declares that it "assumes responsibility in accordance with article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention".

226. As stated above, the role of the sponsoring State is to contribute to the common interest of all States in the proper implementation of the principle of the common heritage of mankind by assisting the Authority and by acting on its own with a view to ensuring that entities under its jurisdiction conform to the rules on deep seabed mining. Contractual arrangements alone cannot satisfy the obligation undertaken by the sponsoring State. The sponsoring State could not claim to be assisting the Authority under article 153, paragraph 4, of the Convention by the mere fact that it had concluded a contract under its domestic law.

## IV. Content of the measures

227. The Convention leaves it to the sponsoring State to determine what measures will enable it to discharge its responsibilities. Policy choices on such matters must be made by the sponsoring State. In view of this, the Chamber considers that it is not called upon to render specific advice as to the necessary and appropriate measures that the sponsoring State must take in order to fulfil its responsibilities under the Convention. Judicial bodies may not perform functions that are not in keeping with their judicial character. Nevertheless, without encroaching on the policy choices a sponsoring State may make, the Chamber deems it appropriate to indicate some general considerations that a sponsoring State may find useful in its choice of measures under articles 139, paragraph 2, 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.

228. What is expected with regard to the responsibility of the sponsoring State in terms of Annex III, article 4, paragraph 4, of the Convention is made clear in the second sentence of the same paragraph. It requires the sponsoring State to adopt laws and regulations and to take administrative measures which are, within the framework of its legal system, "reasonably appropriate" for securing compliance by persons under its jurisdiction. The standard for determining what is appropriate is not open-ended. The measures taken must be "reasonably appropriate". The appropriateness of the measures taken may be justified only if they are agreeable to reason and not arbitrary.

229. The measures to be taken by the sponsoring State must be determined by that State itself within the framework of its legal system. This

determination is, therefore, left to the discretion of the sponsoring State. Annex III, article 4, paragraph 4, of the Convention requires the sponsoring State to put in place laws and regulations and to take administrative measures that are "reasonably appropriate" so that it may be absolved from liability for damage caused by any failure of a contractor sponsored by it to comply with its obligations. The obligation is to act within its own legal system, taking into account, among other things, the particular characteristics of that system.

230. In view of the above, it may be relevant to deal with some general considerations pertaining to the measures to be taken by the sponsoring State. The sponsoring State does not have an absolute discretion with respect to the action it is required to take under Annex III, article 4, paragraph 4, of the Convention. In the sphere of the obligation to assist the Authority acting on behalf of mankind as a whole, while deciding what measures are reasonably appropriate, the sponsoring State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole. It must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole. The need to act in good faith is also underlined in articles 157, paragraph 4, and 300 of the Convention. Reasonableness and non-arbitrariness must remain the hallmarks of any action taken by the sponsoring State. Any failure on the part of the sponsoring State to act reasonably may be challenged before this Chamber under article 187 (b) (i) of the Convention.

231. It may be pertinent to inquire whether there are any restrictions on what a sponsoring State may provide for in its laws and regulations applicable in this regard. Attention may be drawn to Annex III, article 21, paragraph 3, of the Convention. This paragraph reads as follows:

> No State Party may impose conditions on a contractor that are inconsistent with Part XI. However, the application by a State Party to contractors sponsored by it, or to ships flying its flag, of environmental or other laws and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to article 17, paragraph 2(f), of this Annex shall not be deemed inconsistent with Part XI.

232. This provision imposes a general obligation on the sponsoring State not to impose on a contractor conditions that are "inconsistent" with Part XI of the Convention. At the same time, however, it establishes an exception thereto. The exception provides the sponsoring State with the option to apply to contractors sponsored by it, or to ships flying its flag, environmental or other laws

and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to Annex III, article 17, paragraph 2(f ), of the Convention (dealing with protection of the marine environment).

233. While dealing with the obligation of the sponsoring State contained in Annex III, article 21, paragraph 3, of the Convention, account has to be taken of the obligation of the contractor under the legal regime for deep seabed mining and the corresponding obligations of the sponsoring State. According to Annex III, article 4, paragraph 4, of the Convention the contractor shall carry out its activities in the Area "in conformity with" the terms of its contract with the Authority and its obligations under the Convention. The same provision states that it is the responsibility of the sponsoring State to ensure that the contractor carries out this obligation (see paragraph 75).

234. The sponsoring State may find it necessary, depending upon its legal system, to include in its domestic law provisions that are necessary for implementing its obligations under the Convention. These provisions may concern, *inter alia*, financial viability and technical capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for non-compliance by such contractors.

235. Additionally, the Convention itself specifies in various provisions the issues that should be covered by the sponsoring State's laws and regulations. In particular, article 39 of the Statute dealing with enforcement of decisions of the Chamber provides:

> The decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.

Reference may also be made to Annex III, article 21, paragraph 2, of the Convention which provides: "Any final decision rendered by a court or tribunal having jurisdiction under this Convention relating to the rights and obligations of the Authority and of the contractor shall be enforceable in the territory of each State Party". In a number of national jurisdictions, these provisions may require specific legislation for implementation.

236. Other indications may be found in the provisions that establish direct obligations of the sponsoring States (see paragraph 121). These include: the obligations to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments. It is important to stress that these obligations are mentioned only as examples.

237. In this context, the Chamber takes note of the Deep Seabed Mining Law adopted by Germany and of similar legislation adopted by the Czech Republic.

238. While the applicable contract is a contract between the Authority and the contractor only and as such does not bind the sponsoring State, the sponsoring State is nevertheless under an obligation to ensure that the contractor complies with its contract. This means that the sponsoring State must adopt laws and regulations and take administrative measures which do not hinder the contractor in the effective fulfilment of its contractual obligations but rather assist the contractor in that respect.

239. It is inherent in the "due diligence" obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable.

240. Under Annex III, article 21, paragraph 3, of the Convention, the rules, regulations and procedures concerning environmental protection adopted by the Authority are used as a minimum standard of stringency for the environmental or other laws and regulations that the sponsoring State may apply to the sponsored contractor. It is implicit in this provision that sponsoring States may apply to the contractors they sponsor more stringent standards as far as the protection of the marine environment is concerned.

241. Article 209, paragraph 2, of the Convention is based on the same approach. According to this provision, the requirements contained in the laws and regulations that States adopt concerning pollution of the marine environment from activities in the Area "undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority . . . shall be no less effective than the international rules, regulations, and procedures" established under Part XI, which consist primarily of the international rules, regulations and procedures adopted by the Authority.

242. For these reasons,

THE CHAMBER,

1. Unanimously,

***Decides*** **that it has jurisdiction to give the advisory opinion requested.**

2. Unanimously,

***Decides*** **to respond to the request for an advisory opinion.**

3. Unanimously,

***Replies*** **to Question 1 submitted by the Council as follows:**

*Sponsoring States have two kinds of obligations under the Convention and related instruments:*

*A. The obligation to ensure compliance by sponsored contractors with the terms of the contract and the obligations set out in the Convention and related instruments.*

This is an obligation of "due diligence". The sponsoring State is bound to make best possible efforts to secure compliance by the sponsored contractors.

The standard of due diligence may vary over time and depends on the level of risk and on the activities involved.

This "due diligence" obligation requires the sponsoring State to take measures within its legal system. These measures must consist of laws and regulations and administrative measures. The applicable standard is that the measures must be "reasonably appropriate".

*B. Direct obligations with which sponsoring States must comply independently of their obligation to ensure a certain conduct on the part of the sponsored contractors.*

Compliance with these obligations may also be seen as a relevant factor in meeting the "due diligence" obligation of the sponsoring State.

The most important direct obligations of the sponsoring State are:

(a) the obligation to assist the Authority set out in article 153, paragraph 4, of the Convention;
(b) the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in the Nodules Regulations and the Sulphides Regulations; this obligation is also to be considered an integral part of the "due diligence" obligation of the sponsoring State and applicable beyond the scope of the two Regulations;
(c) the obligation to apply the "best environmental practices" set out in the Sulphides Regulations but equally applicable in the context of the Nodules Regulations;
(d) the obligation to adopt measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; and
(e) the obligation to provide recourse for compensation.

The sponsoring State is under a due diligence obligation to ensure compliance by the sponsored contractor with its obligation to conduct an environmental impact assessment set out in section 1, paragraph 7, of the Annex to the 1994 Agreement. The obligation to conduct an environmental impact assessment is also a general obligation under customary law and is set out as a direct obligation for all States in article 206 of the Convention and as an aspect of the sponsoring State's obligation to assist the Authority under article 153, paragraph 4, of the Convention.

Obligations of both kinds apply equally to developed and developing States, unless specifically provided otherwise in the applicable provisions, such as Principle 15 of the Rio Declaration, referred to in the Nodules Regulations and the Sulphides Regulations, according to which States shall apply the precautionary approach "according to their capabilities".

The provisions of the Convention which take into consideration the special interests and needs of developing States should be effectively implemented with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States.

4. Unanimously,

***Replies* to Question 2 submitted by the Council as follows:**

The liability of the sponsoring State arises from its failure to fulfil its obligations under the Convention and related instruments. Failure of the sponsored contractor to comply with its obligations does not in itself give rise to liability on the part of the sponsoring State.

The conditions for the liability of the sponsoring State to arise are:

(a) failure to carry out its responsibilities under the Convention; and
(b) occurrence of damage.

The liability of the sponsoring State for failure to comply with its due diligence obligations requires that a causal link be established between such failure and damage. Such liability is triggered by a damage caused by a failure of the sponsored contractor to comply with its obligations.

The existence of a causal link between the sponsoring State's failure and the damage is required and cannot be presumed.

The sponsoring State is absolved from liability if it has taken "all necessary and appropriate measures to secure effective compliance" by the sponsored contractor with its obligations. This exemption from liability does not apply to the failure of the sponsoring State to carry out its direct obligations.

The liability of the sponsoring State and that of the sponsored contractor exist in parallel and are not joint and several. The sponsoring State has no residual liability.

Multiple sponsors incur joint and several liability, unless otherwise provided in the Regulations of the Authority.

The liability of the sponsoring State shall be for the actual amount of the damage.

Under the Nodules Regulations and the Sulphides Regulations, the contractor remains liable for damage even after the completion of the exploration phase. This is equally valid for the liability of the sponsoring State.

The rules on liability set out in the Convention and related instruments are without prejudice to the rules of international law. Where the

sponsoring State has met its obligations, damage caused by the sponsored contractor does not give rise to the sponsoring State's liability. If the sponsoring State has failed to fulfil its obligation but no damage has occurred, the consequences of such wrongful act are determined by customary international law.

The establishment of a trust fund to cover the damage not covered under the Convention could be considered.

5. Unanimously,

***Replies* to Question 3 submitted by the Council as follows:**

The Convention requires the sponsoring State to adopt, within its legal system, laws and regulations and to take administrative measures that have two distinct functions, namely, to ensure compliance by the contractor with its obligations and to exempt the sponsoring State from liability.

The scope and extent of these laws and regulations and administrative measures depends on the legal system of the sponsoring State.

Such laws and regulations and administrative measures may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor and for co-ordination between the activities of the sponsoring State and those of the Authority.

Laws and regulations and administrative measures should be in force at all times that a contract with the Authority is in force. The existence of such laws and regulations, and administrative measures is not a condition for concluding the contract with the Authority; it is, however, a necessary requirement for carrying out the obligation of due diligence of the sponsoring State and for seeking exemption from liability.

These national measures should also cover the obligations of the contractor after the completion of the exploration phase, as provided for in regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations.

In light of the requirement that measures by the sponsoring States must consist of laws and regulations and administrative measures, the sponsoring State cannot be considered as complying with its obligations only by entering into a contractual arrangement with the contractor.

The sponsoring State does not have absolute discretion with respect to the adoption of laws and regulations and the taking of administrative

measures. It must act in good faith, taking the various options into account in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole.

As regards the protection of the marine environment, the laws and regulations and administrative measures of the sponsoring State cannot be less stringent than those adopted by the Authority, or less effective than international rules, regulations and procedures.

The provisions that the sponsoring State may find necessary to include in its national laws may concern, *inter alia*, financial viability and technical capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for non-compliance by such contractors.

It is inherent in the "due diligence" obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable.

Specific indications as to the contents of the domestic measures to be taken by the sponsoring State are given in various provisions of the Convention and related instruments. This applies, in particular, to the provision in article 39 of the Statute prescribing that decisions of the Chamber shall be enforceable in the territories of the States Parties, in the same manner as judgments and orders of the highest court of the State Party in whose territory the enforcement is sought.

Done in English and French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this first day of February, two thousand and eleven, in three copies, one of which will be placed in the archives of the Tribunal and the others will be sent to the Secretary-General of the International Seabed Authority and to the Secretary-General of the United Nations.

*(signed)* Tullio Treves
President

*(signed)* Philippe Gautier
Registrar

# Annex 65

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# DISPUTE OVER THE STATUS AND USE OF THE WATERS OF THE SILALA

(CHILE *v.* BOLIVIA)

**JUDGMENT OF 1 DECEMBER 2022**

# 2022

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# DIFFÉREND CONCERNANT LE STATUT ET L'UTILISATION DES EAUX DU SILALA

(CHILI c. BOLIVIE)

**ARRÊT DU 1er DÉCEMBRE 2022**

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JUDGMENT

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(CHILI c. BOLIVIE)

1er DÉCEMBRE 2022

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(CHILE *v.* BOLIVIA)

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* *

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*

*Submission* (c)*: Chile's entitlement to its current use of waters of the Silala River system.*

*Claim of Chile regarding "artificially enhanced" parts of the Silala flow initially positively opposed by Bolivia — Parties now agree that Chile has right to use of equitable and reasonable share of waters irrespective of "natural" or "artificial" character or origin of water flow — No claim by Bolivia in these proceedings that Chile owes compensation for past uses of waters of the Silala — Chile not claiming acquired right to current rate of flow and volume of water — Statements by Chile that it is within Bolivia's sovereign powers to dismantle channels and to restore wetlands in its territory — Claim made by Chile in its final submission* (c) *no longer has any object — The Court is therefore not called upon to give decision thereon.*

*

*Submission* (d)*: Bolivia under obligation to take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from its activities in vicinity of the Silala River system.*

*Parties agree that they are bound by customary obligation to prevent significant transboundary harm — Obligation may encompass duty to notify and exchange information, and duty to conduct environmental impact assessment — Contention by*

*Bolivia during written proceedings that obligation to prevent significant transboundary harm only applicable to naturally flowing waters of the Silala — Recognition by Bolivia during oral proceedings that this obligation is applicable to the Silala waters in their entirety — Parties in agreement on threshold for application of obligation of prevention of transboundary harm — Claim made by Chile in its final submission* (d) *no longer has any object — The Court is therefore not called upon to give decision thereon.*

*

*Submission* (e)*: Bolivia under obligation to notify and consult with respect to measures that may have adverse effect on the Silala River system.*

*Disagreement concerning scope of obligation to notify and consult, threshold for its application and whether Bolivia complied with it — The Silala is international watercourse subject in its entirety to customary international law — Right of riparian State under customary international law to equitable and reasonable sharing of resources of international watercourse — Corresponding obligation not to exceed that entitlement by depriving other riparian States of equivalent right to reasonable use and share — Obligation to take all appropriate measures to prevent causing significant harm to other riparian States — Procedural obligations to co-operate, notify and consult as important complement to substantive obligations — Obligation of riparian State under customary international law to notify and consult other riparian State with regard to any planned activity that poses risk of significant harm to latter State — Question of Bolivia's compliance with obligation to notify and consult — Failure of Chile to demonstrate any risk of significant harm linked to measures planned or carried out by Bolivia — Bolivia has not breached obligation to notify and consult — Claim made by Chile in its final submission* (e) *rejected.*

* *

*Counter-claims of Bolivia.*

*Admissibility of Bolivia's counter-claims.*

*Conditions set out in Article 80, paragraph 1, of the Rules of Court — Counter-claim must come within jurisdiction of the Court and be directly connected with subject-matter of claim of other party — The Court's jurisdiction over Bolivia's counter-claims based on Article XXXI of Pact of Bogotá — Counter-claims directly connected with subject-matter of principal claims — Counter-claims not offered merely as defences to Chile's submissions, but set out in separate claims — Bolivia's counter-claims are admissible.*

* *

*First counter-claim: Bolivia's alleged sovereignty over artificial channels and drainage mechanisms installed in its territory.*

*Parties in agreement that Bolivia has sovereign right to construct, maintain or dismantle infrastructure in its territory — That right to be exercised in accordance with applicable rules of customary international law — Bolivia may rely on Chile's acceptance of Bolivia's right to dismantle the channels — No disagreement regarding Bolivia's right to dismantle installations in its territory — The Court may pronounce only on dispute that continues to exist at time of adjudication — Counter-claim made by Bolivia in its final submission* (a) *no longer has any object — The Court is therefore not called upon to give decision thereon.*

*

*Second counter-claim: Bolivia's alleged sovereignty over the "artificial" flow of the Silala waters engineered, enhanced or produced in its territory.*

*Bolivia no longer claims right to determine conditions and modalities for delivery of artificially flowing waters of the Silala — Neither does Bolivia claim that any use of such waters by Chile is subject to Bolivia's consent — Bolivia seeking declaration that Chile does not have acquired right to maintenance of current situation — Statement by Chile that it is not claiming such an "acquired right" — Recognition by Chile that any reduction in flow of waters of the Silala into Chile resulting from dismantlement of infrastructure would not in itself constitute violation by Bolivia of its obligations under customary international law — Counter-claim made by Bolivia in its final submission* (b) *no longer has any object — The Court is therefore not called upon to give decision thereon.*

*

*Third counter-claim: alleged need to conclude agreement between the Parties for any future delivery to Chile of "enhanced flow" of the Silala.*

*Bolivia seeking opinion from the Court on future, hypothetical situation — Not for the Court to pronounce on hypothetical situations — The Court may rule only in connection with concrete cases where actual dispute between the parties exists at time of adjudication — Counter-claim made by Bolivia in its final submission* (c) *rejected.*

## JUDGMENT

*Present:* *President* DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE, CHARLESWORTH; *Judges* ad hoc DAUDET, SIMMA; *Registrar* GAUTIER.

In the case concerning the dispute over the status and use of the waters of the Silala,

*between*

the Republic of Chile,

represented by

H.E. Ms Ximena Fuentes Torrijo, Vice-Minister for Foreign Affairs of the Republic of Chile, Professor of Public International Law, University of Chile,

as Agent, Counsel and Advocate;

Ms Carolina Valdivia Torres, Former Vice-Minister for Foreign Affairs of the Republic of Chile,

as Co-Agent;

H.E. Ms Antonia Urrejola Noguera, Minister for Foreign Affairs of the Republic of Chile,

H.E. Mr. Hernán Salinas Burgos, Ambassador of the Republic of Chile to the Kingdom of the Netherlands,

as National Authorities;

Mr. Alan Boyle, Emeritus Professor of Public International Law, University of Edinburgh, Barrister, Essex Court Chambers, member of the Bar of England and Wales,

Ms Laurence Boisson de Chazournes, Professor of International Law and International Organization, University of Geneva, member of the Institute of International Law,

Ms Johanna Klein Kranenberg, Legal Adviser and General Co-ordinator, Ministry of Foreign Affairs of the Republic of Chile,

Mr. Stephen McCaffrey, Carol Olson Endowed Professor of International Law, University of the Pacific, McGeorge School of Law, former Chair of the International Law Commission,

Mr. Samuel Wordsworth, KC, Barrister, Essex Court Chambers, member of the Bar of England and Wales, member of the Paris Bar,

as Counsel and Advocates;

Ms Mariana Durney, Professor and Head of Department of International Law, Pontificia Universidad Católica de Chile,

Mr. Andrés Jana Linetzky, Professor of Civil Law, University of Chile,

Ms Mara Tignino, Reader, University of Geneva, Lead Legal Specialist of the Platform for International Water Law at the Geneva Water Hub,

Mr. Claudio Troncoso Repetto, Professor and Head of Department of International Law, University of Chile,

Mr. Luis Winter Igualt, former Ambassador of the Republic of Chile, Professor of International Law, Pontificia Universidad Católica de Valparaíso and Universidad de Los Andes,

as Counsel;

Ms Lorraine Aboagye, Barrister, Essex Court Chambers, member of the Bar of England and Wales,

Ms Justine Bendel, Lecturer in Law, University of Exeter, Marie Curie Fellow at the University of Copenhagen,

Ms Marguerite de Chaisemartin, JSD Candidate, University of the Pacific, McGeorge School of Law,
Ms Valeria Chiappini Koscina, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of the Republic of Chile,
Ms María Trinidad Cruz Valdés, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of the Republic of Chile,
Mr. Riley Denoon, JSD Candidate, University of the Pacific, McGeorge School of Law, member of the Bars of the provinces of Alberta and British Columbia,
Mr. Marcelo Meza Peñafiel, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of the Republic of Chile,
Ms Beatriz Pais Alderete, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of the Republic of Chile,

as Legal Advisers;

Mr. Coalter G. Lathrop, Special Adviser, Sovereign Geographic, member of the Bar of the State of North Carolina,

as Scientific Adviser;

Mr. Jaime Moscoso Valenzuela, Minister Counsellor, Embassy of the Republic of Chile in the Kingdom of the Netherlands,
Mr. Hassán Zeran Ruiz-Clavijo, First Secretary, Embassy of the Republic of Chile in the Kingdom of the Netherlands,
Ms María Fernanda Vila Pierart, First Secretary, Embassy of the Republic of Chile in the Kingdom of the Netherlands,
Mr. Diego García González, Second Secretary, Embassy of the Republic of Chile in the Kingdom of the Netherlands,
Ms Josephine Schiphorst, Executive Assistant to the Ambassador, Embassy of the Republic of Chile in the Kingdom of the Netherlands,
Ms Devon Burkhalter, Farm Press Creative,
Mr. David Swanson, Swanson Land Surveying,

as Assistant Advisers,

*and*

the Plurinational State of Bolivia,

represented by

H.E. Mr. Roberto Calzadilla Sarmiento, Ambassador of the Plurinational State of Bolivia to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Rogelio Mayta Mayta, Minister for Foreign Affairs of the Plurinational State of Bolivia,
Mr. Freddy Mamani Laura, President of the Chamber of Deputies of the Plurinational State of Bolivia,
Ms Trinidad Rocha Robles, President of the International Policy Commission of the Chamber of Senators of the Plurinational State of Bolivia,

Mr. Antonio Colque Gabriel, President of the Commission for International Policy and Protection for Migrants of the Chamber of Deputies of the Plurinational State of Bolivia,
H.E. Mr. Freddy Mamani Machaca, Vice-Minister for Foreign Affairs of the Plurinational State of Bolivia,
Mr. Marcelo Bracamonte Dávalos, General Adviser to the Minister for Foreign Affairs of the Plurinational State of Bolivia,

as National Authorities;

Mr. Alain Pellet, Professor Emeritus of the University Paris Nanterre, former Chairman of the International Law Commission, President of the Institut de droit international,
Mr. Rodman R. Bundy, former *avocat à la cour d'appel de Paris*, member of the Bar of the State of New York, partner, Squire Patton Boggs LLC, Singapore,
Mr. Mathias Forteau, Professor, University Paris Nanterre, member of the International Law Commission,
Mr. Gabriel Eckstein, Professor of Law, Texas A&M University, member of the Bar of the State of New York and the Bar of the District of Columbia,

as Counsel and Advocates;

Mr. Emerson Calderón Guzmán, Professor of Public International Law, Universidad Mayor de San Andrés and Secretary-General of the Strategic Directorate for Maritime Claims, Silala and International Water Resources (DIREMAR),
Mr. Francesco Sindico, Associate Professor of International Environmental Law, University of Strathclyde Law School, Glasgow, and Chairman of the IUCN World Commission on Environmental Law Climate Change Law Specialist Group,
Ms Laura Movilla Pateiro, Associate Professor of Public International Law, University of Vigo,
Mr. Edgardo Sobenes, Consultant in International Law (ESILA),
Ms Héloïse Bajer-Pellet, member of the Paris Bar,
Mr. Alvin Yap, Advocate and Solicitor of the Supreme Court of Singapore, Associate, Squire Patton Boggs LLP, Singapore,
Mr. Ysam Soualhi, Researcher, Centre Jean Bodin, University of Angers,

as Counsel;

Ms Alejandra Salinas Quiroga, DIREMAR,
Ms Fabiola Cruz Morena, Embassy of the Plurinational State of Bolivia in the Kingdom of the Netherlands,

as Technical Assistants,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 6 June 2016, the Government of the Republic of Chile (hereinafter "Chile") filed in the Registry of the Court an Application instituting proceed-

ings against the Plurinational State of Bolivia (hereinafter "Bolivia") with regard to a dispute concerning the status and use of the waters of the Silala.

2. In its Application, Chile sought to found the Court's jurisdiction on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such).

3. The Registrar immediately communicated the Application to the Bolivian Government, in accordance with Article 40, paragraph 2, of the Statute of the Court. He also notified the Secretary-General of the United Nations of the filing of the Application by Chile.

4. In addition, by letters dated 20 June 2016, the Registrar informed all Member States of the United Nations of the filing of the above-mentioned Application.

5. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar subsequently notified the Members of the United Nations through the Secretary-General of the filing of the Application, by transmission of the printed bilingual text.

6. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute of the Court to choose a judge *ad hoc* to sit in the case. Chile chose Mr. Bruno Simma, and Bolivia, Mr. Yves Daudet.

7. By an Order of 1 July 2016, the Court fixed 3 July 2017 and 3 July 2018 as the respective time-limits for the filing of a Memorial by Chile and a Counter-Memorial by Bolivia. Chile filed its Memorial within the time-limit thus fixed.

8. By a communication dated 10 July 2017, the Government of the Republic of Peru, referring to Article 53, paragraph 1, of the Rules of Court, asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the President of the Court decided to grant that request. The Registrar duly communicated that decision to the Government of Peru and to the Parties.

9. By an Order of 23 May 2018, the Court, at the request of Bolivia, extended until 3 September 2018 the time-limit for the filing of the Counter-Memorial. Bolivia filed its Counter-Memorial within the time-limit thus extended. In Chapter 6 of its Counter-Memorial, Bolivia, making reference to Article 80 of the Rules of Court, submitted three counter-claims.

10. At a meeting held by the President of the Court with the representatives of the Parties on 17 October 2018, Chile indicated that it did not intend to contest the admissibility of the counter-claims of Bolivia and that a second round of written pleadings was not warranted. Bolivia expressed the view that a second round of written pleadings was necessary so that both Parties could properly address the factual and legal issues raised, in particular those underpinning the counter-claims.

11. In an Order dated 15 November 2018, the Court stated that, in the absence of any objection by Chile to the admissibility of Bolivia's counter-claims, it did not consider that it was required to rule definitively at that stage on the question of whether the conditions set forth in Article 80, paragraph 1, of the Rules of Court had been fulfilled. The Court further indicated that it

considered a second round of written pleadings limited to the Respondent's counter-claims to be necessary. By the same Order, it thus directed the submission of a Reply by Chile and a Rejoinder by Bolivia and fixed 15 February 2019 and 15 May 2019 as the respective time-limits for the filing of those written pleadings. The Reply and the Rejoinder were filed within the time-limits thus fixed.

12. By an Order of 18 June 2019, the Court authorized the submission by Chile of an additional pleading relating solely to the counter-claims of Bolivia and fixed 18 September 2019 as the time-limit for the filing of that pleading. Chile filed its additional pleading within the time-limit thus fixed.

13. By a letter dated 5 November 2018, Chile requested that Bolivia make available certain digital data used in support of the technical report and conclusions contained in Annex 17 of its Counter-Memorial. By the same letter, Chile also requested that Bolivia communicate certain documents referred to in Annexes 17 and 18 of its Counter-Memorial, which were not publicly available and were not filed by Bolivia as part of its pleading. By a letter dated 27 May 2019, Chile further requested Bolivia to provide the digital data referred to in Annex 25 of Bolivia's Rejoinder. In the course of various exchanges of correspondence between the Parties, Bolivia furnished the documents and digital data requested by Chile.

14. By a letter dated 3 September 2019, Bolivia requested Chile to furnish certain documents referred to in Appendix A to Annex II of Volume 4 and Annex 55 of Volume 3 of its Memorial. In response, Chile provided 11 of the requested documents but indicated that two documents had not been found.

15. By letters dated 15 October 2021, the Registrar informed the Parties that the Court had decided that hearings would be held from 1 to 14 April 2022. A detailed schedule of the hearings was communicated to the Parties under cover of that letter. The Parties were also informed that, pursuant to the decision of the Court, each of them was requested to call during the course of the hearings the experts whose reports were annexed to the written pleadings and to provide, by 14 January 2022, a written statement summarizing those reports. The Parties were instructed that those written statements should be limited in content to a summary of the experts' findings already provided in their reports and should set out the points on which the Parties considered themselves to be in agreement, while primarily focusing on the issues on which the experts remained divided. The Parties were informed, moreover, that no further written comments or observations on the written statements would be accepted.

16. By the same letters, the Registrar notified the Parties of the following details regarding the procedure for examining the experts at the hearing. After having made the solemn declaration required under Article 64 of the Rules of Court, the experts would be asked by the Party calling them to confirm their written statement. The written statements would therefore replace the examination-in-chief. The other Party would then have an opportunity for cross-examination on the content of the experts' written statement or their earlier reports. Re-examination would thereafter be limited to subjects raised in cross-examination. In cross-examination and re-examination, the questions would be addressed collectively to the group of experts being heard, and it would be up to the latter to decide as to who should reply to a particular question. Finally, the judges would also have an opportunity to put questions to the experts.

17. Chile and Bolivia filed the written statements summarizing the experts' reports within the time-limit as fixed by the Court (see paragraph 15 above). The written statement of the experts appointed by Chile was prepared by Drs. Howard Wheater and Denis Peach, and that of the experts appointed by Bolivia was prepared by Mr. Roar A. Jensen, Dr. Torsten V. Jacobsen and Mr. Michael M. Gabora, on behalf of DHI (formerly named "Dansk Hydraulisk Institut" (Danish Hydraulic Institute)).

18. By letters dated 15 February 2022, the Registrar informed the Parties that, having considered the ongoing restrictions in place as a result of the COVID-19 pandemic, the Court had decided that the hearings would be held in a hybrid format, in accordance with Article 59, paragraph 2, of the Rules of Court, and on the basis of the Court's Guidelines for the parties on the organization of hearings by video link, adopted on 13 July 2020. A revised schedule of the hearings was subsequently communicated to them.

19. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the written pleadings and the documents annexed thereto, as well as the written statements of the experts, would be made accessible to the public on the opening of the oral proceedings.

20. Hybrid public hearings were held on 1, 4, 5, 6, 7, 8, 11, 13 and 14 April 2022. During the oral proceedings, a number of judges were present in the Great Hall of Justice, while others joined the proceedings via video link, which allowed them to view and hear the speaker and see any demonstrative exhibits displayed. Each Party was permitted to have up to eight representatives present in the Great Hall of Justice and was offered the use of an additional room in the Peace Palace, from which members of the delegation were able to follow the proceedings remotely. The members of each Party's delegation were also given the opportunity to participate via video link from other locations of their choice. The experts called by the Parties participated in the hearings in person.

21. During the above-mentioned hearings, the Court heard the oral arguments and replies of:

*For Chile:* H.E. Ms Ximena Fuentes Torrijo,
Mr. Alan Boyle,
Ms Laurence Boisson de Chazournes,
Ms Johanna Klein Kranenberg,
Mr. Stephen McCaffrey,
Mr. Samuel Wordsworth.

*For Bolivia:* H.E. Mr. Roberto Calzadilla Sarmiento,
Mr. Alain Pellet,
Mr. Rodman R. Bundy,
Mr. Mathias Forteau,
Mr. Gabriel Eckstein.

22. The experts called by the Parties were heard at two public hearings, in accordance with Article 65 of the Rules of Court. On the afternoon of 7 April 2022, Chile called Dr. Howard Wheater and Dr. Denis Peach as experts; and on the afternoon of 8 April 2022, Bolivia called Mr. Roar A. Jensen, Dr. Torsten V. Jacobsen and Mr. Michael M. Gabora as experts. The experts were cross-examined and re-examined by counsel for the Parties. Members of the Court put questions to the experts, to which replies were given orally.

23. At the hearings, a Member of the Court also put a question to Chile, to which a reply was given in writing, pursuant to Article 61, paragraph 4, of the Rules of Court. In accordance with Article 72 of the Rules, Bolivia submitted comments on the written reply provided by Chile.

24. In the course of the hearings, by a letter dated 5 April 2022, the Agent of Chile, referring to Article 56 of the Rules of Court and Practice Direction IX, requested the inclusion in the case file of a document referred to as "Draft Agreement of 2019", together with its accompanying letter from the Vice-Minister for Foreign Affairs of Chile to her Bolivian counterpart. In accordance with Article 56, paragraph 1, of the Rules of Court, copies of the above-mentioned document and covering letter were communicated to the other Party, which was requested to inform the Court of any observations that it might wish to make with regard to the production of this document. By a letter dated 6 April 2022, the Agent of Bolivia informed the Court that his Government "ha[d] no objection" to Chile's request. By letters also dated 6 April 2022, the Registrar informed the Parties that, taking into account the lack of objection by Bolivia to the production of the above-mentioned document, the document had accordingly been added to the case file.

*

25. In the Application, the following claims were made by Chile:

> "Based on the foregoing statement of facts and law, and reserving the right to modify the following requests, Chile requests the Court to adjudge and declare that:
>
> *(a)* The Silala River system, together with the subterranean portions of its system, is an international watercourse, the use of which is governed by customary international law;
>
> *(b)* Chile is entitled to the equitable and reasonable use of the waters of the Silala River system in accordance with customary international law;
>
> *(c)* Under the standard of equitable and reasonable utilization, Chile is entitled to its current use of the waters of the Silala River;
>
> *(d)* Bolivia has an obligation to take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from its activities in the vicinity of the Silala River;
>
> *(e)* Bolivia has an obligation to co-operate and to provide Chile with timely notification of planned measures which may have an adverse effect on shared water resources, to exchange data and information and to conduct where appropriate an environmental impact assessment, in order to enable Chile to evaluate the possible effects of such planned measures, obligations that Bolivia has breached."

26. In the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Chile,*

in the Memorial:

> "Chile therefore requests the Court to adjudge and declare that:

*(a)* The Silala River system, together with the subterranean portions of its system, is an international watercourse, the use of which is governed by customary international law;

*(b)* Chile is entitled to the equitable and reasonable utilization of the waters of the Silala River system in accordance with customary international law;

*(c)* Under the standard of equitable and reasonable utilization, Chile is entitled to its current use of the waters of the Silala River;

*(d)* Bolivia has an obligation to take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from its activities in the vicinity of the Silala River;

*(e)* Bolivia has an obligation to cooperate and to provide Chile with timely notification of planned measures which may have an adverse effect on shared water resources, to exchange data and information and to conduct where appropriate an environmental impact assessment, in order to enable Chile to evaluate the possible effects of such planned measures. Obligations that Bolivia has breached so far as concerns its obligation to notify and consult Chile with respect to activities that may affect the waters of the Silala River or the utilization thereof by Chile."

in the Reply and in the additional pleading:

"With respect to the Counter-Claims presented by the Plurinational State of Bolivia, Chile requests the Court to adjudge and declare that:

*(a)* The Court lacks jurisdiction over Bolivia's Counter-Claim *(a)*, alternatively, Bolivia's Counter-Claim *(a)* is moot, or is otherwise rejected;

*(b)* Bolivia's Counter-Claims *(b)* and *(c)* are rejected."

*On behalf of the Government of Bolivia,*

in the Counter-Memorial:

"1. Bolivia respectfully asks the Court to dismiss and reject the requests and submissions of Chile and to adjudge and declare that:

*(a)* The waters of the Silala springs are part of an artificially enhanced watercourse;

*(b)* Customary international rules on the use of international watercourses do not apply to the artificially-flowing Silala waters;

*(c)* Bolivia and Chile are each entitled to the equitable and reasonable utilization of the naturally-flowing Silala waters, in accordance with customary international law;

*(d)* The current use of the naturally-flowing Silala waters by Chile is without prejudice to Bolivia's right to an equitable and reasonable use of these waters;

*(e)* Bolivia and Chile each have an obligation to take all appropriate measures to prevent the causing of significant transboundary environmental harm in the Silala;

*(f)* Bolivia and Chile each have an obligation to cooperate and provide the other State with timely notification of planned measures which may have a significant adverse effect on naturally-flowing Silala waters, exchange data and information and conduct where appropriate environmental impact assessments;

*(g)* Bolivia did not breach the obligation to notify and consult Chile with respect to activities that may have a significant adverse effect upon the naturally-flowing Silala waters or the lawful utilization thereof by Chile.

2. As to Bolivia's Counter-Claims, Bolivia respectfully requests the Court to adjudge and declare that:

*(a)* Bolivia has sovereignty over the artificial channels and drainage mechanisms in the Silala that are located in its territory and has the right to decide whether and how to maintain them;

*(b)* Bolivia has sovereignty over the artificial flow of Silala waters engineered, enhanced, or produced in its territory and Chile has no right to that artificial flow;

*(c)* Any delivery from Bolivia to Chile of artificially-flowing waters of the Silala, and the conditions and modalities thereof, including the compensation to be paid for said delivery, are subject to the conclusion of an agreement with Bolivia.

3. The present submissions are without prejudice to any other claim that Bolivia may formulate in relation to the Silala waters."

in the Rejoinder:

"With respect to the Counter-Claims presented by the Plurinational State of Bolivia, Bolivia requests the Court to adjudge and declare that:

*(a)* Bolivia has sovereignty over the artificial channels and drainage mechanisms in the Silala that are located in its territory and has the right to decide whether and how to maintain them;

*(b)* Bolivia has sovereignty over the artificial flow of Silala waters engineered, enhanced, or produced in its territory and Chile has no right to that artificial flow;

*(c)* Any delivery from Bolivia to Chile of artificially-flowing waters of the Silala, and the conditions and modalities thereof, including the compensation to be paid for said delivery, are subject to the conclusion of an agreement with Bolivia."

27. At the oral proceedings, the following final submissions were presented by the Parties:

*On behalf of the Government of Chile,*

at the hearing of 11 April 2022, on the claims of Chile:

"Chile requests the Court to adjudge and declare that:

*(a)* The Silala River system, together with the subterranean portions of its

system, is an international watercourse, the use of which is governed by customary international law;

*(b)* Chile is entitled to the equitable and reasonable utilization of the waters of the Silala River system in accordance with customary international law;

*(c)* Under the standard of equitable and reasonable utilization, Chile is entitled to its current use of the waters of the Silala River;

*(d)* Bolivia has an obligation to take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from its activities in the vicinity of the Silala River;

*(e)* Bolivia has an obligation to cooperate and to provide Chile with timely notification of planned measures which may have an adverse effect on shared water resources, to exchange data and information and to conduct where appropriate an environmental impact assessment, in order to enable Chile to evaluate the possible effects of such planned measures. Obligations that Bolivia has breached so far as concerns its obligation to notify and consult Chile with respect to activities that may affect the waters of the Silala River or the utilization thereof by Chile."

at the hearing of 14 April 2022, on the counter-claims of Bolivia:

"[T]he Republic of Chile requests the Court to adjudge and declare that:

*(a)* To the extent that Bolivia claims sovereignty over the channels and drainage mechanisms in the Silala River system that are located in its territory and the right to decide whether to maintain them, the Court lacks jurisdiction over Bolivia's Counter-Claim *(a)* or, alternatively, Bolivia's Counter-Claim *(a)* is moot; to the extent that Bolivia claims that it has the right to dismantle the channels in its territory without fully complying with its obligations under customary international law, Bolivia's Counter-Claim *(a)* is rejected;

*(b)* Bolivia's Counter-Claims *(b)* and *(c)* are rejected."

*On behalf of the Government of Bolivia,*

at the hearing of 13 April 2022, on the claims of Chile and the counter-claims of Bolivia:

"Bolivia respectfully requests the Court to:

(1) Reject all of Chile's submissions.

(2) To the extent that the Court were to consider that there is still a dispute between the Parties, to adjudge and declare that:

*(a)* The waters of the Silala constitute an international watercourse whose surface flow has been artificially enhanced;

*(b)* Under the rules of customary international law on the use of international watercourses that apply to the Silala, Bolivia and Chile are each entitled to an equitable and reasonable utilization of the Silala waters;

*(c)* Chile's current use of the waters of the Silala is without prejudice to Bolivia's right to an equitable and reasonable use of these waters;

*(d)* Bolivia and Chile each have an obligation to take all appropriate measures to prevent the causing of significant transboundary harm in the Silala;

*(e)* Bolivia and Chile each have an obligation to cooperate, notify and consult the other State with respect to activities that may have a risk of significant transboundary harm when confirmed by an environmental impact assessment;

*(f)* Bolivia has not breached any obligation owed to Chile with respect to the waters of the Silala."

"[. . .] Bolivia respectfully requests the Court to adjudge and declare that:

*(a)* Bolivia has sovereignty over the artificial canals and drainage mechanisms in the Silala that are located in its territory and has the right to decide whether and how to maintain them;

*(b)* Bolivia has sovereignty over the artificial flow of Silala waters engineered, enhanced, or produced in its territory and Chile has no acquired right to that artificial flow;

*(c)* Any request by Chile made to Bolivia for the delivery of the enhanced flow of the Silala, and the conditions and modalities thereof, including the compensation to be paid for said delivery, is subject to the conclusion of an agreement with Bolivia."

* * *

## I. General Background

28. The Silala River has its source in the territory of Bolivia. It originates from groundwater springs in the Southern (Orientales) and Northern (Cajones) wetlands, located in the Potosí Department of Bolivia, approximately 0.5 to 3 kilometres north-east of the common boundary with Chile at an altitude of around 4,300 metres (see sketch-map below, p. 631). These high-altitude Andean wetlands, which are also referred to as *bofedales*, are located in an arid region bordering the Atacama Desert. Following the natural topographic gradient which slopes from Bolivia towards Chile, the flow of the Silala, comprised of surface water and groundwater, traverses the boundary between Bolivia and Chile. In Chilean territory, the Silala River continues to flow south-west in the Antofagasta region of Chile until its waters discharge into the San Pedro River at about 6 kilometres from the boundary.

29. Over the years, both Parties have granted concessions for the use of the Silala waters. This use of the waters of the Silala started in 1906, when the "Antofagasta (Chili) and Bolivia Railway Company Limited" (known as the "FCAB", from the Spanish acronym for Ferrocarril de Antofa-

gasta a Bolivia) acquired a concession from the Chilean Government for the purpose of increasing the flow of drinking water serving the Chilean port city Antofagasta. Two years later, in 1908, the FCAB also obtained a right of use from the Bolivian Government for the purpose of supplying the steam engines of the locomotives that operated the Antofagasta-La Paz railway. The FCAB built an intake (Intake No. 1) in 1909 on Bolivian territory, at approximately 600 metres from the boundary. In 1910, the pipeline from Intake No. 1 to the FCAB's water reservoirs in Chile was officially put into operation. In 1928, the FCAB constructed channels in Bolivia. Chile claims that this was done for sanitary reasons, to inhibit breeding of insects and avoid contamination of potable water. According to Bolivia, the channelization had the purpose of artificially drawing the water from the surrounding springs and *bofedales*, which enhanced the surface flow of the Silala into Chile. In 1942, a second intake and pipeline were built in Chilean territory at approximately 40 metres from the international boundary.

30. On 7 May 1996, the Minister for Foreign Affairs of Bolivia issued a press release in response to certain articles in the Bolivian press referring to an alleged diversion by Chile of the waters of the "boundary Silala river". In the press release, the Minister stated that, according to a technical report on the international character of the Silala prepared by Bolivia's National Commission of Sovereignty and Boundaries, the Silala was a river that originated in Bolivian territory, and then flowed into Chilean territory. He also indicated that there was "no water diversion" as confirmed during the field work carried out by the Mixed Boundary Commission in 1992, 1993 and 1994. The Minister noted, however, that he would include the issue on the bilateral agenda "given that the waters of the Silala river have been used since more than a century by Chile" at a cost to Bolivia.

31. On 14 May 1997, the Prefect of the Potosí Department, by Administrative Resolution No. 71/97, revoked and annulled the concession granted to the FCAB in 1908 to exploit the spring waters of the Silala, on the grounds that its object, cause and purpose had disappeared, as steam locomotives were no longer in use, and that the company no longer existed as "an active corporate in Bolivian territory". Supreme Decree No. 24660 of 20 June 1997, which gives the above-mentioned administrative resolution the legal status of a presidential supreme decree, makes reference to "evidence of the improper use" of the Silala waters "outside the granting of their use, with prejudice to the interests of the State and in clear violation of Articles 136 and 137 of the State Political Constitution".

32. By 1999, the question of the status of the Silala and the character of its waters had become a point of contention between the Parties. In particular, on 3 September 1999, the Ministry of Foreign Affairs of Bolivia addressed a diplomatic Note to the Consulate General of Chile in

Sketch-map of the general geographical context

La Paz contending that, despite the annulment in 1997 by Bolivia of the concession granted to the FCAB in 1908 to exploit the spring waters of the Silala, the company persisted in its use of those waters. The Ministry added that the matter was one that remained in the private sphere and was, as such, under Bolivia's jurisdiction. The Ministry moreover asserted that the spring waters of the Silala, which were entirely located in Bolivian territory, created wetlands, from where the waters were conducted by means of artificial works, "generating a system that lack[ed] any characteristic of a river, let alone of an international river of a successive course".

33. In response, the Chilean Government sent two diplomatic Notes to the Ministry of Foreign Affairs of Bolivia. By a Note Verbale dated 15 September 1999, the Ministry of Foreign Affairs of Chile expressed disagreement with the statement that the Silala lacked "any characteristic of a river" and affirmed that, until that point, the "Bolivian Government had never officially disowned the fact that the Silala [was] a river that naturally respond[ed] to the definition that international law takes into account for that purpose". The Ministry further emphasized that any calls for tenders by the Bolivian Water Resources Superintendency should bear in mind the "binational nature of this shared water resource" and the need to "include the rights of Chile in its capacity as sovereign over the downstream course". By a Note Verbale dated 14 October 1999, the General Consulate of Chile in La Paz expressed concern that the

> "Bolivian Water Resources Superintendency insist[ed] on carrying out a public tendering process of the waters of the Silala river, disregarding the clear principles of international law that safeguard the legitimate rights and interests of the Republic of Chile over said water resource".

34. The Ministry of Foreign Affairs of Bolivia replied to the above communications by a diplomatic Note dated 16 November 1999, reaffirming its position that the waters of the Silala were governed by Bolivia's national legal system "in full exercise of the territorial sovereignty that is recognized by the rules and principles of international law". According to the Ministry, the waters of the Silala were "formed in Bolivian territory and . . . would be consumed in that same territory", were it not for the channelization works made by the concessionaire company as a result of the 1908 concession granted by Bolivia.

35. In April 2000, Bolivia granted a concession to a Bolivian company, DUCTEC, authorizing the commercialization of the waters of the Silala. That company later sought to invoice two Chilean companies for their use of Silala waters within Chilean territory. Chile protested against the concession on the grounds that it disregarded the international nature of the Silala and the rights of Chile over the Silala River.

36. The two Parties attempted to reach a bilateral agreement on "the 'rational and sustainable management' of the waters of the Silala" in the period up to 2010. During that period, a bilateral Working Group on the Silala Issue was created to carry out joint technical and scientific studies to determine the nature, origin and flow of the waters of the Silala. Two draft agreements were drawn up in 2009 but were never signed.

37. Chile indicates that it decided to request a judgment from the Court on "the nature of the Silala River as an international watercourse and of Chile's rights as a riparian State", following several statements made by the President of Bolivia, Mr. Evo Morales, in 2016, in which he accused Chile of illegally exploiting the waters of the Silala without compensating Bolivia, stated that the Silala was "not an international river" and expressed an intention to bring the dispute before the Court. Chile accordingly instituted proceedings against Bolivia before the Court on 6 June 2016 (see paragraph 1 above).

38. As mentioned above (see paragraph 24), during the oral proceedings, Chile produced a new document, referred to as "Draft Agreement of 2019", which it had submitted to Bolivia in June 2019 as a new proposal aimed at bringing the dispute over the Silala to an end. According to Chile, the proposal received no reply from Bolivia.

## II. Existence and Scope of the Dispute: General Considerations

39. The Court must, at the outset, determine whether it has jurisdiction to entertain the claims and the counter-claims of the Parties and, if so, whether there are reasons that prevent the Court from exercising its jurisdiction in whole or in part. Chile seeks to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá. That provision reads:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> *(a)* [t]he interpretation of a treaty;
> *(b)* [a]ny question of international law;
> *(c)* [t]he existence of any fact which, if established, would constitute the breach of an international obligation;
> *(d)* [t]he nature or extent of the reparation to be made for the breach of an international obligation."

The existence of a dispute between the Parties is a condition of the Court's jurisdiction under Article XXXI of the Pact of Bogotá. A dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). For the Court to have jurisdiction, the "dispute must in principle exist at the time the Application is submitted to the Court" (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46). The initial written pleadings of the Parties revealed a number of questions of law and fact on which the Parties disagreed (see Sections III and IV). The Parties have not contested that Article XXXI of the Pact of Bogotá provides the Court with jurisdiction to adjudicate the dispute between them. The only exception is Chile's assertion that the Court lacks jurisdiction in respect of Bolivia's first counter-claim. Leaving aside this objection, which will be addressed below (see Section IV), the Court is satisfied that it has jurisdiction to adjudicate the dispute between the Parties.

40. The Court observes that some positions of the Parties have evolved considerably during the course of the proceedings. Each Party now contends that certain claims or counter-claims of the other Party are without object or present hypothetical questions and are thus to be rejected. Before examining the claims and counter-claims of the Parties, the Court makes some general observations with respect to these assertions.

41. The Court recalls that, even if it finds that it has jurisdiction, "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29; see also *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 69, para. 45). The Court has emphasized that "[t]he dispute brought before it must . . . continue to exist at the time when the Court makes its decision" and that "there is nothing on which to give judgment" in situations where the object of a claim has clearly disappeared (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 271-272, paras. 55 and 59). It "has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 14, para. 32; see also *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 66). Such a situation may cause the Court to "deci[de] not to proceed to judgment on the merits" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 12-13, para. 26; see also *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 467-468, para. 88).

42. The Court has held "that it cannot adjudicate upon the merits of the claim" when it considers that "any adjudication [would be] devoid of purpose" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 38). The Court observes that its task is not limited to determining whether a dispute has disappeared in its entirety. The scope of a dispute brought before the Court is circumscribed by the claims submitted to it by the parties. Therefore, in the present case, the Court also has to ascertain whether specific claims have become without object as a consequence of a convergence of positions or agreement between the Parties, or for some other reason.

43. To this end, the Court will carefully assess whether and to what extent the final submissions of the Parties continue to reflect a dispute between them. The Court has no power to "substitute itself for [the parties] and formulate new submissions simply on the basis of arguments and facts advanced" (*Certain German Interests in Polish Upper Silesia, Merits, Judgment, No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 35). However, it is "entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29). In undertaking this task, the Court will take into account not only the submissions, but also, *inter alia*, the Application as well as all the arguments put forward by the Parties in the course of the written and oral proceedings (see *ibid.*, p. 263, paras. 30-31). The Court will thus interpret the submissions, in order to identify their substance and to determine whether they reflect a dispute between the Parties.

44. Each Party maintains that certain submissions of the other Party, while reflecting points of convergence between the Parties, remain vague, ambiguous or conditional, and therefore cannot be taken to express agreement between them. Each has therefore requested the Court to render a declaratory judgment with respect to certain submissions, pointing to the need for legal certainty in their mutual relations. The Applicant emphasized the need for a declaratory judgment to prevent the Respondent from changing its position in the future on the law applicable to international watercourses and to the Silala.

45. The Court notes that "[i]t is clear in the jurisprudence of the Court and its predecessor that 'the Court may, in an appropriate case, make a declaratory judgment'" (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 662, para. 49, citing *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37). The Court further recalls that the purpose of a declaratory judgment

> "is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" (*Interpretation of Judg-*

*ments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20).

46. Given that the Court's role in a contentious case is to resolve existing disputes, the operative paragraph of a judgment should not, in principle, record points on which the Court finds the parties to be in agreement (see *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, pp. 71-73, paras. 53-59). Statements made by the parties before the Court must be presumed to be made in good faith. The Court carefully assesses such statements. If the Court finds that the parties have come to agree in substance regarding a claim or a counter-claim, it will take note of that agreement in its judgment and conclude that such a claim or counter-claim has become without object. In such a case, there is no call for a declaratory judgment.

47. The Court notes that, in the present case, many submissions are closely interrelated. A conclusion that a particular claim or counter-claim is without object does not preclude the Court from addressing certain questions that are relevant to such a claim or counter-claim in the course of examining other claims or counter-claims that remain to be decided.

48. The Court further recalls that its function is "to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 138, para. 123). The Court reaffirms that "it is not for the Court to determine the applicable law with regard to a hypothetical situation" (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 138, para. 123). In particular, it has held that it does not pronounce "on any hypothetical situation which might arise in the future" (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 32, para. 73).

49. In assessing the Parties' claims and counter-claims, the Court will be guided by the above considerations.

## III. Claims of Chile

### 1. *Submission* (a)*: The Silala River System as an International Watercourse Governed by Customary International Law*

50. In its submission *(a)*, Chile asks the Court to adjudge and declare that "[t]he Silala River system, together with the subterranean portions of

its system, is an international watercourse, the use of which is governed by customary international law". Chile maintains that the definition of "international watercourse" contained in Article 2 *(a)* and *(b)* of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter referred to as the "1997 Convention") reflects customary international law and that the Silala waters, irrespective of their "natural" or "artificial" character, qualify as an international watercourse. Chile further maintains that the customary international law rules applicable to international watercourses apply to the Silala waters in their entirety.

51. Chile's position with respect to submission *(a)* has remained unchanged throughout the proceedings. While acknowledging that "Bolivia has belatedly accepted" that submission *(a)* "is true to an extent", Chile maintains that the Parties continue to disagree on its submission *(a)*.

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52. Bolivia's position with respect to Chile's submission *(a)* has evolved in the course of the proceedings. In its Counter-Memorial, Bolivia requested the Court to adjudge and declare that "*(a)* [t]he waters of the Silala springs are part of an artificially enhanced watercourse; *(b)* [c]ustomary international rules on the use of international watercourses do not apply to the artificially-flowing Silala waters". Bolivia opposed the contention that the Silala qualifies, in its entirety, as an international watercourse under customary international law. Bolivia also contested that the definition of the term "international watercourse" contained in Article 2 of the 1997 Convention reflects customary international law as far as the artificially enhanced parts of the Silala waters are concerned. Bolivia further argued that the rules of customary international law applicable to international watercourses only apply to the natural flow of watercourses.

53. During the oral proceedings, Bolivia acknowledged — referring to the findings by the experts appointed by each Party — that the Silala waters, including those parts that are artificially enhanced, qualify as an international watercourse. Bolivia now also recognizes that the customary international law applicable to the non-navigational uses of international watercourses applies to the entirety of the Silala waters. Bolivia concludes that the dispute between the Parties with respect to Chile's submission *(a)* has disappeared in the course of the oral proceedings. On this basis Bolivia requests the Court, in its final submissions, to reject Chile's submission *(a)* for absence of a dispute and, "[t]o the extent that the Court were to consider that there is still a dispute between the Parties, to adjudge and declare that: *(a)* [t]he waters of the Silala constitute an international watercourse whose surface flow has been artificially enhanced".

* *

54. The Court observes at the outset that neither Chile nor Bolivia is party to the 1997 Convention or to any treaty governing the non-navigational uses of the Silala River. Accordingly, in the present case, the respective rights and obligations of the Parties are governed by customary international law.

55. The Court notes that Chile's submission *(a)* contains the legal propositions that the Silala waters are an international watercourse under customary international law, and that the customary international law rules relating to international watercourses apply to the Silala waters in their entirety. The Court observes that the legal position originally taken by Bolivia in its Counter-Memorial positively opposed both legal propositions advanced by Chile. In particular, Bolivia contested that the rules on the non-navigational uses of international watercourses under customary international law apply to the "artificially enhanced" surface flow of the Silala.

56. The Court observes that the positions of the Parties with respect to the legal status of the Silala waters and the rules applicable under customary international law have converged in the course of the proceedings. During the oral proceedings, Bolivia has on several occasions expressed its agreement with Chile's claim that — despite the "artificial enhancement" of the surface flow of the Silala River — the Silala waters qualify in their entirety as an international watercourse under customary international law and stated that, therefore, customary international law applies both to the "naturally flowing" waters and the "artificially enhanced" surface flow of the Silala.

57. The Court notes that Bolivia, while recognizing that the Silala waters qualify as an international watercourse, does not consider Article 2 of the 1997 Convention to reflect customary international law. The Court also notes that Bolivia maintains that the "unique characteristics" of the Silala, including the fact that parts of its surface flow are "artificially enhanced", have to be taken into account when applying the customary rules on international watercourses to the Silala waters. In its final submissions Bolivia thus asks the Court to reject Chile's submission and, if it does not do so, to find that the surface flow of the Silala has been "artificially enhanced".

58. For the purpose of determining whether Bolivia agrees with the position of Chile regarding the legal status of the Silala as an international watercourse under customary international law, the Court does not consider it necessary for Bolivia to have recognized that the definition contained in Article 2 of the 1997 Convention reflects customary international law. Furthermore, Bolivia's insistence on the relevance of the "unique characteristics" of the Silala waters in the application of the rules of customary international law does not change the fact that it has expressed its unequivocal agreement with the proposition that the cus-

tomary international law on non-navigational uses of international watercourses applies to all of the Silala waters. In this regard, the Court takes note of Bolivia's response to a question put by one of its Judges during the oral proceedings in which Bolivia confirmed "the Silala's nature as an international watercourse independent of its undisputable special characteristics, which have no bearing on the existing customary rules", and emphasized that it "has not attached any conditions or restrictions to its acceptance of the application of customary law". The Court takes note of Bolivia's acceptance of the substance of Chile's submission *(a)*.

59. Given that the Parties agree with respect to the legal status of the Silala River system as an international watercourse and on the applicability of the customary international law on non-navigational uses of international watercourses to all the waters of the Silala, the Court finds that the claim made by Chile in its final submission *(a)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

### 2. *Submission* (b)*: Chile's Entitlement to the Equitable and Reasonable Utilization of the Waters of the Silala River System*

60. In its submission *(b)*, Chile asks the Court to adjudge and declare that "Chile is entitled to the equitable and reasonable utilization of the waters of the Silala River system in accordance with customary international law". Chile maintains that its entitlement to the waters of the Silala under the principle of equitable and reasonable utilization is not affected by the fact that parts of the flow of the Silala are "artificially enhanced".

61. Chile's position with respect to submission *(b)* has remained unchanged throughout the proceedings. In support of its final submission, Chile confirms that, in its view, Bolivia is equally entitled to equitable and reasonable use of the waters of the Silala. Chile also maintains that, contrary to Bolivia's allegations, it has never contested Bolivia's entitlement. Chile requests the Court to adjudicate on its submission *(b)* in order to ensure legal certainty between the two States.

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62. Bolivia's position with respect to Chile's submission *(b)* has evolved in the course of the proceedings. In its Counter-Memorial, Bolivia claimed that the principle of equitable and reasonable utilization only applies to the "naturally flowing" parts of the Silala waters. Bolivia further maintained that the use of "artificial flows" of the Silala waters by Chile depends on Bolivia's consent. Bolivia emphasized that, with respect to the "naturally flowing" parts of the Silala, both Parties are entitled to the equitable and reasonable use of the water under customary international law, and that Chile's claim should be dismissed to the extent that it only concerns Chile's rights and disregards Bolivia's rights.

63. During the oral proceedings, Bolivia acknowledged that the right to equitable and reasonable use of the waters of the Silala covers the entirety of the waters. In its view, any dispute between the Parties concerning Chile's submission *(b)* now only concerns the "nuance" that, according to Bolivia, both Parties are entitled to equitable and reasonable utilization. On this basis, Bolivia requests the Court, in its final submissions,

> "[t]o the extent that the Court were to consider that there is still a dispute between the Parties, to adjudge and declare that: . . . [u]nder the rules of customary international law on the use of international watercourses that apply to the Silala, Bolivia and Chile are each entitled to an equitable and reasonable utilization of the Silala waters".

* *

64. The Court observes that, when these proceedings were instituted, Chile's claim regarding its entitlement to the equitable and reasonable use of the waters of the Silala, which includes both the "naturally flowing" and "artificially enhanced" parts, was positively opposed by Bolivia. During the course of the proceedings, however, it became apparent that the Parties agree that the principle of equitable and reasonable utilization applies to the entirety of the waters of the Silala, irrespective of their "natural" or "artificial" character. The Parties also agree that they are both entitled to the equitable and reasonable utilization of the Silala waters under customary international law. It is not for the Court to address a possible difference of opinion regarding a future use of these waters that is entirely hypothetical (see paragraphs 44 and 48 above).

65. For these reasons, the Court finds that the Parties agree with respect to Chile's submission *(b)*. Accordingly, the Court concludes that the claim made by Chile in its final submission *(b)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

### *3. Submission* (c)*: Chile's Entitlement to Its Current Use of the Waters of the Silala River System*

66. In its submission *(c)*, Chile asks the Court to adjudge and declare that "[u]nder the standard of equitable and reasonable utilization, Chile is entitled to its current utilization of the waters of the Silala River". Chile claims that its past and present use of the Silala waters is consistent with the principle of equitable and reasonable utilization. Pointing to the absence of countervailing uses by Bolivia, Chile argues that, as the downstream riparian State, all its past and present use of the flow that crosses the boundary from Bolivia to Chile is equitable and reasonable vis-à-vis Bolivia.

67. Chile's submission *(c)* has remained unchanged throughout the proceedings. Chile asks the Court to confirm that the principle of equitable and reasonable use applies to all the waters of the Silala and that this principle does not leave room for a right to claim compensation for past or future uses of the Silala. In response to Bolivia's interpretation of Chile's submission *(c)* as claiming a right to maintain the "current rate and volume of water flow", Chile emphasizes that this interpretation represents a mischaracterization of its submission. Chile notes that it does not ask the Court to recognize an acquired right, an entitlement to maintain the status quo or a title to a certain amount of water, but rather that it seeks a declaration that its current use of the waters conforms with the principle of equitable and reasonable utilization, without prejudice to any of Bolivia's rights and the future use of the waters by both States. Chile also points out that Bolivia has "taken note" of Chile's indication that it "does not seek to obtain any pre-judgment as to what future use of the Silala River may be equitable and reasonable and likewise does not seek in any way to freeze further development and use of the waters so far as concerns either State". Chile nevertheless maintains that the above-mentioned declaration that it seeks from the Court would ensure legal certainty in the relations between the Parties given the changes in Bolivia's position.

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68. Bolivia's position with respect to Chile's submission *(c)* has evolved during the proceedings. In its Counter-Memorial, Bolivia asked the Court to adjudge and declare that "Bolivia and Chile are each entitled to the equitable and reasonable utilization of the naturally flowing Silala waters, in accordance with customary international law" and that "[t]he current use of the naturally-flowing Silala waters by Chile is without prejudice to Bolivia's right to an equitable and reasonable use of these waters". Bolivia emphasized that any use of the waters by Chile is limited by Bolivia's exclusive rights over the artificial flow of Silala waters. Bolivia also stated that it understood Chile's submission *(c)* as requesting the Court to declare that Chile has a right to maintain the current rate and volume of water flow from Bolivia to Chile which should not be subject to future modification. In its view, such a position would be incompatible with Bolivia's equal right to its own equitable and reasonable share of the naturally flowing waters of the Silala, as well as its exclusive rights over the artificial flow of Silala waters.

69. During the oral proceedings, Bolivia acknowledged that the right to equitable and reasonable use applies to the Silala waters in their entirety (see paragraph 63 above). Bolivia now claims that Chile's past use of all the waters of the Silala should be taken into account to determine Bolivia's future right to an equitable and reasonable use of the

waters. Bolivia further points to the ambiguous formulation of Chile's submission *(c)* and what it considers to be contradictory statements made by the representatives of Chile in the proceedings before the Court as to the correct interpretation to be given to this submission. According to Bolivia, it is thus unclear whether Chile is prepared to accept unconditionally the risks ensuing from a possible dismantling of the channels and installations (see paragraph 27 above), whatever the scale of the reduction caused in the Silala's surface flow. On this basis, Bolivia, in its final submissions, requests "[t]o the extent that the Court were to consider that there is still a dispute between the Parties, to adjudge and declare that: . . . Chile's current use of the waters of the Silala is without prejudice to Bolivia's right to an equitable and reasonable use of these waters".

* *

70. The Court notes that, when these proceedings were instituted, Chile's claim to be entitled to its current use of the waters of the Silala was positively opposed by Bolivia as far as it concerned those parts of the flow which Bolivia describes as "artificially enhanced".

71. Considering the statements made by Bolivia during the oral proceedings, the Court also notes that the Parties agree that Chile has a right to the use of an equitable and reasonable share of the waters of the Silala irrespective of the "natural" or "artificial" character or origin of the water flow (see paragraph 69 above). Furthermore, Bolivia does not claim in these proceedings that Chile owes compensation to Bolivia for past uses of the waters of the Silala.

72. The Court observes that the formulation of submission *(c)* does not, by itself, clearly indicate whether Chile asks the Court only to declare that its current use of the waters of the Silala is in conformity with the principle of equitable and reasonable utilization, or whether Chile requests the Court to declare, in addition, that it has a right to receive the same rate of flow and volume of the waters in the future. In this respect, the Court takes note of several statements made by Chile during the later stages of the proceedings in which it emphasized that submission *(c)* only seeks a declaration to the effect that the present use of the waters of the Silala is in conformity with the principle of equitable and reasonable utilization and that its entitlement to any future use is without prejudice to that of Bolivia. Moreover, Chile has underlined, on several occasions, that its right to equitable and reasonable use would not per se be infringed by the reduction of the flow subsequent to a dismantling of the channels and installations.

73. The Court considers that the clarification brought about by these statements is not called into question by references, in Chile's written and oral pleadings, to the general duty of Bolivia not to breach its obligations under customary international law, should it decide to proceed to a dismantling of the channels. In the Court's view, these references do not

qualify the substance of Chile's statements but simply recall the general duty of States to act in compliance with their obligations under international law.

74. Regarding Bolivia's contention that Chile's use is without prejudice to Bolivia's future uses of the Silala, the Court reaffirms that there is no opposition of views regarding a corresponding right of Bolivia to the equitable and reasonable use of the Silala waters, as Chile does not deny Bolivia's proposition in this regard (see paragraphs 61 and 64 above).

75. For these reasons, the Court finds that the Parties have, in the course of the proceedings, come to agree with respect to Chile's submission *(c)*. In this connection, the Court takes note of statements by Chile according to which it is no longer contested that it is entirely within Bolivia's sovereign powers to dismantle the channels and to restore the wetlands in its territory in conformity with international law.

76. Since the Parties agree regarding Chile's submission *(c)*, the Court concludes that the claim made by Chile in its final submission *(c)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

### *4. Submission* (d)*: Bolivia's Obligation to Prevent and Control Harm Resulting from Its Activities in the Vicinity of the Silala River System*

77. In its submission *(d)*, Chile asks the Court to adjudge and declare that "Bolivia has an obligation to take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from its activities in the vicinity of the Silala River". Chile argues that "Bolivia is under an obligation to co-operate and prevent transboundary harm to the utilization of the waters of the Silala River system in Chile". It claims that "States sharing an international watercourse are under an obligation to take all appropriate measures to prevent the causing of significant harm to other watercourse States. This rule of international law is enshrined in Article 7 of the [1997 Convention]." Chile also emphasizes that it does

> "not ask the Court to specify precisely what measures Bolivia must take in order to give full effect to Article 7 of the [1997 Convention]. Rather, it asks the [C]ourt to reaffirm that Bolivia has an obligation to take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from activities in the vicinity of the Silala River."

78. Chile's submission *(d)* has remained unchanged throughout the proceedings. During the oral proceedings, Chile confirmed its position

that both Parties are bound by the obligation to prevent significant transboundary harm. In Chile's view, this obligation encompasses the duty to notify and exchange information, as well as the duty to conduct an environmental impact assessment.

*

79. Bolivia's position with respect to Chile's submission *(d)* has evolved in the course of the proceedings. In its Counter-Memorial, Bolivia maintained that the law of international watercourses, including its obligation to prevent significant transboundary harm under customary international law as reflected in Article 7 of the 1997 Convention, only applies to the naturally flowing waters of the Silala. During the oral proceedings, Bolivia recognized that the obligation not to cause significant transboundary harm applies to all the waters of the Silala irrespective of whether they flow naturally or are "artificially enhanced".

80. Bolivia maintains its position that the "no significant harm" principle applies only to significant environmental harms and not, as Chile alleges, "to 'prevent[ing] and control[ling] pollution and other forms of harm' without qualifications". Bolivia also stresses that both Parties have an obligation of conduct not to cause significant harm to the other riparian State. In its view, this obligation entails that a riparian State shall conduct an environmental impact assessment if it considers that there is a risk of significant harm. If the risk is confirmed, the State shall, according to Bolivia, notify the other Party.

81. On this basis, Bolivia now maintains that a dispute no longer exists in respect of submission *(d)*. In its final submission, Bolivia requests

> "[t]o the extent that the Court were to consider that there is still a dispute between the Parties, to adjudge and declare that: . . . Bolivia and Chile each have an obligation to take all appropriate measures to prevent the causing of significant transboundary harm in the Silala".

* *

82. The Court notes that when these proceedings were instituted, Bolivia positively opposed the claim contained in Chile's submission *(d)* with respect to the applicability of the obligation to prevent transboundary harm to the "artificially enhanced" flow of the Silala.

83. The Court observes that the Parties agree that they are bound by the customary obligation to prevent transboundary harm. Furthermore,

the Parties now agree that this obligation applies to the Silala waters irrespective of whether they flow naturally or are "artificially enhanced". The Parties also agree that the obligation to prevent transboundary harm is an obligation of conduct and not an obligation of result, and that it may require the notification of, and exchange of information with, other riparian States and the conduct of an environmental impact assessment.

84. It is less clear whether the Parties agree on the threshold for the application of the customary obligation to prevent transboundary harm. Bolivia insists that the obligation to take all appropriate measures to prevent transboundary harm only applies to the causing of "significant" harm. Certain statements by Chile might be understood as suggesting a lower threshold. For example, in its Application Chile argued that Bolivia is under an "obligation to co-operate and prevent transboundary harm". Moreover, Chile has repeatedly claimed that Bolivia is under an obligation "to prevent and control pollution and other forms of harm", including in its final submission *(d)*.

85. When assessing whether and to what extent the final submissions of the Parties continue to reflect the dispute between them, the Court may interpret those submissions, taking into account the Application as a whole and the arguments of the parties before it (see paragraph 43 above; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 263, paras. 30-31). The Court notes that Chile has sometimes referred to the obligation to prevent transboundary harm, without specifying that such an obligation is limited to significant transboundary harm. However, Chile has also repeatedly used the term "significant harm" as the threshold for the application of the obligation of prevention, both in its written pleadings and during the oral proceedings. The Court further notes that neither in its written nor in its oral pleadings did Chile ask the Court to apply a lower threshold than that of "significant harm". The Court is of the view that Chile's varying terminology cannot be interpreted, in the absence of more specific indications to the contrary, as expressing a disagreement in substance with the threshold of "significant transboundary harm" put forward by Bolivia and repeatedly used by Chile itself, including with reference to Article 7 of the 1997 Convention.

86. For these reasons, the Court finds that the Parties have, in the course of the proceedings, come to agree regarding the substance of Chile's submission *(d)*. Accordingly, the Court concludes that the claim made by Chile in its final submission *(d)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

### *5. Submission* (e)*: Bolivia's Obligation to Notify and Consult with respect to Measures that may Have an Adverse Effect on the Silala River System*

87. In its submission *(e)*, Chile requests the Court to adjudge and declare that Bolivia has an obligation to co-operate and to provide Chile with timely notification of planned measures which may have an adverse effect on shared water resources, to exchange data and information and to conduct, where appropriate, an environmental impact assessment, in order to enable Chile to evaluate the possible effects of such measures. It also requests the Court to adjudge and declare that Bolivia has so far breached the obligation to notify and consult Chile with respect to activities that may affect the waters of the Silala or the utilization thereof by Chile.

88. Bolivia, for its part, asserts that it has not breached any obligation owed to Chile with respect to the waters of the Silala because, under customary international law, the obligations to co-operate, notify and consult arise only in the case of activities that "may have a risk of significant transboundary harm when confirmed by an environmental impact assessment". It further contends that Chile has not substantiated its claim that Bolivia has breached its obligation to notify and consult in respect of activities that may have a significant adverse effect on the waters of the Silala, since none of the "very modest" activities on which Chile bases its claim gave rise to any risk of harm.

* *

89. The Court notes that there is a disagreement, in law and in fact, between the Parties regarding Chile's submission *(e)*. This disagreement concerns, first, the scope of the obligation to notify and consult in the customary international law governing the non-navigational uses of international watercourses and the threshold for the application of this obligation. Secondly, it relates to the question whether Bolivia has complied with this obligation when planning and carrying out certain activities.

90. In support of their positions with respect to the relevant rules of customary international law, both Parties refer to the 1997 Convention. They also refer to the draft articles on the law of the non-navigational uses of international watercourses adopted by the International Law Commission (hereinafter the "ILC" or the "Commission") in 1994 (hereinafter the "ILC Draft Articles"), which served as the basis for the 1997 Convention, as well as to the commentaries of the ILC to those Draft Articles. The Court notes in this regard that both Parties consider that a number of provisions of the 1997 Convention reflect customary international law. They disagree, however, about whether this is true as

regards certain other provisions, including those relating to procedural obligations, in particular the obligation to notify and consult.

91. Before examining the question of compliance with the obligation to notify and consult in the specific context of the present case, the Court will first recall the legal framework within which this obligation arises and the rules and principles of customary international law that guide the determination of the procedural obligations incumbent on the Parties to the present proceedings as riparian States of the Silala.

*A. Applicable legal framework*

92. The Court notes that the customary obligations relating to international watercourses are incumbent on the riparian States of the Silala only if the Silala is in fact an international watercourse. It recalls in this regard that, even though both Parties agree that the Silala is an international watercourse (see paragraph 59), Bolivia has not explicitly recognized that the definition of "international watercourse" set out in Article 2 of the 1997 Convention reflects customary international law (see paragraph 57), contrary to what Chile, for its part, asserts.

93. The Court considers that modifications that increase the surface flow of a watercourse have no bearing on its characterization as an international watercourse.

94. The Court notes in this regard that the experts appointed by each Party agree that the waters of the Silala, whether surface or groundwater, constitute a whole flowing from Bolivia into Chile and into a common terminus. There is no doubt that the Silala is an international watercourse and, as such, subject in its entirety to customary international law, as both Parties now agree.

95. The Court further emphasizes that the concept of an international watercourse in customary international law does not prevent the particular characteristics of each international watercourse being taken into consideration when applying customary principles. The particular characteristics of each watercourse, such as those which appear in the non-exhaustive list contained in Article 6 of the 1997 Convention, form part of the "relevant factors and circumstances" that must be taken into account in determining and assessing what constitutes equitable and reasonable use of an international watercourse under customary international law. As stated above (see paragraph 74), the Parties agree that under customary international law they are both equally entitled to the equitable and reasonable use of the Silala's waters.

96. According to the jurisprudence of the Court and that of its predecessor, an international watercourse constitutes a shared resource over which riparian States have a common right. As early as 1929, the Perma-

nent Court of International Justice declared, with regard to navigation on the River Oder, that there is a community of interest in an international watercourse which provides "the basis of a common legal right" (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27). More recently, the Court applied this principle to the non-navigational uses of international watercourses and observed that it has been strengthened by the modern development of international law, as evidenced by the adoption of the 1997 Convention (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 56, para. 85).

97. Under customary international law, every riparian State has a basic right to an equitable and reasonable sharing of the resources of an international watercourse (see *ibid.*, p. 54, para. 78). This implies both a right and an obligation for all riparian States of international watercourses: every such State is both entitled to an equitable and reasonable use and share, and obliged not to exceed that entitlement by depriving other riparian States of their equivalent right to a reasonable use and share. This reflects "the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 74, para. 177). In the present case, under customary international law, the Parties are both entitled to an equitable and reasonable use of the waters of the Silala as an international watercourse and obliged, in utilizing the international watercourse, to take all appropriate measures to prevent the causing of significant harm to the other Party.

98. The Court further observes that the principle of equitable and reasonable use of an international watercourse must not be applied in an abstract or static way but by comparing the situations of the States concerned and their utilization of the watercourse at a given time.

99. The Court recalls that in general international law it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). "A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" in a transboundary context, and in particular as regards a shared resource (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101, citing *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 706, para. 104).

100. The Court has also emphasized that the above-mentioned obligations are accompanied and complemented by narrower and more specific procedural obligations, which facilitate the implementation of the substantive obligations incumbent on riparian States under customary international law (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 49, para. 77). As the Court has already had occasion to state, it is in fact only

> "by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations" *(ibid)*.

101. This is why the Court considers that the obligations to co-operate, notify and consult are an important complement to the substantive obligations of every riparian State. In the Court's view, "[t]hese obligations are all the more vital" when, as in the case of the Silala in the present proceedings, the shared resource at issue "can only be protected through close and continuous co-operation between the riparian States" (*ibid*., p. 51, para. 81).

102. The Court reaffirms that the Parties do not disagree about the customary nature of the above-mentioned substantive obligations or their application to the Silala. Their disagreement relates to the scope of the procedural obligations and their applicability in the circumstances of the present case. In particular, the Parties disagree about the threshold for the application of the obligation to notify and consult and whether Bolivia has breached this obligation.

### *B. Threshold for the application of the obligation to notify and consult under customary international law*

103. According to Chile, the obligations relating to the exchange of information and prior notification laid down in Articles 11 and 12 of the 1997 Convention reflect customary international law and make more concrete the general obligation to co-operate set out in Article 8 of that Convention.

104. Chile argues that Article 11 of the 1997 Convention lays down a general obligation to provide information on planned measures which is not linked to a risk of harm, but which applies to any planned measure that may have an effect, whether adverse or beneficial, on the condition of an international watercourse.

105. As regards Article 12 of the Convention, Chile, relying on the commentary of the ILC on Article 12 of the Draft Articles, contends that the standard of "significant adverse effect", and not what it considers to be the more rigorous criterion of "significant harm" under Article 7, is the threshold for the application of the obligation of notification reflected in Article 12 of the 1997 Convention.

*

106. Bolivia, for its part, asserts that only Article 12 of the 1997 Convention reflects customary international law. It argues that there is nothing in the *travaux préparatoires* of Article 11 or in the commentaries of the ILC to support the contention that this Article has customary status, and it claims that Chile has also been unable to cite any State practice or *opinio juris* in support of its contention that Article 11 reflects customary international law.

107. Bolivia also rejects the contention that Article 11 imposes autonomous obligations, arguing that it is a "highly general provision", a "chapeau" to what follows.

108. As regards Article 12 of the Convention, Bolivia acknowledges the indication in the commentary of the ILC that the threshold established by the criterion of "significant adverse effect" is intended to be lower than that of "significant harm" under Article 7, but emphasizes that both obligations apply only when the activity in question may have a negative effect. Bolivia also recalls the Court's jurisprudence on the nature and scope of the obligation to notify and consult, arguing that, if the activity in question does not give rise to a risk of significant transboundary harm, the State concerned is not under an obligation to conduct an environmental impact assessment or to notify and consult the other riparian States.

* *

109. The Parties disagree about the interpretation to be given to Article 11 of the 1997 Convention and whether that provision reflects customary international law. Article 11 reads as follows: "Watercourse States shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse."

110. The Court recalls that the law applicable in the present case is customary international law. Therefore, the obligation to exchange information on planned measures contained in Article 11 of the 1997 Convention applies to the Parties only in so far as it reflects customary international law.

