SPEECH BY H.E. JUDGE HISASHI OWADA, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE, TO THE SIXTY-FIFTH SESSION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

28 October 2010

Mr. Vice-President H.E. Francisco Carrión-Mena,

Distinguished Delegates,

Ladies and Gentlemen,

Before starting my presentation, I wish to associate myself on behalf of the ICJ with the tribute and expression of condolences for the loss of H.E. David Thompson, the Prime Minister of Barbados.

Mr. President, it is an honour and privilege for me to address the General Assembly for the second time as the President of the International Court of Justice (ICJ) on the Report of the International Court of Justice for the period from 1 August 2009 to 31 July 2010.

I wish to take this opportunity to congratulate the President on his election as President of the Sixty-fifth Session of this Assembly as well as Vice–Presidents on their respective election and wish you every success in this distinguished office.

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I would like to turn, as is traditional, to an overview of the judicial activities of the Court during the past year. The Court is gratified to note that the international community of States continues to place its trust in the Court with respect to a wide variety of legal disputes. Since I addressed you last October, the Court has rendered one judgment on the merits, in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*; and has given one advisory opinion, in the case concerning *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. It also has handed down an order on the admissibility of a counter-claim in *Jurisdictional Immunities of the State (Germany* v. *Italy)* and an Order discontinuing proceedings in *Certain Questions concerning Diplomatic Relations (Honduras* v. *Brazil)*. Moreover, it has been engaging in hearings and deliberations in a number of cases, including: the case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*; the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* and the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*.

These cases have involved States from all regions of the world, and the subject-matter has been wide-ranging, extending from classical issues such as diplomatic protection and sovereign immunity to issues of contemporary relevance such as international environmental law. As you will no doubt note, in one case concerning the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, the Court was requested by the General Assembly to give an Advisory Opinion. This case received active and lively attention from the

United Nations and its Members, including many of the States represented in this Assembly today. The Court is grateful for the co-operation it received from the Secretariat of the United Nations and the Member States who participated in the proceedings at the written stage and the oral stage.

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In the autumn of 2009, following my address to you last year, the Court continued its deliberations in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)* and held public hearings in the case concerning *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, as well as deliberations thereon.

As a result of these deliberations, its first decision in the period under review was reached on 20 April 2010, when the Court rendered its Judgment in *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*. The case involved the planned construction, authorized by Uruguay, of the CMB (ENCE) pulp mill, and the construction and commissioning, also authorized by Uruguay, of the Orion (Botnia) pulp mill, on the River Uruguay. Argentina argued that the authorizations to build, the actual construction and (where applicable) the commissioning of these mills and their associated facilities constituted violations of obligations arising under the Statute of the River Uruguay, a bilateral Treaty signed by the Parties on 26 February 1975. It was alleged by the Applicant that these acts had been taken by Uruguay in violation of the mechanism for prior notification and consultation prescribed by Articles 7 to 13 of the said Statute (the procedural violations). These allegations were made in respect of both the CMB mill, whose construction on the River Uruguay was ultimately abandoned, and the Orion mill, which is currently in operation. Argentina further contended, on the subject of the Orion mill and its port terminal, that Uruguay had also violated three provisions of this Statute that related to the protection of the river environment. It was Argentina's contention that the industrial activities authorized by Uruguay had, or would have, an adverse impact on the quality of the waters of the river and the area affected by it and had caused significant damage to the quality of the waters of the river and significant transboundary damage to Argentina (the substantive violations). Uruguay, for its part, argued that it had violated neither the procedural nor the substantive obligations laid down by the Statute.

In the light of the extensive scientific evidence at issue in the case, the question arose as to the precise status of scientific experts. This issue came up in particular because certain scientific experts presented evidence to the Court in the oral hearings as counsel rather than as experts or witnesses. On this issue, the Court stated in its Judgment:

> "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."[1]

[1] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, para. 167.

Another issue raised in the context of the scientific evidence was that of how the Court should determine the authority and reliability of the studies and reports submitted by the Parties, which were sometimes prepared by experts and consultants retained by the respective Parties, and at other times prepared by outside experts, such as the International Finance Corporation. Assessing these expert reports could be particularly complicated because they often contain conflicting claims and conclusions. Ultimately, the Court concluded that for the purposes of the Judgment, it did not find it necessary to enter into a general discussion on the relative merits, reliability and authority of the studies prepared by the experts and consultants of the Parties. The Judgment concluded 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"[2].

