Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay): Of Environmental Impact Assessments and “Phantom Experts”

Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April

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I. Introduction

On 20 April 2010, the International Court of Justice (ICJ) announced its highly anticipated judgment in the environmental dispute between Argentina and Uruguay. The dispute arose from the authorization by Uruguay of the CMB¹ pulp mill and the actual construction of the Botnia pulp mill² and its associated facilities on the banks of the River Uruguay, which constitutes an international boundary between the two sovereign States of Argentina and Uruguay.³

Argentina argued that such an authorization and construction was in violation of both the procedural and substantive obligations which both States had undertaken under the 1975 Statute of the River Uruguay,⁴ the purpose of which was

…to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties.⁵

The Court found that Uruguay had violated its procedural obligations, as these were set out in the 1975 Statute, to notify and consult with Argentina prior to authorizing and/or constructing

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1 “Celulosas de M’Bopicuá S.A.” (a company formed under Uruguayan law by the Spanish company ENCE).
2 The project for this mill (also called ‘Orion’ Mill) was undertaken by the “Botnia S.A.” and “Botnia Fray Bentos S.A.” companies. These companies were formed by Oy Metsä-Botnia AB (a Finnish company) under Uruguayan law in 2003 specifically for this purpose.
3 On the exact delimitation of the boundary between Argentina and Uruguay in the River Uruguay, see bilateral treaty of Montevideo signed at 7 April 1961; 635 UNTS 9074.
4 Which entered into force on 18 September 1976; 1295 UNTS 340.
5 1975 Statute, Article 1.
the pulp mills. The Court also held that the procedural and substantive obligations of the 1975 Statute were clearly separable and the violation of the former did not necessarily entail a corresponding violation of the latter. With respect to the Argentinean claims of violations of the substantive obligations of the 1975 Statute, which required cooperation between the two States, monitoring and prevention of pollution of the river, the Court held that no such violation could be substantiated. Concluding the Court held that due to the fact that only procedural obligations had been violated the mere “declaration by the Court of this breach constitutes appropriate satisfaction” (emphasis added).

Perhaps the most notable contribution of this judgment to international environmental law and the law on shared watercourses is the fact that the ICJ explicitly recognized Environmental Impact Assessment (EIA) as a practice that has attained customary international law status. Another interesting point is the discussion, which the present case ignited, with respect to the use or non-use in the case in question of experts by the ICJ through an application of Rule 50 of the Statute of the Court. Although the ICJ did not make use of this provision, a lot of concerns were expressed both in the corpus of the judgment and in the opinion of the judges as to the possible usefulness and necessity of this option, especially in such complex and technical matters, which are characteristic of environmental disputes.

II. A Chronology of the Dispute

As mentioned supra the boundary between Argentina and Uruguay with respect to River Uruguay is determined in the Montevideo Treaty of April 7, 1961. Article 7 of that Treaty provides for the establishment by the parties of a “regime for the use of the river”. Such a régime was established through the 1975 Statute, which set up the Administrative Commission of the River Uruguay (CARU), which is an integral mechanism in the proper administration and protection of the River Uruguay.

Articles 7 to 12 of the 1975 Statute, which are pertinent to the facts of this case, establish “a machinery of notification and consultation which must be followed in respect of ‘any works which are liable to affect navigation, the régime of the river or the quality of its waters’.”

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7 Ibid., paras. 77-9.
8 Ibid., paras. 169-266.
9 Ibid., para. 282.
10 Pulp Mills case, para. 204; although no similar recognition was reserved for the precautionary principle; see however, Judge Cançado Trindade’s Separate Opinion, where Judge Cançado Trindade provided an extensive analysis on why he considered the precautionary principle to be a ‘general principle of international environmental law’; Pulp Mills case, Separate Opinion of Judge Cançado Trindade, paras. 62-96 and 103-113.
12 In more detail, see infra Section ‘C. Substantive Obligations of the 1975 Statute’.
This process consists of four stages. Firstly, the party that wishes to undertake certain works in the area must notify CARU, which in turn will take a preliminary decision if the proposed works will adversely affect the environment.\(^\text{14}\) Secondly, if CARU’s decision is unfavourable, the other party must be informed through CARU.\(^\text{15}\) This latter party has, then, 180 days to agree or object to the proposed works.\(^\text{16}\) Thirdly, if the notified party objects,\(^\text{17}\) then a period of another 180 days is provided in order for the two parties to negotiate in good faith in order to reach an agreement on how best to resolve the dispute.\(^\text{18}\) Lastly, if the parties fail to reach an agreement within this period then Chapter XV of the Statute is activated.\(^\text{19}\)