111. Unlike the commentaries to certain other provisions of the ILC Draft Articles, the commentary to Article 11 (which was to become Article 11 of the 1997 Convention) does not refer to any State practice or judicial authority that could suggest the customary nature of this provision. The Commission merely states that illustrations of instruments and decisions "which lay down a requirement similar to that contained in article 11" are provided in the commentary to Article 12 (ILC, Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries thereto, *Yearbook of the International Law Commis-*

*sion (YILC)*, 1994, Vol. II, Part Two, p. 111, paragraph 5 of the commentary to Article 11). Thus, the Commission did not appear to consider that Article 11 of the ILC Draft Articles reflected an obligation under customary international law. In the absence of any general practice or *opinio juris* to support this contention, the Court cannot conclude that Article 11 of the 1997 Convention reflects customary international law. There is therefore no need for the Court to address the interpretation of Article 11 that applies as between the State parties to the 1997 Convention.

112. In view of the foregoing, the Court cannot accept Chile's contention that Article 11 of the 1997 Convention reflects a general obligation in customary international law to exchange information with other riparian States about any planned measure that may have an effect, whether adverse or beneficial, on the condition of an international watercourse.

113. Turning to Article 12 of the 1997 Convention, the Court notes that, while both Parties consider that this provision reflects customary international law, they disagree about its interpretation. Article 12 reads as follows:

> "Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures."

114. The Court observes that the content of this Article corresponds to a large extent to its own jurisprudence on the procedural obligations incumbent on States under customary international law as regards transboundary harm, including in the context of the management of shared resources. Indeed, in its jurisprudence the Court has confirmed the existence, in certain circumstances, of an obligation to notify and consult other riparian States concerned. It has emphasized that this customary obligation applies when "there is a risk of significant transboundary harm" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 707, para. 104). The Court recalls that, in that judgment, it specified the steps and the approach to be taken by a State planning to undertake an activity on or around a shared resource or generally capable of having a significant transboundary effect. The State in question

> "must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk

of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.

. . . . . .

If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, pp. 706-707, para. 104.)

115. The Court is aware of the differences between the formulations used in Article 12 of the 1997 Convention and those used in its own jurisprudence regarding the threshold for the application of the customary obligation to notify and consult, and on the duty to conduct a prior environmental impact assessment. In particular, the Convention refers to "planned measures which may have a significant adverse effect upon other watercourse States", whereas the Court has referred to "a risk of significant transboundary harm". The Court also notes that the ILC's commentary does not specify the degree of harm that meets the threshold for the application of the obligation of notification contained in Article 12 of the Draft Articles. The ILC simply states that "[t]he threshold established by this standard is intended to be lower than that of 'significant harm' under article 7. Thus a 'significant adverse effect' may not rise to the level of 'significant harm' within the meaning of article 7." (ILC, Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries thereto, *YILC*, 1994, Vol. II, Part Two, p. 111, paragraph 2 of the commentary to Article 12.)

116. The Court notes that even though the requirements of notification and consultation established in its jurisprudence and in Article 12 of the 1997 Convention are not worded in identical terms, both formulations suggest that the threshold for the application of the obligation to notify and consult is reached when the measures planned or carried out are capable of producing harmful effects of a certain magnitude.

117. The Court considers that Article 12 of the 1997 Convention does not reflect a rule of customary international law relating to international watercourses that is more rigorous than the general obligation to notify and consult contained in its own jurisprudence.

118. It therefore concludes that each riparian State is required, under customary international law, to notify and consult the other riparian State with regard to any planned activity that poses a risk of significant harm to that State.

*C. Question of Bolivia's compliance with the customary obligation to notify and consult*

119. Having found that customary international law imposes on each Party an obligation to notify and consult with regard to any planned activity that carries a risk of significant harm to the other Party, the Court will now ascertain whether Bolivia's conduct has been in accordance with customary international law, in view of Chile's claims in that regard.

* *

120. Chile maintains that Bolivia, in breach of the obligation incumbent on it, has consistently refused to provide Chile with the necessary information on certain measures planned or carried out with respect to the waters of the Silala.

121. In support of its claim that Bolivia has failed to respect the customary obligations relating to the exchange of information and prior notification, Chile cites the granting of a concession by Bolivia in 1999 to a private Bolivian company, DUCTEC, with the aim of commercializing water taken from the Silala. It contends that the Respondent left unanswered a diplomatic Note from Chile inviting Bolivia to enter into a bilateral dialogue to "agree[] on a cooperation scheme and equitable use" of the Silala's waters. Chile also refers to two diplomatic Notes by which it requested information from Bolivia on several projects in the Silala area announced in the press in 2012 by the Governor of the Department of Potosí, including the construction of a fish farm, a weir and a mineral water bottling plant. It asserts that, in response, Bolivia refused to transmit the information requested on the pretext that the waters of the Silala did not constitute an international watercourse. More recently, in 2017, Chile made a new request seeking information on the construction of a military post and on the building of ten houses situated close to the watercourse. According to Chile, Bolivia refused to provide the information requested, asserting that "the scarce . . . infrastructure" that existed at the site posed no danger of generating pollution or affecting the quality of the Silala's waters, first, because the ten houses were uninhabited, and, secondly, with respect to the military post, because appropriate mechanisms ensuring the preservation and conservation of the waters had been put in place.

122. Chile states that it has taken note of the Respondent's assertion that "none of Bolivia's very limited activities have ever given rise to a risk of a transboundary harm". It maintains, however, that the performance of the obligation to exchange information about planned measures is not linked to a risk of harm, but is an application of both the general obligation to co-operate and the requirement of due diligence in relation to environmental protection.

*

123. Bolivia does not contest Chile's description of the events or of the diplomatic exchanges between the Parties. Nevertheless, it claims that it has complied with all procedural obligations relating to the planned measures concerning the Silala, in accordance with customary international law. It contends that customary international law limits the obligation to notify and consult to situations where an environmental impact assessment confirms that there is a risk of significant transboundary harm. Bolivia asserts that the activities in question gave rise to no risk of significant harm and that, consequently, it had no obligation to notify or consult Chile.

124. Bolivia notes with respect to the projects referred to by Chile that none posed any risk of pollution or of any other form of harm. According to Bolivia, DUCTEC never implemented any plans to use the waters of the Silala; any ideas to build a small weir or a water bottling plant never materialized; the fish farm project was abandoned and the ten "small" houses were never inhabited. As regards the military post which it describes as "very modest", Bolivia claims to have implemented measures to prevent any contamination, as it had assured Chile that it would. Bolivia further notes that Chile has never claimed, let alone established, that the activities carried out by Bolivia have caused it any harm, much less significant harm.

* *

125. The Court will evaluate Bolivia's compliance with the procedural obligation to notify and consult in light of the foregoing conclusions on the content of that customary obligation and the threshold for its application. As established above, a riparian State is obliged to notify and consult the other riparian States about any planned measures that pose a risk of significant transboundary harm.

126. Consequently, the Court would only need to consider the question whether Bolivia has conducted an objective assessment of the circumstances and of the risk of significant transboundary harm in accordance with customary law if it were established that any of the activities undertaken by Bolivia in the vicinity of the Silala posed a risk of significant harm to Chile. This could be the case if, by their nature or by their magnitude, and in view of the context in which they are to be carried out, certain planned measures pose a risk of significant transboundary harm (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, pp. 720-721, para. 155).

127. However, this cannot be said of the measures taken by the Respondent about which Chile complains. Chile has not demonstrated or even alleged any risk of harm, let alone significant harm, linked to the measures planned or carried out by Bolivia. The Court notes that Bolivia has provided a number of factual details about the planned measures, which have not been disputed by Chile. Thus, no steps were taken to implement the plans to allow the Bolivian company DUCTEC to use the waters. No action was taken in respect of the projects to build a fish farm, a weir and a mineral water bottling plant. As for the ten small houses that were built, Bolivia has asserted, without contradiction from Chile, that these have never been inhabited. Only the military post was in fact built and put into operation. Bolivia has stated in this regard that the post in question is modest and that it took all necessary measures to prevent the contamination of the Silala and its waters. Chile has not claimed otherwise, nor alleged that any of the measures planned or carried out were capable of causing the slightest risk of harm to Chile.

128. For these reasons, the Court finds that Bolivia has not breached the obligation to notify and consult incumbent on it under customary international law, and the claim made by Chile in its final submission *(e)* must therefore be rejected.

129. Notwithstanding the above conclusion, the Court takes note of Bolivia's willingness to continue to co-operate with Chile with a view to guaranteeing each Party an equitable and reasonable use of the Silala and its waters. The Court thus invites the Parties to bear in mind the need to conduct consultations on an ongoing basis in a spirit of co-operation, in order to ensure respect for their respective rights and the protection and preservation of the Silala and its environment.

## IV. Counter-Claims of Bolivia

### *1. Admissibility of the Counter-Claims*

130. In its Counter-Memorial, Bolivia made three counter-claims (see paragraph 26 above). The Court, in its Order of 15 November 2018, did not consider that it was required to rule definitively, at that stage of the proceedings, on the question of whether Bolivia's counter-claims met the conditions set forth in the Rules of Court and deferred the matter to a later stage (*Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Order of 15 November 2018, I.C.J. Reports 2018 (II)*, p. 705). Before considering the merits of the counter-claims, the Court will therefore determine whether they fulfil the conditions set forth in its Rules.

131. Article 80, paragraph 1, of its Rules provides that "[t]he Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party". The Court has previously characterized these two requirements as relating to "the admissibility of a counter-claim as such" and has explained that the term "admissibility" must be understood "to encompass both the jurisdictional requirement and the direct connection requirement" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 208, para. 20).

132. Bolivia maintains that its counter-claims fulfil the requirements of Article 80, paragraph 1, of the Rules of Court. It contends that the counter-claims come within the jurisdiction of the Court and are connected with the principal claims in accordance with the Rules and the jurisprudence of the Court.

133. The Court recalls that Chile stated, in a letter to the Registry and then through its representative at a meeting between the President of the Court and the Agents of the Parties, that it did not intend to contest the admissibility of Bolivia's counter-claims (*Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Order of 15 November 2018, I.C.J. Reports 2018 (II)*, pp. 704-705).

134. The Court notes that Chile does not contest that the counter-claims come within the Court's jurisdiction. It also notes that Bolivia, like Chile, founds the Court's jurisdiction over the counter-claims on Article XXXI of the Pact of Bogotá. The Court observes that the counter-claims concern rights claimed by Bolivia under the customary international law applicable to international watercourses and therefore fall within "[a]ny question of international law" in respect of which the Court has jurisdiction under Article XXXI of the Pact of Bogotá.

135. The Court further recalls that in accordance with its jurisprudence, it is for the Court,

> "in its sole discretion, to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and [that], as a general rule, the degree of connection between the claims must be assessed both in fact and in law" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, pp. 204-205, para. 37).

136. The Court considers that, in this case, the counter-claims are directly connected with the subject-matter of the principal claims, both in

fact and in law. It is indeed clear from the Parties' submissions that their claims form part of the same factual complex. Similarly, the respective claims of both Parties concern the determination and application of customary rules in the legal relations between the two States with regard to the Silala. The Court is also of the view that Bolivia's counter-claims are not offered merely as defences to Chile's submissions but set out separate claims (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27).

137. The Court thus concludes that the requirements of Article 80, paragraph 1, of its Rules are met and that it may examine Bolivia's counter-claims on the merits.

### *2. First Counter-Claim: Bolivia's Alleged Sovereignty over the Artificial Channels and Drainage Mechanisms Installed in Its Territory*

138. In its first counter-claim, Bolivia requests the Court to adjudge and declare that it has sovereignty over the artificial channels and drainage mechanisms in the Silala located in its territory and that it has the right to decide whether and how to maintain them. It adds that this counter-claim should be uncontroversial, first, because such sovereignty is clearly recognized in international law and in the jurisprudence of the Court and, second, because Chile does not contest, in principle, that Bolivia possesses such sovereign rights.

139. Bolivia nonetheless states that Chile has left it unclear whether it unconditionally accepts Bolivia's sovereign right over the infrastructure of the Silala, which is why it has maintained this counter-claim. It points out in this respect that, contrary to its final submissions, Chile continues to suggest that Bolivia's sovereign rights over that infrastructure are subject to a number of conditions. According to Bolivia, Chile's conditions aim implicitly to guarantee to the Applicant an "acquired right" to its current use of the waters of the Silala. If Chile were to accept unconditionally Bolivia's sovereign right to maintain or dismantle the infrastructure on the Silala, the Court should then, in Bolivia's view, make a formal finding that there is no longer a dispute between the Parties in respect of the first counter-claim.

*

140. In response to this counter-claim of Bolivia, Chile asserts that it has always recognized Bolivia's sovereignty over the channels located in its territory and does not therefore contest Bolivia's right to dismantle them. In Chile's view, there is no dispute between the Parties in respect of these two points. Chile argues that even if the Court were to consider that a dispute existed at the time Bolivia filed its counter-claim, the exchanges of written pleadings between the Parties in the present case have deprived this counter-claim of its object.

141. In addition, Chile denies that it is claiming any "acquired right" over the waters of the Silala. In this regard, it states that its assertion that Bolivia's sovereign rights, in particular the right to dismantle the channels, must be exercised in accordance with the principles of customary international law applicable to international watercourses is not a condition imposed by Chile but a statement of law. If this counter-claim were to amount to Bolivia seeking the prerogative to be exempt from the international law by which it is bound in the event of the channels being dismantled, then it should, in Chile's view, be rejected.

*

142. The Court has previously stated that, as is the case with principal claims, it "must establish the existence of a dispute between the parties with regard to the subject-matter of the counter-claims" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017*, p. 311, para. 70). Given that the Parties' positions have changed considerably throughout the present proceedings, as already noted, the Court must satisfy itself that the first counter-claim has not become without object (see paragraph 42 above).

143. The Court observes in respect of this counter-claim that the Parties agree that the artificial channels and drainage mechanisms are located in territory under Bolivia's sovereignty. Both States also agree that, under international law, Bolivia has the sovereign right to decide what becomes of the infrastructure in its territory in the future, and whether to maintain or dismantle it.

144. In this regard, Bolivia contends that, in invoking the right to equitable and reasonable utilization in relation to this counter-claim, Chile seems to consider that the effect of dismantling infrastructure on the flow of the river should be regarded as a potential breach of its right to use the waters of the Silala. In Bolivia's view, this amounts to claiming an "acquired right", meaning that Chile's use of these waters, or any use it might make of them in the future, could be set against Bolivia's right to

dismantle the artificial installations. The Court notes in this regard that Chile clearly stated in its written pleadings, and repeated in the oral proceedings, that any reduction in the transboundary surface flow resulting from the dismantling of channels in Bolivia would not be considered a violation of customary international law unless the obligations acknowledged by Bolivia were somehow engaged.

145. Moreover, Chile has accepted the following points presented by Bolivia: Bolivia's sovereignty over the channels and drainage mechanisms; Bolivia's sovereign right to maintain or dismantle those channels and drainage mechanisms; Bolivia's sovereign right to restore the wetlands; and the fact that these rights must be exercised in compliance with the customary obligations applicable with regard to significant transboundary harm. The Court concludes that in respect of these points there is no longer any disagreement between the Parties.

146. As noted above, the Parties agree that Bolivia's right to construct, maintain or dismantle the infrastructure in its territory must be exercised in accordance with the applicable rules of customary international law (see paragraph 75). In particular, Bolivia clearly stated during the oral proceedings that its sovereign right over this infrastructure, including the right to dismantle it, must be exercised in compliance with the customary obligations applicable with regard to significant transboundary harm. The Parties also agree that the rules applicable to the Silala include, in particular, the right to equitable and reasonable utilization by riparian States, the exercise of due diligence to avoid causing significant harm to other watercourse States, and compliance with the general obligation to co-operate as well as with all procedural obligations (see paragraphs 64, 85 and 102 above). It is possible that the Parties may, in the future, express divergent views on the implementation of these obligations in the event of infrastructure installed on the Silala being dismantled. This possibility, however, does not alter the fact that Chile does not contest the right which is the subject-matter of the first counter-claim, namely Bolivia's right to maintain or dismantle the channels located in its territory. The Court considers that Bolivia may rely on Chile's acceptance of Bolivia's right to dismantle the channels.

147. In light of the foregoing, the Court concludes that there is no disagreement between the Parties. In accordance with its judicial function, the Court may pronounce only on a dispute that continues to exist at the time of adjudication (see paragraph 42 above). Consequently, the Court finds that the counter-claim made by Bolivia in its final submission *(a)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

### *3. Second Counter-Claim: Bolivia's Alleged Sovereignty over the "Artificial" Flow of Silala Waters Engineered, Enhanced or Produced in Its Territory*

148. In its second counter-claim as presented in its final submissions, Bolivia requests the Court to adjudge and declare that it has sovereignty over the artificial flow of Silala waters engineered, enhanced or produced in its territory, and that Chile has no acquired right to that artificial flow. It thus argues that Chile has for many years benefited, without paying any compensation, from an artificial flow generated by the infrastructure installed on the Silala by Bolivia, adding that Chile has no acquired right to the maintenance of that flow. Chile's right to the equitable and reasonable utilization of the waters of the Silala does not create an obligation for Bolivia to maintain the infrastructure in its territory and the flows "generated" by it.

149. Bolivia maintains that Chile has acknowledged all the propositions underlying the second counter-claim. It points out that Chile has recognized Bolivia's sovereign right to maintain or dismantle the infrastructure located in its territory if it so wishes. According to Bolivia, Chile also agrees that dismantling that infrastructure could have an impact on the "enhanced" flow, which, unlike the "natural" surface flow and the groundwater, would disappear. Bolivia also recalls that Chile stated both that it was not claiming an acquired right to the flow of water generated by the channels and that a reduction in that flow as a result of the channels being dismantled would not in itself constitute a violation by Bolivia of its obligations under customary international law. For Bolivia, its second counter-claim is the logical consequence of these points of agreement with Chile. Bolivia states that in this counter-claim it is asserting its sovereign right to eliminate the "enhanced" surface flow, a right which stems directly from its right to dismantle the channels, without this giving rise to a violation of international law. Bolivia argues that there is no longer any real dispute between the Parties over this issue, since Chile has accepted all the propositions underlying the second counter-claim, which should therefore be upheld.

*

150. Responding to Bolivia's second counter-claim, Chile argues that, although this counter-claim has evolved considerably, or even completely changed, over the course of the present proceedings, it is still indefensible in international law. Chile states in this regard that the counter-claim continues to be based on a non-existent distinction in customary international law between the "natural flow" and "artificial flow" of an interna-

tional watercourse and on the proposition that the "artificial flow" should be exempted from the law on international watercourses.

151. Chile also points out that Bolivia's second counter-claim is based on a misinterpretation of Chile's position as set out in its submission *(c)* such that Chile would be claiming an acquired right over the waters of the Silala. Chile contends that this interpretation is erroneous and that it is seeking no such right. It recalls that the Silala is an international watercourse and, as such, is subject in its entirety to customary international law. According to Chile, Bolivia cannot therefore claim a sovereign right over a portion of a shared international watercourse which would in any event eventually flow into Chile, save for minimal evaporation losses.

* *

152. The Court notes that the wording of this counter-claim and Bolivia's position thereon have changed considerably throughout the proceedings, in particular as a result of its evolving positions and submissions on the nature of the Silala. As mentioned above (see paragraph 53), Bolivia no longer contests the nature of the Silala as an international watercourse and now acknowledges that customary international law applies to the entirety of its waters. The Court further notes that Bolivia no longer claims, as it did in its written pleadings, that it has the right to determine the conditions and modalities for the delivery of the "artificially flowing" waters of the Silala and that any use of such waters by Chile is subject to Bolivia's consent. Bolivia now argues that Chile may continue to benefit in an equitable and reasonable manner from the flow resulting from the installation and channelizations of the Silala springs, so long as the flow continues. What Bolivia now seeks in this counter-claim is a declaration that Chile does not have an "acquired right" to the maintenance of the current situation, and that Chile's right to the equitable and reasonable utilization of the surface flow generated by the channels is not a "right for the future" that would allow it to oppose either the dismantling of those installations or any equitable and reasonable utilization of the waters that Bolivia may claim under customary international law.

153. The Court observes that the meaning ascribed by Bolivia to the term "sovereignty" is no different in substance from the "sovereign right" that Chile recognizes Bolivia to have over the infrastructure installed in Bolivian territory. Bolivia stated that when it refers to its "sovereignty" over the "enhanced flow", it means that its right over the channel works and its right to dismantle them, which Chile does not dispute, allow it to decide whether the flow generated by those works will be maintained or whether it will cease as a result of the works being dismantled. According

to Bolivia, the right that it claims is not an autonomous one but rather stems from its recognized right to maintain or dismantle all the installations in its territory. In this regard, the Court notes Chile's statement that Bolivia's right over the infrastructure was "wholly uncontroversial" and that Chile did not object to it.

154. The Court also observes that the second counter-claim, as presented in Bolivia's final submissions, rests on the premise that Chile is claiming an "acquired right" over the current flow of the Silala. As the Court noted earlier, Chile has clearly stated, first, that it is not claiming any such "acquired right" (see paragraph 67 above) and, second, that it recognizes that Bolivia has a sovereign right to dismantle the infrastructure and that any resulting reduction in the flow of the waters of the Silala into Chile would not in itself constitute a violation by Bolivia of its obligations under customary international law (see paragraphs 75 and 147 above). Consequently, the Court concludes that there is no longer any disagreement between the Parties on this point.

155. In light of the foregoing, the Court finds that, as a consequence of the convergence of views between the Parties on the second counter-claim made by Bolivia in its final submission *(b)*, this counter-claim no longer has any object, and that, therefore, the Court is not called upon to give a decision thereon.

### *4. Third Counter-Claim: The Alleged Need to Conclude an Agreement for any Future Delivery to Chile of the "Enhanced Flow" of the Silala*

156. In its third counter-claim as presented in its final submissions, Bolivia requests the Court to adjudge and declare that any request addressed by Chile to Bolivia for the delivery of the enhanced flow of the Silala, and the conditions and modalities thereof, including the compensation to be paid for any such delivery, are subject to the conclusion of an agreement with Bolivia. Bolivia states that this counter-claim addresses the situation in which it decides to dismantle the channel works on the Silala, as is its right, and Chile indicates that it would prefer the works to remain in place so as to continue to receive the "enhanced" surface flow produced by those works. Bolivia argues that, in such a case, the conditions and modalities for keeping the channels in operation and maintaining the current flow, and the compensation due to Bolivia for doing so, would need to be the subject of a negotiated agreement between the two States.

157. Bolivia acknowledges that, in the present proceedings, Chile has stated that it has no objection to Bolivia dismantling the works on the Silala, but it points out that this position of Chile is new and that Chile might have an interest in the maintenance of the channels. Bolivia also claims that international law encourages the conclusion of agreements in such situations. It states that it is in this spirit that it advanced its third

counter-claim, which is designed to meet the "particular" and "quite special" circumstances characterizing the waters in their upper reaches in its territory, as well as the interests and needs of both Parties.

*

158. Chile asserts that Bolivia's third counter-claim is premised on an erroneous legal basis. It argues that Bolivia continues to base its third counter-claim on alleged sovereignty over "artificial flows" that does not exist in international law. It states in this regard that Bolivia has no sovereignty over any part of the Silala River and cannot claim compensation from Chile for the use of waters that flow naturally into its territory.

159. Chile also considers that Bolivia's third counter-claim is based on a purely hypothetical future scenario which has no basis in actual fact. According to Chile, this counter-claim is dependent on a double hypothetical: that Bolivia communicates to Chile that it is going to dismantle the channels and that Chile requests Bolivia to retain the channels in place. Chile points out that this hypothetical scenario ignores the fact that it has repeated throughout the proceedings that it encourages Bolivia to dismantle the channels, that it considers this to be a matter for Bolivia alone and, lastly, that it has no doubt that dismantling the channels will not materially affect the Silala's flow.

* *

160. As already noted (see paragraph 48), it is not for the Court to pronounce on hypothetical situations. It may rule only in connection with concrete cases where there exists at the time of the adjudication an actual dispute between the parties.

161. This is, however, not the case with Bolivia's third counter-claim, which does not concern an actual dispute between the Parties. Rather, it seeks an opinion from the Court on a future, hypothetical situation.

162. For these reasons, the counter-claim made by Bolivia in its final submission *(c)* must be rejected.

* * *

163. For these reasons,

THE COURT,

(1) By fifteen votes to one,

*Finds* that the claim made by the Republic of Chile in its final submission *(a)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judge* Charlesworth;

(2) By fifteen votes to one,

*Finds* that the claim made by the Republic of Chile in its final submission *(b)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judge* Charlesworth;

(3) By fifteen votes to one,

*Finds* that the claim made by the Republic of Chile in its final submission *(c)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judge* Charlesworth;

(4) By fourteen votes to two,

*Finds* that the claim made by the Republic of Chile in its final submission *(d)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judges* Robinson, Charlesworth;

(5) Unanimously,

*Rejects* the claim made by the Republic of Chile in its final submission *(e)*;

(6) By fifteen votes to one,

*Finds* that the counter-claim made by the Plurinational State of Bolivia in its final submission *(a)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judge* Charlesworth;

(7) By fifteen votes to one,

*Finds* that the counter-claim made by the Plurinational State of Bolivia in its final submission *(b)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judge* Charlesworth;

(8) Unanimously,

*Rejects* the counter-claim made by the Plurinational State of Bolivia in its final submission *(c)*.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this first day of December, two thousand and twenty-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Chile and the Government of the Plurinational State of Bolivia, respectively.

*(Signed)* Joan E. DONOGHUE,
President.

*(Signed)* Philippe GAUTIER,
Registrar.

Judges TOMKA and CHARLESWORTH append declarations to the Judgment of the Court; Judge *ad hoc* SIMMA appends a separate opinion to the Judgment of the Court.

*(Initialled)* J.E.D.

*(Initialled)* Ph.G.

# Annex 66

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT

(HUNGARY/SLOVAKIA)

**JUDGMENT OF 25 SEPTEMBER 1997**

# 1997

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE AU PROJET GABČÍKOVO-NAGYMAROS

(HONGRIE/SLOVAQUIE)

**ARRÊT DU 25 SEPTEMBRE 1997**

Official citation:
*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7

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# PROJET GABČÍKOVO-NAGYMAROS
# (HONGRIE/SLOVAQUIE)

25 SEPTEMBRE 1997

ARRÊT

INTERNATIONAL COURT OF JUSTICE

1997
25 September
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YEAR 1997

**25 September 1997**

# CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT

## (HUNGARY/SLOVAKIA)

*Treaty of 16 September 1977 concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks — "Related instruments".*

*Suspension and abandonment by Hungary, in 1989, of works on the Project — Applicability of the Vienna Convention of 1969 on the Law of Treaties — Law of treaties and law of State responsibility — State of necessity as a ground for precluding the wrongfulness of an act — "Essential interest" of the State committing the act — Environment — "Grave and imminent peril" — Act having to constitute the "only means" of safeguarding the interest threatened — State having "contributed to the occurrence of the state of necessity".*

*Czechoslovakia's proceeding, in November 1991, to "Variant C" and putting into operation, from October 1992, this Variant — Arguments drawn from a proposed principle of approximate application — Respect for the limits of the Treaty — Right to an equitable and reasonable share of the resources of an international watercourse — Commission of a wrongful act and prior conduct of a preparatory character — Obligation to mitigate damages — Principle concerning only the calculation of damages — Countermeasures — Response to an internationally wrongful act — Proportionality — Assumption of unilateral control of a shared resource.*

*Notification by Hungary, on 19 May 1992, of the termination of the 1977 Treaty and related instruments — Legal effects — Matter falling within the law of treaties — Articles 60 to 62 of the Vienna Convention on the Law of Treaties — Customary law — Impossibility of performance — Permanent disappearance or destruction of an "object" indispensable for execution — Impossibility of performance resulting from the breach, by the party invoking it, of an obligation under the Treaty — Fundamental change of circumstances — Essential basis of the consent of the parties — Extent of obligations still to be performed — Stability of treaty relations — Material breach of the Treaty — Date on which the breach occurred and date of notification of termination — Victim of a breach having itself committed a prior breach of the Treaty — Emergence of new norms of environmental law — Sustainable development — Treaty provisions permit-*

*ting the parties, by mutual consent, to take account of those norms — Repudiation of the Treaty — Reciprocal non-compliance — Integrity of the rule* pacta sunt servanda *— Treaty remaining in force until terminated by mutual consent.*

*Legal consequences of the Judgment of the Court — Dissolution of Czechoslovakia — Article 12 of the Vienna Convention of 1978 on Succession of States in respect of Treaties — Customary law — Succession of States without effect on a treaty creating rights and obligations "attaching" to the territory — Irregular state of affairs as a result of failure of both Parties to comply with their treaty obligations —* Ex injuria jus non oritur *— Objectives of the Treaty — Obligations overtaken by events — Positions adopted by the parties after conclusion of the Treaty — Good faith negotiations — Effects of the Project on the environment — Agreed solution to be found by the Parties — Joint régime — Reparation for acts committed by both Parties — Co-operation in the use of shared water resources — Damages — Succession in respect of rights and obligations relating to the Project — Intersecting wrongs — Settlement of accounts for the construction of the works.*

## JUDGMENT

*Present:* *President* SCHWEBEL; *Vice-President* WEERAMANTRY; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Judge* ad hoc SKUBISZEWSKI; *Registrar* VALENCIA-OSPINA.

In the case concerning the Gabčíkovo-Nagymaros Project,

*between*

the Republic of Hungary,

represented by

H.E. Mr. György Szénási, Ambassador, Head of the International Law Department, Ministry of Foreign Affairs,

as Agent and Counsel;

H.E. Mr. Dénes Tomaj, Ambassador of the Republic of Hungary to the Netherlands,

as Co-Agent;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,

Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II) and Director of the Institut des hautes études internationales of Paris,

Mr. Alexandre Kiss, Director of Research, Centre national de la recherche scientifique (retd.),

Mr. László Valki, Professor of International Law, Eötvös Loránd University, Budapest,

Mr. Boldizsár Nagy, Associate Professor of International Law, Eötvös Loránd University, Budapest,
Mr. Philippe Sands, Reader in International Law, University of London, School of Oriental and African Studies, and Global Professor of Law, New York University,
Ms Katherine Gorove, consulting Attorney,

as Counsel and Advocates;

Dr. Howard Wheater, Professor of Hydrology, Imperial College, London,
Dr. Gábor Vida, Professor of Biology, Eötvös Loránd University, Budapest, Member of the Hungarian Academy of Sciences,
Dr. Roland Carbiener, Professor emeritus of the University of Strasbourg,
Dr. Klaus Kern, consulting Engineer, Karlsruhe,

as Advocates;

Mr. Edward Helgeson,
Mr. Stuart Oldham,
Mr. Péter Molnár,

as Advisers;

Dr. György Kovács,
Mr. Timothy Walsh,
Mr. Zoltán Kovács,

as Technical Advisers;

Dr. Attila Nyikos,

as Assistant;

Mr. Axel Gosseries, LL.M.,

as Translator;

Ms Éva Kocsis,
Ms Katinka Tompa,

as Secretaries,

*and*

the Slovak Republic,

represented by

H.E. Dr. Peter Tomka, Ambassador, Legal Adviser of the Ministry of Foreign Affairs,

as Agent;

Dr. Václav Mikulka, Member of the International Law Commission,

as Co-Agent, Counsel and Advocate;

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor emeritus of International Law at the University of Cambridge, former Member of the International Law Commission,

as Counsel;

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former Member of the International Law Commission,
Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the

Institute of Political Studies, Paris, Member of the International Law Commission,
Mr. Walter D. Sohier, Member of the Bar of the State of New York and of the District of Columbia,
Sir Arthur Watts, K.C.M.G., Q.C., Barrister, Member of the Bar of England and Wales,
Mr. Samuel S. Wordsworth, avocat à la cour d'appel de Paris, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley, Paris,

as Counsel and Advocates;

Mr. Igor Mucha, Professor of Hydrogeology and Former Head of the Groundwater Department at the Faculty of Natural Sciences of Comenius University in Bratislava,
Mr. Karra Venkateswara Rao, Director of Water Resources Engineering, Department of Civil Engineering, City University, London,

Mr. Jens Christian Refsgaard, Head of Research and Development, Danish Hydraulic Institute,

as Counsel and Experts;

Dr. Cecília Kandráčová, Director of Department, Ministry of Foreign Affairs,
Mr. Luděk Krajhanzl, Attorney at Law, Vyroubal Krajhanzl Skácel and Partners, Prague,
Mr. Miroslav Liška, Head of the Division for Public Relations and Expertise, Water Resources Development State Enterprise, Bratislava,

Dr. Peter Vršanský, Minister-Counsellor, Chargé d'affaires *a.i.*, of the Embassy of the Slovak Republic, The Hague,

as Counsellors;

Miss Anouche Beaudouin, allocataire de recherche at the University of Paris X-Nanterre,
Ms Cheryl Dunn, Frere Cholmeley, Paris,
Ms Nikoleta Glindová, attaché, Ministry of Foreign Affairs,
Mr. Drahoslav Štefánek, attaché, Ministry of Foreign Affairs,

as Legal Assistants,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. By a letter dated 2 July 1993, filed in the Registry of the Court on the same day, the Ambassador of the Republic of Hungary (hereinafter called "Hungary") to the Netherlands and the Chargé d'affaires *ad interim* of the Slovak Republic (hereinafter called "Slovakia") to the Netherlands jointly notified to the Court a Special Agreement in English that had been signed at Brussels on 7 April 1993 and had entered into force on 28 June 1993, on the date of the exchange of instruments of ratification.

2. The text of the Special Agreement reads as follows:

"*The Republic of Hungary and the Slovak Republic,*

*Considering* that differences have arisen between the Czech and Slovak Federal Republic and the Republic of Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 and related instruments (hereinafter referred to as 'the Treaty'), and on the construction and operation of the 'provisional solution';

*Bearing in mind* that the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project;

*Recognizing* that the Parties concerned have been unable to settle these differences by negotiations;

*Having in mind* that both the Czechoslovak and Hungarian delegations expressed their commitment to submit the differences connected with the Gabčíkovo-Nagymaros Project in all its aspects to binding international arbitration or to the International Court of Justice;

*Desiring* that these differences should be settled by the International Court of Justice;

*Recalling* their commitment to apply, pending the Judgment of the International Court of Justice, such a temporary water management régime of the Danube as shall be agreed between the Parties;

*Desiring* further to define the issues to be submitted to the International Court of Justice,

*Have agreed as follows:*

*Article 1*

The Parties submit the questions contained in Article 2 to the International Court of Justice pursuant to Article 40, paragraph 1, of the Statute of the Court.

*Article 2*

(1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,

*(a)* whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

*(b)* whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

*(c)* what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article.

*Article 3*

(1) All questions of procedure and evidence shall be regulated in accordance with the provisions of the Statute and the Rules of Court.

(2) However, the Parties request the Court to order that the written proceedings should consist of:

*(a)* a Memorial presented by each of the Parties not later than ten months after the date of notification of this Special Agreement to the Registrar of the International Court of Justice;

*(b)* a Counter-Memorial presented by each of the Parties not later than seven months after the date on which each has received the certified copy of the Memorial of the other Party;

*(c)* a Reply presented by each of the Parties within such time-limits as the Court may order.

*(d)* The Court may request additional written pleadings by the Parties if it so determines.

(3) The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the corresponding part of the proceedings from the said Party.

*Article 4*

(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management régime for the Danube.

(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute.

(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement.

*Article 5*

(1) The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(2) Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.

(3) If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

*Article 6*

(1) The present Special Agreement shall be subject to ratification.

(2) The instruments of ratification shall be exchanged as soon as possible in Brussels.

(3) The present Special Agreement shall enter into force on the date of exchange of instruments of ratification. Thereafter it will be notified jointly to the Registrar of the Court.

In witness whereof the undersigned being duly authorized thereto, have signed the present Special Agreement and have affixed thereto their seals."

3. Pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, Members of the United Nations and other States entitled to appear before the Court.

4. Since the Court included upon the Bench no judge of Slovak nationality, Slovakia exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Krzysztof Jan Skubiszewski.

5. By an Order dated 14 July 1993, the Court fixed 2 May 1994 as the time-limit for the filing by each of the Parties of a Memorial and 5 December 1994 for the filing by each of the Parties of a Counter-Memorial, having regard to the provisions of Article 3, paragraph 2 *(a)* and *(b)*, of the Special Agreement. Those pleadings were duly filed within the prescribed time-limits.

6. By an Order dated 20 December 1994, the President of the Court, having heard the Agents of the Parties, fixed 20 June 1995 as the time-limit for the filing of the Replies, having regard to the provisions of Article 3, paragraph 2 *(c)*, of the Special Agreement. The Replies were duly filed within the time-limit thus prescribed and, as the Court had not asked for the submission of additional pleadings, the case was then ready for hearing.

7. By letters dated 27 January 1997, the Agent of Slovakia, referring to the provisions of Article 56, paragraph 1, of the Rules of Court, expressed his Government's wish to produce two new documents; by a letter dated 10 February 1997, the Agent of Hungary declared that his Government objected to their production. On 26 February 1997, after having duly ascertained the views of the two Parties, the Court decided, in accordance with Article 56, paragraph 2, of the Rules of Court, to authorize the production of those documents under certain conditions of which the Parties were advised. Within the time-limit fixed by the Court to that end, Hungary submitted comments on one of those documents under paragraph 3 of that same Article. The Court authorized Slovakia to comment in turn upon those observations, as it had expressed a wish to do so; its comments were received within the time-limit prescribed for that purpose.

8. Moreover, each of the Parties asked to be allowed to show a video cassette in the course of the oral proceedings. The Court agreed to those requests, provided that the cassettes in question were exchanged in advance between the Parties, through the intermediary of the Registry. That exchange was effected accordingly.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after having ascertained the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

10. By a letter dated 16 June 1995, the Agent of Slovakia invited the Court

to visit the locality to which the case relates and there to exercise its functions with regard to the obtaining of evidence, in accordance with Article 66 of the Rules of Court. For his part, the Agent of Hungary indicated, by a letter dated 28 June 1995, that, if the Court should decide that a visit of that kind would be useful, his Government would be pleased to co-operate in organizing it. By a letter dated 14 November 1995, the Agents of the Parties jointly notified to the Court the text of a Protocol of Agreement, concluded in Budapest and New York the same day, with a view to proposing to the Court the arrangements that might be made for such a visit *in situ*; and, by a letter dated 3 February 1997, they jointly notified to it the text of Agreed Minutes drawn up in Budapest and New York the same day, which supplemented the Protocol of Agreement of 14 November 1995. By an Order dated 5 February 1997, the Court decided to accept the invitation to exercise its functions with regard to the obtaining of evidence at a place to which the case relates and, to that end, to adopt the arrangements proposed by the Parties. The Court visited the area from 1 to 4 April 1997; it visited a number of locations along the Danube and took note of the technical explanations given by the representatives who had been designated for the purpose by the Parties.

11. The Court held a first round of ten public hearings from 3 to 7 March and from 24 to 27 March 1997, and a second round of four public hearings on 10, 11, 14 and 15 April 1997, after having made the visit *in situ* referred to in the previous paragraph. During those hearings, the Court heard the oral arguments and replies of:

*For Hungary:* H.E. Mr. Szénási,
Professor Valki,
Professor Kiss,
Professor Vida,
Professor Carbiener,
Professor Crawford,
Professor Nagy,
Dr. Kern,
Professor Wheater,
Ms Gorove,
Professor Dupuy,
Professor Sands.

*For Slovakia:* H.E. Dr. Tomka,
Dr. Mikulka,
Mr. Wordsworth,
Professor McCaffrey,
Professor Mucha,
Professor Pellet,
Mr. Refsgaard,
Sir Arthur Watts.

12. The Parties replied orally and in writing to various questions put by Members of the Court. Referring to the provisions of Article 72 of the Rules of Court, each of the Parties submitted to the Court its comments upon the replies given by the other Party to some of those questions.

*

13. In the course of the written proceedings, the following submissions were presented by the Parties:

*On behalf of Hungary,*

in the Memorial, the Counter-Memorial and the Reply (*mutatis mutandis* identical texts):

"On the basis of the evidence and legal argument presented in the Memorial, Counter-Memorial and this Reply, the Republic of Hungary

*Requests the Court to adjudge and declare*

*First*, that the Republic of Hungary was entitled to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

*Second*, that the Czech and Slovak Federal Republic was not entitled to proceed to the 'provisional solution' (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

*Third*, that by its Declaration of 19 May 1992, Hungary validly terminated the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 16 September 1977;

*Requests the Court to adjudge and declare further*

that the legal consequences of these findings and of the evidence and the arguments presented to the Court are as follows:

(1) that the Treaty of 16 September 1977 has never been in force between the Republic of Hungary and the Slovak Republic;
(2) that the Slovak Republic bears responsibility to the Republic of Hungary for maintaining in operation the 'provisional solution' referred to above;
(3) that the Slovak Republic is internationally responsible for the damage and loss suffered by the Republic of Hungary and by its nationals as a result of the 'provisional solution';
(4) that the Slovak Republic is under an obligation to make reparation in respect of such damage and loss, the amount of such reparation, if it cannot be agreed by the Parties within six months of the date of the Judgment of the Court, to be determined by the Court;
(5) that the Slovak Republic is under the following obligations:
   *(a)* to return the waters of the Danube to their course along the international frontier between the Republic of Hungary and the Slovak Republic, that is to say the main navigable channel as defined by applicable treaties;
   *(b)* to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution; and
   *(c)* to provide appropriate guarantees against the repetition of the damage and loss suffered by the Republic of Hungary and by its nationals."

*On behalf of Slovakia,*

in the Memorial, the Counter-Memorial and the Reply (*mutatis mutandis* identical texts):

"On the basis of the evidence and legal arguments presented in the Slovak Memorial, Counter-Memorial and in this Reply, and reserving the right to supplement or amend its claims in the light of further written pleadings, the Slovak Republic

*Requests the Court to adjudge and declare:*

1. That the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks, and related instruments, and to which the Slovak Republic is the acknowledged successor, is a treaty in force and has been so from the date of its conclusion; and that the notification of termination by the Republic of Hungary on 19 May 1992 was without legal effect.
2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributed responsibility to the Republic of Hungary.
3. That the act of proceeding with and putting into operation Variant C, the 'provisional solution', was lawful.
4. That the Republic of Hungary must therefore cease forthwith all conduct which impedes the full and bona fide implementation of the 1977 Treaty and must take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty.
5. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary is liable to pay, and the Slovak Republic is entitled to receive, full compensation for the loss and damage caused to the Slovak Republic by those breaches, plus interest and loss of profits, in the amounts to be determined by the Court in a subsequent phase of the proceedings in this case."

14. In the oral proceedings, the following submissions were presented by the Parties

*On behalf of Hungary,*

at the hearing of 11 April 1997:

The submissions read at the hearing were *mutatis mutandis* identical to those presented by Hungary during the written proceedings.

*On behalf of Slovakia,*

at the hearing of 15 April 1997:

"On the basis of the evidence and legal arguments presented in its written and oral pleadings, the Slovak Republic,

*Requests the Court to adjudge and declare:*

1. That the Treaty, as defined in the first paragraph of the Preamble to the Compromis between the Parties, dated 7 April 1993, concerning the construction and operation of the Gabčikovo/Nagymaros System of Locks and related instruments, concluded between Hungary and

Czechoslovakia and with regard to which the Slovak Republic is the successor State, has never ceased to be in force and so remains, and that the notification of 19 May 1992 of purported termination of the Treaty by the Republic of Hungary was without legal effect;

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributes responsibility to the Republic of Hungary;
3. That the Czech and Slovak Federal Republic was entitled, in November 1991, to proceed with the 'provisional solution' and to put this system into operation from October 1992; and that the Slovak Republic was, and remains, entitled to continue the operation of this system;

4. That the Republic of Hungary shall therefore cease forthwith all conduct which impedes the bona fide implementation of the 1977 Treaty and shall take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty, subject to any amendments which may be agreed between the Parties;
5. That the Republic of Hungary shall give appropriate guarantees that it will not impede the performance of the Treaty, and the continued operation of the system;
6. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary shall, in addition to immediately resuming performance of its Treaty obligations, pay to the Slovak Republic full compensation for the loss and damage, including loss of profits, caused by those breaches together with interest thereon;
7. That the Parties shall immediately begin negotiations with a view, in particular, to adopting a new timetable and appropriate measures for the implementation of the Treaty by both Parties, and to fixing the amount of compensation due by the Republic of Hungary to the Slovak Republic; and that, if the Parties are unable to reach an agreement within six months, either one of them may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."

* * *

15. The present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty "concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks" (hereinafter called the "1977 Treaty"). The names of the two contracting States have varied over the years; hereinafter they will be referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978.

It provides for the construction and operation of a System of Locks by the parties as a "joint investment". According to its Preamble, the barrage system was designed to attain

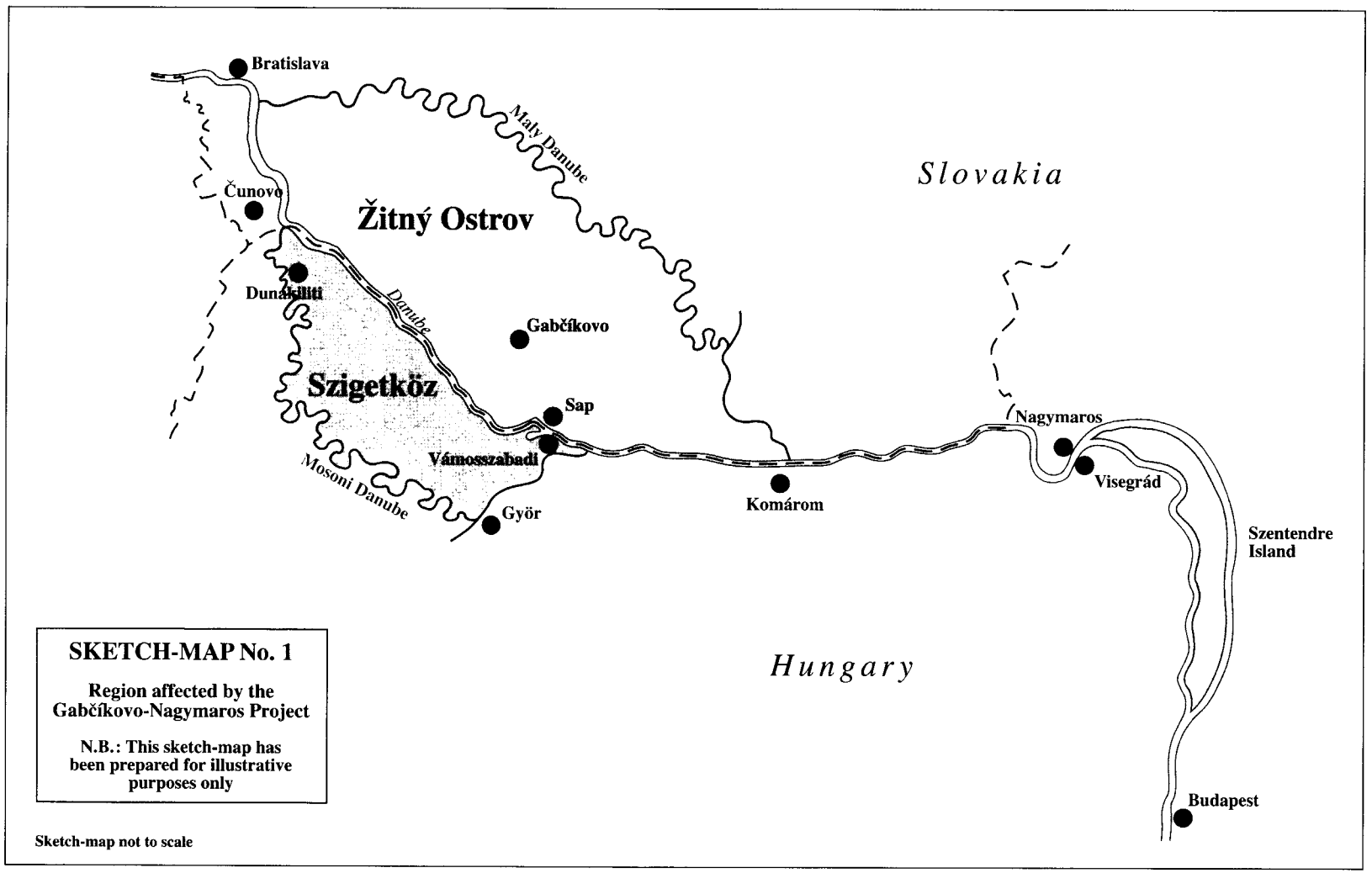
> "the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water

resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties".

The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

16. The Danube is the second longest river in Europe, flowing along or across the borders of nine countries in its 2,860-kilometre course from the Black Forest eastwards to the Black Sea. For 142 kilometres, it forms the boundary between Slovakia and Hungary. The sector with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. This plain is delimited to the north-east, in Slovak territory, by the Malý Danube and to the south-west, in Hungarian territory, by the Mosoni Danube. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. The area lying between the Malý Danube and that channel, in Slovak territory, constitutes the Žitný Ostrov; the area between the main channel and the Mosoni Danube, in Hungarian territory, constitutes the Szigetköz. Čunovo and, further downstream, Gabčíkovo, are situated in this sector of the river on Slovak territory, Čunovo on the right bank and Gabčíkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory and the topography becomes hillier. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (see sketch-map No. 1, p. 19 below).

17. The Danube has always played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international co-operation essential. Improvements to the navigation channel have enabled the Danube, now linked by canal to the Main and thence to the Rhine, to become an important navigational artery connecting the North Sea to the Black Sea. In the stretch of river to which the case relates, flood protection measures have been constructed over the centuries, farming and forestry practised, and, more recently, there has been an increase in population and industrial activity in the area. The cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water régime.


Bratislava
Čunovo
Žitný Ostrov
Maly Danube
Slovakia
Dunakiliti
Danube
Gabčíkovo
Szigetköz
Sap
Vámosszabadi
Mosoni Danube
Győr
Komárom
Nagymaros
Visegrád
Szentendre Island
Budapest
Hungary
SKETCH-MAP No. 1
Region affected by the Gabčíkovo-Nagymaros Project
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale

Only by international co-operation could action be taken to alleviate these problems. Water management projects along the Danube have frequently sought to combine navigational improvements and flood protection with the production of electricity through hydroelectric power plants. The potential of the Danube for the production of hydroelectric power has been extensively exploited by some riparian States. The history of attempts to harness the potential of the particular stretch of the river at issue in these proceedings extends over a 25-year period culminating in the signature of the 1977 Treaty.

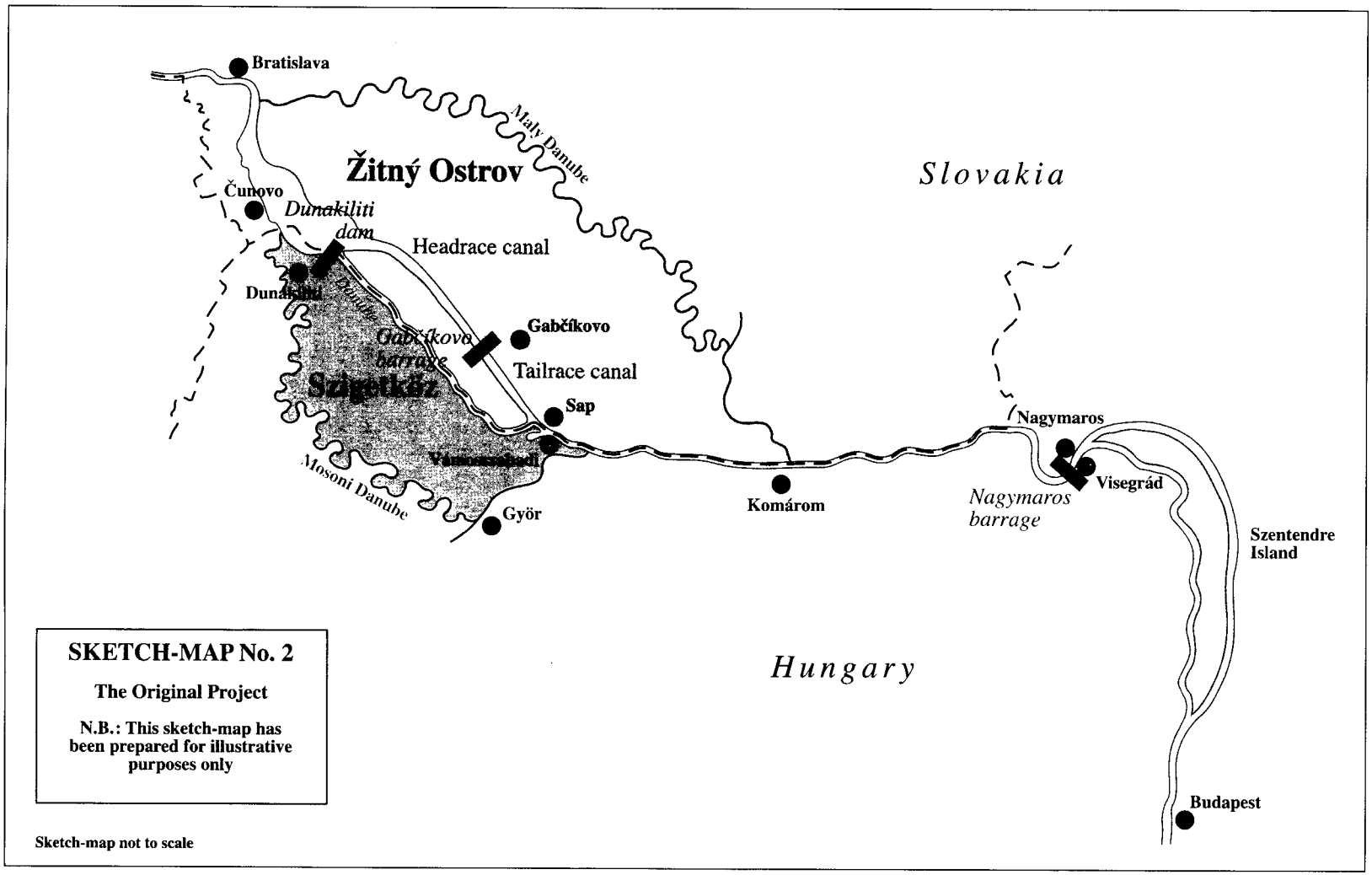
18. Article 1, paragraph 1, of the 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabčíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works" (see sketch-map No. 2, p. 21 below). The Court will subsequently have occasion to revert in more detail to those works, which were to comprise, *inter alia*, a reservoir upstream of Dunakiliti, in Hungarian and Czechoslovak territory; a dam at Dunakiliti, in Hungarian territory; a bypass canal, in Czechoslovak territory, on which was to be constructed the Gabčíkovo System of Locks (together with a hydroelectric power plant with an installed capacity of 720 megawatts (MW)); the deepening of the bed of the Danube downstream of the place at which the bypass canal was to rejoin the old bed of the river; a reinforcement of flood-control works along the Danube upstream of Nagymaros; the Nagymaros System of Locks, in Hungarian territory (with a hydroelectric power plant of a capacity of 158 MW); and the deepening of the bed of the Danube downstream.

Article 1, paragraph 4, of the Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976; Article 4, paragraph 1, for its part, specified that "the joint investment [would] be carried out in conformity with the joint contractual plan".

According to Article 3, paragraph 1:

> "Operations connected with the realization of the joint investment and with the performance of tasks relating to the operation of the System of Locks shall be directed and supervised by the Governments of the Contracting Parties through . . . (. . . 'government delegates')."

Those delegates had, *inter alia*, "to ensure that construction of the System of Locks is . . . carried out in accordance with the approved joint contractual plan and the project work schedule". When the works were brought into operation, they were moreover "To establish the operating


Bratislava
Malý Dunaj
Žitný Ostrov
Slovakia
Čunovo
Dunakiliti dam
Headrace canal
Dunaj
Gabčíkovo barrage
Gabčíkovo
Tailrace canal
Szigetköz
Sap
Nagymaros
Mosoni Danube
Győr
Komárom
Nagymaros barrage
Visegrád
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 2
The Original Project
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale

and operational procedures of the System of Locks and ensure compliance therewith."

Article 4, paragraph 4, stipulated that:

> "Operations relating to the joint investment [should] be organized by the Contracting Parties in such a way that the power generation plants [would] be put into service during the period 1986-1990."

Article 5 provided that the cost of the joint investment would be borne by the contracting parties in equal measure. It specified the work to be carried out by each one of them. Article 8 further stipulated that the Dunakiliti dam, the bypass canal and the two series of locks at Gabčíkovo and Nagymaros would be "jointly owned" by the contracting parties "in equal measure". Ownership of the other works was to be vested in the State on whose territory they were constructed.

The parties were likewise to participate in equal measure in the use of the system put in place, and more particularly in the use of the base-load and peak-load power generated at the hydroelectric power plants (Art. 9).

According to Article 10, the works were to be managed by the State on whose territory they were located, "in accordance with the jointly-agreed operating and operational procedures", while Article 12 stipulated that the operation, maintenance (repair) and reconstruction costs of jointly owned works of the System of Locks were also to be borne jointly by the contracting parties in equal measure.

According to Article 14,

> "The discharge specified in the water balance of the approved joint contractual plan shall be ensured in the bed of the Danube [between Dunakiliti and Sap] unless natural conditions or other circumstances temporarily require a greater or smaller discharge."

Paragraph 3 of that Article was worded as follows:

> "In the event that the withdrawal of water in the Hungarian-Czechoslovak section of the Danube exceeds the quantities of water specified in the water balance of the approved joint contractual plan and the excess withdrawal results in a decrease in the output of electric power, the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced."

Article 15 specified that the contracting parties

> "shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks".

Article 16 set forth the obligations of the contracting parties concerning the maintenance of the bed of the Danube.

Article 18, paragraph 1, provided as follows:

> "The Contracting Parties, in conformity with the obligations previously assumed by them, and in particular with article 3 of the Convention concerning the regime of navigation on the Danube, signed at Belgrade on 18 August 1948, shall ensure uninterrupted and safe navigation on the international fairway both during the construction and during the operation of the System of Locks."

It was stipulated in Article 19 that:

> "The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks."

Article 20 provided for the contracting parties to take appropriate measures, within the framework of their national investments, for the protection of fishing interests in conformity with the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958.

According to Article 22, paragraph 1, of the Treaty, the contracting parties had, in connection with the construction and operation of the System of Locks, agreed on minor revision to the course of the State frontier between them as follows:

> "*(d)* In the Dunakiliti-Hrušov head-water area, the State frontier shall run from boundary point 161.V.O.á. to boundary stone No. I.5. in a straight line in such a way that the territories affected, to the extent of about 10-10 hectares shall be offset between the two States."

It was further provided, in paragraph 2, that the revision of the State frontier and the exchange of territories so provided for should be effected "by the Contracting Parties on the basis of a separate treaty". No such treaty was concluded.

Finally a dispute settlement provision was contained in Article 27, worded as follows:

> "1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.
>
> 2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision."

19. The Joint Contractual Plan, referred to in the previous paragraph, set forth, on a large number of points, both the objectives of the system

and the characteristics of the works. In its latest version it specified in paragraph 6.2 that the Gabčíkovo bypass canal would have a discharge capacity of 4,000 cubic metres per second ($m^3/s$). The power plant would include "Eight . . . turbines with 9.20 m diameter running wheels" and would "mainly operate in peak-load time and continuously during high water". This type of operation would give an energy production of 2,650 gigawatt/hours (GWh) per annum. The Plan further stipulated in paragraph 4.4.2:

> "The low waters are stored every day, which ensures the peak-load time operation of the Gabčíkovo hydropower plant . . . a minimum of 50 $m^3/s$ additional water is provided for the old bed [of the Danube] besides the water supply of the branch system."

The Plan further specified that, in the event that the discharge into the bypass canal exceeded 4,000-4,500 $m^3/s$, the excess amounts of water would be channelled into the old bed. Lastly, according to paragraph 7.7 of the Plan:

> "The common operational regulation stipulates that concerning the operation of the Dunakiliti barrage in the event of need during the growing season 200 $m^3/s$ discharge must be released into the old Danube bed, in addition to the occasional possibilities for rinsing the bed."

The Joint Contractual Plan also contained "Preliminary Operating and Maintenance Rules", Article 23 of which specified that "The final operating rules [should] be approved within a year of the setting into operation of the system." (Joint Contractual Plan, Summary Documentation, Vol. O-1-A.)

Nagymaros, with six turbines, was, according to paragraph 6.3 of the Plan, to be a "hydropower station . . . type of a basic power-station capable of operating in peak-load time for five hours at the discharge interval between 1,000-2,500 $m^3/s$" per day. The intended annual production was to be 1,025 GWh (i.e., 38 per cent of the production of Gabčíkovo, for an installed power only equal to 21 per cent of that of Gabčíkovo).

20. Thus, the Project was to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabčíkovo.

*

21. The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at

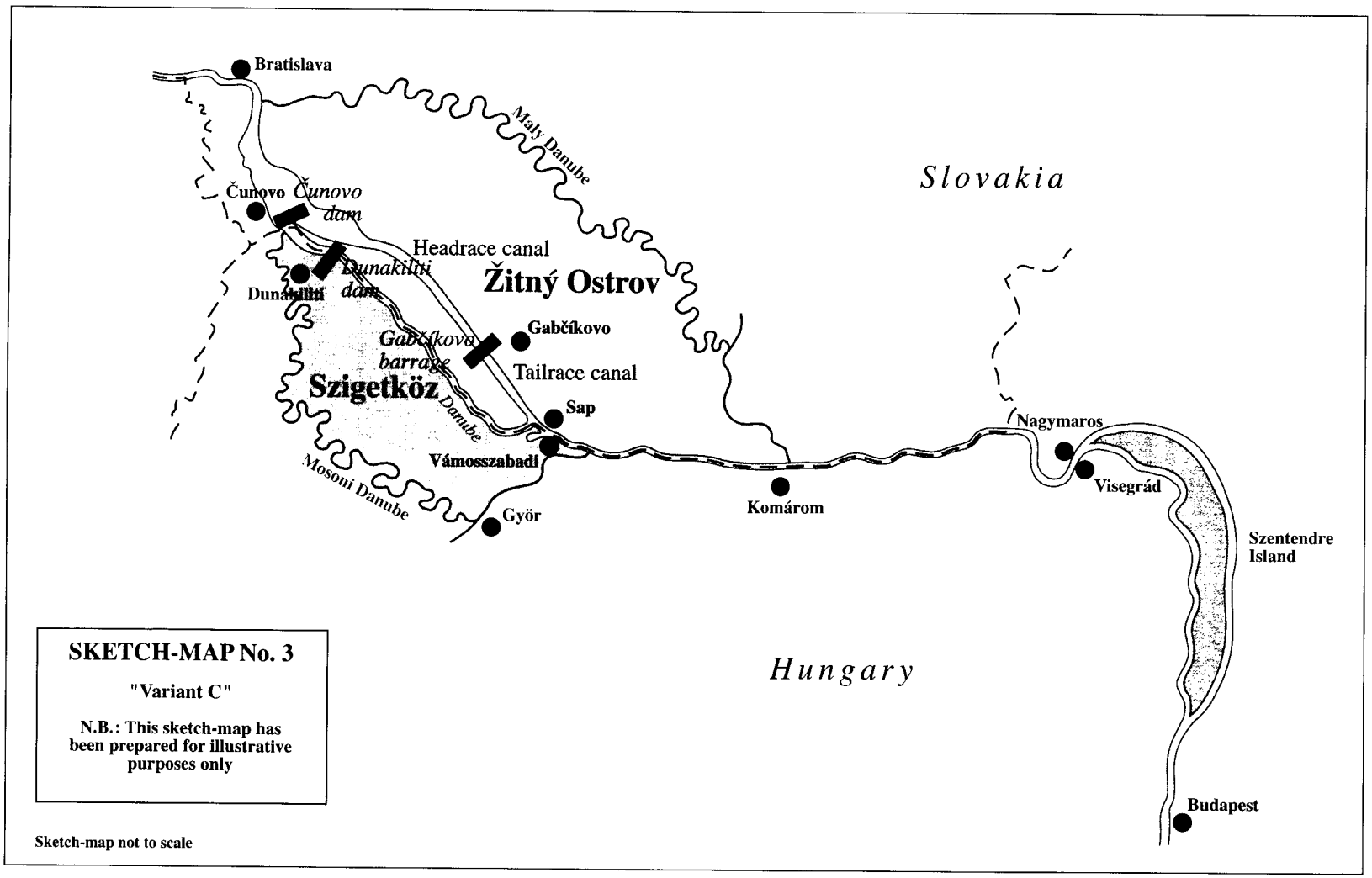
the same time as the Treaty itself. The Agreement moreover made some adjustments to the allocation of the works between the parties as laid down by the Treaty.

Work on the Project started in 1978. On Hungary's initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 (one amending Article 4, paragraph 4, of the 1977 Treaty and the other the Agreement on mutual assistance), to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 (which amended the Agreement on mutual assistance), to accelerate the Project.

22. As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.

23. During this period, negotiations were being held between the parties. Czechoslovakia also started investigating alternative solutions. One of them, subsequently known as "Variant C", entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 kilometres upstream of Dunakiliti (see sketch-map No. 3, p. 26 below). In its final stage, Variant C included the construction at Čunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was to have a smaller surface area and provide approximately 30 per cent less storage than the reservoir initially contemplated. Provision was made for ancillary works, namely: an intake structure to supply the Mosoni Danube; a weir to enable, *inter alia*, floodwater to be directed along the old bed of the Danube; an auxiliary shiplock; and two hydroelectric power plants (one capable of an annual production of 4 GWh on the Mosoni Danube, and the other with a production of 174 GWh on the old bed of the Danube). The supply of water to the side-arms of the Danube on the Czechoslovak bank was to be secured by means of two intake structures in the bypass canal at Dobrohošt' and Gabčíkovo. A solution was to be found for the Hungarian bank. Moreover, the question of the deepening of the bed of the Danube at the confluence of the bypass canal and the old bed of the river remained outstanding.

On 23 July 1991, the Slovak Government decided "to begin, in September 1991, construction to put the Gabčíkovo Project into operation by the provisional solution". That decision was endorsed by the Federal Czechoslovak Government on 25 July. Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian Government transmitted


Bratislava
Mały Danube
Slovakia
Čunovo
Čunovo dam
Headrace canal
Dunakiliti
Dunakiliti dam
Žitný Ostrov
Gabčíkovo
Gabčíkovo barrage
Tailrace canal
Szigetköz
Danube
Sap
Nagymaros
Vámosszabadi
Mosoni Danube
Visegrád
Győr
Komárom
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 3
"Variant C"
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale

to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

24. On 23 October 1992, the Court was seised of an "Application of the Republic of Hungary *v.* The Czech and Slovak Federal Republic on the Diversion of the Danube River"; however, Hungary acknowledged that there was no basis on which the Court could have founded its jurisdiction to entertain that application, on which Czechoslovakia took no action. In the meanwhile, the Commission of the European Communities had offered to mediate and, during a meeting of the two parties with the Commission held in London on 28 October 1992, the parties entered into a series of interim undertakings. They principally agreed that the dispute would be submitted to the International Court of Justice, that a tripartite fact-finding mission should report on Variant C not later than 31 October, and that a tripartite group of independent experts would submit suggestions as to emergency measures to be taken.

25. On 1 January 1993 Slovakia became an independent State. On 7 April 1993, the "Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabčíkovo-Nagymaros Project" was signed in Brussels, the text of which is reproduced in paragraph 2 above. After the Special Agreement was notified to the Court, Hungary informed the Court, by a letter dated 9 August 1993, that it considered its "initial Application [to be] now without object, and . . . lapsed".

According to Article 4 of the Special Agreement, "The Parties [agreed] that, pending the final Judgment of the Court, they [would] establish and implement a temporary water management régime for the Danube." However, this régime could not easily be settled. The filling of the Čunovo dam had rapidly led to a major reduction in the flow and in the level of the downstream waters in the old bed of the Danube as well as in the side-arms of the river. On 26 August 1993, Hungary and Slovakia reached agreement on the setting up of a tripartite group of experts (one expert designated by each party and three independent experts designated by the Commission of the European Communities)

> "In order to provide reliable and undisputed data on the most important effects of the current water discharge and the remedial measures already undertaken as well as to make recommendations for appropriate measures."

On 1 December 1993, the experts designated by the Commission of the European Communities recommended the adoption of various measures to remedy the situation on a temporary basis. The Parties were unable to agree on these recommendations. After lengthy negotiations, they finally concluded an Agreement "concerning Certain Temporary Technical Measures and Discharges in the Danube and Mosoni branch of the Danube",

on 19 April 1995. That Agreement raised the discharge of water into the Mosoni Danube to 43 $m^3/s$. It provided for an annual average of 400 $m^3/s$ in the old bed (not including flood waters). Lastly, it provided for the construction by Hungary of a partially underwater weir near to Dunakiliti with a view to improving the water supply to the side-arms of the Danube on the Hungarian side. It was specified that this temporary agreement would come to an end 14 days after the Judgment of the Court.

* * *

26. The first subparagraph of the Preamble to the Special Agreement covers the disputes arising between Czechoslovakia and Hungary concerning the application and termination, not only of the 1977 Treaty, but also of "related instruments"; the subparagraph specifies that, for the purposes of the Special Agreement, the 1977 Treaty and the said instruments shall be referred to as "the Treaty". "The Treaty" is expressly referred to in the wording of the questions submitted to the Court in Article 2, paragraph 1, subparagraphs *(a)* and *(c)*, of the Special Agreement.

The Special Agreement however does not define the concept of "related instruments", nor does it list them. As for the Parties, they gave some consideration to that question — essentially in the written proceedings — without reaching agreement as to the exact meaning of the expression or as to the actual instruments referred to. The Court notes however that the Parties seemed to agree to consider that that expression covers at least the instruments linked to the 1977 Treaty which implement it, such as the Agreement on mutual assistance of 16 September 1977 and its amending Protocols dated, respectively, 10 October 1983 and 6 February 1989 (see paragraph 21 above), and the Agreement as to the common operational regulations of Plenipotentiaries fulfilling duties related to the construction and operation of the Gabčíkovo-Nagymaros Barrage System signed in Bratislava on 11 October 1979. The Court notes that Hungary, unlike Slovakia, declined to apply the description of related instruments to the 1977 Treaty to the Joint Contractual Plan (see paragraph 19 above), which it refused to see as "an agreement at the same level as the other . . . related Treaties and inter-State agreements".

Lastly the Court notes that the Parties, in setting out the replies which should in their view be given to the questions put in the Special Agreement, concentrated their reasoning on the 1977 Treaty; and that they would appear to have extended their arguments to "related instruments" in considering them as accessories to a whole treaty system, whose fate was in principle linked to that of the main part, the 1977 Treaty. The Court takes note of the positions of the Parties and considers that it does not need to go into this matter further at this juncture.

* * *

27. The Court will now turn to a consideration of the questions submitted by the Parties. In terms of Article 2, paragraph 1 *(a)*, of the Special Agreement, the Court is requested to decide first

> "whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary".

28. The Court would recall that the Gabčíkovo-Nagymaros System of Locks is characterized in Article 1, paragraph 1, of the 1977 Treaty as a "single and indivisible operational system of works".

The principal works which were to constitute this system have been described in general terms above (see paragraph 18). Details of them are given in paragraphs 2 and 3 of Article 1 of the Treaty.

For Gabčíkovo, paragraph 2 lists the following works:

"*(a)* the Dunakiliti-Hrušov head-water installations in the Danube sector at r.km. (river kilometre(s)) 1860-1842, designed for a maximum flood stage of 131.10 m.B. (metres above sea-level, Baltic system), in Hungarian and Czechoslovak territory;

*(b)* the Dunakiliti dam and auxiliary navigation lock at r.km. 1842, in Hungarian territory;

*(c)* the by-pass canal (head-water canal and tail-water canal) at r.km. 1842-1811, in Czechoslovak territory;

*(d)* series of locks on the by-pass canal, in Czechoslovak territory, consisting of a hydroelectric power plant with installed capacity of 720 MW, double navigation locks and appurtenances thereto;

*(e)* improved old bed of the Danube at r.km. 1842-1811, in the joint Hungarian-Czechoslovak section;

*(f)* deepened and regulated bed of the Danube at r.km. 1811-1791, in the joint Hungarian-Czechoslovak section."

For Nagymaros, paragraph 3 specifies the following works:

"*(a)* head-water installations and flood-control works in the Danube sector at r.km. 1791-1696.25 and in the sectors of tributaries affected by flood waters, designed for a maximum flood stage of 107.83 m.B., in Hungarian and Czechoslovak territory;

*(b)* series of locks at r.km. 1696.25, in Hungarian territory, consisting of a dam, a hydroelectric power plant with installed capacity of 158 MW, double navigation locks and appurtenances thereto;

*(c)* deepened and regulated bed of the Danube, in both its branches, at r.km. 1696.25-1657, in the Hungarian section."

29. Moreover, the precise breakdown of the works incumbent on each party was set out in Article 5, paragraph 5, of the 1977 Treaty, as follows:

"5. The labour and supplies required for the realization of the joint investment shall be apportioned between the Contracting Parties in the following manner:

*(a)* The Czechoslovak Party shall be responsible for:

(1) the Dunakiliti-Hrušov head-water installations on the left bank, in Czechoslovak territory;
(2) the head-water canal of the by-pass canal, in Czechoslovak territory;
(3) the Gabčíkovo series of locks, in Czechoslovak territory;
(4) the flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district;
(5) restoration of vegetation in Czechoslovak territory;

*(b)* The Hungarian Party shall be responsible for:

(1) the Dunakiliti-Hrušov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir;
(2) the Dunakiliti-Hrušov head-water installations on the right bank, in Hungarian territory;
(3) the Dunakiliti dam, in Hungarian territory;
(4) the tail-water canal of the by-pass canal, in Czechoslovak territory;
(5) deepening of the bed of the Danube below Palkovičovo, in Hungarian and Czechoslovak territory;
(6) improvement of the old bed of the Danube, in Hungarian and Czechoslovak territory;
(7) operational equipment of the Gabčíkovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;
(8) the flood-control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;
(9) the flood-control works of the Nagymaros head-water installations, in Hungarian territory;
(10) the Nagymaros series of locks, in Hungarian territory;
(11) deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;
(12) operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory;
(13) restoration of vegetation in Hungarian territory."

30. As the Court has already indicated (see paragraph 18 above), Article 1, paragraph 4, of the 1977 Treaty stipulated in general terms that the "technical specifications" concerning the System of Locks would be included in the "joint contractual plan". The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977 (see paragraph 21 above). In accordance with the provisions of Article 1, paragraph 1, of that Agreement, the whole of the works of the barrage system were to have been completed in 1991. As indicated in paragraph 2 of that same article, a summary construction schedule was appended to the Agreement, and provision was made for a more detailed schedule to be worked out in the Joint Contractual Plan. The Agreement of 16 September 1977 was twice amended further. By a Protocol signed on 10 October 1983, the parties agreed first to postpone the works and the putting into operation of the power plants for four more years; then, by a Protocol signed on 6 February 1989, the parties decided, conversely, to bring them forward by 15 months, the whole system having to be operational in 1994. A new summary construction schedule was appended to each of those Protocols; those schedules were in turn to be implemented by means of new detailed schedules, included in the Joint Contractual Plan.

31. In spring 1989, the work on the Gabčíkovo sector was well advanced: the Dunakiliti dam was 90 per cent complete, the Gabčíkovo dam was 85 per cent complete, and the bypass canal was between 60 per cent complete (downstream of Gabčíkovo) and 95 per cent complete (upstream of Gabčíkovo) and the dykes of the Dunakiliti-Hrušov reservoir were between 70 and 98 per cent complete, depending on the location. This was not the case in the Nagymaros sector where, although dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

32. In the wake of the profound political and economic changes which occurred at this time in central Europe, the Gabčíkovo-Nagymaros Project was the object, in Czechoslovakia and more particularly in Hungary, of increasing apprehension, both within a section of public opinion and in some scientific circles. The uncertainties not only about the economic viability of the Project, but also, and more so, as to the guarantees it offered for preservation of the environment, engendered a climate of growing concern and opposition with regard to the Project.

33. It was against this background that, on 13 May 1989, the Government of Hungary adopted a resolution to suspend works at Nagymaros, and ordered

> "the Ministers concerned to commission further studies in order to place the Council of Ministers in a position where it can make well-founded suggestions to the Parliament in connection with the amendment of the international treaty on the investment. In the interests of

> the above, we must examine the international and legal consequences, the technical considerations, the obligations related to continuous navigation on the Danube and the environmental/ecological and seismic impacts of the eventual stopping of the Nagymaros investment. To be further examined are the opportunities for the replacement of the lost electric energy and the procedures for minimising claims for compensation."

The suspension of the works at Nagymaros was intended to last for the duration of these studies, which were to be completed by 31 July 1989. Czechoslovakia immediately protested and a document defining the position of Czechoslovakia was transmitted to the Ambassador of Hungary in Prague on 15 May 1989. The Prime Ministers of the two countries met on 24 May 1989, but their talks did not lead to any tangible result. On 2 June, the Hungarian Parliament authorized the Government to begin negotiations with Czechoslovakia for the purpose of modifying the 1977 Treaty.

34. At a meeting held by the Plenipotentiaries on 8 and 9 June 1989, Hungary gave Czechoslovakia a number of assurances concerning the continuation of works in the Gabčíkovo sector, and the signed Protocol which records that meeting contains the following passage:

> "The Hungarian Government Commissioner and the Hungarian Plenipotentiary stated, that the Hungarian side will complete construction of the Gabčíkovo Project in the agreed time and in accordance with the project plans. Directives have already been given to continue works suspended in the area due to misunderstanding."

These assurances were reiterated in a letter that the Commissioner of the Government of Hungary addressed to the Czechoslovak Plenipotentiary on 9 June 1989.

35. With regard to the suspension of work at Nagymaros, the Hungarian Deputy Prime Minister, in a letter dated 24 June 1989 addressed to his Czechoslovak counterpart, expressed himself in the following terms:

> "The Hungarian Academy of Sciences (HAS) has studied the environmental, ecological and water quality as well as the seismological impacts of abandoning or implementing the Nagymaros Barrage of the Gabčíkovo-Nagymaros Barrage System (GNBS).
>
> . . . . . .
>
> Having studied the expected impacts of the construction in accordance with the original plan, the Committee *[ad hoc]* of the Academy [set up for this purpose] came to the conclusion that we do not have adequate knowledge of the consequences of environmental risks.
>
> In its opinion, the risk of constructing the Barrage System in accordance with the original plan cannot be considered acceptable. Of course, it cannot be stated either that the adverse impacts will

ensue for certain, therefore, according to their recommendation, further thorough and time consuming studies are necessary."

36. The Hungarian and Czechoslovak Prime Ministers met again on 20 July 1989 to no avail. Immediately after that meeting, the Hungarian Government adopted a second resolution, under which the suspension of work at Nagymaros was extended to 31 October 1989. However, this resolution went further, as it also prescribed the suspension, until the same date, of the "Preparatory works on the closure of the riverbed at . . . Dunakiliti"; the purpose of this measure was to invite "international scientific institutions [and] foreign scientific institutes and experts" to co-operate with "the Hungarian and Czechoslovak institutes and experts" with a view to an assessment of the ecological impact of the Project and the "development of a technical and operational water quality guarantee system and . . . its implementation".

37. In the ensuing period, negotiations were conducted at various levels between the two States, but proved fruitless. Finally, by a letter dated 4 October 1989, the Hungarian Prime Minister formally proposed to Czechoslovakia that the Nagymaros sector of the Project be abandoned and that an agreement be concluded with a view to reducing the ecological risks associated with the Gabčíkovo sector of the Project. He proposed that that agreement should be concluded before 30 July 1990.

