

Boston College International and Comparative Law Review

Volume 34

Issue 3 *Volume 34 E. Supp.*

Article 6

2-1-2011

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Recommended Citation

Michael J. McDermott, *International Environmental Disputes and the Need for Court-Commissioned Independent Experts*, 34 B.C. Int'l & Comp. L. Rev. E. Supp. 67 (2011), <http://lawdigitalcommons.bc.edu/iclr/vol34/iss3/6>

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INTERNATIONAL ENVIRONMENTAL DISPUTES AND THE NEED FOR COURT-COMMISSIONED INDEPENDENT EXPERTS

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Abstract: In complex environmental disputes the International Court of Justice should utilize its investigatory powers to identify long-term environmental impacts before reaching legal conclusions. *Pulp Mills on the River Uruguay* highlights the ICJ's current reluctance to utilize its investigatory powers—instead, the court relies on the parties' contentious scientific submissions and fails to verify all potential environmental harms. In so doing, the court fails to conform to the international principle of sustainable development. This Comment identifies the Rules of Court and past cases that demonstrate that justices have the power to question expert witnesses and request independent investigation when evaluating questionable or incomplete scientific evidence. Additionally, this Comment argues that such ICJ-ordered independent investigations will bolster growing international support for the principle of sustainable development.

INTRODUCTION

On May 4, 2006, the Argentine Republic applied to the International Court of Justice (ICJ) claiming the Eastern Republic of Uruguay violated procedures required by a 1975 bilateral agreement (Statute) when it authorized the construction of two pulp mills on the River Uruguay.¹ The case is the second environmental dispute at the ICJ and highlights a need for the ICJ to examine its mechanisms for substantiating scientific evidence that is clearly prejudiced and disputed.² In this case, the ICJ ultimately held Uruguay liable for violating the Statute, but nevertheless refused to grant Argentina any remedy; the majority

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¹ *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, ¶ 67 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

² See *id.* ¶¶ 166–168; Clodagh Boyle, *Uruguay Prevails over Argentina in International Court of Justice in Landmark Environmental Dispute*, FOLEY HOAG (Apr. 20, 2010), http://www.foleyhoag.com/NewsCenter/PressCenter/2010/04/21/Foley_Hoag_Uruguay_Prevails.aspx.

determined that because of discrepancies in the scientific evidence submitted by the parties, Argentina had failed to prove that Uruguay's actions negatively impacted the river.³

This Comment criticizes the ICJ for drawing legal conclusions based on insufficient evidence and it recommends that the ICJ utilize its ability to compel sworn expert testimony and commission independent enquiry to substantiate and analyze disputed data in future complex environmental disputes.⁴

Part I of this Comment provides background information regarding the *Pulp Mill* dispute, including Uruguay's economic motivations and Argentina's Statute-based expectations. Part II reviews the ICJ's analysis and conclusions, focusing on the justices' attempt to examine and understand the diverging and disputed scientific data. Finally, Part III analyzes the ICJ's hesitation to use non-party expert data and explain the benefits of the ICJ's investigatory powers in complex environmental disputes.

I. BACKGROUND

In 1961, Argentina and Uruguay recognized the River Uruguay as their international border and expressed the intent to jointly manage the utilization and biological health of the river's resources.⁵ In 1975, the parties adopted a bilateral statute to establish "joint machinery" allowing "optimum and rational" use of the River Uruguay.⁶ The present dispute arose because Uruguay operated independently as it began to authorize construction of two pulp mill processing plants.⁷

In 2003, Uruguay approved Spanish company ENCE's plans to construct a mill near the city of Fray Bentos.⁸ Then, in February of 2005, it granted a Finnish company, Oy Metsä-Botina AB, permission to

³ See *Pulp Mills on the River Uruguay*, Judgment, ¶¶ 275–280.

⁴ See generally Rules of Court, arts. 50, 62, 67, 1978 I.C.J. Acts & Docs. 91, 123, 129, 131.