As the Court is expected regularly to consider environmental cases in the future, it will increasingly have to consider complex scientific evidence, and in some cases it may find it difficult to come to a conclusion on such material without the assistance of expert testimony. In this regard, I might recall the Resolution Concerning the Internal Judicial Practice of the Court (1976), which in its Article 1 states:

> "After the termination of the written proceedings and before the beginning of the oral proceedings, a deliberation is held at which the judges exchange views concerning the case, and bring to the notice of the Court any point in regard to which they consider it may be necessary to call for explanations during the course of the oral proceedings."

Such deliberation could be more fruitful in highly technical cases if it could afford an opportunity for the Court to discuss the technical ideas of the issue involved, with the assistance, if appropriate, of objective experts, so that the Court could develop the most accurate account of what further material it would like the Parties to produce and whether it would be useful for the Court to hear experts at the oral hearings.

As far as the procedural violations are concerned, the Court noted that Uruguay had not informed the Administrative Commission of the River Uruguay of the projects as prescribed in the Statute. The Administrative Commission of the River Uruguay is a body established under the Statute for the purpose of monitoring the river, including assessing the impact of proposed projects on the river, known under the Spanish acronym "CARU". The Court concluded that 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, and by failing to notify the plans to Argentina through CARU, Uruguay had violated the 1975 Statute[3].

With respect to the substantive violations, the Court found, based on a detailed examination of the Parties' arguments, that there was

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[2] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, para. 168.

[3] *Ibid.*, paras. 111, 122.

> "no conclusive evidence in the record to show that Uruguay ha[d] not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia) mill [had] 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"[4].

Consequently, the Court concluded that Uruguay had not breached substantive obligations under the Statute[5]. In addition to this finding, however, the Court emphasized that, under the 1975 Statute, "[t]he Parties have a legal obligation . . . 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"[6].

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On 6 July 2010, the Court handed down its Order on the admissibility of a counter-claim submitted by Italy in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy)*. This case, which was filed by Germany in December 2008, concerns a dispute over whether Italy has violated the jurisdictional immunity of Germany. The Applicant argued that the Respondent, by allowing civil claims against Germany in Italian courts on the alleged ground of violations of international humanitarian law by the German Reich during World War II**,** committed an internationally wrongful act against the Applicant. In its Counter-Memorial filed on 23 December 2009, Italy presented a counter-claim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich". In its Order of 6 July 2010 on the admissibility of this counter-claim, the Court concluded that the dispute that Italy intended to bring before the Court by way of its counter-claim related to facts and situations existing prior to the entry into force as between the Parties of the European Convention for the Pacific Settlement of Disputes of 29 April 1957, which formed the basis of the Court's jurisdiction[7]. For this reason, the Court gave a decision that the counter-claim did not come within its jurisdiction *ratione temporis* as required by Article 80, paragraph 1, of the Rules of Court[8], and was thus inadmissible[9].

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On 22 July 2010, the Court rendered its advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. As I mentioned earlier, this Advisory Opinion was given in response to the request made by the General Assembly, in its resolution 63/3 of 8 October 2008, that the Court provide an opinion on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

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[4] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, para. 265.

[5] *Ibid.*

[6] *Ibid.*

[7] *Jurisdictional Immunities of the State (Germany* v. *Italy)*, Order of 6 July 2010 , para. 30.

[8] *Ibid.* para. 31.

[9] *Ibid.* para. 35 (1).

A considerable number of States from all regions of the world took part in the *proceedings*. In all, 36 Member States of the United Nations filed written statements on the question, and the authors of the unilateral declaration of independence filed a written contribution. Fourteen States offered their written comments on the written statements by States and the written contribution by the authors of the declaration of independence. The authors of the declaration of independence also submitted a written contribution regarding the written statements by States. In the public hearings stage, 28 States and the authors of the unilateral declaration of independence participated in the proceedings. The procedure was thus truly a global one, and represented an important form of interaction between the General Assembly and the Court.

