

**Speech of H.E. Mr. Ronny Abraham, President of the International Court of Justice,
to the Sixth Committee of the General Assembly**

Mr. Chairman,

Ladies and gentlemen,

It is once again an honour for me to address this Committee and I welcome this renewed opportunity to strengthen the bonds which unite our two institutions. I would like to use this occasion to congratulate His Excellency Mr. Danny Danon on his election as Chair of the Sixth Committee for the seventy-first session of the General Assembly.

I should like today to tell you about the contribution of the International Court of Justice to the development and clarification of international environmental law. The choice of this subject appears to me to be particularly appropriate this year, for two reasons. First, I note the appearance on the Committee's programme of work for this seventy-first session of the questions of the prevention of transboundary harm from hazardous activities and the allocation of loss in the case of such harm, and I believe that these questions were discussed last Thursday. The subject that I am proposing to address also seems topical given the growing importance of concerns regarding respect for the environment both on the international stage and in the disputes brought before the Court.

I shall begin my presentation with some general remarks on the context in which the Court is called upon to hear cases involving international environmental law and on the place that these issues occupy in its work. I shall then endeavour to identify certain recent contributions by the Court to the development of this field of international law. Finally, I shall talk about the tools which are available to the Court under its Statute and Rules and which can prove particularly useful when hearing cases of a specific environmental character.

It is always helpful to recall that the Court, which is the principal judicial organ of the United Nations and which enjoys general subject-matter jurisdiction, may hear any dispute of a legal nature, regardless of its subject-matter. Questions relating to the protection of the environment have appeared only relatively recently in the jurisprudence of the Court, which can easily be explained by the fact that the concerns underpinning those questions are themselves the result of a new and growing awareness within the international community of the potentially harmful effects of human activity on the environment.

This awareness has led to the adoption of a number of international instruments imposing environmental obligations on States, some of which also contain compromissory clauses conferring jurisdiction upon the Court to settle any disputes pertaining thereto. I would note however that, to date, no dispute has ever been submitted to the Court using that basis for jurisdiction. The Court's jurisdiction over disputes involving environmental issues has instead been founded on declarations made by the parties under the Optional Clause, on a special agreement, on provisions contained in treaties for the peaceful settlement of disputes, or on compromissory clauses found in treaties which refer to the protection of the environment in an incidental manner only.

The Court was quick to emphasize the importance that it attaches to environmental protection. It did so as early as 1996, in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, in which, at the request of the General Assembly, it had to answer the question of whether the threat or use of nuclear weapons in any circumstance was permitted under international law. In that Opinion, the Court "recognize[d] that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment" and that "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 concepts of protection of the rights of future generations and of sustainable development were further echoed in the reasoning adopted by the Court in its 1997 Judgment in the case concerning the *Gabčíkovo-Nagymaros Project*, of which it was seised by way of a special agreement between Hungary and Slovakia. In their special agreement, the Parties asked the Court to clarify their respective obligations with respect to the implementation and the termination of a treaty concluded between them regarding the

construction and functioning of a barrage system on the Danube. In its Judgment, the Court observed that while, throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature, without consideration of the effects upon the environment, new norms and standards have been developed and set forth in a great number of instruments. According to the Court, these have to be taken into consideration, not only when States contemplate new activities but also when continuing with activities begun in the past. In its Judgment, the Court referred to the concept of sustainable development, which — and I quote — “aptly expresse[s]” “[the] need to reconcile economic development with protection of the environment”.

The Court has since been seized of cases concerning, among other things, the preservation of the marine environment, the conservation of biological biodiversity, the protection of international watercourses and the protection of shared or common resources. Until very recently, it had only dealt with such issues as part of cases which primarily concerned obligations arising in relation to other fields of law, such as international humanitarian law, the law of State responsibility or the law of treaties. However, this situation has changed in recent years.

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This brings me to the second part of my presentation, in which I will outline the Court’s recent key contributions to the clarification of the rules of international law relating to the protection of the environment. I will do so in English, in line with the bilingualism that characterizes the Court. As you will have understood from the first part of my intervention, this contribution is not limited to decisions made in cases where the Court had to deal with issues directly relating to the protection of the environment. For instance, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* and in its judgment in the case concerning the *Gabčíkovo-Nagymaros Project*, both of which I have already referred to, the Court recognized 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.”