The two Heads of Government met on 26 October 1989, and were unable to reach agreement. By a Note Verbale dated 30 October 1989, Czechoslovakia, confirming the views it had expressed during those talks, proposed to Hungary that they should negotiate an agreement on a system of technical, operational and ecological guarantees relating to the Gabčíkovo-Nagymaros Project, "on the assumption that the Hungarian party will immediately commence preparatory work on the refilling of the Danube's bed in the region of Dunakiliti". It added that the technical principles of the agreement could be initialled within two weeks and that the agreement itself ought to be signed before the end of March 1990. After the principles had been initialled, Hungary "[was to] start the actual closure of the Danube bed". Czechoslovakia further stated its willingness to "conclu[de] . . . a separate agreement in which both parties would oblige themselves to limitations or exclusion of peak hour operation mode of the . . . System". It also proposed "to return to deadlines indicated in the Protocol of October 1983", the Nagymaros construction deadlines being thus extended by 15 months, so as to enable Hungary to take advantage of the time thus gained to study the ecological issues and formulate its own proposals in due time. Czechoslovakia concluded by announcing that, should Hungary continue unilaterally to breach the Treaty, Czechoslovakia would proceed with a provisional solution.

In the meantime, the Hungarian Government had on 27 October adopted a further resolution, deciding to abandon the construction of the

Nagymaros dam and to leave in place the measures previously adopted for suspending the works at Dunakiliti. Then, by Notes Verbales dated 3 and 30 November 1989, Hungary proposed to Czechoslovakia a draft treaty incorporating its earlier proposals, relinquishing peak power operation of the Gabčíkovo power plant and abandoning the construction of the Nagymaros dam. The draft provided for the conclusion of an agreement on the completion of Gabčíkovo in exchange for guarantees on protection of the environment. It finally envisaged the possibility of one or other party seising an arbitral tribunal or the International Court of Justice in the event that differences of view arose and persisted between the two Governments about the construction and operation of the Gabčíkovo dam, as well as measures to be taken to protect the environment. Hungary stated that it was ready to proceed immediately "with the preparatory operations for the Dunakiliti bed-decanting", but specified that the river would not be dammed at Dunakiliti until the agreement on guarantees had been concluded.

38. During winter 1989-1990, the political situation in Czechoslovakia and Hungary alike was transformed, and the new Governments were confronted with many new problems.

In spring 1990, the new Hungarian Government, in presenting its National Renewal Programme, announced that the whole of the Gabčíkovo-Nagymaros Project was a "mistake" and that it would initiate negotiations as soon as possible with the Czechoslovak Government "on remedying and sharing the damages". On 20 December 1990, the Hungarian Government adopted a resolution for the opening of negotiations with Czechoslovakia on the termination of the Treaty by mutual consent and the conclusion of an agreement addressing the consequences of the termination. On 15 February 1991, the Hungarian Plenipotentiary transmitted a draft agreement along those lines to his Czechoslovak counterpart.

On the same day, the Czechoslovak President declared that the Gabčíkovo-Nagymaros Project constituted a "totalitarian, gigomaniac monument which is against nature", while emphasizing that "the problem [was] that [the Gabčíkovo power plant] [had] already been built". For his part, the Czechoslovak Minister of the Environment stated, in a speech given to Hungarian parliamentary committees on 11 September 1991, that "the G/N Project [was] an old, obsolete one", but that, if there were "many reasons to change, modify the treaty . . . it [was] not acceptable to cancel the treaty . . . and negotiate later on".

During the ensuing period, Hungary refrained from completing the work for which it was still responsible at Dunakiliti. Yet it continued to maintain the structures it had already built and, at the end of 1991, completed the works relating to the tailrace canal of the bypass canal assigned to it under Article 5, paragraph 5 *(b)*, of the 1977 Treaty.

* *

39. The two Parties to this case concur in recognizing that the 1977 Treaty, the above-mentioned Agreement on mutual assistance of 1977 and the Protocol of 1989 were validly concluded and were duly in force when the facts recounted above took place.

Further, they do not dispute the fact that, however flexible they may have been, these texts did not envisage the possibility of the signatories unilaterally suspending or abandoning the work provided for therein, or even carrying it out according to a new schedule not approved by the two partners.

40. Throughout the proceedings, Hungary contended that, although it did suspend or abandon certain works, on the contrary, it never suspended the application of the 1977 Treaty itself. To justify its conduct, it relied essentially on a "state of ecological necessity".

Hungary contended that the various installations in the Gabčíkovo-Nagymaros System of Locks had been designed to enable the Gabčíkovo power plant to operate in peak mode. Water would only have come through the plant twice each day, at times of peak power demand. Operation in peak mode required the vast expanse (60 $km^2$) of the planned reservoir at Dunakiliti, as well as the Nagymaros dam, which was to alleviate the tidal effects and reduce the variation in the water level downstream of Gabčíkovo. Such a system, considered to be more economically profitable than using run-of-the-river plants, carried ecological risks which it found unacceptable.

According to Hungary, the principal ecological dangers which would have been caused by this system were as follows. At Gabčíkovo/Dunakiliti, under the original Project, as specified in the Joint Contractual Plan, the residual discharge into the old bed of the Danube was limited to 50 $m^3/s$, in addition to the water provided to the system of side-arms. That volume could be increased to 200 $m^3/s$ during the growing season. Additional discharges, and in particular a number of artificial floods, could also be effected, at an unspecified rate. In these circumstances, the groundwater level would have fallen in most of the Szigetköz. Furthermore, the groundwater would then no longer have been supplied by the Danube — which, on the contrary, would have acted as a drain — but by the reservoir of stagnant water at Dunakiliti and the side-arms which would have become silted up. In the long term, the quality of water would have been seriously impaired. As for the surface water, risks of eutrophication would have arisen, particularly in the reservoir; instead of the old Danube there would have been a river choked with sand, where only a relative trickle of water would have flowed. The network of arms would have been for the most part cut off from the principal bed. The fluvial fauna and flora, like those in the alluvial plains, would have been condemned to extinction.

As for Nagymaros, Hungary argued that, if that dam had been built,

the bed of the Danube upstream would have silted up and, consequently, the quality of the water collected in the bank-filtered wells would have deteriorated in this sector. What is more, the operation of the Gabčíkovo power plant in peak mode would have occasioned significant daily variations in the water level in the reservoir upstream, which would have constituted a threat to aquatic habitats in particular. Furthermore, the construction and operation of the Nagymaros dam would have caused the erosion of the riverbed downstream, along Szentendre Island. The water level of the river would therefore have fallen in this section and the yield of the bank-filtered wells providing two-thirds of the water supply of the city of Budapest would have appreciably diminished. The filter layer would also have shrunk or perhaps even disappeared, and fine sediments would have been deposited in certain pockets in the river. For this twofold reason, the quality of the infiltrating water would have been severely jeopardized.

From all these predictions, in support of which it quoted a variety of scientific studies, Hungary concluded that a "state of ecological necessity" did indeed exist in 1989.

41. In its written pleadings, Hungary also accused Czechoslovakia of having violated various provisions of the 1977 Treaty from before 1989 — in particular Articles 15 and 19 relating, respectively, to water quality and nature protection — in refusing to take account of the now evident ecological dangers and insisting that the works be continued, notably at Nagymaros. In this context Hungary contended that, in accordance with the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 concerning the Joint Contractual Plan, Czechoslovakia bore responsibility for research into the Project's impact on the environment; Hungary stressed that the research carried out by Czechoslovakia had not been conducted adequately, the potential effects of the Project on the environment of the construction having been assessed by Czechoslovakia only from September 1990. However, in the final stage of its argument, Hungary does not appear to have sought to formulate this complaint as an independent ground formally justifying the suspension and abandonment of the works for which it was responsible under the 1977 Treaty. Rather, it presented the violations of the Treaty prior to 1989, which it imputes to Czechoslovakia, as one of the elements contributing to the emergence of a state of necessity.

42. Hungary moreover contended from the outset that its conduct in the present case should not be evaluated only in relation to the law of treaties. It also observed that, in accordance with the provisions of Article 4, the Vienna Convention of 23 May 1969 on the Law of Treaties could not be applied to the 1977 Treaty, which was concluded before that Convention entered into force as between the parties. Hungary has indeed acknowledged, with reference to the jurisprudence of the Court, that in many respects the Convention reflects the existing customary law. Hungary nonetheless stressed the need to adopt a cautious attitude, while

suggesting that the Court should consider, in each case, the conformity of the prescriptions of the Convention with customary international law.

43. Slovakia, for its part, denied that the basis for suspending or abandoning the performance of a treaty obligation can be found outside the law of treaties. It acknowledged that the 1969 Vienna Convention could not be applied as such to the 1977 Treaty, but at the same time stressed that a number of its provisions are a reflection of pre-existing rules of customary international law and specified that this is, in particular, the case with the provisions of Part V relating to invalidity, termination and suspension of the operation of treaties. Slovakia has moreover observed that, after the Vienna Convention had entered into force for both parties, Hungary affirmed its accession to the substantive obligations laid down by the 1977 Treaty when it signed the Protocol of 6 February 1989 that cut short the schedule of work; and this led it to conclude that the Vienna Convention was applicable to the "contractual legal régime" constituted by the network of interrelated agreements of which the Protocol of 1989 was a part.

44. In the course of the proceedings, Slovakia argued at length that the state of necessity upon which Hungary relied did not constitute a reason for the suspension of a treaty obligation recognized by the law of treaties. At the same time, it cast doubt upon whether "ecological necessity" or "ecological risk" could, in relation to the law of State responsibility, constitute a circumstance precluding the wrongfulness of an act.

In any event, Slovakia denied that there had been any kind of "ecological state of necessity" in this case either in 1989 or subsequently. It invoked the authority of various scientific studies when it claimed that Hungary had given an exaggeratedly pessimistic description of the situation. Slovakia did not, of course, deny that ecological problems could have arisen. However, it asserted that they could to a large extent have been remedied. It accordingly stressed that no agreement had been reached with respect to the modalities of operation of the Gabčíkovo power plant in peak mode, and claimed that the apprehensions of Hungary related only to operating conditions of an extreme kind. In the same way, it contended that the original Project had undergone various modifications since 1977 and that it would have been possible to modify it even further, for example with respect to the discharge of water reserved for the old bed of the Danube, or the supply of water to the side-arms by means of underwater weirs.

45. Slovakia moreover denied that it in any way breached the 1977 Treaty — particularly its Articles 15 and 19 — and maintained, *inter alia*, that according to the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 relating to the Joint Contractual Plan, research into the impact of the Project on the environment was not the exclusive responsibility of Czechoslovakia but of either one of the parties, depending on the location of the works.

Lastly, in its turn, it reproached Hungary with having adopted its unilateral measures of suspension and abandonment of the works in viola-

tion of the provisions of Article 27 of the 1977 Treaty (see paragraph 18 above), which it submits required prior recourse to the machinery for dispute settlement provided for in that Article.

* *

46. The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62 (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971,* p. 47, and *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973,* p. 18; see also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980,* pp. 95-96).

Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabčíkovo-Nagymaros Project.

47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.

Thus the Vienna Convention of 1969 on the Law of Treaties confines itself to defining — in a limitative manner — the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73. It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect (cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 228; and see Article 17 of the Draft Articles on State Responsi-

bility provisionally adopted by the International Law Commission on first reading, *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 32).

48. The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".

The Court moreover observes that, when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.

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49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:

"*Article 33. State of Necessity*

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

*(a)* the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

*(b)* the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

*(a)* if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

*(b)* if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

*(c)* if the State in question has contributed to the occurrence of the state of necessity." (*Yearbook of the International Law Commission,* 1980, Vol. II, Part 2, p. 34.)

In its Commentary, the Commission defined the "state of necessity" as being

> "the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State" (*ibid.*, para. 1).

It concluded that "the notion of state of necessity is . . . deeply rooted in general legal thinking" (*ibid.*, p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

> "in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness . . ." (*ibid.*, p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must

have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an "essential interest" to a matter only of the "existence" of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, "a grave danger to . . . the ecological preservation of all or some of [the] territory [of a State]" (*ibid.*, p. 35, para. 3); and specified, with reference to State practice, that "It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States." (*Ibid.*, p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

> "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 241-242, para. 29.)

54. The verification of the existence, in 1989, of the "peril" invoked by Hungary, of its "grave and imminent" nature, as well as of the absence of any "means" to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.

As the Court has already indicated (see paragraphs 33 *et seq.*), Hungary on several occasions expressed, in 1989, its "uncertainties" as to the ecological impact of putting in place the Gabčíkovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a "peril" in the sense of a component element of a state of necessity. The word "peril" certainly evokes the idea of "risk"; that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave" and "imminent". "Imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility". As the International Law Commission emphasized in its commentary, the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, "grave" and "imminent" "peril" existed in 1989 and that the measures taken by Hungary were the only possible response to it.

Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

55. The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see paragraph 40), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment — and in particular the drinking water resources — in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gab-

čikovo power plant would "mainly operate in peak-load time and continuously during high water", the final rules of operation had not yet been determined (see paragraph 19 above); however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established — which, in the Court's appreciation of the evidence before it, was not the case — that the reservoir would ultimately have constituted a "grave peril" for the environment in the area, one would be bound to conclude that the peril was not "imminent" at the time at which Hungary suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szentendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even though — and this is not determinative of the state of necessity — the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56. The Court now comes to the Gabčíkovo sector. It will recall that Hungary's concerns in this sector related on the one hand to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Szigetköz, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above).

Whether in relation to the Dunakiliti site or to the whole of the Szigetköz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it appre-

hended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the *ad hoc* Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35 of the present Judgment, does not express any awareness of an authenticated peril — even in the form of a definite peril, whose realization would have been inevitable in the long term — when it states that:

> "The measuring results of an at least five-year monitoring period following the completion of the Gabčíkovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indicator objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included."

The report concludes as follows:

> "It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.
>
> The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use."

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However "grave" it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore "imminent" in 1989.

The Court moreover considers that Hungary could, in this context

also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, "the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced".

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation "characterized so aptly by the maxim *summum jus summa injuria*" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which — whatever the political circumstances prevailing at the time of its conclusion — was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčíkovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly,

for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, "seriously impair[ed] an essential interest" of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission — a finding which does not in any way prejudge the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

* *

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(a)*, of the Special Agreement (see paragraph 27 above), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

* * *

60. By the terms of Article 2, paragraph 1 *(b)*, of the Special Agreement, the Court is asked in the second place to decide

> "*(b)* whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution'

and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)".

61. The Court will recall that, as soon as Hungary suspended the works at Nagymaros on 13 May 1989 and extended that suspension to certain works to be carried out at Dunakiliti, Czechoslovakia informed Hungary that it would feel compelled to take unilateral measures if Hungary were to persist in its refusal to resume the works. This was *inter alia* expressed as follows in Czechoslovakia's Note Verbale of 30 October 1989 to which reference is made in paragraph 37 above:

"Should the Republic of Hungary fail to meet its liabilities and continue unilaterally to breach the Treaty and related legal documents then the Czechoslovak party will be forced to commence a provisional, substitute project on the territory of the Czechoslovak Socialist Republic in order to prevent further losses. Such a provisional project would entail directing as much water into the Gabčíkovo dam as agreed in the Joint Construction Plan."

As the Court has already indicated (see paragraph 23), various alternative solutions were contemplated by Czechoslovakia. In September 1990, the Hungarian authorities were advised of seven hypothetical alternatives defined by the firm of Hydroconsult of Bratislava. All of those solutions implied an agreement between the parties, with the exception of one variant, subsequently known as "Variant C", which was presented as a provisional solution which could be brought about without Hungarian co-operation. Other contacts between the parties took place, without leading to a settlement of the dispute. In March 1991, Hungary acquired information according to which perceptible progress had been made in finalizing the planning of Variant C; it immediately gave expression to the concern this caused.

62. Inter-governmental negotiation meetings were held on 22 April and 15 July 1991.

On 22 April 1991, Hungary proposed the suspension, until September 1993, of all the works begun on the basis of the 1977 Treaty, on the understanding that the parties undertook to abstain from any unilateral action, and that joint studies would be carried out in the interval. Czechoslovakia maintained its previous position according to which the studies contemplated should take place within the framework of the 1977 Treaty and without any suspension of the works.

On 15 July 1991, Czechoslovakia confirmed its intention of putting the

Gabčíkovo power plant into service and indicated that the available data enabled the effects of four possible scenarios to be assessed, each of them requiring the co-operation of the two Governments. At the same time, it proposed the setting up of a tripartite committee of experts (Hungary, Czechoslovakia, European Communities) which would help in the search for technical solutions to the problems arising from the entry into operation of the Gabčíkovo sector. Hungary, for its part, took the view that:

> "In the case of a total lack of understanding the so-called C variation or 'theoretical opportunity' suggested by the Czecho-Slovak party as a unilateral solution would be such a grave transgression of Hungarian territorial integrity and International Law for which there is no precedent even in the practices of the formerly socialist countries for the past 30 years";

it further proposed the setting up of a bilateral committee for the assessment of environmental consequences, subject to work on Czechoslovak territory being suspended.

63. By a letter dated 24 July 1991, the Government of Hungary communicated the following message to the Prime Minister of Slovakia:

> "Hungarian public opinion and the Hungarian Government anxiously and attentively follows the [Czechoslovakian] press reports of the unilateral steps of the Government of the Slovak Republic in connection with the barrage system.
>
> The preparatory works for diverting the water of the Danube near the Dunakiliti dam through unilaterally are also alarming. These steps are contrary to the 1977 Treaty and to the good relationship between our nations."

On 30 July 1991 the Slovak Prime Minister informed the Hungarian Prime Minister of

> "the decision of the Slovak Government and of the Czech and Slovak Federal Government to continue work on the Gabčíkovo power plant, as a provisional solution, which is aimed at the commencement of operations on the territory of the Czech and Slovak Federal Republic".

On the same day, the Government of Hungary protested, by a Note Verbale, against the filling of the headrace canal by the Czechoslovak construction company, by pumping water from the Danube.

By a letter dated 9 August 1991 and addressed to the Prime Minister of Slovakia, the Hungarian authorities strenuously protested against "any unilateral step that would be in contradiction with the interests of our [two] nations and international law" and indicated that they considered it "very important [to] receive information as early as possible on the

details of the provisional solution". For its part, Czechoslovakia, in a Note Verbale dated 27 August 1991, rejected the argument of Hungary that the continuation of the works under those circumstances constituted a violation of international law, and made the following proposal:

> "Provided the Hungarian side submits a concrete technical solution aimed at putting into operation the Gabčíkovo system of locks and a solution of the system of locks based on the 1977 Treaty in force and the treaty documents related to it, the Czechoslovak side is prepared to implement the mutually agreed solution."

64. The construction permit for Variant C was issued on 30 October 1991. In November 1991 construction of a dam started at Čunovo, where both banks of the Danube are on Czechoslovak (now Slovak) territory.

In the course of a new inter-governmental negotiation meeting, on 2 December 1991, the parties agreed to entrust the task of studying the whole of the question of the Gabčíkovo-Nagymaros Project to a Joint Expert Committee which Hungary agreed should be complemented with an expert from the European Communities. However whereas, for Hungary, the work of that Committee would have been meaningless if Czechoslovakia continued construction of Variant C, for Czechoslovakia, the suspension of the construction, even on a temporary basis, was unacceptable.

That meeting was followed by a large number of exchanges of letters between the parties and various meetings between their representatives at the end of 1991 and early in 1992. On 23 January 1992, Czechoslovakia expressed its readiness "to stop work on the provisional solution and continue the construction upon mutual agreement" if the tripartite committee of experts whose constitution it proposed, and the results of the test operation of the Gabčíkovo part, were to "confirm that negative ecological effects exceed its benefits". However, the positions of the parties were by then comprehensively defined, and would scarcely develop any further. Hungary considered, as it indicated in a Note Verbale of 14 February 1992, that Variant C was in contravention

> "of [the Treaty of 1977] . . . and the convention ratified in 1976 regarding the water management of boundary waters.
>
> . . . . . .
>
> with the principles of sovereignty, territorial integrity, with the inviolability of State borders, as well as with the general customary norms on international rivers and the spirit of the 1948 Belgrade Danube Convention";

and the suspension of the implementation of Variant C was, in its view, a prerequisite. As for Czechoslovakia, it took the view that recourse to Variant C had been rendered inevitable, both for economic and ecologi-

cal as well as navigational reasons, because of the unlawful suspension and abandonment by Hungary of the works for which provision was made in the 1977 Treaty. Any negotiation had, in its view, to be conducted within the framework of the Treaty and without the implementation of Variant C — described as "provisional" — being called into question.

65. On 5 August 1992, the Czechoslovak representative to the Danube Commission informed it that "work on the severance cutting through of the Danube's flow will begin on 15 October 1992 at the 1,851.759-kilometre line" and indicated the measures that would be taken at the time of the "severance". The Hungarian representative on the Commission protested on 17 August 1992, and called for additional explanations.

During the autumn of 1992, the implementation of Variant C was stepped up. The operations involved in damming the Danube at Čunovo had been scheduled by Czechoslovakia to take place during the second half of October 1992, at a time when the waters of the river are generally at their lowest level. On the initiative of the Commission of the European Communities, trilateral negotiations took place in Brussels on 21 and 22 October 1992, with a view to setting up a committee of experts and defining its terms of reference. On that date, the first phase of the operations leading to the damming of the Danube (the reinforcement of the riverbed and the narrowing of the principal channel) had been completed. The closure of the bed was begun on 23 October 1992 and the construction of the actual dam continued from 24 to 27 October 1992: a pontoon bridge was built over the Danube on Czechoslovak territory using river barges, large stones were thrown into the riverbed and reinforced with concrete, while 80 to 90 per cent of the waters of the Danube were directed into the canal designed to supply the Gabčíkovo power plant. The implementation of Variant C did not, however, come to an end with the diversion of the waters, as there still remained outstanding both reinforcement work on the dam and the building of certain auxiliary structures.

The Court has already referred in paragraph 24 to the meeting held in London on 28 October 1992 under the auspices of the European Communities, in the course of which the parties to the negotiations agreed, *inter alia*, to entrust a tripartite Working Group composed of independent experts (i.e., four experts designated by the European Commission, one designated by Hungary and another by Czechoslovakia) with the task of reviewing the situation created by the implementation of Variant C and making proposals as to urgent measures to adopt. After having worked for one week in Bratislava and one week in Budapest, the Working Group filed its report on 23 November 1992.

66. A summary description of the constituent elements of Variant C appears at paragraph 23 of the present Judgment. For the purposes of the question put to the Court, the official description that should be adopted is, according to Article 2, paragraph 1 *(b)*, of the Special Agreement, the one given in the aforementioned report of the Working Group

of independent experts, and it should be emphasized that, according to the Special Agreement, "Variant C" must be taken to include the consequences "on water and navigation course" of the dam closing off the bed of the Danube.

In the section headed "Variant C Structures and Status of Ongoing Work", one finds, in the report of the Working Group, the following passage:

> "In both countries the original structures for the Gabčíkovo scheme are completed except for the closure of the Danube river at Dunakiliti and the
>
> (1) Completion of the hydropower station (installation and testing of turbines) at Gabčíkovo.
>
> Variant C consists of a complex of structures, located in Czecho-Slovakia . . . The construction of these are planned for two phases. The structures include . . .:
>
> (2) By-pass weir controlling the flow into the river Danube.
> (3) Dam closing the Danubian river bed.
> (4) Floodplain weir (weir in the inundation).
> (5) Intake structure for the Mosoni Danube.
> (6) Intake structure in the power canal.
> (7) Earth barrages/dykes connecting structures.
> (8) Ship lock for smaller ships (15 m × 80 m).
> (9) Spillway weir.
> (10) Hydropower station.
>
> The construction of the structures 1-7 are included in Phase 1, while the remaining 8-10 are a part of Phase 2 scheduled for construction 1993-1995."

* *

67. Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary's decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a "principle of approximate application" to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it "of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith".

68. Slovakia also maintained that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary's unlawful actions. It claimed

that a State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the wrongdoing State. It argued furthermore that "Mitigation of damages is also an aspect of the performance of obligations in good faith." For Slovakia, these damages would have been immense in the present case, given the investments made and the additional economic and environmental prejudice which would have resulted from the failure to complete the works at Dunakiliti/Gabčíkovo and to put the system into operation. For this reason, Czechoslovakia was not only entitled, but even obliged, to implement Variant C.

69. Although Slovakia maintained that Czechoslovakia's conduct was lawful, it argued in the alternative that, even were the Court to find otherwise, the putting into operation of Variant C could still be justified as a countermeasure.

70. Hungary for its part contended that Variant C was a material breach of the 1977 Treaty. It considered that Variant C also violated Czechoslovakia's obligations under other treaties, in particular the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters concluded at Budapest, and its obligations under general international law.

71. Hungary contended that Slovakia's arguments rested on an erroneous presentation of the facts and the law. Hungary denied, *inter alia*, having committed the slightest violation of its treaty obligations which could have justified the putting into operation of Variant C. It considered that "no such rule" of "approximate application" of a treaty exists in international law; as to the argument derived from "mitigation of damage[s]", it claimed that this has to do with the quantification of loss, and could not serve to excuse conduct which is substantively unlawful. Hungary furthermore stated that Variant C did not satisfy the conditions required by international law for countermeasures, in particular the condition of proportionality.

* *

72. Before dealing with the arguments advanced by the Parties, the Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabčíkovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal. It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission the Court has referred to in paragraph 24 of the present Judgment, that not using the system would have

led to considerable financial losses, and that it could have given rise to serious problems for the environment.

73. Czechoslovakia repeatedly denounced Hungary's suspension and abandonment of works as a fundamental breach of the 1977 Treaty and consequently could have invoked this breach as a ground for terminating the Treaty; but this would not have brought the Project any nearer to completion. It therefore chose to insist on the implementation of the Treaty by Hungary, and on many occasions called upon the latter to resume performance of its obligations under the Treaty.

When Hungary steadfastly refused to do so — although it had expressed its willingness to pay compensation for damage incurred by Czechoslovakia — and when negotiations stalled owing to the diametrically opposed positions of the parties, Czechoslovakia decided to put the Gabčíkovo system into operation unilaterally, exclusively under its own control and for its own benefit.

74. That decision went through various stages and, in the Special Agreement, the Parties asked the Court to decide whether Czechoslovakia "was entitled to proceed, in November 1991" to Variant C, and "to put [it] into operation from October 1992".

75. With a view to justifying those actions, Slovakia invoked what it described as "the principle of approximate application", expressed by Judge Sir Hersch Lauterpacht in the following terms:

> "It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument — not to change it." (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, separate opinion of Sir Hersch Lauterpacht, p. 46.)

It claimed that this is a principle of international law and a general principle of law.

76. It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of "approximate application" because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

77. As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabčíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčíkovo-Nagymaros Project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried

out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.

The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

79. The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. 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" (see for example the Commentary on Article 41 of the Draft Articles on State Responsibility, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 141, and *Yearbook of the International Law Commission*, 1993, Vol. II, Part 2, p. 57, para. 14).

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80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained."

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.

81. Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damage invoked by Slovakia does not need to be examined further.

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82. Although it did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful, Slovakia stated that "Variant C could be presented as a justified countermeasure to Hungary's illegal acts".

The Court has concluded, in paragraph 78 above, that Czechoslovakia committed an internationally wrongful act in putting Variant C into operation. Thus, it now has to determine whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary's prior failure to comply with its obligations under international law.

83. In order to be justifiable, a countermeasure must meet certain conditions (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 127, para. 249. See also *Arbitral Award of 9 December 1978 in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, pp. 443 *et seq.*; also Articles 47 to 50 of the Draft Articles on State Responsibility adopted by the International Law Commission on first reading, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 144-145.)

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary's suspension and abandon-

ment of works and that it was directed against that State; and it is equally clear, in the Court's view, that Hungary's actions were internationally wrongful.

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case, as recalled above by the Court (see paragraphs 61 *et seq.*), that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.

85. In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

> "[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others" (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23,* p. 27).

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary's consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obliga-

tions under international law, and that the measure must therefore be reversible.

* *

88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(b)*, of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

* * *

89. By the terms of Article 2, paragraph 1 *(c)*, of the Special Agreement, the Court is asked, thirdly, to determine "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".

The Court notes that it has been asked to determine what are the legal effects of the notification given on 19 May 1992 of the termination of the Treaty. It will consequently confine itself to replying to this question.

90. The Court will recall that, by early 1992, the respective parties to the 1977 Treaty had made clear their positions with regard to the recourse by Czechoslovakia to Variant C. Hungary in a Note Verbale of 14 February 1992 had made clear its view that Variant C was a contravention of the 1977 Treaty (see paragraph 64 above); Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 26 February 1992, in a letter to his Czechoslovak counterpart, the Prime Minister of Hungary described the impending diversion of the Danube as "a serious breach of international law" and stated that, unless work was suspended while further enquiries took place, "the Hungarian Government [would] have no choice but to respond to this situation of necessity by terminating the 1977 inter-State Treaty". In a Note Verbale dated 18 March 1992, Czechoslovakia reaffirmed that, while it was prepared to continue negotiations "on every level", it could not agree "to stop all work on the provisional solution".

On 24 March 1992, the Hungarian Parliament passed a resolution authorizing the Government to terminate the 1977 Treaty if Czechoslovakia did not stop the works by 30 April 1992. On 13 April 1992, the Vice-President of the Commission of the European Communities wrote to both parties confirming the willingness of the Commission to chair a committee of independent experts including representatives of the two countries, in order to assist the two Governments in identifying a mutu-

ally acceptable solution. Commission involvement would depend on each Government not taking "any steps . . . which would prejudice possible actions to be undertaken on the basis of the report's findings". The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee "without any preliminary conditions"; criticizing Hungary's approach, he refused to suspend work on the provisional solution, but added, "in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States".

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions "inappropriate".

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia's refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

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92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary stated that, as Czechoslovakia had "remained inflexible" and continued with its implementation of Variant C, "a temporary state of necessity eventually became permanent, justifying termination of the 1977 Treaty".

Slovakia, for its part, denied that a state of necessity existed on the

basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

94. Hungary's second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

> "*Article 61*
>
> *Supervening Impossibility of Performance*
>
> 1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.
>
> 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."

Hungary declared that it could not be "obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage". It concluded that

> "By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform."

In Hungary's view, the "object indispensable for the execution of the treaty", whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, "a legal situation which was the raison d'être of the rights and obligations".

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical "disappearance or destruction" of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility "if the impossibility is the result of a breach by that party . . . of an obligation under the treaty".

95. As to "fundamental change of circumstances", Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

"*Article 62*

*Fundamental Change of Circumstances*

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

*(a)* the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

*(b)* the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

*(a)* if the treaty establishes a boundary; or

*(b)* if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

Hungary identified a number of "substantive elements" present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of "socialist integration", for which the Treaty had originally been a "vehicle", but which subsequently disappeared; the "single and indivisible operational system", which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the "framework treaty" into an "immutable norm"; and, finally, the transformation of a treaty consistent with environmental protection into "a prescription for environmental disaster".

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia's material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:

"*Article 60*

*Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach*

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

*(a)* the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

*(b)* a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

*(c)* any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

*(a)* a repudiation of the treaty not sanctioned by the present Convention; or

*(b)* the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

Hungary claimed in particular that Czechoslovakia violated the 1977 Treaty by proceeding to the construction and putting into operation of Variant C, as well as failing to comply with its obligations under Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia had breached other international conventions (among them the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters) and general international law.

Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as "the best possible approximate application" of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the "precautionary principle". On this basis, Hungary argued, its termination was "forced by the other party's refusal to suspend work on Variant C".

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *jus cogens* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather "to the language of self-help or reprisals".

* *

98. The question, as formulated in Article 2, paragraph 1 *(c)*, of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary's notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty's conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment

and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

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101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

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102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968*, doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term "object" in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it

would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

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104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

The Court recalls that, in the *Fisheries Jurisdiction* case, it stated that

> "Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances" (*I.C.J. Reports 1973*, p. 63, para. 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of

environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

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105. The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.

The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary's Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (in which case the Vienna Convention did not apply):

> "Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith." (*I.C.J. Reports 1980*, p. 96, para. 49.)

The termination of the Treaty by Hungary was to take effect six days

after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary's termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct. As was stated by the Permanent Court of International Justice:

> "It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 31.)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

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111. Finally, the Court will address Hungary's claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the

Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (*I.C.J. Reports 1996*, p. 241, para. 29; see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

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115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(c)*, of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

* * *

116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it.

117. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the "disappearance of one of the parties". On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, "There is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party" and such a treaty will not survive unless another State succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that

> "the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project",

Hungary sought to distinguish between, on the one hand, rights and obligations such as "continuing property rights" under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized "as the successor to the Government of the CSFR" with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-

by-case basis; and Hungary emphasized that no agreement was ever reached with regard to the 1977 Treaty.

119. Hungary claimed that there was no rule of succession which could operate in the present case to override the absence of consent.

Referring to Article 34 of the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties, in which "a rule of automatic succession to all treaties is provided for", based on the principle of continuity, Hungary argued not only that it never signed or ratified the Convention, but that the "concept of automatic succession" contained in that Article was not and is not, and has never been accepted as, a statement of general international law.

Hungary further submitted that the 1977 Treaty did not create "obligations and rights . . . relating to the régime of a boundary" within the meaning of Article 11 of that Convention, and noted that the existing course of the boundary was unaffected by the Treaty. It also denied that the Treaty was a "localized" treaty, or that it created rights "considered as attaching to [the] territory" within the meaning of Article 12 of the 1978 Convention, which would, as such, be unaffected by a succession of States. The 1977 Treaty was, Hungary insisted, simply a joint investment. Hungary's conclusion was that there is no basis on which the Treaty could have survived the disappearance of Czechoslovakia so as to be binding as between itself and Slovakia.

120. According to Slovakia, the 1977 Treaty, which was not lawfully terminated by Hungary's notification in May 1992, remains in force between itself, as successor State, and Hungary.

Slovakia acknowledged that there was no agreement on succession to the Treaty between itself and Hungary. It relied instead, in the first place, on the "general rule of continuity which applies in the case of dissolution"; it argued, secondly, that the Treaty is one "attaching to [the] territory" within the meaning of Article 12 of the 1978 Vienna Convention, and that it contains provisions relating to a boundary.

121. In support of its first argument Slovakia cited Article 34 of the 1978 Vienna Convention, which it claimed is a statement of customary international law, and which imposes the principle of automatic succession as the rule applicable in the case of dissolution of a State where the predecessor State has ceased to exist. Slovakia maintained that State practice in cases of dissolution tends to support continuity as the rule to be followed with regard to bilateral treaties. Slovakia having succeeded to part of the territory of the former Czechoslovakia, this would be the rule applicable in the present case.

122. Slovakia's second argument rests on "the principle of *ipso jure* continuity of treaties of a territorial or localized character". This rule, Slovakia said, is embodied in Article 12 of the 1978 Convention, which in part provides as follows:

"*Article 12*
*Other Territorial Regimes*

. . . . . .

2. A succession of States does not as such affect:

*(a)* obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

*(b)* rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory."

According to Slovakia, "[this] article [too] can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law". The 1977 Treaty is said to fall within its scope because of its "specific characteristics . . . which place it in the category of treaties of a localized or territorial character". Slovakia also described the Treaty as one "which contains boundary provisions and lays down a specific territorial régime" which operates in the interest of all Danube riparian States, and as "a dispositive treaty, creating rights *in rem*, independently of the legal personality of its original signatories". Here, Slovakia relied on the recognition by the International Law Commission of the existence of a "special rule" whereby treaties "intended to establish an objective régime" must be considered as binding on a successor State (*Official Records of the United Nations Conference on the Succession of States in respect of Treaties*, Vol. III, doc. A/CONF.80/16/Add.2, p. 34). Thus, in Slovakia's view, the 1977 Treaty was not one which could have been terminated through the disappearance of one of the original parties.

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123. The Court does not find it necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Convention reflects the state of customary international law. More relevant to its present analysis is the particular nature and character of the 1977 Treaty. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational régime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created a situation in which the interests of other users of the Dan-

ube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure "uninterrupted and safe navigation on the international fairway" in accordance with their obligations under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube.

In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commission identified "treaties of a territorial character" as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States (*Official Records of the United Nations Conference on the Succession of States in respect of Treaties*, Vol. III, doc. A/CONF.80/16/Add.2, p. 27, para. 2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this. Moreover, the Commission indicated that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties" (*ibid.*, p. 33, para. 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force (*ibid.*, pp. 26-37). Those that remained in force would nonetheless bind a successor State.

Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations "attaching to" the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

124. It might be added that Slovakia also contended that, while still a constituent part of Czechoslovakia, it played a role in the development of the Project, as it did later, in the most critical phase of negotiations with Hungary about the fate of the Project. The evidence shows that the Slovak Government passed resolutions prior to the signing of the 1977 Treaty in preparation for its implementation; and again, after signature, expressing its support for the Treaty. It was the Slovak Prime Minister who attended the meeting held in Budapest on 22 April 1991 as the Plenipotentiary of the Federal Government to discuss questions arising out of the Project. It was his successor as Prime Minister who notified his Hun-

garian counterpart by letter on 30 July 1991 of the decision of the Government of the Slovak Republic, as well as of the Government of the Czech and Slovak Federal Republic, to proceed with the "provisional solution" (see paragraph 63 above); and who wrote again on 18 December 1991 to the Hungarian Minister without Portfolio, renewing an earlier suggestion that a joint commission be set up under the auspices of the European Communities to consider possible solutions. The Slovak Prime Minister also wrote to the Hungarian Prime Minister in May 1992 on the subject of the decision taken by the Hungarian Government to terminate the Treaty, informing him of resolutions passed by the Slovak Government in response.

It is not necessary, in the light of the conclusions reached in paragraph 123 above, for the Court to determine whether there are legal consequences to be drawn from the prominent part thus played by the Slovak Republic. Its role does, however, deserve mention.

* * *

125. The Court now turns to the other legal consequences arising from its Judgment.

As to this, Hungary argued that future relations between the Parties, as far as Variant C is concerned, are not governed by the 1977 Treaty. It claims that it is entitled, pursuant to the Convention of 1976 on the Regulation of Water Management Issues of Boundary Waters, to "50% of the natural flow of the Danube at the point at which it crosses the boundary below Čunovo" and considers that the Parties

> "are obliged to enter into negotiations in order to produce the result that the water conditions along the area from below Čunovo to below the confluence at Sap become jointly defined water conditions as required by Article 3 *(a)* of the 1976 Convention".

Hungary moreover indicated that any mutually accepted long-term discharge régime must be "capable of avoiding damage, including especially damage to biodiversity prohibited by the [1992 Rio Convention on Biological Diversity]". It added that "a joint environmental impact assessment of the region and of the future of Variant C structures in the context of the sustainable development of the region" should be carried out.

126. Hungary also raised the question of financial accountability for the failure of the original project and stated that both Parties accept the fact that the other has "proprietary and financial interests in the residues of the original Project and that an accounting has to be carried out". Furthermore, it noted that:

> "Other elements of damage associated with Variant C on Hungarian territory also have to be brought into the accounting . . ., as well as electricity production since the diversion",

and that: "The overall situation is a complex one, and it may be most easily resolved by some form of lump sum settlement."

127. Hungary stated that Slovakia had incurred international responsibility and should make reparation for the damage caused to Hungary by the operation of Variant C. In that connection, it referred, in the context of reparation of the damage to the environment, to the rule of *restitutio in integrum*, and called for the re-establishment of "joint control by the two States over the installations maintained as they are now", and the "re-establishment of the flow of [the] waters to the level at which it stood prior to the unlawful diversion of the river". It also referred to reparation of the damage to the fauna, the flora, the soil, the sub-soil, the groundwater and the aquifer, the damages suffered by the Hungarian population on account of the increase in the uncertainties weighing on its future *(pretium doloris)*, and the damage arising from the unlawful use, in order to divert the Danube, of installations over which the two Parties exercised joint ownership.

Lastly, Hungary called for the "cessation of the continuous unlawful acts" and a "guarantee that the same actions will not be repeated", and asked the Court to order "the permanent suspension of the operation of Variant C".

128. Slovakia argued for its part that Hungary should put an end to its unlawful conduct and cease to impede the application of the 1977 Treaty, taking account of its "flexibility and of the important possibilities of development for which it provides, or even of such amendments as might be made to it by agreement between the Parties, further to future negotiations". It stated that joint operations could resume on a basis jointly agreed upon and emphasized the following:

> "whether Nagymaros is built as originally planned, or built elsewhere in a different form, or, indeed, not built at all, is a question to be decided by the Parties some time in the future.
>
> . . . . . .
>
> Provided the bypass canal and the Gabčíkovo Power-station and Locks — both part of the original Treaty, and not part of Variant C — remain operational and economically viable and efficient, Slovakia is prepared to negotiate over the future roles of Dunakiliti and Čunovo, bearing Nagymaros in mind."

It indicated that the Gabčíkovo power plant would not operate in peak mode "if the evidence of environmental damage [was] clear and accepted by both Parties". Slovakia noted that the Parties appeared to agree that an accounting should be undertaken "so that, guided by the Court's findings on responsibility, the Parties can try to reach a global settlement". It

added that the Parties would have to agree on how the sums due are to be paid.

129. Slovakia stated that Hungary must make reparation for the deleterious consequences of its failures to comply with its obligations, "whether they relate to its unlawful suspensions and abandonments of works or to its formal repudiation of the Treaty as from May 1992", and that compensation should take the form of a *restitutio in integrum*. It indicated that "Unless the Parties come to some other arrangement by concluding an agreement, *restitutio in integrum* ought to take the form of a *return* by Hungary, *at a future time*, to its obligations under the Treaty" and that "For compensation to be 'full' . . ., to 'wipe out all the consequences of the illegal act' . . ., a payment of compensation must . . . *be added* to the *restitutio* . . ." Slovakia claims compensation which must include both interest and loss of profits and should cover the following heads of damage, which it offers by way of guidance:

(1) Losses caused to Slovakia in the Gabčíkovo sector: costs incurred from 1990 to 1992 by Czechoslovakia in protecting the structures of the G/N project and adjacent areas; the cost of maintaining the old bed of the River Danube pending the availability of the new navigation canal, from 1990 to 1992; losses to the Czechoslovak navigation authorities due to the unavailability of the bypass canal from 1990 to 1992; construction costs of Variant C (1990-1992).

(2) Losses caused to Slovakia in the Nagymaros sector: losses in the field of navigation and flood protection incurred since 1992 by Slovakia due to the failure of Hungary to proceed with the works.

(3) Loss of electricity production.

Slovakia also calls for Hungary to "give the appropriate guarantees that it will abstain from preventing the application of the Treaty and the continuous operation of the system". It argued from that standpoint that it is entitled "to be given a formal assurance that the internationally wrongful acts of Hungary will not recur", and it added that "the maintenance of the closure of the Danube at Čunovo constitutes a guarantee of that kind", unless Hungary gives an equivalent guarantee "within the framework of the negotiations that are to take place between the Parties".

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130. The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the *past* conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty.

131. Now the Court has, on the basis of the foregoing findings, to

determine what the *future* conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

* *

132. In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*.

133. The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties.

This does not mean that facts — in this case facts which flow from wrongful conduct — determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.

What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

134. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabčíkovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Čunovo, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it.

135. As the Court has already had occasion to point out, the 1977 Treaty was not only a joint investment project for the production of

energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result.

136. It could be said that that part of the obligations of performance which related to the construction of the System of Locks — in so far as they were not yet implemented before 1992 — have been overtaken by events. It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated and the works at Čunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structures.

137. Whether this is indeed the case is, first and foremost, for the Parties to decide. Under the 1977 Treaty its several objectives must be attained in an integrated and consolidated programme, to be developed in the Joint Contractual Plan. The Joint Contractual Plan was, until 1989, adapted and amended frequently to better fit the wishes of the parties. This Plan was also expressly described as the means to achieve the objectives of maintenance of water quality and protection of the environment.

138. The 1977 Treaty never laid down a rigid system, albeit that the construction of a system of locks at Gabčíkovo and Nagymaros was prescribed by the Treaty itself. In this respect, however, the subsequent positions adopted by the parties should be taken into consideration. Not only did Hungary insist on terminating construction at Nagymaros, but Czechoslovakia stated, on various occasions in the course of negotiations, that it was willing to consider a limitation or even exclusion of operation in peak hour mode. In the latter case the construction of the Nagymaros dam would have become pointless. The explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable.

139. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

140. It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties — even if their conclusions are often contradictory — provide abundant evidence that this impact and these implications are considerable.

In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of

Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

141. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court will recall in this context that, as it said in the *North Sea Continental Shelf* cases:

> "[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (*I.C.J. Reports 1969*, p. 47, para. 85).

142. What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty.

Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and

must be performed by them in good faith." This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.

143. During this dispute both Parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present Judgment is given, bilateral negotiations without pre-conditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.

144. The 1977 Treaty not only contains a joint investment programme, it also establishes a régime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a co-ordinated single unit; and the benefits of the project shall be equally shared.

Since the Court has found that the Treaty is still in force and that, under its terms, the joint régime is a basic element, it considers that, unless the Parties agree otherwise, such a régime should be restored.

145. Article 10, paragraph 1, of the Treaty states that works of the System of Locks constituting the joint property of the contracting parties shall be operated, as a co-ordinated single unit and in accordance with jointly agreed operating and operational procedures, by the authorized operating agency of the contracting party in whose territory the works are built. Paragraph 2 of that Article states that works on the System of Locks owned by one of the contracting parties shall be independently operated or maintained by the agencies of that contracting party in the jointly prescribed manner.

The Court is of the opinion that the works at Čunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management régime. The dam at Čunovo has taken over the role which was originally destined for the works at Dunakiliti, and therefore should have a similar status.

146. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C will be transformed from a *de facto* status into a treaty-based régime.

It appears from various parts of the record that, given the current state

of information before the Court, Variant C could be made to function in such a way as to accommodate both the economic operation of the system of electricity generation and the satisfaction of essential environmental concerns.

Regularization of Variant C by making it part of a single and indivisible operational system of works also appears necessary to ensure that Article 9 of the Treaty, which provides that the contracting parties shall participate in the use and in the benefits of the System of Locks in equal measure, will again become effective.

147. Re-establishment of the joint régime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in concordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, according to which:

> "Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention." (General Assembly doc. A/51/869 of 11 April 1997.)

* *

148. Thus far the Court has indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force. Now the Court will turn to the legal consequences of the internationally wrongful acts committed by the Parties.

149. The Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

150. Reparation must, "as far as possible", wipe out all the consequences of the illegal act. In this case, the consequences of the wrongful acts of both Parties will be wiped out "as far as possible" if they resume their co-operation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner. What it is possible for the Parties to do is to re-establish co-operative administration of what remains of the Project. To that end, it is open to them to agree to maintain the works at Čunovo, with changes in the mode of operation in respect of the allocation of water and electricity, and not to build works at Nagymaros.

151. The Court has been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages. According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.

152. The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.

Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabčíkovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.

153. Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.

154. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Čunovo complex, it must pay a proportionate share of the building and running costs.

* * *

155. For these reasons,

THE COURT,

(1) Having regard to Article 2, paragraph 1, of the Special Agreement,

A. By fourteen votes to one,

*Finds* that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judge* Herczegh;

B. By nine votes to six,

*Finds* that Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" as described in the terms of the Special Agreement;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *President* Schwebel; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek;

C. By ten votes to five,

*Finds* that Czechoslovakia was not entitled to put into operation, from October 1992, this "provisional solution";

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek;

AGAINST: *Judges* Oda, Koroma, Vereshchetin, Parra-Aranguren; *Judge* ad hoc Skubiszewski;

D. By eleven votes to four,

*Finds* that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *President* Schwebel; *Judges* Herczegh, Fleischhauer, Rezek;

(2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. By twelve votes to three,

*Finds* that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer, Rezek;

B. By thirteen votes to two,

*Finds* that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer;

C. By thirteen votes to two,

*Finds* that, unless the Parties otherwise agree, a joint operational régime must be established in accordance with the Treaty of 16 September 1977;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer;

D. By twelve votes to three,

*Finds* that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Oda, Koroma, Vereshchetin;

E. By thirteen votes to two,

*Finds* that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and 2 C of the present operative paragraph.

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of September, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Hungary and the Government of the Slovak Republic, respectively.

*(Signed)* Stephen M. SCHWEBEL,
President.

*(Signed)* Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judge REZEK append declarations to the Judgment of the Court.

Vice-President WEERAMANTRY and Judges BEDJAOUI and KOROMA append separate opinions to the Judgment of the Court.

Judges ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, VERESHCHETIN and PARRA-ARANGUREN and Judge *ad hoc* SKUBISZEWSKI append dissenting opinions to the Judgment of the Court.

*(Initialled)* S.M.S.

*(Initialled)* E.V.O.

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# Annex 67

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE À DES USINES DE PÂTE À PAPIER SUR LE FLEUVE URUGUAY

(ARGENTINE c. URUGUAY)

**ARRÊT DU 20 AVRIL 2010**

# 2010

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY

(ARGENTINA *v.* URUGUAY)

**JUDGMENT OF 20 APRIL 2010**

Mode officiel de citation :
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ARRÊT

# USINES DE PÂTE À PAPIER SUR LE FLEUVE URUGUAY
(ARGENTINE c. URUGUAY)

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# PULP MILLS ON THE RIVER URUGUAY
(ARGENTINA *v.* URUGUAY)

20 APRIL 2010

JUDGMENT

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## ABBREVIATIONS AND ACRONYMS

| | |
|---|---|
| AAP | "Autorización Ambiental Previa" (initial environmental authorization) |
| ADCP | Acoustic Doppler Current Profiler |
| AOX | Adsorbable Organic Halogens |
| BAT | Best Available Techniques (or Technology) |
| Botnia | "Botnia S.A." and "Botnia Fray Bentos S.A." (two companies formed under Uruguayan law by the Finnish company Oy Metsä-Botnia AB) |
| CARU | "Comisión Administradora del Río Uruguay" (Administrative Commission of the River Uruguay) |
| CIS | Cumulative Impact Study (prepared in September 2006 at the request of the International Finance Corporation) |
| CMB | Celulosas de M'Bopicuá S.A." (a company formed under Uruguayan law by the Spanish company ENCE) |
| CMB (ENCE) | Pulp mill planned at Fray Bentos by the Spanish company ENCE, which formed the Uruguayan company CMB for that purpose |
| DINAMA | "Dirección Nacional de Medio Ambiente" (National Directorate for the Environment of the Uruguayan Government) |
| ECF | Elemental Chlorine-Free |
| EIA | Environmental Impact Assessment |
| ENCE | "Empresa Nacional de Celulosas de España" (Spanish company which formed the company CMB under Uruguayan law) |
| ESAP | Environmental and Social Action Plan |
| GTAN | "Grupo Técnico de Alto Nivel" (High-Level Technical Group established in 2005 by Argentina and Uruguay to resolve their dispute over the CMB (ENCE) and Orion (Botnia) mills) |
| IFC | International Finance Corporation |
| IPPC-BAT | Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry |
| MVOTMA | "Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente" (Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs) |
| Orion (Botnia) | Pulp mill built at Fray Bentos by the Finnish company Oy Metsä-Botnia AB, which formed the Uruguayan companies Botnia S.A. and Botnia Fray Bentos S.A. for that purpose |
| OSE | "Obras Sanitarias del Estado" (Uruguay's State Agency for Sanitary Works) |
| POPs | Persistent Organic Pollutants |
| PROCEL | "Plan de Monitoreo de la Calidad Ambiental en el Río Uruguay en áreas de Plantas Celulósicas" (Plan for monitoring water quality in the area of the pulp mills set up under CARU) |

PROCON "Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay" (Water quality and pollution control programme set up under CARU)

INTERNATIONAL COURT OF JUSTICE

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**20 April 2010**

# CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY

(ARGENTINA *v.* URUGUAY)

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# JUDGMENT

*Present:* *Vice-President* TOMKA, *Acting President*; *Judges* KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD; *Judges* ad hoc TORRES BERNÁRDEZ, VINUESA; *Registrar* COUVREUR.

In the case concerning pulp mills on the River Uruguay,

*between*

the Argentine Republic,

represented by

H.E. Ms Susana Ruiz Cerutti, Ambassador, Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship,

as Agent;

H.E. Mr. Horacio A. Basabe, Ambassador, Director of the Argentine Institute for Foreign Service, former Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship, Member of the Permanent Court of Arbitration,

H.E. Mr. Santos Goñi Marenco, Ambassador of the Argentine Republic to the Kingdom of the Netherlands,

as Co-Agents;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Philippe Sands, Q.C., Professor of International Law at University College London, Barrister at Matrix Chambers, London,

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, associate member of the Institut de droit international,

Ms Laurence Boisson de Chazournes, Professor of International Law at the University of Geneva,

Mr. Alan Béraud, Minister at the Embassy of the Argentine Republic to the European Union, former Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Counsel and Advocates;

Mr. Homero Bibiloni, Federal Secretary for the Environment and Sustainable Development,

as Governmental Authority;

Mr. Esteban Lyons, National Director of Environmental Control, Secretariat of the Environment and Sustainable Development,

Mr. Howard Wheater, Ph.D. in Hydrology from Bristol University, Professor of Hydrology at Imperial College and Director of the Imperial College Environment Forum,

Mr. Juan Carlos Colombo, Ph.D. in Oceanography from the University of Quebec, Professor at the Faculty of Sciences and Museum of the National University of La Plata, Director of the Laboratory of Environmental Chemistry and Biogeochemistry at the National University of La Plata,
Mr. Neil McIntyre, Ph.D. in Environmental Engineering, Senior Lecturer in Hydrology at Imperial College London,
Ms Inés Camilloni, Ph.D. in Atmospheric Sciences, Professor of Atmospheric Sciences in the Faculty of Sciences of the University of Buenos Aires, Senior Researcher at the National Research Council (CONICET),

Mr. Gabriel Raggio, Doctor in Technical Sciences of the Swiss Federal Institute of Technology Zurich (ETHZ) (Switzerland), Independent Consultant,

as Scientific Advisers and Experts;

Mr. Holger Martinsen, Minister at the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,
Mr. Mario Oyarzábal, Embassy Counsellor, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,
Mr. Fernando Marani, Second Secretary, Embassy of the Argentine Republic in the Kingdom of the Netherlands,
Mr. Gabriel Herrera, Embassy Secretary, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Ms Cynthia Mulville, Embassy Secretary, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Ms Kate Cook, Barrister at Matrix Chambers, London, specializing in environmental law and law relating to development,
Ms Mara Tignino, Ph.D. in Law, Researcher at the University of Geneva,
Mr. Magnus Jesko Langer, teaching and research assistant, Graduate Institute of International and Development Studies, Geneva,

as Legal Advisers,

*and*

the Eastern Republic of Uruguay,

represented by

H.E. Mr. Carlos Gianelli, Ambassador of the Eastern Republic of Uruguay to the United States of America,

as Agent;

H.E. Mr. Carlos Mora Medero, Ambassador of the Eastern Republic of Uruguay to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, Member of the English Bar,
Mr. Luigi Condorelli, Professor at the Faculty of Law, University of Florence,

Mr. Lawrence H. Martin, Foley Hoag LLP, Member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,
Mr. Stephen C. McCaffrey, Professor at the McGeorge School of Law, University of the Pacific, California, former Chairman of the International Law Commission and Special Rapporteur for the Commission's work on the law of non-navigational uses of international watercourses,

Mr. Alberto Pérez Pérez, Professor in the Faculty of Law, University of the Republic, Montevideo,
Mr. Paul S. Reichler, Foley Hoag LLP, Member of the Bars of the United States Supreme Court and the District of Columbia,

as Counsel and Advocates;

Mr. Marcelo Cousillas, Legal Counsel at the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. César Rodriguez Zavalla, Chief of Cabinet, Ministry of Foreign Affairs,

Mr. Carlos Mata, Deputy Director of Legal Affairs, Ministry of Foreign Affairs,
Mr. Marcelo Gerona, Counsellor at the Embassy of the Eastern Republic of Uruguay in the Kingdom of the Netherlands,
Mr. Eduardo Jiménez de Aréchaga, Attorney at Law, admitted to the Bar of the Eastern Republic of Uruguay and Member of the Bar of New York,
Mr. Adam Kahn, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Mr. Andrew Loewenstein, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Ms Analia Gonzalez, LL.M., Foley Hoag LLP, admitted to the Bar of the Eastern Republic of Uruguay,
Ms Clara E. Brillembourg, Foley Hoag LLP, Member of the Bars of the District of Columbia and New York,
Ms Cicely Parseghian, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Mr. Pierre Harcourt, Ph.D. candidate, University of Edinburgh,
Mr. Paolo Palchetti, Associate Professor at the School of Law, University of Macerata,
Ms Maria E. Milanes-Murcia, M.A., LL.M., J.S.D. Candidate at the McGeorge School of Law, University of the Pacific, California, Ph.D. Candidate, University of Murcia, admitted to the Bar of Spain,

as Assistant Counsel;

Ms Alicia Torres, National Director for the Environment at the Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. Eugenio Lorenzo, Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. Cyro Croce, Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,

Ms Raquel Piaggio, State Agency for Sanitary Works (OSE), Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,

Mr. Charles A. Menzie, Ph.D., Principal Scientist and Director of the Eco-Sciences Practice at Exponent, Inc., Alexandria, Virginia,
Mr. Neil McCubbin, Eng., B.Sc. (Eng.), 1st Class Honours, Glasgow, Associate of the Royal College of Science and Technology, Glasgow,

as Scientific Advisers and Experts,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 4 May 2006, the Argentine Republic (hereinafter "Argentina") filed in the Registry of the Court an Application instituting proceedings against the Eastern Republic of Uruguay (hereinafter "Uruguay") in respect of a dispute concerning the breach, allegedly committed by Uruguay, of obligations under the Statute of the River Uruguay (United Nations, *Treaty Series (UNTS)*, Vol. 1295, No. I-21425, p. 340), a treaty signed by Argentina and Uruguay at Salto (Uruguay) on 26 February 1975 and having entered into force on 18 September 1976 (hereinafter the "1975 Statute"); in the Application, Argentina stated that this breach arose out of "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".

In its Application, Argentina, referring to Article 36, paragraph 1, of the Statute of the Court, seeks to found the jurisdiction of the Court on Article 60, paragraph 1, of the 1975 Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Registrar communicated the Application forthwith to the Government of Uruguay. In accordance with paragraph 3 of that Article, the Secretary-General of the United Nations was notified of the filing of the Application.

3. On 4 May 2006, immediately after the filing of the Application, Argentina also submitted a request for the indication of provisional measures based on Article 41 of the Statute and Article 73 of the Rules of Court. In accordance with Article 73, paragraph 2, of the Rules of Court, the Registrar transmitted a certified copy of this request forthwith to the Government of Uruguay.

4. On 2 June 2006, Uruguay transmitted to the Court a CD-ROM containing the electronic version of two volumes of documents relating to the Argentine request for the indication of provisional measures, entitled "Observations of Uruguay" (of which paper copies were subsequently received); a copy of these documents was immediately sent to Argentina.

5. On 2 June 2006, Argentina transmitted to the Court various documents, including a video recording, and, on 6 June 2006, it transmitted further documents; copies of each series of documents were immediately sent to Uruguay.

6. On 6 and 7 June 2006, various communications were received from the

Parties, whereby each Party presented the Court with certain observations on the documents submitted by the other Party. Uruguay objected to the production of the video recording submitted by Argentina. The Court decided not to authorize the production of that recording at the hearings.

7. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Argentina chose Mr. Raúl Emilio Vinuesa, and Uruguay chose Mr. Santiago Torres Bernárdez.

8. By an Order of 13 July 2006, the Court, having heard the Parties, found "that the circumstances, as they [then] present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

9. By another Order of the same date, the Court, taking account of the views of the Parties, fixed 15 January 2007 and 20 July 2007, respectively, as the time-limits for the filing of a Memorial by Argentina and a Counter-Memorial by Uruguay; those pleadings were duly filed within the time-limits so prescribed.

10. On 29 November 2006, Uruguay, invoking Article 41 of the Statute and Article 73 of the Rules of Court, in turn submitted a request for the indication of provisional measures. In accordance with Article 73, paragraph 2, of the Rules of Court, the Registrar transmitted a certified copy of this request forthwith to the Argentine Government.

11. On 14 December 2006, Uruguay transmitted to the Court a volume of documents concerning the request for the indication of provisional measures, entitled "Observations of Uruguay"; a copy of these documents was immediately sent to Argentina.

12. On 18 December 2006, before the opening of the oral proceedings, Argentina transmitted to the Court a volume of documents concerning Uruguay's request for the indication of provisional measures; the Registrar immediately sent a copy of these documents to the Government of Uruguay.

13. By an Order of 23 January 2007, the Court, having heard the Parties, found "that the circumstances, as they [then] present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

14. By an Order of 14 September 2007, the Court, taking account of the agreement of the Parties and of the circumstances of the case, authorized the submission of a Reply by Argentina and a Rejoinder by Uruguay, and fixed 29 January 2008 and 29 July 2008 as the respective time-limits for the filing of those pleadings. The Reply of Argentina and the Rejoinder of Uruguay were duly filed within the time-limits so prescribed.

15. By letters dated 16 June 2009 and 17 June 2009 respectively, the Governments of Uruguay and Argentina notified the Court that they had come to an agreement for the purpose of producing new documents pursuant to Article 56 of the Rules of Court. By letters of 23 June 2009, the Registrar informed the Parties that the Court had decided to authorize them to proceed as they had agreed. The new documents were duly filed within the agreed time-limit.

16. On 15 July 2009, each of the Parties, as provided for in the agreement between them and with the authorization of the Court, submitted comments on the new documents produced by the other Party. Each Party also filed documents in support of these comments.

17. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

18. By letter of 15 September 2009, Uruguay, referring to Article 56, paragraph 4, of the Rules of Court and to Practice Direction IX*bis*, communicated documents to the Court, forming part of publications readily available, on which it intended to rely during the oral proceedings. Argentina made no objection with regard to these documents.

19. By letter of 25 September 2009, the Argentine Government, referring to Article 56 of the Rules of Court and to Practice Direction IX, paragraph 2, sent new documents to the Registry which it wished to produce. By letter of 28 September 2009, the Government of Uruguay informed the Court that it was opposed to the production of these documents. It further indicated that if, nevertheless, the Court decided to admit the documents in question into the record of the case, it would present comments on them and submit documents in support of those comments. By letters dated 28 September 2009, the Registrar informed the Parties that the Court did not consider the production of the new documents submitted by the Argentine Government to be necessary within the meaning of Article 56, paragraph 2, of the Rules of Court, and that it had not moreover identified any exceptional circumstance (Practice Direction IX, paragraph 3) which justified their production at that stage of the proceedings.

20. Public hearings were held between 14 September 2009 and 2 October 2009, at which the Court heard the oral arguments and replies of:

*For Argentina:* H.E. Ms Susana Ruiz Cerutti,
Mr. Alain Pellet,
Mr. Philippe Sands,
Mr. Howard Wheater,
Ms Laurence Boisson de Chazournes,
Mr. Marcelo Kohen,
Mr. Alan Béraud,
Mr. Juan Carlos Colombo,
Mr. Daniel Müller.

*For Uruguay:* H.E. Mr. Carlos Gianelli,
Mr. Alan Boyle,
Mr. Paul S. Reichler,
Mr. Neil McCubbin,
Mr. Stephen C. McCaffrey,
Mr. Lawrence H. Martin,
Mr. Luigi Condorelli.

21. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, one of the Parties submitted written comments on a written reply provided by the other and received after the closure of the oral proceedings.

*

22. In its Application, the following claims were made by Argentina:

"On the basis of the foregoing statement of facts and law, Argentina, while reserving the right to supplement, amend or modify the present Application in the course of the subsequent procedure, requests 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.

Argentina reserves the right to amplify or amend these requests at a subsequent stage of the proceedings."

23. In the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Argentina,*

in the Memorial:

"For all the reasons described in this Memorial, the Argentine Republic requests the International Court of Justice:

1. to find that by unilaterally authorizing the construction of the CMB and Orion pulp mills and the facilities associated with the latter on the left bank of the River Uruguay, in breach of the obligations resulting from the Statute of 26 February 1975, the Eastern Republic of Uruguay has committed the internationally wrongful acts set out in Chapters IV and V of this Memorial, which entail its international responsibility;
2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:
   (i) cease immediately the internationally wrongful acts referred to above;
   (ii) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;

(iii) re-establish on the ground and in legal terms the situation that existed before the internationally wrongful acts referred to above were committed;

(iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;

(v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty.

The Argentine Republic reserves the right to supplement or amend these submissions should the need arise, in the light of the development of the situation. This would in particular apply if Uruguay were to aggravate the dispute[1], for example if the Orion mill were to be commissioned before the end of these proceedings.

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[1] See the Order of the Court of 13 July 2006 on Argentina's request for the indication of provisional measures, para. 82."

in the Reply:

"For all the reasons described in its Memorial, which it fully stands by, and in the present Reply, the Argentine Republic requests the International Court of Justice:

1. to find that by authorizing

   — the construction of the CMB mill;
   — the construction and commissioning of the Orion mill and its associated facilities on the left bank of the River Uruguay,

   the Eastern Republic of Uruguay has violated the obligations incumbent on it under the Statute of the River Uruguay of 26 February 1975 and has engaged its international responsibility;

2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:

   (i) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;

   (ii) cease immediately the internationally wrongful acts by which it has engaged its responsibility;

   (iii) re-establish on the ground and in legal terms the situation that existed before these internationally wrongful acts were committed;

   (iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;

   (v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty.

The Argentine Republic reserves the right to supplement or amend these submissions should the need arise, in the light of subsequent developments in the case."

*On behalf of the Government of Uruguay,*

in the Counter-Memorial:

"On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected."

In the Rejoinder:

"Based on all the above, it can be concluded that:

*(a)* Argentina has not demonstrated any harm, or risk of harm, to the river or its ecosystem resulting from Uruguay's alleged violations of its substantive obligations under the 1975 Statute that would be sufficient to warrant the dismantling of the Botnia plant;

*(b)* the harm to the Uruguayan economy in terms of lost jobs and revenue would be substantial;

*(c)* in light of points *(a)* and *(b)*, the remedy of tearing the plant down would therefore be disproportionately onerous, and should not be granted;

*(d)* if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has violated its procedural obligations to Argentina, it can issue a declaratory judgment to that effect, which would constitute an adequate form of satisfaction;

*(e)* if the Court finds, notwithstanding all the evidence to the contrary, that the plant is not in complete compliance with Uruguay's obligation to protect the river or its aquatic environment, the Court can order Uruguay to take whatever additional protective measures are necessary to ensure that the plant conforms to the Statute's substantive requirements;

*(f)* if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has actually caused damage to the river or to Argentina, it can order Uruguay to pay Argentina monetary compensation under Articles 42 and 43 of the Statute; and

*(g)* the Court should issue a declaration making clear the Parties are obligated to ensure full respect for all the rights in dispute in this case, including Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute.

*Submissions*

On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed."

24. At the oral proceedings, the following final submissions were presented by the Parties:

*On behalf of the Government of Argentina,*

at the hearing of 29 September 2009:

"For all the reasons described in its Memorial, in its Reply and in the oral proceedings, which it fully stands by, the Argentine Republic requests the International Court of Justice:

1. to find that by authorizing
   — the construction of the ENCE mill;
   — the construction and commissioning of the Botnia mill and its associated facilities on the left bank of the River Uruguay,

   the Eastern Republic of Uruguay has violated the obligations incumbent on it under the Statute of the River Uruguay of 26 February 1975 and has engaged its international responsibility;
2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:
   (i) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;
   (ii) cease immediately the internationally wrongful acts by which it has engaged its responsibility;
   (iii) re-establish on the ground and in legal terms the situation that existed before these internationally wrongful acts were committed;
   (iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;
   (v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty."

*On behalf of the Government of Uruguay,*

at the hearing of 2 October 2009:

"On the basis of the facts and arguments set out in Uruguay's Counter-Memorial, Rejoinder and during the oral proceedings, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed."

* * *

## I. Legal Framework and Facts of the Case

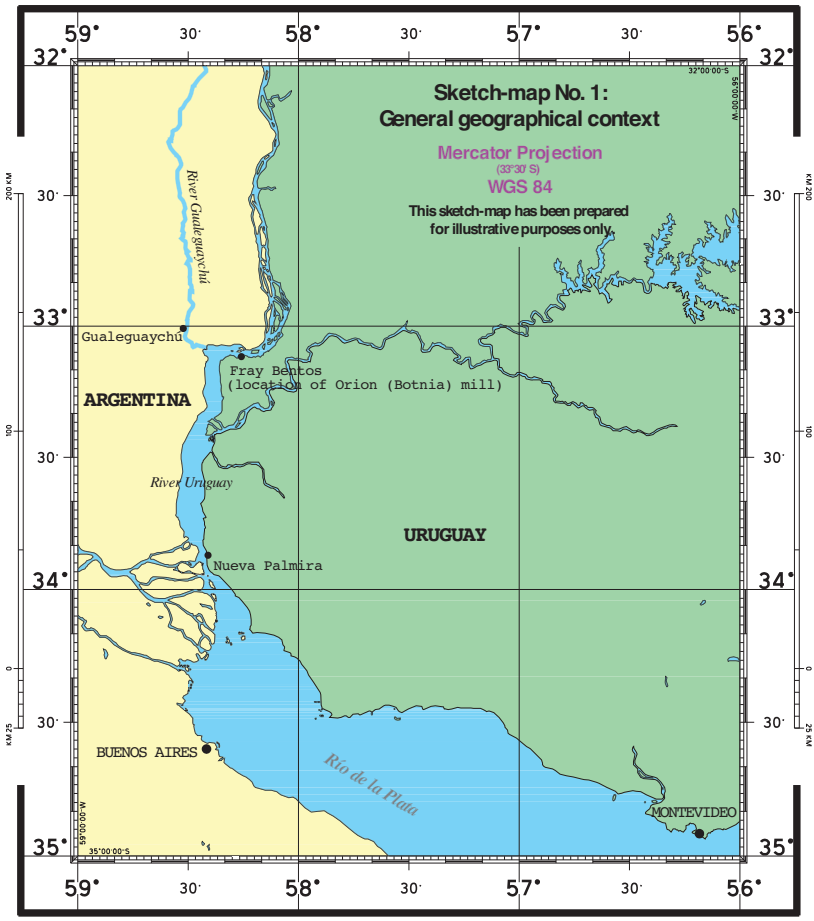
25. The dispute before the Court has arisen in connection with the planned construction authorized by Uruguay of one pulp mill and the construction and commissioning of another, also authorized by Uruguay,

on the River Uruguay (see sketch-map No. 1 on p. 33 for the general geographical context). After identifying the legal instruments concerning the River Uruguay by which the Parties are bound, the Court will set out the main facts of the case.

### *A. Legal Framework*

26. The boundary between Argentina and Uruguay in the River Uruguay is defined by the bilateral Treaty entered into for that purpose at Montevideo on 7 April 1961 (*UNTS*, Vol. 635, No. 9074, p. 98). Articles 1 to 4 of the Treaty delimit the boundary between the Contracting States in the river and attribute certain islands and islets in it to them. Articles 5 and 6 concern the régime for navigation on the river. Article 7 provides for the establishment by the parties of a "régime for the use of the river" covering various subjects, including the conservation of living resources and the prevention of water pollution of the river. Articles 8 to 10 lay down certain obligations concerning the islands and islets and their inhabitants.

27. The "régime for the use of the river" contemplated in Article 7 of the 1961 Treaty was established through the 1975 Statute (see paragraph 1 above). Article 1 of the 1975 Statute states that the parties adopted it "in order to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties". After having thus defined its purpose (Article 1) and having also made clear the meaning of certain terms used therein (Article 2), the 1975 Statute lays down rules governing navigation and works on the river (Chapter II, Articles 3 to 13), pilotage (Chapter III, Articles 14 to 16), port facilities, unloading and additional loading (Chapter IV, Articles 17 to 18), the safeguarding of human life (Chapter V, Articles 19 to 23) and the salvaging of property (Chapter VI, Articles 24 to 26), use of the waters of the river (Chapter VII, Articles 27 to 29), resources of the bed and subsoil (Chapter VIII, Articles 30 to 34), the conservation, utilization and development of other natural resources (Chapter IX, Articles 35 to 39), pollution (Chapter X, Articles 40 to 43), scientific research (Chapter XI, Articles 44 to 45), and various powers of the parties over the river and vessels sailing on it (Chapter XII, Articles 46 to 48). The 1975 Statute sets up the Administrative Commission of the River Uruguay (hereinafter "CARU", from the Spanish acronym for "Comisión Administradora del Río Uruguay") (Chapter XIII, Articles 49 to 57), and then establishes procedures for conciliation (Chapter XIV, Articles 58 to 59) and judicial settlement of disputes (Chapter XV, Article 60). Lastly, the 1975 Statute contains transitional (Chapter XVI, Articles 61 to 62) and final (Chapter XVII, Article 63) provisions.

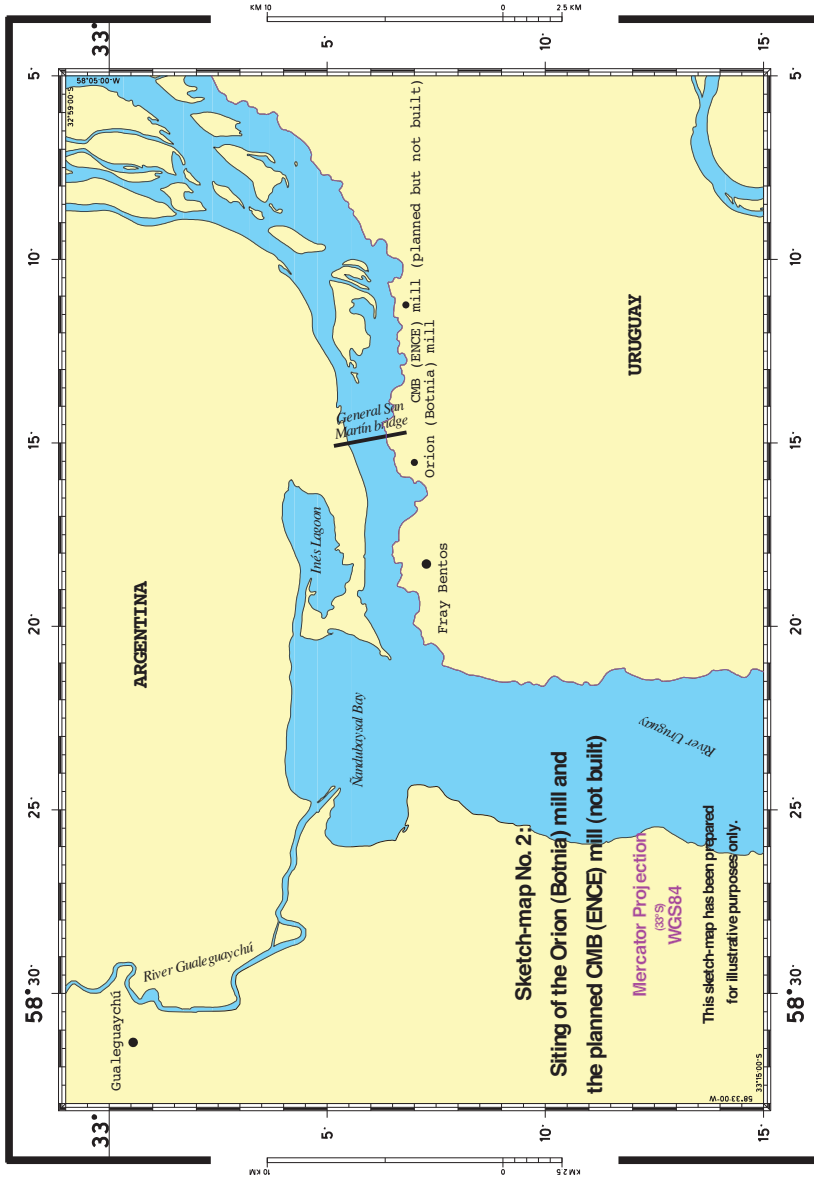

Sketch-map No. 1:
General geographical context
Mercator Projection
(33°30' S)
WGS 84
This sketch-map has been prepared
for illustrative purposes only.
River Gualeguaychú
Gualeguaychú
Fray Bentos
(location of Orion (Botnia) mill)
ARGENTINA
River Uruguay
URUGUAY
Nueva Palmira
BUENOS AIRES
Río de la Plata
MONTEVIDEO
59°
30'
58°
57°
56°
32°
33°
34°
35°

### *B. CMB (ENCE) Project*

28. The first pulp mill at the root of the dispute was planned by "Celulosas de M'Bopicuá S.A." (hereinafter "CMB"), a company formed by the Spanish company ENCE (from the Spanish acronym for "Empresa Nacional de Celulosas de España", hereinafter "ENCE"). This mill, hereinafter referred to as the "CMB (ENCE)" mill, was to have been built on the left bank of the River Uruguay in the Uruguayan department of Río Negro opposite the Argentine region of Gualeguaychú, more specifically to the east of the city of Fray Bentos, near the "General San Martín" international bridge (see sketch-map No. 2 on p. 35).

29. On 22 July 2002, the promoters of this industrial project approached the Uruguayan authorities and submitted an environmental impact assessment ("EIA" according to the abbreviation used by the Parties) of the plan to Uruguay's National Directorate for the Environment (hereinafter "DINAMA", from the Spanish acronym for "Dirección Nacional de Medio Ambiente"). During the same period, representatives of CMB, which had been specially formed to build the CMB (ENCE) mill, informed the President of CARU of the project. The President of CARU wrote to the Uruguayan Minister of the Environment on 17 October 2002 seeking a copy of the environmental impact assessment of the CMB (ENCE) project submitted by the promoters of this industrial project. This request was reiterated on 21 April 2003. On 14 May 2003, Uruguay submitted to CARU a document entitled "Environmental Impact Study, Celulosas de M'Bopicuá. Summary for public release". One month later, the CARU Subcommittee on Water Quality and Pollution Control took notice of the document transmitted by Uruguay and suggested that a copy thereof be sent to its technical advisers for their opinions. Copies were also provided to the Parties' delegations.

30. A public hearing, attended by CARU's Legal Adviser and its technical secretary, was held on 21 July 2003 in the city of Fray Bentos concerning CMB's application for an environmental authorization. On 15 August 2003, CARU asked Uruguay for further information on various points concerning the planned CMB (ENCE) mill. This request was reiterated on 12 September 2003. On 2 October 2003, DINAMA submitted its assessment report to the Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs (hereinafter "MVOTMA", from the Spanish abbreviation for "Ministerio de Vivienda Ordenamiento Territorial y Medio Ambiente"), recommending that CMB be granted an initial environmental authorization ("AAP" according to the Spanish abbreviation for "Autorización Ambiental Previa") subject to certain conditions. On 8 October 2003, CARU was informed by the Uruguayan delegation that DINAMA would very shortly send CARU a report on the CMB (ENCE) project.


Sketch-map No. 2:
Siting of the Orion (Botnia) mill and
the planned CMB (ENCE) mill (not built)
Mercator Projection
(33°S)
WGS84
This sketch-map has been prepared
for illustrative purposes only.
ARGENTINA
URUGUAY
CMB (ENCE) mill (planned but not built)
Orion (Botnia) mill
General San Martín bridge
Fray Bentos
Inés Lagoon
Ñandubaysal Bay
River Uruguay
River Gualeguaychú
Gualeguaychú
58°30'
33°
KM 10
0
2.5 KM
10 KM
KM 2.5

31. On 9 October 2003, MVOTMA issued an initial environmental authorization to CMB for the construction of the CMB (ENCE) mill. On the same date the Presidents of Argentina and Uruguay met at Anchorena (Colonia, Uruguay). Argentina maintains that the President of Uruguay, Jorge Battle, then promised his Argentine counterpart, Néstor Kirchner, that no authorization would be issued before Argentina's environmental concerns had been addressed. Uruguay challenges this version of the facts and contends that the Parties agreed at that meeting to deal with the CMB (ENCE) project otherwise than through the procedure under Articles 7 to 12 of the 1975 Statute and that Argentina let it be known that it was not opposed to the project per se. Argentina disputes these assertions.