In its Advisory Opinion delivered on 22 July this year, the Court concluded that "the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law"[10]. In reaching its conclusion, the Court first addressed the question of whether it possessed jurisdiction to give the advisory opinion requested by the General Assembly. The position the Court reached on that preliminary question was that the question asked was referred to the Court by the General Assembly, which is authorized to request the Court to give an advisory opinion on any legal question under Article 96, paragraph 1, of the Charter, and that because that question was a "legal question" within the meaning of Article 96 of the Charter and Article 65 of its Statute, it had jurisdiction to give an advisory opinion in response to the request[11]. The Court then dealt with the question, raised by a number of participants on various grounds, as to whether the Court should nonetheless decline**,** as a matter of discretion, to exercise its jurisdiction to give an advisory opinion. After detailed examination of various aspects of the issues involved in this question, the Court concluded that, in light of its established jurisprudence, there were "no compelling reasons for it to decline to exercise its jurisdiction"[12].

In addressing the question referred to it by the General Assembly, the Court carefully examined the precise scope and meaning of the question put to it. In particular, with regard to the reference to the "Provisional Institutions of Self-government of Kosovo" in the request for an Advisory Opinion formulated by the General Assembly, the Court stated that it was part of its judicial function to decide, *proprio motu*, whether the declaration of independence had been promulgated by a body of that designation or any other entity[13]. The Court also concluded that the question that it had been asked to answer amounted to a strictly circumscribed question of whether a rule of international law *prohibited* a declaration of independence[14] and not the question of whether international law conferred a positive entitlement upon Kosovo to declare independence.

It was on the basis of this careful circumscription of the issues presented to the Court that the Court assessed whether the declaration of independence was in accordance with general international law. It noted that State practice during the eighteenth, nineteenth, and early twentieth centuries "points clearly to the conclusion that international law contained no prohibition of declarations of independence"[15]. The Court declared that "the scope of the principle of territorial integrity is confined to the sphere of relations between States"[16]. It further analysed three Security Council resolutions which were cited by some participants as evidence for the proposition that the declaration of independence was prohibited by international law, and concluded that no general prohibition of declarations of independence could be deduced from them, since the Security

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[10] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 123 (3).

[11] *Ibid.*, paras. 18-28.

[12] *Ibid.*, paras. 29-48.

[13] *Ibid.*, paras. 52-54.

[14] *Ibid.*, para. 56.

[15] *Ibid.*, para. 79.

[16] *Ibid.*, para. 80.

Council resolutions were addressed to specific situations where declarations of independence had been made in the context of an unlawful use of force or a violation of a *jus cogens* norm[17]. The Court thus concluded that the declaration of independence as such was not prohibited by general international law[18].

The Court then analysed whether the declaration of independence of Kosovo in question was in accordance with Security Council resolution 1244 of 10 June 1999. It determined that the object and purpose of resolution 1244 was to form "a temporary, exceptional legal régime which . . . superseded the Serbian legal order . . . on an interim basis"[19]. As such the resolution constituted a legal framework in relation to the institutions established by the "Constitutional Framework". The question to be examined was whether the authors of the declaration of independence could act outside this framework. The Court in this context carefully analysed whether the authors of the declaration of independence were the "Provisional Institutions of Self-Government of Kosovo". Analysing the content and form of the declaration, as well as the context in which it was declared, the Court came to the conclusion that the authors of the Declaration of Independence were not the "Provisional Institutions of Self-Government" "but rather . . . persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration"[20]. On this basis the Court came to the conclusion that the declaration of independence of Kosovo did not violate resolution 1244 on the following two grounds: first, that the resolution and the declaration of independence "operate on a different level", since resolution 1244 remained silent as to the final status of Kosovo whereas the declaration of independence was an attempt to determine that final status[21]; second, that resolution 1244 imposes only very limited obligations on non-State actors, but that none of these obligations contains a general prohibition on Kosovo to declare independence[22]. Since the authors of the declaration of independence were not the Provisional Institutions of Self-Government of Kosovo, the authors of the declaration of independence were not bound by the Constitutional Framework established under resolution 1244 and thus their declaration of independence had not violated that framework[23].

Consequently, the Court concluded that the adoption of the declaration of independence did not violate any applicable rule of international law[24].

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In addition to these cases that I have just summarized, the Court also held, during the period covered by this Annual Report, oral proceedings and deliberations in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*. That case concerns claims for diplomatic protection made by Guinea on behalf of Mr. Ahmadou Sadio Diallo, a Guinean businessman, who alleges that he was unlawfully arrested, detained, and expelled from the Democratic Republic of the Congo, where he had been living and conducting business for over 30 years since 1962. The Court had already disposed of the issue of preliminary objections raised

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[17] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 81.

