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Le recours à des experts désignés par la Cour en vertu de l'article 50 du Statut

26 octobre 2018

Monsieur le président,
Mesdames et Messieurs les représentants,

1. C'est un grand honneur de m'adresser pour la première fois à la Sixième Commission de l'Assemblée générale en ma qualité de président de la Cour internationale de Justice.

2. Je tiens à vous féliciter, Monsieur le président de votre élection à la présidence de cette Commission pour la soixante-treizième session de l'Assemblée générale.

3. Au fil des années, la Cour a soumis à l'Assemblée générale de nombreux rapports sur ses activités judiciaires. Un lecteur attentif de ces documents ne manquerait pas d'y discerner deux tendances qui se font jour. La première est l'augmentation considérable du nombre de décisions rendues par la Cour sur le fond et sur les procédures incidentes. En dix mois cette année, la Cour a rendu pas moins de quatre arrêts, dont deux sur le fond, un sur l'indemnisation et un sur des exceptions préliminaires, ainsi que deux ordonnances en indication de mesures conservatoires.

4. La seconde tendance qui se dessine est la diversité croissante des affaires soumises à la Cour. En sus des litiges traditionnels, tels que ceux portant sur la souveraineté territoriale ou la délimitation maritime, la Cour est de plus en plus souvent saisie de différends ayant trait à d'autres sujets très divers, comme les droits humains, les relations diplomatiques ou la protection de l'environnement. Seule juridiction internationale à compétence générale, elle peut connaître de toute question de droit international, sous réserve, bien entendu, du consentement des parties au différend.

5. Le siècle passé a vu s'accroître nettement le nombre de domaines régis par le droit international. Parallèlement, les techniques juridiques utilisés pour réglementer ces domaines se sont diversifiés. Alors que la science ne cesse de progresser, nous constatons que les Etats et organisations internationales s'appuient sur des normes scientifiques et techniques pour définir le champ de leurs obligations juridiques. En conséquence, un nombre croissant de différends soulevant des questions scientifiques complexes relèvent de la compétence *ratione materiae* de la Cour. Je donnerai deux séries d'exemples pour illustrer ce point.

6. La première série concerne des situations où les Etats ont défini le contenu de leurs obligations juridiques en se référant à des paramètres scientifiques donnés. Ainsi, en l'affaire relative à la *Chasse à la baleine dans l'Antarctique (Australie c. Japon ; Nouvelle Zélande (intervenant))*, la Cour devait statuer sur la question de savoir si le Japon menait son programme de chasse à la baleine «en vue de recherches scientifiques», conformément au paragraphe 1 de l'article VIII de la convention internationale pour la réglementation de la chasse à la baleine. D'autres conventions internationales définissent une notion juridique à l'aide de termes scientifiques, revêtant souvent ceux-ci d'un sens précis. A titre d'exemple,

l'article 76 de la convention des Nations Unies de 1982 sur le droit de la mer définit le plateau continental au-delà de 200 milles marins en utilisant des paramètres scientifiques.

7. La seconde série d'exemples concerne des situations dans lesquelles les faits du différend porté devant la Cour doivent être établis conformément à des principes et méthodes scientifiques. Ainsi, en l'affaire relative à des *Usines de pâte à papier (Argentine c. Uruguay)*, la Cour devait déterminer si le rejet de certaines substances dans le fleuve Uruguay polluerait ce cours d'eau, en violation des obligations que le statut du fleuve impose à l'Uruguay. L'affaire relative à des *Epandages aériens d'herbicides (Equateur c. Colombie)* posait des questions analogues.

8. De tels cas amènent souvent les milieux universitaires à demander si la Cour est bien outillée pour connaître d'affaires où interviennent des éléments scientifiques ou de nombreuses données factuelles.

9. Mon allocution a pour objet d'examiner l'un des outils de procédure dont dispose la Cour pour prendre en considération les questions scientifiques en jeu dans les affaires qui lui sont soumises, à savoir, la désignation d'experts. En vertu de l'article 50 de son Statut, «[à] tout moment, la Cour peut confier une enquête ou une expertise à toute personne, corps, bureau, commission ou organe de son choix».