⁵ See Treaty Concerning the Boundary Constituted by the River Uruguay, Arg.-Uru., Apr. 7, 1961, 635 U.N.T.S. 98, 104–06 [hereinafter Treaty]; *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, ¶ 26 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

⁶ Statute of the River Uruguay, Arg.-Uru., Feb. 26, 1975, 1295 U.N.T.S. 340, 340.

⁷ *Pulp Mills on the River Uruguay*, Judgment, ¶¶ 106, 107.

⁸ *Pulp Mills on the River Uruguay*, Order of 13 July 2006, 2006 I.C.J. 113, ¶ 5. ENCE halted the construction of its mill in October, 2006, officially citing physical problems with the location of the mill, but it is thought that ENCE wanted to avoid the growing public protests and Argentina's opposition to the mills. Chris Lang, *ENCE Cancels Pulp Mill in Uruguay*, PULP INC. (Oct. 2, 2006), <http://pulpinc.wordpress.com/2006/10/02/ence-cancels-pulp-mill-in-uruguay/>.

construct a mill and a private port, known as the Botina Mill, in the same area.⁹

Argentina first raised concerns about the Botina Mill in June 2005 and requested a halt in construction until the two nations and the Statute's bi-national oversight organization—the Administrative Commission of the River Uruguay (CARU)—could determine the environmental impact of the project.¹⁰ Uruguay, however, continued to move towards final project approval, despite Argentina's objections and ongoing negotiations.¹¹ During this time period, locals began to grow increasingly concerned with the environmental impact of the pulp mill and organized intermittent, but large, protests throughout 2006 and 2007.¹²

Uruguay's economic motivations for the project included the potential for foreign investment, exemplified by the International Finance Corporation's (IFC) investment of \$170 million in the project.¹³ The IFC stated that the Botina mill, as Uruguay's largest foreign investment project in history, would have "economic, environmental, and social benefits" by creating thousands of local jobs, providing cleaner energy resources, and treating wastewater.¹⁴ The IFC acknowledged that Argentina was concerned with environmental harms, but emphasized that the IFC's own environmental impact study had concluded that the mill provided an optimal use of the river with insignificant negative environmental impact.¹⁵

Due to Uruguay's independent authorizations and failure to communicate sufficient scientific and project information, CARU was unable to complete a preliminary environmental impact assessment and bilateral talks failed.¹⁶ After these Statute-based mechanisms failed, Argentina took the dispute to the ICJ.¹⁷ Argentina argued that Uruguay violated the Statute by failing to follow the requisite notification and

⁹ See *Pulp Mills on the River Uruguay*, 2006 I.C.J. ¶ 6.

¹⁰ See *Pulp Mills on the River Uruguay*, Judgment, ¶¶ 41, 42.

¹¹ See *id.* ¶ 42.

¹² See *Pulp Mills on the River Uruguay*, Order of 23 Jan. 2007, ¶ 8 (Jan. 23, 2007), available at <http://www.icj-cij.org/docket/files/135/13615.pdf>. Large protests blocked international bridges, allegedly costing Uruguay hundreds of millions of dollars in trade and tourism. See *id.*

¹³ See Press Release, International Finance Corporation, IFC and MIGA Board Approves Orion Pulp Mill in Uruguay: 2,500 Jobs to be Created, No Environmental Harm (Nov. 21, 2006), available at <http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=F76F15A5FE7735918525722D0058F472>.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 97.