The present case concerns the authorization and/or construction of two pulp mills: i) the CMB pulp mill project and ii) the Botnia mill.

**A) The CMB Pulp Mill Project**

On 22 July 2002 CMB submitted an EIA to the Uruguayan authorities in order to obtain authorization for the construction of a pulp mill. A relevant document was transmitted to CARU on 14 May 2003 but CARU asked for further information. On 9 October 2003, MVOTMA\(^\text{20}\) issued an initial environmental authorization for the construction of the CMB pulp mill. On 27 October and on 7 November 2003 Uruguay forwarded to Argentina the initial EIA of CMB and the file of the Uruguayan’s Ministry of Environment file on the project, respectively. These documents were in turn forwarded to CARU by Argentina. On 2 March 2004, the Ministers of Foreign Affairs of the two States met and reached an ‘understanding’,\(^\text{21}\) which led CARU to resuming its work on 15 May 2004. On 28 November 2005, Uruguay authorized preparatory work for the construction of the CMB mill to begin; nevertheless, the project was, eventually, abandoned on 21 September 2006.\(^\text{22}\)

**B) Botnia Pulp Mill**

The second pulp mill was undertaken by two companies formed specifically for that purpose in 2003 by a Finnish company, Oy Metsä-Botnia AB. On 31 March 2004, an initial environmental authorization was requested by the Uruguayan authorities, which was granted on 14 February 2005. Following an agreement between the Presidents of the two States on 5 May 2005, a High-Level Technical Group (GTAN) was created on 31 May 2005 in order to resolve the disputes over the two projects, i.e. the CMB and the Botnia mills. GTAN was supposed to accomplish this within a period of 180 days. However, on 31 January 2006

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\(^{14}\) 1975 Statute, Article 7.
\(^{15}\) 1975 Statute, Article 7(2) and (3).
\(^{16}\) 1975 Statute, Article 8.
\(^{17}\) If it does not object, then the first party may proceed with its planned works.
\(^{18}\) 1975 Statute, Articles 11 and 12.
\(^{19}\) 1975 Statute, Article 12. Chapter XV consists of only one Article; Article 60, which gives jurisdiction to the ICJ.
\(^{20}\) Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs.
\(^{21}\) Although the Parties dispute the exact content of this ‘understanding’; *Pulp Mills* case, para. 34.
\(^{22}\) *Pulp Mills* case, para. 36.
Uruguay determined that the negotiation-process of GTAN had failed. Argentina was of the same opinion but declared this failure on 3 February 2006.\(^{23}\)

However, as early as 5 July 2005, Uruguay had already authorized the Botnia company to build a port adjacent to the Botnia mill and at later dates further authorizations were issued. Despite the repeated requests by the Argentinian President for any work relating to the construction of the CMB and Botnia mills to be halted, these were only suspended for 90 days for the former and for 10 days for the latter.\(^{24}\)

After the repeated failures of the aforementioned efforts to resolve the issue of the authorization of the construction of the CMB and Botnia mills Argentina, on 4 May 2006, submitted the dispute to the ICJ and simultaneously requested provisional measures.\(^{25}\) The Court however, decided that the circumstances of the case did not necessitate the granting of provisional measures.\(^{26}\)

III. The Court’s Judgment

The Court in its Judgment dealt with three main issues: i) the scope of its jurisdiction, ii) the alleged violation of the procedural obligations incorporated in the 1975 Statute and iii) the alleged violation of the substantive obligations included in the same instrument.