10. Je suis convaincu que le recours à des experts permet à la Cour d'apprécier pleinement les questions scientifiques soulevées dans certaines affaires dont elle est saisie, sans préjudice des droits procéduraux des parties. Pour illustrer ce point, je traiterai aujourd'hui de deux questions essentielles pour la désignation d'experts. Dans un premier temps, j'expliquerai la valeur ajoutée qu'apportent de tels experts dans les affaires soumises à la Cour. Dans un second temps, j'examinerai les circonstances dans lesquelles la Cour devrait désigner ses propres experts. Je conclurai par quelques observations d'ordre général.

Mr Chairman,
Excellencies,
Ladies and gentlemen,

I will continue my presentation in English.

I. The added value of Court-appointed experts in proceedings before the Court

11. I shall turn now to my first point: the added value of Court-appointed experts.

12. In general, the disputing parties are the main providers of evidence in the cases brought before the Court. In the *Pulp Mills* case to which I have just alluded, the Court explained 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 (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 162).

13. To this end, parties have frequently relied on experts to address or elucidate controversial scientific issues. Party-appointed experts undoubtedly offer valuable assistance to the Court. However, there are at least two reasons why the Court may still need to appoint its own experts under Article 50 of its Statute.

14. The first reason is the practice which has often been adopted by disputing parties not to call experts as witnesses, but rather to include them as counsel in their respective delegations. This has certain legal consequences under Article 42, paragraph 2, of the Statute of the Court. When experts appear before the Court as counsel, they are not subject to cross-examination by the other party. What is more, Members of the Court cannot directly cross-examine them either. As a result, the veracity of the statements made by such experts or their bearing on the decision of the Court remains untested.

15. Since 2010, the Court has sought to encourage parties to call their experts as witnesses, rather than using them as counsel. In an *obiter dictum* in the *Pulp Mills* case, the Court explained that it would have found it more useful if experts had 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 during the oral hearings. According to the Court, 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. Thus, they may be submitted to questioning by the other party as well as by the Court. (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 72, para. 167.)

16. Since that case, the Court has begun to issue letters, before the opening of the hearings, requesting the parties to call as witnesses the experts cited in their written pleadings. This approach was followed, for example, in the case concerning *Whaling in the Antarctic*, and in the joined cases concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* and *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*. The practice of experts appearing as counsel before the Court thus seems to have come to an end.

17. There is, however, a second reason why the Court might still need to appoint its own experts under Article 50 of its Statute. Party-appointed experts tend to make submissions before the Court that are more favourably disposed to the interests of the party which has appointed them. As one might expect, it would be strategically ill-advised for a State to call as a witness an expert who could undermine its case. On the one hand, the Court treats with caution evidentiary material specifically prepared for the purposes of a case, such as that which may be presented by expert witnesses. On the other, the Court gives particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them. (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61).

18. Cross-examination may certainly assist the Court in understanding the diverging views of party-appointed experts. It is also useful for understanding the methodological differences underlying these views. Notwithstanding the assistance of the parties, however, the Court may still need to draw its own conclusions on the scientific issues before it and, in such situations, may need to rely on its own experts.

19. In academic literature, scholars often claim that the Court does not appoint experts under Article 50 because it relies on ghost experts, known in French as "*experts-fantômes*". These persons are called ghost experts because their identity is not disclosed to the parties and their input in the decision-making process of the Court is not made available to the parties for comment.

20. This criticism, as well as the solution proposed to address it in academic articles, is based on a lack of familiarity with the work of the Court. The persons referred to as "ghost experts" are neither "ghosts", nor "experts" within the meaning of the Statute. Of course, we work in an old palace, but that does not necessarily mean that there are ghosts there. They are in fact temporary Registry officials, appointed under Article 21, paragraph 2, of the Statute of the Court.

21. The Registry of the Court plays an important role in supporting the functioning of the Court, but its staff members do not submit reports. Thus, the question of submitting a report to the parties for comment does not in fact arise. Like other Registry officials, the staff members in question merely help the Court to materialize and concretize its decisions and provide information to individual judges upon request.

II. Deciding to have recourse to Court-appointed experts

Mr. Chairman,
Distinguished Delegates,

22. I shall now turn to the second part of my presentation, namely under what circumstances the Court should exercise its power to appoint experts.