¹⁷ See *id.* ¶ 82.

environmental impact research procedures.¹⁸ It also argued that the pulp mill violated substantive environmental standards expressed in both the Statute and other international treaties.¹⁹ In contrast, Uruguay argued that the Statute simply provided an optional mechanism to assist cooperation, which was unnecessary because the countries had initiated bilateral negotiations pursuant to other agreements.²⁰ Uruguay maintains that the pulp mill does not violate any substantive environmental obligations, as the IFC's and their own research does not indicate negative environmental impacts.²¹

II. DISCUSSION

In 2010, the ICJ held that Uruguay violated the Statute's procedural obligations.²² However, the court did not require Uruguay to pay compensation or close the pulp mill because Argentina failed to prove a violation of the Statute's substantive obligations to protect the river environment and biological organisms.²³

A. Treaty History and Scope

The obligations between Uruguay and Argentina were first articulated in a 1961 bilateral treaty recognizing that the River Uruguay formed the shared border between the two countries, and expressing general principles of cooperation for the utilization and protection of the river's resources.²⁴ The agreement declared the nations' intent to develop a regime that covers, among other things, the "conservation of living resources" and to prevent water pollution.²⁵ This regime was formalized by the Statute in 1975, which established joint machinery for the optimum and rational use of the river in observance of the parties' rights and obligations arising from the Statute and other international treaties and agreements.²⁶

The Statute also established procedural mechanisms requiring environmental impact studies, environmental monitoring and bi-party

¹⁸ *See id.*

¹⁹ *See id.* ¶ 56.

²⁰ *See id.* ¶¶ 84, 125.

²¹ *See Pulp Mills on the River Uruguay*, 2006 I.C.J. ¶¶ 44, 45.

²² *See Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, ¶¶ 275–280 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

²³ *See id.* ¶ 276.

²⁴ Treaty, *supra* note 5.

²⁵ *Id.* arts. 1, 7(e), 7(f).

²⁶ Statute of the River Uruguay, Arg.-Uru., Feb. 26, 1975, 1295 U.N.T.S. 340, 340.

communication through the bi-national CARU, and also outlined substantive river utilization and environmental obligations.²⁷ With regard to the present dispute, the parties have interpreted the Statute differently, with Uruguay arguing that it limits the court's examination to only those claims concerning the pulp mill's impact on the quality and biological organisms of the river.²⁸ Argentina reads the Statute to include general principles of international environmental law, allowing evaluation of the mill's impact on air quality, vistas, and sound.²⁹

In the instant case the ICJ dismissed air, noise, and visual pollution claims because such claims would not have been evaluated by CARU; however, the court recognized that both the ICJ and CARU could consider the international principle of sustainable development.³⁰ The Statute and CARU were established to oversee environmental and utilization issues related to "any change in the ecological balance and to control pests and other harmful factors in the river," limiting CARU's and the ICJ's parallel jurisdiction to disputes regarding the environmental impact of new river uses.³¹

B. Procedural Obligations

The justices were in general agreement that Uruguay had violated the Statute's procedural obligations.³² The ICJ held that the Statute required Uruguay to notify CARU at the initial planning stage of the pulp mill projects so that CARU could have the opportunity to make its preliminary environmental impact determination.³³ Uruguay's "initial environmental authorizations" for each of the mills failed to comply with the Statute because CARU was notified only after Uruguay gave its own national authorization for the projects.³⁴ Additionally, the information Uruguay finally submitted to CARU was considered inadequate as it was only a summary of the environmental impact assessment for the never-completed ENCE mill, and it failed to address the Botina project.³⁵

Because CARU could not make a preliminary environmental impact determination, Uruguay was then obligated to initiate a 180-day

²⁷ See *Pulp Mills on the River Uruguay*, Judgment, ¶¶ 90, 91.

²⁸ See *id.* ¶ 49.

²⁹ *Id.* ¶ 50.

³⁰ See *id.* ¶ 52.

³¹ *Id.*

³² See *id.* ¶ 282.

³³ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 104.

³⁴ *Id.* at ¶ 111.