A. Scope of the Court’s Jurisdiction

Both States were in agreement that the jurisdiction of the ICJ was based on Article 36(1) of the ICJ Statute in combination with Article 60 of the 1975 Statute. However, the point on which the two States differed was whether any kind of environmental damage\(^{27}\) was within the *ratione materiae* jurisdiction of the Court by virtue of Article 60 of the 1975 Statute.\(^{28}\)

The ICJ held that a plain reading of both Articles 60 and 36 of the 1975 Statute did not support such an understanding and therefore, that the Argentinean claims relating to noise, ‘visual pollution’, and ‘bad odours’ could not be examined.\(^{29}\)

Within the context of its jurisdiction, the ICJ was also called to make a pronouncement on whether Articles 1 and 41 of the 1975 Statute were ‘referral clauses’. A ‘referral clause’ is a clause, which incorporates within the text of a specific treaty, certain provisions or the entirety of other treaties. Argentina argued that Articles 1 and 41(a) of the 1975 Statute were such clauses and for this reason the ICJ had jurisdiction to apply: the 1973 Convention on

\(^{23}\) *Pulp Mills* case, para. 40.

\(^{24}\) *Ibid.*, para. 42.


\(^{26}\) *Ibid.*, para. 87.

\(^{27}\) Extending to such forms of damage as noise, ‘visual pollution’, or ‘bad odours’.

\(^{28}\) *Pulp Mills* case, paras. 48-50.

\(^{29}\) *Ibid.*, para. 52.
International Trade in Endangered Species of Wild Fauna and Flora, the 1971 Ramsar Convention on Wetlands of International Importance, the 1992 United Nations Convention on Biological Diversity, and the 2001 Stockholm Convention on Persistent Organic Pollutants. In addition to this, both Argentina and Uruguay agreed that the 1975 Statute should be interpreted by taking into consideration “all relevant rules of international law”. However, interpretation via Article 31(3)(c) and ‘referral clauses’, are two completely different matters and the Court correctly points that out. Taking into consideration the ‘relevant rules of international law’ as required by Article 31(3)(c) of the VCLT is a matter of interpretation not of applicable law. The international judge does not apply these rules as such, but only for interpretative purposes. Consequently, which rules are ‘relevant’ under Article 31(3)(c) is not an issue of applicable law. As to whether Articles 1 and 41(a) of the 1975 Statute are referral clauses, the ICJ by referring to the authentic Spanish text and juxtaposing it with the French and English translations, came to the conclusion that the aforementioned provisions were not intended to function as referral clauses and, thus, the conventions referred to by Argentina were not directly incorporated within the 1975 Statute and thus were not applicable.

B. Procedural Obligations of the 1975 Statute

The Court then turned its attention to the alleged breaches by Uruguay of the procedural obligations set by the 1975 Statute. Based on the arguments put forward by the parties to the dispute the Court identified the following issues:

i) the relationship between the procedural and the substantive obligations of the 1975 Statute and whether a violation of the former entails ipso facto a violation of the latter, ii) the interrelationship between the procedural obligations themselves iii) whether the various actions taken by Argentina and Uruguay constituted, in essence, an agreement to derogate from the procedural obligations of the 1975 Statute and finally iv) what were the obligations of Uruguay after the end of the negotiation period, i.e. whether Uruguay was under a duty ‘not to construct’.

i) Relationship between Procedural and Substantive Obligations

With respect to this issue the Court reiterated its finding in its Order of 13 July 2006 on the same case, ie. that the régime of the 1975 Statute is “a comprehensive and progressive

30 Known as the CITES Convention; 993 UNTS 243.
31 Known as the Ramsar Convention; 996 UNTS 243.
32 Known as the Biodiversity Convention; 31 ILM 822.
33 Known as the POPs Convention; 40 ILM 532.
34 Article 31(3)(c) of the Vienna Convention on the Law Treaties (hereinafter VCLT).
35 The Court takes the time to clarify, as it has repeatedly done in numerous cases, that despite the fact the VCLT does not apply to the 1975 Statute, as it entered into force in 1980, nevertheless Articles 31 and 32 reflect customary international law and it is that custom, which the ICJ will apply when interpreting the 1975 Statute; Pulp Mills case, para. 65.
36 Pulp Mills case, paras. 58-63.
régime”, and that “the two categories of obligations … complement one another perfectly, enabling the parties to achieve the object of the Statute”. Despite this, however, the Court found itself unable to conclude that a violation of a procedural obligation is at the same time a violation of procedural obligations or vice versa, since nowhere in the Statute is such an automaticity provided for. Consequently, the Court noted any alleged violation of procedural and/or substantive obligations would have to be examined separately.