23. It would be impossible to list *in abstracto* every circumstance under which the Court might need to appoint its own experts. An examination of the Court's case law reveals that it has exercised its power under Article 50 of the Statute only on four occasions: in the *Corfu Channel (United Kingdom* v. *Albania)* case, during both the merits and compensation phases; in the *Gulf of Maine (Canada/United States of America)* case; and, most recently, in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case.

24. The fact that the Court did not exercise its power under Article 50 of the Statute for more than 40 years gave rise to allegations that it was reluctant to appoint experts. These criticisms were not only external. They also came from the Bench itself, in the form of separate or dissenting opinions or declarations. For instance, in my declaration in the *Pulp Mills* case, I stated that

> "the Court should have had recourse to expert assistance, as provided in Article 50 of its Statute, to help it gain a more profound insight into the scientific and technical intricacies of the evidence submitted by the Parties, particularly with regard to the possible impact of the effluent discharges of the Orion (Botnia) mill on the living resources, quality of the water and the ecological balance of the River Uruguay".

25. Other judges had drawn attention to the need to appoint experts much earlier. For example, Judge Wellington Koo did so in the case concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)* in 1960.

26. There are two elements which should guide the Court when determining whether or not to appoint experts under Article 50 of its Statute: Article 38 of the Statute, which sets out the function of the Court, and fundamental principles of international procedure. I shall examine these two elements in turn.

A. The impact of Article 38 of the Court's Statute

27. The first element to be taken into account is Article 38 of the Statute, which provides that the Court's function is "to decide in accordance with international law such disputes as are submitted to it".

28. This provision has two consequences for the appointment of experts by the Court. First, it is for the Members of the Court, not the experts, to settle the disputes submitted to it. The appointment of experts by the Court must not result in an outsourcing of its judicial function to those experts. Thus, the Court explained in the *Pulp Mills case* 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." *(Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I),* pp. 72-73, para. 168).

29. Second, the Court will appoint experts only when they are necessary for its decision on the case. Article 38 of the Statute provides that the Court's function is "to decide in accordance with international law such disputes as are submitted to it". Referring to Article 50 of the Statute, the Court explained in the case concerning the *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya)* that this provision (Article 50) must be read in relation to the terms in which jurisdiction is conferred upon the Court in a specific case; the purpose of the expert opinion must be to assist the Court in giving judgment upon the issues submitted to it for decision (*I.C.J. Reports 1985*, p. 228, para. 65).

30. I shall try to illustrate this point by referring to situations in which the Court may need to appoint its own experts under Article 50 of its Statute. In this context, two types of claims brought by States before the Court may be referred to. The first type of claims are the so-called "*violation claims*", in which one State argues that another State has breached its international obligations, and asks the Court to determine the latter's international responsibility. The second type of claims may be described as "*legal situation claims*". These are cases in which the Court is asked to declare the existence or extent of the rights of the parties, such as in territorial and maritime disputes.

31. This distinction is not of course exhaustive, but has direct implications for the present discussion.

32. With regard to "violation claims", four hypotheses may be mentioned. They correspond to four key elements under the law of State responsibility. To establish the responsibility of a State for a breach

of international law, the Court must first ascertain: *(a)* the existence of a breach of international law; *(b)* the attribution of that breach to a State; and *(c)* the non-existence of any relevant circumstances precluding the wrongfulness of that breach, before determining *(d) [the last element]* the consequences arising from the internationally wrongful act, especially the payment of compensation. The Court may need to appoint an expert to establish each of these four hypotheses, which I shall now briefly address in turn.

33. A first hypothesis is when scientific expertise is required to ascertain a fact, which, if proven, would establish the breach of a State's obligations under international law. For instance, in recent environmental cases brought before it, the Court has been faced with determining which kinds of substances discharged in a river or in another location, and in what amount, would entail the breach of treaty obligations. In the case concerning *Construction of a Road in Costa Rica along the San Juan River*, for example, the Court had to decide whether sediments deposited in the San Juan River could be characterized as causing environmental damage. It goes without saying that judges do not necessarily have the requisite skills to determine whether and when such substances may cause environmental damage, or in what amount. The role of an expert might therefore be crucial.