32. The day after the meeting between the Heads of State of Argentina and Uruguay, CARU declared its willingness to resume the technical analyses of the CMB (ENCE) project as soon as Uruguay transmitted the awaited documents. On 17 October 2003, CARU held an extraordinary plenary meeting at the request of Argentina, at which Argentina complained of Uruguay's granting on 9 October 2003 of the initial environmental authorization. Following the extraordinary meeting CARU suspended work for more than six months, as the Parties could not agree on how to implement the consultation mechanism established by the 1975 Statute.

33. On 27 October 2003, Uruguay transmitted to Argentina copies of the environmental impact assessment submitted by ENCE on 22 July 2002, of DINAMA's final assessment report dated 2 October 2003 and of the initial environmental authorization of 9 October 2003. Argentina reacted by expressing its view that Article 7 of the 1975 Statute had not been observed and that the transmitted documents did not appear adequate to allow for a technical opinion to be expressed on the environmental impact of the project. On 7 November 2003, further to a request from the Ministry of Foreign Affairs of Argentina, Uruguay provided Argentina with a copy of the Uruguayan Ministry of the Environment's entire file on the CMB (ENCE) project. On 23 February 2004, Argentina forwarded all of this documentation received from Uruguay to CARU.

34. On 2 March 2004, the Parties' Ministers for Foreign Affairs met in Buenos Aires. On 15 May 2004, CARU resumed its work at an extraordinary plenary meeting during which it took note of the ministerial "understanding" which was reached on 2 March 2004. The Parties are at odds over the content of this "understanding". The Court will return to this when it considers Argentina's claims as to Uruguay's breach of its procedural obligations under the 1975 Statute (see paragraphs 67 to 158).

35. Following up on CARU's extraordinary meeting of 15 May 2004, the CARU Subcommittee on Water Quality and Pollution Control pre-

pared a plan for monitoring water quality in the area of the pulp mills (hereinafter the "PROCEL" plan from the Spanish acronym for "Plan de Monitoreo de la Calidad Ambiental del Río Uruguay en Areas de Plantas Celulósicas"). CARU approved the plan on 12 November 2004.

36. On 28 November 2005, Uruguay authorized preparatory work to begin for the construction of the CMB (ENCE) mill (ground clearing). On 28 March 2006, the project's promoters decided to halt the work for 90 days. On 21 September 2006, they announced their intention not to build the mill at the planned site on the bank of the River Uruguay.

### *C. Orion (Botnia) Mill*

37. The second industrial project at the root of the dispute before the Court was undertaken by "Botnia S.A." and "Botnia Fray Bentos S.A." (hereinafter "Botnia"), companies formed under Uruguayan law in 2003 specially for the purpose by Oy Metsä-Botnia AB, a Finnish company. This second pulp mill, called "Orion" (hereinafter the "Orion (Botnia)" mill), has been built on the left bank of the River Uruguay, a few kilometres downstream of the site planned for the CMB (ENCE) mill, and also near the city of Fray Bentos (see sketch-map No. 2 on p. 35). It has been operational and functioning since 9 November 2007.

38. After informing the Uruguayan authorities of this industrial project in late 2003, the project promoters submitted an application to them for an initial environmental authorization on 31 March 2004 and supplemented it on 7 April 2004. Several weeks later, on 29 and 30 April 2004, CARU members and Botnia representatives met informally. Following that meeting, CARU's Subcommittee on Water Quality and Pollution Control suggested on 18 June 2004 that Botnia expand on the information provided at the meeting. On 19 October 2004, CARU held another meeting with Botnia representatives and again expressed the need for further information on Botnia's application to DINAMA for an initial environmental authorization. On 12 November 2004, when approving the water quality monitoring plan put forward by the CARU Subcommittee on Water Quality and Pollution Control (see paragraph 35 above), CARU decided, on the proposal of that subcommittee, to ask Uruguay to provide further information on the application for an initial environmental authorization. CARU transmitted this request for further information to Uruguay by note dated 16 November 2004.

39. On 21 December 2004 DINAMA held a public hearing, attended

by a CARU adviser, on the Orion (Botnia) project in Fray Bentos. DINAMA adopted its environmental impact study of the planned Orion (Botnia) mill on 11 February 2005 and recommended that the initial environmental authorization be granted, subject to certain conditions. MVOTMA issued the initial authorization to Botnia on 14 February 2005 for the construction of the Orion (Botnia) mill and an adjacent port terminal. At a CARU meeting on 11 March 2005, Argentina questioned whether the granting of the initial environmental authorization was well-founded in view of the procedural obligations laid down in the 1975 Statute. Argentina reiterated this position at the CARU meeting on 6 May 2005. On 12 April 2005, Uruguay had in the meantime authorized the clearance of the future mill site and the associated groundworks.

40. On 31 May 2005, in pursuance of an agreement made on 5 May 2005 by the Presidents of the two Parties, their Ministers for Foreign Affairs created a High-Level Technical Group (hereinafter the "GTAN", from the Spanish abbreviation for "Grupo Técnico de Alto Nivel"), which was given responsibility for resolving the disputes over the CMB (ENCE) and Orion (Botnia) mills within 180 days. The GTAN held twelve meetings between 3 August 2005 and 30 January 2006, with the Parties exchanging various documents in the context of this bilateral process. On 31 January 2006, Uruguay determined that the negotiations undertaken within the GTAN had failed; Argentina did likewise on 3 February 2006. The Court will return later to the significance of this process agreed on by the Parties (see paragraphs 132 to 149).

41. On 26 June 2005, Argentina wrote to the President of the International Bank for Reconstruction and Development to express its concern at the possibility of the International Finance Corporation (hereinafter the "IFC") contributing to the financing of the planned pulp mills. The IFC nevertheless decided to provide financial support for the Orion (Botnia) mill, but did commission EcoMetrix, a consultancy specializing in environmental and industrial matters, to prepare various technical reports on the planned mill and an environmental impact assessment of it. EcoMetrix was also engaged by the IFC to carry out environmental monitoring on the IFC's behalf of the plant once it had been placed in service.

42. On 5 July 2005, Uruguay authorized Botnia to build a port adjacent to the Orion (Botnia) mill. This authorization was transmitted to CARU on 15 August 2005. On 22 August 2005, Uruguay authorized the construction of a chimney and concrete foundations for the Orion (Botnia) mill. Further authorizations were granted as the construction of this mill proceeded, for example in respect of the waste treatment installations. On 13 October 2005, Uruguay transmitted additional documentation to CARU concerning the port terminal adjacent to the Orion (Botnia) mill.

Argentina repeatedly asked, including at CARU meetings, that the initial work connected with the Orion (Botnia) mill and the CMB (ENCE) mill should be suspended. At a meeting between the Heads of State of the Parties at Santiago de Chile on 11 March 2006, Uruguay's President asked ENCE and Botnia to suspend construction of the mills. ENCE suspended work for 90 days (see paragraph 36 above), Botnia for ten.

43. Argentina referred the present dispute to the Court by Application dated 4 May 2006. On 24 August 2006, Uruguay authorized the commissioning of the port terminal adjacent to the Orion (Botnia) mill and gave CARU notice of this on 4 September 2006. On 12 September 2006, Uruguay authorized Botnia to extract and use water from the river for industrial purposes and formally notified CARU of its authorization on 17 October 2006. At the summit of Heads of State and Government of the Ibero-American countries held in Montevideo in November 2006, the King of Spain was asked to endeavour to reconcile the positions of the Parties; a negotiated resolution of the dispute did not however result. On 8 November 2007, Uruguay authorized the commissioning of the Orion (Botnia) mill and it began operating the next day. In December 2009, Oy Metsä-Botnia AB transferred its interest in the Orion (Botnia) mill to UPM, another Finnish company.

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44. In addition, Uruguay authorized Ontur International S.A. to build and operate a port terminal at Nueva Palmira. The terminal was inaugurated in August 2007 and, on 16 November 2007, Uruguay transmitted to CARU a copy of the authorization for its commissioning.

45. In their written pleadings the Parties have debated whether, in light of the procedural obligations laid down in the 1975 Statute, the authorizations for the port terminal were properly issued by Uruguay. The Court deems it unnecessary to review the detailed facts leading up to the construction of the Nueva Palmira terminal, being of the view that these port facilities do not fall within the scope of the subject of the dispute before it. Indeed, nowhere in the claims asserted in its Application or in the submissions in its Memorial or Reply (see paragraphs 22 and 23 above) did Argentina explicitly refer to the port terminal at Nueva Palmira. In its final submissions presented at the hearing on 29 September 2009, Argentina again limited the subject-matter of its claims to the authorization of the construction of the CMB (ENCE) mill and the authorization of the construction and commissioning of "the Botnia mill and its associated facilities on the left bank of the River Uruguay". The Court does not consider the port terminal at Nueva Palmira, which lies some 100 km south of Fray Bentos, downstream of the Orion (Botnia)

mill (see sketch-map No. 1 on p. 33), and is used by other economic operators as well, to be a facility "associated" with the mill.

46. The dispute submitted to the Court concerns the interpretation and application of the 1975 Statute, namely, on the one hand whether Uruguay complied with its procedural obligations under the 1975 Statute in issuing authorizations for the construction of the CMB (ENCE) mill as well as for the construction and the commissioning of the Orion (Botnia) mill and its adjacent port; and on the other hand whether Uruguay has complied with its substantive obligations under the 1975 Statute since the commissioning of the Orion (Botnia) mill in November 2007.

* *

47. Having thus related the circumstances surrounding the dispute between the Parties, the Court will consider the basis and scope of its jurisdiction, including questions relating to the law applicable to the present dispute (see paragraphs 48 to 66). It will then examine Argentina's allegations of breaches by Uruguay of procedural obligations (see paragraphs 67 to 158) and substantive obligations (see paragraphs 159 to 266) laid down in the 1975 Statute. Lastly, the Court will respond to the claims presented by the Parties in their final submissions (see paragraphs 267 to 280).

* *

## II. Scope of the Court's Jurisdiction

48. The Parties are in agreement that the Court's jurisdiction is based on Article 36, paragraph 1, of the Statute of the Court and Article 60, paragraph 1, of the 1975 Statute. The latter reads: "Any dispute concerning the interpretation or application of the Treaty[1] and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice." The Parties differ as to whether all the claims advanced by Argentina fall within the ambit of the compromissory clause.

49. Uruguay acknowledges that the Court's jurisdiction under the compromissory clause extends to claims concerning any pollution or type of harm caused to the River Uruguay, or to organisms living there, in violation of the 1975 Statute. Uruguay also acknowledges that claims concerning the alleged impact of the operation of the pulp mill on the

[1] The Montevideo Treaty of 7 April 1961, concerning the boundary constituted by the River Uruguay (*UNTS*, Vol. 635, No. 9074, p. 98; footnote added).

quality of the waters of the river fall within the compromissory clause. On the other hand, Uruguay takes the position that Argentina cannot rely on the compromissory clause to submit claims regarding every type of environmental damage. Uruguay further argues that Argentina's contentions concerning air pollution, noise, visual and general nuisance, as well as the specific impact on the tourism sector, allegedly caused by the Orion (Botnia) mill, do not concern the interpretation or the application of the 1975 Statute, and the Court therefore lacks jurisdiction over them.

Uruguay nevertheless does concede that air pollution which has harmful effects on the quality of the waters of the river or on the aquatic environment would fall within the jurisdiction of the Court.

50. Argentina maintains that Uruguay's position on the scope of the Court's jurisdiction is too narrow. It contends that the 1975 Statute was entered into with a view to protect not only the quality of the waters of the river but more generally its "régime" and the areas affected by it. Relying on Article 36 of the 1975 Statute, which lays out the obligation of the parties to co-ordinate measures to avoid any change in the ecological balance and to control harmful factors in the river and the areas affected by it, Argentina asserts that the Court has jurisdiction also with respect to claims concerning air pollution and even noise and "visual" pollution. Moreover, Argentina contends that bad odours caused by the Orion (Botnia) mill negatively affect the use of the river for recreational purposes, particularly in the Gualeguaychú resort on its bank of the river. This claim, according to Argentina, also falls within the Court's jurisdiction.

51. The Court, when addressing various allegations or claims advanced by Argentina, will have to determine whether they concern "the interpretation or application" of the 1975 Statute, as its jurisdiction under Article 60 thereof covers "[a]ny dispute concerning the interpretation or application of the [1961] Treaty and the [1975] Statute". Argentina has made no claim to the effect that Uruguay violated obligations under the 1961 Treaty.

52. In order to determine whether Uruguay has breached its obligations under the 1975 Statute, as alleged by Argentina, the Court will have to interpret its provisions and to determine their scope *ratione materiae*.

Only those claims advanced by Argentina which are based on the provisions of the 1975 Statute fall within the Court's jurisdiction *ratione materiae* under the compromissory clause contained in Article 60. Although Argentina, when making claims concerning noise and "visual" pollution allegedly caused by the pulp mill, invokes the provision of Article 36 of the 1975 Statute, the Court sees no basis in it for such claims. The plain language of Article 36, which provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it", leaves no doubt

that it does not address the alleged noise and visual pollution as claimed by Argentina. Nor does the Court see any other basis in the 1975 Statute for such claims; therefore, the claims relating to noise and visual pollution are manifestly outside the jurisdiction of the Court conferred upon it under Article 60.

Similarly, no provision of the 1975 Statute addresses the issue of "bad odours" complained of by Argentina. Consequently, for the same reason, the claim regarding the impact of bad odours on tourism in Argentina also falls outside the Court's jurisdiction. Even if bad odours were to be subsumed under the issue of air pollution, which will be addressed in paragraphs 263 and 264 below, the Court notes that Argentina has submitted no evidence as to any relationship between the alleged bad odours and the aquatic environment of the river.

53. Characterizing the provisions of Articles 1 and 41 of the 1975 Statute as "referral clauses", Argentina ascribes to them the effect of incorporating into the Statute the obligations of the Parties under general international law and a number of multilateral conventions pertaining to the protection of the environment. Consequently, in the view of Argentina, the Court has jurisdiction to determine whether Uruguay has complied with its obligations under certain international conventions.

54. The Court now therefore turns its attention to the issue whether its jurisdiction under Article 60 of the 1975 Statute also encompasses obligations of the Parties under international agreements and general international law invoked by Argentina and to the role of such agreements and general international law in the context of the present case.

55. Argentina asserts that the 1975 Statute constitutes the law applicable to the dispute before the Court, as supplemented so far as its application and interpretation are concerned, by various customary principles and treaties in force between the Parties and referred to in the Statute. Relying on the rule of treaty interpretation set out in Article 31, paragraph 3 *(c)* of the Vienna Convention on the Law of Treaties, Argentina contends notably that the 1975 Statute must be interpreted in the light of principles governing the law of international watercourses and principles of international law ensuring protection of the environment. It asserts that the 1975 Statute must be interpreted so as to take account of all "relevant rules" of international law applicable in the relations between the Parties, so that the Statute's interpretation remains current and evolves in accordance with changes in environmental standards. In this connection Argentina refers to the principles of equitable, reasonable and non-injurious use of international watercourses, the principles of sustainable development, prevention, precaution and the need to carry out an environmental impact assessment. It contends that these rules and principles

are applicable in giving the 1975 Statute a dynamic interpretation, although they neither replace it nor restrict its scope.

56. Argentina further considers that the Court must require compliance with the Parties' treaty obligations referred to in Articles 1 and 41 *(a)* of the 1975 Statute. Argentina maintains that the "referral clauses" contained in these articles make it possible to incorporate and apply obligations arising from other treaties and international agreements binding on the Parties. To this end, Argentina refers to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter the "CITES Convention"), the 1971 Ramsar Convention on Wetlands of International Importance (hereinafter the "Ramsar Convention"), the 1992 United Nations Convention on Biological Diversity (hereinafter the "Biodiversity Convention"), and the 2001 Stockholm Convention on Persistent Organic Pollutants (hereinafter the "POPs Convention"). It asserts that these conventional obligations are in addition to the obligations arising under the 1975 Statute, and observance of them should be ensured when application of the Statute is being considered. Argentina maintains that it is only where "more specific rules of the [1975] Statute *(lex specialis)*" derogate from them that the instruments to which the Statute refers should not be applied.

57. Uruguay likewise considers that the 1975 Statute must be interpreted in the light of general international law and it observes that the Parties concur on this point. It maintains however that its interpretation of the 1975 Statute accords with the various general principles of the law of international watercourses and of international environmental law, even if its understanding of these principles does not entirely correspond to that of Argentina. Uruguay considers that whether Articles 1 and 41 *(a)* of the 1975 Statute can be read as a referral to other treaties in force between the Parties has no bearing in the present case, because conventions relied on by Argentina are either irrelevant, or Uruguay cannot be found to have violated any other conventional obligations. In any event, the Court would lack jurisdiction to rule on alleged breaches of international obligations which are not contained in the 1975 Statute.

58. The Court will first address the issue whether Articles 1 and 41 *(a)* can be read as incorporating into the 1975 Statute the obligations of the Parties under the various multilateral conventions relied upon by Argentina.

59. Article 1 of the 1975 Statute reads as follows:

> "The parties agree on this Statute, in implementation of the provisions of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay of 7 April 1961, in order to establish the joint machinery necessary for the optimum and rational utilization

> of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties." (*UNTS*, Vol. 1295, No. I-21425, p. 340; footnote omitted.)

Article 1 sets out the purpose of the 1975 Statute. The Parties concluded it in order to establish the joint machinery necessary for the rational and optimum utilization of the River Uruguay. It is true that this article contains a reference to "the rights and obligations arising from treaties and other international agreements in force for each of the parties". This reference, however, does not suggest that the Parties sought to make compliance with their obligations under other treaties one of their duties under the 1975 Statute; rather, the reference to other treaties emphasizes that the agreement of the Parties on the Statute is reached in implementation of the provisions of Article 7 of the 1961 Treaty *and* "*in strict observance* of the rights and obligations arising from treaties and other international agreements in force for each of the parties" (emphasis added). While the conjunction "and" is missing from the English and French translations of the 1975 Statute, as published in the *United Nations Treaty Series* (*ibid.*, p. 340 and p. 348), it is contained in the Spanish text of the Statute, which is the authentic text and reads as follows:

> "Las partes acuerdan el presente Estatuto, en cumplimiento de lo dispuesto en el Artículo 7 del Tratado de Límites en el Río Uruguay, de 7 de Abril de 1961 con el fin de establecer los mecanismos comunes necesarios para el óptimo y racional aprovechamiento del Río Uruguay, *y* en estricta observancia de los derechos y obligaciones emergentes de los tratados y demás compromisos internacionales vigentes para cualquiera de las partes." (*Ibid.*, p. 332; emphasis added.)

The presence of the conjunction in the Spanish text suggests that the clause "in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties" is linked to and is to be read with the first part of Article 1, i.e., "[t]he parties agree on this Statute, in implementation of the provisions of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay".

60. There is one additional element in the language of Article 1 of the 1975 Statute which should be noted. It mentions "treaties and other international agreements in force for *each* of the parties" (in Spanish original "tratados y demás compromisos internacionales vigentes para *cualquiera* de las partes"; emphasis added). In the French translation, this part of Article 1 reads "traités et autres engagements internationaux en vigueur à l'égard de *l'une ou l'autre* des parties" (emphasis added).

The fact that Article 1 does not require that the "treaties and other

international agreements" should be in force between the *two* parties thus clearly indicates that the 1975 Statute takes account of the prior commitments of each of the parties which have a bearing on it.

61. Article 41 of the 1975 Statute, paragraph *(a)* of which Argentina considers as constituting another "referral clause" incorporating the obligations under international agreements into the Statute, reads as follows:

> "Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:
>
> *(a)* to protect and preserve the aquatic environment and, in particular, to prevent its pollution, *by prescribing appropriate rules and [adopting appropriate] measures in accordance* with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies;
>
> *(b)* not to reduce in their respective legal systems:
>
> 1) the technical requirements in force for preventing water pollution, and
> 2) the severity of the penalties established for violations;
>
> *(c)* to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems." (Emphasis added.)

62. The Court observes that the words "adopting appropriate" do not appear in the English translation while they appear in the original Spanish text ("dictando las normas y adoptando las medidas apropiadas"). Basing itself on the original Spanish text, it is difficult for the Court to see how this provision could be construed as a "referral clause" having the effect of incorporating the obligations of the parties under international agreements and other norms envisaged within the ambit of the 1975 Statute.

The purpose of the provision in Article 41 *(a)* is to protect and preserve the aquatic environment by requiring each of the parties to enact rules and to adopt appropriate measures. Article 41 *(a)* distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible ("con adecuación") with those guidelines and recommendations. However, Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and

preservation of the aquatic environment of the River Uruguay. Under Article 41 *(b)* the existing requirements for preventing water pollution and the severity of the penalties are not to be reduced. Finally, paragraph *(c)* of Article 41 concerns the obligation to inform the other party of plans to prescribe rules on water pollution.

63. The Court concludes that there is no basis in the text of Article 41 of the 1975 Statute for the contention that it constitutes a "referral clause". Consequently, the various multilateral conventions relied on by Argentina are not, as such, incorporated in the 1975 Statute. For that reason, they do not fall within the scope of the compromissory clause and therefore the Court has no jurisdiction to rule whether Uruguay has complied with its obligations thereunder.

64. The Court next briefly turns to the issue of how the 1975 Statute is to be interpreted. The Parties concur as to the 1975 Statute's origin and historical context, although they differ as to the nature and general tenor of the Statute and the procedural and substantive obligations therein.

The Parties nevertheless are in agreement that the 1975 Statute is to be interpreted in accordance with rules of customary international law on treaty interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties.

65. The Court has had recourse to these rules when it has had to interpret the provisions of treaties and international agreements concluded before the entry into force of the Vienna Convention on the Law of Treaties in 1980 (see, e.g., *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 21, para. 41; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18).

The 1975 Statute is also a treaty which predates the entry into force of the Vienna Convention on the Law of Treaties. In interpreting the terms of the 1975 Statute, the Court will have recourse to the customary rules on treaty interpretation as reflected in Article 31 of the Vienna Convention. Accordingly the 1975 Statute is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the [Statute] in their context and in light of its object and purpose". That interpretation will also take into account, together with the context, "any relevant rules of international law applicable in the relations between the parties".

66. In the interpretation of the 1975 Statute, taking account of relevant rules of international law applicable in the relations between the Parties, whether these are rules of general international law or contained in multilateral conventions to which the two States are parties, nevertheless has no bearing on the scope of the jurisdiction conferred on the

Court under Article 60 of the 1975 Statute, which remains confined to disputes concerning the interpretation or application of the Statute.

* *

## III. The Alleged Breach of Procedural Obligations

67. The Application filed by Argentina on 4 May 2006 concerns the alleged breach by Uruguay of both procedural and substantive obligations laid down in the 1975 Statute. The Court will start by considering the alleged breach of procedural obligations under Articles 7 to 12 of the 1975 Statute, in relation to the (CMB) ENCE and Orion (Botnia) mill projects and the facilities associated with the latter, on the left bank of the River Uruguay near the city of Fray Bentos.

68. Argentina takes the view that the procedural obligations were intrinsically linked to the substantive obligations laid down by the 1975 Statute, and that a breach of the former entailed a breach of the latter.

With regard to the procedural obligations, these are said by Argentina to constitute an integrated and indivisible whole in which CARU, as an organization, plays an essential role.

Consequently, according to Argentina, Uruguay could not invoke other procedural arrangements so as to derogate from the procedural obligations laid down by the 1975 Statute, except by mutual consent.

69. Argentina argues that, at the end of the procedural mechanism provided for by the 1975 Statute, and in the absence of agreement between the Parties, the latter have no choice but to submit the matter to the Court under the terms of Articles 12 and 60 of the Statute, with Uruguay being unable to proceed with the construction of the planned mills until the Court has delivered its Judgment.

70. Following the lines of the argument put forward by the Applicant, the Court will examine in turn the following four points: the links between the procedural obligations and the substantive obligations (A); the procedural obligations and their interrelation with each other (B); whether the Parties agreed to derogate from the procedural obligations set out in the 1975 Statute (C); and Uruguay's obligations at the end of the negotiation period (D).

### *A. The Links between the Procedural Obligations and the Substantive Obligations*

71. Argentina maintains that the procedural provisions laid down in Articles 7 to 12 of the 1975 Statute are aimed at ensuring "the optimum

and rational utilization of the [r]iver" (Article 1), just as are the provisions concerning use of water, the conservation, utilization and development of other natural resources, pollution and research. The aim is also said to be to prevent the Parties from acting unilaterally and without regard for earlier or current uses of the river. According to Argentina, any disregarding of this machinery would therefore undermine the object and purpose of the 1975 Statute; indeed the "optimum and rational utilization of the [r]iver" would not be ensured, as this could only be achieved in accordance with the procedures laid down under the Statute.

72. It follows, according to Argentina, that a breach of the procedural obligations automatically entails a breach of the substantive obligations, since the two categories of obligations are indivisible. Such a position is said to be supported by the Order of the Court of 13 July 2006, according to which the 1975 Statute created "a comprehensive régime".

73. Uruguay similarly takes the view that the procedural obligations are intended to facilitate the performance of the substantive obligations, the former being a means rather than an end. It too points out that Article 1 of the 1975 Statute defines its object and purpose.

74. However, Uruguay rejects Argentina's argument as artificial, since it appears to mix procedural and substantive questions with the aim of creating the belief that the breach of procedural obligations necessarily entails the breach of substantive ones. According to Uruguay, it is for the Court to determine the breach, in itself, of each of these categories of obligations, and to draw the necessary conclusions in each case in terms of responsibility and reparation.

75. The Court notes that the object and purpose of the 1975 Statute, set forth in Article 1, is for the Parties to achieve "the optimum and rational utilization of the River Uruguay" by means of the "joint machinery" for co-operation, which consists of both CARU and the procedural provisions contained in Articles 7 to 12 of the Statute.

The Court has observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of "the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 80).

76. In the *Gabčikovo-Nagymaros* case, the Court, after recalling that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development", added that "[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty" (*Gabčíkovo-*

*Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, paras. 140-141).

77. The Court observes that it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute. However, whereas the substantive obligations are frequently worded in broad terms, the procedural obligations are narrower and more specific, so as to facilitate the implementation of the 1975 Statute through a process of continuous consultation between the parties concerned. The Court has described the régime put in place by the 1975 Statute as a "comprehensive and progressive régime" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 81), since the two categories of obligations mentioned above complement one another perfectly, enabling the parties to achieve the object of the Statute which they set themselves in Article 1.

78. The Court notes that the 1975 Statute created CARU and established procedures in connection with that institution, so as to enable the parties to fulfil their substantive obligations. However, nowhere does the 1975 Statute indicate that a party may fulfil its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones.

Likewise, the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied *ipso facto* with their procedural obligations, or are excused from doing so. Moreover, the link between these two categories of obligations can also be broken, in fact, when a party which has not complied with its procedural obligations subsequently abandons the implementation of its planned activity.

79. The Court considers, as a result of the above, that there is indeed a functional link, in regard to prevention, between the two categories of obligations laid down by the 1975 Statute, but that link does not prevent the States parties from being required to answer for those obligations separately, according to their specific content, and to assume, if necessary, the responsibility resulting from the breach of them, according to the circumstances.

### *B. The Procedural Obligations and Their Interrelation*

80. The 1975 Statute imposes on a party which is planning certain activities, set out in Article 7, first paragraph, procedural obligations whose content, interrelation and time-limits are specified as follows in Articles 7 to 12:

"*Article 7*

If one party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters, it shall notify the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

If the Commission finds this to be the case or if a decision cannot be reached in that regard, the party concerned shall notify the other party of the plan through the said Commission.

Such notification shall describe the main aspects of the work and, where appropriate, how it is to be carried out and shall include any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters.

*Article 8*

The notified party shall have a period of 180 days in which to respond in connection with the plan, starting from the date on which its delegation to the Commission receives the notification.

Should the documentation referred to in Article 7 be incomplete, the notified party shall have 30 days in which to so inform, through the Commission, the party which plans to carry out the work.

The period of 180 days mentioned above shall begin on the date on which the delegation of the notified party receives the full documentation.

This period may be extended at the discretion of the Commission if the complexity of the plan so requires.

*Article 9*

If the notified party raises no objections or does not respond within the period established in Article 8, the other party may carry out or authorize the work planned.

*Article 10*

The notified party shall have the right to inspect the works being carried out in order to determine whether they conform to the plan submitted.

*Article 11*

Should the notified party come to the conclusion that the execution of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, it shall so notify the other party, through the Commission, within the period of 180 days established in Article 8.

Such notification shall specify which aspects of the work or the

programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations.

*Article 12*

Should the parties fail to reach agreement within 180 days following the notification referred to in Article 11, the procedure indicated in Chapter XV shall be followed."

81. The original Spanish text of Article 7 of the 1975 Statute reads as follows:

"La parte que proyecte la construcción de nuevos canales, la modificación o alteración significativa de los ya existentes o la realización de cualesquiera otras obras de entidad suficiente para afectar la navegación, el régimen del Río o la calidad de sus aguas, deberá comunicarlo a la Comisión, la cual determinará sumariamente, y en un plazo máximo de treinta días, si el proyecto puede producir perjuicio sensible a la otra parte.

Si así se resolviere o no se llegare a una decisión al respecto, la parte interesada deberá notificar el proyecto a la otra parte a través de la misma Comisión.

En la notificación deberán figurar los aspectos esenciales de la obra y, si fuere el caso, el modo de su operación y los demás datos técnicos que permitan a la parte notificada hacer una evaluación del efecto probable que la obra ocasionará a la navegación, al régimen del Río o a la calidad de sus aguas."

The Court notes that, just as the original Spanish text, the French translation of this Article (see paragraph 80 above) distinguishes between the obligation to inform ("comunicar") CARU of any plan falling within its purview (first paragraph) and the obligation to notify ("notificar") the other party (second paragraph). By contrast, the English translation uses the same verb "notify" in respect of both obligations. In order to conform to the original Spanish text, the Court will use in both linguistic versions of this Judgment the verb "inform" for the obligation set out in the first paragraph of Article 7 and the verb "notify" for the obligation set out in the second and third paragraphs.

The Court considers that the procedural obligations of informing, notifying and negotiating constitute an appropriate means, accepted by the Parties, of achieving the objective which they set themselves in Article 1 of the 1975 Statute. These obligations are all the more vital when a shared resource is at issue, as in the case of the River Uruguay, which can only be protected through close and continuous co-operation between the riparian States.

82. According to Argentina, by failing to comply with the initial obligation (Article 7, first paragraph, of the 1975 Statute) to refer the matter

to CARU, Uruguay frustrated all the procedures laid down in Articles 7 to 12 of the Statute. In addition, by failing to notify Argentina of the plans for the CMB (ENCE) and Orion (Botnia) mills, through CARU, with all the necessary documentation, Uruguay is said not to have complied with Article 7, second and third paragraphs. Argentina adds that informal contacts which it or CARU may have had with the companies in question cannot serve as a substitute for Uruguay referring the matter to CARU and notifying Argentina of the projects through the Commission. Argentina concludes that Uruguay has breached all of its procedural obligations under the terms of Articles 7 to 12 of the 1975 Statute.

Uruguay, for its part, considers that referring the matter to CARU does not impose so great a constraint as Argentina contends and that the parties may agree, by mutual consent, to use different channels by employing other procedural arrangements in order to engage in co-operation. It concludes from this that it has not breached the procedural obligations laid down by the 1975 Statute, even if it has performed them without following to the letter the formal process set out therein.

83. The Court will first examine the nature and role of CARU, and then consider whether Uruguay has complied with its obligations to inform CARU and to notify Argentina of its plans.

*1. The nature and role of CARU*

84. Uruguay takes the view that CARU, like other river commissions, is not a body with autonomous powers, but rather a mechanism established to facilitate co-operation between the Parties. It adds that the States which have created these river commissions are free to go outside the joint mechanism when it suits their purposes, and that they often do so. According to Uruguay, since CARU is not empowered to act outside the will of the Parties, the latter are free to do directly what they have decided to do through the Commission, and in particular may agree not to inform it in the manner provided for in Article 7 of the 1975 Statute. Uruguay maintains that that is precisely what happened in the present case: the two States agreed to dispense with the preliminary review by CARU and to proceed immediately to direct negotiations.

85. For Argentina, on the other hand, the 1975 Statute is not merely a bilateral treaty imposing reciprocal obligations on the parties; it establishes an institutional framework for close and ongoing co-operation, the core and essence of which is CARU. For Argentina, CARU is the key body for co-ordination between the Parties in virtually all areas covered by the 1975 Statute. By failing to fulfil its obligations in this respect, Uruguay is said to be calling the 1975 Statute fundamentally into question.

86. The Court recalls that it has already described CARU as

> "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; . . . [a] mechanism [which] constitutes a very important part of that treaty régime" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, pp. 133-134, para. 81).

87. The Court notes, first, that CARU, in accordance with Article 50 of the 1975 Statute, was endowed with legal personality "in order to perform its functions" and that the parties to the 1975 Statute undertook to provide it with "the necessary resources and all the information and facilities essential to its operations". Consequently, far from being merely a transmission mechanism between the parties, CARU has a permanent existence of its own; it exercises rights and also bears duties in carrying out the functions attributed to it by the 1975 Statute.

88. While the decisions of the Commission must be adopted by common accord between the riparian States (Article 55), these are prepared and implemented by a secretariat whose staff enjoy privileges and immunities. Moreover, CARU is able to decentralize its various functions by setting up whatever subsidiary bodies it deems necessary (Article 52).

89. The Court observes that, like any international organization with legal personality, CARU is entitled to exercise the powers assigned to it by the 1975 Statute and which are necessary to achieve the object and purpose of the latter, namely, "the optimum and rational utilization of the River Uruguay" (Article 1). As the Court has pointed out,

> "[i]nternational organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them" (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 78, para. 25).

This also applies of course to organizations, which like CARU, only have two member States.

90. Since CARU serves as a framework for consultation between the parties, particularly in the case of the planned works contemplated in Article 7, first paragraph, of the 1975 Statute, neither of them may depart from that framework unilaterally, as they see fit, and put other channels of communication in its place. By creating CARU and investing it with all the resources necessary for its operation, the parties have sought to provide the best possible guarantees of stability, continuity and effective-

ness for their desire to co-operate in ensuring "the optimum and rational utilization of the River Uruguay".

91. That is why CARU plays a central role in the 1975 Statute and cannot be reduced to merely an optional mechanism available to the parties which each may use or not, as it pleases. CARU operates at all levels of utilization of the river, whether concerning the prevention of transboundary harm that may result from planned activities; the use of water, on which it receives reports from the parties and verifies whether the developments taken together are liable to cause significant damage (Articles 27 and 28); the avoidance of any change in the ecological balance (Article 36); scientific studies and research carried out by one party within the jurisdiction of the other (Article 44); the exercise of the right of law enforcement (Article 46); or the right of navigation (Article 48).

92. Furthermore, CARU has been given the function of drawing up rules in many areas associated with the joint management of the river and listed in Article 56 of the 1975 Statute. Lastly, at the proposal of either party, the Commission can act as a conciliation body in any dispute which may arise between the parties (Article 58).

93. Consequently, the Court considers that, because of the scale and diversity of the functions they have assigned to CARU, the Parties intended to make that international organization a central component in the fulfilment of their obligations to co-operate as laid down by the 1975 Statute.

*2. Uruguay's obligation to inform CARU*

94. The Court notes that the obligation of the State initiating the planned activity to inform CARU constitutes the first stage in the procedural mechanism as a whole which allows the two parties to achieve the object of the 1975 Statute, namely, the optimum and rational utilization of the River Uruguay". This stage, provided for in Article 7, first paragraph, involves the State which is initiating the planned activity informing CARU thereof, so that the latter can determine "on a preliminary basis" and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

95. To enable the remainder of the procedure to take its course, the parties have included alternative conditions in the 1975 Statute: either that the activity planned by one party should be liable, in CARU's opinion, to cause significant damage to the other, creating an obligation of prevention for the first party to eliminate or minimize the risk, in consultation with the other party; or that CARU, having been duly informed, should not have reached a decision in that regard within the prescribed period.

96. The Court notes that the Parties are agreed in considering that the two planned mills were works of sufficient importance to fall within the scope of Article 7 of the 1975 Statute, and thus for CARU to have been

informed of them. The same applies to the plan to construct a port terminal at Fray Bentos for the exclusive use of the Orion (Botnia) mill, which included dredging work and use of the river bed.

97. However, the Court observes that the Parties disagree on whether there is an obligation to inform CARU in respect of the extraction and use of water from the river for industrial purposes by the Orion (Botnia) mill. Argentina takes the view that the authorization granted by the Uruguayan Ministry of Transport and Public Works on 12 September 2006 concerns an activity of sufficient importance ("entidad suficiente") to affect the régime of the river or the quality of its waters and that, in this matter, Uruguay should have followed the procedure laid down in Articles 7 to 12 of the 1975 Statute. For its part, Uruguay maintains that this activity forms an integral part of the Orion (Botnia) mill project as a whole, and that the 1975 Statute does not require CARU to be informed of each step in furtherance of the planned works.

98. The Court points out that while the Parties are agreed in recognizing that CARU should have been informed of the two planned mills and the plan to construct the port terminal at Fray Bentos, they nonetheless differ as regards the content of the information which should be provided to CARU and as to when this should take place.

99. Argentina has argued that the content of the obligation to inform must be determined in the light of its objective, which is to prevent threats to navigation, the régime of the river or the quality of the waters. According to Argentina, the plan which CARU must be informed of may be at a very early stage, since it is simply a matter of allowing the Commission to "determine on a preliminary basis", within a very short period of 30 days, whether the plan "might cause significant damage to the other party". It is only in the following phase of the procedure that the substance of the obligation to inform is said to become more extensive. In Argentina's view, however, CARU must be informed prior to the authorization or implementation of a project on the River Uruguay.

100. Citing the terms of Article 7, first paragraph, of the 1975 Statute, Uruguay gives a different interpretation of it, taking the view that the requirement to inform CARU specified by this provision cannot occur in the very early stages of planning, because there could not be sufficient information available to the Commission for it to determine whether or not the plan might cause significant damage to the other State. For that, according to Uruguay, the project would have to have reached a stage where all the technical data on it are available. As the Court will consider further below, Uruguay seeks to link the content of the information to the time when it should be provided, which may even be after the State concerned has granted an initial environmental authorization.

101. The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu*

*Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation "is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29).

102. In the view of the Court, the obligation to inform CARU allows for the initiation of co-operation between the Parties which is necessary in order to fulfil the obligation of prevention. This first procedural stage results in the 1975 Statute not being applied to activities which would appear to cause damage only to the State in whose territory they are carried out.

103. The Court observes that with regard to the River Uruguay, which constitutes a shared resource, "significant damage to the other party" (Article 7, first paragraph, of the 1975 Statute) may result from impairment of navigation, the régime of the river or the quality of its waters. Moreover, Article 27 of the 1975 Statute stipulates that:

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

104. The Court notes that, in accordance with the terms of Article 7, first paragraph, the information which must be provided to CARU, at this initial stage of the procedure, has to enable it to determine swiftly and on a preliminary basis whether the plan might cause significant damage to the other party. For CARU, at this stage, it is a question of deciding whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the quality of its waters. This explains, in the opinion of the Court, the difference between the terminology of the first paragraph of Article 7, concerning the requirement to inform CARU, and that of the third paragraph, concerning the content of the notification to be addressed to the other party at a later stage, enabling it "to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters".

105. The Court considers that the State planning activities referred to in Article 7 of the Statute is required to inform CARU as soon as it is in possession of a plan which is sufficiently developed to enable CARU to make the preliminary assessment (required by paragraph 1 of that provision) of whether the proposed works might cause significant damage to the other party. At that stage, the information provided will not neces-

sarily consist of a full assessment of the environmental impact of the project, which will often require further time and resources, although, where more complete information is available, this should, of course, be transmitted to CARU to give it the best possible basis on which to make its preliminary assessment. In any event, the duty 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.

106. The Court observes that, in the present case, Uruguay did not transmit to CARU the information required by Article 7, first paragraph, in respect of the CMB (ENCE) and Orion (Botnia) mills, despite the requests made to it by the Commission to that effect on several occasions, in particular on 17 October 2002 and 21 April 2003 with regard to the CMB (ENCE) mill, and on 16 November 2004 with regard to the Orion (Botnia) mill. Uruguay merely sent CARU, on 14 May 2003, a summary for public release of the environmental impact assessment for the CMB (ENCE) mill. CARU considered this document to be inadequate and again requested further information from Uruguay on 15 August 2003 and 12 September 2003. Moreover, Uruguay did not transmit any document to CARU regarding the Orion (Botnia) mill. Consequently, Uruguay issued the initial environmental authorizations to CMB on 9 October 2003 and to Botnia on 14 February 2005 without complying with the procedure laid down in Article 7, first paragraph. Uruguay therefore came to a decision on the environmental impact of the projects without involving CARU, thereby simply giving effect to Article 17, third paragraph, of Uruguayan Decree No. 435/994 of 21 September 1994, Environmental Impact Assessment Regulation, according to which the Ministry of Housing, Land Use Planning and Environmental Affairs may grant the initial environmental authorization provided that the adverse environmental impacts of the project remain within acceptable limits.

107. The Court further notes that on 12 April 2005 Uruguay granted an authorization to Botnia for the first phase of the construction of the Orion (Botnia) mill and, on 5 July 2005, an authorization to construct a port terminal for its exclusive use and to utilize the river bed for industrial purposes, without informing CARU of these projects in advance.

108. With regard to the extraction and use of water from the river, of which CARU should have first been informed, according to Argentina, the Court takes the view that this is an activity which forms an integral part of the commissioning of the Orion (Botnia) mill and therefore did not require a separate referral to CARU.

109. However, Uruguay maintains that CARU was made aware of the plans for the mills by representatives of ENCE on 8 July 2002, and no later than 29 April 2004 by representatives of Botnia, before the initial environmental authorizations were issued. Argentina, for its part, considers that these so-called private dealings, whatever form they may have

taken, do not constitute performance of the obligation imposed on the Parties by Article 7, first paragraph.

110. The Court considers that the information on the plans for the mills which reached CARU via the companies concerned or from other non-governmental sources cannot substitute for the obligation to inform laid down in Article 7, first paragraph, of the 1975 Statute, which is borne by the party planning to construct the works referred to in that provision. Similarly, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, the Court observed that

> "[i]f the information eventually came to Djibouti through the press, the information disseminated in this way could not be taken into account for the purposes of the application of Article 17 [of the Convention on Mutual Assistance in Criminal Matters between the two countries, providing that '[r]easons shall be given for any refusal of mutual assistance']" (*Judgment, I.C.J. Reports 2008*, p. 231, para. 150).

111. Consequently, the Court concludes from the above that Uruguay, by not informing CARU of the planned works before the issuing of the initial environmental authorizations for each of the mills and for the port terminal adjacent to the Orion (Botnia) mill, has failed to comply with the obligation imposed on it by Article 7, first paragraph, of the 1975 Statute.

*3. Uruguay's obligation to notify the plans to the other party*

112. The Court notes that, under the terms of Article 7, second paragraph, of the 1975 Statute, if CARU decides that the plan might cause significant damage to the other party or if a decision cannot be reached in that regard, "the party concerned shall notify the other party of this plan through the said Commission".

Article 7, third paragraph, of the 1975 Statute sets out in detail the content of this notification, which

> "shall describe the main aspects of the work and . . . any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters".

113. In the opinion of the Court, the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause.

114. Article 8 stipulates a period of 180 days, which may be extended by the Commission, for the notified party to respond in connection with

the plan, subject to it requesting the other party, through the Commission, to supplement as necessary the documentation it has provided.

If the notified party raises no objections, the other party may carry out or authorize the work (Article 9). Otherwise, the former must notify the latter of those aspects of the work which may cause it damage and of the suggested changes (Article 11), thereby opening a further 180-day period of negotiation in which to reach an agreement (Article 12).

115. The obligation to notify is therefore an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects.

116. The Parties agree on the need for a full environmental impact assessment in order to assess any significant damage which might be caused by a plan.

117. Uruguay takes the view that such assessments were carried out in accordance with its legislation (Decree No. 435/994 of 21 September 1994, Environmental Impact Assessment Regulation), submitted to DINAMA for consideration and transmitted to Argentina on 7 November 2003 in the case of the CMB (ENCE) project and on 19 August 2005 for the Orion (Botnia) project. According to Uruguay, DINAMA asked the companies concerned for all the additional information that was required to supplement the original environmental impact assessments submitted to it, and only when it was satisfied did it propose to the Ministry of the Environment that the initial environmental authorizations requested should be issued, which they were to CMB on 9 October 2003 and to Botnia on 14 February 2005.

Uruguay maintains that it was not required to transmit the environmental impact assessments to Argentina before issuing the initial environmental authorizations to the companies, these authorizations having been adopted on the basis of its legislation on the subject.

118. Argentina, for its part, first points out that the environmental impact assessments transmitted to it by Uruguay were incomplete, particularly in that they made no provision for alternative sites for the mills and failed to include any consultation of the affected populations. The Court will return later in the Judgment to the substantive conditions which must be met by environmental impact assessments (see paragraphs 203 to 219).

Furthermore, in procedural terms, Argentina considers that the initial environmental authorizations should not have been granted to the companies before it had received the complete environmental impact assessments, and that it was unable to exercise its rights in this context under Articles 7 to 11 of the 1975 Statute.

119. The Court notes that the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause sig-

nificant transboundary harm to another State must be notified by the party concerned to the other party, through CARU, pursuant to Article 7, second and third paragraphs, of the 1975 Statute. This notification is intended to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts (Article 8 of the 1975 Statute).

120. The Court observes that this notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it.

121. In the present case, the Court observes that the notification to Argentina of the environmental impact assessments for the CMB (ENCE) and Orion (Botnia) mills did not take place through CARU, and that Uruguay only transmitted those assessments to Argentina after having issued the initial environmental authorizations for the two mills in question. Thus in the case of CMB (ENCE), the matter was notified to Argentina on 27 October and 7 November 2003, whereas the initial environmental authorization had already been issued on 9 October 2003. In the case of Orion (Botnia), the file was transmitted to Argentina between August 2005 and January 2006, whereas the initial environmental authorization had been granted on 14 February 2005. Uruguay ought not, prior to notification, to have issued the initial environmental authorizations and the authorizations for construction on the basis of the environmental impact assessments submitted to DINAMA. Indeed by doing so, Uruguay gave priority to its own legislation over its procedural obligations under the 1975 Statute and disregarded the well-established customary rule reflected in Article 27 of the Vienna Convention on the Law of Treaties, according to which "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

122. The Court concludes from the above that Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7, second and third paragraphs, of the 1975 Statute.

### *C. Whether the Parties Agreed to Derogate from the Procedural Obligations Set Out in the 1975 Statute*

123. Having thus examined the procedural obligations laid down by the 1975 Statute, the Court now turns to the question of whether the Parties agreed, by mutual consent, to derogate from them, as alleged by Uruguay.

124. In this respect the Parties refer to two "agreements" reached on 2 March 2004 and 5 May 2005; however, they hold divergent views regarding their scope and content.

*1. The "understanding" of 2 March 2004 between Argentina and Uruguay*

125. The Court recalls that, after the issuing of the initial environmental authorization to CMB by Uruguay, without CARU having been able to carry out the functions assigned to it in this context by the 1975 Statute, the Foreign Ministers of the Parties agreed on 2 March 2004 on the procedure to be followed, as described in the minutes of the extraordinary meeting of CARU of 15 May 2004. The relevant extract from those minutes reads as follows in Spanish:

> "II) En fecha 2 de marzo de 2004 los Cancilleres de Argentina y Uruguay llegaron a un entendimiento con relación al curso de acción que se dará al tema, esto es, facilitar por parte del gobierno uruguayo, la información relativa a la construcción de la planta y, en relación a la fase operativa, proceder a realizar el monitoreo, por parte de CARU, de la calidad de las aguas conforme a su Estatuto.
>
> . . . . . .
>
> I) Ambas delegaciones reafirmaron el compromiso de los Ministros de Relaciones Exteriores de la República Argentina y de la República Oriental del Uruguay de fecha 2 de marzo de 2004 por el cual el Uruguay comunicará la información relativa a la construcción de la planta incluyendo el Plan de Gestión Ambiental. En tal sentido, *la CARU recibirá* los Planes de Gestión Ambiental para la construcción y operación de la planta que presente la empresa al gobierno uruguayo una vez que le sean remitidos por la delegación uruguaya." (Emphasis in the original.)

Argentina and Uruguay have provided the Court, respectively, with French and English translations of these minutes. In view of the discrepancies between those two translations, the Court will use the following translation:

> "(II) On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding on how to proceed in the matter, namely, that the Uruguayan Government would provide information on the construction of the mill and that, in terms of the operational phase, CARU would carry out monitoring of water quality in accordance with its Statute.
>
> . . . . . .
>
> (I) Both delegations reaffirmed the arrangement which had been come to by the Foreign Ministers of the Republic of Argentina and the Eastern Republic of Uruguay on 2 March 2004, whereby Uruguay would communicate information on the construction of the mill, including the environmental management plan. As a result, *CARU would receive* the environmental management plans for the

construction and operation of the mill provided by the company to the Uruguayan Government, when these were forwarded to it by the Uruguayan delegation." (Emphasis in the original.) *[Translation by the Court.]*

126. Uruguay considers that, under the terms of this "understanding", the Parties agreed on the approach to be followed in respect of the CMB (ENCE) project, outside CARU, and that there was no reason in law or logic to prevent them derogating from the procedures outlined in the 1975 Statute pursuant to an appropriate bilateral agreement.

The said "understanding", according to Uruguay, only covered the transmission to CARU of the Environmental Management Plans for the construction and operation of the (CMB) ENCE mill. It supposedly thereby puts an end to any dispute with Argentina regarding the procedure laid down in Article 7 of the 1975 Statute. Lastly, Uruguay maintains that the "understanding" of 2 March 2004 on the (CMB) ENCE project was later extended to include the Orion (Botnia) project, since the PROCEL water quality monitoring plan put in place by CARU's Subcommittee on Water Quality to implement that "understanding" related to the activity of "both plants", the CMB (ENCE) and Orion (Botnia) mills, the plural having been used in the title and text of the Subcommittee's report.

127. Argentina, for its part, maintains that the "understanding" between the two Ministers of 2 March 2004 was intended to ensure compliance with the procedure laid down by the 1975 Statute and thus to reintroduce the CMB (ENCE) project within CARU, ending the dispute on CARU's jurisdiction to deal with the project. Argentina claims that it reiterated to the organs within CARU that it had not given up its rights under Article 7, although it accepted that the dispute between itself and Uruguay in this respect could have been resolved if the procedure contemplated in the "understanding" of 2 March 2004 had been brought to a conclusion.

According to Argentina, however, Uruguay never transmitted the required information to CARU as it undertook to do in the "understanding" of 2 March 2004. Argentina also denies that the "understanding" of 2 March 2004 was extended to the Orion (Botnia) mill; the reference to both future plants in the PROCEL plan does not in any way signify, in its view, the renunciation of the procedure laid down by the 1975 Statute.

128. The Court first notes that while the existence of the "understanding" of 2 March 2004, as minuted by CARU, has not been contested by the Parties, they differ as to its content and scope. Whatever its specific designation and in whatever instrument it may have been recorded (the CARU minutes), this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement. The Court recalls that the Parties disagree on whether

the procedure for communicating information provided for by the "understanding" would, if applied, replace that provided for by the 1975 Statute. Be that as it may, such replacement was dependent on Uruguay complying with the procedure laid down in the "understanding".

129. The Court finds that the information which Uruguay agreed to transmit to CARU in the "understanding" of 2 March 2004 was never transmitted. Consequently, the Court cannot accept Uruguay's contention that the "understanding" put an end to its dispute with Argentina in respect of the CMB (ENCE) mill, concerning implementation of the procedure laid down by Article 7 of the 1975 Statute.

130. Further, the Court observes that, when this "understanding" was reached, only the CMB (ENCE) project was in question, and that it therefore cannot be extended to the Orion (Botnia) project, as Uruguay claims. The reference to both mills is made only as from July 2004, in the context of the PROCEL plan. However, this plan only concerns the measures to monitor and control the environmental quality of the river waters in the areas of the pulp mills, and not the procedures under Article 7 of the 1975 Statute.

131. The Court concludes that the "understanding" of 2 March 2004 would have had the effect of relieving Uruguay of its obligations under Article 7 of the 1975 Statute, if that was the purpose of the "understanding", only if Uruguay had complied with the terms of the "understanding". In the view of the Court, it did not do so. Therefore the "understanding" cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations laid down by the 1975 Statute.

*2. The agreement setting up the High-Level Technical Group (the GTAN)*

132. The Court notes that, in furtherance of the agreement reached on 5 May 2005 between the Presidents of Argentina and Uruguay (see paragraph 40 above), the Foreign Ministries of the two States issued a press release on 31 May 2005 announcing the creation of the High-Level Technical Group, referred to by the Parties as the GTAN. According to this communiqué:

> "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."

133. Uruguay regards this press release as an agreement that binds the two States, whereby they decided to make the GTAN the body within which the direct negotiations between the Parties provided for by Article 12 of the 1975 Statute would take place, since its purpose was to analyse the effects on the environment of the "operation of the cellulose plants that are being constructed in the Eastern Republic of Uruguay". Uruguay infers from this that the Parties were agreed on the construction of the mills and that they had limited the extent of the dispute between them to the environmental risks caused by their operation. Uruguay sees proof of this in the referral to the Court on the basis of Article 12 of the 1975 Statute, which allows either Party to apply to the Court in the event of the negotiations failing to produce an agreement within the period of 180 days.

According to Uruguay, therefore, the agreement contained in the press release of 31 May 2005, by paving the way for the direct negotiations provided for in Article 12, covered any possible procedural irregularities in relation to Articles 7 *et seq.* of the 1975 Statute. Uruguay points out that it communicated all the necessary information to Argentina during the 12 meetings held by the GTAN and that it transmitted the Orion (Botnia) port project to CARU, as agreed by the Parties at the first meeting of the GTAN.

134. Uruguay further notes that the 1975 Statute is silent as to whether the notifying State may or may not implement a project while negotiations are ongoing. It acknowledges that, under international law, the initiating State must refrain from doing so during the period of negotiation, but takes the view that this does not apply to all work and, in particular, that preparatory work is permitted. Uruguay acknowledges that it carried out such work, for example construction of the foundations for the Orion (Botnia) mill, but in its view this did not involve faits accomplis which prevented the negotiations from reaching a conclusion. Uruguay also considers that it had no legal obligation to suspend any and all work on the port.

135. Argentina considers that no acceptance on its part of the construction of the disputed mills can be inferred from the terms of the press release of 31 May 2005. It submits that in creating the GTAN, the Parties did not decide to substitute it for CARU, but regarded it as a means of negotiation that would co-exist with the latter.

Contrary to Uruguay, Argentina takes the view that this matter has been submitted to the Court on the basis of Article 60 of the 1975 Statute and not of Article 12, since Uruguay, by its conduct, has prevented the latter from being used as a basis, having allegedly disregarded the entire procedure laid down in Chapter II of the Statute. Argentina therefore

sees it as for the Court to pronounce on all the breaches of the 1975 Statute, including and not limited to the authorization for the construction of the disputed mills.

136. Argentina submits that Uruguay, by its conduct, frustrated the procedures laid down in Articles 7 to 9 of the 1975 Statute and that, during the period of negotiation within the GTAN, Uruguay continued the construction work on the Orion (Botnia) mill and began building the port terminal. During that same period, Argentina reiterated, within CARU, the need for Uruguay to comply with its procedural obligations under Articles 7 to 12 of the 1975 Statute and to suspend the works.

Lastly, Argentina rejects Uruguay's claim that the work on the foundations of the Orion (Botnia) mill, its chimney and the port was merely preliminary in nature and cannot be regarded as the beginning of construction work as such. For Argentina, such a distinction is groundless and cannot be justified by the nature of the work carried out.

137. The Court first points out that there is no reason to distinguish, as Uruguay and Argentina have both done for the purpose of their respective cases, between referral on the basis of Article 12 and of Article 60 of the 1975 Statute. While it is true that Article 12 provides for recourse to the procedure indicated in Chapter XV, should the negotiations fail to produce an agreement within the 180-day period, its purpose ends there. Article 60 then takes over, in particular its first paragraph, which enables either Party to submit to the Court any dispute concerning the interpretation or application of the Statute which cannot be settled by direct negotiations. This wording also covers a dispute relating to the interpretation or application of Article 12, like any other provision of the 1975 Statute.

138. The Court notes that the press release of 31 May 2005 sets out an agreement between the two States to create a negotiating framework, the GTAN, in order 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 shared Uruguay River, with "the group [having] to produce an initial report within a period of 180 days".

139. The Court recognizes that the GTAN was created with the aim of enabling the negotiations provided for in Article 12 of the 1975 Statute, also for a 180-day period, to take place. Under Article 11, these negotiations between the parties with a view to reaching an agreement are to be held once the notified party has sent a communication to the other party, through the Commission, specifying

> "which aspects of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality

of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations".

The Court is aware that the negotiation provided for in Article 12 of the 1975 Statute forms part of the overall procedure laid down in Articles 7 to 12, which is structured in such a way that the parties, in association with CARU, are able, at the end of the process, to fulfil their obligation to prevent any significant transboundary harm which might be caused by potentially harmful activities planned by either one of them.

140. The Court therefore considers that the agreement to set up the GTAN, while indeed creating a negotiating body capable of enabling the Parties to pursue the same objective as that laid down in Article 12 of the 1975 Statute, cannot be interpreted as expressing the agreement of the Parties to derogate from other procedural obligations laid down by the Statute.

141. Consequently, the Court finds that Argentina, in accepting the creation of the GTAN, did not give up, as Uruguay claims, the other procedural rights belonging to it by virtue of the 1975 Statute, nor the possibility of invoking Uruguay's responsibility for any breach of those rights. Argentina did not, in the agreement to set up the GTAN, "effect a clear and unequivocal waiver" of its rights under the 1975 Statute (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 247, para. 13). Nor did it consent to suspending the operation of the procedural provisions of the 1975 Statute. Indeed, under Article 57 of the Vienna Convention on the Law of Treaties of 23 May 1969, concerning "[s]uspension of the operation of a treaty", including, according to the International Law Commission's commentary, suspension of "the operation of . . . some of its provisions" (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 251), suspension is only possible "in conformity with the provisions of the treaty" or "by consent of all the parties".

142. The Court further observes that the agreement to set up the GTAN, 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.

143. The Court finds that Uruguay was not entitled, for the duration of the period of consultation and negotiation provided for in Articles 7 to 12 of the 1975 Statute, either to construct or to authorize the construction of the planned mills and the port terminal. It would be contrary to the object and purpose of the 1975 Statute to embark on disputed activities before having applied the procedures laid down by the "joint machinery necessary for the optimum and rational utilization of the [r]iver" (Article 1). However, Article 9 provides that: "[i]f the notified party raises no objections or does not respond within the period established in Arti-

cle 8 [180 days], the other party may carry out or authorize the work planned".

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

145. The Court notes, moreover, that the 1975 Statute is perfectly in keeping with the requirements of international law on the subject, since the mechanism for co-operation between States is governed by the principle of good faith. Indeed, according to customary international law, as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". That applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States. The Court recalled in the cases concerning *Nuclear Tests (Australia* v. *France) (New Zealand* v. *France)*:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation . . ." (*Judgments, I.C.J. Reports 1974*, p. 268, para. 46, and p. 473, para. 49; see also *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94.)

146. The Court has also had occasion to draw attention to the characteristics of the obligation to negotiate and to the conduct which this imposes on the States concerned: "[the Parties] are under an obligation so to conduct themselves 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).

147. In the view of the Court, 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 negotiations between the parties would no longer have any purpose.

148. In this respect, contrary to what Uruguay claims, the preliminary work on the pulp mills on sites approved by Uruguay alone does not constitute an exception. This work does in fact form an integral part of the construction of the planned mills (see paragraphs 39 and 42 above).

149. The Court concludes from the above that the agreement to set up the GTAN did not permit Uruguay to derogate from its obligations of information and notification under Article 7 of the 1975 Statute, and 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. Consequently, Uruguay disregarded the whole of the co-operation mechanism provided for in Articles 7 to 12 of the 1975 Statute.

150. Given that "an obligation to negotiate does not imply an obligation to reach an agreement" (*Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116), it remains for the Court to examine whether the State initiating the plan is under certain obligations following the end of the negotiation period provided for in Article 12.

### *D. Uruguay's Obligations Following the End of the Negotiation Period*

151. Article 12 refers the Parties, should they fail to reach an agreement within 180 days, to the procedure indicated in Chapter XV.

Chapter XV contains a single article, Article 60, according to which:

> "Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice.
>
> In the cases referred to in Articles 58 and 59, either party may submit any dispute concerning the interpretation or application of the Treaty and the Statute to the International Court of Justice, when it has not been possible to settle the dispute within 180 days following the notification referred to in Article 59."

152. According to Uruguay, the 1975 Statute does not give one party a "right of veto" over the projects initiated by the other. It does not consider there to be a "no construction obligation" borne by the State initiating the projects until such time as the Court has ruled on the dispute. Uruguay points out that the existence of such an obligation would enable one party to block a project that was essential for the sustainable development of the other, something that would be incompatible with the "optimum and rational utilization of the [r]iver". On the contrary, for Uruguay, in the absence of any specific provision in the 1975 Statute, reference should be made to general international law, as reflected in the 2001 draft Articles of the International Law Commission on Prevention of Transboundary Harm from Hazardous Activities (*Yearbook of the International Law Commission*, 2001, Vol. II, Part Two); in particular, draft Article 9, paragraph 3, concerning "Consultations on preventive measures", states that "[i]f the consultations . . . fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued . . .".

153. Argentina, on the other hand, maintains that Article 12 of the 1975 Statute makes the Court the final decision-maker where the parties have failed to reach agreement within 180 days following the notification referred to in Article 11. It is said to follow from Article 9 of the Statute, interpreted in the light of Articles 11 and 12 and taking account of its object and purpose, that if the notified party raises an objection, the other party may neither carry out nor authorize the work in question until the procedure laid down in Articles 7 to 12 has been completed and the Court has ruled on the project. Argentina therefore considers that, during the dispute settlement proceedings before the Court, the State which is envisaging carrying out the work cannot confront the other Party with the fait accompli of having carried it out.

Argentina argues that the question of the "veto" raised by Uruguay is inappropriate, since neither of the parties can impose its position in respect of the construction works and it will ultimately be for the Court to settle the dispute, if the parties disagree, by a decision that will have the force of *res judicata*. It could be said, according to Argentina, that Uruguay has no choice but to come to an agreement with it or to await the settlement of the dispute. Argentina contends that, by pursuing the construction and commissioning of the Orion (Botnia) mill and port, Uruguay has committed a continuing violation of the procedural obligations under Chapter II of the 1975 Statute.

154. The Court observes that the "no construction obligation", said to be borne by Uruguay between the end of the negotiation period and the decision of the Court, is not expressly laid down by the 1975 Statute and does not follow from its provisions. Article 9 only provides for such an obligation during the performance of the procedure laid down in Articles 7 to 12 of the Statute.

Furthermore, in the event of disagreement between the parties on the planned activity persisting at the end of the negotiation period, the Statute does not provide for the Court, to which the matter would be submitted by the State concerned, according to Argentina, to decide whether or not to authorize the activity in question. The Court points out that, while the 1975 Statute gives it jurisdiction to settle any dispute concerning its interpretation or application, it does not however confer on it the role of deciding in the last resort whether or not to authorize the planned activities. Consequently, the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk.

The Court cannot uphold the interpretation of Article 9 according to which any construction is prohibited until the Court has given its ruling pursuant to Articles 12 and 60.

155. Article 12 does not impose an obligation on the parties to submit a matter to the Court, but gives them the possibility of doing so, following the end of the negotiation period. Consequently, Article 12 can do nothing to alter the rights and obligations of the party concerned as long as the Court has not ruled finally on them. The Court considers that

those rights include that of implementing the project, on the sole responsibility of that party, since the period for negotiation has expired.

156. In its Order of 13 July 2006, the Court took the view that the "construction [of the mills] at the current site cannot be deemed to create a fait accompli" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 78). Thus, in pronouncing on the merits in the dispute between the Parties, the Court is the ultimate guarantor of their compliance with the 1975 Statute.

157. The Court concludes from the above that Uruguay did not bear any "no construction obligation" after the negotiation period provided for in Article 12 expired on 3 February 2006, the Parties having determined at that date that the negotiations undertaken within the GTAN had failed (see paragraph 40). Consequently the wrongful conduct of Uruguay (established in paragraph 149 above) could not extend beyond that period.

158. Having established that Uruguay breached its procedural obligations to inform, notify and negotiate to the extent and for the reasons given above, the Court will now turn to the question of the compliance of that State with the substantive obligations laid down by the 1975 Statute.

* *

## IV. Substantive Obligations

159. Before taking up the examination of the alleged violations of substantive obligations under the 1975 Statute, the Court will address two preliminary issues, namely, the burden of proof and expert evidence.

### *A. Burden of Proof and Expert Evidence*

160. Argentina contends that the 1975 Statute adopts an approach in terms of precaution whereby "the burden of proof will be placed on Uruguay for it to establish that the Orion (Botnia) mill will not cause significant damage to the environment". It also argues that the burden of proof should not be placed on Argentina alone as the Applicant, because, in its view, the 1975 Statute imposes an equal onus to persuade — for the one that the plant is innocuous and for the other that it is harmful.

161. Uruguay, on the other hand, asserts that the burden of proof is on Argentina, as the Applicant, in accordance with the Court's long-standing case law, although it considers that, even if the Argentine position about transferring the burden of proof to Uruguay were correct, it would make no difference given the manifest weakness of Argentina's

case and the extensive independent evidence put before the Court by Uruguay. Uruguay also strongly contests Argentina's argument that the precautionary approach of the 1975 Statute would imply a reversal of the burden of proof, in the absence of an explicit treaty provision prescribing it as well as Argentina's proposition that the Statute places the burden of proof equally on both Parties.

162. To begin with, the Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle which has been consistently upheld by the Court (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 31, para. 45; *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 (I)*, p. 128, para. 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101) applies to the assertions of fact both by the Applicant and the Respondent.

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

164. Regarding the arguments put forward by Argentina on the reversal of the burden of proof and on the existence, vis-à-vis each Party, of an equal onus to prove under the 1975 Statute, the Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof. The Court is also of the view that there is nothing in the 1975 Statute itself to indicate that it places the burden of proof equally on both Parties.

*

165. The Court now turns to the issue of expert evidence. Both Argentina and Uruguay have placed before the Court a vast amount of factual and scientific material in support of their respective claims. They have also submitted reports and studies prepared by the experts and consultants commissioned by each of them, as well as others commissioned by the International Finance Corporation in its quality as lender to the project. Some of these experts have also appeared

before the Court as counsel for one or the other of the Parties to provide evidence.

166. The Parties, however, disagree on the authority and reliability of the studies and reports submitted as part of the record and prepared, on the one hand, by their respective experts and consultants, and on the other, by the experts of the IFC, which contain, in many instances, conflicting claims and conclusions. In reply to a question put by a judge, Argentina stated that the weight to be given to such documents should be determined by reference not only to the "independence" of the author, who must have no personal interest in the outcome of the dispute and must not be an employee of the government, but also by reference to the characteristics of the report itself, in particular the care with which its analysis was conducted, its completeness, the accuracy of the data used, and the clarity and coherence of the conclusions drawn from such data. In its reply to the same question, Uruguay suggested that reports prepared by retained experts for the purposes of the proceedings and submitted as part of the record should not be regarded as independent and should be treated with caution; while expert statements and evaluations issued by a competent international organization, such as the IFC, or those issued by the consultants engaged by that organization should be regarded as independent and given "special weight".

167. The Court has given most careful attention to the material submitted to it by the Parties, as will be shown in its consideration of the evidence below with respect to alleged violations of substantive obligations. Regarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.

168. As for the independence of such experts, the Court does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties. It needs only to be mindful of the fact that, despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence

presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.

### *B. Alleged Violations of Substantive Obligations*

169. The Court now turns to the examination of the alleged violations by Uruguay of its substantive obligations under the 1975 Statute by authorizing the construction and operation of the Orion (Botnia) mill. In particular, Argentina contends that Uruguay has breached its obligations under Articles 1, 27, 35, 36 and 41 *(a)* of the 1975 Statute and "other obligations deriving from . . . general, conventional and customary international law which are necessary for the application of the 1975 Statute". Uruguay rejects these allegations. Uruguay considers furthermore that Article 27 of the 1975 Statute allows the parties to use the waters of the river for domestic, sanitary, industrial and agricultural purposes.

#### *1. The obligation to contribute to the optimum and rational utilization of the river (Article 1)*

170. According to Argentina, Uruguay has breached its obligation to contribute to the "optimum and rational utilization of the river" by failing to co-ordinate with Argentina on measures necessary to avoid ecological change, and by failing to take the measures necessary to prevent pollution. Argentina also maintains that, in interpreting the 1975 Statute (in particular Articles 27, 35, and 36 thereof) according to the principle of equitable and reasonable use, account must be taken of all pre-existing legitimate uses of the river, including in particular its use for recreational and tourist purposes.

171. For Uruguay, the object and purpose of the 1975 Statute is to establish a structure for co-operation between the Parties through CARU in pursuit of the shared goal of equitable and sustainable use of the water and biological resources of the river. Uruguay contends that it has in no way breached the principle of equitable and reasonable use of the river and that this principle provides no basis for favouring pre-existing uses of the river, such as tourism or fishing, over other, new uses.

172. The Parties also disagree on the scope and implications of Article 27 of the 1975 Statute on the right of each Party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes.

173. The Court observes that Article 1, as stated in the title to Chapter I of the 1975 Statute, sets out the purpose of the Statute. As such, it informs the interpretation of the substantive obligations, but does not by itself lay down specific rights and obligations for the parties. Optimum and rational utilization is to be achieved through compliance with the obligations prescribed by the 1975 Statute for the protection of the envi-

ronment and the joint management of this shared resource. This objective must also be ensured through CARU, which constitutes "the joint machinery" necessary for its achievement, and through the regulations adopted by it as well as the regulations and measures adopted by the Parties.

174. The Court recalls that the Parties concluded the treaty embodying the 1975 Statute, in implementation of Article 7 of the 1961 Treaty, requiring the Parties jointly to establish a régime for the use of the river covering, *inter alia*, provisions for preventing pollution and protecting and preserving the aquatic environment. Thus, optimum and rational utilization may be viewed as the cornerstone of the system of co-operation established in the 1975 Statute and the joint machinery set up to implement this co-operation.

175. The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other. The need for this balance is reflected in various provisions of the 1975 Statute establishing rights and obligations for the Parties, such as Articles 27, 36, and 41. The Court will therefore assess the conduct of Uruguay in authorizing the construction and operation of the Orion (Botnia) mill in the light of those provisions of the 1975 Statute, and the rights and obligations prescribed therein.

176. The Court has already addressed in paragraphs 84 to 93 above the role of CARU with respect to the procedural obligations laid down in the 1975 Statute. In addition to its role in that context, the functions of CARU relate to almost all aspects of the implementation of the substantive provisions of the 1975 Statute. Of particular relevance in the present case are its functions relating to rule-making in respect of conservation and preservation of living resources, the prevention of pollution and its monitoring, and the co-ordination of actions of the Parties. These functions will be examined by the Court in its analysis of the positions of the Parties with respect to the interpretation and application of Articles 36 and 41 of the 1975 Statute.

177. Regarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development. The Court has already dealt with the obligations arising from Articles 7 to 12 of the 1975 Statute which have to be observed, according to Article 27, by any party wishing to exercise its right to use the waters of the river for any of the purposes mentioned therein insofar as such use may be liable to affect the régime of the river

or the quality of its waters. The Court wishes to add that such utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account. Consequently, it is the opinion of the Court that Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.

*2. The obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters (Article 35)*

178. Article 35 of the 1975 Statute provides that the parties:

> "undertake to adopt the necessary measures to ensure that the management of the soil and woodland and the use of groundwater and the waters of the tributaries of the river do not cause changes which may significantly impair the régime of the river or the quality of its waters".

179. Argentina contends that Uruguay's decision to carry out major eucalyptus planting operations to supply the raw material for the Orion (Botnia) mill has an impact on management of the soil and Uruguayan woodland, but also on the quality of the waters of the river. For its part, Uruguay states that Argentina does not make any arguments that are based on Uruguay's management of soil or woodland — "nor has it made any allegations concerning the waters of tributaries".

180. The Court observes that Argentina has not provided any evidence to support its contention. Moreover, Article 35 concerns the management of the soil and woodland as well as the use of groundwater and the water of tributaries, and there is nothing to suggest, in the evidentiary material submitted by Argentina, a direct relationship between Uruguay's management of the soil and woodland, or its use of ground water and water of tributaries and the alleged changes in the quality of the waters of the River Uruguay which had been attributed by Argentina to the Orion (Botnia) mill. Indeed, while Argentina made lengthy arguments about the effects of the pulp mill discharges on the quality of the waters of the river, no similar arguments have been presented to the Court regarding a deleterious relationship between the quality of the waters of the river and the eucalyptus-planting operations by Uruguay. The Court concludes that Argentina has not established its contention on this matter.

*3. The obligation to co-ordinate measures to avoid changes in the ecological balance (Article 36)*

181. Argentina contends that Uruguay has breached Article 36 of the

1975 Statute, which places the Parties under an obligation to co-ordinate through CARU the necessary measures to avoid changing the ecological balance of the river. Argentina asserts that the discharges from the Orion (Botnia) mill altered the ecological balance of the river, and cites as examples the 4 February 2009 algal bloom, which, according to it, provides graphic evidence of a change in the ecological balance, as well as the discharge of toxins, which gave rise, in its view, to the malformed rotifers whose pictures were shown to the Court.

182. Uruguay considers that any assessment of the Parties' conduct in relation to Article 36 of the 1975 Statute must take account of the rules adopted by CARU, because this Article, creating an obligation of co-operation, refers to such rules and does not by itself prohibit any specific conduct. Uruguay takes the position that the mill fully meets CARU requirements concerning the ecological balance of the river, and concludes that it has not acted in breach of Article 36 of the 1975 Statute.

183. It is recalled that Article 36 provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it".

184. It is the opinion of the Court that compliance with this obligation cannot be expected to come through the individual action of either Party, acting on its own. Its implementation requires co-ordination through the Commission. It reflects the common interest dimension of the 1975 Statute and expresses one of the purposes for the establishment of the joint machinery which is to co-ordinate the actions and measures taken by the Parties for the sustainable management and environmental protection of the river. The Parties have indeed adopted such measures through the promulgation of standards by CARU. These standards are to be found in Sections E3 and E4 of the CARU Digest. One of the purposes of Section E3 is "[t]o protect and preserve the water and its ecological balance". Similarly, it is stated in Section E4 that the section was developed "in accordance with . . . Articles 36, 37, 38, and 39".

185. In the view of the Court, the purpose of Article 36 of the 1975 Statute is to prevent any transboundary pollution liable to change the ecological balance of the river by co-ordinating, through CARU, the adoption of the necessary measures. It thus imposes an obligation on both States to take positive steps to avoid changes in the ecological balance. These steps consist not only in the adoption of a regulatory framework, as has been done by the Parties through CARU, but also in the observance as well as enforcement by both Parties of the measures adopted. As the Court emphasized in the *Gabčíkovo-Nagymaros* case:

> "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage

to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140).

186. The Parties also disagree with respect to the nature of the obligation laid down in Article 36, and in particular whether it is an obligation of conduct or of result. Argentina submits that, on a plain meaning, both Articles 36 and 41 of the 1975 Statute establish an obligation of result.

187. The Court considers that the obligation laid down in Article 36 is addressed to both Parties and prescribes the specific conduct of co-ordinating the necessary measures through the Commission to avoid changes to the ecological balance. An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river.

188. This vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil. The obligation to co-ordinate, through the Commission, the adoption of the necessary measures, as well as their enforcement and observance, assumes, in this context, a central role in the overall system of protection of the River Uruguay established by the 1975 Statute. It is therefore of crucial importance that the Parties respect this obligation.

189. In light of the above, the Court is of the view that Argentina has not convincingly demonstrated that Uruguay has refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision.

*4. The obligation to prevent pollution and preserve the aquatic environment (Article 41)*

190. Article 41 provides that:

"Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:

*(a)* to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and [adopting appropriate] measures in accordance with applicable international agreements and in keeping, where rele-

vant, with the guidelines and recommendations of international technical bodies;

*(b)* not to reduce in their respective legal systems:

1. the technical requirements in force for preventing water pollution, and
2. the severity of the penalties established for violations;

*(c)* to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems."

191. Argentina claims that by allowing the discharge of additional nutrients into a river that is eutrophic and suffers from reverse flow and stagnation, Uruguay violated the obligation to prevent pollution, as it failed to prescribe appropriate measures in relation to the Orion (Botnia) mill, and failed to meet applicable international environmental agreements, including the Biodiversity Convention and the Ramsar Convention. It maintains that the 1975 Statute prohibits any pollution which is prejudicial to the protection and preservation of the aquatic environment or which alters the ecological balance of the river. Argentina further argues that the obligation to prevent pollution of the river is an obligation of result and extends not only to protecting the aquatic environment proper, but also to any reasonable and legitimate use of the river, including tourism and other recreational uses.

192. Uruguay contends that the obligation laid down in Article 41 *(a)* of the 1975 Statute to "prevent . . . pollution" does not involve a prohibition on all discharges into the river. It is only those that exceed the standards jointly agreed by the Parties within CARU in accordance with their international obligations, and that therefore have harmful effects, which can be characterized as "pollution" under Article 40 of the 1975 Statute. Uruguay also maintains that Article 41 creates an obligation of conduct, and not of result, but that it actually matters little since Uruguay has complied with its duty to prevent pollution by requiring the plant to meet best available technology ("BAT") standards.

193. Before turning to the analysis of Article 41, the Court recalls that:

> "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.)

194. The Court moreover had occasion to stress, in the *Gabčíkovo-Nagymaros Project* case, that "the Parties together should look afresh at

the effects on the environment of the operation of the Gabčíkovo power plant" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140). The Court is mindful of these statements in taking up now the examination of Article 41 of the 1975 Statute.

195. In view of the central role of this provision in the dispute between the Parties in the present case and their profound differences as to its interpretation and application, the Court will make a few remarks of a general character on the normative content of Article 41 before addressing the specific arguments of the Parties. First, in the view of the Court, Article 41 makes a clear distinction between regulatory functions entrusted to CARU under the 1975 Statute, which are dealt with in Article 56 of the Statute, and the obligation it imposes on the Parties to adopt rules and measures individually to "protect and preserve the aquatic environment and, in particular, to prevent its pollution". Thus, the obligation assumed by the Parties under Article 41, which is distinct from those under Articles 36 and 56 of the 1975 Statute, is to adopt appropriate rules and measures within the framework of their respective domestic legal systems to protect and preserve the aquatic environment and to prevent pollution. This conclusion is supported by the wording of paragraphs *(b)* and *(c)* of Article 41, which refer to the need not to reduce the technical requirements and severity of the penalties already in force in the respective legislation of the Parties as well as the need to inform each other of the rules to be promulgated so as to establish equivalent rules in their legal systems.

196. Secondly, it is the opinion of the Court that a simple reading of the text of Article 41 indicates that it is the rules and measures that are to be prescribed by the Parties in their respective legal systems which must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies".

197. Thirdly, the obligation to "preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures" is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction. The obligation of due diligence under Article 41 *(a)* in the adoption and enforcement of appropriate

rules and measures is further reinforced by the requirement that such rules and measures must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies". This requirement has the advantage of ensuring that the rules and measures adopted by the parties both have to conform to applicable international agreements and to take account of internationally agreed technical standards.

198. Finally, the scope of the obligation to prevent pollution must be determined in light of the definition of pollution given in Article 40 of the 1975 Statute. Article 40 provides that: "For the purposes of this Statute, pollution shall mean the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects." The term "harmful effects" is defined in the CARU Digest as:

> "any alteration of the water quality that prevents or hinders any legitimate use of the water, that causes deleterious effects or harm to living resources, risks to human health, or a threat to water activities including fishing or reduction of recreational activities" (Title I, Chapter 1, Section 2, Article 1 *(c)* of the Digest (E3)).