The first case in which the Court was asked to apply rules of international law relating to activities alleged to be at least potentially harmful to the environment was the case concerning *Pulp Mills on the River Uruguay*, filed by Argentina against Uruguay on 4 May 2006. In this case, the Court had to determine whether Uruguay had breached its obligations under the Statute of the River Uruguay, a treaty signed by the Parties in February 1975 and entered into force in September 1976. In its Application, Argentina alleged that Uruguay's breaches of its obligations arose out of "the authorization, construction and future commissioning of two pulp mills on the River Uruguay". Argentina was invoking in particular "the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river".

The Court made clear in its Judgment of 20 April 2010 that its jurisdiction was limited to examining the allegations of breaches by the Respondent of its obligations under the Statute. However, it also explained that, according to the relevant rules of treaty interpretation, the interpretation of the 1975 Statute had to take into account, together with the context, "any relevant rules of international law applicable in the relations between the parties". It is in this context that the Court elaborated on the obligations incumbent upon States under general international law relating to the environment.

The Court first pointed 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". Relying on its statement made in the *Corfu Channel* Judgment on the merits of 1949 that it is every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States, the Court concluded that "[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 obligation, recalled the Court, "is now part of the corpus of international law relating to the environment".

The Court went further, and recognized the existence of a practice which, and I quote the judgment, “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”.

The *Pulp Mills* Judgment, therefore, was a substantial step towards the clarification of the régime applicable to States embarking in activities having the potential substantially to affect the environment of another State. Nevertheless, given the scope of the Court’s jurisdiction in the case, the relevance of that decision with regard to general international law was meant to be limited.

In the period between Argentina’s Application and the Court’s Judgment in the *Pulp Mills* case, Ecuador filed, in March 2008, an Application instituting proceedings against Colombia, in which it alleged that, by spraying toxic herbicides at locations near, at and across its border with Ecuador, Colombia had violated Ecuador’s rights under customary and conventional international law. It appeared from the written pleadings in the case that the Parties disagreed as to whether the Respondent had violated obligations incumbent upon it under the customary international law relating to the prevention of transboundary harm. However, the case was removed from the Court’s List in 2013 following the discontinuance of the proceedings by Ecuador.

Hence, it was not until its Judgment on the merits of the joined cases concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, issued in December last year, that the Court was faced with the opportunity – or, rather, the necessity – to further clarify the applicable rules of customary international law in this field. This Judgment, which addressed a number of complex factual and legal issues, clarified important questions and will certainly be relied upon as setting the Court’s jurisprudence on the matter.

The contributions of this decision are threefold. First, it confirmed that general international law imposes on States obligations of a substantive as well as of a procedural nature when it comes to activities carried out in their territory that may detrimentally impact the environment. Secondly, it clarified the scope and content of such obligations. Thirdly, it specified the rules applicable to the assessment of the evidence and the burden of proof.

With regard to substantive obligations, the Court recalled its statement from the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, restated in the *Pulp Mills Judgment*, that “[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”. In the first case – the one filed by Costa Rica against Nicaragua –, the Court considered that the Applicant had not proved that the Respondent’s activities had caused *any* harm to its own territory. According to the Court, it was therefore not established that the Respondent had breached its substantive obligations concerning transboundary harm. More interestingly, the Court considered in the second case – the one filed by Nicaragua against Costa Rica – that, since the Applicant had failed to prove that the activity undertaken by the Respondent had caused it *significant* transboundary harm, it followed that the latter could not be considered to have breached its substantive obligations under customary international law concerning transboundary harm. The Court’s analysis of the evidence leading to this conclusion shows that the question whether *any* harm had been caused to the Applicant’s territory was not the one the Court was asking, but indeed the question was whether *significant* harm – in French, *des dommages importants* – had been caused. The Court thus confirmed that only significant harm would allow for a conclusion that a State had breached its substantive obligations under customary international law concerning transboundary harm. Given the finding that there was no such harm in the case at hand, the Court did not need to go further in the consideration of the nature of the obligation invoked.

With respect to procedural obligations, the Court stated that “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.” It made clear that such obligation does not apply to industrial activities only, but generally to proposed activities which may have a significant adverse impact in a transboundary context.