However, such a clear separation between procedural and substantive obligations reinforced by the fact that, eventually, the Court held that whereas procedural obligations had been violated the same could not be said about the substantive ones, was not adopted unanimously. Judges Al-Khasawneh, Simma and Vinuesa were of the opinion that in such cases where procedural obligations play an essential role in the protection of the environment, their violation or not should seriously affect any conclusion as to the breach or not of substantive obligations.

**ii) Interrelationship between Procedural Obligations**

Having established that any alleged violations of procedural and substantive obligations of the 1975 Statute should be examined separately, the Court turned its attention to the system established in Articles 7-12 of the 1975 Statute. First, it established that CARU was an international organization, which was intended to be “a central component in the fulfilment of [Argentina and Uruguay’s] obligations to co-operate as laid down by the 1975 Statute”. In order for CARU to carry out its assigned role, it being informed of any works that might affect the environment of the River Uruguay was an essential element of the system set up by the 1975 Statute. However, Uruguay failed to transmit to CARU the information required by Article 7, and thus was in violation of that Article. The fact that CARU had obtained certain information directly from the companies concerned and NGOs did not erase Uruguay’s obligation. Similarly, the Court held, Uruguay failed to comply with its obligation to inform the other concerned party (i.e. Argentina) through CARU, as provided for in Article 7. The reason for that being that any such information should have been transmitted prior to Uruguay granting any environmental authorizations, whereas the exact opposite had happened in the case at hand.

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38 Pulp Mills case, para. 77.
39 Ibid., para. 78.
40 Ibid., para. 79.
41 Pulp Mills case, Joint Dissenting Opinion of Judge al-Khasawneh and Simma, para. 26; Dissenting Opinion of Judge ad hoc Vinuesa, para. 4.
42 Pulp Mills case, paras. 84-93.
43 Ibid., para. 93.
44 Ibid., para. 106.
45 Ibid., para. 110.
46 Ibid., paras. 119-21.
iii) Derogation from the Procedural Obligations of the 1975 Statute

One of the main arguments put forward by Uruguay was that it had not violated its procedural obligations because both parties had agreed to derogate from the procedure envisaged in the 1975 Statute in two instances: the ‘understanding’ of 2 March 2004 and the agreement of 5 May 2005 setting up GTAN. With respect to the ‘understanding’ of 2004, the Court considered that since the 1975 Statute is *jus dispositivum*, the ‘understanding’ could have had the effect of relieving Uruguay of its procedural obligations under the Statute if that was its purpose and the intention of the parties. However, even in that case Uruguay would have had to comply with all the terms of that ‘understanding’. Since Uruguay failed to do so the procedure of the 1975 Statute was never replaced, and the question of whether the ‘understanding’ had such a purpose became a moot point.

As to what pertains to the GTAN agreement of 2005, the Court held that the agreement in question could not be interpreted as expressing the intention of the parties to derogate from all the other procedural obligations of the 1975 Statute. Therefore, the obligation of Uruguay to inform and notify, as laid out in Article 7 of the 1975 Statute, remained active. Thus, by authorizing the construction of the mills, before the end of the period of negotiations Uruguay had failed to negotiate in good faith and had violated its procedural obligations.

iv) Obligations Following the End of the Negotiation Period

The final question which arose with respect to the alleged violations of procedural obligations of the 1975 Statute was whether a ‘no construction obligation’ existed even after the end of the negotiations but prior to the resolution of the dispute. Argentina argued that such an obligation flowed from Article 9 of the 1975 Statute, which should be extended to cover the time-period when the Court would be seized under either Article 12 or 60. Nevertheless, the ICJ was unable to concur with such a reading of the Statute since it was not expressly laid down in the Statute. Furthermore

> [t]he 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.