199. The Digest expresses the will of the Parties and their interpretation of the provisions of the 1975 Statute. Article 41, not unlike many other provisions of the 1975 Statute, lays down broad obligations agreed to by the Parties to regulate and limit their use of the river and to protect its environment. These broad obligations are given more specific content through the co-ordinated rule-making action of CARU as established under Article 56 of the 1975 Statute or through the regulatory action of each of the parties, or by both means. The two regulatory actions are meant to complement each other. As discussed below (see paragraphs 201 to 202, and 214), CARU standards concern mainly water quality. The CARU Digest sets only general limits on certain discharges or effluents from industrial plants such as: "hydrocarbons", "sedimentable solids", and "oils and greases". As the Digest makes explicit, those matters are left to each party to regulate. The Digest provides that, as regards effluents within its jurisdiction, each party shall take the appropriate "corrective measures" in order to assure compliance with water quality standards (CARU Digest, Sec. E3: Pollution, Title 2, Chapter 5, Section 1, Article 3). Uruguay has taken that action in its Regulation on Water Quality (Decree No. 253/79) and in relation to the Orion (Botnia) mill in the conditions stipulated in the authorization issued by MVOTMA. In Argentina, the Entre Ríos Province, which borders the river opposite the plant, has regulated industrial discharges in a decree that also recognizes the binding effect of the

CARU Digest (Regulatory Decree No. 5837, Government of Entre Ríos, 26 December 1991, and Regulatory Decree No. 5394, Government of Entre Ríos, 7 April 1997).

200. The Court considers it appropriate to now address the question of the rules by which any allegations of breach are to be measured and, more specifically, by which the existence of "harmful effects" is to be determined. It is the view of the Court that these rules are to be found in the 1975 Statute, in the co-ordinated position of the Parties established through CARU (as the introductory phrases to Article 41 and Article 56 of the Statute contemplate) and in the regulations adopted by each Party within the limits prescribed by the 1975 Statute (as paragraphs *(a)*, *(b)* and *(c)* of Article 41 contemplate).

201. The functions of CARU under Article 56 *(a)* include making rules governing the prevention of pollution and the conservation and preservation of living resources. In the exercise of its rule-making power, the Commission adopted in 1984 the Digest on the uses of the waters of the River Uruguay and has amended it since. In 1990, when Section E3 of the Digest was adopted, the Parties recognized that it was drawn up under Article 7 *(f)* of the 1961 Treaty and Articles 35, 36, 41 to 45 and 56 *(a)* (4) of the 1975 Statute. As stated in the Digest, the "basic purposes" of Section E3 of the Digest are to be as follows:

"*(a)* to protect and preserve the water and its ecological balance;

*(b)* to ensure any legitimate use of the water considering long term needs and particularly human consumption needs;

*(c)* to prevent all new forms of pollution and to achieve its reduction in case the standard values adopted for the different legitimate uses of the River's water are exceeded;

*(d)* to promote scientific research on pollution." (Title I, Chapter 2, Section 1, Article 1.)

202. The standards laid down in the Digest are not, however, exhaustive. As pointed out earlier, they are to be complemented by the rules and measures to be adopted by each of the Parties within their domestic laws.

The Court will apply, in addition to the 1975 Statute, these two sets of rules to determine whether the obligations undertaken by the Parties have been breached in terms of the discharge of effluent by the mill as well as in respect of the impact of those discharges on the quality of the waters of the river, on its ecological balance and on its biodiversity.

(a) *Environmental Impact Assessment*

203. The Court will now turn to the relationship between the need for an environmental impact assessment, where the planned activity is liable to cause harm to a shared resource and transboundary harm, and the obligations of the Parties under Article 41 *(a)* and *(b)* of the 1975 Statute. The Parties agree on the necessity of conducting an environmental impact assessment. Argentina maintains that the obligations under the 1975 Statute viewed together impose an obligation to conduct an environmental impact assessment prior to authorizing Botnia to construct the plant. Uruguay also accepts that it is under such an obligation. The Parties disagree, however, with regard to the scope and content of the environmental impact assessment that Uruguay should have carried out with respect to the Orion (Botnia) mill project. Argentina maintains in the first place that Uruguay failed to ensure that "full environmental assessments [had been] produced, prior to its decision to authorize the construction . . ."; and in the second place that "Uruguay's decisions [were] . . . based on unsatisfactory environmental assessments", in particular because Uruguay failed to take account of all potential impacts from the mill, even though international law and practice require it, and refers in this context to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context of the United Nations Economic Commission for Europe (hereinafter the "Espoo Convention") (*UNTS*, Vol. 1989, p. 309), and the 1987 Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme (hereinafter the "UNEP Goals and Principles") (*UNEP/WG.152/4 Annex (1987)*, document adopted by UNEP Governing Council at its 14th Session (Dec. 14/25 (1987)). Uruguay accepts that, in accordance with international practice, an environmental impact assessment of the Orion (Botnia) mill was necessary, but argues that international law does not impose any conditions upon the content of such an assessment, the preparation of which being a national, not international, procedure, at least where the project in question is not one common to several States. According to Uruguay, the only requirements international law imposes on it are that there must be assessments of the project's potential harmful transboundary effects on people, property and the environment of other States, as required by State practice and the International Law Commission 2001 draft Articles on Prevention of Transboundary Harm from Hazardous Activities, without there being any need to assess remote or purely speculative risks.

204. It is the opinion of the Court that in order for the Parties properly to comply with their obligations under Article 41 *(a)* and *(b)* of the 1975 Statute, they must, for the purposes of protecting and preserving the

aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment. As the Court has observed in the case concerning the *Dispute Regarding Navigational and Related Rights*,

> "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (*Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64).

In this sense, the obligation to protect and preserve, under Article 41 *(a)* of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

205. The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment. It points out moreover that Argentina and Uruguay are not parties to the Espoo Convention. Finally, the Court notes that the other instrument to which Argentina refers in support of its arguments, namely, the UNEP Goals and Principles, is not binding on the Parties, but, as guidelines issued by an international technical body, has to be taken into account by each Party in accordance with Article 41 *(a)* in adopting measures within its domestic regulatory framework. Moreover, this instrument provides only that the "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance" (Principle 5) without giving any indication of minimum core components of the assessment. Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once

operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

206. The Court has already considered the role of the environmental impact assessment in the context of the procedural obligations of the Parties under the 1975 Statute (paragraphs 119 and 120). It will now deal with the specific points in dispute with regard to the role of this type of assessment in the fulfilment of the substantive obligations of the Parties, that is to say, first, whether such an assessment should have, as a matter of method, necessarily considered possible alternative sites, taking into account the receiving capacity of the river in the area where the plant was to be built and, secondly, whether the populations likely to be affected, in this case both the Uruguayan and Argentine riparian populations, should have, or have in fact, been consulted in the context of the environmental impact assessment.

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

207. According to Argentina, one reason why Uruguay's environmental impact assessment is inadequate is that it contains no analysis of alternatives for the choice of the mill site, whereas the study of alternative sites is required under international law (UNEP Goals and Principles, Espoo Convention, IFC Operational Policy 4.01). Argentina contends that the chosen site is particularly sensitive from an ecological point of view and unconducive to the dispersion of pollutants "[b]ecause of the nature of the waters which will receive the pollution, the propensity of the site to sedimentation and eutrophication, the phenomenon of reverse flow and the proximity of the largest settlement on the River Uruguay".

208. Uruguay counters that the Fray Bentos site was initially chosen because of the particularly large volume of water in the river at that location, which would serve to promote effluent dilution. Uruguay adds that the site is moreover easily accessible for river navigation, which facilitates delivery of raw materials, and local manpower is available there. Uruguay considers that, if there is an obligation to consider alternative sites, the instruments invoked for that purpose by Argentina do not require alternative locations to be considered as part of an environmental impact assessment unless it is necessary in the circumstances to do so. Finally, Uruguay affirms that in any case it did so and that the suitability of the Orion (Botnia) site was comprehensively assessed.

209. The Court will now consider, first, whether Uruguay failed to exercise due diligence in conducting the environmental impact assessment, particularly with respect to the choice of the location of the plant

and, secondly, whether the particular location chosen for the siting of the plant, in this case Fray Bentos, was unsuitable for the construction of a plant discharging industrial effluent of this nature and on this scale, or could have a harmful impact on the river.

210. Regarding the first point, the Court has already indicated that the Espoo Convention is not applicable to the present case (see paragraph 205 above); while with respect to the UNEP Goals and Principles to which Argentina has referred, whose legal character has been described in paragraph 205 above, the Court recalls that Principle 4 *(c)* simply provides that an environmental impact assessment should include, at a minimum, "[a] description of practical alternatives, as appropriate". It is also to be recalled that Uruguay has repeatedly indicated that the suitability of the Fray Bentos location was comprehensively assessed and that other possible sites were considered. The Court further notes that the IFC's Final Cumulative Impact Study of September 2006 (hereinafter "CIS") shows that in 2003 Botnia evaluated four locations in total at La Paloma, at Paso de los Toros, at Nueva Palmira, and at Fray Bentos, before choosing Fray Bentos. The evaluations concluded that the limited amount of fresh water in La Paloma and its importance as a habitat for birds rendered it unsuitable, while for Nueva Palmira its consideration was discouraged by its proximity to residential, recreational, and culturally important areas, and with respect to Paso de los Toros insufficient flow of water during the dry season and potential conflict with competing water uses, as well as a lack of infrastructure, led to its exclusion. Consequently, the Court is not convinced by Argentina's argument that an assessment of possible sites was not carried out prior to the determination of the final site.

211. Regarding the second point, the Court cannot fail to note that any decision on the actual location of such a plant along the River Uruguay should take into account the capacity of the waters of the river to receive, dilute and disperse discharges of effluent from a plant of this nature and scale.

212. The Court notes, with regard to the receiving capacity of the river at the location of the mill, that the Parties disagree on the geomorphological and hydrodynamic characteristics of the river in the relevant area, particularly as they relate to river flow, and how the flow of the river, including its direction and its velocity, in turn determines the dispersal and dilution of pollutants. The differing views put forward by the Parties with regard to the river flow may be due to the different modelling systems which each has employed to analyse the hydrodynamic features of the River Uruguay at the Fray Bentos location. Argentina implemented a three-dimensional modelling that measured speed and direction at ten different depths of the river and used a sonar — an Acoustic Doppler Current Profiler (hereafter

"ADCP") — to record water flow velocities for a range of depths for about a year. The three-dimensional system generated a large number of data later introduced in a numerical hydrodynamic model. On the other hand, Botnia based its environmental impact assessment on a bi-dimensional modelling — the RMA2. The EcoMetrix CIS implemented both three-dimensional and bi-dimensional models. However, it is not mentioned whether an ADCP sonar was used at different depths.

213. The Court sees no need to go into a detailed examination of the scientific and technical validity of the different kinds of modelling, calibration and validation undertaken by the Parties to characterize the rate and direction of flow of the waters of the river in the relevant area. The Court notes however that both Parties agree that reverse flows occur frequently and that phenomena of low flow and stagnation may be observed in the concerned area, but that they disagree on the implications of this for the discharges from the Orion (Botnia) mill into this area of the river.

214. The Court considers that in establishing its water quality standards in accordance with Articles 36 and 56 of the 1975 Statute, CARU must have taken into account the receiving capacity and sensitivity of the waters of the river, including in the areas of the river adjacent to Fray Bentos. Consequently, in so far as it is not established that the discharges of effluent of the Orion (Botnia) mill have exceeded the limits set by those standards, in terms of the level of concentrations, the Court finds itself unable to conclude that Uruguay has violated its obligations under the 1975 Statute. Moreover, neither of the Parties has argued before the Court that the water quality standards established by CARU have not adequately taken into consideration the geomorphological and hydrological characteristics of the river and the capacity of its waters to disperse and dilute different types of discharges. The Court is of the opinion that, should such inadequacy be detected, particularly with respect to certain areas of the river such as at Fray Bentos, the Parties should initiate a review of the water quality standards set by CARU and ensure that such standards clearly reflect the characteristics of the river and are capable of protecting its waters and its ecosystem.

(ii) *Consultation of the affected populations*

215. The Parties disagree on the extent to which the populations likely to be affected by the construction of the Orion (Botnia) mill, particularly on the Argentine side of the river, were consulted in the course of the environmental impact assessment. While both Parties agree that consultation of the affected populations should form part of an environmental impact assessment, Argentina asserts that international law imposes specific obligations on States in this regard. In support of this argument, Argentina points to Articles 2.6 and 3.8 of

the Espoo Convention, Article 13 of the 2001 International Law Commission draft Articles on Prevention of Transboundary Harm from Hazardous Activities, and Principles 7 and 8 of the UNEP Goals and Principles. Uruguay considers that the provisions invoked by Argentina cannot serve as a legal basis for an obligation to consult the affected populations and adds that in any event the affected populations had indeed been consulted.

216. The Court is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina.

217. Regarding the facts, the Court notes that both before and after the granting of the initial environmental authorization, Uruguay did undertake activities aimed at consulting the affected populations, both on the Argentine and the Uruguayan sides of the river. These activities included meetings on 2 December 2003 in Río Negro, and on 26 May 2004 in Fray Bentos, with participation of Argentine non-governmental organizations. In addition, on 21 December 2004, a public hearing was convened in Fray Bentos which, according to Uruguay, addressed among other subjects, the

> "handling of chemical products in the plant and in the port; the appearance of acid rain, dioxins, furans and other polychlorates of high toxicity that could affect the environment; compliance with the Stockholm Convention; atmospheric emissions of the plant; electromagnetic and electrostatic emissions; [and] liquid discharges into the river".

Inhabitants of Fray Bentos and nearby regions of Uruguay and Argentina participated in the meeting and submitted 138 documents containing questions or concerns.

218. Further, the Court notes that between June and November 2005 more than 80 interviews were conducted by the Consensus Building Institute, a non-profit organization specializing in facilitated dialogues, mediation, and negotiation, contracted by the IFC. Such interviews were conducted *inter alia* in Fray Bentos, Gualeguaychú, Montevideo, and Buenos Aires, with interviewees including civil society groups, non-governmental organizations, business associations, public officials, tourism operators, local business owners, fishermen, farmers and plantation owners on both sides of the river. In December 2005, the draft CIS and the report prepared by the Consensus Building Institute were released, and the IFC opened a period of consultation to receive additional feedback from stakeholders in Argentina and Uruguay.

219. In the light of the above, the Court finds that consultation by Uruguay of the affected populations did indeed take place.

(b) *Question of the production technology used in the Orion (Botnia) mill*

220. Argentina maintains that Uruguay has failed to take all measures to prevent pollution by not requiring the mill to employ the "best available techniques", even though this is required under Article 5 *(d)* of the POPs Convention, the provisions of which are incorporated by virtue of the "referral clause" in Article 41 *(a)* of the 1975 Statute. According to Argentina, the experts' reports it cites establish that the mill does not use best available techniques and that its performance is not up to international standards, in the light of the various techniques available for producing pulp. Uruguay contests these claims. Relying on the CIS, the second Hatfield report and the audit conducted by AMEC at the IFC's request, Uruguay asserts that the Orion (Botnia) mill is, by virtue of the technology employed there, one of the best pulp mills in the world, applying best available techniques and complying with European Union standards, among others, in the area.

221. Argentina, however, specifically criticizes the absence of any "tertiary treatment of effluent" (i.e., a third round of processing production waste before discharge into the natural environment), which is necessary to reduce the quantity of nutrients, including phosphorus, since the effluent is discharged into a highly sensitive environment. The mill also lacks, according to Argentina, an empty emergency basin, designed to contain effluent spills. Answering a question asked by a judge, Argentina considers that a tertiary treatment would be possible, but that Uruguay failed to conduct an adequate assessment of tertiary treatment options for the Orion (Botnia) mill.

222. Uruguay observes that "the experts did not consider it necessary to equip the mill with a tertiary treatment phase". Answering the same question, Uruguay argued that, though feasible, the addition of a tertiary treatment facility would not be environmentally advantageous overall, as it would significantly increase the energy consumption of the plant, its carbon emissions, together with sludge generation and chemical use. Uruguay has consistently maintained that the bleaching technology used is acceptable, that the emergency basins in place are adequate, that the mill's production of synthetic chemical compounds meets technological requirements and that the potential risk from this production was indeed assessed.

223. To begin with, the Court observes that the obligation to prevent pollution and protect and preserve the aquatic environment of the River Uruguay, laid down in Article 41 *(a)*, and the exercise of due diligence implied in it, entail a careful consideration of the technology to be used

by the industrial plant to be established, particularly in a sector such as pulp manufacturing, which often involves the use or production of substances which have an impact on the environment. This is all the more important in view of the fact that Article 41 *(a)* provides that the regulatory framework to be adopted by the Parties has to be in keeping with the guidelines and recommendations of international technical bodies.

224. The Court notes that the Orion (Botnia) mill uses the bleached Kraft pulping process. According to the December 2001 Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry of the European Commission (hereinafter "IPPC-BAT"), which the Parties referred to as the industry standard in this sector, the Kraft process already accounted at that time for about 80 per cent of the world's pulp production and is therefore the most applied production method of chemical pulping processes. The plant employs an ECF-light (Elemental chlorine-free) bleaching process and a primary and secondary wastewater treatment involving activated sludge treatment.

225. The Court finds that, from the point of view of the technology employed, and based on the documents submitted to it by the Parties, particularly the IPPC-BAT, there is no evidence to support the claim of Argentina that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced. This finding is supported by the fact that, as shown below, no clear evidence has been presented by Argentina establishing that the Orion (Botnia) mill is not in compliance with the 1975 Statute, the CARU Digest and applicable regulations of the Parties in terms of the concentration of effluents per litre of wastewater discharged from the plant and the absolute amount of effluents that can be discharged in a day.

226. The Court recalls that Uruguay has submitted extensive data regarding the monitoring of effluent from the Orion (Botnia) mill, as contained in the various reports by EcoMetrix and DINAMA (EcoMetrix, Independent Performance Monitoring as required by the IFC Phase 2: Six Month Environmental Performance Review (July 2008); EcoMetrix, Independent Performance Monitoring as required by the IFC, Phase 3: Environmental Performance Review (2008 Monitoring Year) (hereinafter "EcoMetrix Third Monitoring Report"); DINAMA, Performance Report for the First Year of Operation of the Botnia Plant and the Environmental Quality of the Area of Influence, May 2009; DINAMA, Six Month Report on the Botnia Emission Control and Environmental Performance Plan), and that Argentina expressed the view, in this regard, that Uruguay had on this matter, much greater, if not exclusive, access to the factual evidence. However, the Court notes that Argentina has itself generated much factual information and that the materials which Uruguay produced have

been available to Argentina at various stages of the proceedings or have been available in the public domain. Therefore the Court does not consider that Argentina has been at a disadvantage with regard to the production of evidence relating to the discharges of effluent of the mill.

227. To determine whether the concentrations of pollutants discharged by the Orion (Botnia) mill are within the regulatory limits, the Court will have to assess them against the effluent discharge limits — both in terms of the concentration of effluents in each litre of wastewater discharged and the absolute amount of effluents that can be discharged in a day — prescribed by the applicable regulatory standards of the Parties, as characterized by the Court in paragraph 200 above, and the permits issued for the plant by the Uruguayan authorities, since the Digest only sets general limits on "hydrocarbons", "sedimentable solids", and "oils and greases", but does not establish specific ones for the substances in contention between the Parties. Argentina did not allege any non-compliance of the Orion (Botnia) mill with CARU's effluent standards (CARU Digest, Sec. E3 (1984, as amended)).

228. Taking into account the data collected after the start-up of the mill as contained in the various reports by DINAMA and EcoMetrix, it does not appear that the discharges from the Orion (Botnia) mill have exceeded the limits set by the effluent standards prescribed by the relevant Uruguayan regulation as characterized by the Court in paragraph 200 above, or the initial environmental authorization issued by MVOTMA (MVOTMA, Initial Environmental Authorization for the Botnia Plant (14 February 2005)), except for a few instances in which the concentrations have exceeded the limits. The only parameters for which a recorded measurement exceeded the standards set by Decree No. 253/79 or the initial environmental authorization by MVOTMA are: nitrogen, nitrates, and AOX (Adsorbable Organic Halogens). In those cases, measurements taken on one day exceeded the threshold. However, the initial environmental authorization of 14 February 2005 specifically allows yearly averaging for the parameters. The most notable of these cases in which the limits were exceeded is the one relating to AOX, which is the parameter used internationally to monitor pulp mill effluent, sometimes including persistent organic pollutants (POPs). According to the IPPC-BAT reference document submitted by the Parties, and considered by them as the industry standard in this sector, "the environmental control authorities in many countries have set severe restrictions on the discharges of chlorinated organics measured as AOX into the aquatic environment". Concentrations of AOX reached at one point on 9 January 2008, after the mill began operations, as high a level as 13 mg/L, whereas the maximum limit used in the environ-

mental impact assessment and subsequently prescribed by MVOTMA was 6 mg/L. However, in the absence of convincing evidence that this is not an isolated episode but rather a more enduring problem, the Court is not in a position to conclude that Uruguay has breached the provisions of the 1975 Statute.

(c) *Impact of the discharges on the quality of the waters of the river*

229. As pointed out earlier (see paragraph 165), the Parties have over the last three years presented to the Court a vast amount of factual and scientific material containing data and analysis of the baseline levels of contaminants already present in the river prior to the commissioning of the plant and the results of measurements of its water and air emissions after the plant started its production activities and, in some cases, until mid-2009.

230. Regarding the baseline data, the studies and reports submitted by the Parties contained data and analysis relating, *inter alia*, to water quality, air quality, phytoplankton and zooplankton of the river, health indicators and biomarkers of pollution in fish from the river, monitoring of fish fauna in the area around the Orion (Botnia) mill, fish community and species diversity in the river, concentrations of resin acids, chlorinated phenols and plant sterols in fish from the river, survey of species belonging to the genus Tillandsia, the Orion (Botnia) mill pre-start-up audit, and analysis of mercury and lead in fish muscle.

231. Argentina contends that Uruguay's baseline data were both inadequate and incomplete in many aspects. Uruguay rejects this allegation, and argues that Argentina has actually relied on Uruguay's baseline data to give its own assessment of water quality. According to Uruguay, contrary to Argentina's assertions, collection of baseline data by Uruguay started in August 2006, when DINAMA started to conduct for a period of 15 months pre-operational water quality monitoring prior to the commissioning of the plant in November 2007, which served to complement almost 15 years of more general monitoring that had been carried out within CARU under the PROCON programme (River Uruguay Water Quality and Pollution Control Programme, from the Spanish acronym for "Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay"). Argentina did not challenge counsel for Uruguay's statement during the oral proceedings that it used Uruguay's baseline data for the assessment of water quality.

232. The data presented by the Parties on the post-operation monitor-

ing of the actual performance of the plant in terms of the impact of its emissions on the river includes data obtained through different testing programmes conducted, *inter alia*, by an Argentine scientific team from two national universities, contracted by the National Secretariat of Environment and Sustainable Development of Argentina (ten sites), the OSE (Uruguay's State Agency for Sanitary Works, from the Spanish acronym for "Obras Sanitarias del Estado"), DINAMA, independently of Botnia (16 sites), and Botnia, reporting to DINAMA and the IFC (four sites; and testing the effluent).

233. The monitoring sites maintained by Argentina are located on the Argentine side of the river; with the most upstream position located 10 km from the plant and the furthest downstream one at about 16 km from the plant. Nevertheless, three of the sites (U0, U2 and U3) are near the plant; while another three are in Nandubaysal Bay and Inés Lagoon, the data from which, according to Argentina's counsel, "enabled the scientists to clearly set the bay apart, as it acts as an ecosystem that is relatively detached from the Uruguay river" (Scientific and Technical Report, Chapter 3, appendix: "Background Biogeochemical Studies", para. 4.1.2; see also *ibid.*, para. 4.3.1.2).

234. The monitoring sites maintained by Uruguay (DINAMA) and by Botnia are located on the Uruguayan side. The OSE monitoring point is located at the drinking water supply intake pipe for Fray Bentos, at or near DINAMA station 11.

235. Argentina's team gathered data from November 2007 until April 2009 with many of the results being obtained from October 2008. Uruguay, through DINAMA, has been carrying out its monitoring of the site since March 2006. Its most recent data cover the period up to June 2009. The OSE, in terms of its overall responsibility for Uruguayan water quality, has been gathering relevant data which has been used in the periodic reports on the operation of the plant.

236. The Court also has before it interpretations of the data provided by experts appointed by the Parties, and provided by the Parties themselves and their counsel. However, in assessing the probative value of the evidence placed before it, the Court will principally weigh and evaluate the data, rather than the conflicting interpretations given to it by the Parties or their experts and consultants, in order to determine whether Uruguay breached its obligations under Articles 36 and 41 of the 1975 Statute in authorizing the construction and operation of the Orion (Botnia) mill.

237. The particular parameters and substances that are subject to controversy between the Parties in terms of the impact of the discharges of effluent from the Orion (Botnia) mill on the quality of the waters of the

river are: dissolved oxygen; total phosphorus (and the related matter of eutrophication due to phosphate); phenolic substances; nonylphenols and nonylphenolethoxylates; and dioxins and furans. The Court now turns to the assessment of the evidence presented to it by the Parties with respect to these parameters and substances.

(i) *Dissolved oxygen*

238. Argentina raised for the first time during the oral proceedings the alleged negative impact of the Orion (Botnia) mill on dissolved oxygen in the river referring to data contained in the report of the Uruguayan OSE. According to Argentina, since dissolved oxygen is environmentally beneficial and there is a CARU standard which sets a minimum level of dissolved oxygen for the river waters (5.6 mg/L), the introduction by the Orion (Botnia) mill into the aquatic environment of substances or energy which caused the dissolved oxygen level to fall below that minimum constitutes a breach of the obligation to prevent pollution and to preserve the aquatic environment. Uruguay argues that Argentina's figures taken from the measurements of the OSE were for "oxidabilidad", which refers to the "demand for oxygen" and not for "oxígeno disuelto" — i.e., dissolved oxygen. Uruguay also claims that a drop in the level of demand for oxygen shows an improvement in the quality of the water, since the level of demand should be kept as low as possible.

239. The Court observes that a post-operational average value of 3.8 mg/L for dissolved oxygen would indeed, if proven, constitute a violation of CARU standards, since it is below the minimum value of 5.6 mg of dissolved oxygen per litre required according to the CARU Digest (E3, Title 2, Chapter 4, Section 2). However, the Court finds that the allegation made by Argentina remains unproven. First, the figures on which Argentina bases itself do not correspond to the ones for dissolved oxygen that appear in the EcoMetrix Third Monitoring Report, where the samples taken between February and October 2008 were all above the CARU minimum standard for dissolved oxygen. Secondly, DINAMA's Surface Water and Sediment Quality Data Report of July 2009 (Six Month Report: January-June) (hereinafter "DINAMA's Water Quality Report") (see p. 7, fig. 4.5: average of 9.4 mg/L) displays concentrations of dissolved oxygen that are well above the minimum level required under the CARU Digest. Thirdly, Argentina's 30 June 2009 report says in its summary that the records of water quality parameters over the period were "normal for the river with typical seasonal patterns of temperature and associated dissolved oxygen". The hundreds of measurements presented in the figures in that chapter of the "Colombo Report" support that conclusion even taking account of some slightly lower figures. Fourthly, the figures relating to dissolved oxygen contained in DINAMA's Water Quality Report have essentially the same characteristics as those gathered by Argentina — they

are above the CARU minimum and are the same upstream and downstream. Thus, the Court concludes that there appears to be no significant difference between the sets of data over time and that there is no evidence to support the contention that the reference to "oxidabilidad" in the OSE report referred to by Argentina should be interpreted to mean "dissolved oxygen".

(ii) *Phosphorus*

240. There is agreement between the Parties that total phosphorus levels in the River Uruguay are high. According to Uruguay, the total amount of (natural and anthropogenic) phosphorus emitted into the river per year is approximately 19,000 tonnes, of which the Orion (Botnia) mill has a share of some 15 tonnes (in 2008) or even less, as was expected for 2009. These figures have not been disputed by Argentina during the proceedings. Uruguay contends further that no violation of the provisions of the 1975 Statute can be alleged since the high concentration cannot be clearly attributed to the Orion (Botnia) mill as the source, and since no standard is set by CARU for phosphorus. Uruguay maintains also that based on data provided by DINAMA as compared to baseline data also compiled by DINAMA, it can be demonstrated that "[t]otal phosphorus levels were generally lower post-start-up as compared to the 2005-2006 baseline" (EcoMetrix Third Monitoring Report, March 2009).

241. A major disagreement between the Parties relates to the relationship between the higher concentration of phosphorus in the waters of the river and the algal bloom of February 2009 and whether operation of the Orion (Botnia) mill has caused the eutrophication of the river. Argentina claims that the Orion (Botnia) mill is the cause of the eutrophication and higher concentration of phosphates, while Uruguay denies the attributability of these concentrations as well as the eutrophication to the operation of the plant in Fray Bentos.

242. The Court notes that CARU has not adopted a water quality standard relating to levels of total phosphorus and phosphates in the river. Similarly, Argentina has no water quality standards for total phosphorus. The Court will therefore have to use the water quality and effluent limits for total phosphorus enacted by Uruguay under its domestic legislation, as characterized by the Court in paragraph 200 above, to assess whether the concentration levels of total phosphorus have exceeded the limits laid down in the regulations of the Parties adopted in accordance with Article 41 *(a)* of the 1975 Statute. The water quality standard for total phosphorus under the Uruguayan Regulation is 0.025 mg/L for certain purposes such as drinking water, irrigation of crops for human consumption and water used for recreational purposes which involve direct human contact with the water (Decree No. 253/79, Regulation of

Water Quality). The Uruguayan Decree also establishes a total phosphorus discharge standard of 5 mg/L (Decree No. 253/79 Regulation of Water Quality, Art. 11 (2)). The Orion (Botnia) mill must comply with both standards.

243. The Court finds that based on the evidence before it, the Orion (Botnia) mill has so far complied with the standard for total phosphorus in effluent discharge. In this context, the Court notes that, for 2008 according to the EcoMetrix Third Monitoring Report, the Uruguayan data recorded an average of 0.59 mg/L total phosphorus in effluent discharge from the plant. Moreover, according to the DINAMA 2009 Emissions Report, the effluent figures for November 2008 to May 2009 were between 0.053 mg/L and 0.41 mg/L (e.g., DINAMA, "Six Month Report on the Botnia Emission Control and Environmental Performance Plan November 11, 2008 to May 31, 2009" (22 July 2009) p. 5; see also pp. 25 and 26). Argentina does not contest these figures which clearly show values much below the standard established under the Uruguayan Decree.

244. The Court observes in this connection that as early as 11 February 2005, DINAMA, in its environmental impact assessment for the Orion (Botnia) mill, noted the heavy load of nutrients (phosphorus and nitrogen) in the river and stated that:

> "This situation has generated the frequent proliferation of algae, in some cases with an important degree of toxicity as a result of the proliferation of cyanobacteria. These proliferations, which in recent years have shown an increase in both frequency and intensity, constitute a health risk and result in important economic losses since they interfere with some uses of water, such as recreational activities and the public supply of drinking water. To this already existing situation it must be added that, in the future, the effluent in the plant will emit a total of 200 t/a of N[itrogen] and 20 t/a of P[hosphorus], values that are the approximate equivalent of the emission of the untreated sewage of a city of 65,000 people." (P. 20, para. 6.1.)

245. The DINAMA Report then continues as follows:

> "It is also understood that it is not appropriate to authorize any waste disposal that would increase any of the parameters that present critical values, even in cases in which the increase is considered insignificant by the company. Nevertheless, considering that the parameters in which the quality of water is compromised are not specific to the effluents of this project, but rather would be affected by the waste disposal of any industrial or domestic effluent under consideration, it is understood that the waste disposal proposed in the project may be accepted, as long as there is compensation for any

increase over and above the standard value for any of the critical parameters." (DINAMA Report, p. 21.)

246. The Court further notes that the initial environmental authorization, granted on 15 February 2005, required compliance by Botnia with those conditions, with CARU standards and with best available techniques as included in the December 2001 IPPC-BAT of the European Commission. It also required the completion of an implementation plan for mitigation and compensation measures. That plan was completed by the end of 2007 and the authorization to operate was granted on 8 November 2007. On 29 April 2008, Botnia and the OSE concluded an Agreement Regarding Treatment of the Municipal Wastewater of Fray Bentos, aimed at reducing total phosphorus and other contaminants.

247. The Court considers that the amount of total phosphorus discharge into the river that may be attributed to the Orion (Botnia) mill is insignificant in proportionate terms as compared to the overall total phosphorus in the river from other sources. Consequently, the Court concludes that the fact that the level of concentration of total phosphorus in the river exceeds the limits established in Uruguayan legislation in respect of water quality standards cannot be considered as a violation of Article 41 *(a)* of the 1975 Statute in view of the river's relatively high total phosphorus content prior to the commissioning of the plant, and taking into account the action being taken by Uruguay by way of compensation.

248. The Court will now turn to the consideration of the issue of the algal bloom of 4 February 2009. Argentina claims that the algal bloom of 4 February 2009 was caused by the Orion (Botnia) mill's emissions of nutrients into the river. To substantiate this claim Argentina points to the presence of effluent products in the blue-green algal bloom and to various satellite images showing the concentration of chlorophyll in the water. Such blooms, according to Argentina, are produced during the warm season by the explosive growth of algae, particularly cyanobacteria, responding to nutrient enrichment, mainly phosphate, among other compounds present in detergents and fertilizers.

249. Uruguay contends that the algal bloom of February 2009, and the high concentration of chlorophyll, was not caused by the Orion (Botnia) mill but could have originated far upstream and may have most likely been caused by the increase of people present in Gualeyguaychú during the yearly carnival held in that town, and the resulting increase in sewage, and not by the mill's effluents. Uruguay maintains that Argentine data actually prove that the Orion (Botnia) mill has not added to the concentration of phosphorus in the river at any time since it began operating.

250. The Parties are in agreement on several points regarding the algal bloom of 4 February 2009, including the fact that the concentrations of

nutrients in the River Uruguay have been at high levels both before and after the bloom episode, and the fact that the bloom disappeared shortly after it had begun. The Parties also appear to agree on the interdependence between algae growth, higher temperatures, low and reverse flows, and presence of high levels of nutrients such as nitrogen and phosphorus in the river. It has not, however, been established to the satisfaction of the Court that the algal bloom episode of 4 February 2009 was caused by the nutrient discharges from the Orion (Botnia) mill.

(iii) *Phenolic substances*

251. With regard to phenolic substances, Argentina contends that the Orion (Botnia) mill's emission of pollutants have resulted in violations of the CARU standard for phenolic substances once the plant started operating, while, according to Argentina, pre-operational baseline data did not show that standard to have been exceeded. Uruguay on the other hand argues that there have been numerous violations of the standard, throughout the river, long before the plant went into operation. Uruguay substantiates its arguments by pointing to several studies including the EcoMetrix final Cumulative Impact Study, which had concluded that phenolic substances were found to have frequently exceeded the water quality standard of 0.001 mg/L fixed by CARU.

252. The Court also notes that Uruguayan data indicate that the water quality standard was being exceeded from long before the plant began operating. The Cumulative Impact Study prepared in September 2006 by EcoMetrix for the IFC states that phenolics were found frequently to exceed the standard, with the highest values on the Argentine side of the river. The standard is still exceeded in some of the measurements in the most recent report before the Court but most are below it (DINAMA July 2009 Water Quality Report, p. 21, para. 4.1.11.2 and App. 1, showing measurements from 0.0005 to 0.012 mg/L).

253. During the oral proceedings, counsel for Argentina claimed that the standard had not previously been exceeded and that the plant has caused the limit to be exceeded. The concentrations, he said, had increased on average by three times and the highest figure was 20 times higher. Uruguay contends that the data contained in the DINAMA 2009 Report shows that the post-operational levels of phenolic substances were lower than the baseline levels throughout the river including at the OSE water intake.

254. Based on the record, and the data presented by the Parties, the Court concludes that there is insufficient evidence to attribute the alleged

increase in the level of concentrations of phenolic substances in the river to the operations of the Orion (Botnia) mill.

(iv) *Presence of nonylphenols in the river environment*

255. Argentina claims that the Orion (Botnia) mill emits, or has emitted, nonylphenols and thus has caused damage to, or at least has substantially put at risk, the river environment. According to Argentina, the most likely source of these emissions are surfactants (detergents), nonylphenolethoxylates used to clean the wood pulp as well as the installations of the plant itself. Argentina also contends that from 46 measurements performed in water samples the highest concentrations, in particular those exceeding the European Union relevant standards, were determined in front-downstream the mill and in the bloom sample collected on 4 February 2009, with lower levels upstream and downstream, indicating that the Orion (Botnia) mill effluent is the most probable source of these residues. In addition, according to Argentina, bottom sediments collected in front-downstream the mill showed a rapid increase of nonylphenols from September 2006 to February 2009, corroborating the increasing trend of these compounds in the River Uruguay. For Argentina, the spatial distribution of sub-lethal effects detected in rotifers (absence of spines), transplanted Asiatic clams (reduction of lipid reserves) and fish (estrogenic effects) coincided with the distribution area of nonylphenols suggesting that these compounds may be a significant stress factor.

256. Uruguay rejects Argentina's claim relating to nonylphenols and nonylphenolethoxylates, and categorically denies the use of nonylphenols and nonylphenolethoxylates by the Orion (Botnia) mill. In particular, it provides affidavits from Botnia officials to the effect that the mill does not use and has never used nonylphenols or nonylphenolethoxylate derivatives in any of its processes for the production of pulp, including in the pulp washing and cleaning stages, and that no cleaning agents containing nonylphenols are or have been used for cleaning the plant's equipment (Affidavit of Mr. González, 2 October 2009).

257. The Court recalls that the issue of nonylphenols was included in the record of the case before the Court only by the Report submitted by Argentina on 30 June 2009. Although testing for nonylphenols had been carried out since November 2008, Argentina has not however, in the view of the Court, adduced clear evidence which establishes a link between the nonylphenols found in the waters of the river and the Orion (Botnia) mill. Uruguay has also categorically denied before the Court the use of nonylphenolethoxylates for production or cleaning by the Orion (Botnia) mill. The Court therefore concludes that the evidence in

the record does not substantiate the claims made by Argentina on this matter.

(v) *Dioxins and furans*

258. Argentina has alleged that while the concentration of dioxins and furans in surface sediments is generally very low, data from its studies demonstrated an increasing trend compared to data compiled before the Orion (Botnia) mill commenced operations. Argentina does not claim a violation of standards, but relies on a sample of *sábalo* fish tested by its monitoring team, which showed that one fish presented elevated levels of dioxins and furans which, according to Argentina, pointed to a rise in the incidence of dioxins and furans in the river after the commissioning of the Orion (Botnia) mill. Uruguay contests this claim, arguing that such elevated levels cannot be linked to the operation of the Orion (Botnia) mill, given the presence of so many other industries operating along the River Uruguay and in neighbouring Nandubaysal Bay, and the highly migratory nature of the *sábalo* species which was tested. In addition, Uruguay advances that its testing of the effluent coming from the Orion (Botnia) mill demonstrate that no dioxins and furans could have been introduced into the mill effluent, as the levels detected in the effluent were not measurably higher than the baseline levels in the River Uruguay.

259. The Court considers that there is no clear evidence to link the increase in the presence of dioxins and furans in the river to the operation of the Orion (Botnia) mill.

(d) *Effects on biodiversity*

260. Argentina asserts that Uruguay "has failed to take all measures to protect and preserve the biological diversity of the River Uruguay and the areas affected by it". According to Argentina, the treaty obligation "to protect and preserve the aquatic environment" comprises an obligation to protect the biological diversity including "habitats as well as species of flora and fauna". By virtue of the "referral clause" in Article 41 *(a)*, Argentina argues that the 1975 Statute requires Uruguay, in respect of activities undertaken in the river and areas affected by it, to comply with the obligations deriving from the CITES Convention, the Biodiversity Convention and the Ramsar Convention. Argentina maintains that through its monitoring programme abnormal effects were detected in aquatic organisms — such as malformation of rotifers and loss of fat by clams — and the biomagnification of persistent pollutants such as dioxins and furans was detected in detritus feeding fish (such as the sábalo fish). Argentina also contends that the operation of the mill poses a threat, under conditions of reverse flow, to the Esteros de Farrapos site, situated "in the lower section of the River . . . downstream from

the Salto Grande dam and on the frontier with Argentina", a few kilometres upstream from the Orion (Botnia) mill.

261. Uruguay states that Argentina has failed to demonstrate any breach by Uruguay of the Biodiversity Convention, while the Ramsar Convention has no bearing in the present case because Esteros de Farrapos was not included in the list of Ramsar sites whose ecological character is threatened. With regard to the possibility of the effluent plume from the mill reaching Esteros de Farrapos, Uruguay in the oral proceedings acknowledged that under certain conditions that might occur. However, Uruguay added that it would be expected that the dilution of the effluent from the mill of 1:1000 would render the effluent quite harmless and below any concentration capable of constituting pollution. Uruguay contends that Argentina's claims regarding the harmful effects on fish and rotifers as a result of the effluents from the Orion (Botnia) mill are not credible. It points out that a recent comprehensive report of DINAMA on ichthyofauna concludes that compared to 2008 and 2009 there has been no change in species biodiversity. Uruguay adds that the July 2009 report of DINAMA, with results of its February 2009 monitoring of the sediments in the river where some fish species feed, stated that "the quality of the sediments at the bottom of the Uruguay River has not been altered as a consequence of the industrial activity of the Botnia plant".

262. The Court is of the opinion that as part of their obligation to preserve the aquatic environment, the Parties have a duty to protect the fauna and flora of the river. The rules and measures which they have to adopt under Article 41 should also reflect their international undertakings in respect of biodiversity and habitat protection, in addition to the other standards on water quality and discharges of effluent. The Court has not, however, found sufficient evidence to conclude that Uruguay breached its obligation to preserve the aquatic environment including the protection of its fauna and flora. The record rather shows that a clear relationship has not been established between the discharges from the Orion (Botnia) mill and the malformations of rotifers, or the dioxin found in the sábalo fish or the loss of fat by clams reported in the findings of the Argentine River Uruguay Environmental Surveillance (URES) programme.

(e) *Air pollution*

263. Argentina claims that the Orion (Botnia) mill has caused air, noise and visual pollution which negatively impact on "the aquatic environment" in violation of Article 41 of the 1975 Statute. Argentina also

argues that the 1975 Statute was concluded not only to protect the quality of the waters, but also, more generally, the "régime" of the river and "the areas affected by it, i.e., all the factors that affect, and are affected by the ecosystem of the river as a whole". Uruguay contends that the Court has no jurisdiction over those matters and that, in any event, the claims are not established on the merits.

264. With respect to noise and visual pollution, the Court has already concluded in paragraph 52 that it has no jurisdiction on such matters under the 1975 Statute. As regards air pollution, the Court is of the view that if emissions from the plant's stacks have deposited into the aquatic environment substances with harmful effects, such indirect pollution of the river would fall under the provisions of the 1975 Statute. Uruguay appears to agree with this conclusion. Nevertheless, in view of the findings of the Court with respect to water quality, it is the opinion of the Court that the record does not show any clear evidence that substances with harmful effects have been introduced into the aquatic environment of the river through the emissions of the Orion (Botnia) mill into the air.

(f) *Conclusions on Article 41*

265. It follows from the above that there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia) mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007. Consequently, on the basis of the evidence submitted to it, the Court concludes that Uruguay has not breached its obligations under Article 41.

(g) *Continuing obligations: monitoring*

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

* *

## V. The Claims Made by the Parties in Their Final Submissions

267. Having concluded that Uruguay breached its procedural obligations under the 1975 Statute (see paragraphs 111, 122, 131, 149, 157 and 158 above), it is for the Court to draw the conclusions following from these internationally wrongful acts giving rise to Uruguay's international responsibility and to determine what that responsibility entails.

268. Argentina first requests the Court to find that Uruguay has violated the procedural obligations incumbent on it under the 1975 Statute and has thereby engaged its international responsibility. Argentina further requests the Court to order that Uruguay immediately cease these internationally wrongful acts.

269. The Court considers that its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina. As Uruguay's breaches of the procedural obligations occurred in the past and have come to an end, there is no cause to order their cessation.

270. Argentina nevertheless argues that a finding of wrongfulness would be insufficient as reparation, even if the Court were to find that Uruguay has not breached any substantive obligation under the 1975 Statute but only some of its procedural obligations. Argentina maintains that the procedural obligations and substantive obligations laid down in the 1975 Statute are closely related and cannot be severed from one another for purposes of reparation, since undesirable effects of breaches of the former persist even after the breaches have ceased. Accordingly, Argentina contends that Uruguay is under an obligation to "re-establish on the ground and in legal terms the situation that existed before [the] internationally wrongful acts were committed". To this end, the Orion (Botnia) mill should be dismantled. According to Argentina, *restitutio in integrum* is the primary form of reparation for internationally wrongful acts. Relying on Article 35 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, Argentina maintains that restitution takes precedence over all other forms of reparation except where it is "materially impossible" or involves "a burden out of all proportion to the benefit deriving from restitution instead of compensation". It asserts that dismantling the mill is not materially impossible and would not create for the Respondent State a burden out of all proportion, since the Respondent has

> "maintained that construction of the mills would not amount to a fait accompli liable to prejudice Argentina's rights and that it was for Uruguay alone to decide whether to proceed with construction

> and thereby assume the risk of having to dismantle the mills in the event of an adverse decision by the Court",

as the Court noted in its Order on Argentina's request for the indication of provisional measures in this case (*Order of 13 July 2006, I.C.J. Reports 2006*, p. 125, para. 47). Argentina adds that whether or not restitution is disproportionate must be determined at the latest as of the filing of the Application instituting proceedings, since as from that time Uruguay, knowing of Argentina's request to have the work halted and the *status quo ante* re-established, could not have been unaware of the risk it ran in proceeding with construction of the disputed mill. Lastly, Argentina considers Articles 42 and 43 of the 1975 Statute to be inapplicable in the present case, since they establish a régime of responsibility in the absence of any wrongful act.

271. Taking the view that the procedural obligations are distinct from the substantive obligations laid down in the 1975 Statute, and that account must be taken of the purport of the rule breached in determining the form to be taken by the obligation of reparation deriving from its violation, Uruguay maintains that restitution would not be an appropriate form of reparation if Uruguay is found responsible only for breaches of procedural obligations. Uruguay argues that the dismantling of the Orion (Botnia) mill would at any rate involve a "striking disproportion between the gravity of the consequences of the wrongful act of which it is accused and those of the remedy claimed", and that whether or not a disproportionate burden would result from restitution must be determined as of when the Court rules, not, as Argentina claims, as of the date it was seised. Uruguay adds that the 1975 Statute constitutes a *lex specialis* in relation to the law of international responsibility, as Articles 42 and 43 establish compensation, not restitution, as the appropriate form of reparation for pollution of the river in contravention of the 1975 Statute.

272. The Court, not having before it a claim for reparation based on a régime of responsibility in the absence of any wrongful act, deems it unnecessary to determine whether Articles 42 and 43 of the 1975 Statute establish such a régime. But it cannot be inferred from these Articles, which specifically concern instances of pollution, that their purpose or effect is to preclude all forms of reparation other than compensation for breaches of procedural obligations under the 1975 Statute.

273. The Court recalls that customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),*

*Judgment, I.C.J. Reports 1997*, p. 81, para. 152; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 198, paras. 152-153; *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 (I)*, p. 233, para. 460; see also Articles 34 to 37 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts).

274. Like other forms of reparation, restitution must be appropriate to the injury suffered, taking into account the nature of the wrongful act having caused it. As the Court has made clear,

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

275. As the Court has pointed out (see paragraphs 154 to 157 above), the procedural obligations under the 1975 Statute did not entail any ensuing prohibition on Uruguay's building of the Orion (Botnia) mill, failing consent by Argentina, after the expiration of the period for negotiation. The Court has however observed that construction of that mill began before negotiations had come to an end, in breach of the procedural obligations laid down in the 1975 Statute. Further, as the Court has found, on the evidence submitted to it, the operation of the Orion (Botnia) mill has not resulted in the breach of substantive obligations laid down in the 1975 Statute (paragraphs 180, 189 and 265 above). As Uruguay was not barred from proceeding with the construction and operation of the Orion (Botnia) mill after the expiration of the period for negotiation and as it breached no substantive obligation under the 1975 Statute, ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations.

276. As Uruguay has not breached substantive obligations arising under the 1975 Statute, the Court is likewise unable, for the same reasons, to uphold Argentina's claim in respect of compensation for alleged injuries suffered in various economic sectors, specifically tourism and agriculture.

277. Argentina further requests the Court to adjudge and declare that Uruguay must "provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty".

278. The Court fails to see any special circumstances in the present case requiring the ordering of a measure such as that sought by Argentina. As the Court has recently observed:

> "[W]hile the Court may order, as it has done in the past, a State responsible for internationally wrongful conduct to provide the injured State with assurances and guarantees of non-repetition, it will only do so if the circumstances so warrant, which it is for the Court to assess.
>
> As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed (see *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 63; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). There is thus no reason, except in special circumstances . . . to order [the provision of assurances and guarantees of non-repetition]." (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150.)

279. Uruguay, for its part, requests the Court to confirm its right "to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute". Argentina contends that this claim should be rejected, in particular because it is a counter-claim first put forward in Uruguay's Rejoinder and, as such, is inadmissible by virtue of Article 80 of the Rules of Court.

280. There is no need for the Court to decide the admissibility of this claim; it is sufficient to observe that Uruguay's claim is without any practical significance, since Argentina's claims in relation to breaches by Uruguay of its substantive obligations and to the dismantling of the Orion (Botnia) mill have been rejected.

* * *

281. Lastly, the Court points out that the 1975 Statute places the Parties under a duty to co-operate with each other, on the terms therein set out, to ensure the achievement of its object and purpose. This obligation to co-operate encompasses ongoing monitoring of an industrial facility, such as the Orion (Botnia) mill. In that regard the Court notes that the Parties have a long-standing and effective tradition of co-operation and co-ordination through CARU. By acting jointly through CARU, the Parties have established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment. They have also co-ordinated their actions through the joint

mechanism of CARU, in conformity with the provisions of the 1975 Statute, and found appropriate solutions to their differences within its framework without feeling the need to resort to the judicial settlement of disputes provided for in Article 60 of the Statute until the present case was brought before the Court.

* * *

282. For these reasons,

THE COURT,

(1) By thirteen votes to one,

*Finds* that the Eastern Republic of Uruguay has breached its procedural obligations under Articles 7 to 12 of the 1975 Statute of the River Uruguay and that the declaration by the Court of this breach constitutes appropriate satisfaction;

IN FAVOUR: *Vice-President* Tomka, *Acting President*; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge* ad hoc Vinuesa;

AGAINST: *Judge* ad hoc Torres Bernárdez;

(2) By eleven votes to three,

*Finds* that the Eastern Republic of Uruguay has not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay;

IN FAVOUR: *Vice-President* Tomka, *Acting President*; *Judges* Koroma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge* ad hoc Torres Bernárdez;

AGAINST: *Judges* Al-Khasawneh, Simma; *Judge* ad hoc Vinuesa;

(3) Unanimously,

*Rejects* all other submissions by the Parties.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twentieth day of April, two thousand and ten, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Argentine Republic and the Government of the Eastern Republic of Uruguay, respectively.

*(Signed)* Peter TOMKA,
Vice-President.

*(Signed)* Philippe COUVREUR,
Registrar.

Judges AL-KHASAWNEH and SIMMA append a joint dissenting opinion to the Judgment of the Court; Judge KEITH appends a separate opinion to the Judgment of the Court; Judge SKOTNIKOV appends a declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge YUSUF appends a declaration to the Judgment of the Court; Judge GREENWOOD appends a separate opinion to the Judgment of the Court; Judge *ad hoc* TORRES BERNÁRDEZ appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VINUESA appends a dissenting opinion to the Judgment of the Court.

*(Initialled)* P.T.

*(Initialled)* Ph.C.

# Annex 68

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
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# CERTAINES ACTIVITÉS MENÉES PAR LE NICARAGUA DANS LA RÉGION FRONTALIÈRE

(COSTA RICA c. NICARAGUA)

ET

# CONSTRUCTION D'UNE ROUTE AU COSTA RICA LE LONG DU FLEUVE SAN JUAN

(NICARAGUA c. COSTA RICA)

**ARRÊT DU 16 DÉCEMBRE 2015**

# 2015

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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(COSTA RICA *v.* NICARAGUA)

AND

# CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER

(NICARAGUA *v.* COSTA RICA)

**JUDGMENT OF 16 DECEMBER 2015**

Mode officiel de citation :

*Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* et *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015*, p. 665

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Official citation :

*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015*, p. 665

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ARRÊT

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*

*Alleged violations of international environmental law.*

*Procedural obligations — Obligation to conduct environmental impact assessment concerning activities that risk causing significant transboundary harm — Content of environmental impact assessment depends on specific circumstances — If assessment confirms risk of significant transboundary harm, State planning the activity is required, in conformity with due diligence obligation, to notify and consult with potentially affected State, where necessary to determine appropriate measures to prevent or mitigate risk — Nicaragua's dredging programme did not give rise to risk of significant transboundary harm — Nicaragua not required to carry out transboundary environmental impact assessment — No obligation under general international law to notify and consult since no risk of significant transboundary harm — No conventional obligation to notify and consult in present case — Court concludes that no procedural obligations breached by Nicaragua.*

*Substantive obligations — Specific obligations concerning San Juan River in 1858 Treaty as interpreted by Cleveland Award — Customary law obligation to exercise due diligence to avoid causing significant transboundary harm — No need to discuss relationship between these obligations because no harm established — No proof that dredging of Lower San Juan harmed Costa Rican wetland — Not shown that dredging programme caused significant reduction in flow of Colorado River — Any diversion of water due to dredging did not seriously impair navigation on Colorado River or otherwise cause harm to Costa Rica — Court concludes that no substantive obligations breached by Nicaragua.*

*

*Compliance with provisional measures — Nicaragua breached its obligations under Order of 8 March 2011 by excavating two* caños *and establishing a military presence in disputed territory in 2013 — Breach of obligations under Court's Order of 22 November 2013 not established.*

*

*Rights of navigation — Claim is admissible — Article VI of the 1858 Treaty — Court's Judgment in* Dispute regarding Navigational and Related Rights *— No need for the Court to interpret Nicaraguan Decree No. 079-2009 — Five instances of violations of navigational rights raised by Costa Rica — Two of the five instances examined — Court concludes Nicaragua breached Costa Rica's navigational rights pursuant to the 1858 Treaty — Not necessary for Court to consider the other incidents invoked by Costa Rica.*

*

*Reparation — Requests to order repeal of Decree No. 079-2009 and cessation of dredging activities cannot be granted — Declaration of breach provides adequate satisfaction for non-material injury suffered — No need for guarantees of non-repetition — Costa Rica entitled to compensation for material damage — Parties should engage in negotiation on amount of compensation — Failing agreement within 12 months, Court will determine amount at request of one of the Parties — Award of costs under Article 64 of the Statute not appropriate.*

* *

*Issues in the* Nicaragua *v.* Costa Rica *case.*

*Procedural obligations.*

*Alleged breach of obligation to carry out environmental impact assessment — Due diligence obligation requires State to ascertain whether a proposed activity entails risk of significant transboundary harm — Environmental impact assessment required when risk is present — No evidence that Costa Rica determined whether environmental impact assessment was necessary prior to constructing the road — Large scale of road project — Proximity to San Juan River on Nicaraguan territory — Risk of erosion due to deforestation — Possibility of natural disasters in area — Presence of two wetlands of international importance in area — Construction of road carried a risk of significant transboundary harm — No emergency justifying immediate construction of road — Court need not decide whether there is, in international law, an emergency exemption from obligation to carry out environmental impact assessment — Costa Rica under obligation to conduct environmental impact assessment — Obligation requires* ex ante *evaluation of risk of significant transboundary harm — Environmental Diagnostic Assessment and other studies by Costa Rica were* post hoc *assessments — Costa Rica has not complied with obligation to carry out environmental impact assessment.*

*Alleged breach of Article 14 of Convention on Biological Diversity — No violation established.*

*Alleged breach of obligation to notify and consult — General international law duty to notify and consult does not call for examination because Costa Rica has not carried out environmental impact assessment — 1858 Treaty did not impose obligation on Costa Rica to notify Nicaragua of construction of road — No procedural obligations arose under Ramsar Convention.*

*

*Substantive obligations.*

*Alleged breach of obligation to exercise due diligence to prevent causing significant transboundary harm — Modelling and estimates by experts suggest sediment due to construction of road amounts to at most 2 per cent of San Juan River's total load — Actual measurements provided to Court do not indicate that road significantly impacted sediment levels in river — Increase in sediment levels as a result of construction of road did not in and of itself cause significant transboundary harm — No significant harm to river's morphology, to navigation or to Nicaragua's dredging programme established — No proof of significant harm to river's ecosystem or water quality — Arguments concerning other alleged harm fail.*

*Alleged breaches of treaty obligations — No violation established.*

*Claim concerning violation of territorial integrity and sovereignty — No violation established.*

*

*Reparation — Declaration of wrongful conduct in respect of obligation to conduct environmental impact assessment is the appropriate measure of satisfaction — No grounds to order Costa Rica to cease continuing wrongful acts — Restitution and compensation not appropriate remedies in absence of significant harm — No need to appoint expert or committee to evaluate harm — Nicaragua's request to order Costa Rica not to undertake future development without an environmental impact assessment dismissed.*

## JUDGMENT

*Present:* *President* ABRAHAM; *Vice-President* YUSUF; *Judges* OWADA, TOMKA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, GEVORGIAN; *Judges* ad hoc GUILLAUME, DUGARD; *Registrar* COUVREUR.

In the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, and in the joined case (see paragraph 19 below) concerning *Construction of a Road in Costa Rica along the San Juan River*,

*between*

the Republic of Costa Rica,

represented by

H.E. Mr. Manuel A. González Sanz, Minister for Foreign Affairs and Worship of Costa Rica;

H.E. Mr. Edgar Ugalde Alvarez, Ambassador on Special Mission,

as Agent;

H.E. Mr. Sergio Ugalde, Ambassador of Costa Rica to the Kingdom of the Netherlands, member of the Permanent Court of Arbitration,

as Co-Agent, Counsel and Advocate;

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, member of the Institut de droit international,
Mr. Samuel Wordsworth, Q.C., member of the English Bar, member of the Paris Bar, Essex Court Chambers,
Mr. Arnoldo Brenes, Senior Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica, member of the Costa Rican Bar,
Ms Kate Parlett, Solicitor admitted in Queensland, Australia, and in England and Wales,
Ms Katherine Del Mar, member of the English Bar, 4 New Square, Lincoln's Inn,

as Counsel and Advocates;

Mr. Simon Olleson, member of the English Bar, 13 Old Square Chambers,

as Counsel;

Mr. Ricardo Otárola, Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica,
Ms Shara Duncan, Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica,
Mr. Gustavo Campos, Minister Counsellor and Consul General of Costa Rica to the Kingdom of the Netherlands,
Mr. Rafael Sáenz, Minister Counsellor at the Costa Rican Embassy in the Kingdom of the Netherlands,
Ms Ana Patricia Villalobos, Official at the Ministry of Foreign Affairs and Worship of Costa Rica,

as Assistant Counsel;

Ms Elisa Rivero, Administrative Assistant at the Ministry of Foreign Affairs and Worship of Costa Rica,

as Assistant,

*and*

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands,

as Agent and Counsel;

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, former member and former Chair of the International Law Commission,
Mr. Alain Pellet, Professor at the University Paris Ouest, Nanterre-La Défense, former member and former Chair of the International Law Commission, member of the Institut de droit international,
Mr. Paul S. Reichler, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court and the District of Columbia,
Mr. Andrew B. Loewenstein, Attorney-at-Law, Foley Hoag LLP, member of the Bar of the Commonwealth of Massachusetts,

as Counsel and Advocates;

Mr. César Vega Masís, Deputy Minister for Foreign Affairs, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs of Nicaragua,
Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,
Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

as Counsel;

Mr. Edgardo Sobenes Obregon, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,
Ms Claudia Loza Obregon, First Secretary, Embassy of Nicaragua in the Kingdom of the Netherlands,
Mr. Benjamin Samson, Researcher, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,
Ms Cicely O. Parseghian, Attorney-at-Law, Foley Hoag LLP, member of the Bar of the Commonwealth of Massachusetts,
Mr. Benjamin K. Guthrie, Attorney-at-Law, Foley Hoag LLP, member of the Bar of the Commonwealth of Massachusetts,
Mr. Ofilio J. Mayorga, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the Republic of Nicaragua and New York,

as Assistant Counsel;

Mr. Danny K. Hagans, Principal Earth Scientist at Pacific Watershed Associates, Inc.,
Mr. Robin Cleverly, Geographical and Technical Consultant,
Ms Blanca P. Ríos Touma, Ph.D., Assistant Professor at Universidad Tecnológica Indoamérica in Quito, Ecuador,
Mr. Scott P. Walls, Master of Landscape Architecture — Environmental Planning, Sole Proprietor and Fluvial Geomorphologist at Scott Walls Consulting, Ecohydrologist at cbec ecoengineering, Inc., and Chief Financial Officer and Project Manager at International Watershed Partners,

Ms Victoria Leader, Geographical and Technical Consultant,

as Scientific Advisers and Experts,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. By an Application filed in the Registry of the Court on 18 November 2010, the Republic of Costa Rica (hereinafter "Costa Rica") instituted proceedings against the Republic of Nicaragua (hereinafter "Nicaragua") in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* (hereinafter referred to as the "*Costa Rica* v. *Nicaragua* case"). In that Application, Costa Rica alleges in particular that Nicaragua invaded and occupied Costa Rican territory, and that it dug a channel thereon; it further reproaches Nicaragua with conducting works (notably dredging of the San Juan River) in violation of its international obligations.

2. In its Application, Costa Rica invokes as a basis of the jurisdiction of the Court Article XXXI of the American Treaty on Pacific Settlement adopted at Bogotá on 30 April 1948 (hereinafter the "Pact of Bogotá"). In addition, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 (and amended on 23 October 2001) under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court.

3. On 18 November 2010, having filed its Application, Costa Rica also submitted a request for the indication of provisional measures, pursuant to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

4. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the Application forthwith to the Government of Nicaragua; and, under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

5. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed at Ramsar on 2 February 1971 (hereinafter the "Ramsar Convention"), the notification provided for in Article 63, paragraph 1, of the Statute.

6. Since the Court included no judge of the nationality of the Parties upon the Bench, each of them, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, chose a judge *ad hoc* in the case. Costa Rica chose Mr. John Dugard and Nicaragua chose Mr. Gilbert Guillaume.

7. By an Order of 8 March 2011 (hereinafter the "Order of 8 March 2011"), the Court, having heard the Parties, indicated provisional measures addressed to both Parties. The Court also directed each Party to inform it about compliance with the provisional measures. By various communications, the Parties each notified the Court of the measures they had taken with reference to the aforementioned Order and made observations on the compliance by the other Party with the said Order.

8. By an Order of 5 April 2011, the Court fixed 5 December 2011 and 6 August 2012 as the respective time-limits for the filing in the case of a Memo-

rial by Costa Rica and a Counter-Memorial by Nicaragua. The Memorial and the Counter-Memorial were filed within the time-limits thus prescribed.

9. By an Application filed in the Registry on 22 December 2011, Nicaragua instituted proceedings against Costa Rica in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* (hereinafter referred to as the "*Nicaragua* v. *Costa Rica* case"). In that Application, Nicaragua stated that the case related to "violations of Nicaraguan sovereignty and major environmental damages on its territory", contending, in particular, that Costa Rica was carrying out major road construction works in the border area between the two countries along the San Juan River, in violation of several international obligations and with grave environmental consequences.

10. In its Application, Nicaragua invokes Article XXXI of the Pact of Bogotá as a basis for the jurisdiction of the Court. In addition, Nicaragua seeks to found the jurisdiction of the Court on the aforementioned declarations accepting the jurisdiction of the Court (see paragraph 2 above).

11. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the Application forthwith to the Government of Costa Rica; and, under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

12. Pursuant to the instructions of the Court under Article 43 of its Rules, the Registrar addressed the notifications provided for in Article 63, paragraph 1, of the Statute, to States parties to the Ramsar Convention, to the 1992 Convention on Biological Diversity and to the 1992 Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America.

13. Since the Court included no judge of the nationality of the Parties upon the Bench, each of them, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, chose a judge *ad hoc* in the case. Nicaragua chose Mr. Gilbert Guillaume and Costa Rica chose Mr. Bruno Simma.

14. By an Order of 23 January 2012, the Court fixed 19 December 2012 and 19 December 2013 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Costa Rica. The Memorial and the Counter-Memorial were filed within the time-limits thus prescribed.

15. In the Counter-Memorial it filed in the *Costa Rica* v. *Nicaragua* case on 6 August 2012, Nicaragua submitted four counter-claims. In its first counter-claim, it requested the Court to declare that "Costa Rica bears responsibility to Nicaragua" for "the impairment and possible destruction of navigation on the San Juan River caused by the construction of [the] road". In its second counter-claim, it asked the Court to declare that it "has become the sole sovereign over the area formerly occupied by the Bay of San Juan del Norte". In its third counter-claim, it requested the Court to find that "Nicaragua has a right to free navigation on the Colorado . . . until the conditions of navigability existing at the time the 1858 Treaty [of Limits] was concluded are re-established". Finally, in its fourth counter-claim, Nicaragua alleged that Costa Rica violated the provisional measures indicated by the Court in its Order of 8 March 2011.

16. At a meeting held by the President with the representatives of the Parties on 19 September 2012, the Parties agreed not to request the Court's authorization to file a Reply and a Rejoinder in the *Costa Rica* v. *Nicaragua* case. At the

same meeting, the Co-Agent of Costa Rica raised certain objections to the admissibility of the first three counter-claims contained in the Counter-Memorial of Nicaragua. He confirmed these objections in a letter of the same day.

By letters dated 28 September 2012, the Registrar informed the Parties that the Court had fixed 30 November 2012 and 30 January 2013 as the respective time-limits for the filing of written observations by Costa Rica and Nicaragua on the admissibility of the latter's first three counter-claims. Both Parties filed their observations within the time-limits thus prescribed.

17. By letters dated 19 December 2012, which accompanied its Memorial in the *Nicaragua* v. *Costa Rica* case, Nicaragua requested the Court to "decide *proprio motu* whether the circumstances of the case require[d] the indication of provisional measures" and to consider whether there was a need to join the proceedings in the *Nicaragua* v. *Costa Rica* and *Costa Rica* v. *Nicaragua* cases.

By a letter dated 15 January 2013, the Registrar, acting on the instructions of the President, asked Costa Rica to inform the Court, by 18 February 2013 at the latest, of its views on both questions. Costa Rica communicated its views within the time-limit thus prescribed.

18. By letters dated 11 March 2013, the Registrar informed the Parties that the Court was of the view that the circumstances of the *Nicaragua* v. *Costa Rica* case, as they presented themselves to it at that time, were not such as to require the exercise of its power under Article 75 of the Rules of Court to indicate provisional measures *proprio motu*.

19. By two separate Orders dated 17 April 2013, the Court joined the proceedings in the *Costa Rica* v. *Nicaragua* and *Nicaragua* v. *Costa Rica* cases.

20. By a communication of the same date, Mr. Simma, who had been chosen by Costa Rica to sit as judge *ad hoc* in the *Nicaragua* v. *Costa Rica* case, informed the Court of his decision to resign from his functions, following the above-mentioned joinder of proceedings. Thereafter, Judges Guillaume and Dugard sat as judges *ad hoc* in the joined cases (see paragraphs 6 and 13 above).

21. By an Order of 18 April 2013, the Court ruled on the admissibility of Nicaragua's counter-claims in the *Costa Rica* v. *Nicaragua* case. It concluded that there was no need for it to adjudicate on the admissibility of Nicaragua's first counter-claim as such. It found the second and third counter-claims inadmissible as such. The Court also found that there was no need for it to entertain the fourth counter-claim as such, and that the Parties might take up any question relating to the implementation of the provisional measures indicated by the Court in its Order of 8 March 2011 in the further course of the proceedings.

22. On 23 May 2013, Costa Rica, with reference to Article 41 of the Statute and Article 76 of the Rules of Court, filed with the Registry a request for the modification of the Order indicating provisional measures made on 8 March 2011. In its written observations thereon, dated 14 June 2013, Nicaragua asked the Court to reject Costa Rica's request, while in its turn requesting the Court to otherwise modify the Order of 8 March 2011 on the basis of Article 76 of the Rules of Court. Costa Rica communicated to the Court its written observations on Nicaragua's request on 20 June 2013.

23. By an Order of 16 July 2013, the Court found that "the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011". The Court however reaffirmed the said provisional measures.

24. On 24 September 2013, Costa Rica, with reference to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, filed with the Registry a request for the indication of new provisional measures in the *Costa Rica* v. *Nicaragua* case.

25. On 11 October 2013, Nicaragua filed with the Registry a request for the indication of provisional measures in the *Nicaragua* v. *Costa Rica* case. Nicaragua suggested that its request be heard concurrently with Costa Rica's request for the indication of new provisional measures in the *Costa Rica* v. *Nicaragua* case, at a single set of oral proceedings. By letter of 14 October 2013, Costa Rica objected to Nicaragua's suggestion. By letters dated 14 October 2013, the Registrar informed the Parties that the Court had decided that it would consider the two requests separately.

26. By an Order of 22 November 2013 rendered in the *Costa Rica* v. *Nicaragua* case, the Court, having heard the Parties, reaffirmed the provisional measures indicated in its Order of 8 March 2011 and indicated new provisional measures addressed to both Parties. The Court also directed each Party to inform it, at three-month intervals, as to compliance with the provisional measures. By various communications, each of the Parties notified the Court of the measures they had taken with reference to the aforementioned Order and made observations on the compliance by the other Party with the said Order.

27. By an Order of 13 December 2013 rendered in the *Nicaragua* v. *Costa Rica* case, the Court, after hearing the Parties, found "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".

28. At a meeting held by the President with the representatives of the Parties on 22 January 2014, Nicaragua requested the Court to authorize a second round of written pleadings in the *Nicaragua* v. *Costa Rica* case, while Costa Rica objected. By an Order of 3 February 2014, the Court authorized the submission of a Reply by Nicaragua and a Rejoinder by Costa Rica, and fixed 4 August 2014 and 2 February 2015 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Costa Rica were duly filed within the time-limits so prescribed.

29. By letters dated 2 April 2014, the Registrar informed the Parties that the Court, in accordance with Article 54, paragraph 1, of the Rules of Court, had fixed 3 March 2015 as the date for the opening of the oral proceedings in the joined cases.

30. In a letter dated 4 August 2014, which accompanied its Reply in the *Nicaragua* v. *Costa Rica* case, Nicaragua suggested that the Court appoint "a neutral expert on the basis of Articles 66 and 67 of the Rules". By letter of 14 August 2014, Costa Rica indicated that it was of the view "that there [was] no basis for the Court to exercise its power to appoint an expert as requested by Nicaragua".

31. By a letter dated 15 October 2014, Nicaragua requested that the opening of the oral proceedings in the joined cases be postponed until May 2015. On the basis that Costa Rica had stated, in its letter of 14 August 2014 referred to in the previous paragraph, that the evidence submitted by the Parties "w[ould] be sup-

plemented and completed" in Costa Rica's Rejoinder in the *Nicaragua* v. *Costa Rica* case, Nicaragua expressed the view that it would be "inadequate and inequitable for [it] to have less than one month to analyze and respond to Costa Rica's new scientific information and expert reports". By letter of 20 October 2014, Costa Rica opposed this request, arguing in particular that any delay in the Court hearing and adjudging the *Costa Rica* v. *Nicaragua* case would prejudice Costa Rica, that Nicaragua had sufficient time to analyse the Rejoinder and formulate its response before the commencement of the hearings, and that Nicaragua's request was belated. By letters dated 17 November 2014, the Registrar informed the Parties that the Court had decided to postpone the date for the opening of the oral proceedings in the joined cases until 14 April 2015.

32. By letters dated 5 December 2014, referring to the communications mentioned in paragraph 30 above, the Registrar informed the Parties that the Court would find it useful if, during the course of the hearings in the two cases, they could call the experts whose reports were annexed to the written pleadings, in particular Mr. Thorne and Mr. Kondolf. The Registrar also indicated that the Court would be grateful if, by 15 January 2015 at the latest, the Parties would make suggestions regarding the modalities of the examination of those experts. Such suggestions were received from Nicaragua within the time-limit indicated. By a letter dated 20 January 2015, Costa Rica commented on the suggestions of Nicaragua.

33. In a letter dated 2 February 2015, which accompanied its Rejoinder in the *Nicaragua* v. *Costa Rica* case, Costa Rica raised the possibility of a site visit to the "location of the Road". By a letter dated 10 February 2015, Nicaragua expressed its willingness to assist to the fullest possible extent in the organization "of such a visit at the location of the road and the San Juan de Nicaragua River". It also reiterated its proposal that the Court appoint an expert (see paragraph 30 above) to assess the construction of the road, and suggested that the expert be included in the Court's delegation for any site visit. By a letter dated 11 February 2015, Costa Rica commented on Nicaragua's letter of 10 February 2015, stating in particular that the appointment of an expert by the Court was unnecessary. By letters dated 25 February 2015, the Registrar informed the Parties that the Court had decided not to carry out a site visit.

34. By letters of the Registrar dated 4 February 2015, the Parties were informed that they should indicate to the Court, by 2 March 2015 at the latest, the names of the experts they intended to call, and communicate the other information required by Article 57 of the Rules of Court. The Parties were also instructed to provide the Court, by 16 March 2015 at the latest, with written statements of these experts (limited to a summary of the expert's own reports or to observations on other expert reports in the case file), and were informed that these would replace the examination-in-chief. In addition, the Court invited the Parties to come to an agreement as to the allocation of time for the cross-examination and re-examination of experts by 16 March 2015 at the latest.

By the same letters, the Registrar also notified the Parties of the following details regarding the procedure for examining the experts. After having made the solemn declaration required under Article 64 of the Rules of Court, the expert would be asked by the Party calling him to endorse his written statement. The other Party would then have an opportunity for cross-examination on the contents of the expert's written statement or his earlier reports. Re-examination would thereafter be limited to subjects raised in cross-examination. Finally, the judges would have an opportunity to put questions to the expert.

35. By letters dated 2 March 2015, the Parties indicated the names of the experts they wished to call at the hearings, and provided the other information concerning them required by Article 57 of the Rules of Court (see paragraph 34 above).

36. Under cover of a letter dated 3 March 2015, Costa Rica communicated to the Court a video which it wished to be included in the case file and presented at the hearings. By a letter dated 13 March 2015, Nicaragua stated that it had no objection to Costa Rica's request and presented certain comments on the utility of the video; it also announced that it would produce photographs in response. By letters dated 23 March 2015, the Registrar informed the Parties that the Court had decided to grant Costa Rica's request.

37. By letters dated 16 March 2015, the Parties communicated the written statements of the experts they intended to call at the hearings. Costa Rica also asked the Court to extend to 20 March 2015 the time-limit within which the Parties might transmit an agreement or their respective positions regarding the allocation of time for the cross-examination and re-examination of those experts, which was granted by the Court. However, since the Parties were unable to agree fully on this matter within the time-limit thus extended, the Registrar informed them, by letters of 23 March 2015, of the Court's decision in respect of the maximum time that could be allocated for the examinations. In this connection, the Parties were invited to indicate the order in which they wished to present their experts, and the precise amount of time they wished to reserve for the cross-examination of each of the experts called by the other Party, which they did by letters dated 30 March and 2 April 2015. By letters dated 10 April 2015, the Registrar communicated to the Parties the detailed schedule for the examination of the experts, as adopted by the Court.

38. By letters of 23 March 2015, the Registrar informed the Parties that, in relation to the *Nicaragua* v. *Costa Rica* case, the Court wished each of them to produce, by 10 April 2015 at the latest, a map showing the San Juan River and the road constructed by Costa Rica, and indicating the precise locations discussed in the key studies referred to in the written statements provided to the Court on 16 March 2015 (see paragraph 37 above). Under cover of letters dated 10 April 2015, Nicaragua and Costa Rica each provided the Court with printed and electronic versions of the maps they had prepared.

39. By a letter dated 23 March 2015, Nicaragua, as announced (see paragraph 36 above), communicated to the Court photographs that it wished to be included in the case file. By a letter dated 31 March 2015, Costa Rica informed the Court that it had no objection to Nicaragua's request. By letters dated 8 April 2015, the Registrar informed the Parties that the Court had decided to grant Nicaragua's request.

40. By a letter dated 13 April 2015, Costa Rica requested that Nicaragua file a copy of the report of Ramsar Advisory Mission No. 72 in relation to Nicaragua's *Refugio de Vida Silvestre Río San Juan* (San Juan River Wildlife Refuge). By a letter dated 16 April 2015, Nicaragua indicated that it was in possession only of a draft report, in Spanish, which it enclosed with its letter. Subsequently, under cover of a letter dated 24 April 2015, Nicaragua transmitted to the Court the comments it had submitted on 30 November 2011 on the draft report of the Ramsar Advisory Mission (original Spanish version and English translation of certain extracts), as well as the reply from the Ramsar Secretariat dated 19 December 2011 (original Spanish version only). The Parties later provided

the Court with English translations of the documents submitted in Spanish by Nicaragua.

41. By a letter dated 21 April 2015, the Registrar informed the Parties that the Court had decided to request, under Article 62 of its Rules, that Nicaragua produce the full text of two documents, excerpts of which were annexed to its Counter-Memorial in the *Costa Rica* v. *Nicaragua* case. By a letter dated 24 April 2015, Nicaragua communicated to the Court the full text of the original Spanish versions of the documents requested. Certified English translations were transmitted by Nicaragua under cover of a letter dated 15 May 2015.

42. By letter of 28 April 2015, Costa Rica asked for photographs to be included in the *Nicaragua* v. *Costa Rica* case file. In a letter dated 29 April 2015, Nicaragua stated that it objected to this request, which it considered had been made too late. By letters dated 29 April 2015, the Registrar informed the Parties that the Court had decided not to grant Costa Rica's request.

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43. In accordance with Article 53, paragraph 2, of the Rules of Court, after ascertaining the views of the Parties, the Court decided that copies of the pleadings and documents annexed would be made accessible to the public at the opening of the oral proceedings.

44. Public hearings were held in the joined cases from 14 April 2015 to 1 May 2015. Between 14 and 17 April 2015 and 28 and 29 April 2015, the hearings focused on the *Costa Rica* v. *Nicaragua* case, and between 20 and 24 April 2015 and 30 April and 1 May 2015 on the *Nicaragua* v. *Costa Rica* case. The Court heard the oral arguments and replies of:

In the *Costa Rica* v. *Nicaragua* case,

*For Costa Rica:* H.E. Mr. Edgar Ugalde Alvarez,
H.E. Mr. Sergio Ugalde,
Mr. Arnoldo Brenes,
Mr. Samuel Wordsworth,
Mr. Marcelo Kohen,
Ms Kate Parlett,
Ms Katherine Del Mar.

*For Nicaragua:* H.E. Mr. Carlos José Argüello Gómez,
Mr. Alain Pellet,
Mr. Paul S. Reichler,
Mr. Andrew B. Loewenstein,
Mr. Stephen C. McCaffrey.

In the *Nicaragua* v. *Costa Rica* case,

*For Nicaragua:* H.E. Mr. Carlos José Argüello Gómez,
Mr. Paul S. Reichler,
Mr. Andrew B. Loewenstein,
Mr. Stephen C. McCaffrey,
Mr. Alain Pellet.

*For Costa Rica:* H.E. Mr. Edgar Ugalde Alvarez,
Mr. Arnoldo Brenes,

Ms Katherine Del Mar,
Mr. Marcelo Kohen,
Mr. Samuel Wordsworth,
Ms Kate Parlett,
H.E. Mr. Sergio Ugalde.