[18] *Ibid.*, para. 84.

[19] *Ibid.*, para. 100.

[20] *Ibid.*, para. 109.

[21] *Ibid.*, para. 114.

[22] *Ibid.*, paras. 115-119.

[23] *Ibid.*, para. 121.

[24] *Ibid.*, para. 122.

by the Respondent in its 2009 Judgment. The public hearings it held in April this year thus related to the merits of the case. The Court is now deliberating on its Judgment on the merits of this case, and the Judgment will be rendered in due course.

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Another case that the Court had to deal with during the period covered by this Report is the case between Honduras and Brazil. You may recall that, in my address to you last year, I mentioned that the Court had just (only the day before) received an "Application instituting proceedings by the Republic of Honduras against the Federative Republic of Brazil" relating to "legal questions concerning diplomatic relations and associated with the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any State"[25].

This case was unique in that the Court was faced with conflicting contacts coming from competing governmental authorities both purporting to be acting on behalf of Honduras in a situation of political uncertainty. Immediately after the Application of 28 October 2009 was made in the name of the Government of Honduras (represented by its Ambassador in the Netherlands allegedly acting as Agent), another letter of the same date, in the name of the Minister for Foreign Affairs of the Republic of Honduras, stated that the Agents and Co-Agents of the Republic of Honduras who had filed the first Application of 28 October 2009 had been relinquished of their duties. In spite of this notice, a subsequent letter of 2 November 2009, signed by one of the "Agents" who had been relinquished of his duties in the letter from the Minister for Foreign Affairs, informed the Court that "the Government of the Republic of Honduras . . . [had] appointed to act as its Agent" the other of the "Agents" who had been relinquished of his duties in that previous letter. Under these unclear circumstances, the Court decided that no further action would be taken in the case until the situation in Honduras was clarified.

The matter was finally settled when the Court received a letter dated 30 April 2010, in which the Minister for Foreign Affairs of the Republic of Honduras informed the Court that the Honduran Government was "not going on with the proceedings initiated by the Application filed on 28 October 2009 against the Federative Republic of Brazil" and that "in so far as necessary, the Honduran Government accordingly [was] withdraw[ing] this Application from the Registry".

In light of this communication, which put an end to this complex situation, the President of the Court, in his Order of 12 May 2010, while noting that the Brazilian Government had not taken in the meantime any step in the proceedings in the case, took an official decision to record the discontinuance by the Republic of Honduras of the proceedings it had instituted, and ordered the removal of the case from the General List.

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In addition to these cases that the Court has dealt with, three new contentious cases were filed in the relevant period, and the Court also received one new request for an advisory opinion.

First, in December 2009, the Kingdom of Belgium initiated proceedings against the Swiss Confederation in the case concerning *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium* v. *Switzerland)*, which relates primarily to the interpretation and

[25] *Certain questions concerning diplomatic relations (Honduras* v. *Brazil)*, Application, 28 October 2009, para. 1.

application of the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters. In particular, the case involves a dispute between the main shareholders in Sabena, the former Belgian airline. Belgium argues that Switzerland is breaching the Lugano Convention and other international obligations by virtue of the decision of its courts to refuse to recognize a decision in a Belgian court on the liability of the Swiss shareholders to the Belgian shareholders (including the Belgian State and three companies owned by the Belgian State). The Parties are now in the process of preparing their written pleadings.

Secondly, in April 2010 , the Court received a request for an advisory opinion from the International Fund for Agricultural Development ("IFAD"), a specialized agency of the United Nations, concerning a judgment rendered by the Administrative Tribunal of the International Labour Organization ("ILOAT"), requiring IFAD to pay two years' salary plus moral damages and costs for the abolishment of a post of a staff member of the Global Mechanism of the United Nations Convention to Combat Desertification. The Global Mechanism is hosted by IFAD.

This request for an advisory opinion falls within the framework of a special procedure, under which the Court is given the power of engaging in the review of judgments of administrative tribunals of the United Nations family in the form of an advisory opinion — a procedure which has given rise to four advisory opinions since 1946.

The Court has set 29 October 2010 as the time limit for the submission of written statements by IFAD and its Member States entitled to appear before the Court, the States parties to the above United Nations convention entitled to appear before the Court and those specialized agencies of the United Nations which have made a declaration recognizing the jurisdiction of the ILOAT.