34. A second hypothesis is when scientific expertise is needed to establish a fact, which, if proven, would establish the attribution of an international wrongful act to a State. An illustrative example of this hypothesis is the *Corfu Channel* case, which arose from the destruction of British naval vessels owing to mines laid in the Corfu Channel. In that case, the Court appointed a committee of three experts. That committee was tasked with examining, among other things, the available information regarding "the means employed for laying the minefield discovered on November 13th, 1946, and . . . (ii) the possibility of mooring those mines with those means without the Albanian authorities being aware of it, having regard to the extent of the measures of vigilance existing in the Saranda region" (*Corfu Channel (United Kingdom* v. *Albania), Order of 17 December 1948, I.C.J. Reports 1947-1948*, p. 126). Eventually, the committee found that the mines could not have been laid without Albania being aware, and the Court held Albania responsible for breach of its duty of due diligence. In this hypothesis too, the role of an expert may be instrumental.

35. The third hypothesis concerns the appointment of experts to determine the existence of a circumstance precluding international wrongfulness. In the case concerning the *Gabčikovo-Nagymaros Project*, Hungary invoked a "state of ecological necessity" to justify the non-compliance with its obligations under the 1977 Treaty regarding the Danube River. Despite the impressive amount of scientific material submitted by the Parties, the Court did not find it necessary to determine whether such a state of ecological necessity effectively existed. For the Court, Hungary did not, at any rate, satisfy the conditions for invoking a state of necessity as circumstance precluding wrongfulness under the international law of state responsibility. Thus, 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. (*Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 46, para. 57). Thus, under these circumstances, the Court did not consider it necessary to have recourse to the services of experts.

36. The fourth and final hypothesis relates to the obligation to pay compensation and the assessment of the appropriate amount of compensation. The assessment of the extent of the damage, as well as that of the contribution of various factors to such damage, is not an easy exercise. Notably, when the Court appointed experts to assess damages in the *Corfu Channel* case, it observed that the estimates

and figures submitted by the Government of the United Kingdom raised questions of a technical nature which called for the application of Article 50 of the Statute. (*Corfu Channel (United Kingdom* v. *Albania), Order of 19 November 1949, I.C.J. Reports 1949*, p. 238).

37. Allow me to turn now to the second type of claims which I mentioned earlier: "*legal situation claims*". In these cases, using Court-appointed experts may be important for assessing facts which could create legal situations and respective entitlements. I shall give two examples by way of illustration.

38. First, States may disagree as to whether a given maritime feature is an island or a low-tide elevation under the 1982 United Nations Convention on the Law of the Sea, and may rely on different measurements and techniques to determine whether the maritime feature in question is above the water level at high tide (see Article 13, paragraph 1, and Article 121 of UNCLOS). In *Qatar* v. *Bahrain*, the dissenting judge *ad hoc*, Torres Bernárdez, expressed regret that the Court had not appointed its own experts to determine whether or not Qit'a Jaradah was an island or a low-tide elevation (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001*, p. 275, para. 41).

39. My second example concerns the Court's recent decision in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*, in which the Court exercised its power under Article 50 of the Statute. In its 2015 Judgment, the Court had interpreted the 1858 Treaty between Costa Rica and Nicaragua as providing 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. However, due to the absence of detailed information provided by the Parties, the Court had left the geographical situation of the area in question somewhat unclear with regard to the configuration of the coast of Isla Portillos, in particular regarding the existence of maritime features off the coast and the presence of a channel separating the wetland from the coast.

40. For the purpose of reaching its decision on the merits this year, the Court appointed two experts under Article 50 of the Statute

> "to provide it with information regarding the state of the coast between the point suggested by Costa Rica and the point suggested by Nicaragua in their pleadings as the starting-point of the maritime boundary in the Caribbean Sea, [stating] that this expert opinion will be entrusted to two independent experts appointed by Order of the President of the Court after hearing the Parties" (*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua), Order of 16 June 2016, I.C.J. Reports 2016 (I)*, p. 240).

41. In the light of the findings of the Court-appointed experts, the Court determined that Costa Rica had sovereignty over the whole of Isla Portillos up to where the river reaches the Caribbean Sea. As a consequence, it found that the starting-point of the land boundary between Costa Rica and Nicaragua was the point at which the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea. The Court identified this point as currently located at the end of the sandspit constituting the right bank of the San Juan River at its mouth.