It is apparent from the judgment that a State contemplating engaging in such activity has what could be described as a two-step procedural obligation, which must be fulfilled *before* the activity is even started. First, it must ascertain before engaging in the activity whether the latter entails a risk of significant transboundary harm; this can be done, for instance, by way of a preliminary assessment of the risk posed by the activity. Second, if such risk is found to exist, the State must carry out an environmental impact assessment – or EIA – to *confirm* whether the risk is real and, in the affirmative, to evaluate its nature and scope.

With respect to the specific content of such impact assessment, the Court recalled its statement from the *Pulp Mills* judgment 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. Thus, it made clear that, in cases where the obligation to carry out an EIA is based on customary international law, domestic law still plays a role, at the stage of the implementation of such obligation.

It also appears from the Court’s judgment that the fulfilment of the two-step procedural obligation to evaluate the adverse impact of an activity before engaging in it can lead to the recognition of the existence of another procedural obligation. Indeed, the Court stated 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 ... 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.”

Finally, as I already mentioned, the Court’s 2015 judgment specified the rules applicable to the assessment of the evidence and the burden of proof. To be more precise, it clarified that, while

it is incumbent upon the Parties to provide the evidence supporting their factual allegations, which may entail scientific material such as expert reports, it is then 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. The Court thereby reasserted that it has exclusive responsibility to assess the evidence before it, and that this responsibility may not be delegated to experts, whether appointed by the parties or even by the Court itself. With regard to the burden of proof, the Court's reasoning indicates that there is no exception in the field of prevention of transboundary harm to the principle that it is for the Party which alleges a fact to establish its existence.

These are the major contributions of the Court's jurisprudence to the field of international environmental law. Undoubtedly, there are still questions that remain unanswered. Given the growing importance of environmental concerns, it is foreseeable that some of these questions will come before the Court in the future. For now, however, I believe that the Court's contribution has already significantly clarified the regime applicable to inter State relations in the field.

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Let me now turn — and I revert to French — to the tools which are available to the Court to respond to the specific challenges posed by the cases submitted to it involving environmental issues.

As a preliminary matter, I would note that the Court has always shown itself to be willing to adapt its methods of work in order better to fulfil its role in connection with such disputes. In this regard, I would recall the Chamber for Environmental Matters, created by the Court in 1993 pursuant to Article 26, paragraph 1, of its Statute, in order to deal with any environmental case falling within its jurisdiction. It is true that the Chamber was never used, which prompted the decision not to hold internal elections for the renewal of its composition in 2006. However, its very creation, which was never called into question, bears witness to the Court's willingness to use

all the tools at its disposal to take careful account of the specific nature of cases involving issues relating to the environment.

Ultimately, it is clear from the cases of an environmental nature which have been submitted to the Court that certain provisions of its Statute and Rules, although of general application, allow account to be taken of the specific characteristics of disputes with an environmental dimension for an optimal handling of the claims. I would mention, by way of example, the possibility for the Court to indicate provisional measures and the possibility for it to have recourse to certain methods for establishing the facts, when it considers it necessary.

As you are aware, under Article 41, paragraph 1, of its Statute, “[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party”. These measures, whose purpose is to protect the rights of the parties to a case pending a final decision on the merits, may only be indicated where there exists a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before a final decision has been given. And as the Court noted in its Judgment in the case concerning the *Gabčíkovo-Nagymaros Project*, “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.” Provisional measures are therefore a particularly useful tool to ensure that a decision of the Court in a case involving allegations of environmental damage does not come at a time when, in the particular circumstances of the case, serious and irreversible damage has already been caused.

The Court has had occasion to rule on requests for the indication of provisional measures in a number of cases involving an environmental component which have been brought before it. For example, the Court considered it appropriate to indicate such measures in the *Nuclear Tests* cases, in which Australia and New Zealand each had instituted proceedings against France in respect of a dispute concerning the legality of atmospheric nuclear tests conducted by the French Government in the South Pacific region. The Applicants, who sought, *inter alia*, to protect their right not to

have radioactive fallout deposited on their territory, requested the Court to order France to refrain from conducting such nuclear tests pending a final decision. The Court considered that it could not exclude the possibility, on the basis of the evidence before it, that irreparable prejudice to the rights invoked by the Applicants might be shown to be caused by the deposit on their territory of radioactive fallout resulting from those tests. The Court therefore considered it necessary to indicate, as a provisional measure, that the French Government should avoid nuclear tests causing the deposit of radioactive fallouts on Australian territory, in one case, and, on the territory of New Zealand and of certain islands in respect of which the latter had invoked special responsibilities, in the other.