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48 *Id.*
49 *See* ‘Chronology of Dispute’.
51 *i.e.* because the case was pending in front of an international court.
52 *Pulp Mills* case, para. 154. *In agreement see Pulp Mills* case, Separate Opinion of Judge Greenwood, para. 8. However, Judge Skotnikov felt that such an interpretation would be contrary to the *ut res magis valeat quam pereat* principle, as it would render Article 12 meaningless. Ergo, according to him, a duty not to construct should have been acknowledged by the Court; *Pulp Mills* case, Declaration of Judge Skotnikov, paras. 2-6.
C. Substantive Obligations of the 1975 Statute

Having found that Uruguay had breached its procedural obligations under the 1975 Statute, the Court turned its attention to the substantive obligations. This part of the Court’s judgment is quite technical in nature, relying on a variety of documents submitted by the two parties. Argentina claimed that Uruguay had violated the following obligations: the obligation to contribute to the optimum and rational utilization of the river, the obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters, the obligation to co-ordinate measures to avoid changes in the ecological balance and the obligation to prevent pollution and preserve the aquatic environment.

The Court briefly reiterated that the burden of proof lies with party claiming certain facts, which is the well-established principle of onus probandi incubit actori. Furthermore, contrary to what Argentina argued, neither the precautionary approach nor any provision of the 1975 Statute could substantiate a reversal of the burden of proof. After examining all the facts and information available to it, the Court held that Uruguay had not violated any substantive obligation under the 1975 Statute. Judge Greenwood in his Separate Opinion, although in agreement with the dicta of the Court as to the issue of burden of proof, felt that one should also have regard to the standard of proof. Judge Greenwood advocated that a distinction similar to “criminal and civil standards of proof familiar to common law” might not only be logical but beneficial to the administration of international justice and in the present case the lower standard of proof would have been the appropriate one. Nevertheless, even in such a case Argentina would not have succeeded in discharging its burden of proof.

There are two elements of this part of the judgment that stand out: an explicit statement by the Court, and a missed opportunity.

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54 1975 Statute, Article 35.
55 1975 Statute, Article 36.
56 1975 Statute, Article 41. With respect to this obligation the Court embarked on an examination of a variety of issues, such as EIAs, the siting of the two mill, the consultation of affected populations, the production technology used air pollution, biodiversity and what was the impact of the various discharges (e.g. dissolved oxygen, phosphorus, phenolic substances, nonylphenols, dioxins and furans) on the quality of the waters of the river.
58 Pulp Mills case, para. 164.
60 Ibid., para. 26.
Firstly, when examining whether Uruguay had violated its obligation to prevent pollution, the Court turned its attention to the notion of EIAs and explicitly acknowledged that:

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.

What this amounts to is an *expressis verbis* acknowledgement, within the text of an ICJ judgment, that the duty to undertake an EIA when there is a risk of pollution with transboundary elements has achieved customary international law status. The Court, further, observes that general international law does not specify the exact scope and content of an EIA. EIA would, thus, be generic terms that may evolve in time and whose content will depend on each case. Nevertheless, the fact remains that the obligation to undertake EIAs has been explicitly acknowledged as customary international law, which is a landmark point for the field of international environmental law.

The second element, which sparked several comments in the Opinions of the judges, was not so much the eventual finding of the Court, but rather the way in which it had arrived at it. Both parties to the dispute had “placed before the Court a vast amount of factual and scientific material”. Some of these reports were prepared by experts, who, nevertheless, appeared in front of the Court not in that capacity but as counsel for one of the parties to the dispute. What this meant was that such experts could not be cross-examined by the other party or be questioned by the Court, a fact which the Court considered important enough to mention into the corpus of the judgment:

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.

