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Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

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Compilation of decisions of international courts, tribunals and other bodies

Report of the Secretary-General

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I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution 65/28, in which the Assembly requested the Secretary-General to submit a compilation of decisions of international courts, tribunals and other bodies referring to the articles on prevention of transboundary harm from hazardous activities (annexed to resolution 62/68), and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (annexed to resolution 61/36) adopted by the International Law Commission.

2. The Commission, in 2001, under the subtitle "Prevention of transboundary damage from hazardous activities" of the topic "International liability for injurious consequences arising out of acts not prohibited by international law", which was first included in its programme of work in 1978, completed and adopted a set of 19 draft articles on prevention and recommended to the Assembly the drafting of a convention on the basis of the draft articles. In resolution 56/82, the General Assembly expressed its appreciation for the valuable work done on the issue of prevention. Pursuant to a request contained in the same resolution, in 2002 the Commission resumed work on the liability aspects, under the subtitle "International liability in case of loss from transboundary harm arising out of hazardous activities". In 2006, the Commission completed and adopted a set of eight draft principles on the allocation of loss and recommended to the Assembly that it endorse the draft principles by a resolution and urge States to take national and international action to implement them.

3. In its resolution 61/36, the Assembly took note of the principles and commended them to the attention of Governments. In resolution 62/68, the Assembly commended the articles to the attention of Governments, without prejudice to any future action, as recommended by the Commission. It also commended the principles once more to the attention of Governments. Moreover, Governments were invited to submit comments on any future action, in particular on the form of the respective articles and principles, bearing in mind the recommendations made by the Commission in that regard, including in relation to the elaboration of a convention on the basis of the draft articles, as well as on any practice in relation to the application of the articles and principles. The report of the Secretary-General containing observations and comments submitted by Governments is contained in documents A/65/184 and Add.1. The General Assembly made similar commendations for the articles and the principles, respectively, in its resolution 65/28.

4. In a note verbale dated 19 January 2011, the Secretary-General drew the attention of Governments to resolution 65/28. By a note verbale dated 15 August 2012, the Secretary-General invited Governments to submit, by 31 January 2013, any information (including copies of decisions) regarding instances in which they had pleaded or relied upon the articles or principles before international courts, tribunals or other bodies. Submissions were received from the Netherlands and Qatar.

5. In preparing the present compilation, it is recalled that, in preparing the draft articles, the Commission kept in view the mandate given to the Commission to codify and develop international law, while, in developing the principles, it was recognized that they were general and residuary. The draft principles were cast as a

non-binding declaration, as it was felt that the goal of widespread acceptance of the substantive provisions was more likely to be met if the outcome was in that form. The focus of the Commission was on the formulation of the substance of the draft principles as a coherent set of standards of conduct and practice. It did not attempt to identify the current status of the various aspects of the draft principles in customary international law and the way in which the draft principles were formulated was not intended to affect that question.

6. The Secretariat has reviewed the case law of the various international courts, tribunals and other bodies and has identified only five decisions in which the draft articles were invoked. The present compilation has been prepared on the basis of those decisions of the International Court of Justice (2); the International Tribunal for the Law of the Sea (2); and the Permanent Court of Arbitration (1). In preparing the report, the Secretariat reviewed the official compilations of decisions, information provided on websites and secondary sources. The requested information referred to in paragraph 4 above did not yield any information on case law or pleadings. The Governments that responded typically indicated that they were not aware of any instances in which they had pleaded or relied upon the articles on prevention or the principles. However, as seen in some of the case law, paragraphs of which are reproduced in section II below, the draft articles — either generally or some of the provisions — were invoked by some States in litigation in which they were involved. The case law also includes examples of prior texts of the draft articles being cited before their eventual adoption by the Commission in 2001. The case law does not reveal any instances in which the principles were invoked.

7. The five cases identified by the Secretariat are outlined in section II. In some instances, the draft articles were invoked expressly, while in others their invocation was implicit in the substance addressed.