I now come to the methods for establishing the facts provided for by the Statute and the Rules which are particularly relevant in the context of cases involving environmental protection. In my view, two of these methods merit particular attention, namely the possibility for the Court and the parties to appoint an expert, and a site visit by the Court.

On the first point, I would begin by observing that the appointment of experts can be particularly appropriate in environmental disputes. Indeed, given the abundance and technical and scientific complexity of the factual data presented by parties in support of their positions in these types of cases, the Court may often benefit from the experts' analytical skills in relation to these data, since it is a judicial organ, not a scientific body.

The Court's Statute and Rules recognize the right of the parties to have recourse to experts in presenting their case, during both the written and oral proceedings. The Court's jurisprudence shows that when the Parties make use of this possibility, the experts' reports and statements are carefully examined by the Court. In the two joined cases *Costa Rica v. Nicaragua* and *Nicaragua v. Costa Rica* that I mentioned earlier, the Court referred to the experts' reports in the context of its evaluation of the possibility that a navigable channel existed over a significant span of time in the location claimed by Nicaragua, as well as to determine the risk — or the lack thereof — created by the dredging programme undertaken by Nicaragua. The findings of experts were also helpful to its assessment of the evidence submitted by Nicaragua for the purpose of determining whether the

construction of a road by Costa Rica had caused significant damage to the San Juan River situated – as we know – in Nicaraguan territory.

It is also worth mentioning the case concerning *Whaling in the Antarctic*, in which Australia alleged that Japan had violated some of its obligations under the International Convention for the Regulation of Whaling by pursuing a programme presented as being for purposes of scientific research, but which Australia claimed was being conducted to serve other purposes. Once again, the testimony of the experts presented by the Parties, particularly with regard to whether it was possible to make use of non-lethal methods within the disputed programme, and the sample sizes chosen for certain species, proved helpful to the Court's assessment of the evidence submitted to it.

As well as having recourse to experts called by the parties, the Court may itself decide to arrange for an expert opinion. Indeed, Article 50 of its Statute provides that “[t]he Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion”. According to Article 67, paragraph 1, of the Rules of Court, “[i]f the Court considers it necessary to arrange for an enquiry or an expert opinion, it shall, after hearing the parties, issue an order to this effect, defining the subject of the enquiry or expert opinion, stating the number and mode of appointment of the persons to hold the enquiry or of the experts, and laying down the procedure to be followed”.

Up to now the Court has only rarely made use of the power which this provision confers on it: it did so notably in the very first case brought before it, namely the *Corfu Channel* case, which, needless to say, did not concern environmental protection. It also did so very recently, in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*.

The power derived by the Court under Article 50 of its Statute is of a discretionary nature, and you will have noticed that it has never used it so far in the context of a case relating to environmental protection. It has, in the past, considered that there was no ground to exercise that power when it appeared, for example, that it was capable of ruling on the questions before it without having recourse to it. That said, it is a possibility which may prove useful in future cases

involving allegations of damage or of risks of damage to the environment, and it is interesting to note that the Court has recently shown that it is prepared to use it.

Finally, I shall briefly mention the Court's power to conduct a visit to the site to which a case relates, which is provided for in Article 66 of its Rules. The Court has made use of this power only once in its history, in 1997, in the case concerning the *Gabčíkovo-Nagymaros Project*, which I have already mentioned. On a joint proposal by the Parties, the Court visited the site of the proposed Gabčíkovo-Nagymaros barrage system on the Danube in order to collect evidence. The Permanent Court of International Justice also conducted a site visit in one of its cases. In the case concerning *Diversion of Water from the Meuse*, between the Netherlands and Belgium, which related to the construction of certain works and to the feeding of certain canals with water taken from the Meuse, the Court conducted a site visit in order to view the disputed installations, canals and waterways. Once again, it is not impossible that the Court may, in the future, make use of this possibility provided for in its Rules in cases involving allegations of environmental damage.

Mr. Chairman,

Ladies and gentlemen,

Those are the few points that I wanted to address with respect to the Court's contribution to the settlement of disputes involving environmental issues. If time permits, I would be delighted to engage in a discussion on this matter or to answer any questions you may have.

I should like once again to thank all the delegates representing the Member States for their support and the interest they have shown in the work of the International Court of Justice.