³⁵ See *id.* ¶ 106.

negotiation period with Argentina.³⁶ Uruguay claimed that the requirement was met by the parties that created the “High-Level Technical Group” (GTAN), which exchanged information and studied the effects of the pulp mills.³⁷ The ICJ disagreed, holding that the GTAN meetings did not replace the Statute’s procedures and that any dialogue between the nations, including GTAN, was frustrated by Uruguay’s final authorization of the construction and operation of the Botina Mill.³⁸

C. Substantive Obligations

Article 40 of the Statute obligates the parties to prevent the “direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects.”³⁹ CARU, acting in its rule-making and monitoring capacities, defined “harmful effects” as those which alter the water quality in a way that prevents any legitimate use of the water by harming living resources, human health, or water activities.⁴⁰ Additionally, CARU and the individual states are responsible for establishing the environmental and health standards, which includes setting acceptable levels for pollutants.⁴¹

To determine if the mill’s impact undermined the Statute’s purpose or violated bilateral and national standards, the ICJ relied on the data submitted by the parties.⁴² The ICJ used the scientific data to conclude that Uruguay had acted with due diligence to protect the environment and that the mill produced pollutants within the agreed upon levels.⁴³

The ICJ’s examination of Uruguay’s due diligence and the environmental impact of the mill was based only on the data which the ICJ

³⁶ See Statute of the River Uruguay, 1295 U.N.T.S. at 341; *Pulp Mills on the River Uruguay*, Judgment, ¶ 114.

³⁷ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 132 (quoting from a press release issued by both Parties on May 31, 2005).

³⁸ See *id.* ¶¶ 140, 141, 143. The court held that because Uruguay began building the mill during GTAN meetings those negotiations were without purpose. See *id.* Consequently, the ICJ concluded that Uruguay had violated the principle of “good faith” and the Statute’s requirement that the nations “conduct themselves that the negotiations are meaningful” to allow full cooperation. See *id.* ¶¶ 143–146.

³⁹ See *id.* ¶ 198.

⁴⁰ See *id.* ¶¶ 92, 198.

⁴¹ See, e.g., *Pulp Mills on the River Uruguay*, Judgment, ¶ 238 (“[T]here is a CARU standard which sets a minimum level of dissolved oxygen for the river waters (5.6 mg/L).”).

⁴² See *id.* ¶ 265. Additionally, the court recognized that violation of procedural obligations does not necessarily indicate that substantive obligations were breached. See *id.* ¶ 78.

⁴³ See *id.* ¶ 236.

had already recognized as disputed by the parties.⁴⁴ Although the parties questioned the models, data collection and interpretations, the ICJ stated that it would rely principally on that data, which had been submitted by the parties' attorneys rather than experts.⁴⁵ Specifically, based on the data provided, the majority determined that there was no evidence sufficiently proving that the mill caused river levels of dissolved oxygen, phosphorus, phenolic substances, nonylphenols, dioxins, or furans to exceed the levels set by CARU or national legislation.⁴⁶

However, the fourteen-justice court was divided on whether the data allowed the ICJ to reach such a legal conclusion because there was clear disagreement about the evidence submitted and the ability to rely on that data.⁴⁷ The dissenting justices were skeptical of the veracity of the scientific evidence submitted by the parties and believed that the ICJ should have commissioned its own independent experts to verify and investigate the claims of environmental harms.⁴⁸

Argentina claimed that, unlike Uruguay's environmental impact assessment, one conducted with due diligence would have identified alternative sites for the mill and recognized the danger that the river's reverse flow at Fray Bentos can trap pollutants.⁴⁹ Argentina presented three-dimensional modeling, which projected that the effects of reverse flow at Fray Bentos made the site environmentally unsuitable because pollutants would increase in concentration by becoming trapped during the summer months.⁵⁰ Argentina also claimed that Uruguay's data was unconvincing because it had not sampled enough sites and failed to collect data during crucial summer months when there are reverse flows.⁵¹ The majority, however, did not examine the "scientific and technical validity" of Argentina's model and instead assumed that CARU would have recognized, and will continue to monitor, the impact of the river's reverse flow when it sets standards for pollution levels.⁵² When evaluating Uruguay's failure to provide an environmental impact assessment

⁴⁴ See *id.*

⁴⁵ See, e.g., *id.* ¶¶ 212, 231, 236.

⁴⁶ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 237.