42. So much for Article 38 of the Court's Statute, which, as I have just explained, is of direct importance to the determination of whether Court-appointed experts are needed. However, that is not the

end of the matter: there are also other factors that might be given weight in such a decision, in particular, the fundamental principles of international procedure.

B. The impact of fundamental principles of international procedure

43. There are two general principles of procedure that may influence the Court's decision to appoint experts: the principle *iura novit curia* and the principle of equality of arms. I shall address each of them in turn.

(1) The principle *iura novit curia*

44. The principle *iura novit curia* operates to limit the situations in which the Court may need to appoint experts. Allow me to elaborate on this point.

45. The maxim *iura novit curia* expresses the principle that the *Court or the Members of the Court know the law.* The Court described its significance in the *Fisheries Jurisdiction* cases as follows:

> "The Court however, as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court." (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 9, para. 17.)

46. Consequently, it is for the Court to interpret treaties in the cases submitted to it. Since the Court knows the law, it cannot outsource its judicial function to experts. This applies even in situations where treaties express the parties' legal obligations using scientific parameters. The Court followed this approach in the *Whaling in the Antarctic* case, in which, as I have already mentioned, it had to decide whether Japan's whaling programme was conducted "for purposes of scientific research" under Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling. The Court considered that the issue it was facing was one of treaty interpretation. It held that as a matter of scientific opinion, the experts called by the Parties agreed that lethal methods can have a place in scientific research, while not necessarily agreeing on the conditions for their use. However, the Court insisted that their conclusions as scientists, must be distinguished from the interpretation of the Convention, which is the task of the Court. (*Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 257, para. 82.)

47. Since the Court construed the question at stake as a matter of legal interpretation, it did not deem it necessary to appoint experts to decide whether or not Japan's programme was in fact conducted for the purposes of scientific research (*ibid.*, para. 58). This decision was controversial. Some Members of the Court felt that the terms of Article VIII, paragraph 1, of the Whaling Convention referred either to another field of knowledge or to pure questions of fact. For these judges, the Court had to appoint its own experts to determine whether or not Japan's research programme was conducted for scientific purposes. But, a decision of the Court is a decision of the Court and has to be respected by all its Members.

(2) The principle of equality of arms

48. This brings me to the second principle of procedure that might influence the Court's decision to appoint experts: the principle of equality of arms.

49. The exercise by the Court of its power to appoint experts interferes with the allocation of the burden of proof between the parties. This is particularly so with regard to the maxim *onus probandi incumbit actori*, which stems from the principle of equality of arms. Thus, the Court has to ensure that the presence of Court-appointed experts does not tilt the balance in favour of one party or the other.

50. In this regard, I shall identify four possible scenarios, depending on the conduct of the parties to the dispute.

51. The first situation is when the parties do not disagree on the scientific evidence or when their disagreement is not material. In such circumstances, the Court may not need to appoint experts under Article 50. According to Judge Keith, who voted with the majority in the *Pulp Mills* case, these factors weighed in the Court's decision not to appoint experts in that case (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, separate opinion of Judge Keith, p. 124).

52. The question remains, however, whether the absence of a material disagreement between the disputing parties to the case will always be dispositive of the question. Perhaps the Court should not be dissuaded from appointing its own experts when the case concerns global commons, such as the environment. In such cases, rules of international law not only protect the interests of the parties, but also those of their populations, and, in the case of certain ecosystems, those of humanity as a whole. In general, I do not see any reason why the Court should not do so, especially if it secures sufficient funding from the General Assembly for this purpose.

53. The second situation is when the parties have a material disagreement on the scientific evidence and the Court needs to make a finding on that point in order to decide on the case. In such an event, appointing experts under Article 50 would be useful to allow those experts to engage with the information provided by the experts appointed by the parties. It would also be useful to obtain the parties' reactions to any reports on scientific evidence produced by the Court-appointed experts. The procedure set forth in Articles 67 and 68 of the Rules of Court has been designed to ensure respect for the principle *audi alteram partem*, but also to allow the Court to obtain the information needed to make its decision.