II. Extracts of decisions referring to the articles on prevention of transboundary harm from hazardous activities (annexed to resolution 62/68), and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (annexed to resolution 61/36)

International Court of Justice

8. In the 1995 dissenting opinion in the *Request for an examination of the situation in accordance with paragraph 63 of the Court's judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) case, Order of 22 September 1995* before the International Court of Justice,[1] Judge Sir Geoffrey Palmer referred to the draft articles on prevention prior to their adoption by the International Law Commission.

9. In determining whether a prima facie case had been made out on the environmental facts to examine the 1974 judgment, in particular whether a change in the pertinent facts had increased the risk of nuclear contamination, the dissenting opinion made reference to draft article 2 (a) defining "risk of causing significant

[1] *I.C.J Reports 1995*, p. 288 at p. 381.

transboundary harm" of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law to derive support for a test to determine the calculus of risk.[2] Judge Palmer said:

> 68. There are a number of factors to be weighed in deciding whether New Zealand satisfied the prima facie standard … which would warrant a decision that the basis of the 1974 judgment had altered and should be examined. These factors are:
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> – the ultrahazardous nature of nuclear explosions and the dangerous nature of the waste they produce;
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> – the length of time that some of the nuclear materials remain hazardous which is measured in tens of thousands of years or longer;
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> – the fragile nature of the atoll structure and the cumulative effect of a large number of nuclear explosions upon the structure;
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> – the fact that atolls cannot be distinguished from the marine environment and must be thought of as an inherent part of the ocean ecosystem;
>
> – the high number of tests which have been concentrated within a small area;
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> – the proximity of the testing to the marine environment;
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> – the high quantities of dangerous nuclear wastes now accumulated on the test sites;
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> – the risks of radiation entering the food chain through plankton, tuna and other fish;
>
> – the risks of further fissures and shearing off of part of the atoll structure occurring as the result of further testing.
>
> 69. It cannot be doubted that France has engaged in activities that have substantially altered the natural environment of the test sites in the Pacific. These actions have been intentional and they have been under scientific scrutiny, especially by French scientists. But the unintended repercussions of intentional human action are often the most important. The nature of the risks inherent in the activity itself would suggest caution to be appropriate. Some means of calculating those risks is necessary to arrive at a determination of whether New Zealand has satisfied the test. This calculus I suggest should contain a number of elements:
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> – the magnitude of the recognizable risk of harm by nuclear contamination in the circumstances;
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> – the probability of the risk coming to pass;
>
> – the utility and benefits of the conduct being assessed — viz. nuclear testing by France;
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> – the cost of the measures needed to avert the risk.

[2] Upon final adoption of the draft articles on prevention by the Commission, the above definition and commentary thereto remained unaltered. See *Yearbook … 2001*, vol. II (Part Two), pp. 151-153.

> 70. In my opinion what is required under the test the Court should apply is a risk-benefit analysis. There must be a balancing of the risks of the activity, the probability of harm, the utility of the activity and the measures needed to eliminate the risk. This is similar to a calculus of the risk analysis in the law of torts in some common law jurisdictions [references omitted]. But it is submitted that it is an appropriate analytical construct with some modifications for measuring the issue here.
>
> 71. The gravity of the radiation harm if it occurs is likely to be serious for the marine environment. The magnitude of the risk that the harm will occur must be regarded as significant given the destructive force of nuclear explosions and the possibility of other disturbances or abnormal situations occurring in the course of the long life of the dangerous substances. The costs of averting the risk in this instance are low — they consist of France providing a fully scientifically verifiable environment impact assessment in accordance with modern environmental practice which demonstrates that the proposed tests will not result in nuclear contamination. No doubt France and New Zealand would differ greatly on the utility of nuclear testing but it can reasonably be said that the extra tests proposed cannot have great value given the number that have preceded them. They are of diminishing marginal value, if they have any value at all. If the calculus of the risk analysis were applied in this way, then on these facts a prima facie case is made out by New Zealand in my opinion.
>
> 72. The test put forward here derives [some] support from the recent work of the International Law Commission where it laid down that for the purposes of draft articles under its consideration "risk of causing significant transboundary harm" an expression which refers "to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact" (Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), p. 400).