⁴⁷ See *id.* ¶ 282; see, e.g., *Pulp Mills on the River Uruguay*, Judgment, ¶ 2 (Al-Khasawneh, J., & Simma, J., dissenting), available at <http://www.icj-cij.org/docket/files/135/15879.pdf>.

⁴⁸ See, e.g., *Pulp Mills on the River Uruguay*, Judgment, ¶ 4 (Al-Khasawneh, J., & Simma, J., dissenting).

⁴⁹ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 212.

⁵⁰ See *id.*

⁵¹ See Anna Petherick, *Science Panel Gives Hope in River-Pollution Dispute*, 466 NATURE 911, 911 (Aug. 19, 2010).

⁵² See *Pulp Mills on the River Uruguay*, Judgment, ¶ 213.

listing alternative sites, the majority refused to analyze technical data and simply set the question aside for CARU to monitor further.⁵³

Additionally, Argentina claimed that the pulp mill caused the river's dissolved oxygen levels to fall below allowed levels.⁵⁴ Uruguay responded that Argentina failed to sufficiently prove its claim because Argentina's data measured "demand for oxygen" instead of the actual levels of "dissolved oxygen."⁵⁵ The ICJ acknowledged this discrepancy and decided to ignore Argentina's data, relying only on research funded by the project's international funding agency, the IFC, which indicated that the dissolved oxygen levels met CARU's standards.⁵⁶ Rather than taking the initiative to evaluate the discrepancy in Argentina's data, the ICJ relied on data obtained by a self-interested non-state actor, and then concluded that Argentina had failed to provide sufficient evidence.⁵⁷

Similarly, the ICJ dismissed Argentina's claim that the mill caused an algal bloom simply because Argentina was unable to rebut Uruguay's unsubstantiated alternative hypothesis—the actual cause of the algal bloom remains unproven.⁵⁸ Argentina argued that a spike in compounds dispersed by the mill altered the ecological balance of the river, thus causing the algal bloom and therefore violating CARU's requirement of preserving the river's ecological balance.⁵⁹ Rather than directly rebut Argentina's evidence, Uruguay responded with a hypothesis that upstream activities were equally responsible for the algal bloom.⁶⁰ The ICJ, unable to qualify either hypothesis, left the question unanswered and held that Argentina had not satisfactorily established that the mill was the sole cause of the algal bloom.⁶¹ Consequently, on three separate legal conclusions regarding the mill's environmental impact, the ICJ's inability to factually ascertain the veracity of each parties' data resulted in the majority holding that the mill could continue to operate because it had not harmed the environment.⁶²

⁵³ See *id.* ¶ 214.

⁵⁴ See *id.* ¶ 238.

⁵⁵ See *id.*

⁵⁶ See *id.* ¶ 239.

⁵⁷ See *id.*

⁵⁸ See *Pulp Mills on the River Uruguay*, Judgment, ¶¶ 248–250.

⁵⁹ See *id.* ¶¶ 201, 248–250.

⁶⁰ See *id.* ¶ 249.

⁶¹ See *id.* ¶ 250.

⁶² See, e.g., *id.* ¶¶ 213, 239, 250.

III. ANALYSIS

In this dispute, despite rampant allegations that the data had been twisted and misconstrued to suit each government's agenda, the ICJ relied only on the data submitted by the parties.⁶³ The majority indicated that the data submitted by the parties was unreliable because it was submitted for advocacy purposes, rather than as expert testimony, but stated that the justices were still capable of drawing conclusions from this data.⁶⁴ It was also noted that the ICJ would not entertain any discussion of the merits and reliability of the submissions and would rely solely on the parties' scientific data, because reliance on the "factual information submitted" has been a long-standing practice of the ICJ.⁶⁵