45. In the *Costa Rica* v. *Nicaragua* case, Costa Rica called Mr. Thorne as an expert during the public hearing of 14 April 2015 (afternoon). Later, during the public hearing of 17 April 2015 (morning), Nicaragua called the following experts: Mr. van Rhee and Mr. Kondolf. In the *Nicaragua* v. *Costa Rica* case, Nicaragua called the following experts during the public hearings of 20 April 2015 (morning and afternoon): Mr. Weaver, Mr. Kondolf, Mr. Andrews and Mr. Sheate. Costa Rica called Mr. Cowx and Mr. Thorne as experts during the public hearing of 24 April 2015 (morning). A number of judges put questions to the experts, to which replies were given orally.

46. At the hearings, Members of the Court also put questions to the Parties, to which replies were given orally, in accordance with Article 61, paragraph 4, of the Rules of Court.

* *

47. In its Application filed in the *Costa Rica* v. *Nicaragua* case, Costa Rica made the following claims:

> "For these reasons, and reserving the right to supplement, amplify or amend the present Application, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River.
>
> In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has breached:
>
> *(a)* the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;
> *(b)* the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;
> *(c)* the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;
> *(d)* the obligation not to damage Costa Rican territory;
> *(e)* the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;
> *(f)* the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;
> *(g)* the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;

*(h)* the obligations under the Ramsar Convention on Wetlands;

*(i)* the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions that would infringe Costa Rica's territorial integrity under international law."

Costa Rica also requested the Court to "determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to . . . above".

48. In the course of the written proceedings in the *Costa Rica* v. *Nicaragua* case, the following submissions were presented by the Parties:

*On behalf of the Government of Costa Rica,*

in the Memorial:

"For these reasons, and reserving the right to supplement, amplify or amend the present submissions:

1. Costa Rica requests the Court to adjudge and declare that, by its conduct, Nicaragua has breached:

*(a)* the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards;

*(b)* the prohibition of use of force under Article 2 (4) of the United Nations Charter and Articles 1, 19, 21 and 29 of the Charter of the Organization of American States;

*(c)* the obligation of Nicaragua under Article IX of the 1858 Treaty of Limits not to use the San Juan to carry out hostile acts;

*(d)* the rights of Costa Rican nationals to free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the Cleveland Award and the Court's Judgment of 13 July 2009;

*(e)* the obligation not to dredge, divert or alter the course of the San Juan, or conduct any other works on the San Juan, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights in accordance with the Cleveland Award;

*(f)* the obligation to consult with Costa Rica about implementing obligations arising from the Ramsar Convention, in particular the obligation to co-ordinate future policies and regulations concerning the conservation of wetlands and their flora and fauna under Article 5 (1) of the Ramsar Convention; and

*(g)* the Court's Order for Provisional Measures of 8 March 2011;

and further to adjudge and declare that Nicaragua is:

*(h)* obliged to cease such breaches and to make reparation therefore.

2. The Court is requested to order, in consequence, that Nicaragua:

*(a)* withdraw any presence, including all troops and other personnel (whether civilian, police or security, or volunteers) from that part of Costa Rica known as Isla Portillos, on the right bank of the San Juan, and prevent any return there of any such persons;

*(b)* cease all dredging activities on the San Juan in the area between the point of bifurcation of the Colorado River and the San Juan and the outlet of the San Juan in the Caribbean Sea ('the area'), pending:

(i) an adequate environmental impact assessment;

(ii) notification to Costa Rica of further dredging plans for the area, not less than three months prior to the implementation of such plans;

(iii) due consideration of any comments of Costa Rica made within one month of notification;

*(c)* not engage in any dredging operations or other works in the area if and to the extent that these may cause significant harm to Costa Rican territory (including the Colorado River) or its environment, or to impair Costa Rica's rights under the Cleveland Award.

3. The Court is also requested to determine, in a separate phase, the reparation and satisfaction to be made by Nicaragua."

*On behalf of the Government of Nicaragua,*

in the Counter-Memorial:

"For the reasons given herein, the Republic of Nicaragua requests the Court to:

(1) *dismiss and reject* the requests and submissions of Costa Rica in her pleadings;

(2) *adjudge and declare* that:

(i) Nicaragua enjoys full sovereignty over the *caño* joining Harbor Head Lagoon with the San Juan River proper, the right bank of which constitutes the land boundary as established by the 1858 Treaty as interpreted by the Cleveland and Alexander Awards;

(ii) Costa Rica is under an obligation to respect the sovereignty and territorial integrity of Nicaragua, within the boundaries delimited by the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards;

(iii) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River; and,

(iv) in so doing, Nicaragua is entitled as it deems suitable to re-establish the situation that existed at the time the 1858 Treaty was concluded;
(v) the only rights enjoyed by Costa Rica on the San Juan de Nicaragua River are those defined by said Treaty as interpreted by the Cleveland and Alexander Awards."

49. At the oral proceedings in the joined cases, the following submissions were presented by the Parties in the *Costa Rica* v. *Nicaragua* case:

*On behalf of the Government of Costa Rica,*

at the hearing of 28 April 2015:

"For the reasons set out in the written and oral pleadings, the Republic of Costa Rica requests the Court to:

(1) reject all Nicaraguan claims;
(2) adjudge and declare that:

*(a)* sovereignty over the 'disputed territory', as defined by the Court in its Orders of 8 March 2011 and 22 November 2013, belongs to the Republic of Costa Rica;
*(b)* by occupying and claiming Costa Rican territory, Nicaragua has breached:

(i) the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards;
(ii) the prohibition of the threat or use of force under Article 2 (4) of the Charter of the United Nations and Article 22 of the Charter of the Organization of American States;
(iii) the prohibition to make the territory of other States the object, even temporarily, of military occupation, contrary to Article 21 of the Charter of the Organization of American States; and
(iv) the obligation of Nicaragua under Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;

*(c)* by its further conduct, Nicaragua has breached:

(i) the obligation to respect Costa Rica's territory and environment, including its wetland of international importance under the Ramsar Convention 'Humedal Caribe Noreste', on Costa Rican territory;
(ii) Costa Rica's perpetual rights of free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the 1888 Cleveland Award and the Court's Judgment of 13 July 2009;
(iii) the obligation to inform and consult with Costa Rica about any dredging, diversion or alteration of the course of the San Juan River, or any other works on the San Juan River that may cause damage to Costa Rican territory (including the Colorado River), its environment, or Costa Rican rights, in accordance with the 1888 Cleveland Award and relevant treaty and customary law;
(iv) the obligation to carry out an appropriate transboundary environ-

mental impact assessment, which takes account of all potential significant adverse impacts on Costa Rican territory;

(v) the obligation not to dredge, divert or alter the course of the San Juan River, or conduct any other works on the San Juan River, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights under the 1888 Cleveland Award;

(vi) the obligations arising from the Orders of the Court indicating provisional measures of 8 March 2011 and 22 November 2013;

(vii) the obligation to consult with Costa Rica on the implementation of obligations arising from the Ramsar Convention, in particular the obligation to co-ordinate future policies and regulations concerning the conservation of wetlands and their flora and fauna under Article 5 (1) of the Ramsar Convention; and

(viii) the agreement between the Parties, established in the exchange of notes dated 19 and 22 September 2014, concerning navigation on the San Juan River by Costa Rica to close the eastern *caño* constructed by Nicaragua in 2013;

*(d)* Nicaragua may not engage in any dredging operations or other works if and to the extent that these may cause damage to Costa Rican territory (including the Colorado River) or its environment, or which may impair Costa Rica's rights under the 1888 Cleveland Award, including its right not to have its territory occupied without its express consent;

(3) to order, in consequence, that Nicaragua must:

*(a)* repeal, by means of its own choosing, those provisions of the Decree No. 079-2009 and the Regulatory Norms annexed thereto of 1 October 2009 which are contrary to Costa Rica's right of free navigation under Article VI of the 1858 Treaty of Limits, the 1888 Cleveland Award, and the Court's Judgment of 13 July 2009;

*(b)* cease all dredging activities on the San Juan River in the vicinity of Delta Costa Rica and in the lower San Juan River, pending:

(i) an appropriate transboundary environmental impact assessment, which takes account of all potential significant adverse impacts on Costa Rican territory, carried out by Nicaragua and provided to Costa Rica;

(ii) formal written notification to Costa Rica of further dredging plans in the vicinity of Delta Costa Rica and in the lower San Juan River, not less than three months prior to the implementation of any such plans; and

(iii) due consideration of any comments made by Costa Rica upon receipt of said notification;

*(c)* make reparation in the form of compensation for the material damage caused to Costa Rica, including but not limited to:

(i) damage arising from the construction of artificial *caños* and destruction of trees and vegetation on the 'disputed territory';

(ii) the cost of the remediation measures carried out by Costa Rica in relation to those damages, including but not limited to those taken to close the eastern *caño* constructed by Nicaragua in 2013, pursuant to paragraph 59 (2) (E) of the Court's Order on provisional measures of 22 November 2013;

the amount of such compensation to be determined in a separate phase of these proceedings;

*(d)* provide satisfaction so to achieve full reparation of the injuries caused to Costa Rica in a manner to be determined by the Court;

*(e)* provide appropriate assurances and guarantees of non-repetition of Nicaragua's unlawful conduct, in such a form as the Court may order; and

*(f)* pay all of the costs and expenses incurred by Costa Rica in requesting and obtaining the Order on provisional measures of 22 November 2013, including, but not limited to, the fees and expenses of Costa Rica's counsel and experts, with interest, on a full indemnity basis."

*On behalf of the Government of Nicaragua,*

at the hearing of Wednesday 29 April 2015:

"In accordance with Article 60 of the Rules and the reasons given during the written and oral phase of the pleadings the Republic of Nicaragua respectfully requests the Court to:

*(a)* dismiss and reject the requests and submissions of the Republic of Costa Rica;

*(b)* adjudge and declare that:

(i) Nicaragua enjoys full sovereignty over the *caño* joining Harbor Head Lagoon with the San Juan River proper, the right bank of which constitutes the land boundary as established by the 1858 Treaty as interpreted by the Cleveland and Alexander Awards;

(ii) Costa Rica is under an obligation to respect the sovereignty and territorial integrity of Nicaragua, within the boundaries delimited by the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards;

(iii) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River;

(iv) the only rights enjoyed by Costa Rica on the San Juan de Nicaragua River are those defined by said Treaty as interpreted by the Cleveland and Alexander Awards."

*

50. In its Application filed in the *Nicaragua* v. *Costa Rica* case, Nicaragua made the following claims:

"On the basis of the foregoing statement of facts and law, Nicaragua, while reserving the right to supplement, amend or modify this Application, requests the Court to adjudge and declare that Costa Rica has breached:

*(a)* its obligation not to violate Nicaragua's territorial integrity as delimited by the 1858 Treaty of Limits, the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899 and 10 March 1900;

*(b)* its obligation not to damage Nicaraguan territory;

*(c)* its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Areas [Priority Wilderness Areas] in Central America.

Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

*(a)* restore the situation to the *status quo ante*;
*(b)* pay for all damages caused including the costs added to the dredging of the San Juan River;
*(c)* not undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction.

Finally, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

*(a)* cease all the constructions underway that affect or may affect the rights of Nicaragua;
*(b)* produce and present to Nicaragua an adequate environmental impact assessment with all the details of the works."

51. In the course of the written proceedings in the *Nicaragua* v. *Costa Rica* case, the following submissions were presented by the Parties:

*On behalf of the Government of Nicaragua,*

in the Memorial:

"1. For the reasons given herein, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, Costa Rica has breached:

(i) its obligation not to violate the integrity of Nicaragua's territory as delimited by the 1858 Treaty of Limits, the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899 and 10 March 1900;
(ii) its obligation not to damage Nicaraguan territory;

(iii) its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Sites [Priority Wilderness Areas] in Central America.

2. Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

(i) cease all the constructions underway that affects or may affect the rights of Nicaragua;
(ii) restore the situation to the *status quo ante*;
(iii) compensate for all damages caused including the costs added to the dredging of the San Juan de Nicaragua River, with the amount of the compensation to be determined in a subsequent phase of the case;

(iv) not to continue or undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction.

3. The Republic of Nicaragua further requests the Court to adjudge and declare that:

(i) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River to remove sedimentation and other barriers to navigation; and,
(ii) in so doing, Nicaragua is entitled to re-establish the conditions of navigation that existed at the time the 1858 Treaty was concluded;
(iii) that the violations of the 1858 Treaty and under many rules of international law by Costa Rica, allow Nicaragua to take appropriate countermeasures including the suspension of Costa Rica's right of navigation in the San Juan de Nicaragua River.

4. Finally, Nicaragua requests the Court to order Costa Rica to immediately take the emergency measures recommended by its own experts and further detailed in the Kondolf Report, in order to alleviate or mitigate the continuing damage being caused to the San Juan de Nicaragua River and the surrounding environment.

If Costa Rica does not of itself proceed to take these measures and the Court considers it cannot order that it be done without the full procedure contemplated in Articles 73 *et seq.* of the Rules of Court, the Republic of Nicaragua reserves its right to request provisional measures on the basis of Article 41 of the Statute and the pertinent procedures of Article 73 and ff. of the Rules of Court and to amend and modify these submissions in the light of the further pleadings in this case."

in the Reply:

"For the reasons given in its Memorial and in this Reply, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, the Republic of Costa Rica has breached:

(i) its obligation not to violate the integrity of Nicaragua's territory as delimited by the 1858 Treaty of Limits as interpreted by the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899, and 10 March 1900;

(ii) its obligation not to damage Nicaraguan territory;

(iii) its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Sites [Priority Wilderness Areas] in Central America.

2. Nicaragua also requests the Court to adjudge and declare that Costa Rica must:

(i) cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua;

(ii) inasmuch as possible, restore the situation to the *status quo ante*, in full respect of Nicaragua's sovereignty over the San Juan de Nicaragua River, including by taking the emergency measures necessary to alleviate or mitigate the continuing harm being caused to the river and the surrounding environment;

(iii) compensate for all damages caused insofar as they are not made good by restitution, including the costs added to the dredging of the San Juan de Nicaragua River, with the amount of the compensation to be determined in a subsequent phase of the case.

3. Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

(i) not undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction;

(ii) refrain from using Route 1856 to transport hazardous material as long as it has not given the guarantees that the road complies with the best construction practices and the highest regional and international standards of security for road traffic in similar situations.

4. The Republic of Nicaragua further requests the Court to adjudge and declare that Nicaragua is entitled:

(i) in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San

Juan River and that these works include the dredging of the San Juan de Nicaragua River to remove sedimentation and other barriers to navigation; and,

(ii) in so doing, to re-establish the conditions of navigation foreseen in the 1858 Treaty.

5. Finally, if the Court has not already appointed a neutral expert at the time when it adopts its Judgment, Nicaragua requests the Court to appoint such an expert who could advise the Parties in the implementation of the Judgment."

*On behalf of the Government of Costa Rica,*

in the Counter-Memorial:

"For these reasons, and reserving the right to supplement, amplify or amend the present submissions, Costa Rica requests the Court to dismiss all of Nicaragua's claims in this proceeding."

in the Rejoinder:

"For these reasons, and reserving the right to supplement, amplify or amend the present submissions, Costa Rica requests the Court to dismiss all of Nicaragua's claims in this proceeding."

52. At the oral proceedings in the joined cases, the following submissions were presented by the Parties in the *Nicaragua* v. *Costa Rica* case:

*On behalf of the Government of Nicaragua,*

at the hearing of 30 April 2015:

"1. In accordance with Article 60 of the Rules and the reasons given during the written and oral phase of the pleadings the Republic of Nicaragua respectfully requests the Court to adjudge and declare that, by its conduct, the Republic of Costa Rica has breached:

(i) its obligation not to violate the integrity of Nicaragua's territory as delimited by the 1858 Treaty of Limits as interpreted by the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899, and 10 March 1900;

(ii) its obligation not to damage Nicaraguan territory;

(iii) its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Sites in Central America.

2. Nicaragua also requests the Court to adjudge and declare that Costa Rica must:

(i) cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua;

(ii) inasmuch as possible, restore the situation to the *status quo ante*, in full respect of Nicaragua's sovereignty over the San Juan de Nicaragua River, including by taking the emergency measures necessary to alleviate or mitigate the continuing harm being caused to the river and the surrounding environment;

(iii) compensate for all damages caused insofar as they are not made good by restitution, including the costs added to the dredging of the San Juan de Nicaragua River, with the amount of the compensation to be determined in a subsequent phase of the case.

3. Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

(i) not undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction;

(ii) refrain from using Route 1856 to transport hazardous material as long as it has not given the guarantees that the road complies with the best construction practices and the highest regional and international standards of security for road traffic in similar situations.

4. The Republic of Nicaragua further requests the Court to adjudge and declare that Nicaragua is entitled:

(i) in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River and that these works include the dredging of the San Juan de Nicaragua River to remove sedimentation and other barriers to navigation."

*On behalf of the Government of Costa Rica,*

at the hearing of 1 May 2015: "For the reasons set out in the written and oral pleadings, Costa Rica requests the Court to dismiss all of Nicaragua's claims in this proceeding."

* * *

53. The Court will begin by dealing with the elements common to both cases. It will thus address, in a first part, the question of its jurisdiction, before recalling, in a second part, the geographical and historical context and the origin of the disputes.

The Court will then examine in turn, in two separate parts, the disputed issues in the *Costa Rica* v. *Nicaragua* case and in the *Nicaragua* v. *Costa Rica* case.

## I. Jurisdiction of the Court

54. With regard to the *Costa Rica* v. *Nicaragua* case, the Court recalls that Costa Rica invokes, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the declarations by which the Parties have recognized

the compulsory jurisdiction of the Court under paragraphs 2 and 5 of Article 36 of the Statute (see paragraph 2 above). It notes that Nicaragua does not contest its jurisdiction to entertain Costa Rica's claims.

The Court finds that it has jurisdiction over the dispute.

55. With regard to the *Nicaragua* v. *Costa Rica* case, the Court notes that Nicaragua invokes, for its part, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the above-mentioned declarations of acceptance (see paragraph 2 above). It further observes that Costa Rica does not contest its jurisdiction to entertain Nicaragua's claims.

The Court finds that it has jurisdiction over the dispute.

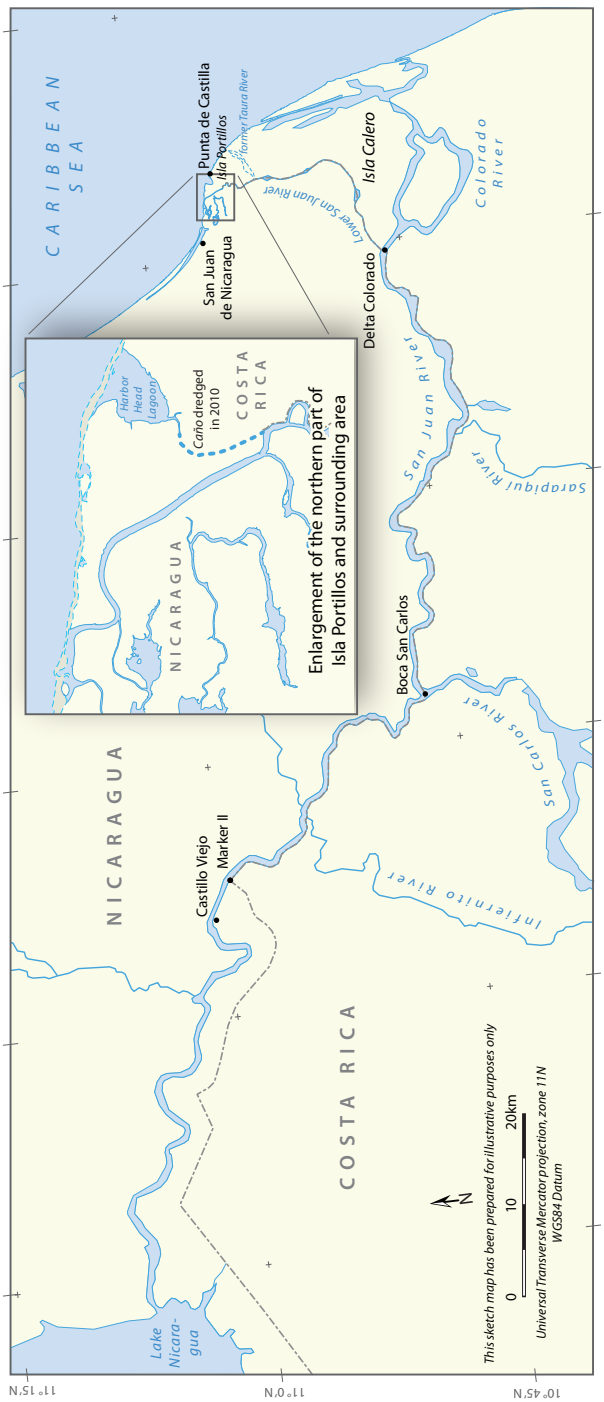
## II. Geographical and Historical Context and Origin of the Disputes

56. The San Juan River runs approximately 205 km from Lake Nicaragua to the Caribbean Sea. At a point known as "Delta Colorado" (or "Delta Costa Rica"), the San Juan River divides into two branches: the Lower San Juan is the northerly of these two branches and flows into the Caribbean Sea about 30 km downstream from the delta, near the town of San Juan de Nicaragua, formerly known as San Juan del Norte or Greytown; the Colorado River is the southerly and larger of the two branches and runs entirely within Costa Rica, reaching the Caribbean Sea at Barra de Colorado, about 20 km south-east of the mouth of the Lower San Juan. The Parties are in agreement that the Colorado River currently receives approximately 90 per cent of the water of the San Juan River, with the remaining 10 per cent flowing into the Lower San Juan.

57. The area situated between the Colorado River and the Lower San Juan is broadly referred to as Isla Calero (approximately 150 sq km). Within that area, there is a smaller region known to Costa Rica as Isla Portillos and to Nicaragua as Harbor Head (approximately 17 sq km); it is located north of the former Taura River. In the north of Isla Portillos is a lagoon, called Laguna Los Portillos by Costa Rica and Harbor Head Lagoon by Nicaragua. This lagoon is at present separated from the Caribbean Sea by a sandbar (see sketch-map No. 1 p. 692).

58. Isla Calero is part of the *Humedal Caribe Noreste* (Northeast Caribbean Wetland) which was designated by Costa Rica in 1996 as a wetland of international importance under the Ramsar Convention. The area immediately adjacent to it — including the San Juan River itself and a strip of land 2 km in width abutting the river's left (Nicaraguan) bank — was designated by Nicaragua as a wetland of international importance under the Ramsar Convention in 2001 and is known as the *Refugio de Vida Silvestre Río San Juan* (San Juan River Wildlife Refuge).

Sketch-map No. 1:
Geographical context



59. The present disputes between the Parties are set within a historical context dating back to the 1850s. Following hostilities between the two States in 1857, the Governments of Costa Rica and Nicaragua signed on 15 April 1858 a Treaty of Limits, which was ratified by Costa Rica on 16 April 1858 and by Nicaragua on 26 April 1858 (hereinafter the "1858 Treaty"). The 1858 Treaty fixed the course of the boundary between Costa Rica and Nicaragua from the Pacific Ocean to the Caribbean Sea. According to Article II of the Treaty (quoted in paragraph 71 below), part of the boundary between the two States runs along the right (Costa Rican) bank of the San Juan River from a point three English miles below Castillo Viejo, a small town in Nicaragua, to "the end of Punta de Castilla, at the mouth of the San Juan" on the Caribbean coast. Article VI of the 1858 Treaty (quoted in paragraph 133 below) established Nicaragua's *dominium* and *imperium* over the waters of the river, but at the same time affirmed Costa Rica's right of free navigation on the river for the purposes of commerce.

60. Following challenges by Nicaragua on various occasions to the validity of the 1858 Treaty, Costa Rica and Nicaragua signed another instrument on 24 December 1886, whereby the two States agreed to submit the question of the validity of the 1858 Treaty to the President of the United States, Grover Cleveland, for arbitration. In addition, the Parties agreed that, if the 1858 Treaty were found to be valid, President Cleveland should also decide "upon all the other points of doubtful interpretation which either of the parties may find in the treaty". On 22 June 1887, Nicaragua communicated to Costa Rica 11 points of doubtful interpretation, which were subsequently submitted to President Cleveland for resolution. The Cleveland Award of 1888 confirmed, in its paragraph 1, the validity of the 1858 Treaty and found, in its paragraph 3 (1), that the boundary line between the two States on the Atlantic side "begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858". The Cleveland Award also settled the other points of doubtful interpretation submitted by Nicaragua, such as the conditions under which Nicaragua may carry out works of improvement on the San Juan River (para. 3 (6), quoted in paragraph 116 below), the conditions under which Costa Rica may prevent Nicaragua from diverting the waters of the San Juan (para. 3 (9), quoted in paragraph 116 below), and the requirement that Nicaragua not make any grants for the purpose of constructing a canal across its territory without first asking for the opinion of Costa Rica (para. 3 (10)) or, "where the construction of the canal will involve an injury to the natural rights of Costa Rica", obtaining its consent (para. 3 (11)).

61. Subsequent to the Cleveland Award, Costa Rica and Nicaragua agreed in 1896, under the Pacheco-Matus Convention on border demarcation, to establish two national Demarcation Commissions, each com-

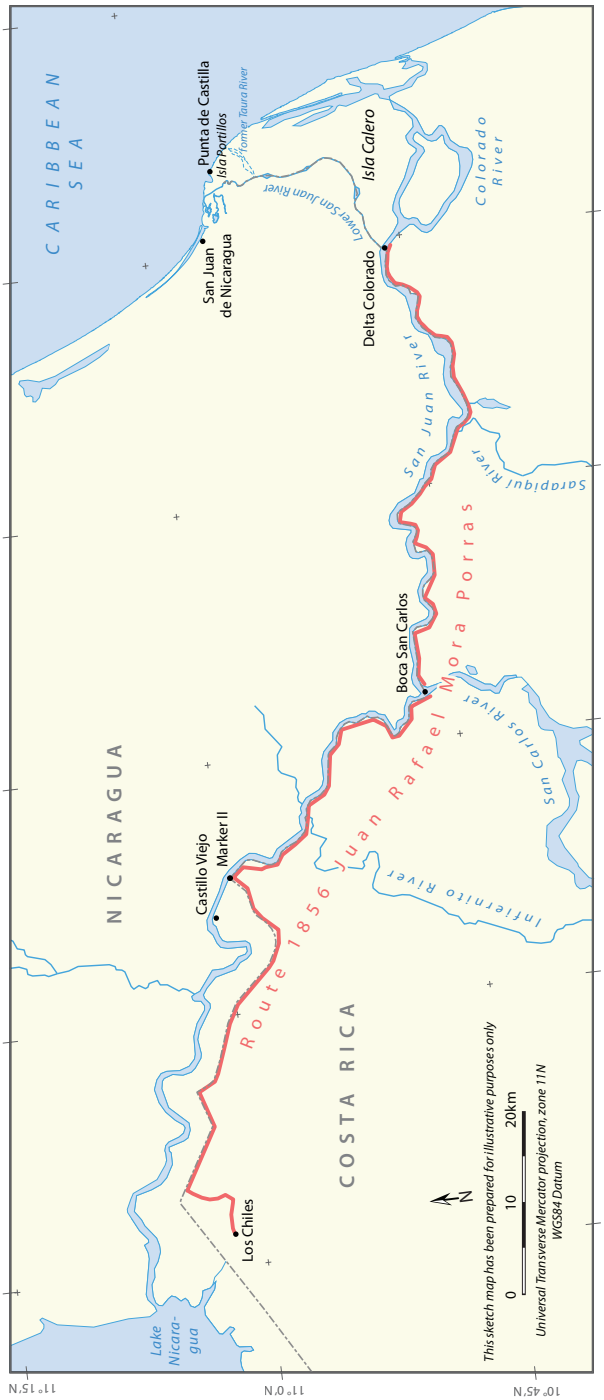
posed of two members (Art. I). The Pacheco-Matus Convention further provided that the Commissions would include an engineer, appointed by the President of the United States of America, who "shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final" (Art. II). United States General Edward Porter Alexander was so appointed. During the demarcation process, which began in 1897 and was concluded in 1900, General Alexander rendered five awards, the first three of which are of particular relevance to the *Costa Rica* v. *Nicaragua* case (see paragraphs 73-75 below).

62. Starting in the 1980s, some disagreements arose between Costa Rica and Nicaragua concerning the precise scope of Costa Rica's rights of navigation under the 1858 Treaty. This dispute led Costa Rica to file an Application with the Court instituting proceedings against Nicaragua on 29 September 2005. The Court rendered its Judgment on 13 July 2009, which, *inter alia*, clarified Costa Rica's navigational rights and the extent of Nicaragua's power to regulate navigation on the San Juan River (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213).

63. On 18 October 2010, Nicaragua started dredging the San Juan River in order to improve its navigability. It also carried out works in the northern part of Isla Portillos (see sketch-map No. 1 p. 692). In this regard, Costa Rica contends that Nicaragua artificially created a channel (both Parties refer to such channels as *"caños"*) on Costa Rican territory, in Isla Portillos between the San Juan River and Laguna Los Portillos/Harbor Head Lagoon, whereas Nicaragua argues that it was only clearing an existing *caño* on Nicaraguan territory. Nicaragua also sent some military units and other personnel to that area. On 18 November 2010, Costa Rica filed its Application instituting proceedings in the *Costa Rica* v. *Nicaragua* case (see paragraph 1 above). Costa Rica also submitted a request for the indication of provisional measures under Article 41 of the Statute (see paragraph 3 above).

64. In December 2010, Costa Rica started works for the construction of Route 1856 Juan Rafael Mora Porras (hereinafter the "road"), which runs in Costa Rican territory along part of its border with Nicaragua. The road has a planned length of 159.7 km, extending from Los Chiles in the west to a point just beyond "Delta Colorado" in the east. For 108.2 km, it follows the course of the San Juan River (see sketch-map No. 2 p. 695). On 21 February 2011, Costa Rica adopted an Executive Decree declaring a state of emergency in the border area, which Costa Rica maintains exempted it from the obligation to conduct an environmental impact assessment before constructing the road. On 22 December 2011, Nicaragua filed its Application instituting proceedings in the *Nicaragua* v. *Costa Rica* case (see paragraph 9 above), claiming in particular that the construction of the road resulted in significant transboundary harm.

Sketch-map No. 2:
Route 1856 Juan Rafael Mora Porras



## III. Issues in the *Costa Rica* v. *Nicaragua* Case

### *A. Sovereignty over the Disputed Territory and Alleged Breaches Thereof*

65. Costa Rica submits that Nicaragua breached

> "the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards" (final submissions, para. 2 *(b)* (i)).

This claim is based on the premise that "[s]overeignty over the 'disputed territory', as defined by the Court in its Orders of 8 March 2011 and 22 November 2013, belongs to the Republic of Costa Rica" (*ibid.*, para. 2 *(a)*). In its final submissions Costa Rica requested the Court to make a finding also on the issue of sovereignty over the disputed territory.

66. Costa Rica alleges that Nicaragua violated its territorial sovereignty in the area of Isla Portillos in particular by excavating in 2010 a *caño* with the aim of connecting the San Juan River with the Harbor Head Lagoon and laying claim to Costa Rican territory. According to Costa Rica, this violation of sovereignty was exacerbated by Nicaragua's establishment of a military presence in the area and by its excavation in 2013 of two other *caños* located near the northern tip of Isla Portillos.

67. The Court notes that although the violations that allegedly took place in 2013 occurred after the Application was made, they concern facts which are of the same nature as those covered in the Application and which the Parties had the opportunity to discuss in their pleadings. These alleged violations may therefore be examined by the Court as part of the merits of the claim. They will later also be considered in relation to Nicaragua's compliance with the Court's Order on provisional measures of 8 March 2011.

68. Nicaragua does not contest that it dredged the three *caños*, but maintains that "Nicaragua enjoys full sovereignty over the *caño* joining Harbor Head Lagoon with the San Juan River proper, the right bank of which constitutes the land boundary as established by the 1858 Treaty as interpreted by the Cleveland and Alexander Awards" (final submissions, para. *(b)* (i)). Nicaragua further submits that "Costa Rica is under an obligation to respect the sovereignty and territorial integrity of Nicaragua, within the boundaries delimited by the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards" (*ibid.*, para. *(b)* (ii)).

69. Since it is uncontested that Nicaragua conducted certain activities in the disputed territory, it is necessary, in order to establish whether there was a breach of Costa Rica's territorial sovereignty, to determine

which State has sovereignty over that territory. The "disputed territory" was defined by the Court in its Order of 8 March 2011 on provisional measures as "the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon" (*I.C.J. Reports 2011 (I)*, p. 19, para. 55). The *caño* referred to is the one which was dredged by Nicaragua in 2010. Nicaragua did not contest this definition of the "disputed territory", while Costa Rica expressly endorsed it in its final submissions (para. 2 *(a)*). The Court will maintain the definition of "disputed territory" given in the 2011 Order. It recalls that its Order of 22 November 2013 indicating provisional measures specified that a Nicaraguan military encampment "located on the beach and close to the line of vegetation" near one of the *caños* dredged in 2013 was "situated in the disputed territory as defined by the Court in its Order of 8 March 2011" (*I.C.J. Reports 2013*, p. 365, para. 46).

70. The above definition of the "disputed territory" does not specifically refer to the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon, which lagoon both Parties agree is Nicaraguan, and the mouth of the San Juan River. In their oral arguments the Parties expressed different views on this issue. However, they did not address the question of the precise location of the mouth of the river nor did they provide detailed information concerning the coast. Neither Party requested the Court to define the boundary more precisely with regard to this coast. Accordingly, the Court will refrain from doing so.

71. In their claims over the disputed territory both Parties rely on the 1858 Treaty, the Cleveland Award and the Alexander Awards. According to Article II of the Treaty:

> "The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua River, and shall run along the right bank of the said river up to a point three English miles distant from Castillo Viejo . . ." [In the Spanish original: *"La línea divisoria de las dos Repúblicas, partiendo del mar del Norte, comenzará en la extremidad de Punta de Castilla, en la desembocadura del río de San Juan de Nicaragua, y continuará marcándose con la márgen derecha del expresado río, hasta un punto distante del Castillo Viejo tres millas inglesas . . ."*]

72. In 1888 President Cleveland found in his Award that:

> "The boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858. The ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to

that subject." (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 209.)

73. When the Commissions on demarcation were established by the Pacheco-Matus Convention, one member, to be designated by the President of the United States of America, was given the power to "resolve any dispute between the Commissions of Costa Rica and Nicaragua arising from the operations" (see paragraph 61 above). According to this Convention, the said person "shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final" (Art. II, *RIAA*, Vol. XXVIII, p. 212). On this basis, General Alexander, who had been duly designated to this position, rendered five awards concerning the border. In his first Award he stated that the boundary line:

> "must follow the . . . branch . . . called the Lower San Juan, through its harbor and into the sea.
>
> The natural terminus of that line is the right-hand headland of the harbor mouth." (*Ibid.*, p. 217.)

He observed that:

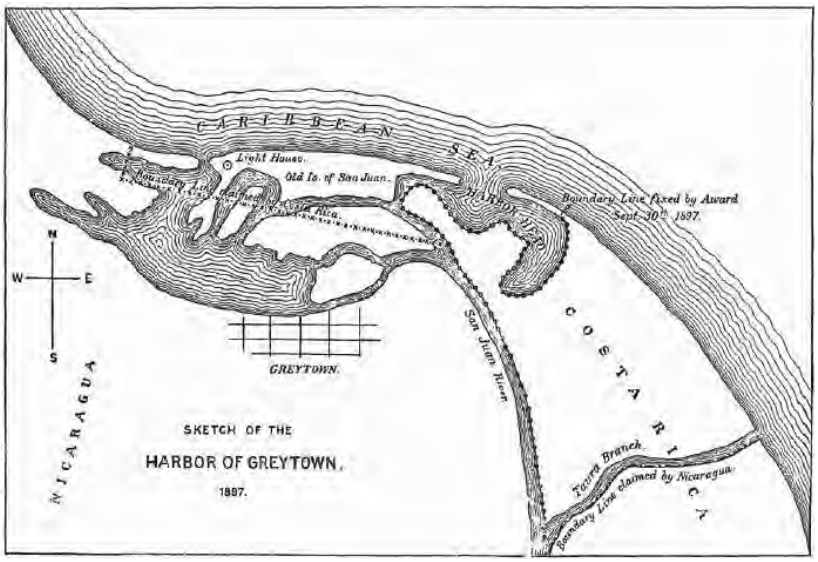
> "throughout the treaty the river is treated and regarded as an outlet of commerce. This implies that it is to be considered as in average condition of water, in which condition alone it is navigable." (*Ibid.*, pp. 218-219.)

He then defined the initial part of the boundary starting from the Caribbean Sea in the following terms:

> "The exact spot which was the extremity of the headland of Punta de Castillo [on] April 15, 1858, has long been swept over by the Caribbean Sea, and there is too little concurrence in the shore outline of the old maps to permit any certainty of statement of distance or exact direction to it from the present headland. It was somewhere to the north-eastward, and probably between 600 and 1,600 feet distant, but it can not now be certainly located. Under these circumstances it best fulfils the demands of the treaty and of President Cleveland's award to adopt what is practically the headland of today, or the north-western extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon.
>
> I have accordingly made personal inspection of this ground, and declare the initial line of the boundary to run as follows, to wit:
>
> Its direction shall be due north-east and south-west, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass, at its nearest point, 300 feet on the north-west side from the small hut now standing in that vicinity. On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the

left, or south-eastward, and shall follow the water's edge around the harbor until it reaches the river proper by the first channel met. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty." (*RIAA*, Vol. XXVIII, p. 220.)

A sketch illustrating this initial part of the boundary in the geographic situation prevailing at the time was attached to this first Award (*ibid.*, p. 221). In that sketch, what the Arbitrator considered to be the "first channel" was the branch of the Lower San Juan River which was then flowing into the Harbor Head Lagoon (see sketch-map No. 3 below). The same boundary line was sketched with greater precision in the proceedings of the Commissions on demarcation.




74. The second Alexander Award envisaged the possibility that the banks of the San Juan River would "not only gradually expand or contract but that there [would] be wholesale changes in its channels". The Arbitrator observed that:

> "Today's boundary line must necessarily be affected in future by all these gradual or sudden changes. But the impact in each case can only be determined by the circumstances of the case itself, on a case-by-case basis in accordance with such principles of international law as may be applicable.
>
> The proposed measurement and demarcation of the boundary line will not have any effect on the application of those principles." (*RIAA*, Vol. XXVIII, p. 224.)

75. In his third Award, General Alexander noted that "borders delimited by waterways are likely to change when changes occur in the beds of such waterways. In other words, it is the riverbed that affects changes and not the water within, over or below its banks." (*RIAA*, Vol. XXVIII, p. 229.) He reached the following conclusion:

> "Let me sum up briefly and provide a clearer understanding of the entire question in accordance with the principles set out in my first award, to wit, that in the practical interpretation of the 1858 Treaty, the San Juan River must be considered a navigable river. I therefore rule that the exact dividing line between the jurisdictions of the two countries is the right bank of the river, with the water at ordinary stage and navigable by ships and general-purpose boats. At that stage, every portion of the waters of the river is under Nicaraguan jurisdiction. Every portion of land on the right bank is under Costa Rican jurisdiction." (*Ibid.*, p. 230.)

76. The Court considers that the 1858 Treaty and the awards by President Cleveland and General Alexander lead to the conclusion that Article II of the 1858 Treaty, which places the boundary on the "right bank of the . . . river", must be interpreted in the context of Article VI (quoted in full at paragraph 133 below), which provides that "the Republic of Costa Rica shall . . . have a perpetual right of free navigation on the . . . waters [of the river] between [its] mouth . . . and a point located three English miles below Castillo Viejo". As General Alexander observed in demarcating the boundary, the 1858 Treaty regards the river, "in average condition of water", as an "outlet of commerce" (see paragraph 73 above). In the view of the Court, Articles II and VI, taken together, provide that the right bank of a channel of the river forms the boundary on the assumption that this channel is a navigable "outlet of commerce". Thus, Costa Rica's rights of navigation are linked with sovereignty over the right bank, which has clearly been attributed to Costa Rica as far as the mouth of the river.

77. Costa Rica contends that, while no channel of the San Juan River now flows into the Harbor Head Lagoon, there has been no significant shifting of the bed of the main channel of the Lower San Juan River since the Alexander Awards. Costa Rica maintains that the territory on the right bank of that channel as far as the river's mouth in the Caribbean Sea should be regarded as under Costa Rican sovereignty. According to Costa Rica, no importance should be given to what it considers to be an artificial *caño* which was excavated by Nicaragua in 2010 in order to connect the San Juan River with the Harbor Head Lagoon.

78. Nicaragua argues that, as a result of natural modifications in the geographical configuration of the disputed territory, the "first channel" to which General Alexander referred in his first Award is now a channel

connecting the river, at a point south of the Harbor Head Lagoon, with the southern tip of that lagoon. The channel in question, according to Nicaragua, is the *caño* that it dredged in 2010 only to improve its navigability. Relying on the alleged existence of this *caño* over a number of years and contending that it now marks the boundary, Nicaragua claims sovereignty over the whole of the disputed territory.

79. According to Nicaragua, the existence of the *caño* before 2010 is confirmed by aerial and satellite imagery. In particular, Nicaragua alleges that a satellite picture dating from 1961 shows that a *caño* existed where Nicaragua was dredging in 2010.

80. Costa Rica points out that, especially by reason of the thick vegetation, aerial and satellite images of the disputed territory are not clear, including the satellite picture of 1961. Moreover, Costa Rica produces a satellite image dating from August 2010, which would rule out the existence of a channel in the period between the clearing of vegetation in the location of the *caño* and the dredging of the *caño*. In the oral proceedings, Nicaragua admitted that because of the tree canopy, only an inspection on the ground could provide certainty regarding the *caño*.

81. In the opinion of the Court, an inspection would hardly be useful for reconstructing the situation prevailing before 2010. The Court considers that, given the general lack of clarity of satellite and aerial images and the fact that the channels that may be identified on such images do not correspond to the location of the *caño* dredged in 2010, this evidence is insufficient to prove that a natural channel linked the San Juan River with the Harbor Head Lagoon following the same course as the *caño* that was dredged.

82. In order further to substantiate the view that the *caño* had existed for some time before it was dredged, Nicaragua also supplies three affidavits of Nicaraguan policemen or military agents who refer to a stream linking the San Juan River with the lagoon and assert that it was navigable for part of the year. Some affidavits of other agents mention streams in the area of the lagoon and describe them as navigable by boats to a certain extent, but do not specify their location.

83. The Court recalls that "[i]n determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 78, para. 196). Affidavits will be treated "with caution", in particular those made by State officials for purposes of litigation (*ibid.*, pp. 78, paras. 196-197, referring to *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244). In the present case, the Court finds that the affidavits of Nicaraguan State officials, which were prepared after the institution of proceedings by Costa Rica, provide little support for Nicaragua's contention.

84. Nicaragua refers to a map produced in 1949 by the National Geographic Institute of Costa Rica which shows a *caño* in the location of the one dredged in 2010. It acknowledges, however, that the map in question describes the entire disputed territory as being under Costa Rican sovereignty. Nicaragua further invokes a map published in 1971 by the same Institute which shows a boundary close to the line claimed by Nicaragua. However, the Court notes that this evidence is contradicted by several official maps of Nicaragua, in particular a map of 1967 of the Directorate of Cartography and a map, dating from 2003, published by the Nicaraguan Institute of Territorial Studies (INETER, by its Spanish acronym), which depict the disputed area as being under Costa Rica's sovereignty.

85. As the Boundary Commission in the *Eritrea/Ethiopia* case stated, in a passage that was quoted with approval by the Court in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, a map "stands as a statement of geographical fact, especially when the State adversely affected has itself produced and disseminated it, even against its own interest" (*Judgment, I.C.J. Reports 2008*, p. 95, para. 271). In the present case, the evidence of maps published by the Parties on the whole gives support to Costa Rica's position, but their significance is limited, given that they are all small-scale maps which are not focused on the details of the disputed territory.

86. Both Parties invoke *effectivités* to corroborate their claims to territorial sovereignty. Costa Rica argues that it had exercised sovereignty over the disputed territory without being challenged by Nicaragua until 2010. Costa Rica recalls that it adopted legislation applying specifically to that area, that it issued permits or titles to use land in the same territory, and that Isla Portillos was included within the area it designated as a wetland of international importance under the Ramsar Convention *(Humedal Caribe Noreste)*. Costa Rica notes that, when Nicaragua registered its own wetland of international importance concerning the area *(Refugio de Vida Silvestre Río San Juan)*, it only included the Harbor Head Lagoon and did not encompass the disputed territory.

87. Nicaragua for its part contends that it acted as sovereign over the disputed territory. Relying on affidavits by State officials and two police reports, it asserts that at least since the late 1970s the Nicaraguan army, navy and police have all patrolled the area in and around Harbor Head Lagoon, including the *caños* connecting the lagoon with the San Juan River.

88. Costa Rica questions the value of the evidence adduced by Nicaragua to substantiate its claim of having exercised sovereign powers in the disputed territory.

Nicaragua argues that Costa Rica's claimed exercise of sovereignty was merely a limited "paper presence" in the disputed territory not supported by any actual conduct on the ground.

89. The *effectivités* invoked by the Parties, which the Court considers are in any event of limited significance, cannot affect the title to sovereignty resulting from the 1858 Treaty and the Cleveland and Alexander Awards.

90. The Court notes that the existence over a significant span of time of a navigable *caño* in the location claimed by Nicaragua is put into question by the fact that in the bed of the channel there were trees of considerable size and age which had been cleared by Nicaragua in 2010. Moreover, as was noted by Costa Rica's main expert, if the channel had been a distributary of the San Juan River, "sediment would have filled in, or at a minimum partially-filled, the southern part of the lagoon". Furthermore, the fact that, as the Parties' experts agree, the *caño* dredged in 2010 no longer connected the river with the lagoon by mid-summer 2011 casts doubt on the existence over a number of years of a navigable channel following the same course before Nicaragua carried out its dredging activities. This *caño* could hardly have been the navigable outlet of commerce referred to above (see paragraph 76).

91. If Nicaragua's claim were accepted, Costa Rica would be prevented from enjoying territorial sovereignty over the right bank of the San Juan River as far as its mouth, contrary to what is stated in the 1858 Treaty and in the Cleveland Award. Moreover, according to Article VI of the 1858 Treaty (quoted below at paragraph 133), Costa Rica's rights of navigation are over the waters of the river, the right bank of which forms the boundary between the two countries. As the Court noted (see paragraph 76 above), these rights of navigation are linked with sovereignty over the right bank.

92. The Court therefore concludes that the right bank of the *caño* which Nicaragua dredged in 2010 is not part of the boundary between Costa Rica and Nicaragua, and that the territory under Costa Rica's sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea. Sovereignty over the disputed territory thus belongs to Costa Rica.

93. It is not contested that Nicaragua carried out various activities in the disputed territory since 2010, including excavating three *caños* and establishing a military presence in parts of that territory. These activities were in breach of Costa Rica's territorial sovereignty. Nicaragua is responsible for these breaches and consequently incurs the obligation to make reparation for the damage caused by its unlawful activities (see Section E).

94. Costa Rica submits that "by occupying and claiming Costa Rican territory" Nicaragua also committed other breaches of its obligations.

95. Costa Rica's final submission 2 *(b)* (iv) asks the Court to adjudge and declare that Nicaragua breached its obligation "not to use the San

Juan River to carry out hostile acts" under Article IX of the 1858 Treaty. This provision reads as follows:

> "Under no circumstances, and even in [the] case that the Republics of Costa Rica and Nicaragua should unhappily find themselves in a state of war, neither of them shall be allowed to commit any act of hostility against the other, whether in the port of San Juan del Norte, or in the San Juan River, or the Lake of Nicaragua." [In the Spanish original: *"Por ningún motivo, ni en caso y estado de guerra, en que por desgracia llegasen á encontrarse las Repúblicas de Nicaragua y Costa Rica, les será permitido ejercer ningún acto de hostilidad entre ellas en el puerto de San Juan del Norte, ni en el río de este nombre y Lago de Nicaragua."*]

No evidence of hostilities in the San Juan River has been provided. Therefore the submission concerning the breach of Nicaragua's obligations under Article IX of the Treaty must be rejected.

96. In its final submission 2 *(b)* (ii), Costa Rica asks the Court to find a breach by Nicaragua of "the prohibition of the threat or use of force under Article 2 (4) of the Charter of the United Nations and Article 22 of the Charter of the Organization of American States".

97. The relevant conduct of Nicaragua has already been addressed in the context of the Court's examination of the violation of Costa Rica's territorial sovereignty. The fact that Nicaragua considered that its activities were taking place on its own territory does not exclude the possibility of characterizing them as an unlawful use of force. This raises the issue of their compatibility with both the United Nations Charter and the Charter of the Organization of American States. However, in the circumstances, given that the unlawful character of these activities has already been established, the Court need not dwell any further on this submission. As in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, the Court finds that, "by the very fact of the present Judgment and of the evacuation" of the disputed territory, the injury suffered by Costa Rica "will in all events have been sufficiently addressed" (*Judgment, I.C.J. Reports 2002*, p. 452, para. 319).

98. In its final submission 2 *(b)* (iii), Costa Rica requests the Court to find that Nicaragua made the territory of Costa Rica "the object, even temporarily, of military occupation, contrary to Article 21 of the Charter of the Organization of American States". The first sentence of this provision stipulates: "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever."

In order to substantiate this claim, Costa Rica refers to the presence of military personnel of Nicaragua in the disputed territory.

99. The Court has already established that the presence of military personnel of Nicaragua in the disputed territory was unlawful because it violated Costa Rica's territorial sovereignty. The Court does not need to ascertain whether this conduct of Nicaragua constitutes a military occupation in breach of Article 21 of the Charter of the Organization of American States.

### *B. Alleged Violations of International Environmental Law*

100. The Court will now turn to Costa Rica's allegations concerning violations by Nicaragua of its obligations under international environmental law in connection with its dredging activities to improve the navigability of the Lower San Juan River. Costa Rica's environmental claims can be grouped into two broad categories. First, according to Costa Rica, Nicaragua breached the procedural obligations to carry out an appropriate transboundary environmental impact assessment of its dredging works, and to notify, and consult with, Costa Rica regarding those works. Secondly, Costa Rica alleges that Nicaragua breached the substantive environmental obligation not to cause harm to Costa Rica's territory. The Court will consider Costa Rica's allegations in turn.

#### *1. Procedural obligations*

##### (a) *The alleged breach of the obligation to carry out an environmental impact assessment*

101. The Parties broadly agree on the existence in general international law of an obligation to conduct an environmental impact assessment concerning activities carried out within a State's jurisdiction that risk causing significant harm to other States, particularly in areas or regions of shared environmental conditions.

102. Costa Rica claims that Nicaragua has not complied with that obligation, and must do so in advance of any further dredging. It submits in particular that the analysis carried out in the Environmental Impact Study undertaken by Nicaragua in 2006 does not support the conclusion that the dredging project would cause no harm to the flow of the Colorado River. Moreover, according to Costa Rica, the Environmental Impact Study did not assess the impact of the dredging programme on the wetlands. Costa Rica maintains that the artificial changes to the morphology of the river resulting from Nicaragua's dredging activities risked causing an adverse impact on those wetlands. Costa Rica also argues that a document entitled "Report: Ramsar Advisory Mission No. 72", prepared in April 2011, confirms the existence of a risk of transboundary

harm, shows that Nicaragua's study did not contain an assessment of that risk, and concludes that such an assessment should have been undertaken prior to the implementation of the dredging programme.

103. Nicaragua contends for its part that its 2006 Environmental Impact Study and the related documentation fully addressed the potential transboundary impact of its dredging programme, including its effects on the environment of Costa Rica and the possible reduction in flow of the Colorado River. It points out that this study concluded that the programme posed no risk of significant transboundary harm and would actually have beneficial effects for the San Juan River and the surrounding area. As to the document entitled "Report: Ramsar Advisory Mission No. 72", Nicaragua argues that it was only a draft report, on which Nicaragua commented in a timely manner, but which the Ramsar Secretariat never finalized; accordingly, it should be given no weight. Furthermore, Nicaragua explains that the report's conclusion that there had been no analysis of the impact of the dredging programme on the hydrology of the area was incorrect, as Nicaragua pointed out in the comments it submitted to the Ramsar Secretariat.

*

104. As the Court has had occasion to emphasize in its Judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*:

> "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State." (*Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101.)

Furthermore, the Court concluded in that case that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource" (*ibid.*, p. 83, para. 204). Although the Court's statement in the *Pulp Mills* case refers to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context. Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of

another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.

Determination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case. As the Court held in the *Pulp Mills* case:

> "it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment" (*I.C.J. Reports 2010 (I)*, p. 83, para. 205).

If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.

105. The Court notes that the risk to the wetlands alleged by Costa Rica refers to Nicaragua's dredging activities as a whole, including the dredging of the 2010 *caño*. The Court recalls that the dredging activities carried out in breach of Costa Rica's territorial sovereignty have been considered previously. Accordingly, the Court will confine its analysis to ascertaining whether Nicaragua's dredging activities in the Lower San Juan carried a risk of significant transboundary harm. The principal risk cited by Costa Rica was the potential adverse impact of those dredging activities on the flow of the Colorado River, which could also adversely affect Costa Rica's wetland. In 2006, Nicaragua conducted a study of the impact that the dredging programme would have on its own environment, which also stated that the programme would not have a significant impact on the flow of the Colorado River. This conclusion was later confirmed by both Parties' experts. Having examined the evidence in the case file, including the reports submitted and testimony given by experts called by both Parties, the Court finds that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm, either with respect to the flow of the Colorado River or to Costa Rica's wetland. In light of the absence of risk of significant transboundary harm, Nicaragua was not required to carry out an environmental impact assessment.

(b) *The alleged breach of an obligation to notify and consult*

106. The Parties concur on the existence in general international law of an obligation to notify, and consult with, the potentially affected State in

respect of activities which carry a risk of significant transboundary harm. Costa Rica contends that, in addition to its obligations under general international law, Nicaragua was under a duty to notify and consult with it as a result of treaty obligations binding on the Parties. First, it asserts that Article 3, paragraph 2, and Article 5 of the Ramsar Convention provide for a duty to notify and consult. Secondly, it submits that Articles 13 *(g)* and 33 of the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America establish an obligation to share information related to activities which may be particularly damaging to biological resources.

107. While not contesting the existence of an obligation to notify and consult under general international law, Nicaragua asserts that in the present case such obligation is limited by the 1858 Treaty, as interpreted by the Cleveland Award, which constitutes the *lex specialis* with respect to procedural obligations. For Nicaragua, since the 1858 Treaty contains no duty to notify or consult with respect to dredging or any other "works of improvement", any such duty in customary or treaty law does not apply to the facts of the case. In any event, Nicaragua asserts that a duty to notify and consult would not be triggered because both countries' studies have shown that Nicaragua's dredging programme posed no likelihood of significant transboundary harm. Nicaragua further argues that neither Article 3, paragraph 2, nor Article 5 of the Ramsar Convention is applicable to the facts of the case. With respect to the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America, Nicaragua asserts that it does not set out an obligation to share information relating to activities which may be particularly damaging to biological resources; at most it encourages States to do so.

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108. The Court observes that the fact that the 1858 Treaty may contain limited obligations concerning notification or consultation in specific situations does not exclude any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law. In any event, the Court finds that, since Nicaragua was not under an international obligation to carry out an environmental impact assessment in light of the absence of risk of significant transboundary harm (see paragraph 105 above), it was not required to notify, or consult with, Costa Rica.

109. As to the alleged existence of an obligation to notify and consult in treaties binding on the Parties, the Court observes that both Costa Rica

and Nicaragua are parties to the Ramsar Convention and the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America. The Court recalls that Article 3, paragraph 2, of the Ramsar Convention provides that:

> "Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List [of wetlands of international importance] has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the [Ramsar Secretariat]."

While this provision contains an obligation to notify, that obligation is limited to notifying the Ramsar Secretariat of changes or likely changes in the "ecological character of any wetland" in the territory of the notifying State. In the present case, the evidence before the Court does not indicate that Nicaragua's dredging programme has brought about any changes in the ecological character of the wetland, or that it was likely to do so unless it were to be expanded. Thus the Court finds that no obligation to inform the Ramsar Secretariat arose for Nicaragua.

110. The Court further recalls that Article 5 of the Ramsar Convention provides that:

> "The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to co-ordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna."

While this provision contains a general obligation to consult "about implementing obligations arising from the Convention", it does not create an obligation on Nicaragua to consult with Costa Rica concerning a particular project that it is undertaking, in this case the dredging of the Lower San Juan River. In light of the above, Nicaragua was not required under the Ramsar Convention to notify, or consult with, Costa Rica prior to commencing its dredging project.

111. As to the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America, the Court sees no need to take its enquiry further, as neither of the two provi-

sions invoked by Costa Rica contains a binding obligation to notify or consult.

(c) *Conclusion*

112. In light of the above, the Court concludes that it has not been established that Nicaragua breached any procedural obligations owed to Costa Rica under treaties or the customary international law of the environment. The Court takes note of Nicaragua's commitment, made in the course of the oral proceedings, to carry out a new Environmental Impact Study before any substantial expansion of its current dredging programme. The Court further notes that Nicaragua stated that such a study would include an assessment of the risk of transboundary harm, and that it would notify, and consult with, Costa Rica as part of that process.

*2. Substantive obligations concerning transboundary harm*

113. The Court has already found that Nicaragua is responsible for the harm caused by its activities in breach of Costa Rica's territorial sovereignty. What remains to be examined is whether Nicaragua is responsible for any transboundary harm allegedly caused by its dredging activities which have taken place in areas under Nicaragua's territorial sovereignty, in the Lower San Juan River and on its left bank.

114. Costa Rica submits that Nicaragua has breached "the obligation not to dredge, divert or alter the course of the San Juan River, or conduct any other works on the San Juan River, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights under the 1888 Cleveland Award" (final submissions, para. 2 *(c)* (v)). According to Costa Rica, the dredging programme executed by Nicaragua in the Lower San Juan River was in breach of Nicaragua's obligations under customary international law and caused harm to Costa Rican lands on the right bank of the river and to the Colorado River.

115. Nicaragua contends that the dredging programme has not caused any harm to Costa Rican territory including the Colorado River. It argues that the execution of the dredging programme has been beneficial to the dredged section of the Lower San Juan River and to the wetlands of international importance lying downstream. Moreover, Nicaragua maintains that, under a special rule stated in the Cleveland Award and applying to the San Juan River, even if damage to Costa Rica's territory resulted from the works to maintain and improve the river, the dredging activities would not be unlawful.

116. Both Parties referred to the passage in the Cleveland Award which reads as follows:

> "The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement." (*RIAA*, Vol. XXVIII, p. 210, para. 3 (6); emphasis in the original.)

Both Parties also referred to the following passage in the same Award:

> "The Republic of Costa Rica can deny to the Republic of Nicaragua the right of deviating the waters of the River San Juan in case such deviation will result in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same." (*Ibid.*, para. 3 (9).)

117. According to Nicaragua, the statements in the Cleveland Award quoted above should be understood as implying that Nicaragua is free to undertake any dredging activity, possibly even if it is harmful to Costa Rica. On the other hand, according to Costa Rica, Nicaragua would be under an obligation to pay compensation for any harm caused to Costa Rica, whether the harm was significant or not and whether Nicaragua was or was not diligent in ensuring that the environment of Costa Rica would not be affected; damage caused by "unforeseeable or uncontrollable events" related to dredging activities would also have to be compensated by Nicaragua. Costa Rica also argued that "all of Nicaragua's rights and obligations under the 1858 Treaty and the 1888 Award must be interpreted in the light of principles for the protection of the environment in force today" and that the Treaty and the Award do not "override the application of environmental obligations under general principles of law and under international treaties" requiring States not to cause significant transboundary harm.

118. As the Court restated in the *Pulp Mills* case, under customary international law, "[a] State is . . . obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" (*I.C.J. Reports 2010 (I)*, p. 56, para. 101; see also

*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29).

In any event, it would be necessary for the Court to address the question of the relationship between the 1858 Treaty as interpreted by the Cleveland Award and the current rule of customary international law with regard to transboundary harm only if Costa Rica were to prove that the dredging programme in the Lower San Juan River produced harm to Costa Rica's territory.

119. Costa Rica has not provided any convincing evidence that sediments dredged from the river were deposited on its right bank. Costa Rica has also not proved that the dredging programme caused harm to its wetland (see paragraph 109 above). With regard to Costa Rica's contention that "the dredging programme has had a significant effect upon the Colorado River", it has already been noted that the Parties agree that at the so-called "Delta Colorado" the Colorado River receives about 90 per cent of the waters flowing through the San Juan River (see paragraph 56 above). Nicaragua estimates that the diversion of water from the Colorado River due to the dredging of the Lower San Juan River affected less than 2 per cent of the waters flowing into the Colorado River. No higher figure has been suggested by Costa Rica. Its main expert observed that "there is no evidence that the dredging programme has significantly affected flows in the Río Colorado". Costa Rica did adduce evidence indicating a significant reduction in flow of the Colorado River between January 2011 and October 2014. However, the Court considers that a causal link between this reduction and Nicaragua's dredging programme has not been established. As Costa Rica admits, other factors may be relevant to the decrease in flow, most notably the relatively small amount of rainfall in the relevant period. In any event, the diversion of water due to the dredging of the Lower San Juan River is far from seriously impairing navigation on the Colorado River, as envisaged in paragraph 3 (9) of the Cleveland Award, or otherwise causing harm to Costa Rica.

120. The Court therefore concludes that the available evidence does not show that Nicaragua breached its obligations by engaging in dredging activities in the Lower San Juan River.

### *C. Compliance with Provisional Measures*

121. In its final submissions Costa Rica contends that Nicaragua has also breached its "obligations arising from the Orders of the Court indicating provisional measures of 8 March 2011 and 22 November 2013" (para. 2 *(c)* (vi)).

122. Nicaragua, for its part, raised certain issues about Costa Rica's compliance with some of the provisional measures adopted by the Court, but did not request the Court to make a finding on this matter.

123. In its Order on provisional measures of 8 March 2011 the Court indicated that "[e]ach Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security"; the Court also required each Party to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" (*I.C.J. Reports 2011 (I)*, p. 27, para. 86).

124. Costa Rica argued that the presence in the disputed territory of large groups of Nicaraguan civilians who were members of an environmental movement constituted a breach of the 2011 Order. Nicaragua denied this. In its Order of 16 July 2013, the Court specified that "the presence of organized groups of Nicaraguan nationals in the disputed area carrie[d] the risk of incidents which might aggravate the . . . dispute" (*I.C.J. Reports 2013*, p. 240, para. 37).

125. Costa Rica maintained and Nicaragua later acknowledged that the excavation of the second and third *caños* took place after the 2011 Order had been adopted, that this activity was attributable to Nicaragua and that moreover a military encampment had been installed on the disputed territory as defined by the Court. In the oral hearings Nicaragua also acknowledged that the excavation of the second and third *caños* represented an infringement of its obligations under the 2011 Order.

126. The Court already ascertained these facts in its Order of 22 November 2013 (*ibid.*, pp. 364-365, paras. 45-46). However, that statement was only instrumental in ensuring the protection of the rights of the Parties during the judicial proceedings. The judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures. Thus, contrary to what was argued by Nicaragua, a statement of the existence of a breach to be included in the present Judgment cannot be viewed as "redundant". Nor can it be said that any responsibility for the breach has ceased: what may have ceased is the breach, not the responsibility arising from the breach.

127. On the basis of the facts that have become uncontested, the Court accordingly finds that Nicaragua breached its obligations under the Order of 8 March 2011 by excavating two *caños* and establishing a military presence in the disputed territory.

128. The Court's Order of 22 November 2013 required the following measures from Nicaragua: to "refrain from any dredging and other activities in the disputed territory"; to "fill the trench on the beach north of the eastern *caño*"; to "cause the removal from the disputed territory of any personnel, whether civilian, police or security"; to "prevent any such personnel from entering the disputed territory"; and to "cause the removal from and prevent the entrance into the disputed territory of any private persons under its jurisdiction or control" (*ibid.*, p. 369, para. 59). No allegations of subsequent breaches of any of these obligations were made by Costa Rica, which only maintained that some of Nicaragua's activities after this Order were in breach of its obligation not to aggravate

the dispute, which had been stated in the 2011 Order. The Court does not find that a breach of this obligation has been demonstrated on the basis of the available evidence.

129. The Court thus concludes that Nicaragua acted in breach of its obligations under the 2011 Order by excavating the second and third *caños* and by establishing a military presence in the disputed territory. The Court observes that this finding is independent of the conclusion set out above (see Section A) that the same conduct also constitutes a violation of the territorial sovereignty of Costa Rica.

### *D. Rights of Navigation*

130. In its final submissions Costa Rica also claims that Nicaragua has breached "Costa Rica's perpetual rights of free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the 1888 Cleveland Award and the Court's Judgment of 13 July 2009" (final submissions, para. 2 *(c)* (ii)).

131. Nicaragua contests the admissibility of this submission, which it considers not covered by the Application and as having an object unconnected with that of the "main dispute". Costa Rica points out that it had already requested in its Application (para. 41 *(f)*) that the Court adjudge and declare that, "by its conduct, Nicaragua has breached . . . the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals".

132. The Court observes that, although Costa Rica's submission could have been understood as related to the "dredging and canalization activities being carried out by Nicaragua on the San Juan River", to which the same paragraph of the Application also referred, the wording of the submission quoted above did not contain any restriction to that effect. The Court considers that Costa Rica's final submission concerning rights of navigation is admissible.

133. Article VI of the 1858 Treaty provides that:

> "The Republic of Nicaragua shall have exclusive *dominium* and *imperium* over the waters of the San Juan River from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo, *[con objetos de comercio]*, whether with Nicaragua or with the interior of Costa Rica by the rivers San Carlos or Sarapiquí or any other waterway starting from the section of the bank of the San Juan established as belonging to that Republic. The vessels of both countries may land indiscriminately on either bank of the section of the river where navigation is common, without paying any taxes, unless agreed by both Governments." (Translation from the Spanish original as reproduced in *Dispute regarding Naviga-*

> *tional and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 236, para. 44: *"La República de Nicaragua tendrá exclusivamente el dominio y sumo imperio sobre las aguas del río de San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico; pero la República de Costa Rica tendrá en dichas aguas los derechos perpetuos de libre navegación, desde la expresada desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica, por los ríos de San Carlos ó Sarapiquí, ó cualquiera otra vía procedente de la parte que en la ribera del San Juan se establece corresponder á esta República. Las embarcaciones de uno ú otro país podrán indistintamente atracar en las riberas del río en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, á no ser que se establezcan de acuerdo entre ambos Gobiernos."*)

The Cleveland Award contains some references to Costa Rica's rights of navigation that were quoted above (see paragraph 116). In its Judgment in *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the Court noted that:

> "two types of private navigation are certainly covered by the right of free navigation pursuant to Article VI of the 1858 Treaty: the navigation of vessels carrying goods intended for commercial transactions; and that of vessels carrying passengers who pay a price other than a token price (or for whom a price is paid) in exchange for the service thus provided" (*I.C.J. Reports 2009*, p. 245, para. 73).

While the express language of Article VI of the 1858 Treaty only considered navigation for purposes of commerce, the Court also observed that:

> "it cannot have been the intention of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river, where that bank constitutes the boundary between the two States, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area" (*ibid.*, p. 246, para. 79).

In the operative part of the same Judgment, the Court found that:

> "the inhabitants of the Costa Rican bank of the San Juan River have the right to navigate on the river between the riparian communities for the purposes of the essential needs of everyday life which require expeditious transportation" (*ibid.*, p. 270, para. 156 (1) *(f)*).

134. Costa Rica includes among the alleged breaches of its rights of navigation the enactment by Nicaragua of Decree No. 079-2009 of 1 October 2009, concerning navigation on the San Juan River. The interpretation of this decree is controversial between the Parties: Costa Rica

considers that the decree is of general application, whereas Nicaragua contends that it applies only to tourist boats. While it is clear that the decree should be consistent with Article VI of the 1858 Treaty as interpreted by the Court, the Court observes that none of the instances of interference with Costa Rica's rights of navigation specifically alleged by Costa Rica relates to the application of Decree No. 079-2009. The Court is therefore not called upon to examine this decree.

135. Costa Rica alleges that breaches of its rights of navigation occurred in five instances. Nicaragua emphasizes the small number of alleged breaches, but does not contest two of those incidents. In the first one, in February 2013, a riparian farmer and his uncle were detained for several hours at a Nicaraguan army post and subjected to humiliating treatment. This incident is set out in an affidavit. In the second incident, in June 2014, a Costa Rican property owner and some members of a local agricultural co-operative were prevented by Nicaraguan agents from navigating the San Juan River. This is supported by five affidavits.

136. The Court finds that Nicaragua did not provide a convincing justification with regard to Article VI of the 1858 Treaty for the conduct of its authorities in these two incidents concerning navigation by inhabitants of the Costa Rican bank of the San Juan River. The Court concludes that the two incidents show that Nicaragua breached Costa Rica's rights of navigation on the San Juan River pursuant to the 1858 Treaty. Given this finding, it is unnecessary for the Court to examine the other incidents invoked by Costa Rica.

### *E. Reparation*

137. Costa Rica requests the Court to order Nicaragua to "repeal, by means of its own choosing, those provisions of the Decree No. 079-2009 and the Regulatory Norms annexed thereto of 1 October 2009 which are contrary to Costa Rica's right of free navigation under Article VI of the 1858 Treaty of Limits, the 1888 Cleveland Award, and the Court's Judgment of 13 July 2009" and to cease all dredging activities in the San Juan River pending the fulfilment of certain conditions (final submissions, para. 3 *(a)* and *(b)*).

Costa Rica moreover asks the Court to order Nicaragua to:

> "make reparation in the form of compensation for the material damage caused to Costa Rica, including but not limited to: (i) damage arising from the construction of artificial *caños* and destruction of trees and vegetation on the 'disputed territory'; (ii) the cost of the remediation measures carried out by Costa Rica in relation to those damages . . .; the amount of such compensation to be determined in a separate phase of these proceedings" (*ibid.*, para. 3 *(c)*).

The Court is further requested to order Nicaragua to "provide satisfaction so [as] to achieve full reparation of the injuries caused to Costa Rica in a manner to be determined by the Court" (final submissions, para. 3 *(d)*) and to "provide appropriate assurances and guarantees of non-repetition of Nicaragua's unlawful conduct, in such a form as the Court may order" (*ibid.*, para. 3 *(e)*). Costa Rica finally requests an award of costs that will be considered later in the present section.

138. In view of the conclusions reached by the Court in Sections B and D above, the requests made by Costa Rica in its final submissions under paragraph 3 *(a)* and *(b)*, concerning the repeal of the Decree No. 079-2009 on navigation and the cessation of dredging activities respectively, cannot be granted.

139. The declaration by the Court that Nicaragua breached the territorial sovereignty of Costa Rica by excavating three *caños* and establishing a military presence in the disputed territory provides adequate satisfaction for the non-material injury suffered on this account. The same applies to the declaration of the breach of the obligations under the Court's Order of 8 March 2011 on provisional measures. Finally, the declaration of the breach of Costa Rica's rights of navigation in the terms determined above in Section D provides adequate satisfaction for that breach.

140. The request for "appropriate assurances and guarantees of non-repetition" was originally based on Nicaragua's alleged "bad faith" in the dredging of the 2010 *caño* and later on Nicaragua's infringement of its obligations under the 2011 Order.

141. As the Court noted in the *Navigational and Related Rights* case, "there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed" and therefore assurances and guarantees of non-repetition will be ordered only "in special circumstances" (*I.C.J. Reports 2009*, p. 267, para. 150). While Nicaragua failed to comply with the obligations under the 2011 Order, it is necessary also to take into account the fact that Nicaragua later complied with the requirements, stated in the Order of 22 November 2013, to "refrain from any dredging and other activities in the disputed territory" and to "cause the removal from the disputed territory of any personnel, whether civilian, police or security" (*I.C.J. Reports 2013*, p. 369, para. 59). It is to be expected that Nicaragua will have the same attitude with regard to the legal situation resulting from the present Judgment, in particular in view of the fact that the question of territorial sovereignty over the disputed territory has now been resolved.

142. Costa Rica is entitled to receive compensation for the material damage caused by those breaches of obligations by Nicaragua that have

been ascertained by the Court. The relevant material damage and the amount of compensation may be assessed by the Court only in separate proceedings. The Court is of the opinion that the Parties should engage in negotiation in order to reach an agreement on these issues. However, if they fail to reach such an agreement within 12 months of the date of the present Judgment, the Court will, at the request of either Party, determine the amount of compensation on the basis of further written pleadings limited to this issue.

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143. Costa Rica also requests the Court to order Nicaragua to:

> "pay all of the costs and expenses incurred by Costa Rica in requesting and obtaining the Order on provisional measures of 22 November 2013, including, but not limited to, the fees and expenses of Costa Rica's counsel and experts, with interest, on a full indemnity basis" (final submissions, para. 3 *(f)*).

The special reason for this request is that the proceedings which led to the Order of 22 November 2013 were allegedly due to the infringements by Nicaragua of its obligations under the Order of 8 March 2011.

144. According to Article 64 of the Statute, "[u]nless otherwise decided by the Court, each party shall bear its own costs". This Article provides that as a rule, costs are not awarded to any of the parties, but gives the Court the power to order that one of them will pay some or all of the costs. While the breach by Nicaragua of its obligations under the 2011 Order necessitated Costa Rica engaging in new proceedings on provisional measures, the Court finds that, taking into account the overall circumstances of the case, an award of costs to Costa Rica, as the latter requested, would not be appropriate.

## IV. Issues in the *Nicaragua* v. *Costa Rica* Case

145. The Application filed by Nicaragua on 22 December 2011 (see paragraph 9 above) concerns the alleged breach by Costa Rica of both procedural and substantive obligations in connection with the construction of the road along the San Juan River. The Court will start by considering the alleged breach of procedural obligations; then it will address the alleged breach of substantive obligations.

### *A. The Alleged Breach of Procedural Obligations*

#### *1. The alleged breach of the obligation to carry out an environmental impact assessment*

146. According to Nicaragua, Costa Rica breached its obligation under general international law to assess the environmental impact of the construction of the road before commencing it, particularly in view of the road's length and location.

147. Costa Rica denies the allegation. It argues that the construction of the road did not create a risk of significant transboundary harm through the discharge of harmful substances into the San Juan River or otherwise into Nicaraguan territory, and that there was no risk that the river would be materially affected by the relatively insignificant quantities of sediment coming from the road.

148. Costa Rica also maintains that it was exempted from the requirement to prepare an environmental impact assessment because of the state of emergency created by Nicaragua's occupation of Isla Portillos (see paragraphs 63-64 above). First, Costa Rica argues that an emergency can exempt a State from the requirement to conduct an environmental impact assessment, either because international law contains a *renvoi* to domestic law on this point, or because it includes an exemption for emergency situations. Secondly, Costa Rica submits that the construction of the road was an appropriate response to the emergency situation because it would facilitate access to the police posts and remote communities located along the right bank of the San Juan River, particularly in light of the real risk of a military confrontation with Nicaragua, which would require Costa Rica to evacuate the area. Thus, Costa Rica claims that it could proceed with its construction works without an environmental impact assessment.

149. In any event, Costa Rica maintains that, even if it was required under international law to conduct an environmental impact assessment in this case, it fulfilled the obligation by carrying out a number of environmental impact studies, including an "Environmental Diagnostic Assessment" in 2013.

150. In reply, Nicaragua argues that there was no *bona fide* emergency. It states that the road is not located near the disputed territory, as defined by the Court's Order of 8 March 2011, and that the emergency was declared several months after the beginning of the construction works. Nicaragua further argues that there is no emergency exemption from the international obligation to carry out an environmental impact assessment. It points out that Costa Rica improperly seeks to rely on a declaration of emergency made under its domestic law to justify its failure to perform its international law obligations.

151. Finally, Nicaragua points out that the environmental impact studies produced by Costa Rica after the bulk of the construction work

had been completed do not constitute an adequate environmental impact assessment. As a consequence, it asks the Court to declare that Costa Rica should not undertake any future development in the area without an appropriate environmental impact assessment.

152. Following the lines of argument put forward by the Parties, the Court will first examine whether Costa Rica was under an obligation to carry out an environmental impact assessment under general international law. If so, the Court will assess whether it was exempted from the said obligation or whether it complied with that obligation by carrying out the Environmental Diagnostic Assessment and other studies.

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153. The Court recalls (see paragraph 104 above) that a State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment. The obligation in question rests on the State pursuing the activity. Accordingly, in the present case, it fell on Costa Rica, not on Nicaragua, to assess the existence of a risk of significant transboundary harm prior to the construction of the road, on the basis of an objective evaluation of all the relevant circumstances.

154. In the oral proceedings, counsel for Costa Rica stated that a preliminary assessment of the risk posed by the road project was undertaken when the decision to build the road was made. According to Costa Rica, this assessment took into account the nature of the project and its likely impact on the river, and concluded that the road posed no risk of significant harm. In support of this claim, Costa Rica emphasized the modest scale of the works, that the road was clearly not a highway, that some of it was constructed on pre-existing tracks, and that the only possible risk was the contribution of sediment by the road to a river that already carried a heavy sediment load.

The Court observes that to conduct a preliminary assessment of the risk posed by an activity is one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm. However, Costa Rica has not adduced any evidence that it actually carried out such a preliminary assessment.

155. In evaluating whether, as of the end of 2010, the construction of the road posed a risk of significant transboundary harm, the Court will have regard to the nature and magnitude of the project and the context in which it was to be carried out.

First, the Court notes that, contrary to Costa Rica's submission, the scale of the road project was substantial. The road, which is nearly 160 km long, runs along the river for 108.2 km (see sketch-map

No. 2 above). Approximately half of that stretch is completely new construction.

Secondly, the Court notes that, because of the planned location of the road along the San Juan River, any harm caused by the road to the surrounding environment could easily affect the river, and therefore Nicaragua's territory. The evidence before the Court shows that approximately half of the stretch of road following the San Juan River is situated within 100 metres of the river bank; for nearly 18 km it is located within 50 metres of the river; and in some stretches it comes within 5 metres of the right bank of the river. The location of the road in such close proximity to the river and the fact that it would often be built on slopes, risked increasing the discharge of sediment into the river. Another relevant factor in assessing the likelihood of sedimentation due to erosion from the road is that almost a quarter of the road was to be built in areas that were previously forested. The possibility of natural disasters in the area caused by adverse events such as hurricanes, tropical storms and earthquakes, which would increase the risk of sediment erosion, must equally be taken into consideration.

Thirdly, the geographic conditions of the river basin where the road was to be situated must be taken into account. The road would pass through a wetland of international importance in Costa Rican territory and be located in close proximity to another protected wetland — the *Refugio de Vida Silvestre Río San Juan* — situated in Nicaraguan territory. The presence of Ramsar protected sites heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive. The principal harm that could arise was the possible large deposition of sediment from the road, with resulting risks to the ecology and water quality of the river, as well as morphological changes.

156. In conclusion, the Court finds that the construction of the road by Costa Rica carried a risk of significant transboundary harm. Therefore, the threshold for triggering the obligation to evaluate the environmental impact of the road project was met.

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157. The Court now turns to the question of whether Costa Rica was exempted from its obligation to evaluate the environmental impact of the road project because of an emergency. First, the Court recalls its holding that "it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case", having regard to various factors (see paragraph 104 above, quoting *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 205). The Court observes that this reference to domestic law does not relate to the question of whether an environmental impact assessment should be undertaken. Thus, the fact that there may be an

emergency exemption under Costa Rican law does not affect Costa Rica's obligation under international law to carry out an environmental impact assessment.