10. So as to clarify the standards to be applied to the dispute, the dissenting opinion also addressed how the state of international law relating to the environment in general and nuclear testing in particular had rapidly developed and progressed between 1974 and 1995. In the main, Judge Palmer sought to establish, inter alia, that international environmental law had developed rapidly and was tending to develop in a way that provided comprehensive protection for the natural environment; that it had taken an increasingly restrictive approach to the regulation of nuclear radiation; and that customary international law may have developed a norm of requiring environmental impact assessment where activities may have a significant effect on the environment. Taken together, the legal developments were sufficient to meet a prima facie test that the legal circumstances had altered sufficiently to favour an examination of the 1974 case.

11. In this regard, the work of the International Law Commission on the draft articles on prevention was first referred to more generally, as part of a review of developments in the drafting of conventions and in the case law, as follows:

> 81. But authoritative decisions in the area of international environment law are scarce enough. They certainly lag behind the plethora of conventional law that has sprung into existence in the more than 20 years spanning the life of

this case. The nature of some of the issues is helpfully discussed in the Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, on "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law" (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), pp. 367 ff.), a subject with which the Commission has been grappling since 1978 without definitive result. The Commission is giving priority in its work to prevention of activities having a risk of causing transboundary harm.

12. Secondly, the dissenting opinion referred to the draft articles with specific regard to international law concerning radioactive hazards, in particular the emerging international law on environmental impact assessment and its application to the facts of the case:

87. At this point, Mr. D. J. MacKay for New Zealand went on to develop this segment of the argument by pointing to the application of the emerging international law on environmental impact assessment (EIA) and the precautionary principle in their application to the facts of this case. In both respects the law had changed dramatically, thus supporting the view that the basis of the Court's Judgment was affected. It was submitted that other parties likely to be affected by the risks have a right to know what the investigations for the EIA are, have a right to propose additional investigations and a right to verify for themselves the result of such investigations. As the law now stands it is a matter of legal duty to first establish before undertaking an activity that the activity does not involve any unacceptable risk to the environment. An EIA is simply a means of establishing a process to comply with that international legal duty. New Zealand pointed to a number of international instruments, including Article 205 of the United Nations Law of the Sea Convention that make explicit reference to EIA.

88. Under Article 12 that has been adopted by the International Law Commission in the course of its deliberations, the Commission has decided that before a State carries out activities which involve a risk of causing significant transboundary harm through their physical consequences

> "a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States."[3]

The Noumea Convention referred to earlier also contains an explicit obligation in Article 16 to conduct environmental impact assessments before embarking upon any major project which might affect the marine environment. A more explicit measure appears in Article 12 of that Convention producing a duty to prevent, reduce and control pollution in the Convention area which might result from the testing of nuclear devices.

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[3] *Draft Article 12. Risk assessment (as provisionally adopted by the International Law Commission at its forty-sixth session)*:
Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States. See *Yearbook … 1994*, vol. II (Part Two), p. 166.

13. In the draft articles on prevention adopted on second reading, draft article 12 on risk assessment, as amended, eventually became draft article 7 and read as follows:

> **Article 7**
> **Assessment of risk**
>
> Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.

14. The question of the scope and content of an environmental impact assessment was also the subject of consideration by the International Court of Justice in 2010 in the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* judgment.[4] The *Pulp Mills* case concerned a dispute between Argentina and Uruguay regarding alleged breaches by Uruguay of obligations incumbent upon it under the Statute of the River Uruguay, a treaty signed by Argentina and Uruguay on 26 February 1975. The Court, inter alia, addressed the relationship between the need for an environmental impact assessment, where the planned activity was liable to cause harm to a shared resource and transboundary harm, and the obligations of the Parties under article 41 *(a)* and *(b)* of the 1975 Statute. The parties to the dispute disagreed on the scope and content of the environmental impact assessment and the draft articles on prevention were invoked to justify the limited scope of an environmental impact assessment in international law as not intended to assess remote or purely speculative risks:

> 203. … The Parties agree on the necessity of conducting an environmental impact assessment. Argentina maintains that the obligations under the 1975 Statute viewed together impose an obligation to conduct an environmental impact assessment prior to authorizing Botnia to construct the plant. Uruguay also accepts that it is under such an obligation. The Parties disagree, however, with regard to the scope and content of the environmental impact assessment that Uruguay should have carried out with respect to the Orion (Botnia) mill project. Argentina maintains in the first place that Uruguay failed to ensure that "full environmental assessments [had been] produced, prior to its decision to authorize the construction …"; and in the second place that "Uruguay's decisions [were] … based on unsatisfactory environmental assessments", in particular because Uruguay failed to take account of all potential impacts from the mill, even though international law and practice require it, and refers in this context to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context of the United Nations Economic Commission for Europe (hereinafter the "Espoo Convention") (*UNTS*, Vol. 1989, p. 309), and the 1987 Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme (hereinafter the "UNEP Goals and Principles") (*UNEP/WG.152/4 Annex (1987))*, document adopted by UNEP Governing Council at its 14th Session (Dec. 14/25 (1987)). Uruguay accepts that, in accordance with international practice, an environmental impact assessment of the Orion (Botnia) mill was necessary, but argues that international law does not impose any conditions upon the content of such an

[4] *I.C.J. Reports 2010*, p. 14.

assessment, the preparation of which being a national, not international, procedure, at least where the project in question is not one common to several States. According to Uruguay, the only requirements international law imposes on it are that there must be assessments of the project's potential harmful transboundary effects on people, property and the environment of other States, as required by State practice and the International Law Commission 2001 draft Articles on Prevention of Transboundary Harm from Hazardous Activities, without there being any need to assess remote or purely speculative risks.

204. It is the opinion of the Court that in order for the Parties properly to comply with their obligations under Article 41 *(a)* and *(b)* of the 1975 Statute, they must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment. As the Court has observed in the case concerning the *Dispute Regarding Navigational and Related Rights*,

> "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (*Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), judgment, I.C.J. Reports 2009*, p. 242, para. 64).

In this sense, the obligation to protect and preserve, under Article 41 *(a)* of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

205. The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment. It points out moreover that Argentina and Uruguay are not parties to the Espoo Convention. Finally, the Court notes that the other instrument to which Argentina refers in support of its arguments, namely, the UNEP Goals and Principles, is not binding on the Parties, but, as guidelines issued by an international technical body, has to be taken into account by each Party in accordance with Article 41 *(a)* in adopting measures within its domestic regulatory framework. Moreover, this instrument provides only that the "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance" (Principle 5) without giving any indication of minimum core components of the assessment. Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case,

> having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

15. The Court also considered the role of the environmental impact assessment in the fulfilment of the substantive obligations of the Parties, in particular whether the populations likely to be affected, namely both the Uruguayan and Argentine riparian populations, should have, or had in fact, been consulted in the context of the environmental impact assessment:

> 215. The Parties disagree on the extent to which the populations likely to be affected by the construction of the Orion (Botnia) mill, particularly on the Argentine side of the river, were consulted in the course of the environmental impact assessment. While both Parties agree that consultation of the affected populations should form part of an environmental impact assessment, Argentina asserts that international law imposes specific obligations on States in this regard. In support of this argument, Argentina points to Articles 2.6 and 3.8 of the Espoo Convention, Article 13 of the 2001 International Law Commission draft Articles on Prevention of Transboundary Harm from Hazardous Activities,[5] and Principles 7 and 8 of the UNEP Goals and Principles. Uruguay considers that the provisions invoked by Argentina cannot serve as a legal basis for an obligation to consult the affected populations and adds that in any event the affected populations had indeed been consulted.
>
> 216. The Court is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina.
>
> 217. Regarding the facts, the Court notes that both before and after the granting of the initial environmental authorization, Uruguay did undertake activities aimed at consulting the affected populations, both on the Argentine and the Uruguayan sides of the river ... [The Court cited some examples of activities that were carried out]
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> 219. In the light of the above, the Court finds that consultation by Uruguay of the affected populations did indeed take place.