A. *Unsubstantiated Data Requires Additional Expert Analysis*

While it is common for the ICJ to rely on parties' submissions, the ICJ has the power to commission experts to provide additional enquiry and opinions or to substantiate a party's claims.⁶⁶ Two separate articles in the Rules of Court provide mechanisms for the ICJ to call witnesses, commission expert testimony, and take steps necessary to clarify any information relevant to the dispute.⁶⁷ Article 62 gives the ICJ the power to call witnesses, to require parties to produce evidence or provide further explanation, and allows the court to seek other information on its own accord.⁶⁸ The Rules of Court require that experts called to give their opinion under Article 62 must swear to the truth and sincerity of their statements, and that they will have their opinions questioned by the justices and examined by all parties.⁶⁹ These truth and transparency requirements are not imposed on data submitted by attorneys as part of their written or oral persuasive argument.⁷⁰

⁶³ See *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, ¶ 166 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>; Petherick, *supra* note 51.

⁶⁴ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 167.

⁶⁵ *Id.* ¶ 168.

⁶⁶ See *Pulp Mills on the River Uruguay*, Judgment, ¶¶ 5–8 (Al-Khasawneh, J., & Simma, J., dissenting), available at <http://www.icj-cij.org/docket/files/135/15879.pdf>.

⁶⁷ See Rules of Court, *supra* note 4, arts. 62, 67.

⁶⁸ See *id.* art. 62.

⁶⁹ See *id.*

⁷⁰ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 7 (Al-Khasawneh, J., & Simma, J., dissenting). This is not to say that data provided by parties' counsel can be untruthful, as submissions must be certified and provide factual information, but it is to indicate that the Rules apply less rigor to the parties' submissions as they are seen as part of the parties' arguments and will be scrutinized through the litigation process. See, e.g., Rules of Court, *supra* note 4, art. 58.

Additionally, the ICJ can utilize Article 50 to entrust nonparties to carry out an independent enquiry and give expert opinion to clarify relevant issues.⁷¹ Such independent expert opinions supplement the justices with the scientific and technical knowledge that they lack professionally.⁷² Despite the majority's insinuation that such practices are uncommon, the ICJ has previously commissioned independent external opinions to examine technical matters and substantiate a party's "fact"-based claims.⁷³

The Article 50 mechanism was first utilized by the Permanent Court of International Justice in *Chorzow Factory* when the court commissioned an expert to assist in calculating appropriate damages.⁷⁴ On their own, the justices were unable to infer from the parties' submissions what effects the one party's breach of the agreement had on market prices, and therefore they presented that question to an expert.⁷⁵ Additionally, the I.C.J. has commissioned experts to substantiate one party's claims and also upon direct request of the parties.⁷⁶

In the *Corfu Channel* dispute, regarding hostilities between the British Royal Navy and Albania in 1946, the court ordered naval experts from three non-party nations to independently investigate the facts, including confidential military information, and provide the court with a "precise and concrete" opinion regarding weather conditions, visibility, and the Royal Navy's knowledge of Albania's land-mining activities.⁷⁷ The court found it necessary to obtain an expert opinion because the parties contested whether the anchored automatic maritime mines caused the damage to the Royal Navy, whether the Albanian Government actually knew of the location of the mines, whether the Royal Navy's presence in those waters was lawful, and whether Albanian

⁷¹ See Rules of Court, *supra* note 4, art. 50.

⁷² See *Pulp Mills on the River Uruguay*, Judgment, ¶¶ 11, 12 (Al-Khasawneh, J., & Simma, J., dissenting).

⁷³ See, e.g., *Delimitation of Maritime Boundary in Gulf of Maine Area (Gulf of Maine)*, Order of 30 Mar. 1984, 1984 I.C.J. 165, ¶ 3; *Corfu Channel*, Order of 17 Dec. 1948, 1947–1948 I.C.J. 124, ¶ 1.

⁷⁴ See *The Factory at Chorzow*, Order of 13 Sept. 1928, 1928 P.C.I.J. (ser. A) No. 17, 99, 100–01.

⁷⁵ See *id.* The expert findings were never presented to the court or relied on by the justices because the parties settled. See *Factory at Chorzow*, Order of 25 May 1929, 1929 P.C.I.J. (ser. A) No. 19, 10, 13, 15.