Thirdly, at the end of May 2010, Australia initiated proceedings against Japan concerning

> "Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II'), in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ('ICRW'), as well as its other international obligations for the preservation of marine mammals and the marine environment"[26].

Australia alleges in its Application that whales caught in the JARPA II programme are ultimately being placed on commercial sale, and that the scale of whaling under the programme is in fact bigger than existed before the moratorium on commercial whaling under the ICRW, in violation of certain international obligations under the international conventions that it cites in its Application. The Parties are now preparing their written pleadings.

Finally, on 20 July 2010, Burkina Faso and Niger jointly submitted to the Court a territorial dispute relating to the boundary between them, pursuant to a Special Agreement signed in Niamey on 24 February 2009 which entered into force on 20 November 2009. In the Special Agreement, the Court is requested to determine the course of the boundary between the two countries from Tong-Tong to the beginning of the Botou bend. The Parties have also requested the Court to take cognizance of the Parties' agreement to follow the recommendations of a Joint Technical Commission with regard to two other sections of their common border.

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[26] *Whaling in the Antarctic (Australia* v. *Japan)*, Application of 31 May 2010, para. 2.

As you can see, all these different cases raise a great variety of divergent issues of public international law. I can say that the work of the Court truly reflects the broad substantive scope that international law now covers.

Mr. President,

Distinguished delegates,

Ladies and Gentlemen,

As I stated at the beginning of this presentation, the international community of States continues to place its trust in the Court to handle a wide variety of legal disputes, coming from all geographic regions of the world. The Court's docket of pending cases has been consistently increasing in number in recent years, now standing at 16 cases, involving approximately 30 different States. Moreover, the coverage of the cases that the Court is entrusted to deal with are also broader in its scope than ever, with each case presenting distinct legal and factual elements. The increased recourse by States to the International Court of Justice for the judicial settlement of their disputes testifying to the growing consciousness among political leaders of these States of the importance of the rule of law in the international community. Indeed, it must be emphasized that the importance of the rule of law in the contemporary international community is growing rapidly, against the backdrop of the deepening process of globalization. It is no exaggeration to say that the rule of law now permeates every aspect of the activities of the United Nations, from the maintenance of peace and security to the protection of human rights, from the fight against poverty to the protection of the global environment, including the case of climate change. While every part of the Organization has a role to play in the promotion of the rule of law, the Court, as the principal judicial organ of the United Nations, is expected to play a central role in this area. By working to strengthen the rule of law, the Organization can strengthen its moral fibres that are so essential to uniting an increasingly interconnected world.

In this situation, the Court greatly appreciates the trust that Member States have continued to place in its work**.** I wish in particular to express my deep and sincere gratitude to the General Assembly and its Member States in this context for its recent decision to provide the Court with additional P-2 legal officers so as to enable each judge now to benefit from the assistance of a dedicated law clerk. I am particularly happy to report that the new law clerks have now been selected through a most rigorous recruitment process in which the Court received no less than 1600 applications, and have just taken up their functions at the beginning of September this year. These additional staff members provide essential assistance to the Court which, with its rapidly increasing workload, badly needs support to be able to continue producing the quality work that is expected of it. This added research support not only helps the Court as it deals with its increased caseload, but also assists it enormously in strengthening the high degree of collegiality and confidentiality between chambers within the Court, as a collegial body of judges who are dedicated to the cause of promoting justice in the contemporary world. On behalf of the entire Court, let me express our deep appreciation for this assistance.

Looking ahead, I pledge that the Court will continue to do its utmost to achieve its mandate as set out under the Charter and the Statute, in assisting the Member States in the pacific settlement of their disputes. It is my hope that Member States will continue to place their trust in the Court, not only with the submission of new disputes, but also through the acceptance of the Court's jurisdiction, be it through a declaration under Article 36, paragraph 2, of the Statute, or through the signature of the many multilateral treaties which now contain compromissory clauses that refer disputes as to the interpretation or application of those treaties to the Court.

Let me close my brief presentation of recent activities of the International Court of Justice by thanking you for this opportunity to address you today. I wish you a productive Sixty-fifth Session of this Assembly. For our part, the Court will continue to dedicate its fullest efforts to the promotion of the rule of law at the international level and the peaceful settlement of disputes among Member States of the United Nations.

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