16. The Court had earlier dealt with the alleged violations of procedural obligations, including the obligations of the parties following the end of the negotiating period. In that regard, one of the parties invoked the residual character of the draft articles as reflective of customary international law. The Court interpreted the obligations as follows:

> 151. Article 12 refers the Parties, should they fail to reach an agreement within 180 days, to the procedure indicated in Chapter XV.

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[5] *Article 13 (Information to the public)*:

States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Chapter XV contains a single article, Article 60, according to which:

> "Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice.
>
> In the cases referred to in Articles 58 and 59, either party may submit any dispute concerning the interpretation or application of the Treaty and the Statute to the International Court of Justice, when it has not been possible to settle the dispute within 180 days following the notification referred to in Article 59."

152. According to Uruguay, the 1975 Statute does not give one party a "right of veto" over the projects initiated by the other. It does not consider there to be a "no construction obligation" borne by the State initiating the projects until such time as the Court has ruled on the dispute. Uruguay points out that the existence of such an obligation would enable one party to block a project that was essential for the sustainable development of the other, something that would be incompatible with the "optimum and rational utilization of the [r]iver". On the contrary, for Uruguay, in the absence of any specific provision in the 1975 Statute, reference should be made to general international law, as reflected in the 2001 draft Articles of the International Law Commission on Prevention of Transboundary Harm from Hazardous Activities (*Yearbook of the International Law Commission*, 2001, vol. II, Part Two); in particular, draft Article 9, paragraph 3, concerning "Consultations on preventive measures", states that "[i]f the consultations … fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued …".

153. Argentina, on the other hand, maintains that Article 12 of the 1975 Statute makes the Court the final decision-maker where the parties have failed to reach agreement within 180 days following the notification referred to in Article 11. It is said to follow from Article 9 of the Statute, interpreted in the light of Articles 11 and 12 and taking account of its object and purpose, that if the notified party raises an objection, the other party may neither carry out nor authorize the work in question until the procedure laid down in Articles 7 to 12 has been completed and the Court has ruled on the project. Argentina therefore considers that, during the dispute settlement proceedings before the Court, the State which is envisaging carrying out the work cannot confront the other Party with the fait accompli of having carried it out.

Argentina argues that the question of the "veto" raised by Uruguay is inappropriate, since neither of the parties can impose its position in respect of the construction works and it will ultimately be for the Court to settle the dispute, if the parties disagree, by a decision that will have the force of *res judicata*. It could be said, according to Argentina, that Uruguay has no choice but to come to an agreement with it or to await the settlement of the dispute. Argentina contends that, by pursuing the construction and commissioning of the Orion (Botnia) mill and port, Uruguay has committed a continuing violation of the procedural obligations under Chapter II of the 1975 Statute.

154. The Court observes that the "no construction obligation", said to be borne by Uruguay between the end of the negotiation period and the decision of the Court, is not expressly laid down by the 1975 Statute and does not follow from its provisions. Article 9 only provides for such an obligation during the performance of the procedure laid down in Articles 7 to 12 of the Statute.

Furthermore, in the event of disagreement between the parties on the planned activity persisting at the end of the negotiation period, the Statute does not provide for the Court, to which the matter would be submitted by the State concerned, according to Argentina, to decide whether or not to authorize the activity in question. The Court points out that, while the 1975 Statute gives it jurisdiction to settle any dispute concerning its interpretation or application, it does not however confer on it the role of deciding in the last resort whether or not to authorize the planned activities. Consequently, the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk.

The Court cannot uphold the interpretation of Article 9 according to which any construction is prohibited until the Court has given its ruling pursuant to Articles 12 and 60.

155. Article 12 does not impose an obligation on the parties to submit a matter to the Court, but gives them the possibility of doing so, following the end of the negotiation period. Consequently, Article 12 can do nothing to alter the rights and obligations of the party concerned as long as the Court has not ruled finally on them. The Court considers that those rights include that of implementing the project, on the sole responsibility of that party, since the period for negotiation has expired.

156. In its Order of 13 July 2006, the Court took the view that the "construction [of the mills] at the current site cannot be deemed to create a fait accompli" (*Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 78). Thus, in pronouncing on the merits in the dispute between the Parties, the Court is the ultimate guarantor of their compliance with the 1975 Statute.