⁷⁶ See, e.g., *Gulf of Maine*, 1984 I.C.J. 165, ¶ 3; *Corfu Channel*, 1947–1948 I.C.J. 124, ¶ 1. In *Gulf of Maine*, the court was required to commission an expert to assist in the determination of the maritime boundary dividing the fisheries zones of Canada and the United States of America by a special agreement between the parties. *Gulf of Maine*, 1984 I.C.J. 165, ¶ 3.

⁷⁷ See *Corfu Channel*, 1947–1948 I.C.J. 124, ¶ 1.

agents could have actually seen the ships approach the mines in enough time to warn the Royal Navy of the minefield.⁷⁸ In establishing the facts of the case, the court repeatedly relied on the expert opinion and noted such expert opinion provided technical information “that might guide [the court] in its search for the truth,” as the experts were able to provide “correct and impartial information” after examining the data and visiting the relevant locations.⁷⁹

In the *Pulp Mill* dispute, the judges drew conclusions from the technical environmental data provided by the parties, but the majority opinion and dissenting opinions diverged on their legal conclusions because of their inconsistent reliance on the data.⁸⁰ Judge Vinuesa, in his dissenting opinion, questioned the court’s ability “to draw solid and justified conclusions of law” from disputed data that contained numerous factual discrepancies.⁸¹ For example, Judge Vinuesa drew different conclusions, from the same data, disagreeing with the majority by concluding that Argentina’s “extensive data,” including satellite imagery, provided clear evidence that the mill contributed to the 2009 algal blooms.⁸²

Consequently, the *Pulp Mill* case is analogous to *Corfu Channel* because both are disputes requiring legal conclusions to be drawn from complex and technical facts that are beyond the justices’ professional competencies.⁸³ Because *Corfu Channel* shows that the ICJ can commission expert enquiry when essential facts are in dispute, the justices in *Pulp Mill* had a mechanism available to verify the complex facts.⁸⁴ Thus, the ICJ should have clarified and substantiated the parties’ data, as it did in *Corfu Channel*, before making environmental and legal conclusions on the admittedly deficient data.⁸⁵

B. “Sustainable Development” Demands Stronger Scientific Analysis

The use of independent expert enquiry would have allowed the ICJ to truly capture the essence of sustainable development in its deci-

⁷⁸ See *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 9–10, 13.

⁷⁹ See *id.* at 20, 21.

⁸⁰ Compare *Pulp Mills on the River Uruguay*, Judgment, ¶ 243, with *Pulp Mills on the River Uruguay*, Judgment, ¶ 69 (Vinuesa, J., dissenting), available at <http://www.icj-cij.org/docket/files/135/15893.pdf>.

⁸¹ *Pulp Mills on the River Uruguay*, Judgment, ¶ 68 (Vinuesa, J., dissenting).

⁸² *Id.* ¶ 80.

⁸³ See, e.g., *Corfu Channel*, Judgment, 1949 I.C.J. at 20 (inferring that the experts provided technical information that the justices could not have provided).

⁸⁴ See, e.g., *id.* at 14.

⁸⁵ See *Corfu Channel*, 1947–1948 I.C.J. 124, ¶ 1.

sion. The majority stated that because the Statute seeks optimum and rational utilization of the river, the parties had recognized that the agreement addressed both environmental concerns and national economic development goals.⁸⁶ Such an interpretation explains the ICJ's belief that the procedural obligations and CARU promote *sustainable development*, requiring the parties to protect both environmental and economic rights.⁸⁷ According to the majority, such balancing of economic and environmental rights is the "essence of sustainable development," which is a principle that has previously influenced the ICJ.⁸⁸ In this case, however, the majority's definition does not include all internationally accepted elements of "sustainable development" as the majority fails to recognize the rights and protection of both present and future generations.⁸⁹

Generally, the international community defines sustainable development as more than just a balancing of environmental and economic needs, and includes the belief that sustainable development must recognize and protect future generations.⁹⁰ Under that definition, there is an emphasis on identifying the impact of future environmental harms, which would require the ICJ to examine not just historical and current data, but also future projections.⁹¹