158. Secondly, independently of the question whether or not an emergency could exempt a State from its obligation under international law to carry out an environmental impact assessment, or defer the execution of this obligation until the emergency has ceased, the Court considers that, in the circumstances of this case, Costa Rica has not shown the existence of an emergency that justified constructing the road without undertaking an environmental impact assessment. In fact, completion of the project was going to take, and is indeed taking, several years. In addition, when Costa Rica embarked upon the construction of the road, the situation in the disputed territory was before the Court, which shortly thereafter issued provisional measures. Although Costa Rica maintains that the construction of the road was meant to facilitate the evacuation of the area of Costa Rican territory adjoining the San Juan River, the Court notes that the road provides access to only part of that area and thus could constitute a response to the alleged emergency only to a limited extent. Moreover, Costa Rica has not shown an imminent threat of military confrontation in the regions crossed by the road. Finally, the Court notes that the Executive Decree proclaiming an emergency was issued by Costa Rica on 21 February 2011, after the works on the road had begun.

159. Having thus concluded that, in the circumstances of this case, there was no emergency justifying the immediate construction of the road, the Court does not need to decide whether there is an emergency exemption from the obligation to carry out an environmental impact assessment in cases where there is a risk of significant transboundary harm.

It follows that Costa Rica was under an obligation to conduct an environmental impact assessment prior to commencement of the construction works.

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160. Turning now to the question of whether Costa Rica complied with its obligation to carry out an environmental impact assessment, the Court notes that Costa Rica produced several studies, including an Environmental Management Plan for the road in April 2012, an Environmental Diagnostic Assessment in November 2013, and a follow-up study thereto in January 2015. These studies assessed the adverse effects that had already been caused by the construction of the road on the environment and suggested steps to prevent or reduce them.

161. In its Judgment in the *Pulp Mills* case, the Court held that the obligation to carry out an environmental impact assessment is a continuous one, and that monitoring of the project's effects on the environment

shall be undertaken, where necessary, throughout the life of the project (*I.C.J. Reports 2010 (I)*, pp. 83-84, para. 205). Nevertheless, the obligation to conduct an environmental impact assessment requires an *ex ante* evaluation of the risk of significant transboundary harm, and thus "an environmental impact assessment must be conducted prior to the implementation of a project" (*ibid.*, p. 83, para. 205). In the present case, Costa Rica was under an obligation to carry out such an assessment prior to commencing the construction of the road, to ensure that the design and execution of the project would minimize the risk of significant transboundary harm. In contrast, Costa Rica's Environmental Diagnostic Assessment and its other studies were *post hoc* assessments of the environmental impact of the stretches of the road that had already been built. These studies did not evaluate the risk of future harm. The Court notes moreover that the Environmental Diagnostic Assessment was carried out approximately three years into the road's construction.

162. For the foregoing reasons, the Court concludes that Costa Rica has not complied with its obligation under general international law to carry out an environmental impact assessment concerning the construction of the road.

*2. The alleged breach of Article 14 of the Convention on Biological Diversity*

163. Nicaragua submits that Costa Rica was required to carry out an environmental impact assessment by Article 14 of the Convention on Biological Diversity. Costa Rica responds that the provision at issue concerns the introduction of appropriate procedures with respect to projects that are likely to have a significant adverse effect on biological diversity. It claims that it had such procedures in place and that, in any event, they do not apply to the construction of the road, as it was not likely to have a significant adverse effect on biological diversity.

164. The Court recalls that the provision reads, in relevant part:

> "Each Contracting Party, as far as possible and as appropriate, shall: *(a)* Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures."

The Court considers that the provision at issue does not create an obligation to carry out an environmental impact assessment before undertaking an activity that may have significant adverse effects on biological diversity. Therefore, it has not been established that Costa Rica breached Article 14 of the Convention on Biological Diversity by failing to conduct an environmental impact assessment for its road project.

*3. The alleged breach of an obligation to notify and consult*

165. Nicaragua contends that Costa Rica breached its obligation to notify, and consult with, Nicaragua in relation to the construction works. Nicaragua founds the existence of such obligation on three grounds, namely, customary international law, the 1858 Treaty, and the Ramsar Convention. The Court will examine each of Nicaragua's arguments in turn.

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166. In Nicaragua's view, Costa Rica should have notified it of the road project and should have consulted with it, as Costa Rica had every reason to believe that the construction of the road risked causing significant transboundary harm. According to Nicaragua, the alleged emergency did not exempt Costa Rica from this obligation.

167. For Costa Rica, the relevant threshold of "risk of significant adverse impact" was not met in this case. Moreover, Costa Rica claims to have invited Nicaragua to engage in consultations, but Nicaragua did not do so. In any event, according to Costa Rica, Nicaragua is prevented from relying on the obligation to notify since it has itself created the emergency to which Costa Rica had to respond by constructing the road.

168. The Court reiterates its conclusion that, if the environmental impact assessment confirms that there is a risk of significant transboundary harm, a State planning an activity that carries such a risk is required, in order to fulfil its obligation to exercise due diligence in preventing significant transboundary harm, to notify, and consult with, the potentially affected State in good faith, where that is necessary to determine the appropriate measures to prevent or mitigate that risk (see paragraph 104 above). However, the duty to notify and consult does not call for examination by the Court in the present case, since the Court has established that Costa Rica has not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road.

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169. Nicaragua further asserts the existence of an obligation to notify under the 1858 Treaty. In its 2009 Judgment in the *Navigational Rights* case, the Court held that Nicaragua has an obligation to notify Costa Rica of its regulations concerning navigation on the river. According to Nicaragua, since the construction of the road affects Nicaragua's navigational rights, the same reasoning applies *a fortiori* in this case.

170. For Costa Rica, Nicaragua's reference to the 1858 Treaty is misplaced, since the Treaty does not impose on Costa Rica an obligation to

notify Nicaragua if Costa Rica undertakes infrastructure works on its own territory.

171. The Court recalls its finding in the 2009 Judgment that Nicaragua's obligation to notify Costa Rica under the 1858 Treaty arises, amongst other factors, by virtue of Costa Rica's rights of navigation on the river, which is part of Nicaragua's territory (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, pp. 251-252, paras. 94-97). In contrast, the 1858 Treaty does not grant Nicaragua any rights on Costa Rica's territory, where the road is located. Therefore, no obligation to notify Nicaragua with respect to measures undertaken on Costa Rica's territory arises. The Court concludes that the 1858 Treaty did not impose on Costa Rica an obligation to notify Nicaragua of the construction of the road.

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172. Lastly, Nicaragua relies on Article 3, paragraph 2, and on Article 5 of the Ramsar Convention (see paragraphs 109-110 above) as imposing an obligation of notification and consultation upon the Contracting Parties. In the Court's view, Nicaragua has not shown that, by constructing the road, Costa Rica has changed or was likely to change the ecological character of the wetland situated in its territory. Moreover, contrary to Nicaragua's contention, on 28 February 2012 Costa Rica notified the Ramsar Secretariat about the stretch of the road that passes through the *Humedal Caribe Noreste*. Therefore, the Court concludes that Nicaragua has not shown that Costa Rica breached Article 3, paragraph 2, of the Ramsar Convention. As regards Article 5 of the Ramsar Convention, the Court finds that this provision creates no obligation for Costa Rica to consult with Nicaragua concerning a particular project it is undertaking, in this case the construction of the road (see also paragraph 110 above).

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173. In conclusion, the Court finds that Costa Rica failed to comply with its obligation to evaluate the environmental impact of the construction of the road. Costa Rica remains under an obligation to prepare an appropriate environmental impact assessment for any further works on the road or in the area adjoining the San Juan River, should they carry a risk of significant transboundary harm. Costa Rica accepts that it is under such an obligation. There is no reason to suppose that it will not take note of the reasoning and conclusions in this Judgment as it conducts any future development in the area, including further construction works on the road. The Court also notes Nicaragua's commitment, made in the course of the oral proceedings, that it will co-operate with Costa Rica in

assessing the impact of such works on the river. In this connection, the Court considers that, if the circumstances so require, Costa Rica will have to consult in good faith with Nicaragua, which is sovereign over the San Juan River, to determine the appropriate measures to prevent significant transboundary harm or minimize the risk thereof.

### *B. Alleged Breaches of Substantive Obligations*

174. The Court now turns to the examination of the alleged violations by Costa Rica of its substantive obligations under customary international law and the applicable international conventions. In particular, Nicaragua claims that the construction of the road caused damage to the San Juan River, which is under Nicaragua's sovereignty according to the 1858 Treaty. Thus, in Nicaragua's view, Costa Rica breached the obligation under customary international law not to cause significant transboundary harm to Nicaragua, the obligation to respect the territorial integrity of Nicaragua and treaty obligations regarding the protection of the environment.

175. Over the past four years, the Parties have presented to the Court a vast amount of factual and scientific material in support of their respective contentions. They have also submitted numerous reports and studies prepared by experts and consultants commissioned by each of them on questions such as technical standards for road construction; river morphology; sedimentation levels in the San Juan River, their causes and effects; the ecological impact of the construction of the road; and the status of remediation works carried out by Costa Rica. Some of these specialists have also appeared before the Court to give evidence in their capacity as experts pursuant to Articles 57 and 64 of the Rules of Court.

176. It is the duty of the Court, after having given careful consideration to all the evidence in the record, to assess its probative value, to determine which facts must be considered relevant, and to draw conclusions from them as appropriate. In keeping with this practice, the Court will make its own determination of the facts, on the basis of the totality of the evidence presented to it, and it will then apply the relevant rules of international law to those facts which it has found to be established (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 72, para. 168).

#### *1. The alleged breach of the obligation not to cause significant transboundary harm to Nicaragua*

177. Nicaragua claims that the construction works resulted in the dumping of large quantities of sediment into the San Juan River, in particular because Costa Rica's disregard of basic engineering principles led to significant erosion. For example, Costa Rica carried out extensive deforestation in areas adjacent to the river and earthmoving activities

that led to the creation of unstable cuts and fills in the river's proximity. Moreover, the road builders left piles of earth exposed to rainfall and failed to construct proper drainage systems and stream crossings so as to avoid erosion. Furthermore, Nicaragua maintains that the stretch of road along the San Juan River is situated too close to the river — nearly half of it was built within 100 metres of the river, and parts of it even within 5 metres of the river bank — or on steep slopes, thereby increasing the delivery of sediment to the river. Nicaragua's main expert opined that erosion is particularly severe in the 41.6 km stretch of the road containing the steepest sections, situated between a point denominated "Marker II" (the western point from which the right bank of the San Juan marks the boundary with Nicaragua) and Boca San Carlos (at the junction of the San Juan and San Carlos Rivers; see sketch-map No. 2 above).

178. According to Nicaragua, the delivery of these large quantities of sediment to the San Juan River caused an increase in sediment concentrations in the river, which are already unnaturally elevated. It argues that this increase, in and of itself, produced harm to the river, as sediment is a pollutant, and that it had a number of adverse effects. First, it brought about changes in the river morphology, as large quantities of the sediment eroded from the road accumulated on the bed of the Lower San Juan, thereby exacerbating the problems for navigation in this stretch of the river and rendering additional dredging necessary to restore the navigability of the channel. Moreover, sediment eroded from the road created large deltas along the Costa Rican bank of the river that obstruct navigation. Secondly, Nicaragua argues that sediment eroded from the road caused harm to the river's water quality and ecosystem. Thirdly, Nicaragua alleges that the construction of the road has had an adverse impact on tourism and the health of the river's riparian communities. In addition, Nicaragua maintains that Costa Rica's continuing failure to comply with road construction standards exposes Nicaragua to future harm, and that Costa Rica has failed to take appropriate remediation measures. Nicaragua further contends that additional risks derive from the possibility of spills of toxic materials into the river, the further development of the Costa Rican bank of the river and the likelihood of natural disasters caused by adverse events such as hurricanes, tropical storms and earthquakes.

179. For its part, Costa Rica argues that the construction of the road has not caused any harm to Nicaragua. According to Costa Rica, erosion is a natural process and sediment is not a pollutant. It contends that Nicaragua has not adduced any evidence of actual harm to the river, let alone significant harm. In addition, Costa Rica argues that the road's sediment contribution is tiny compared to the river's existing sediment load. It also recalls that, since 2012, it has carried out remediation works to mitigate erosion at slopes and watercourse crossings (such as slope-terracing; digging drainage channels; installing cross-drains on the road;

constructing sediment traps; and replacing log bridges with modular bridges), with a view to further reducing the quantity of sediment from the road that reaches the San Juan River.

180. In order to pronounce on Nicaragua's allegations, the Court will first address the Parties' arguments on the contribution of sediment from the road to the river; then it will examine whether the road-derived sediment caused significant harm to Nicaragua.

(a) *The contribution of sediment from the road to the river*

181. The Parties agree that sediment eroded from the road is delivered to the river, but disagree considerably as to the actual volume.

182. Nicaragua argues that the most direct and reliable method to assess the total amount of sediment contributed from the road is to estimate the volume of sediment entering the river from all the sites along the road that are subject to erosion. It submits, based on its main expert's estimates, that the total road-derived sediment reaching the river amounts to approximately 190,000 to 250,000 tonnes per year, including sediment eroded from the access roads that connect the road to inland areas. Nicaragua further submits that the volume of sediment in the river due to the construction of the road would increase by a factor of at least ten during a tropical storm or a hurricane.

183. Costa Rica challenges the estimates of road-derived sediment put forward by Nicaragua. In particular, it argues, relying on its main expert's evidence, that Nicaragua's experts over-estimated the areas subject to erosion, which they could not measure directly because the road is in Costa Rica's territory. It adds that Nicaragua's estimates are inflated by the inclusion of access roads, which do not contribute any appreciable quantities of sediment to the San Juan River. According to Costa Rica, the sediment contribution from the road is approximately 75,000 tonnes per year. In Costa Rica's view, even this figure is a significant over-estimate because it does not take into account the effects of mitigation works recently carried out. Finally, Costa Rica argues that Nicaragua's experts have overstated the risk of unprecedented rainfall and the impact on sediment loads in the river as a result of hurricanes or tropical storms.

184. Costa Rica further points out that the most direct and reliable method for measuring the road's impact on sediment concentrations in the San Juan River would have been for Nicaragua, which is sovereign over the river, to carry out a sampling programme. Yet Nicaragua has not provided measurements of sedimentation and flow levels in the river. The only empirical data before the Court are two reports of the Nicara-

guan Institute of Territorial Studies (INETER), which contain measurements of flow rates and suspended sediment concentrations taken at various locations along the San Juan River in 2011 and 2012. Costa Rica argues that neither set of measurements shows any impact from the road.

185. Nicaragua replies that a sampling programme would not have been of assistance to assess the impact of the road-derived sediment because the baseline sediment load of the San Juan prior to the construction of the road is unknown.

186. The Court notes that it is not contested that sediment eroded from the road is delivered to the river. As regards the total volume of sediment contributed by the road, the Court observes that the evidence before it is based on modelling and estimates by experts appointed by the Parties. The Court further observes that there is considerable disagreement amongst the experts on key data such as the areas subject to erosion and the appropriate erosion rates, which led them to reach different conclusions as to the total amount of sediment contributed by the road. The Court sees no need to go into a detailed examination of the scientific and technical validity of the different estimates put forward by the Parties' experts. Suffice it to note here that the amount of sediment in the river due to the construction of the road represents at most 2 per cent of the river's total load, according to Costa Rica's calculations based on the figures provided by Nicaragua's experts and uncontested by the latter (see paragraphs 182-183 above and 188-191 below). The Court will come back to this point below (see paragraph 194), after considering further arguments by the Parties.

(b) *Whether the road-derived sediment caused significant harm to Nicaragua*

187. The core question before the Court is whether the construction of the road by Costa Rica has caused significant harm to Nicaragua. The Court will begin its analysis by considering whether the fact that the total amount of sediment in the river was increased as a result of the construction of the road, in and of itself, caused significant harm to Nicaragua. The Court will then examine whether such increase in sediment concentrations caused harm in particular to the river's morphology, navigation and Nicaragua's dredging programme; the water quality and the aquatic ecosystem; or whether it caused any other harm that may be significant.

*(i) Alleged harm caused by increased sediment concentrations in the river*

188. Nicaragua contends that the volume (absolute quantity) of sediment eroded from the road, irrespective of its precise amount, polluted the river thereby causing significant harm to Nicaragua. In Nicaragua's

view, the impact of the road's contribution must be considered taking into account the elevated sediment load in the San Juan River which is allegedly due to deforestation and poor land use practices by Costa Rica. An expert for Nicaragua estimated the current sediment load to be approximately 13,700,000 tonnes per year. In this context, Nicaragua submits that there is a maximum load for sediment in the San Juan, and that any additional amount of sediment delivered from the road to the river is necessarily harmful.

189. Costa Rica responds that Nicaragua has not shown that the San Juan River has a maximum sediment capacity that has been exceeded. For Costa Rica, the question before the Court is whether the relative impact of the road-derived sediment on the total load of the San Juan River caused significant harm. Costa Rica claims that it did not. According to Costa Rica, the San Juan River naturally carries a heavy sediment load, which is attributable to the geology of the region, and in particular to the occurrence of earthquakes and volcanic eruptions in the drainage area of the river and its tributaries. The volume of sediment contributed by the road is insignificant in the context of the river's total sediment load (estimated by Costa Rica at 12,678,000 tonnes per year), of which it represents a mere 0.6 per cent at most. The road-derived sediment is also indiscernible considering the high variability in the river's sediment loads deriving from other sources. Costa Rica adds that, even if Nicaragua's figures were to be adopted, the sediment contribution due to the construction of the road would still only represent a small proportion, within the order of 1-2 per cent, of the total load transported by the San Juan. In Costa Rica's view, this amount is too small to have any significant impact.

190. Nicaragua further argues, drawing on the commentary to the International Law Commission's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, that any detrimental impact of the construction of the road on the San Juan River need only be susceptible of being measured to qualify as significant harm. Since the amount of sediment in the river due to the construction of the road is measurable, as shown by the fact that both Nicaragua's and Costa Rica's experts have estimated its amount, Nicaragua claims that it caused significant harm.

191. Costa Rica retorts that Nicaragua has not shown significant harm by factual and objective standards. It also argues that, even lacking an appropriate baseline, Nicaragua could have measured the impact of the construction of the road on the river's sediment concentrations by taking its own measurements upstream and downstream of the construction works. However, Nicaragua failed to do so.

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192. In the Court's view, Nicaragua's submission that any detrimental impact on the river that is susceptible of being measured constitutes significant harm is unfounded. Sediment is naturally present in the river in

large quantities, and Nicaragua has not shown that the river's sediment levels are such that additional sediment eroded from the road passes a sort of critical level in terms of its detrimental effects. Moreover, the Court finds that, contrary to Nicaragua's submissions, the present case does not concern a situation where sediment contributed by the road exceeds maximum allowable limits, which have not been determined for the San Juan River. Thus, the Court is not convinced by Nicaragua's argument that the absolute quantity of sediment in the river due to the construction of the road caused significant harm *per se*.

193. The Court will therefore proceed to consider the relative impact of the road-derived sediment on the current overall sediment load of the San Juan River. In this regard, the Court notes that the total sediment load of the San Juan River has not been established. Indeed, Nicaragua has not provided direct measurements of sediment levels in the river. Costa Rica, based on its main expert's report, estimated the river's total sediment load to be approximately 12,678,000 tonnes per year using measurements from the Colorado River. Nicaragua has not provided a comparable figure, although its expert stated that the current total sediment load of the San Juan River is roughly 13,700,000 tonnes per year.

194. On the basis of the evidence before it, and taking into account the estimates provided by the experts of the amount of sediment in the river due to the construction of the road and of the total sediment load of the San Juan River, the Court observes that the road is contributing at most 2 per cent of the river's total load. It considers that significant harm cannot be inferred therefrom, particularly taking into account the high natural variability in the river's sediment loads.

195. In any event, in the Court's view, the only measurements that are before it, namely, those contained in the INETER reports from 2011 and 2012, do not support Nicaragua's claim that sediment eroded from the road has had a significant impact on sediment concentrations in the river. A comparison of the measurements taken in 2011, when most of the road had not yet been built, and in 2012, when construction works were under way, shows that sediment levels in the river are variable, and that tributaries (particularly the San Carlos and Sarapiquí Rivers) are major sources of sediment for the San Juan. However, the data do not indicate a significant impact on sediment levels from the construction of the road. Moreover, the measurements taken at El Castillo and upstream of Boca San Carlos, which are representative of the steepest stretch of the road, show no significant impact.

196. In light of the above, the Court concludes that Nicaragua has not established that the fact that sediment concentrations in the river increased as a result of the construction of the road in and of itself caused significant transboundary harm.

*(ii) Alleged harm to the river's morphology, to navigation and to Nicaragua's dredging programme*

197. The Court will now examine whether the sediment contributed by the road, which the Court has noted corresponds to at most 2 per cent of the river's average total load, caused any other significant harm. Nicaragua's primary argument on the harm caused by the construction of the road concerns the impact of the resulting sediment on the morphology of the river, and particularly on the Lower San Juan.

198. The Parties broadly agree that, on the assumption that at "Delta Colorado" 10 per cent of the waters of the San Juan River flow into the Lower San Juan, approximately 16 per cent of the suspended sediments and 20 per cent of the coarse load in the San Juan River would flow into the Lower San Juan. They also concur that, unlike the much larger Colorado River, the Lower San Juan has no unfilled capacity to transport sediment. Thus, coarse sediment deposits on the bed of the Lower San Juan. The Parties' experts further agree that sediment that settles on the riverbed does not spread evenly, but tends to accumulate in shoals and sandbars that may obstruct navigation, especially in the dry season. They disagree, however, on whether and to what extent the finer suspended sediments are also deposited on the riverbed and, more broadly, on the effects of the construction of the road on sediment deposition in the Lower San Juan.

199. According to Nicaragua's expert, all of the coarse sediment and 60 per cent of the fine sediment contributed by the road to the Lower San Juan settle on the riverbed. To maintain the navigability of the river, Nicaragua is thus required to dredge the fine and coarse sediment that accumulates in the Lower San Juan. In Nicaragua's view, in a river that is already overloaded with sediment such as the Lower San Juan, any addition of sediment coming from the road causes significant harm to Nicaragua because it increases its dredging burden. Furthermore, the accumulation of road-derived sediment reduces the flow of fresh water to the wetlands downstream, which depend on it for their ecological balance.

200. Nicaragua also argues that sediment eroded from the road created "huge" deltas along the river's channel that obstruct navigation, thereby causing significant harm to Nicaragua.

201. Costa Rica responds, relying on the evidence of its main expert, that the aggradation of the Lower San Juan is an inevitable natural phenomenon that is unrelated to the construction of the road. For Costa Rica, Nicaragua's experts also dramatically overestimate the amount of road-derived sediment that is deposited in the Lower San Juan. First, in Costa Rica's view, only coarse sediment accumulates on the riverbed, whereas most of the fine sediment is washed into the Caribbean Sea. Secondly, Costa Rica argues that there is no evidence that coarse sediment

from the road has actually reached the Lower San Juan. Sediment deposition is not a linear process; in particular, sediment tends to accumulate in stretches of the river called "response reaches" and may stay there for years before it is transported further down the channel. Moreover, Costa Rica points out that the Parties' estimates are based on a number of untested assumptions, including estimates of the split of flow and sediment loads between the Colorado River and the Lower San Juan at "Delta Colorado". Costa Rica further argues that Nicaragua's case on harm rests on the mistaken assumption that sediment accumulating on the bed of the Lower San Juan will necessarily need to be dredged.

202. As to the deltas along the Costa Rican bank of the river, Costa Rica argues that Nicaragua has not shown that they were created as a result of the construction of the road. For example, satellite imagery demonstrates that at least two of these deltas pre-date the road. Costa Rica further points out that similar deltas exist on the Nicaraguan bank of the river. In any event, their impact on the morphology of the river and on navigation is insignificant because of their small size relative to the width of the river.

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203. The Court notes that Nicaragua has produced no direct evidence of changes in the morphology of the Lower San Juan or of a deterioration of its navigability since the construction of the road began. Nicaragua's case once again rests on modelling and estimates by its experts, which have not been substantiated by empirical data. The Court observes in this regard that there are considerable uncertainties concerning the volume of sediment eroded from the road that has allegedly reached the Lower San Juan and deposited on its bed. For example, Nicaragua has not adduced scientific evidence on the division of flow and sediment loads at "Delta Colorado", but based its estimates on a report of the Costa Rican Institute of Electricity, which is in turn based on measurements taken only in the Colorado River.

204. The Court further considers that the expert evidence before it establishes that the accumulation of sediment is a long-standing natural feature of the Lower San Juan, and that sediment delivery along the San Juan is not a linear process. The road-derived sediment is one of a number of factors that may have an impact on the aggradation of the Lower San Juan. The Court therefore considers that the evidence adduced by Nicaragua does not prove that any morphological changes in the Lower San Juan have been caused by the construction of the road in particular.

205. As to Nicaragua's claim that the construction of the road has had a significant adverse impact on its dredging burden, the Court notes that

Nicaragua has adduced no evidence of an increase in its dredging activities due to the construction of the road. In this connection, the Court also recalls that Nicaragua initiated its dredging programme before the construction of the road started (see paragraphs 63-64 above). In any event, the Court recalls its conclusion that the construction of the road has caused an increase in sediment concentrations in the river corresponding to at most 2 per cent (see paragraph 194 above). The Court observes that there is no evidence that sediment due to the construction of the road is more likely to settle on the riverbed than sediment from other sources. Thus, sediment coming from the road would correspond to at most 2 per cent of the sediment dredged by Nicaragua in the Lower San Juan. The Court is therefore not convinced that the road-derived sediment led to a significant increase in the bed level of the Lower San Juan or in Nicaragua's dredging burden.

206. Finally, the Court turns to Nicaragua's claim that the sediment deltas along the Costa Rican bank of the river have caused significant harm to the river's morphology and to navigation. In the Court's view, the photographic evidence adduced by Nicaragua indicates that there are deltas on the Costa Rican bank of the river to which the construction of the road is contributing sediment. The Court observes that Nicaragua submitted that in the steepest stretch of the road there are eight "huge" deltas but was not able to specify the total number of deltas allegedly created as a consequence of the construction of the road. The Court further notes that satellite images in the record show that at least two of these deltas pre-date the road. In any event, the Court considers that Nicaragua has not presented sufficient evidence to prove that these deltas, which only occupy the edge of the river's channel on the Costa Rican bank, have had a significant adverse impact on the channel's morphology or on navigation.

207. For the foregoing reasons, the Court concludes that Nicaragua has not shown that sediment contributed by the road has caused significant harm to the morphology and navigability of the San Juan River and the Lower San Juan, nor that such sediment significantly increased Nicaragua's dredging burden.

*(iii) Alleged harm to water quality and the aquatic ecosystem*

208. The Court will now consider Nicaragua's contention concerning harm to water quality and the aquatic ecosystem. In its written pleadings, Nicaragua alleged that the increased sediment concentrations in the river as a result of the construction of the road caused significant harm to fish species, many of which belong to families that are vulnerable to elevated levels of sediments, to macro-invertebrates and to algal communities in the river. Furthermore, according to Nicaragua, the road's sediment

caused a deterioration in the water quality of the river. To prove harm to aquatic organisms and water quality, Nicaragua relied *inter alia* on an expert report based on sampling at 16 deltas in the river, which concluded that both species richness and abundance of macro-invertebrates were significantly lower on the south bank than on the north bank.

209. During the course of the oral proceedings, Nicaragua's case shifted from its prior claim of actual harm to the river's ecosystem to a claim based on the risk of harm. The Parties now agree that there have been no studies of the fish species in the San Juan River to determine whether they are vulnerable to elevated levels of sediment. However, Nicaragua claims that Costa Rica's Environmental Diagnostic Assessment and the follow-up study carried out in January 2015 by the Tropical Science Centre (hereinafter "CCT", by its Spanish acronym) show that the road is harming macro-invertebrates and water quality in the tributaries that flow into the San Juan River. The CCT measured water quality in Costa Rican tributaries upstream and downstream of the road and recorded a lower water quality downstream of the road. For Nicaragua, this demonstrates a risk of harm to the river itself due to the cumulative impact of those tributaries.

210. For Costa Rica, Nicaragua's case on the impact on fish species fails due to the lack of evidence of actual harm. Relying on one of its experts, Costa Rica argues that it is very likely that species living in the river are adapted to conditions of high and variable sediment loads and are highly tolerant of such conditions. As to macro-invertebrates and water quality, Costa Rica submits that the CCT study shows no significant impact. In any event, its results are based on sampling on small tributary streams in Costa Rica, and cannot be transposed to the much larger San Juan River. Costa Rica further argues that the expert report adduced by Nicaragua does not provide sufficient support for Nicaragua's claim that the construction of the road has had an adverse impact on macro-invertebrates living in deltas along the south bank of the river.

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211. The Court observes that Nicaragua has not presented any evidence of actual harm to fish in the San Juan River, nor has it identified with precision which species of fish have allegedly been harmed by the construction of the road.

212. In the Court's view, the Environmental Diagnostic Assessment relied upon by Nicaragua only shows that the construction of the road

has had a localized impact on macro-invertebrate communities and water quality in small Costa Rican streams draining into the San Juan River. However, the Court is not persuaded that the results of the Environmental Diagnostic Assessment and the follow-up study can be transposed to the San Juan River, which has an average width of nearly 300 metres. As regards the expert report submitted by Nicaragua, the Court finds it difficult to attribute any differences in macro-invertebrate richness and abundance between the north and the south banks of the river to the construction of the road alone, as opposed to other factors such as the size of the catchment area and the nutrient levels therein.

213. On the basis of the foregoing considerations, the Court finds that Nicaragua has not proved that the construction of the road caused significant harm to the river's ecosystem and water quality.

*(iv) Other alleged harm*

214. Nicaragua also alleges that the construction of the road has had an adverse impact on the health of the communities along the river, which is dependent upon the health of the river itself. Furthermore, in Nicaragua's view, the road significantly affected the area's tourism potential as it has a negative visual impact on the natural landscape. Finally, Nicaragua argues that, in addition to the transboundary harm that the road has already caused, it poses a significant risk of future transboundary harm. According to Nicaragua, additional risks derive from the possibility of spills of toxic materials into the river whenever hazardous substances are transported on the road, and from any further development of the right bank of the river, such as increased agricultural and commercial activities.

215. Costa Rica responds that Nicaragua did not adduce any evidence of actual impact on tourism or on the health of riparian communities. Moreover, it did not explain the legal basis of its claims. Furthermore, Costa Rica contends that Nicaragua's arguments on the risk of toxic spills in the river are based entirely on speculation: Costa Rica's 1995 Regulations for the Ground Transportation of Hazardous Material provide that hazardous substances can only be transported on authorized roads, and Route 1856 is not one of them.

*

216. The Court finds that Nicaragua did not substantiate its contentions regarding harm to tourism and health. The Court further observes that Nicaragua's arguments concerning the risk of toxic spills into the river and of further development of the Costa Rican bank of the river are speculative and fail to show any harm. Therefore, these arguments fail.

(c) *Conclusion*

217. In light of the above, the Court concludes that Nicaragua has not proved that the construction of the road caused it significant transboundary harm. Therefore, Nicaragua's claim that Costa Rica breached its substantive obligations under customary international law concerning transboundary harm must be dismissed.

*2. Alleged breaches of treaty obligations*

218. Nicaragua further argues that Costa Rica violated substantive obligations contained in several universal and regional instruments. First, it contends that Costa Rica breached Article 3, paragraph 1, of the Ramsar Convention. Secondly, it argues that Costa Rica acted contrary to the object and purpose of the 1990 Agreement over the Border Protected Areas between Nicaragua and Costa Rica ("SI-A-PAZ Agreement"). Thirdly, Nicaragua alleges that, by its activities, Costa Rica violated Articles 3 and 8 of the Convention on Biological Diversity. Fourthly, it claims that Costa Rica violated several provisions of the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America. Fifthly, it alleges violations of the Central American Convention for the Protection of the Environment and the Tegucigalpa Protocol to the Charter of the Organization of Central American States. Finally, Nicaragua contends that Costa Rica breached Article 3 of the Regional Agreement on the Transboundary Movement of Hazardous Wastes, on the ground that it did not adopt and implement the precautionary approach to pollution problems provided for in that instrument.

219. In response to these allegations, Costa Rica argues at the outset that, since Nicaragua failed to prove that the construction of the road caused any significant transboundary harm, its contentions must fail. Costa Rica further points out that the construction of the road does not touch upon protected Nicaraguan wetlands falling within the Ramsar Convention. Moreover, it states that Nicaragua has identified no provision of the SI-A-PAZ Agreement that was allegedly breached. Costa Rica further maintains that the Central American Convention for the Protection of the Environment and the Tegucigalpa Protocol are of no relevance to the present dispute and that there is no factual basis for Nicaragua's contentions regarding the Regional Agreement on the Transboundary Movement of Hazardous Wastes.

*

220. The Court notes that both Nicaragua and Costa Rica are parties to the instruments invoked by Nicaragua. Irrespective of the question of the binding character of some of the provisions at issue, the Court

observes that, in relation to these instruments, Nicaragua simply makes assertions about Costa Rica's alleged violations and does not explain how the "objectives" of the instruments or provisions invoked would have been breached, especially in the absence of proof of significant harm to the environment (see paragraph 217 above). The Court therefore considers that Nicaragua failed to show that Costa Rica infringed the above-mentioned instruments.

*3. The obligation to respect Nicaragua's territorial integrity and sovereignty over the San Juan River*

221. Nicaragua further alleges that the deltas created by sediment eroded from the road are "physical invasions, incursions by Costa Rica into Nicaragua's sovereign territory . . . through the agency of sediment" and that their presence constitutes "trespass" into Nicaragua's territory. Moreover, Nicaragua maintains that the dumping of sediments, soil, uprooted vegetation and felled trees into the river by Costa Rica poses a serious threat to the exercise of Nicaragua's right of navigation on the San Juan, which is based on its sovereignty over the river. Nicaragua therefore claims that, by its conduct and activities, Costa Rica violated Nicaragua's territorial integrity and sovereignty over the San Juan River, as established by the 1858 Treaty.

222. Costa Rica argues that undertaking road infrastructure works entirely within its territory does not infringe the boundary delimited by the 1858 Treaty or violate Nicaragua's sovereignty, nor does it affect Nicaragua's right to navigate the San Juan River. Furthermore, Costa Rica maintains that the 1858 Treaty has no bearing on this case, as it does not regulate the issues that are at stake here.

223. The Court considers that, whether or not sediment deltas are created as a consequence of the construction of the road, Nicaragua's theory to support its claim of a violation of its territorial integrity via sediment is unconvincing. There is no evidence that Costa Rica exercised any authority on Nicaragua's territory or carried out any activity therein. Moreover, for the reasons already expressed in paragraphs 203 to 207 above, Nicaragua has not shown that the construction of the road impaired its right of navigation on the San Juan River. Therefore, Nicaragua's claim concerning the violation of its territorial integrity and sovereignty must be dismissed.

## *C. Reparation*

224. Nicaragua requests the Court to adjudge and declare that, by its conduct, Costa Rica has breached its obligation not to violate Nicaragua's territorial integrity; its obligation not to damage Nicaraguan terri-

tory; and its obligations under general international law and the relevant environmental treaties (final submissions, para. 1; see paragraph 52 above).

In the light of its reasoning above, the Court's declaration that Costa Rica violated its obligation to conduct an environmental impact assessment is the appropriate measure of satisfaction for Nicaragua.

225. Secondly, Nicaragua asks the Court to order that Costa Rica "[c]ease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua" (*ibid.*, para. 2 (i)).

The Court considers that Costa Rica's failure to conduct an environmental impact assessment does not at present adversely affect the rights of Nicaragua nor is it likely further to affect them. Consequently, there are no grounds to grant the remedy requested.

226. Thirdly, Nicaragua requests the Court to order Costa Rica to restore to the extent possible the situation that existed before the road was constructed, and to provide compensation for the damage caused insofar as it is not made good by restitution (*ibid.*, para. 2 (ii) and (iii)). The Court recalls that restitution and compensation are forms of reparation for material injury. The Court notes that, although Costa Rica did not comply with the obligation to conduct an environmental impact assessment, it has not been established that the construction of the road caused significant harm to Nicaragua or was in breach of other substantive obligations under international law. As such, restoring the original condition of the area where the road is located would not constitute an appropriate remedy for Costa Rica's breach of its obligation to carry out an environmental impact assessment (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 103, para. 271). For the same reasons, the Court declines to grant Nicaragua's claim for compensation.

In view of Nicaragua's failure to prove that significant harm was caused, the Court does not need to consider the appointment of an expert or committee to evaluate the extent of harm and the chain of causation, as Nicaragua suggests.

227. The Court further considers that Nicaragua's request to order Costa Rica not to undertake any future development in the border area without an appropriate environmental impact assessment (final submissions, para. 3 (i)) must be rejected. As the Court stated in paragraph 173 above, Costa Rica's obligation to conduct an environmental impact assessment only applies to activities carrying a risk of significant transboundary harm, and there is no reason to suppose that Costa Rica will not comply with its obligations under international law, as outlined in this Judgment, as it conducts any future activities in the area, including further construction works on the road.

228. To conclude, the Court notes that Costa Rica has begun mitigation works in order to reduce the adverse effects of the construction of the road on the environment. It expects that Costa Rica will continue to pursue these efforts in keeping with its due diligence obligation to monitor the effects of the project on the environment. It further reiterates the value of ongoing co-operation between the Parties in the performance of their respective obligations in connection with the San Juan River.

* * *

229. For these reasons,

THE COURT,

(1) By fourteen votes to two,

*Finds* that Costa Rica has sovereignty over the "disputed territory", as defined by the Court in paragraphs 69-70 of the present Judgment;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson; *Judge* ad hoc Dugard;

AGAINST: *Judge* Gevorgian; *Judge* ad hoc Guillaume;

(2) Unanimously,

*Finds* that, by excavating three *caños* and establishing a military presence on Costa Rican territory, Nicaragua has violated the territorial sovereignty of Costa Rica;

(3) Unanimously,

*Finds* that, by excavating two *caños* in 2013 and establishing a military presence in the disputed territory, Nicaragua has breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 8 March 2011;

(4) Unanimously,

*Finds* that, for the reasons given in paragraphs 135-136 of the present Judgment, Nicaragua has breached Costa Rica's rights of navigation on the San Juan River pursuant to the 1858 Treaty of Limits;

(5) *(a)* Unanimously,

*Finds* that Nicaragua has the obligation to compensate Costa Rica for material damages caused by Nicaragua's unlawful activities on Costa Rican territory;

*(b)* Unanimously,

*Decides* that, failing agreement between the Parties on this matter within 12 months from the date of this Judgment, the question of compensation due to Costa Rica will, at the request of one of the Parties, be settled by the Court, and reserves for this purpose the subsequent procedure in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*;

*(c)* By twelve votes to four,

*Rejects* Costa Rica's request that Nicaragua be ordered to pay costs incurred in the proceedings;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Bennouna, Cançado Trindade, Xue, Donoghue, Gaja, Bhandari, Robinson, Gevorgian; *Judge* ad hoc Guillaume;

AGAINST: *Judges* Tomka, Greenwood, Sebutinde; *Judge* ad hoc Dugard;

(6) Unanimously,

*Finds* that Costa Rica has violated its obligation under general international law by failing to carry out an environmental impact assessment concerning the construction of Route 1856;

(7) By thirteen votes to three,

*Rejects* all other submissions made by the Parties.

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Gevorgian; *Judge* ad hoc Guillaume;

AGAINST: *Judges* Bhandari, Robinson; *Judge* ad hoc Dugard.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this sixteenth day of December, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, respectively.

*(Signed)* Ronny ABRAHAM,
President.

*(Signed)* Philippe COUVREUR,
Registrar.

Vice-President YUSUF appends a declaration to the Judgment of the Court; Judge OWADA appends a separate opinion to the Judgment of the Court; Judges TOMKA, GREENWOOD, SEBUTINDE and Judge *ad hoc*

DUGARD append a joint declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge DONOGHUE appends a separate opinion to the Judgment of the Court; Judge BHANDARI appends a separate opinion to the Judgment of the Court; Judge ROBINSON appends a separate opinion to the Judgment of the Court; Judge GEVORGIAN appends a declaration to the Judgment of the Court; Judge *ad hoc* GUILLAUME appends a declaration to the Judgment of the Court; Judge *ad hoc* DUGARD appends a separate opinion to the Judgment of the Court.

*(Initialled)* R.A.

*(Initialled)* Ph.C.

# Annex 69

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

**REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC) (REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)**
**List of cases: No. 21**

**ADVISORY OPINION OF 2 APRIL 2015**

# 2015

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

**DEMANDE D'AVIS CONSULTATIF SOUMISE PAR LA COMMISSION SOUS-RÉGIONALE DES PÊCHES (CSRP) (DEMANDE D'AVIS CONSULTATIF SOUMISE AU TRIBUNAL)**
**Rôle des affaires : No. 21**

**AVIS CONSULTATIF DU 2 AVRIL 2015**

 | DOI 10.1163/9789004324633_001

Official citation:

*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4

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Mode officiel de citation :

*Demande d'avis consultatif soumise par la Commission sous-régionale des pêches, avis consultatif, 2 avril 2015, Recueil 2015*, p. 4

2 APRIL 2015
ADVISORY OPINION

# REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC) (REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)

# DEMANDE D'AVIS CONSULTATIF SOUMISE PAR LA COMMISSION SOUS-RÉGIONALE DES PÊCHES (CSRP) (DEMANDE D'AVIS CONSULTATIF SOUMISE AU TRIBUNAL)

2 AVRIL 2015
AVIS CONSULTATIF

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

**YEAR 2015**

2 April 2015

List of cases:
No. 21

# REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC)

**(Request for Advisory Opinion submitted to the Tribunal)**

**ADVISORY OPINION**

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**ADVISORY OPINION**

*Present:* *President* YANAI; *Vice-President* HOFFMANN; *Judges* NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Registrar* GAUTIER.

On the Request submitted to the Tribunal by the Sub-Regional Fisheries Commission,

THE TRIBUNAL,

composed as above,

*gives the following Advisory Opinion*:

## I Introduction

### Request

1. By letter dated 27 March 2013, received electronically by the Registry on 28 March 2013, the Permanent Secretary of the Sub-Regional Fisheries Commission (hereinafter "the SRFC") transmitted to the Tribunal a Request for an advisory opinion (hereinafter "the Request"), pursuant to a resolution adopted by the Conference of Ministers of the SRFC at its fourteenth session, held on 27 and 28 March 2013. The originals of that letter and of the resolution were filed with the Registry on 2 April 2013.

2. The resolution adopted by the Conference of Ministers of the SRFC reads:

> **14TH SESSION OF THE CONFERENCE OF THE MINISTERS**
> **27TH to 28TH MARCH 2013, DAKAR, SENEGAL**
>
> **Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC) on authorizing the Permanent Secretary to seek Advisory opinion pursuant to Article 33 of the *Convention on the definition of the minimum access conditions and exploitation of fisheries resources within the maritime zones under the jurisdiction of SRFC Member States* (*MAC Convention*)**

***The Conference of Ministers of the Sub-Regional Fisheries Commission,***

*Considering* the United Nations Convention on the Law of the Sea signed at Montego Bay on 10 December 1982;

*Reaffirming* their commitment to supporting the principles and standards stipulated in the Code of Conduct for Responsible Fisheries of the United Nations Food and Agriculture Organization (FAO);

*Recalling* their resolve to implement the International Plan of Action for preventing, opposing and eliminating illegal, unreported and unregulated fishing adopted in 2001 by the FAO Conference;

*Considering* the Convention of 29 March 1985 on the establishment of the SRFC, and as amended in 1993 especially with respect to its articles on enhancing cooperation between its member States for the wellbeing of their respective populations;

*Considering* that the Convention of 14 July 1993 on the Definition of the Conditions of Access and Exploitation of Fisheries Resources off the Coastal zones of SRFC member States (MAC Convention), plays an essential role in the harmonization of fisheries policies and legislations of the States in the sub-region;

*Desirous* to aligning the Convention of 14 July 1993 to the technical and legal changes which have occurred since its adoption, in particular with respect to the definition of the conditions for responsible fishing, the use of the eco-systemic approach for a sustainable management of fisheries resources and the fight against illegal, unreported and unregulated fishing, in accordance with international law;

*Considering* the Convention of 8 June 2012 relating to the definition of the minimum conditions of access and exploitation of fisheries resources within the maritime zones under the jurisdiction of SRFC member States (CMAC) on the review of the MAC Convention, which entered into force on 16 September 2012;

*Considering* the provisions of Article 33 (Seizure of the International Tribunal for the Law of the Sea for advisory opinion) of the CMAC of 8 June 2012, which stipulates as follows: « *The Conference of Ministers of the SRFC shall authorize the Permanent Secretary of the SRFC to seize the International Tribunal for the Law of the Sea on a specific legal matter for its advisory opinion* »;

*Considering* Article 20 of the Statute of the Tribunal and Article 138 of its Rules of Procedure;

***Decides***, in accordance with Article 33 of the CMAC, to authorize the Permanent Secretary of the Sub-Regional Fisheries Commission to seize the International Tribunal for the Law of the Sea, pursuant to Article 138 of the Rules of the said Tribunal, in order to obtain its advisory opinion on the following matters:

1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?
2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

**(*Signed*)**
**His Excellency Moussa CONDE,**
Minister of Fisheries and Aquaculture, Republic of Guinea
And Chairman in office of the Conference of Ministers of the SRFC

(*Signed*)
**His Excellency Adalberto VIEIRA,**
Secretary of State of Marine Resources, Republic of Cape Verde

(*Signed*)
**His Excellency Axi GYE,**
Minister of Fisheries, Water Resources and National Assembly, Republic of The Gambia

(*Signed*)
**His Excellency Jose BIAI,**
Minister of Economy and Regional Integration, Republic of Guinea Bissau

(*Signed*)
**His Excellency Aghdhefna Ould EYIH,**
Minister of Fisheries, and Marine Economy, Islamic Republic of Mauritania

(*Signed*)
**His Excellency Papa DIOUF,**
Minister of Fisheries and Marine Affairs, Republic of Senegal

(*Signed*)
**His Excellency Charles ROGERS,**
Vice-Minister of Fisheries and Marine Resources, Republic of Sierra Leone

3. In his letter dated 27 March 2013, the Permanent Secretary of the SRFC stated that the Conference of Ministers of the SRFC had authorized him to submit a request for advisory opinion to the Tribunal on the basis of article 138 of the Rules of the Tribunal (hereinafter "the Rules") and article 20 of the Statute of the Tribunal (hereinafter "the Statute"). By letter dated 9 April 2013, the Permanent Secretary of the SRFC corrected this to read "article 21" of the Statute.

4. In his letter of 27 March 2013, the Permanent Secretary of the SRFC informed the Tribunal of the appointment of Ms Diénaba Bèye Traoré, Head of the Department for the Harmonization of Fisheries Policies and Legislation of the Permanent Secretariat of the SRFC, as the representative of the SRFC for the proceedings.

5. On 28 March 2013, the Request was entered into the List of cases as Case No. 21, which was named "Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission".

**Chronology of the procedure**

6. By letter dated 28 March 2013, the Registrar informed the Permanent Secretary of the SRFC that the Request had been filed with the Registry on 28 March 2013 and entered into the List of cases as Case No. 21. In the same letter, the Registrar, pursuant to article 131 of the Rules, invited the Permanent Secretary of the SRFC to transmit to the Tribunal all documents likely to throw light upon the questions contained in the Request. In that letter, the Registrar also requested the Permanent Secretary of the SRFC to submit to the Tribunal documents referred to in the Request.

7. By letter dated 4 April 2013, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the Request.

8. By note verbale dated 8 April 2013, in accordance with article 133, paragraph 1, of the Rules, the Registrar notified all States Parties to the United Nations Convention on the Law of the Sea (hereinafter "States Parties") of the Request.

9. By letter dated 9 April 2013, the Permanent Secretary of the SRFC transmitted to the Tribunal documents in support of the Request. By letters dated 18 April and 23 May 2013, the Permanent Secretary of the SRFC submitted additional documents. All of these documents were posted on the Tribunal's website.

10. By Order dated 24 May 2013, pursuant to article 133, paragraph 2, of the Rules, the Tribunal decided "that the SRFC and the intergovernmental organizations listed in the annex to the [. . . ] order are considered likely to be able to

furnish information on the questions submitted to the Tribunal for an advisory opinion". Accordingly, pursuant to article 133, paragraph 3, of the Rules, the Tribunal invited the States Parties, the SRFC, and the aforementioned intergovernmental organizations to present written statements on those questions, and fixed 29 November 2013 as the time-limit within which written statements could be presented to the Tribunal.

11. In the same Order, the Tribunal decided that, in accordance with article 133, paragraph 4, of the Rules, oral proceedings would be held. The Order was notified to the States Parties, the SRFC and the intergovernmental organizations listed in its annex.

12. On 28 November 2013, the Registry received a written statement from the United States of America, a State not party to the United Nations Convention on the Law of the Sea (hereinafter "the Convention").

13. By letter dated 29 November 2013 addressed to the Registrar, the World Wide Fund for Nature (hereinafter "the WWF") requested permission to file, as *amicus curiae,* a statement with respect to the proceedings before the Tribunal. A copy of the statement was attached to the said letter.

14. By letter dated 3 December 2013, the Registrar notified the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements of the submission of a statement by the United States of America, informing them that the said statement would be placed on the Tribunal's website in a separate section of documents relating to the case and that its status would be considered by the Tribunal at a later stage. The same information was communicated to the United States of America, by letter from the Registrar dated 4 December 2013.

15. By the above-mentioned letter dated 3 December 2013, the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements were informed of the submission of a statement by the WWF. At the request of the President, the Registrar, by letter dated 4 December 2013, informed the WWF that its statement would not be included in the case file since it had not been submitted under article 133 of the Rules; it would, however, be transmitted to the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements, and placed on the website of the Tribunal in a separate section of documents relating to the case.

16. By Order dated 3 December 2013, in light of a request submitted to the Tribunal and pursuant to article 133, paragraph 3, of the Rules, the President extended the time-limit within which written statements could be presented to the Tribunal up to 19 December 2013. The Order was notified to States Parties, the SRFC and the intergovernmental organizations listed in the annex to the Order of 24 May 2013.

17. Within the time-limit fixed by the President, written statements were submitted by the following twenty-two States Parties: Saudi Arabia, Germany, New Zealand, China, Somalia, Ireland, the Federated States of Micronesia, Australia, Japan, Portugal, Chile, Argentina, the United Kingdom, Thailand, the Netherlands, the European Union, Cuba, France, Spain, Montenegro, Switzerland and Sri Lanka. Within the same time-limit, written statements were also submitted by the SRFC and the following six organizations: the Forum Fisheries Agency, the International Union for Conservation of Nature and Natural Resources (hereinafter "the IUCN"), the Caribbean Regional Fisheries Mechanism, the United Nations, the Food and Agriculture Organization of the United Nations (hereinafter "the FAO") and the Central American Fisheries and Aquaculture Organization.

18. By letter dated 3 December 2013, in accordance with article 133, paragraph 3, of the Rules, the Registrar transmitted copies of the written statements to the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements.

19. Pursuant to article 134 of the Rules, the written statements submitted to the Tribunal were made accessible to the public on the Tribunal's website.

20. By Order dated 20 December 2013, the President decided that, in accordance with article 133, paragraph 3, of the Rules, States Parties, the SRFC and the intergovernmental organizations having presented written statements could submit written statements on the statements made, and fixed 14 March 2014 as the time-limit within which such statements would have to be submitted to the Tribunal. The Order was notified to the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements.

21. Within the prescribed time-limit, additional written statements were submitted by the following five States Parties: the European Union, the Netherlands, New Zealand, Thailand and the United Kingdom. Within the same time-limit, an additional written statement was also submitted by the SRFC.

22. By letter dated 20 March 2014, in accordance with article 133, paragraph 3, of the Rules, the Registrar transmitted copies of these additional statements to the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements. In addition, pursuant to article 134 of the Rules, these statements were made accessible to the public on the Tribunal's website.

23. By letter dated 14 March 2014, the WWF requested permission from the Tribunal to file a further statement, as *amicus curiae,* with respect to the proceedings before the Tribunal. A copy of the statement was attached to the said letter. By letter dated 20 March 2014, at the request of the President, the Registrar informed the WWF that, although its statement would not be included in the case file since it had not been transmitted under article 133 of the Rules, the statement would be notified to the States Parties, the SRFC and the intergovernmental organizations that had presented written statements, and would be placed on the Tribunal's website in a separate section of documents relating to the case. By separate letter dated 20 March 2014, the Registrar transmitted this information to the States Parties, the SRFC and the intergovernmental organizations that had presented written statements.

24. On 1 April 2014, the Tribunal decided that the statement presented by the United States of America should be considered as part of the case file and should be posted on the Tribunal's website, in a separate section of documents related to the case, entitled "States Parties to the 1995 Straddling Fish Stocks Agreement". By letter dated 2 April 2014, the Registrar communicated this decision to the United States of America and, by letter dated 7 April 2014, to the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements.

25. By Order dated 14 April 2014, in accordance with article 133, paragraph 4, of the Rules, the President fixed 2 September 2014 as the date for the opening of the oral proceedings and invited the States Parties, the SRFC and the intergovernmental organizations listed in the annex to the Order of the Tribunal of 24 May 2013 to participate in these proceedings. By the same Order, the above-mentioned States, the SRFC and the intergovernmental organizations listed in the annex to the Order of the Tribunal of 24 May 2013 were also invited to indicate to the Registrar, no later than 5 August 2014, whether they intended to make oral statements at the hearing. The Order was notified to the States Parties, the SRFC and the intergovernmental organizations listed in the annex to the Order of 24 May 2013.

26. Within the prescribed time-limit, ten States Parties expressed their intention to participate in the oral proceedings, namely Argentina, Australia, Chile, the European Union, Germany, the Federated States of Micronesia, New Zealand, Spain, Thailand and the United Kingdom. Within the same time-limit, the SRFC, the Caribbean Regional Fisheries Mechanism and the IUCN also expressed their intention to participate in the oral proceedings.

27. By letter dated 23 June 2014 addressed to the Registrar, the WWF transmitted to the Tribunal a request to make a statement as *amicus curiae* in the oral proceedings of the case. By letter dated 24 June 2014, the Registrar informed the WWF that the President had decided that, in light of articles 133 and 138 of the Rules, it would not be possible to grant the organization the status of participant in the proceedings.

28. Prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 29 August and 1 September 2014.

29. The Tribunal held four public sittings on 2, 3, 4, and 5 September 2014, at which it heard oral statements, in the following order, by:

| | |
|---|---|
| *For the SRFC:* | Mr Lousény Camara, Minister of Fisheries and Aquaculture of the Republic of Guinea; Chairman-in-Office of the Conference of Ministers of the SRFC; |
| | Ms Diénaba Bèye Traoré, Head of the Department for Harmonization of Policies and Legislation, SRFC; |
| | and |
| | Mr Papa Kebe, Expert, Specialist in pelagic species; |
| *For Germany:* | Mr Martin Ney, Legal Adviser, Director-General for Legal Affairs, Federal Foreign Office; |
| *For Argentina:* | Mr Holger F. Martinsen, Deputy Legal Adviser, Office of the Legal Adviser, Ministry of Foreign Affairs and Worship; |

| | |
|---|---|
| *For Australia:* | Mr William McFadyen Campbell QC, General Counsel (International Law), Office of International Law, Attorney-General's Department, |
| | and |
| | Ms Stephanie Ierino, Principal Legal Officer, Office of International Law, Attorney-General's Department; |
| *For Chile:* | Mr Eduardo Schott S., Consul-General of Chile in Hamburg; |
| *For Spain:* | Mr José Martín y Pérez de Nanclares, Director of the International Law Department, Ministry of Foreign Affairs and Cooperation; |
| *For the Federated States of Micronesia:* | Mr Clement Yow Mulalap, Esq., Legal Adviser, Permanent Mission of the Federated States of Micronesia to the United Nations in New York; |
| *For New Zealand:* | Ms Penelope Ridings, International Legal Adviser, Ministry of Foreign Affairs and Trade; |
| *For the United Kingdom of Great Britain and Northern Ireland:* | Sir Michael Wood, Member of the English Bar and Member of the International Law Commission, |
| | and |
| | Ms Nicola Smith, Assistant Legal Adviser, Foreign and Commonwealth Office; |
| *For Thailand:* | Mr Kriangsak Kittichaisaree, Executive Director, Thailand Trade and Economic Office (Taipei); Member of the International Law Commission; |

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| *For the European Union:* | Mr Esa Paasivirta, Member of the Legal Service, European Commission; |
| *For the Caribbean Regional Fisheries Mechanism:* | Mr Pieter Bekker, Professor of International Law, Graduate School of Natural Resources Law, Policy and Management, University of Dundee, United Kingdom; Member of the New York Bar; |
| *For the International Union for the Conservation of Nature:* | Ms Cymie Payne, Assistant Professor, School of Law, Camden, and Bloustein School of Planning and Public Policy, Rutgers University, United States of America,<br><br>Ms Nilufer Oral, Faculty of Law, Istanbul Bilgi University, Turkey,<br><br>and<br><br>Ms Anastasia Telesetsky, Associate Professor, College of Law, Natural Resources and Environmental Law Program, University of Idaho, United States of America. |

30. The hearing was broadcast on the internet as a webcast.

31. In the course of the hearing, on 2 September 2014, pursuant to article 76, paragraph 3, of the Rules, questions were put to the SRFC by Judges Cot, Pawlak and Gao. Subsequently, by letter dated 2 September 2014, the Registrar communicated these questions in writing to the SRFC.

32. By letter dated 5 September 2014, the SRFC transmitted its written responses to the questions put by the judges. These responses were placed on the Tribunal's website.

33. By letter dated 9 September 2014, the Registrar invited the States Parties and the intergovernmental organizations which had participated in the oral proceedings to submit comments on the written responses of the SRFC by 16 September 2014. Comments were received from Australia by letter dated 16 September 2014. By letter dated 19 September 2014, the Registrar transmitted these comments to the participants in the oral proceedings.

34. At the hearing held on 4 September 2014, the European Union stated that it would "remain at the disposal of the Tribunal" to provide an update "on the status of some specific measures regarding non-cooperating third States" and "copies of the relevant decisions". By letter dated 20 October 2014, received by the Registry on 21 October 2014, the European Union transmitted a number of additional documents. In the said letter, the European Union stated that these documents were submitted "for the information and update of the Tribunal, as it was indicated on behalf of the European Union at the hearing on 4 September [2014]". By letter dated 23 October 2014, the Registrar invited the States Parties, the SRFC and the intergovernmental organizations which had participated in the oral proceedings to submit comments on those documents by 3 November 2014.

35. In an electronic communication dated 3 November 2014, the SRFC requested an extension of the time-limit for the submission of its comments on the additional documents submitted by the European Union. By letter dated 4 November 2014, the Registrar informed the SRFC that the President had agreed to an extension of the time-limit to 5 November 2014. The States Parties and the intergovernmental organizations which had participated in the oral proceedings were informed accordingly. The SRFC submitted comments on the additional documents by letter dated 6 November 2014, the filing of which was accepted by decision of the President. By letter dated 11 November 2014, the Registrar transmitted these comments to the participants in the oral proceedings. By letter dated 13 November 2014, the Registrar, at the request of the President, informed the SRFC that the comments contained in its letter dated 6 November 2014 would be considered by the Tribunal to the extent that they related to the Request as submitted to it by the SRFC on 28 March 2013.

36. President Yanai, whose term of office as President expired on 30 September 2014, continued to preside over the Tribunal in the present case until completion, pursuant to article 16, paragraph 2, of the Rules. In accordance with article 17 of the Rules, Judges Nelson and Türk, whose term of office expired on 30 September 2014, having participated in the meeting mentioned in article 68 of the Rules, continued to sit in the case until its completion.

## II Jurisdiction

37. The Tribunal will first consider whether it has jurisdiction to give the advisory opinion requested by the SRFC.

38. The Tribunal wishes to draw attention to articles 16 and 21 of the Statute and article 138 of the Rules with regard to the jurisdiction of the Tribunal to deliver advisory opinions. Article 16 of the Statute reads as follows:

> The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure.

Article 21 of the Statute reads:

> The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

Article 138 of the Rules reads:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

39. While some participants have argued in favour of the jurisdiction of the Tribunal to entertain the Request, other participants have contended that the Tribunal is not competent to entertain the Request. The Tribunal will proceed to examine these arguments.

40. The main arguments against the advisory jurisdiction of the Tribunal are that the Convention makes no reference, express or implied, to advisory opinions by the full Tribunal and that if the Tribunal were to exercise advisory jurisdiction, it would be acting *ultra vires* under the Convention.

41. It has also been contended that the Tribunal has no implied powers to serve as an independent source of authority to confer upon itself an advisory jurisdiction that it does not otherwise possess.

42. It has been argued that article 138 of the Rules cannot serve as a basis for the exercise of any jurisdiction to give advisory opinions since the Rules of the Tribunal, being procedural provisions, "cannot override" the provisions of the Convention.

43. It has been contended that article 21 of the Statute is intended to encapsulate the contentious jurisdiction of the Tribunal, which is set out more fully in the Convention, in particular article 288 thereof. Accordingly, it has been argued that article 21 of the Statute has to be interpreted consistently with article 288, paragraph 2, of the Convention, which reads:

> A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

44. It has also been contended that article 288, which is contained in Part XV of the Convention dealing with "Settlement of Disputes", provides for the contentious jurisdiction of the Tribunal in clear and express terms and so does article 21 of the Statute.

45. It has been argued that, had the States which negotiated the Convention intended to confer advisory jurisdiction on the Tribunal, the inclusion of an express provision in the Convention would have been straightforward, but they did not do so.

46. It has also been argued that the word "matters" in the concluding phrase of article 21 of the Statute, i.e. "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal", refers to contentious cases, as may be seen from the use of a same word in article 36, paragraph 1, of the Statute of the International Court of Justice (hereinafter "the ICJ") and article 36 of the Statute of the Permanent Court of International Justice (hereinafter "the PCIJ").

47. It has been further contended that the Request does not fulfil the essential conditions set out in article 138 of the Rules.

48. Other participants have spoken in favour of the advisory jurisdiction of the Tribunal. They have argued that article 21 of the Statute by itself serves as a sufficient legal basis for the competence of the full Tribunal to accept a request for an advisory opinion if it is specifically provided for by a relevant international agreement and that there is no reason to assume that the wording "all matters" does not cover a request for an advisory opinion. They have added that the arguments that the expression "all matters" must be read as meaning "all disputes" and that the jurisdiction of the Tribunal is limited by article 288, paragraph 2, of the Convention cannot be accepted. They have pointed out that article 288 of the Convention is complemented by the Statute, including its article 21.

49. It has also been argued that the purpose of article 21 of the Statute is to shape the Tribunal as a living institution and to expressly provide room for States to enter into bilateral or multilateral agreements conferring jurisdiction on the Tribunal.

50. It has been pointed out that article 138 of the Rules does not create a new type of jurisdiction but only specifies the prerequisites that the Tribunal has established for exercising its jurisdiction.

51. It has been contended that, if the drafters of the Convention had intended to limit the Tribunal's jurisdiction under article 21 of the Statute to contentious jurisdiction, they would have used the expression "confers contentious jurisdiction on the Tribunal" as opposed to "confers jurisdiction on the Tribunal", the words employed in article 21 of the Statute.

52. At the outset, the Tribunal wishes to clarify the relationship between the Statute in Annex VI to the Convention and the Convention. As specified by article 318 of the Convention, Annexes "form an integral part of this Convention". As stated in article 1, paragraph 1, of the Statute, "[t]he International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute." It follows from the above that the Statute enjoys the same status as the Convention. Accordingly, article 21 of the Statute should not be considered as subordinate to article 288 of the Convention. It stands on its own footing and should not be read as being subject to article 288 of the Convention.

53. Neither the Convention nor the Statute makes explicit reference to the advisory jurisdiction of the Tribunal. Those who argued against the advisory jurisdiction of the Tribunal as also those who considered that the Tribunal has such jurisdiction centred their arguments on article 21 of the Statute.

54. Article 21 of the Statute, which is reproduced in paragraph 38, deals with the "jurisdiction" of the Tribunal. It provides that the jurisdiction of the Tribunal comprises three elements: (i) all "disputes" submitted to the Tribunal in accordance with the Convention; (ii) all "applications" submitted to the Tribunal in accordance with the Convention; and (iii) all "matters" ("toutes les fois que cela" in French) specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

55. The use of the word "disputes" in article 21 of the Statute is an unambiguous reference to the contentious jurisdiction of the Tribunal. Similarly, the word "applications" refers to applications in contentious cases submitted to the Tribunal in accordance with the Convention. This is made clear by article 23 of the Statute, which provides: "The Tribunal shall decide all disputes and applications in accordance with article 293." Article 293 is found in Part XV of the Convention, dealing with "Settlement of Disputes". Reference may also be made to articles 292 on "Prompt release of vessels and crews" and 294 on "Preliminary proceedings" in this Part, which make provision for "applications".

56. It is the third element which has attracted diverse interpretations. The words all "matters" ("toutes les fois que cela" in French) should not be interpreted as covering only "disputes", for, if that were to be the case, article 21 of the Statute would simply have used the word "disputes". Consequently, it must mean something more than only "disputes". That something more must include advisory opinions, if specifically provided for in "any other agreement which confers jurisdiction on the Tribunal."

57. The argument that the expression all "matters" should have the same meaning here as it has in the Statutes of the PCIJ and ICJ is not tenable. As the Tribunal held in the *MOX Plant Case*,

> the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.
> (*MOX Plant* (*Ireland* v. *United Kingdom*), *Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95, at p. 106, para. 51)

58. The Tribunal wishes to clarify that the expression "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" does not by itself establish the advisory jurisdiction of the Tribunal. In terms of article 21 of the Statute, it is the "other agreement" which confers such jurisdiction on the Tribunal. When the "other agreement" confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regard to "all matters" specifically provided for in the "other agreement". Article 21 and the "other agreement" conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal.

59. The argument that it is article 138 of the Rules which establishes the advisory jurisdiction of the Tribunal and that, being a procedural provision, article 138 cannot form a basis for the advisory jurisdiction of the Tribunal is misconceived. Article 138 does not establish the advisory jurisdiction of the Tribunal. It only furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction.

60. These prerequisites are: an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion; the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; and such an opinion may be given on "a legal question" .

61. In the present case, the prerequisites specified in article 138 of the Rules are satisfied.

62. The Tribunal notes that, in the present case, the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (hereinafter "the MCA Convention") is an international agreement concluded by seven States.

Article 33 of this agreement provides that "[t]he Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal of the Law of the Sea for advisory opinion." The Tribunal further notes that, at its fourteenth extraordinary session, the Conference of Ministers of the SRFC adopted a resolution by which it decided, in accordance with article 33 of the MCA Convention, to authorize the Permanent Secretary of the Commission to seize the Tribunal in order to obtain an advisory opinion. The text of that resolution was transmitted to the Tribunal by a letter from the Permanent Secretary of the Commission dated 27 March 2013, which was received by the Registry on 28 March 2013.

63. As stated in its preamble, the objective of the MCA Convention is to implement the Convention "especially its provisions calling for the signing of regional and sub-regional cooperation agreements in the fisheries sector as well [as] the other relevant international treaties" and ensure that the policies and legislation of its Member States "are more effectively harmonized with a view to a better exploitation of fisheries resources in the maritime zones under their respective jurisdictions, for the benefit of current and future generations". The MCA Convention is thus closely related to the purposes of the Convention.

64. A further issue is whether the questions asked of the Tribunal are legal in nature. The questions read as follows:

1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?
2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

65. These questions have been framed in terms of law. To respond to these questions, the Tribunal will be called upon to interpret the relevant provisions

of the Convention and of the MCA Convention and to identify other relevant rules of international law. As stated by the Seabed Disputes Chamber of the Tribunal (hereinafter "the Seabed Disputes Chamber") in its Advisory Opinion:

> The questions put to the Chamber concern the interpretation of provisions of the Convention and raise issues of general international law. The Chamber recalls that the International Court of Justice (hereinafter "the ICJ") has stated that "questions 'framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law'" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, 22 July 2010, paragraph 25; *Western Sahara, Advisory Opinion, I.C.J. Report*[*s*] *1975*, p. 12, at paragraph 15).
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 25, para. 39)

66. For these reasons, the Tribunal considers that the questions raised by the SRFC are of a legal nature.

67. A further question is to what matters the advisory jurisdiction extends. Article 21 of the Statute lays down that such jurisdiction extends to "all matters specially provided for in any other agreement which confers jurisdiction on the Tribunal." It is necessary for the Tribunal to assess whether the questions posed by the SRFC constitute matters which fall within the framework of the MCA Convention.

68. The questions relate to activities which fall within the scope of the MCA Convention. The questions need not necessarily be limited to the interpretation or application of any specific provision of the MCA Convention. It is enough if these questions have, in the words of the ICJ, a "sufficient connection" (see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 77, para. 22) with the purposes and principles of the MCA Convention. In this respect, there is no reason why the words "all matters specifically provided for in any other agreement" in article 21 of the Statute should be interpreted restrictively.

69. For the reasons given above, the Tribunal finds that it has jurisdiction to entertain the Request submitted to it by the SRFC. As held later in this Advisory

Opinion, the jurisdiction of the Tribunal in the present case is limited to the exclusive economic zones of the SRFC Member States.

## III Discretionary power

70. The Tribunal will now turn to the issue of its discretionary power to render an advisory opinion in the present case.

71. Article 138 of the Rules, which provides that "the Tribunal may give an advisory opinion", should be interpreted to mean that the Tribunal has a discretionary power to refuse to give an advisory opinion even if the conditions of jurisdiction are satisfied. It is well settled that a request for an advisory opinion should not in principle be refused except for "compelling reasons" (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 235, para. 14). The question is whether there are compelling reasons in this case why the Tribunal should not give the advisory opinion which the SRFC has requested.

72. It has been argued that the questions raised by the SRFC, though legal, are vague, general and unclear. In the view of the Tribunal, these questions are clear enough to enable it to deliver an advisory opinion. It is also well settled that an advisory opinion may be given "on any legal question, abstract or otherwise" (see *Conditions of Admission of a State to Membership in the United Nations* (*Article 4 of the Charter*), *Advisory Opinion, 1948, I.C.J. Reports 1947–1948*, p. 57, at p. 61).

73. It has also been contended that, while the four questions may be couched as legal questions, what the SRFC actually seeks is not answers *lex lata*, but *lex ferenda* and that is outside the functions of the Tribunal as a judicial body.

74. The Tribunal does not consider that, in submitting this Request, the SRFC is seeking a legislative role for the Tribunal. The Tribunal also wishes to make it clear that it does not take a position on issues beyond the scope of its judicial functions.

75. It has been argued that in this case the Tribunal should not pronounce on the rights and obligations of third States not members of the SRFC without their consent. It has also been observed that the present Request for an

advisory opinion does not involve an underlying dispute and that the issue of State consent simply does not arise in this advisory proceeding.

76. The Tribunal wishes to clarify in this regard that in advisory proceedings the consent of States not members of the SRFC is not relevant (see *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at p. 71). The advisory opinion as such has no binding force and is given only to the SRFC, which considers it to be desirable "in order to obtain enlightenment as to the course of action it should take" (*ibid.,* p. 71). The object of the request by the SRFC is to seek guidance in respect of its own actions.

77. The Tribunal is mindful of the fact that by answering the questions it will assist the SRFC in the performance of its activities and contribute to the implementation of the Convention (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 24, para. 30).

78. In view of what is stated above, the Tribunal does not find any compelling reasons to use its discretionary power not to give an advisory opinion.

79. Accordingly, the Tribunal deems it appropriate to render the advisory opinion requested by the SRFC.

## IV Applicable law

80. The Tribunal will now proceed to indicate the applicable law concerning its advisory jurisdiction. Attention has been drawn earlier to article 138, paragraph 3, of the Rules, which states: "The Tribunal shall apply *mutatis mutandis* articles 130 to 137" of the Rules in the exercise of the Tribunal's functions relating to advisory opinions. These articles lay down the rules applicable to the Seabed Disputes Chamber in the exercise of its functions relating to advisory opinions.

81. Article 130, paragraph 1, of the Rules states:

> In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent

to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.

82. The Tribunal also refers in this regard to article 23 of the Statute, which reads: "The Tribunal shall decide all disputes and applications in accordance with article 293."

83. Article 293 of the Convention reads:

*Article 293*
*Applicable law*

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

84. Therefore, the Tribunal concludes that the Convention, the MCA Convention and other relevant rules of international law not incompatible with the Convention constitute the applicable law in this case.

## V Question 1

85. The first question submitted to the Tribunal is as follows:

*What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zones of third party States?*

86. Before dealing with the flag State obligations, the Tribunal wishes to examine certain preliminary issues. They concern the scope of application of Question 1, the meaning of the wording "[IUU] fishing activities . . . conducted within the Exclusive Economic Zones of third party States", the definition of IUU fishing, and the issue of conservation and management of living resources within the exclusive economic zone.

87. In accordance with article 1, paragraph 2, and article 2, paragraph 11, of the MCA Convention, that Convention "is applicable to the maritime area under jurisdiction of the SRFC Member States." Consequently, the Tribunal considers that the first question in terms of geographical scope relates only to the exclusive economic zones of the SRFC Member States and the expression "[IUU] fishing activities . . . conducted within the Exclusive Economic Zones of third party States" means such activities conducted within the exclusive economic zones of the SRFC Member States.

88. The Tribunal observes that article 2, paragraph 9, of the MCA Convention defines the expression "[f]ishing vessels belonging to non-Member States or third Party States" as "fishing vessels operating under the flag of a State which is not a member of the SRFC . . .". Consequently, the term "flag State" in the first question refers to a State which is not a member of the SRFC, as the MCA Convention addresses matters related to access by fishing vessels belonging to non-Member States to fisheries resources within the exclusive economic zones of the SRFC Member States.

89. The Tribunal, therefore, concludes that the first question relates only to the obligations of flag States not parties to the MCA Convention in cases where vessels flying their flag are engaged in IUU fishing within the exclusive economic zones of the SRFC Member States. It does not relate to the obligations of flag States in cases of IUU fishing in other maritime areas, including the high seas.

90. With regard to the notion of IUU fishing, the MCA Convention defines it in article 2, paragraph 4. This provision reads as follows:

> 4. Illegal, unreported and unregulated fishing or IUU fishing[:]
>
> 4.1 "Illegal fishing": fishing activities:
>
> - conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
> - conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

- in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

4.2 "Unreported fishing": fishing activities:

- which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
- undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

4.3 "Unregulated fishing": fishing activities[:]

- in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
- in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

91. The "Technical Note" on the MCA Convention annexed to the Request explains that when the MCA Convention was revised the SRFC Member States were specifically guided by the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter "the IPOA-IUU"), adopted by the FAO in 2001, and the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter "the Port States Measures Agreement").

92. The Tribunal notes that the revised MCA Convention, which was signed on 8 June 2012 and entered into force on 16 September 2012, reproduces in article 2, paragraph 4, verbatim the definition of IUU fishing contained in paragraph 3 of the IPOA-IUU. Although the IPOA-IUU, which was drawn up within the framework of the FAO Code of Conduct for Responsible Fisheries of 1995 is voluntary, as envisaged by article 2(d) of the Code of Conduct, it should be noted that this definition of IUU fishing was subsequently incorporated and reaffirmed in article 1(e) of the Port States Measures Agreement. This definition has also been included in decisions of some regional fisheries management organizations (hereinafter "RFMOs"), the national legislation of a number of States and the law of the European Union.

93. The Tribunal further notes that the MCA Convention states in article 31, paragraph 1, that IUU fishing constitutes one of the infringements enumerated in that article which "shall be integrated in the national legislations of the Member States". The MCA Convention further requires, in article 25, paragraph 1, that its "Member States shall commit themselves to take all the necessary measures to prevent, deter and eliminate illegal, unreported and unregulated fishing."

94. It follows from the above provisions of the MCA Convention that IUU fishing, as defined in its article 2, paragraph 4, constitutes not only a violation of this convention but also a violation of the national legislation of the SRFC Member States.

95. The definition of IUU fishing, as contained in article 2, paragraph 4, of the MCA Convention, thus plays an important role in the context of the consideration of the obligations borne within the area of application of the MCA Convention by the flag States which are not members of the SRFC. As noted above, that area encompasses the exclusive economic zones of the SRFC Member States.

96. With respect to "unregulated fishing" as referred to in article 2, paragraph 4.3, of the MCA Convention, the Tribunal wishes to point out that, in accordance with the Convention, the adoption by the coastal State of conservation and management measures for all living resources within its exclusive economic zone is mandatory. Article 61, paragraph 2, of the Convention requires that the coastal State "shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation."

97. Article 9 of the MCA Convention states that "[i]n giving access to fishing vessels, the Member States shall take into account their national management and conservation measures and policies". It follows from article 9 of the MCA Convention that all the SRFC Member States accordingly must have in place national management and conservation measures and policies in relation to fishing resources. In accordance with article 2, paragraph 5, of the MCA Convention, conservation and management measures mean "measures aimed at conserving and managing marine biological resources and adopted and applied in a manner that is compatible with the relevant rules of international law, including those stipulated in the present Convention".

98. In light of the foregoing provisions of the MCA Convention, the Tribunal finds it appropriate to reiterate the conclusions it reached in the *M/V "Virginia G" Case* concerning activities that in accordance with the Convention may be regulated by the coastal State in the exercise of its sovereign rights for the purpose of conserving and managing living resources in the exclusive economic zone. The Tribunal stated:

> The use of the terms "conserving" and "managing" in article 56 of the Convention indicates that the rights of coastal States go beyond conservation in its strict sense. The fact that conservation and management cover different aspects is supported by article 61 of the Convention, which addresses the issue of conservation as its title indicates, whereas article 62 of the Convention deals with both conservation and management.
>
> The Tribunal emphasizes that in the exercise of the sovereign rights of the coastal State to explore, exploit, conserve and manage the living resources of the exclusive economic zone the coastal State is entitled under the Convention, to adopt laws and regulations establishing the terms and conditions for access by foreign fishing vessels to its exclusive economic zone (articles 56, paragraph 1, and 62, paragraph 4, of the Convention). Under article 62, paragraph 4, of the Convention, the laws and regulations thus adopted must conform to the Convention and may relate to, *inter alia*, the matters listed therein. The Tribunal notes that the list of matters in article 62, paragraph 4, of the Convention covers several measures which may be taken by coastal States. These measures may be considered as management. The Tribunal further notes that the wording of article 62, paragraph 4, of the Convention indicates that this list is not exhaustive.

(*M/V "Virginia G"* (*Panama/Guinea-Bissau*), *Judgment of 14 April 2014*, paras. 212 and 213)

99. On the subject of access by foreign fishing vessels to the living resources of the exclusive economic zone of the coastal State, referred to in the preceding paragraph, article 3, paragraph 1, of the MCA Convention explicitly provides that access by fishing vessels belonging to non-Member States to the allowable surplus of resources in the maritime areas under the jurisdiction of an SRFC Member State must be authorized by the Member State "through agreements and other arrangements." In this regard, the MCA Convention defines, in article 2, paragraph 6, the term "fishing vessels" to include "[a]ny vessel that is used for fishing or for that purpose including support vessels, commercial vessels, and any other vessel participating directly in fishing activities" and, in paragraph 8 of the same article, the term "support vessels" as "vessels which transport fuel and food for ships carrying out fishing activities."

100. In the *M/V "Virginia G" Case*, the Tribunal concluded that "it is apparent from the list in article 62, paragraph 4, of the Convention that for all activities that may be regulated by a coastal State there must be a direct connection to fishing" (*M/V "Virginia G"* (*Panama/Guinea-Bissau*), *Judgment of 14 April 2014,* para. 215).

101. The Tribunal will now address the issue of conservation and management of living resources within the exclusive economic zone in view of the negative impact of IUU fishing thereon.