157. The Court concludes from the above that Uruguay did not bear any "no construction obligation" after the negotiation period provided for in Article 12 expired on 3 February 2006, the Parties having determined at that date that the negotiations undertaken within the GTAN had failed (see paragraph 40). Consequently the wrongful conduct of Uruguay (established in paragraph 149 above) could not extend beyond that period.

17. In addressing substantive matters concerning obligations to coordinate measures to avoid changes in the ecological balance and to prevent pollution and preserve the aquatic environment arising under articles 36 and 41 of the 1975 Statute, the Court, as part of general remarks on the normative content of those articles, implicitly alluded to the nature of the obligation of due diligence contained in the draft articles on prevention. It stated:

183. It is recalled that Article 36 provides that "[t]he parties shall coordinate, through the Commission, the necessary measures to avoid any change in the

ecological balance and to control pests and other harmful factors in the river and the areas affected by it".

184. It is the opinion of the Court that compliance with this obligation cannot be expected to come through the individual action of either Party, acting on its own. Its implementation requires co-ordination through the Commission ...

…

186. The Parties also disagree with respect to the nature of the obligation laid down in Article 36, and in particular whether it is an obligation of conduct or of result. Argentina submits that, on a plain meaning, both Articles 36 and 41 of the 1975 Statute establish an obligation of result.

187. The Court considers that the obligation laid down in Article 36 is addressed to both Parties and prescribes the specific conduct of coordinating the necessary measures through the Commission to avoid changes to the ecological balance. An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river.

…

197. … [T]he obligation to "preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures" is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction.

International Tribunal for the Law of the Sea

18. The nature and scope of the obligation of due diligence was a subject of further elucidation in the Advisory opinion of 1 February 2011 on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea was in that instance requested, inter alia, to opine on the legal responsibilities and obligations of States Parties to the United Nations Convention on the Law of the Sea with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. The Chamber identified the key provisions concerning the obligations of the sponsoring States to be article 139, paragraph 1; article 153, paragraph 4 (especially the last sentence); and annex III, article 4, paragraph 4, of the Convention (especially the first sentence), noting that the central

issue to the question posed concerned the meaning of the expression "responsibility to ensure" in article 139, paragraph 1, and annex III, article 4, paragraph 4, of the Convention. In its analysis, which entailed the invocation of the draft articles, it stated as follows:

> 108. "Responsibility to ensure" points to an obligation of the sponsoring State under international law. It establishes a mechanism through which the rules of the Convention concerning activities in the Area, although being treaty law and thus binding only on the subjects of international law that have accepted them, become effective for sponsored contractors which find their legal basis in domestic law. This mechanism consists in the creation of obligations which States Parties must fulfil by exercising their power over entities of their nationality and under their control.
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> …
>
> 110. The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence".
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> 111. The notions of obligations "of due diligence" and obligations "of conduct" are connected. This emerges clearly from the Judgment of the ICJ in the *Pulp Mills on the River Uruguay*: "An obligation to adopt regulatory or administrative measures … and to enforce them is an obligation of conduct. Both parties are therefore called upon, under article 36 [of the Statute of the River Uruguay], to exercise due diligence in acting through the [Uruguay River] Commission for the necessary measures to preserve the ecological balance of the river" (paragraph 187 of the Judgment).
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> 112. The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1).

19. To further elucidate the meaning of the expression "to ensure", the Chamber cited examples found in article 194, paragraph 2, and article 139 of the Convention. In addition, the Chamber observed that:

> 115. In its Judgment in the *Pulp Mills on the River Uruguay* case, the ICJ illustrates the meaning of a specific treaty obligation that it had qualified as "an obligation to act with due diligence" as follows:
>
> > It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private

> operators, such as the monitoring of activities undertaken by such operators … (paragraph 197)

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

> The obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. In that eventuality, the State of origin is required … to exert its best possible efforts to minimize the risk. In this sense, it does not guarantee that the harm would not occur. (Paragraph 7)