Nevertheless and despite the above criticism to the practice of the parties to the dispute the ICJ decided to make its own determination of the facts of the case, based only on the evidence presented to it. It is at this point that many of the judges felt that the Court missed a great opportunity to demonstrate its capability to tackle any and all future cases of a highly

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61 1975 Statute, Article 41.
62 *Pulp Mills* case, para. 204 (emphasis added).
63 Ibid., para. 205.
64 Ibid., para. 165.
65 Ibid., para. 167.
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technical and complex nature, be they environmental or not. Article 50 of the ICJ Statute provides that:

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

The Court and its predecessor (the PCIJ) have made use of this option in four cases: Factory at Chorzów,66 Corfu Channel (Merits),67 Corfu Channel (Assessment of Amount of Compensation)68 and Gulf of Maine.69 Judge Keith felt that the ICJ would not have drawn any assistance of importance from consulting experts70 and Judge Cançado Trindade considered that any response to the question of whether the Court would have ultimately benefited from such an action would be conjectural and therefore had no place in the judgment or his opinion.71 Nevertheless, they all agreed that it was a pity that the option had been passed over. In addition to that Judge Yusufu rightly pointed out that although the judge may consult experts “[it would be] absurd to think that the judge has delegated his responsibility to the expert”.72 Consequently,

…although experts may assist the Court to develop a finer grasp of the scientific and technical details of factual issues arising in the case, it always remains the ultimate responsibility of the judge to decide on the relevance and significance of those facts to the adjudication of the dispute.73

Finally, Judges Al-Khasawneh and Simma felt that apart from the reasons mentioned supra the Court might have benefited from an activation of the process provided for in Article 50 of the ICJ Statute for an additional reason. A use of the process envisaged in Article 50 would have put to rest the concerns expressed regarding the practice of ICJ judges being advised by

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66 Case Concerning the Factory at Chorzów (Germany v. Poland), Judgment on Claim for Indemnity, Merits of 13 September 1928, PCIJ Series A, No.17, 3, at 99.
68 Corfu Channel (United Kingdom v. Albania), Judgment on Assessment of Amount of Compensation of 15 December 1949, ICJ Rep. 1949, 244.
69 Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Appointment of Expert, Order of 30 March 1984, ICJ Rep. 1984,165. In more detail on these cases see Pulp Mills case, Separate Opinion of Judge Keith, paras. 9-11; Joint Dissenting Opinion of Judge ad hoc Vinuesa, paras. 93-5; Separate Opinion of Judge Cançado Trindade, paras. 149-51; Declaration of Judge Yusuf, paras. 1-14; Dissenting Opinion of Judges Al-Khasawneh and Simma, paras. 2-17. In this last Joint Dissenting Opinion Judges Al-Khasawneh and Simma offer examples of international courts and tribunals other than the ICJ using experts for fact-finding purposes; Ibid., paras. 15-6.
70 Pulp Mills case, Separate Opinion of Judge Keith, para. 11.
71 Pulp Mills case, Separate Opinion of Judge Cançado Trindade, para. 151.
73 Pulp Mills case, Declaration of Judge Yusuf, para. 12.
so-called ‘phantom experts’. Citing statements by Sir Robert Jennings and Philippe Couvreur, who acknowledged the use of such experts in cases brought before the ICJ, Judges Al-Khasawneh and Simma felt that an application of Article 50, especially in cases of such a high level of complexity, would put a stop to such a practice and would, thus, better serve the need for transparency, openness and procedural fairness.

IV. Concluding Remarks

The Pulp Mills case was the latest in an ever increasing line of environmental disputes that find their way to international courts and tribunals and even the ICJ. As is characteristic of disputes emanating from this field of international law, it was characterized by a high level of complexity and an astounding volume of available information. Despite these difficulties and regardless of the various criticisms as to the failure of the court to take full advantage of all the options offered by its own Statute (such as Article 50), Pulp Mills can, nevertheless, stake a claim to jurisprudential fame due to its unequivocal recognition of the customary status of the requirement to undertake Environmental Impact Assessments whenever there is risk of pollution which may have transboundary effects. In both these cases i.e. the clarification of the notion of EIA and the use of the process of Article 50 of the Statute, it remains to be seen in which direction the Court will proceed.