102. One of the goals of the Convention, as stated in its preamble, is to establish "a legal order for the seas and oceans which . . . will promote" *inter alia* "the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment". Consequently, laws and regulations adopted by the coastal State in conformity with the provisions of the Convention for the purpose of conserving the living resources and protecting and preserving the marine environment within its exclusive economic zone, constitute part of the legal order for the seas and oceans established by the Convention and therefore must be complied with by other States Parties whose ships are engaged in fishing activities within that zone.

103. The Convention provides in article 55 that the exclusive economic zone is an area beyond and adjacent to the territorial sea which is subject to the specific legal regime established in Part V of the Convention, "under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of [the] Convention."

104. Under the Convention, responsibility for the conservation and management of living resources in the exclusive economic zone rests with the coastal State, which, pursuant to article 56, paragraph 1, of the Convention, has in that zone sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living. In this regard, in accordance with article 61, paragraphs 1 and 2, of the Convention, the coastal State is entrusted with the responsibility to determine the allowable catch of the living resources in its exclusive economic zone and to "ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation." Pursuant to article 62, paragraph 2, of the Convention, the coastal State is required through agreements or other arrangements to give other States access to the surplus of the allowable catch if it does not have the capacity to harvest the entire allowable catch. To meet its responsibilities, in accordance with article 62, paragraph 4, of the Convention, the coastal State is required to adopt the necessary laws and regulations, including enforcement procedures, which must be consistent with the Convention.

105. To ensure compliance with its laws and regulations concerning the conservation and management measures for living resources pursuant to article 73, paragraph 1, of the Convention, the coastal State may take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention.

106. Thus, in light of the special rights and responsibilities given to the coastal State in the exclusive economic zone under the Convention, the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing rests with the coastal State.

107. This responsibility of the coastal State is also acknowledged in the MCA Convention, which states in article 25 that the SRFC Member States commit

themselves to take such measures, and, to this end, to strengthen cooperation to fight against IUU fishing, in accordance with international law.

108. The Tribunal wishes to emphasize that the primary responsibility of the coastal State in cases of IUU fishing conducted within its exclusive economic zone does not release other States from their obligations in this regard.

109. The Tribunal will now turn to the examination of the obligations of flag States in the exclusive economic zones of the SRFC Member States in relation to the living resources in these zones. These will be considered from two perspectives: that of general obligations of States under the Convention with regard to the conservation and management of marine living resources and that of specific obligations of flag States in the exclusive economic zone of the coastal State.

110. The Tribunal observes that the issue of flag State responsibility for IUU fishing activities is not directly addressed in the Convention. Therefore, this issue is examined by the Tribunal in light of general and specific obligations of flag States under the Convention for the conservation and management of marine living resources.

111. The Convention contains provisions concerning general obligations which are to be met by the flag State in all maritime areas regulated by the Convention, including the exclusive economic zone of the coastal State. These general obligations are set out in articles 91, 92 and 94 as well as articles 192 and 193 of the Convention. At the same time, the Convention imposes specific obligations on the flag State in article 58, paragraph 3, and article 62, paragraph 4, of the Convention with regard to its activities within the exclusive economic zone of the coastal State, in particular in respect of fishing activities conducted by nationals of the flag State.

112. The Tribunal wishes to observe that general and specific obligations of flag States for the conservation and management of marine living resources set out in the Convention are further specified in fisheries access agreements concluded between coastal States and flag States concerned. The Tribunal also observes, in this regard, that the MCA Convention contains specific provisions on the minimum conditions for access and exploitation of marine resources within the maritime zones under the jurisdiction of the SRFC Member States.

113. The Tribunal notes that the provisions of the MCA Convention require, *inter alia*, that fishing vessels belonging to a non-Member State obtain a fishing licence issued by the SRFC Member State concerned and land all their catches in the ports of the SRFC Member State that issued the fishing licence. Such provisions also require fishing vessels to carry out any transhipment in harbours designated by the SRFC Member State, provide declarations of catches in their logbook, and refrain from employing prohibited gear or equipment. In addition, the provisions of the MCA Convention require fishing vessels to give notice of their entry into and exit from maritime zones under the jurisdiction of an SRFC Member State and to take on board observers or inspectors from the SRFC Member State.

114. The Tribunal further notes that bilateral fisheries access agreements concluded by the SRFC Member States contain provisions setting out obligations for the flag State and vessels flying its flag. Such obligations require the flag State, *inter alia*, to: ensure compliance by its vessels with the laws and regulations of the SRFC Member State governing fisheries in the maritime zone under the jurisdiction of the SRFC Member State as well as with the relevant fisheries access agreements; ensure that its vessels undertake responsible fishing on the basis of the principle of sustainable exploitation of fishery resources; and, with regard to highly migratory species, ensure compliance with measures and recommendations of the International Commission for the Conservation of Atlantic Tunas (hereinafter "ICCAT"). Vessels of the flag State are required, *inter alia*, to: possess a valid fishing authorization issued by the SRFC Member State; forward to the SRFC Member State statements of their catches; report to the SRFC Member State the date and time of their entry into and exit from the maritime zones; allow on board officials from the SRFC Member State for the inspection and control of fishing activities; take on board observers appointed by the SRFC Member State; be equipped with a satellite monitoring system. In addition, such vessels are required to send the position messages to the SRFC Member State when they are in the maritime zones under its jurisdiction.

115. Article 92 of the Convention stipulates that, save in exceptional cases expressly provided for in international treaties or in the Convention, ships are subject to the exclusive jurisdiction of the flag State on the high seas; by virtue

of article 58, this also applies to the exclusive economic zone in so far as it is not incompatible with Part V of the Convention.

116. Article 94, paragraph 1, of the Convention requires the flag State to effectively exercise its jurisdiction and control over ships flying its flag in "administrative, technical and social matters". To achieve this purpose, the flag State is required by article 94, paragraph 2, subparagraph (b), to "assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship." Article 94 specifies in paragraphs 2, subparagraph (a), 3 and 4, that such exercise of jurisdiction and control by the flag State must include, in particular, maintaining a register of ships containing the names and particulars of the ships flying its flag, and taking necessary measures: to ensure safety of navigation and periodical surveying by a qualified surveyor of ships; to ensure that each ship flying its flag is in the charge of a master and officers who possess appropriate qualifications; and to ensure that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship.

117. The Tribunal holds the view that, since article 94, paragraph 2, of the Convention starts with the words "[i]n particular", the list of measures that are to be taken by the flag State to ensure effective exercise of its jurisdiction and control over ships flying its flag in administrative, technical and social matters is only indicative, not exhaustive.

118. Further, under article 94, paragraph 6, of the Convention, if a State has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised, it may report the facts to the flag State and the latter is obliged to investigate the matter upon receiving such a report and, if appropriate, take any action necessary to remedy the situation. The Tribunal is of the view that the flag State is under the obligation to inform the reporting State about the action taken.

119. It follows from the provisions of article 94 of the Convention that as far as fishing activities are concerned, the flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control in administrative matters,

must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State's responsibilities under the Convention in respect of the conservation and management of marine living resources. If such violations nevertheless occur and are reported by other States, the flag State is obliged to investigate and, if appropriate, take any action necessary to remedy the situation.

120. Article 192 of the Convention imposes on all States Parties an obligation to protect and preserve the marine environment. Article 193 of the Convention provides that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment." In the *Southern Bluefin Tuna Cases*, the Tribunal observed that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment" (*Southern Bluefin Tuna* (*New Zealand* v. *Japan; Australia* v. *Japan*), *Provisional Measures*, *Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 295, para. 70). As article 192 applies to all maritime areas, including those encompassed by exclusive economic zones, the flag State is under an obligation to ensure compliance by vessels flying its flag with the relevant conservation measures concerning living resources enacted by the coastal State for its exclusive economic zone because, as concluded by the Tribunal, they constitute an integral element in the protection and preservation of the marine environment.

121. As to the specific obligations of flag States in the exclusive economic zone of the coastal State, article 58, paragraph 3, of the Convention provides that:

> In exercising their rights and performing their duties . . . in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

122. The Convention further stipulates, in article 62, paragraph 4, that "[n]ationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State."

123. The Tribunal is of the view that article 62, paragraph 4, of the Convention imposes an obligation on States to ensure that their nationals engaged in fishing activities within the exclusive economic zone of a coastal State comply with the conservation measures and with the other terms and conditions established in its laws and regulations.

124. It follows from article 58, paragraph 3, and article 62, paragraph 4, as well as from article 192, of the Convention that flag States are obliged to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities. In accordance with the MCA Convention and the national legislation of the SRFC Member States, such activities also constitute an infringement of the conservation and management measures adopted by these States within their exclusive economic zones. In other words, while under the Convention the primary responsibility for the conservation and management of living resources in the exclusive economic zone, including the adoption of such measures as may be necessary to ensure compliance with the laws and regulations enacted by the coastal State in this regard, rests with the coastal State, flag States also have the responsibility to ensure that vessels flying their flag do not conduct IUU fishing activities within the exclusive economic zones of the SRFC Member States.

125. In this regard, the Tribunal draws attention to the clarifications given by the Seabed Disputes Chamber in its Advisory Opinion on the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*. Although the relationship between sponsoring States and contractors is not entirely comparable to that existing between the flag State and vessels flying its flag which are engaged in fishing activities in the exclusive economic zone of the coastal State, the Tribunal holds the view that the clarifications provided by the Seabed Disputes Chamber regarding the meaning of the expression "responsibility to ensure" and the interrelationship between the notions of obligations "of due diligence" and obligations "of conduct" referred to in paragraph 129 are fully applicable in the present case.

126. With reference to the meaning of the expression "responsibility to ensure", the Seabed Disputes Chamber in its Advisory Opinion states that:

> "Responsibility to ensure" points to an obligation of the sponsoring State under international law. It establishes a mechanism through which the rules of the Convention concerning activities in the Area, although being treaty law and thus binding only on the subjects of international law that have accepted them, become effective for sponsored contractors which find their legal basis in domestic law. This mechanism consists in the creation of obligations which States Parties must fulfil by exercising their power over entities of their nationality and under their control.
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10, at pp. 40–41, para. 108)

127. In the present case, as has been explained earlier, the flag State has the "responsibility to ensure", pursuant to articles 58, paragraph 3, and 62, paragraph 4, of the Convention, compliance by vessels flying its flag with the laws and regulations concerning conservation measures adopted by the coastal State. The flag State must meet this responsibility by taking measures defined in paragraphs 134 to 140 as well as by effectively exercising its jurisdiction and control in "administrative, technical and social matters" over ships flying its flag in accordance with article 94, paragraph 1, of the Convention.

128. As to the meaning of the term "to ensure", the Seabed Disputes Chamber in its Advisory Opinion states that:

> 110. The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence".
> 111. The notions of obligations "of due diligence" and obligations "of conduct" are connected. This emerges clearly from the Judgment of the ICJ in the *Pulp Mills on the River Uruguay: "*An obligation to adopt regulatory or administrative measures . . . and to enforce them is an obligation of conduct. Both parties are therefore called upon,

> under article 36 [of the Statute of the River Uruguay], to exercise due diligence in acting through the [Uruguay River] Commission for the necessary measures to preserve the ecological balance of the river" (paragraph 187 of the Judgment).
>
> 112. The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1).
>
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 41, paras. 110–112)

129. In the case of IUU fishing in the exclusive economic zones of the SRFC Member States, the obligation of a flag State not party to the MCA Convention to ensure that vessels flying its flag are not involved in IUU fishing is also an obligation "of conduct". In other words, as stated in the Advisory Opinion of the Seabed Disputes Chamber, this is an obligation "to deploy adequate means, to exercise best possible efforts, to do the utmost" to prevent IUU fishing by ships flying its flag. However, as an obligation "of conduct" this is a "due diligence obligation", not an obligation "of result". This means that this is not an obligation of the flag State to achieve compliance by fishing vessels flying its flag in each case with the requirement not to engage in IUU fishing in the exclusive economic zones of the SRFC Member States. The flag State is under the "due diligence obligation" to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag.

130. The Tribunal will now address the question of what constitutes the "due diligence obligation" of the flag State in the present case.

131. As to the meaning of "due diligence obligation", the Seabed Disputes Chamber referred to the following clarification provided by the ICJ in the *Pulp Mills on the River Uruguay* case:

> It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction.
> (*Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*), *Judgment, I.C.J. Reports 2010*, p. 14, at p. 79, para. 197)

132. The Seabed Disputes Chamber in its Advisory Opinion pointed out that:

> The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. . . . The standard of due diligence has to be more severe for the riskier activities.
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10, at p. 43, para. 117)

133. The Tribunal holds that, in the present case, the Convention is the key instrument which provides guidance regarding the content of the measures that need to be taken by the flag State in order to ensure compliance with the "due diligence" obligation to prevent IUU fishing by vessels flying its flag in the exclusive economic zones of the SRFC Member States.

134. The Tribunal observes that, under articles 58, paragraph 3, and 62, paragraph 4, of the Convention, the flag State has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations adopted by the SRFC Member States in accordance with the provisions of the Convention.

135. The aforementioned provisions of the Convention also impose the obligation on the flag State to adopt the necessary measures prohibiting its vessels from fishing in the exclusive economic zones of the SRFC Member States, unless so authorized by the SRFC Member States.

136. Pursuant to articles 192 and 193 of the Convention, the flag State has the obligation to take the necessary measures to ensure that vessels flying its flag comply with the protection and preservation measures adopted by the SRFC Member States.

137. Article 94, paragraphs 1 and 2, of the Convention provides that the flag State is under an obligation to exercise effectively its jurisdiction and control in administrative matters over fishing vessels flying its flag, by ensuring, in particular, that such vessels are properly marked.

138. While the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system, the flag State nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations. Sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.

139. In accordance with article 94, paragraph 6, of the Convention, "[a] State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State" and "upon receiving such a report, the flag State shall investigate the matter

and, if appropriate, take any action necessary to remedy the situation." In the view of the Tribunal, this obligation equally applies to a flag State whose ships are alleged to have been involved in IUU fishing when such allegations have been reported to it by the coastal State concerned. The flag State is then under an obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action. The action to be taken by the flag State is without prejudice to the rights of the coastal State to take measures pursuant to article 73 of the Convention.

140. The Tribunal wishes to recall that, as stated in the *MOX Plant Case*,

> the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law . . .
> (*MOX Plant* (*Ireland* v. *United Kingdom*), *Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 110, para. 82)

The Tribunal holds that this obligation extends also to cases of alleged IUU fishing activities.

## VI Question 2

141. The second question submitted to the Tribunal is as follows:

> *To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?*

142. The Tribunal wishes to note that neither the Convention nor the MCA Convention provides guidance on the issue of liability of the flag State for IUU fishing activities conducted by vessels under its flag.

143. Pursuant to article 293 of the Convention, the Tribunal, in examining this question, will therefore be guided by relevant rules of international law on responsibility of States for internationally wrongful acts.

144. In light of international jurisprudence, including its own, the Tribunal finds that the following rules reflected in the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (hereinafter "the ILC Draft Articles on State Responsibility") are the rules of general international law relevant to the second question:

(i) Every internationally wrongful act of a State entails the international responsibility of that State
(article 1 of the ILC Draft Articles on State Responsibility);
(ii) There is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State
(article 2 of the ILC Draft Articles on State Responsibility); and
(iii) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act
(article 31, paragraph 1, of the ILC Draft Articles on State Responsibility).

145. In answering the second question, the Tribunal finds it appropriate to clarify the meaning of the term "liable" referred to in this question. The Tribunal observes that, in the context of State responsibility, the English term "liability" refers to the secondary obligation, namely, the consequences of a breach of the primary obligation. While the French term "*responsabilité*" generally refers to both primary and secondary obligations, for the purposes of the second and third questions, the Tribunal wishes to clarify that the French term "*responsabilité*" is used to cover secondary obligations (see Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, at pp. 30–31, paras. 64–71).

146. In the present case, the liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations of the SRFC Member States concerning IUU fishing activities in their exclusive economic zones, as the violation of such laws and regulations by vessels is not *per se* attributable to the flag State. The liability of the flag State arises from its failure to comply with its "due diligence" obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.

147. The Tribunal is of the view that the SRFC Member States may hold liable the flag State of a vessel conducting IUU fishing activities in their exclusive economic zones for a breach, attributable to the flag State, of its international obligations referred to in the reply to the first question (see paragraphs 109 to 140; see also *M/V "SAIGA" (No. 2) Case* (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment, ITLOS Reports 1999*, p. 10, at p. 65, para. 170).

148. However, the flag State is not liable if it has taken all necessary and appropriate measures to meet its "due diligence" obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States.

149. The meaning of "due diligence" obligations has been explained in paragraphs 131 and 132.

150. The Tribunal also wishes to address the issue as to whether isolated IUU fishing activities or only a repeated pattern of such activities would entail a breach of "due diligence" obligations of the flag State. As explained in paragraphs 146 to 148, the Tribunal finds that a breach of "due diligence" obligations of a flag State arises if it has not taken all necessary and appropriate measures to meet its obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States. Therefore, the frequency of IUU fishing activities by vessels in the exclusive economic zones of the SRFC Member States is not relevant to the issue as to whether there is a breach of "due diligence" obligations by the flag State.

## VII Question 3

151. The third question submitted to the Tribunal is as follows:

> *Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or the international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?*

152. The Tribunal wishes to clarify the scope of the third question. The Tribunal notes in this regard that this question concerns the liability of a flag State or of an international agency for the violation of the fisheries legislation of a coastal State by a vessel holding a fishing license issued within the framework of an international agreement with that flag State or international agency. In the present case, the expression "international agency" is considered synonymous with "international organization".

153. The third question raises the issue of liability of the flag State on the one hand and of the international organization on the other.

154. The Tribunal considers that, in light of its conclusion that its jurisdiction in this case is limited to the exclusive economic zones of the SRFC Member States, the scope of this question is limited to a flag State or international organization that has concluded a fisheries access agreement with a State party to the MCA Convention.

155. Regarding the liability of the flag State that may result from the violation of the laws and regulations of the coastal State by vessels flying its flag fishing in the exclusive economic zones of the SRFC Member States under a license issued within the framework of a fisheries access agreement between one such State and the flag State, the Tribunal is of the view that its conclusions reached in paragraphs 146 to 150 apply in this context.

156. The Tribunal will now deal with the issue of liability of an international organization where fishing licences are issued within the framework of a fisheries access agreement between the SRFC Member States and the organization.

157. The Tribunal emphasizes that the third question is not to be understood as relating to international organizations in general, but only to international organizations, referred to in articles 305, paragraph 1(f), and 306 of the Convention, and Annex IX to the Convention, to which their member States, which are parties to the Convention, have transferred competence over matters governed by it; in the present case the matter in question is fisheries.

158. In accordance with its articles 305, paragraph 1(f), and 306 as well as its Annex IX, the Convention is open for participation by international organizations. An international organization may become a party to the Convention upon the deposit of an instrument of formal confirmation or of accession.

On that basis, the European Community (hereinafter "the EC") became a party to the Convention on 1 May 1998, following the deposit of its instrument of formal confirmation.

159. At present, the only such organization party to the Convention is the European Union (hereinafter "the EU"), which, on 1 December 2009, succeeded and replaced the EC (see article 1, Consolidated Version of the Treaty on European Union (TEU), Official Journal of the European Union, C 326, 26 October 2012, p. 16).

160. According to article 4, paragraphs 1, 2 and 3, of Annex IX to the Convention:

> 1. The instrument of formal confirmation or of accession of an international organization shall contain an undertaking to accept the rights and obligations of States under this Convention in respect of matters relating to which competence has been transferred to it by its member States which are Parties to this Convention.
> 2. An international organization shall be a Party to this Convention to the extent that it has competence in accordance with the declarations, communications of information or notifications referred to in article 5 of this Annex.
> 3. Such an international organization shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States. The member States of that international organization shall not exercise competence which they have transferred to it.

161. In depositing its instrument of formal confirmation, the EC declared "its acceptance, in respect of matters for which competence has been transferred to it by those of its member States which are parties to the Convention, of the rights and obligations laid down for States in the Convention and the Agreement" relating to the implementation of Part XI. The EC also stated that "[t]he scope and the exercise of such Community competences are, by their nature, subject to continuous development, and the Community will complete or amend this declaration, if necessary, in accordance with article 5(4) of Annex IX to the Convention."

162. The Tribunal notes that the declaration by the EC concerning competence under article 5, paragraph 1, of Annex IX, attached to the instrument

of formal confirmation, specifies the matters governed by the Convention in respect of which competence has been transferred to the organization by its member States, all of which are parties to the Convention.

163. In this declaration, the EC specified certain matters of exclusive competence, as well as matters of shared competence with its member States. The respective parts of the declaration are reproduced below:

> 1. Matters for which the Community has exclusive competence:
>
> The Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence in this field it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and, within its competence, to enter into external undertakings with third States or competent international organizations. This competence applies to waters under national fisheries jurisdiction and to the high seas. Nevertheless, in respect of measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, competence rests with the Member States whilst respecting Community law. Community law also provides for administrative sanctions.
> . . .
>
> 2. Matters for which the Community shares competence with its Member States:
>
> With regard to fisheries, for a certain number of matters that are not directly related to the conservation and management of sea fishing resources, for example research and technological development and development cooperation, there is shared competence.

164. The Tribunal notes that in the present case, pursuant to the declaration of the EU with regard to "the conservation and management of sea fishing resources", it is only the exclusive competence of the EU that is relevant.

165. The Tribunal observes that the Common Fisheries Policy of the EU contains a definition of "Union fishing vessel", that is a "fishing vessel flying the flag of a Member State and registered in the Union" (see article 4, para.5, Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC).

166. The Tribunal is of the view that the issue of liability in respect of vessels that are owned or operated by a national of a member State of an international organization and which are flying the flag of a State that is not a member of that international organization is beyond the scope of the third question.

167. The Tribunal takes note of the statement made by the EU in the course of the oral proceedings that "[i]n the European Union, international agreements concluded by the EU are binding on its institutions and its member States." The EU added that "[a]s envisaged in question 3, the European Union is the only contracting party with the coastal State, exercising competence in respect of the EU member States" and that "[i]t follows from that that it is only the EU – the organization – that is potentially liable under international law for violations of the obligations under these agreements."

168. The Tribunal wishes to point out that, in the present case, the liability of an international organization for an internationally wrongful act is linked to its competence. This is clearly spelled out in article 6, paragraph 1, of Annex IX to the Convention, which provides that parties which have competence under article 5 of that Annex have responsibility for failure to comply with obligations or for any other violation of the Convention. It follows that an international organization which in a matter of its competence undertakes an obligation, in respect of which compliance depends on the conduct of its member States, may be held liable if a member State fails to comply with such obligation and the organization did not meet its obligation of "due diligence".

169. The Tribunal further notes that the EU stated in the course of the oral proceedings that the fisheries access agreements "are an integral part of the EU legal order and . . . are implemented within the Union by the Member States'

authorities" and that "[i]f a member State of the European Union fails to fulfil the obligations stemming from the agreement, it is still the Union which is internationally liable."

170. The Tribunal considers that the liability of an international organization for a violation of the fisheries legislation of the coastal State by a vessel flying the flag of a member State holding a fishing license issued within the framework of a fisheries access agreement depends on whether the relevant agreement contains specific provisions regarding liability for such violation. In the absence of such provisions in the agreement, the general rules of international law apply. The Tribunal notes that the EU expressed a similar view during the proceedings, stating:

> The liability of the flag State or the international agency for the violation of the fisheries legislation of the coastal State depends on the content of the international agreement applicable to it, possibly including specific provisions regarding liability of the flag State. In the absence of specific provisions, the general rules of international law on State responsibility for a breach by the State of its international obligations are applicable.

171. The activities of fishing vessels of the EU operating in the exclusive economic zone of an SRFC Member State under a fisheries access agreement with the EU are, according to these agreements, subject to the fisheries laws and regulations of that State. In this regard, the Tribunal takes note of the statement made by the EU in the course of the oral proceedings that "[f]ishing operations need to be authorized and conducted in conformity with the law of coastal States, as the agreements concluded by the European Union consistently provide", that "[t]hese agreements commit the Union '[t]o take appropriate steps required to ensure that its vessels comply with the Agreement and the legislation governing fisheries'", and that "[o]n that basis the EU would investigate alleged violations of such legislation by the Union vessels and take additional measures, as necessary, in line with both the content of the agreement and with the due-diligence obligation".

172. The Tribunal holds that in cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization. The international organization, as the only contracting party to the fisheries access agreement with the SRFC Member State, must therefore ensure that vessels flying the flag of a member State comply with the fisheries laws and regulations of the SRFC Member State and do not conduct IUU fishing activities within the exclusive economic zone of that State.

173. Accordingly, only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States. Therefore, if the international organization does not meet its "due diligence" obligations, the SRFC Member States may hold the international organization liable for the violation of their fisheries laws and regulations by a vessel flying the flag of a member State of that organization and fishing in the exclusive economic zones of the SRFC Member States within the framework of a fisheries access agreement between that organization and such Member States.

174. The SRFC Member States may, pursuant to article 6, paragraph 2, of Annex IX to the Convention, request an international organization or its member States which are parties to the Convention for information as to who has responsibility in respect of any specific matter. The organization and the member States concerned must provide this information. Failure to do so within a reasonable time or the provision of contradictory information results in joint and several liability of the international organization and the member States concerned.

## VIII Question 4

175. The fourth question submitted to the Tribunal is as follows:

> *What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?*

176. In its written submission, the SRFC gives the following details as to the background of this question posed to the Tribunal:

> Small pelagic species and tuna are migratory species that concentrate seasonally, depending on the environmental conditions, in the waters under national jurisdiction of several coastal States. Accordingly, the concerned States should take concerted action for their sustainable management.
>
> It has to be highlighted that, in general, the concerned States do not consult each other when setting up management measures on those resources. In fact, these pelagic resources are subject to fishing authorization through fishing agreement signed between the coastal State and foreign companies without consultation with neighbouring coastal States that are along the migration routes of those resources.

177. The SRFC adds that "some Member States continue to act in isolation, issuing fishing licenses on the shared resources, thereby undermining the interests of neighbouring States and the initiatives of the SRFC." The SRFC concludes that "[t]oday, the practice shows the lack of cooperation among SRFC Member States in managing sustainably the stocks of common interest or shared stocks."

178. Before addressing the rights and obligations of the coastal State, certain preliminary issues need to be clarified, namely: which States are covered by the reference to the coastal State; what is the scope of the rights and obligations; what do the expressions "shared stocks", "stocks of common interest" and "sustainable management" as used in this question mean?

179. The Tribunal recalls that its jurisdiction in this case is limited to the exclusive economic zones of the SRFC Member States. Therefore, the rights and obligations of the coastal State referred to in the fourth question are to be construed as rights and obligations of the SRFC Member States.

180. The Tribunal observes that the Convention contains several provisions, namely articles 61, 62, 73, 192 and 193, concerning general rights and obligations of the coastal State in ensuring the conservation and management of living resources in its exclusive economic zone.

181. The Tribunal notes, however, that the fourth question addresses specifically the rights and obligations of the SRFC Member States in ensuring the sustainable management of shared stocks and stocks of common interest, especially small pelagic species and tuna.

182. The focus of the fourth question is therefore on the rights and obligations of the SRFC Member States in ensuring the sustainable management of the fish stocks in their exclusive economic zones when such fish stocks are shared with other SRFC Member States or between them and non-Member States fishing for such stocks in an area beyond and adjacent to those zones.

183. The Tribunal wishes to clarify the meaning of the expressions "shared stocks" and "stocks of common interest".

184. The Tribunal observes that these expressions are not found in the Convention. However, the expression "shared stocks" is defined in article 2, paragraph 12, of the MCA Convention as "stocks occurring within the exclusive economic zones of two or more coastal states or both within the exclusive economic zone and in an area beyond and adjacent to it."

185. The Tribunal observes that there is no established definition of "stocks of common interest". However, the Tribunal notes that, in its statement made during the oral proceedings, the SRFC provided the following explanation with respect to the meaning of the expression "stocks of common interest":

> In the central eastern Atlantic, a number of migratory pelagic species move between the exclusive economic zones of several States ("transboundary stocks" or "stocks of common interest") and/or between the exclusive economic zones and the waters beyond ("straddling stocks"). Thus, these are stocks which are shared between two neighbouring coastal States, two non-neighbouring coastal States located on either side of a gulf or an ocean, or a coastal State and the flag State of the vessel fishing the stock.

186. As the definition of "shared stocks" contained in article 2, paragraph 12, of the MCA Convention applies to both situations described in paragraphs 1 and 2 of article 63 of the Convention, the Tribunal considers that this expression as well as the expression "stocks of common interest" cover all stocks addressed in that article of the Convention.

187. The Tribunal now wishes to clarify its understanding of the expression "sustainable management".

188. The Tribunal observes that the Convention does not define the expression "sustainable management". Article 63 of the Convention as such does not address the issue of cooperation with respect to measures necessary to ensure the sustainable management of shared stocks. This article rather deals with cooperation regarding measures necessary to coordinate and ensure the "conservation and development of such stocks" when they occur within the exclusive economic zones of two or more States, and cooperation regarding measures necessary for the "conservation of these stocks in the adjacent area" when they "occur both within the exclusive economic zone and in an area beyond and adjacent to the zone".

189. The Tribunal, however, considers that article 61 of the Convention, which sets out the basic framework concerning the conservation and management of the living resources in the exclusive economic zone, provides guidance as to the meaning of "sustainable management". In this connection paragraphs 2, 3 and 4 of this article are of particular relevance; they read as follows:

*Article 61*
*Conservation of the living resources*

2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.
3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.
4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested

> species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

190. The Tribunal observes that the ultimate goal of sustainable management of fish stocks is to conserve and develop them as a viable and sustainable resource.

191. The Tribunal will therefore construe the expression "sustainable management" as used in the fourth question as meaning "conservation and development", as referred to in article 63, paragraph 1, of the Convention.

192. The Tribunal will now identify the rights and obligations of the SRFC Member States in ensuring the sustainable management of shared stocks occurring within their exclusive economic zones and shared stocks occurring both within the exclusive economic zones of the SRFC Member States and in an area beyond and adjacent to these zones, especially small pelagic species. The Tribunal will first examine the applicable provisions of the Convention.

193. In the view of the Tribunal, these provisions are: article 63, paragraph 1, of the Convention, on the same stocks or stocks of associated species occurring within the exclusive economic zones of two or more coastal States; paragraph 2 of the same article on the same stock or stocks of associated species occurring within the exclusive economic zone and in an area beyond and adjacent to the zone; and article 64, paragraph 1, of the Convention, on the highly migratory species listed in Annex I to the Convention.

194. Article 63 of the Convention, which relates to stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it, covers shared stocks as defined by article 2, paragraph 12, of the MCA Convention.

195. Article 63, paragraph 1, of the Convention reads as follows:

> Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States

> shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

196. Article 63, paragraph 2, of the Convention reads as follows:

> Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

197. The Tribunal notes that article 63, paragraph 1, of the Convention establishes that the coastal States concerned "shall seek . . . to agree" on the necessary measures to coordinate and ensure "conservation and development" of shared stocks. While article 61 of the Convention provides guidance regarding "conservation", the term "development" needs to be clarified.

198. The Tribunal is of the view that the term "development of such stocks" used in article 63, paragraph 1, of the Convention suggests that these stocks should be used as fishery resources within the framework of a sustainable fisheries management regime. This may include the exploitation of non-exploited stocks or an increase in the exploitation of under-exploited stocks through the development of responsible fisheries, as well as more effective fisheries management schemes to ensure the long-term sustainability of exploited stocks. This may also include stock restoration, guided by the requirement under article 61 of the Convention that a given stock is not endangered by over-exploitation, thus preserving it as a long-term viable resource.

199. Article 63, paragraph 2, of the Convention establishes a cooperation regime between the coastal State and the States fishing for the same stocks and stocks of associated species with a view to agreeing on measures necessary for the conservation of these stocks in the adjacent area.

200. Since the Tribunal has jurisdiction to entertain the Request only in so far as it relates to the exclusive economic zones of the SRFC Member States, article 63, paragraph 2, of the Convention, as far as it relates to "States fishing for such stocks in the adjacent area", is not applicable to the exclusive economic zones of the SRFC Member States.

201. While article 63, paragraph 2, of the Convention does not apply to the exclusive economic zones of the SRFC Member States, the part of the straddling stocks that occurs within these zones is not left unprotected. These straddling stocks are subject to the cooperation regime of article 63, paragraph 1, of the Convention, as they occur within the exclusive economic zones of the SRFC Member States.

202. The reference to tuna in the fourth question necessarily invokes the provision contained in article 64, paragraph 1, of the Convention, which reads:

> The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organizations exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

203. This provision establishes the cooperation regime on conservation of the highly migratory species listed in Annex I to the Convention. As tuna stocks are highly migratory species listed in this Annex, this provision therefore becomes relevant in the examination of this question.

204. The reference to tuna in this question will cover only tuna stocks that occur within the exclusive economic zones of the SRFC Member States, as the jurisdiction of the Tribunal in this case does not extend to the exclusive economic zones of other States or to the high seas.

205. Turning now to the rights and obligations of the coastal State, the Tribunal is of the view that, although the Convention approaches the issue of conservation and management of living resources from the perspective of obligations of the coastal State, these obligations entail corresponding rights. Therefore, the obligations of the SRFC Member States as identified below entail corresponding rights.

206. In the case of stocks referred to in article 63, paragraph 1, of the Convention, the SRFC Member States have the right to seek to agree, either directly or through appropriate subregional or regional organizations, with other SRFC Member States in whose exclusive economic zones these stocks occur upon the measures necessary to coordinate and ensure the conservation and development of such stocks.

207. Under the Convention, the SRFC Member States have the obligation to ensure the sustainable management of shared stocks while these stocks occur in their exclusive economic zones; this includes the following:

(i) the obligation to cooperate, as appropriate, with the competent international organizations, whether subregional, regional or global, to ensure through proper conservation and management measures that the maintenance of the shared stocks in the exclusive economic zone is not endangered by over-exploitation (see article 61, paragraph 2, of the Convention);
(ii) in relation to the same stock or stocks of associated species which occur within the exclusive economic zones of two or more SRFC Member States, the obligation to "seek . . . to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks" (article 63, paragraph 1, of the Convention);
(iii) in relation to tuna species, the obligation to cooperate directly or through the SRFC with a view to ensuring conservation and promoting the objective of optimum utilization of such species in their exclusive economic zones (see article 64, paragraph 1, of the Convention). The measures taken pursuant to such obligation should be consistent and compatible with those taken by the appropriate regional organization, namely the

ICCAT, throughout the region, both within and beyond the exclusive economic zones of the SRFC Member States.

208. To comply with these obligations, the SRFC Member States, pursuant to the Convention, specifically articles 61 and 62, must ensure that:

(i) the maintenance of shared stocks, through conservation and management measures, is not endangered by over-exploitation;
(ii) conservation and management measures are based on the best scientific evidence available to the SRFC Member States and, when such evidence is insufficient, they must apply the precautionary approach, pursuant to article 2, paragraph 2, of the MCA Convention;
(iii) conservation and management measures are designed to maintain or restore stocks at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special needs of the SRFC Member States, taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

209. Such measures shall:

(i) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened;
(ii) provide for exchange on a regular basis, through competent international organizations, of available scientific information, catch and fishing efforts statistics, and other data relevant to the conservation of shared stocks.

210. The Tribunal observes that the obligation to "seek to agree . . ." under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention are "due diligence" obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the

Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.

211. The Tribunal is of the view that the conservation and development of shared stocks in the exclusive economic zone of an SRFC Member State require from that State effective measures aimed at preventing over-exploitation of such stocks that could undermine their sustainable exploitation and the interests of neighbouring Member States.

212. In light of the foregoing, SRFC Member States fishing in their exclusive economic zones for shared stocks which also occur in the exclusive economic zones of other Member States must consult each other when setting up management measures for those shared stocks to coordinate and ensure the conservation and development of such stocks. Such management measures are also required in respect of fishing for those stocks by vessels flying the flag of non-Member States.

213. The Tribunal is of the view that cooperation between the States concerned on issues pertaining to the conservation and management of shared fisheries resources, as well as the promotion of the optimum utilization of those resources, is a well-established principle in the Convention. This principle is reflected in several articles of the Convention, namely articles 61, 63 and 64.

214. While limiting its examination of the rights and obligations of the coastal State to the exclusive economic zones of the SRFC Member States, the Tribunal is aware that fisheries conservation and management measures, to be effective, should concern the whole stock unit over its entire area of distribution or migration routes. The Tribunal is equally aware that the fish stocks, in particular the stocks of small pelagic species and tuna, shared by the SRFC Member States in their exclusive economic zones are also shared by several other States bordering the Atlantic Ocean. The Tribunal, however, has limited its examination and conclusions to the shared stocks in the exclusive economic zones of the SRFC Member States, constrained as it is by the limited scope of its jurisdiction in the present case.

215. The Tribunal wishes to emphasize that in order to secure the effectiveness of the conservation and development measures concerning shared stocks that the SRFC Member States may take and apply in their own exclusive economic zones, these States may, directly or through relevant subregional or regional organizations, seek the cooperation of non-Member States sharing the same stocks along their migrating routes with a view to ensuring conservation and sustainable management of these stocks in the whole of their geographical distribution or migrating area. While being aware of the scope of its jurisdiction in this case, the Tribunal is of the view that, when it comes to conservation and management of shared resources, the Convention imposes the obligation to cooperate on each and every State Party concerned.

216. The Tribunal notes in this regard that, while the SRFC Member States and other States Parties to the Convention have sovereign rights to explore, exploit, conserve and manage the living resources in their exclusive economic zones, in exercising their rights and performing their duties under the Convention in their respective exclusive economic zones, they must have due regard to the rights and duties of one another. This flows from articles 56, paragraph 2, and 58, paragraph 3, of the Convention and from the States Parties' obligation to protect and preserve the marine environment, a fundamental principle underlined in articles 192 and 193 of the Convention and referred to in the fourth paragraph of its preamble. The Tribunal recalls in this connection that living resources and marine life are part of the marine environment and that, as the Tribunal stated in the *Southern Bluefin Tuna Cases,* "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment" (*Southern Bluefin Tuna* (*New Zealand* v. *Japan; Australia* v. *Japan*), *Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 295, para. 70).

217. Accordingly, the Tribunal observes that, although in the present case its jurisdiction is limited to the area of application of the MCA Convention, in the case of fish stocks that occur both within the exclusive economic zones of the SRFC Member States and in an area beyond and adjacent to these zones, these States and the States fishing for such stocks in the adjacent area are required, under article 63, paragraph 2, of the Convention, to seek to agree upon the measures necessary for the conservation of those stocks in the adjacent area.

218. The Tribunal further observes that with respect to tuna species the SRFC Member States have the right, under article 64, paragraph 1, of the Convention, to require cooperation from non-Member States whose nationals fish for tuna in the region, "directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species".

## IX Operative Clause

219. For these reasons,

THE TRIBUNAL,

1. Unanimously

***Decides* that:**

**It has jurisdiction to give the advisory opinion requested by the SRFC; and**

**Its jurisdiction is limited to the exclusive economic zones of the SRFC Member States.**

2. By 19 votes to 1

***Decides* to respond to the Request for an advisory opinion submitted by the SRFC.**

FOR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK ;

AGAINST: *Judge* COT.

3. Unanimously

***Replies* to the first question as follows:**

The flag State has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations enacted by the SRFC Member States concerning marine living resources within their exclusive economic zones for purposes of conservation and management of these resources.

The flag State is under an obligation, in light of the provisions of article 58, paragraph 3, article 62, paragraph 4, and article 192 of the Convention, to take the necessary measures to ensure that vessels flying its flag are not engaged in IUU fishing activities as defined in the MCA Convention within the exclusive economic zones of the SRFC Member States.

The flag State, in fulfilment of its obligation to effectively exercise jurisdiction and control in administrative matters under article 94 of the Convention, has the obligation to adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities in the exclusive economic zones of the SRFC Member States which undermine the flag State's responsibility under article 192 of the Convention for protecting and preserving the marine environment and conserving the marine living resources which are an integral element of the marine environment.

The foregoing obligations are obligations of "due diligence".

The flag State and the SRFC Member States are under an obligation to cooperate in cases related to IUU fishing by vessels of the flag State in the exclusive economic zones of the SRFC Member States concerned.

The flag State, in cases where it receives a report from an SRFC Member State alleging that a vessel or vessels flying its flag have been involved in IUU fishing within the exclusive economic zone of that SRFC Member State, has the obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation, and to inform the SRFC Member State of that action.

4. By 18 votes to 2

***Replies* to the second question as follows:**

The liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations of the SRFC Member States concerning IUU fishing activities in their exclusive economic zones, as the violation of such laws and regulations by vessels is not *per se* attributable to the flag State.

The liability of the flag State arises from its failure to comply with its "due diligence" obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.

The SRFC Member States may hold liable the flag State of a vessel conducting IUU fishing activities in their exclusive economic zones for a breach, attributable to the flag State, of its international obligations, referred to in the reply to the first question.

The flag State is not liable if it has taken all necessary and appropriate measures to meet its "due diligence" obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States.

FOR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK;

AGAINST: *Judges* COT, LUCKY.

5. Unanimously

***Replies* to the third question as follows:**

The question only relates to those international organizations, referred to in articles 305, paragraph 1(f), and 306 of the Convention, and Annex IX to the Convention, to which their member States, which are parties to the Convention, have transferred competence over matters governed by it; in the present case the matter in question is fisheries. At present, the only such international organization is the European Union to which the member States, which are parties

to the Convention, have transferred competence with regard to "the conservation and management of sea fishing resources".

In cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization. The international organization, as the only contracting party to the fisheries access agreement with the SRFC Member State, must therefore ensure that vessels flying the flag of a member State comply with the fisheries laws and regulations of the SRFC Member State and do not conduct IUU fishing activities within the exclusive economic zone of that State.

Accordingly, only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States. Therefore, if the international organization does not meet its "due diligence" obligations, the SFRC Member States may hold the international organization liable for the violation of their fisheries laws and regulations by a vessel flying the flag of a member State of that organization and fishing in the exclusive economic zones of the SRFC Member States within the framework of a fisheries access agreement between that organization and such Member States.

The SRFC Member States may, pursuant to article 6, paragraph 2, of Annex IX to the Convention, request an international organization or its member States which are parties to the Convention for information as to who has responsibility in respect of any specific matter. The organization and the member States concerned must provide this information. Failure to do so within a reasonable time or the provision of contradictory information results in joint and several liability of the international organization and the member States concerned.

6. By 19 votes to 1

***Replies* to the fourth question as follows:**

In the case of stocks referred to in article 63, paragraph 1, of the Convention, the SRFC Member States have the right to seek to agree, either directly or

through appropriate subregional or regional organizations, with other SRFC Member States in whose exclusive economic zones these stocks occur upon the measures necessary to coordinate and ensure the conservation and development of such stocks.

Under the Convention, the SRFC Member States have the obligation to ensure the sustainable management of shared stocks while these stocks occur in their exclusive economic zones; this includes the following:

(i) the obligation to cooperate, as appropriate, with the competent international organizations, whether subregional, regional or global, to ensure through proper conservation and management measures that the maintenance of the shared stocks in the exclusive economic zone is not endangered by over-exploitation (see article 61, paragraph 2, of the Convention);
(ii) in relation to the same stock or stocks of associated species which occur within the exclusive economic zones of two or more SRFC Member States, the obligation to "seek . . . to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks" (article 63, paragraph 1, of the Convention);
(iii) in relation to tuna species, the obligation to cooperate directly or through the SRFC with a view to ensuring conservation and promoting the objective of optimum utilization of such species in their exclusive economic zones (see article 64, paragraph 1, of the Convention). The measures taken pursuant to such obligation should be consistent and compatible with those taken by the appropriate regional organization, namely the International Commission for the Conservation of Atlantic Tunas, throughout the region, both within and beyond the exclusive economic zones of the SRFC Member States.

To comply with these obligations, the SRFC Member States, pursuant to the Convention, specifically articles 61 and 62, must ensure that:

(i) the maintenance of shared stocks, through conservation and management measures, is not endangered by over-exploitation;
(ii) conservation and management measures are based on the best scientific evidence available to the SRFC Member States and, when such evidence

is insufficient, they must apply the precautionary approach, pursuant to article 2, paragraph 2, of the MCA Convention;

(iii) conservation and management measures are designed to maintain or restore stocks at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special needs of the SRFC Member States, taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

Such measures shall:

(i) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened;

(ii) provide for exchange on a regular basis through competent international organizations, of available scientific information, catch and fishing efforts statistics, and other data relevant to the conservation of shared stocks.

The obligation to "seek to agree . . ." under articles 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention are "due diligence" obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.

The conservation and development of shared stocks in the exclusive economic zone of an SRFC Member State require from that State effective measures aimed at preventing over-exploitation of such stocks that could undermine their sustainable exploitation and the interests of neighbouring Member States.

In light of the foregoing, the SRFC Member States fishing in their exclusive economic zones for shared stocks which also occur in the exclusive economic zones of other Member States must consult each other when setting up management measures for those shared stocks to coordinate and ensure the conservation and development of such stocks. Such management measures are

also required in respect of fishing for those stocks by vessels flying the flag of non-Member States.

Cooperation between the States concerned on issues pertaining to the conservation and management of shared fisheries resources, as well as the promotion of the optimum utilization of those resources, is a well-established principle in the Convention. This principle is reflected in several articles of the Convention, namely articles 61, 63 and 64.

Fisheries conservation and management measures, to be effective, should concern the whole stock unit over its entire area of distribution or migration routes. Fish stocks, in particular the stocks of small pelagic species and tuna, shared by the SRFC Member States in their exclusive economic zones are also shared by several other States bordering the Atlantic Ocean. The Tribunal, however, has limited its examination and conclusions to the shared stocks in the exclusive economic zones of the SRFC Member States, constrained as it is by the limited scope of its jurisdiction in the present case.

In exercising their rights and performing their duties under the Convention in their respective exclusive economic zones, the SRFC Member States and other States Parties to the Convention must have due regard to the rights and duties of one another. This flows from articles 56, paragraph 2, and 58, paragraph 3, of the Convention and from the States Parties' obligation to protect and preserve the marine environment, a fundamental principle underlined in articles 192 and 193 of the Convention and referred to in the fourth paragraph of its preamble. Living resources and marine life are part of the marine environment and, as stated in the *Southern Bluefin Tuna Cases,* "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment".

Although, in the present case, the jurisdiction of the Tribunal is limited to the area of application of the MCA Convention, in the case of fish stocks that occur both within the exclusive economic zones of the SRFC Member States and in an area beyond and adjacent to these zones, these States and the States fishing for such stocks in the adjacent area are required, under article 63, paragraph 2, of the Convention, to seek to agree upon the measures necessary for the conservation of those stocks in the adjacent area.

With respect to tuna species, the SRFC Member States have the right, under article 64, paragraph 1, of the Convention, to require cooperation from non-member States whose nationals fish for tuna in the region, "directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species".

FOR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK ;

AGAINST: *Judge* NDIAYE.

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Done in English and French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this second day of April, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Tribunal and the others will be sent to the Permanent Secretary of the Sub-Regional Fisheries Commission and to the Secretary-General of the United Nations.

(*signed*) Shunji YANAI,
President

(*signed*) Philippe GAUTIER,
Registrar

*Judge* WOLFRUM, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

(*initialled*) R.W.

*Judge* COT, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

(*initialled*) J.-P.C.

*Judge* NDIAYE, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Advisory Opinion of the Tribunal.

(*initialled*) T.M.N.

*Judge* LUCKY, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Advisory Opinion of the Tribunal.

(*initialled*) A.A.L.

*Judge* PAIK, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Advisory Opinion of the Tribunal.

(*initialled*) J.-H.P.

# Annex 70

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

**DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN GHANA AND CÔTE D'IVOIRE IN THE ATLANTIC OCEAN (GHANA/CÔTE D'IVOIRE)**
**List of cases: No. 23**

PROVISIONAL MEASURES

**ORDER OF 25 APRIL 2015**

# 2015

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

**DIFFÉREND RELATIF À LA DÉLIMITATION DE LA FRONTIÈRE MARITIME ENTRE LE GHANA ET LA CÔTE D'IVOIRE DANS L'OCÉAN ATLANTIQUE (GHANA/CÔTE D'IVOIRE)**
**Rôle des affaires : No. 23**

MESURES CONSERVATOIRES

**ORDONNANCE DU 25 AVRIL 2015**

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Official citation:

*Delimitation of the Maritime Boundary in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*), *Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146

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Mode officiel de citation :

*Délimitation de la frontière maritime dans l'océan Atlantique* (*Ghana/Côte d'Ivoire*), *mesures conservatoires, ordonnance du 25 avril 2015, TIDM Recueil 2015*, p. 146

25 APRIL 2015
ORDER

# DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN GHANA AND CÔTE D'IVOIRE IN THE ATLANTIC OCEAN (GHANA/CÔTE D'IVOIRE)

PROVISIONAL MEASURES

# DIFFÉREND RELATIF À LA DÉLIMITATION DE LA FRONTIÈRE MARITIME ENTRE LE GHANA ET LA CÔTE D'IVOIRE DANS L'OCÉAN ATLANTIQUE (GHANA/CÔTE D'IVOIRE)

MESURES CONSERVATOIRES

25 AVRIL 2015
ORDONNANCE

**SPECIAL CHAMBER OF THE
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

**YEAR 2015**

25 April 2015

List of cases:
No. 23

# DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN GHANA AND CÔTE D'IVOIRE IN THE ATLANTIC OCEAN

(GHANA/CÔTE D'IVOIRE)

Request for the prescription of provisional measures

## ORDER

*Present:* Vice-President BOUGUETAIA, *President of the Special Chamber*; *Judges* WOLFRUM, PAIK; *Judges* ad hoc MENSAH, ABRAHAM; *Registrar* GAUTIER.

The Special Chamber of the International Tribunal for the Law of the Sea (hereinafter "the Special Chamber") formed to deal with the dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean,

composed as above,

after deliberation,

Having regard to articles 288, paragraph 1, and 290, paragraph 1, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") and articles 15, paragraph 2, 21 and 25 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89, 90 and 107 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the Notification and the "Statement of the claim and grounds on which it is based", dated 19 September 2014 and addressed by the Republic of Ghana (hereinafter "Ghana") to the Republic of Côte d'Ivoire (hereinafter "Côte d'Ivoire"), instituting arbitral proceedings under Annex VII to the Convention in "the dispute concerning the maritime boundary between Ghana and Côte d'Ivoire",

Having regard to the Special Agreement concluded between Ghana and Côte d'Ivoire on 3 December 2014 (hereinafter "the Special Agreement") to submit the dispute concerning the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean to a special chamber of the Tribunal to be formed pursuant to article 15, paragraph 2, of the Statute,

Having regard to the Order of the Tribunal dated 12 January 2015 by which the Tribunal decided to accede to the request of Ghana and Côte d'Ivoire to form a special chamber,

Having regard to the Request submitted by Côte d'Ivoire to the Special Chamber on 27 February 2015 for the prescription of provisional measures, pursuant to article 290, paragraph 1, of the Convention,

*Makes the following Order:*

1. *Whereas*, on 27 February 2015, Côte d'Ivoire filed with the Special Chamber a Request for the prescription of provisional measures (hereinafter "the Request") under article 290, paragraph 1, of the Convention, in the above-mentioned dispute;

2. *Whereas*, on the same date, the Registrar transmitted a certified copy of the Request to the Agent of Ghana;

3. *Whereas*, in the Minutes of Consultations agreed between Ghana and Côte d'Ivoire on 3 December 2014 and attached to the Special Agreement, the Parties recorded their agreement that

> the special chamber to be formed pursuant to article 15, paragraph 2, of the Statute shall be composed of five members, two of whom will be judges ad hoc chosen by the parties in accordance with article 17 of the Statute of the Tribunal. The composition of the special chamber will be determined by the Tribunal with the approval of the parties. In this respect, the parties have agreed on the following names:
>
> Judge Bouguetaia
> Judge Paik
> Judge Wolfrum;

4. *Whereas*, in the said Special Agreement, Ghana notified the Tribunal of its choice of Mr Thomas Mensah to sit as judge *ad hoc* in the Special Chamber, and Côte d'Ivoire notified the Tribunal of its choice of Mr Ronny Abraham to sit as judge *ad hoc* in the Special Chamber;

5. *Whereas*, in the Order dated 12 January 2015, the Tribunal determined, with the approval of the Parties, the composition of the Special Chamber as follows:

| | |
|---|---|
| President | Bouguetaia |
| Judges | Wolfrum, Paik |
| Judges *ad hoc* | Mensah, Abraham; |

6. *Whereas* no objection to the choices of judge *ad hoc* was raised by either Party, and no objection appeared to the Tribunal itself;

7. *Whereas,* at a public sitting held on 28 March 2015, Mr Thomas Mensah and Mr Ronny Abraham made the solemn declaration required under articles 11 and 17, paragraph 6, of the Statute of the Tribunal;

8. *Whereas* the Special Agreement stated that the Government of Ghana had appointed Ms Marietta Brew Appiah-Opong, Attorney-General and Minister of Justice, as Agent for Ghana, and the Government of Côte d'Ivoire had appointed Mr Adama Toungara, Minister of Petroleum and Energy, and

Mr Ibrahima Diaby, Director General of Hydrocarbons, Ministry of Petroleum and Energy, as Agent and Co-Agent, respectively, for Côte d'Ivoire;

9. *Whereas*, by letter dated 23 March 2015, the Agent of Ghana notified the Registrar of the appointment of Ms Akua Sena Dansua, Ambassador of Ghana to the Federal Republic of Germany, as Co-Agent of Ghana, pursuant to article 56, paragraph 2, of the Rules;

10. *Whereas*, on 3 March 2015, the President of the Special Chamber held a telephone conference with the Agents and Counsel of Côte d'Ivoire and Ghana in order to ascertain the views of the Parties regarding the procedure for the hearing in accordance with article 73 of the Rules;

11. *Whereas*, by letter dated 5 March 2015, the Registrar requested the Agent of Côte d'Ivoire to supplement the documentation in accordance with article 63, paragraphs 1 and 2, of the Rules, and Côte d'Ivoire submitted the requested documents on 9 March 2015, and *whereas* on the same day a copy of those documents was transmitted to Ghana;

12. *Whereas*, pursuant to article 90, paragraph 2, of the Rules, the President of the Special Chamber, by Order dated 6 March 2015, fixed 29 March 2015 as the date for the opening of the hearing, notice of which was communicated to the Parties on 6 March 2015;

13. *Whereas*, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified of the Request by a letter from the Registrar dated 11 March 2015;

14. *Whereas*, in accordance with article 24, paragraph 3, of the Statute, States Parties to the Convention were notified of the Request by a note verbale from the Registrar dated 12 March 2015;

15. *Whereas*, pursuant to article 90, paragraph 3, of the Rules, Ghana filed its Written Statement with the Special Chamber on 23 March 2015, a certified copy of which was transmitted to the Agent of Côte d'Ivoire on the same date;

16. *Whereas* Côte d'Ivoire submitted electronically an additional document on 27 March 2015, and *whereas* this document was transmitted to Ghana on the same date;

17. *Whereas*, on 28 March 2015, the Parties submitted materials pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal;

18. *Whereas*, in accordance with article 68 of the Rules, the Special Chamber held initial deliberations on 28 March 2015 concerning the written pleadings and the conduct of the case;

19. *Whereas*, on 28 and 30 March 2015, in accordance with article 45 of the Rules, the President of the Special Chamber held consultations with the Parties with regard to questions of procedure;

20. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request and documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

21. *Whereas* oral statements were presented at four public sittings held on 29 and 30 March 2015 by the following:

*On behalf of Côte d'Ivoire:* Mr Adama Toungara, Minister for Petroleum and Energy,

*as Agent*,

Mr Ibrahima Diaby, Director-General for Hydrocarbons, Ministry of Petroleum and Energy,

*as Co-Agent*,

Mr Adama Kamara, Lawyer, Member of the Bar of Côte d'Ivoire, Partner, Adka, Côte d'Ivoire,

Mr Alain Pellet, Professor emeritus, Université Paris Ouest Nanterre La Défense, France, former Chairman of the International Law Commission, Member of the Institut de droit international,

Mr Michel Pitron, Lawyer, Member of the Paris Bar, Partner, Gide Loyrette Nouel, France,

Sir Michael Wood, K.C.M.G., Member of the International Law Commission, Member of the English Bar, United Kingdom,

Ms Alina Miron, Doctor of Law, Centre de droit international de Nanterre, Université Paris Ouest Nanterre La Défense, France,

*as Counsel and Advocates*;

*On behalf of Ghana:* Ms Marietta Brew Appiah-Opong, Attorney-General and Minister of Justice,

*as Agent*,

Mr Paul S. Reichler, Partner, Foley Hoag LLP, United States of America,

Ms Clara Brillembourg, Partner, Foley Hoag LLP, United States of America,

Mr Pierre Klein, Professor, Centre of International Law, Université Libre de Bruxelles, Belgium,

Ms Alison Macdonald, Member of the Bar of England and Wales, Matrix Chambers, United Kingdom,

Mr Philippe Sands, Professor of Law, University College London, Matrix Chambers, United Kingdom,

*as Counsel and Advocates*;

22. *Whereas*, in the course of the oral proceedings, a number of exhibits, including photographs and extracts from documents, were displayed by the Parties on video monitors;

23. *Whereas*, during the oral proceedings, on 30 March 2015, Côte d'Ivoire submitted additional documents to the Special Chamber, consisting of a decree of Côte d'Ivoire relating to research permits awarded to oil companies, a final report of a ministerial meeting of Member States of the Economic Commission of West African States on the outer limits of the continental shelf, and a joint communiqué of the official visit of the former President of Côte d'Ivoire to Ghana;

24. *Whereas*, by letter dated 30 March 2015 addressed to the Parties, the Registrar confirmed that, further to consultations held on the same day between the President of the Special Chamber and the representatives of the Parties, Ghana was authorized to transmit to the Special Chamber its observations on those documents by 31 March 2015, and *whereas* no such observations were submitted by Ghana;

* * *

25. *Whereas*, at the public sitting held on 30 March 2015, the Agent of Côte d'Ivoire made the following final submissions, which reiterate the claims contained in paragraph 54 of the Request:

> Côte d'Ivoire requests the Special Chamber to prescribe provisional measures requiring Ghana to:
>
> - take all steps to suspend all ongoing oil exploration and exploitation operations in the disputed area;
>
> - refrain from granting any new permit for oil exploration and exploitation in the disputed area;
>
> - take all steps necessary to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area from being used in any way whatsoever to the detriment of Côte d'Ivoire;

- and, generally, take all necessary steps to preserve the continental shelf, its superjacent waters and its subsoil; and

- desist and refrain from any unilateral action entailing a risk of prejudice to the rights of Côte d'Ivoire and any unilateral action that might lead to aggravating the dispute;

26. *Whereas*, at the public sitting held on 30 March 2015, the Agent of Ghana made the following final submissions, which reiterate the claim contained in paragraph 126 of its Written Statement:

> Ghana requests the Special Chamber to deny all of Côte d'Ivoire's requests for provisional measures;

* * *

27. *Considering* that, at the request of the President of the Special Chamber, the Co-Agent of Côte d'Ivoire communicated by letter dated 8 April 2015 to the Registrar the following information concerning the coordinates of the line drawn in yellow and shown on Sketch map No. 1 (entitled "The disputed area") which appears on page 5 of the Request for the prescription of provisional measures of 27 February 2015:

> The yellow line shown on that sketch map . . . is a straight line passing through two points X and Y whose coordinates, given by reference to WGS84 as geodetic datum, are:
>
> X: 003° 06' 24" W and 05° 05' 23" N
> Y: 002° 22' 23" W and 01° 24' 10" N;

28. *Considering* that, in the said letter, the Co-Agent of Côte d'Ivoire stated that the yellow line shown on the above-mentioned Sketch map No. 1 was "provided by way of illustration for the purposes of the proceedings for the prescription of provisional measures";

29. *Considering* that, at the request of the President of the Special Chamber, the Agent of Ghana communicated by letter dated 9 April 2015 to the Registrar the following information concerning the coordinates of the line which "Ghana considers to be long recognised by both States as their maritime boundary":

The coordinates are:

| | | |
|---|---|---|
| GPM-1* | 05°05'28.4"N | 03°06'21.8"W |
| GPM-2 | 04°47'34.9"N | 03°10'35.3"W |
| GPM-3 | 04°25'54.0"N | 03°14'53.0"W |
| GPM-4 | 04°04'59.0"N | 03°19'02.0"W |
| GPM-5 | 03°40'13.0"N | 03°23'51.0"W |
| GPM-6 | 01°48'45.3"N | 03°47'33.6"W |
| GPM-7 | 01°04'44.6"N | 03°56'39.5"W |

*Land boundary terminus

These coordinates are in the WGS-84 geographic coordinate system and are rounded to the nearest one-tenth of one second of latitude and longitude;

30. *Considering* that in the said letter, the Agent of Ghana stated that

> [n]oting that the request is made "in the context of the request for the prescription of provisional measures relating to the case", Ghana wishes to reiterate that these coordinates are offered without prejudice to the position adopted by Ghana in the merits phase of these proceedings;

* * *

31. *Considering* that, on 3 December 2014, by notification of the Special Agreement concluded on the same day, the Parties requested the Tribunal to form a special chamber to deal with the dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean;

32. *Considering* that, on 27 February 2015, Côte d'Ivoire submitted to the Special Chamber a Request for provisional measures, pursuant to article 290, paragraph 1, of the Convention;

33. *Considering* that article 290, paragraph 1, of the Convention provides:

> If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective

rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision;

34. *Considering* that, before prescribing provisional measures under article 290, paragraph 1, of the Convention, the Special Chamber must satisfy itself that *prima facie* it has jurisdiction over the dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, submitted by the Parties on 3 December 2014;

35. Considering that Ghana and Côte d'Ivoire are States Parties to the Convention;

36. *Considering* that article 288, paragraph 1, of the Convention provides that "[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with [Part XV]."

37. *Considering* that both Parties have accepted that *prima facie* the Special Chamber has jurisdiction over the dispute submitted by the Special Agreement;

38. *Considering* that, in light of the above, the Special Chamber finds that *prima facie* it has jurisdiction over the dispute;

39. *Considering* that the power of the Special Chamber to prescribe provisional measures under article 290, paragraph 1, of the Convention has as its object the preservation of the respective rights of the parties to the dispute or the prevention of serious harm to the marine environment pending the final decision;

40. *Considering* that the Chamber must be concerned to safeguard the respective rights which may be adjudged in its Judgment on the merits to belong to either Party;

41. *Considering* that the Special Chamber may not prescribe provisional measures unless it finds that there is "a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute" (*M/V "Louisa"* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008–2010*, p. 58, at p. 69, para. 72);

42. *Considering*, in this regard, that urgency is required in order to exercise the power to prescribe provisional measures, that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered (see *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua* v. *Costa Rica*)*; Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*)*, Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013,* p. 398, at p. 405, para. 25);

43. *Considering* that the decision whether there exists imminent risk of irreparable prejudice can only be taken on a case by case basis in light of all relevant factors;

44. *Considering* that Côte d'Ivoire requests the prescription of provisional measures to preserve three categories of "exclusive sovereign rights that are the subject of this dispute, rights arising under UNCLOS";

45. *Considering* that Côte d'Ivoire argues that the rights which it claims relate to "a triangular disputed area" defined by the competing claims of the Parties, namely that of Côte d'Ivoire to "a boundary starting from the land boundary pillar to the north and running towards the south-east", and that of Ghana to "a boundary starting from the same land boundary pillar" for which it "draws the delimitation line towards the south-west";

46. *Considering* that Côte d'Ivoire claims in the disputed area "the right to explore for and exploit the resources of Côte d'Ivoire's seabed and the subsoil thereof by carrying out seismic studies and drilling, and installing major submarine infrastructures there";

47. *Considering* that Côte d'Ivoire also claims "the right to exclusive access to confidential information about its natural resources" in the disputed area, and argues that this is one of the sovereign rights of the coastal State for the purpose of exploring the continental shelf and exploiting its natural resources as provided for in article 77 of the Convention, and that the sovereign rights "include all rights necessary for and connected with the exploration and exploitation of the resources of the shelf";

48. *Considering* that Côte d'Ivoire further claims "the right to select the oil companies to conduct exploration and exploitation operations and freely to determine the terms and conditions in its own best interest and in accordance with its own requirements with respect to oil and the environment";

49. *Considering* that Côte d'Ivoire invokes article 2, paragraph 2, article 56, paragraph 1, article 77, paragraph 1, article 81 and article 246, paragraph 5, of the Convention in support of its claims;

50. *Considering* that Côte d'Ivoire further alleges that, as regards the conditions for awarding oil contracts, Ghana's legislation "is out of step with international standards" and that the recent exploitation of a field adjacent to the disputed area (Jubilee field) "has already evidenced many technical failings";

51. *Considering* that Ghana contends that Côte d'Ivoire seeks provisional measures "on the basis of wholly theoretical rights", rights which are "newly claimed" by Côte d'Ivoire;

52. *Considering* that Ghana contends further that "Ghana and Côte d'Ivoire share a maritime boundary which has been mutually recognized for decades in numerous ways, although not formally delimited", that "[t]his customary boundary is based on international law", that "activities undertaken on the Ghanaian side of the customary boundary based on equidistance . . . have been carried out there for decades" without any objections or protests from Côte d'Ivoire and that "Côte d'Ivoire has respected precisely the same equidistance line as Ghana";

53. *Considering* that Ghana argues that "Côte d'Ivoire has introduced no evidence . . . to show that the activities of which it now complains are new activities, or that it has only recently become aware of them";

54. *Considering* that Ghana, in relation to Côte d'Ivoire's alleged right referred to in paragraph 46, maintains that "[t]here were no objections over a lengthy period of Ghanaian oil operations" in the areas concerned and argues that this was because "there were no rights, . . . and . . . there are no rights today";

55. *Considering* that Ghana submits that Côte d'Ivoire's alleged right referred to in paragraph 47 is not based on any specific provisions of the Convention, that "Côte d'Ivoire has failed to establish a basis for the legal existence of an alleged right to information newly claimed to be harmed", and that "Côte d'Ivoire has cited no legal authority for any such right to information";

56. *Considering* that, in relation to the allegation of Côte d'Ivoire in paragraph 50, Ghana argues that its concessions "are being operated in a transparent manner, in full accordance with contractual commitments, best industry practice, and the highest international standards, including the environmental and social standards of the World Bank's International Finance Corporation (IFC)";

57. *Considering* that a court called upon to rule on a request for provisional measures does not need, at this stage of the proceedings, to settle the parties' claims in respect of the rights and obligations in dispute and is not called upon to determine definitively whether the rights which they each wish to see protected exist (see *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*)*; Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua* v. *Costa Rica*)*, Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 354, at p. 360, para. 27);

58. *Considering* that, before prescribing provisional measures, the Special Chamber need not therefore concern itself with the competing claims of the Parties, and that it need only satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks to protect are at least plausible;

59. *Considering* that the Special Chamber observes that, by instituting arbitral proceedings under Annex VII to the Convention against Côte d'Ivoire, Ghana itself recognized the existence of a dispute concerning the maritime boundary between the two States and the existence of opposing claims of the Parties to the disputed area;

60. *Considering* that, for the purpose of the present proceedings and pending the final decision on the merits, the disputed area lies between the coordinates of the line drawn by Côte d'Ivoire, as described in paragraph 27, and the coordinates of the line which according to Ghana would be the maritime boundary between the two countries, as described in paragraph 29;

61. *Considering* that, in the view of the Special Chamber, the rights claimed by Côte d'Ivoire comprise rights of sovereignty over the territorial sea and its subsoil (article 2, paragraph 2, of the Convention) and sovereign rights of exploration and exploitation of the natural resources of the continental shelf (articles 56, paragraph 1, and 77, paragraph 1, of the Convention) and that the sovereign rights include all rights necessary for or connected with the exploration of the continental shelf and the exploitation of its natural resources;

62. *Considering* that, in the circumstances of this case, the Special Chamber finds that Côte d'Ivoire has presented enough material to show that the rights it seeks to protect in the disputed area are plausible;

63. *Considering* that the Special Chamber finds that there is a link between the rights Côte d'Ivoire claims and the provisional measures it seeks (see *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*), *Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, p. 6, at p. 18, para. 54);

64. *Considering* that Côte d'Ivoire requests the prescription of provisional measures to prevent serious harm to the marine environment;

65. *Considering* that Côte d'Ivoire maintains that "oil-related activities being carried out today on behalf of and in the name of Ghana, whether in or near the disputed area, have already given rise to pollution incidents", and that Ghana's lack of due diligence is highlighted by "its failure to monitor oil activities effectively" and "the shortcomings in its legislative framework";

66. *Considering* that Ghana contends that "[s]ince the start of the Jubilee operations, there has not been an oil pollution incident resulting in an oil slick that has reached the shores of Ghana", that constant monitoring is required by law, and that Ghana's environmental protection legislation is among the most robust in the region;

67. *Considering* that the Special Chamber finds that Côte d'Ivoire has not adduced sufficient evidence to support its allegations that the activities conducted by Ghana in the disputed area are such as to create an imminent risk of serious harm to the marine environment;

68. *Considering,* however, that the risk of serious harm to the marine environment is of great concern to the Special Chamber;

69. *Considering* that article 192 of the Convention imposes an obligation on States to protect and preserve the marine environment (see *M/V "Louisa"* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008–2010*, p. 58, at p. 70, para. 76);

70. *Considering* that article 193 of the Convention provides that States have the sovereign right to exploit their natural resources pursuant to their environmental policies and it also states that this right is to be exercised "in accordance with their duty to protect and preserve the marine environment";

71. *Considering* further that:

> [t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment
> (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 241–242, para. 29);

72. *Considering* that, in the view of the Special Chamber, the Parties should in the circumstances "act with prudence and caution to prevent serious harm to the marine environment" (*M/V "Louisa"* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at p. 70, para. 77; see also *Southern Bluefin Tuna* (*New Zealand* v. *Japan; Australia* v. *Japan*), *Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 296, para. 77; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 46, para. 132);

73. *Considering* that, as the Tribunal has already stated, "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention" (*MOX Plant* (*Ireland* v. *United Kingdom*), *Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*,

p. 95, at p. 110, para. 82; see also *Land Reclamation in and around the Straits of Johor* (*Malaysia* v. *Singapore*), *Order of 10 September 2003, ITLOS Reports 2003*, p. 10, at p. 25, para. 92; and *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion of 2 April 2015*, para. 140);

74. *Considering* that, pursuant to article 290, paragraph 1, of the Convention, the Special Chamber may prescribe provisional measures if it finds that there is a real and imminent risk that irreparable prejudice could be caused to the rights of the parties to the dispute pending the final decision by the Special Chamber;

75. *Considering* that Côte d'Ivoire maintains that

> [t]he Special Chamber must preserve Côte d'Ivoire's sovereign rights by prescribing provisional measures such as to ensure that it will be able to exercise those rights fully once the Special Chamber has handed down its final decision on the course of the maritime boundary, thereby preventing that decision from being deprived of effectiveness;

76. *Considering* that Côte d'Ivoire further maintains that "[t]o that end, unilateral oil operations in a disputed area must be precluded in order to preserve the rights of the parties";

77. *Considering* that Côte d'Ivoire claims that the continuation of unilateral activities of Ghana in the disputed area would "deprive irremediably . . . Côte d'Ivoire of its sovereign right to decide when, how and under what conditions the exploitation of these resources will take place, and even *whether* it should take place";

78. *Considering* that Côte d'Ivoire asserts that

> [b]y its very nature, drilling is irreversible because once the rock has been crushed it cannot be reconstituted. You can plug a shaft with cement, but its lining remains. You cannot restore the subsoil to its prior state. Therefore, the criterion of permanent and irreversible damage to the seabed and subsoil deriving from the case-law is satisfied in the present case;

79. *Considering* that Cote d'Ivoire argues that "[t]he past and ongoing collection of information relating to the natural resources of the disputed area by Ghana and by private oil companies is a serious infringement of the disputed rights of Cote d'Ivoire" and that the damage thus sustained is "irreversible insofar as a return to the situation *ex ante* will be impossible owing to the fact that information will have circulated and that, unlike a living resource, bargaining power cannot regenerate on its own";

80. *Considering* that Côte d'Ivoire states that "[t]his does not necessarily mean that all activities in a disputed area are to be excluded, but such activities are lawful only if they do not imperil . . . the judicial . . . decision ultimately established";

81. *Considering* that Côte d'Ivoire further states that it is "not asking for Ghana's offshore oil and gas industry to be 'closed down'" and that it is "solely requesting that *ongoing activities be suspended*";

82. *Considering* that Ghana maintains that the sovereign rights claimed by it "would be severely harmed if the provisional measures requested by Côte d'Ivoire were ordered";

83. *Considering* that Ghana states that "[w]hat Côte d'Ivoire seeks in effect is an order . . . to close down large parts of Ghana's well-established offshore oil and gas industry";

84. *Considering* that Ghana further states that "[a]n Order to stop all activity in the TEN field" would be "financially ruinous" and "the enormous investment in the Deepwater Tano Concession Block, including the TEN . . . fields, which has taken place over the last nine years (since 2006), would be threatened with irreparable harm";

85. *Considering* that Ghana explains that stopping the project "would have the most impacts on the investments already made in relation to both facilities and equipment for which construction is far advanced" and that "[e]quipment will degrade and Ghana will possibly lose its contractors entirely";

86. *Considering* that Ghana argues that "Côte d'Ivoire can show neither that there is, in fact, a risk of harm to its rights, nor that the harms which it posits would, in law, count as 'irreparable', in light of the fact that they could readily be compensated in damages at the end of the case";

87. *Considering* that Ghana further states that "the only loss which Cote d'Ivoire would suffer over the lifetime of these proceedings would be the loss of the revenues derived from oil production . . . by Ghana in any area which the Special Chamber ultimately determined to fall within Cote d'Ivoire's territory" and that "[t]his is a pure financial loss, and could be completely addressed through . . . an award of damages in due course";

88. *Considering* that, as regards the sovereign rights claimed by Côte d'Ivoire for the purpose of exploring the continental shelf and exploiting its natural resources, the Special Chamber is of the view that, while the alleged loss of the revenues derived from oil production could be the subject of adequate compensation in the future, the on-going exploration and exploitation activities conducted by Ghana in the disputed area will result in a modification of the physical characteristics of the continental shelf;

89. *Considering* that there is a risk of irreparable prejudice where, in particular, activities result in significant and permanent modification of the physical character of the area in dispute and where such modification cannot be fully compensated by financial reparations;

90. *Considering* that, whatever its nature, any compensation awarded would never be able to restore the *status quo ante* in respect of the seabed and subsoil;

91. *Considering* that this situation may affect the rights of Côte d'Ivoire in an irreversible manner if the Special Chamber were to find in its decision on the merits that all or any part of the area in dispute belongs to Côte d'Ivoire;

92. *Considering* that, as regards the right claimed by Côte d'Ivoire to exclusive access to confidential information about the natural resources of the continental shelf, Ghana, in its Written Statement, declares that "information about petroleum recovered is recorded in detail, as part of standard practice in petroleum production and revenue accounting" and that "the information currently being gathered in the disputed area will be duly recorded, and Ghana will be in a position to provide that information to Côte d'Ivoire if ordered to do so at the conclusion of the case";

93. *Considering* that the Special Chamber places on record the assurance and undertaking given by Ghana as mentioned in paragraph 92;

94. *Considering* that the Special Chamber considers that the rights of the coastal State over its continental shelf include all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf and that the exclusive right to access to information about the resources of the continental shelf is plausibly among those rights;

95. *Considering* that the acquisition and use of information about the resources of the disputed area would create a risk of irreversible prejudice to the rights of Côte d'Ivoire should the Special Chamber, in its decision on the merits, find that Côte d'Ivoire has rights in all or any part of the disputed area;

96. *Considering* therefore that the exploration and exploitation activities, as planned by Ghana, may cause irreparable prejudice to the sovereign and exclusive rights invoked by Côte d'Ivoire in the continental shelf and superjacent waters of the disputed area, before a decision on the merits is given by the Special Chamber, and that the risk of such prejudice is imminent;

* * *

97. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Special Chamber may prescribe measures different in whole or in part from those requested;

98. *Considering* that the Order must not prejudice any decision on the merits;

99. *Considering* that, in the view of the Special Chamber, the suspension of ongoing activities conducted by Ghana in respect of which drilling has already taken place would entail the risk of considerable financial loss to Ghana and its concessionaires and could also pose a serious danger to the marine environment resulting, in particular, from the deterioration of equipment;

100. *Considering* that, in the view of the Special Chamber, an order suspending all exploration or exploitation activities conducted by or on behalf of Ghana in the disputed area, including activities in respect of which drilling has already taken place, would therefore cause prejudice to the rights claimed by Ghana and create an undue burden on it;

101. *Considering* that such an order could also cause harm to the marine environment;

102. *Considering*, on the other hand, that the Special Chamber considers it appropriate, in order to preserve the rights of Côte d'Ivoire, to order Ghana to take all the necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area;

103. *Considering* that any action or abstention by either party in order to avoid aggravation or extension of the dispute should not in any way be construed as a waiver of any of its claims or an admission of the claims of the other party to the dispute (see *M/V "SAIGA" (No. 2)* (*Saint Vincent and the Grenadines* v. *Guinea*), *Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 24, at p. 39, para. 44; *M/V "Louisa"* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008–2010*, p. 58, at p. 70, para. 79; *"Arctic Sunrise"* (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 251, para. 99);

104. *Considering* that the present Order in no way prejudges the question of the jurisdiction of the Special Chamber to deal with the merits of the case or relating to the merits themselves, and leaves unaffected the rights of Ghana and of Côte d'Ivoire, respectively, to submit arguments in respect of those questions (see *M/V "Louisa"* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008–2010*, p. 58, at p. 70, para. 80; "*ARA Libertad*" (*Argentina* v. *Ghana*), *Order of 20 November 2012, ITLOS Reports 2012*, p. 326, at p. 350, para. 106; *"Arctic Sunrise"* (*Kingdom of the Netherlands* v. *Russian Federation, Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 251, para. 100);

105. *Considering* that pursuant to article 95, paragraph 1, of the Rules, each Party is required to submit to the Special Chamber a report and information on compliance with any provisional measures prescribed;

106. *Considering* that it may be necessary for the Special Chamber to request further information from the Parties on the implementation of the provisional measures and that it is appropriate that the President of the Special Chamber be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

107. *Considering* that, in the present case, the Special Chamber sees no reason to depart from the general rule, as set out in article 34 of its Statute, that each party shall bear its own costs;

108. *For these reasons*,

THE SPECIAL CHAMBER,

(1) Unanimously

*Prescribes*, pending the final decision, the following provisional measures under article 290, paragraph 1, of the Convention:

(a) Ghana shall take all necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area as defined in paragraph 60;

(b) Ghana shall take all necessary steps to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area that is not already in the public domain from being used in any way whatsoever to the detriment of Côte d'Ivoire;

(c) Ghana shall carry out strict and continuous monitoring of all activities undertaken by Ghana or with its authorization in the disputed area with a view to ensuring the prevention of serious harm to the marine environment;

(d) The Parties shall take all necessary steps to prevent serious harm to the marine environment, including the continental shelf and its superjacent waters, in the disputed area and shall cooperate to that end;

(e) The Parties shall pursue cooperation and refrain from any unilateral action that might lead to aggravating the dispute.

(2) Unanimously

*Decides* that Ghana and Côte d'Ivoire shall each submit to the Special Chamber the initial report referred to in paragraph 105 not later than 25 May 2015, and authorizes the President of the Special Chamber, after that date, to request such information from the Parties as he may consider appropriate.

(3) Unanimously

*Decides* that each Party shall bear its own costs.

* * *

Done in English and French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this twenty-fifth day of April, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of the Republic of Côte d'Ivoire and the Government of the Republic of Ghana, respectively.

(*signed*) Boualem BOUGUETAIA,
President of the Special Chamber

(*signed*) Philippe GAUTIER,
Registrar

Judge *ad hoc* Mensah appends a separate opinion to the Order of the Special Chamber.