117. The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity ...

20. In his separate opinion in the *Proceedings Concerning the Mox Plant (Ireland v. United Kingdom)*, order of 3 December 2001, Judge Anderson, while concurring fully with the reasoning of the Tribunal on the main substantive issues, found that the order did not go not far enough in its findings regarding the preservation of rights and the prevention of serious harm to the marine environment. Draft articles 1 and 3 of the Draft Articles on Prevention were cited by the Judge, without further elucidation, in advancing the proposition that the Order of the Tribunal could have gone further and reached conclusions upon the questions of preserving rights claimed by the Applicant and of "serious harm to the marine environment", within the meaning of article 290, paragraph 5, of the United Nations Convention on the Law of the Sea. He stated in pertinent part:

> In its principal submission, the Applicant sought the equivalent of an injunction restraining *pendente lite* the Respondent from allowing the MOX plant to commence operations and production on 20 December 2001 — a request which the Tribunal clearly did not accept. It is common ground that the plant is situated on the territory of the United Kingdom and thus under the sovereignty of the United Kingdom. In the terms of the draft articles on Prevention of Transboundary Harm from Hazardous Activities recently adopted by the International Law Commission, the plant will conduct "activities not prohibited by international law". In the terms of the Convention on the Law of the Sea, the plant falls to be considered in the context of article 193, which reads:

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

The operation of the plant involves a dry process, but, as an indirect result of normal cleaning work, it is expected to result in the introduction of some very small amounts of liquid and gaseous substances and energy into the marine environment of the Irish Sea by two pathways: first, via an outfall structure, within the meaning of article 207, and secondly via the atmosphere, to which article 212 applies.

The question before the Tribunal was whether there would be irreparable harm to any of the rights claimed by the Applicant under articles 123, 192 to 194, 197, 206, 207, 211, 212 and 213 arising from alleged breaches of its duties under those articles by the Respondent. These rights were categorised, in broad terms, as the right to ensure that the Irish Sea will not be subject to additional radioactive pollution; procedural rights to have the Respondent prepare proper environmental impact statements; and the right to cooperation and coordination over the protection of the Irish Sea as a semi-enclosed sea.

Tribunal constituted through the Permanent Court of Arbitration

21. In his declaration in the *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland, Final Award, Decision of 2 July 2003*, Professor W. Michael Reisman, in deciding not to concur in the majority's interpretation of article 9(1) of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic ("the OSPAR Convention"), inter alia, cited draft article 5 of the articles on prevention and its accompanying commentary. He stated in relevant part:

> 6. … The words "ensure that their competent authorities are required to," which Ireland's submission would require the Tribunal to ignore, make Article 9(1) an obligation to adjust domestic law in a prescribed way by providing for certain institutional recourses, for which specific criteria are provided. Article 9(1) is not expressed in terms to establish an obligation on the international plane to provide information, with the performance of mat obligation in specific cases to be subject to the jurisdiction of a Tribunal established under Article 32.
>
> 7. This plain reading of Article 9(1) appears both to reflect its objects and purposes and to produce a reasonable and economic means for implementing Article 9(2) and (3) obligations ...
>
> …
>
> 12. The result of the interpretation of Article 9 that I believe is required is consistent with a not uncommon treaty practice in which states are obliged to make adjustments in domestic law and, to the extent that they do so appropriately, they have fulfilled their treaty obligations. The International Law Commission ("ILC") has had occasion to review this practice in the course of its work on International Liability for injurious consequences arising

out of acts not prohibited by international law. Article 5 of the ILC draft on this subject provides:

> States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles.

13. In the third paragraph of its Commentary to this provision, the ILC said:

> To say that States must take the necessary measures does not mean that they must themselves get involved in operational issues relating to the activities to which article 1 applies. *Where these activities are conducted by private persons or enterprises, the obligation of the State is limited to establishing the appropriate regulatory framework and applying it in accordance with those articles. The application of that regulatory framework in the given case will then be a matter of ordinary administration or, in the case of disputes, for the relevant courts of tribunals*, aided by the principle of non-discrimination contained in article 15 (italics in original).