54. The third scenario arises when one of the parties to the dispute decides not to appear before the Court, also known as non-appearance. Whenever a State fails to appear before it, the Court expresses its regret, because the decision not to appear has a negative effect on the sound administration of justice. However, the non-appearance of a party does not end the proceedings before the Court. Article 53 of the Statute provides in this respect that:

> "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

55. As far as the law is concerned, the Court explained in the case concerning *Military and Paramilitary Activities in and against Nicaragua* that the principle *iura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law. Consequently, the absence of one party has less impact in this regard. (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 24, para. 29).

56. However, non-appearance raises problems relating to the production of evidence and its examination, both of which tasks fall on the parties under the maxim *onus probandi incumbit actori*. In such cases, Article 53 of the Statute obliges the Court to employ whatever means and resources may enable it to satisfy itself whether the submissions of the applicant State are well-founded in fact and law, and simultaneously to safeguard the essential principles of the sound administration of justice. (*ibid.,* p. 40, para. 59).

57. As part of its enquiries, the Court may therefore decide to appoint experts under Article 50 of the Statute. In the *Corfu Channel* case, the Court emphasized the non-appearance of Albania in the last phase of the case and the technical character of the determination of the damages to be paid. Both of these factors were important in justifying its decision to appoint experts to quantify the damage to be paid for the destruction of the British warships (*Corfu Channel (United Kingdom* v. *Albania), Order of 19 November I949, I.C.J. Reports 1949*, pp. 237-238).

58. There is one final scenario that deserves our consideration and attention. It concerns situations in which the parties jointly request the Court to appoint experts. This happened in the *Gulf of Maine* case, heard by a Chamber of the Court under Article II of the Special Agreement between Canada and the United States.

59. In that case, the Court appointed Commander Peter Bryan Beazley, who had been jointly nominated by the Parties, relying for this purpose on its power under Article 50 of the Statute. However, it is important to reiterate that, under Article 50 of the Statute, the appointment of experts is a power of the Court, and not one of the parties. The *Gulf of Maine* case can be explained by the nature of the task which was assigned to Commander Beazley in that case. The Court-appointed expert was not appointed to establish some scientific fact or its scientific meaning; rather, he was tasked with assisting the Chamber in describing the geographical co-ordinates of the boundary and in depicting that boundary on Canadian Hydrographic Service Chart No. 4003 and United States National Ocean Survey Chart No. 13006. It was therefore very specific.

60. The Court would normally rely on the Registry to perform such a task. However, nothing prevents the parties from making available to it persons who are familiar with the peculiarities of their request. Even in those cases, however, it is for the Court itself to determine whether such experts would be useful in its decision-making process.

61. In conclusion, Mr Chairman, the equality of arms and the allocation of the burden of proof between the parties are critical elements in deciding whether or not to appoint experts. Depending on the specificities of each case, the principle of equality of arms may point the Court in one direction or the other.

62. On the basis of the foregoing, please allow me to make some concluding remarks.

Conclusion

Mr. Chairman,
Ladies and gentlemen,

63. First of all, I would like to say that the great scientific progress made by humanity over the last century has revolutionized the way in which we address issues both in international relations and in our daily lives. It is, therefore, not surprising that science has had an impact on international law and has come to affect the work of the International Court of Justice. However, the Court is not the arbiter of scientific issues. Within the scope of its contentious jurisdiction, the Court is charged with deciding disputes brought to it on the basis of law. It is only when scientific evidence is relevant for the decision-making process, and that evidence has not been adequately provided by the parties, that the Court will exercise its power to appoint its own experts.

64. Looking at the practice of the Court over the years — and this is the second point it is clear that it has not shown any reluctance to deal with scientific evidence. Rather, it has tried to exercise its function within the bounds of the Statute, while respecting fundamental principles of international adjudication. Nonetheless, the law is not an island unto itself. It affects, and it is in turn affected by, other disciplines. There is no doubt that its application is being increasingly influenced by scientific and technological changes. The Court cannot remain oblivious to these realities and must continue to assess the extent to which its work may benefit from the introduction of outside experts, bearing in mind the various factors outlined in my presentation today. Luckily, the Statute provides for that possibility under Article 50, thanks to the incredible foresight of its drafters.