In *Gabcikovo-Nagymaros Project*, the ICJ balanced the parties' environmental and economic objectives as just one means for incorporating the principle of sustainable development into their judgment.⁹² In that case, the ICJ was asked to decide whether environmental and ecological harms excused Hungary from refusing to complete a hydroelectric project on the parties' border, the River Danube, in violation of a bilateral agreement.⁹³ The ICJ recognized, in *Gabcikovo-Nagymaros Project*, that sustainable development requires examination of the effects

⁸⁶ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 175.

⁸⁷ See *Pulp Mills on the River Uruguay*, Order of 13 July 2006, 2006 I.C.J. 113, ¶ 80. This also may explain why Uruguay's second claim, in its "counter-memorial," argued that any court order to dismantle the Botina Mill would "harm . . . the Uruguay economy in terms of lost jobs and revenue." See *Pulp Mills on the River Uruguay*, Judgment, ¶ 22.

⁸⁸ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 177.

⁸⁹ See *id.* ¶ 265.

⁹⁰ See, e.g., United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*].

⁹¹ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 141 (Cancado Trindade, J., dissenting), available at <http://www.icj-cij.org/docket/files/135/15885.pdf>.

⁹² See *Gabcikovo-Nagymaros Project* (Hun. v. Slov.), Judgment of 25 Sept. 1997, 1997 I.C.J. 7, ¶ 140.

⁹³ See *id.* ¶ 33, ¶¶ 143–146.

on the quality of life and health of both present and future generations as it attempts to resolve the tension between the parties' environmental and economic priorities.⁹⁴

In *Pulp Mill*, Justice Weeramantry's separate opinion further explains the principle of sustainable development as a part of customary international law.⁹⁵ He recommends that the ICJ incorporate sustainable development into their judgment by balancing economic and environmental harms, looking beyond static historical data and giving weight to the future environmental impacts on humanity.⁹⁶ Further, in *Gabcikovo-Nagymaros Project*, both parties recognized that the principle of sustainable development was applicable to their dispute and looked to international sources to define the term, including the Rio Declaration on the Environment and Development.⁹⁷ The Rio Declaration was also cited by Argentina, in the *Pulp Mill* dispute, as an international statement expressing the parties' obligation to protect the environment.⁹⁸ The Declaration, which affirms the U.N. member states' commitment to balancing economic and environmental goals, expresses that sustainable development requires balancing "developmental and environmental needs of present and future generations."⁹⁹

In the present case, the majority incorrectly claimed that it captured the "essence" of sustainable development, failing to incorporate any discussion of impact on future generations into its decision.¹⁰⁰ The majority drew legal conclusions from historical data and did not indicate whether they had evaluated whether the parties' environmental impact assessments examined future environmental impacts.¹⁰¹ Therefore, because the majority did not determine the impact on future generations it failed to fully uphold the principle of sustainable development.¹⁰² However, had the ICJ sincerely attempted to reach legal

⁹⁴ See *id.* ¶ 53.

⁹⁵ See *Gabcikovo-Nagymaros Project*, Judgment, 1997 I.C.J. at 7, 88, 103–04 (separate opinion of Vice Pres. Weeramantry).

⁹⁶ See *id.* at 114, 118 (urging the court not to uphold an obviously harmful environmental practice just because a twenty-year-old treaty allowed such practices).

⁹⁷ *Id.* at 90.

⁹⁸ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 106 (Cancado Trindade, J., dissenting).

⁹⁹ *Rio Declaration*, *supra* note 90, arts. 1, 3, 16.

¹⁰⁰ See *Pulp Mills on the River Uruguay*, Judgment, ¶ 177.

¹⁰¹ See, e.g., *id.* ¶¶ 239, 250 (examining dissolved oxygen and phosphates).

¹⁰² Compare *Gabcikovo-Nagymaros Project*, Judgment, 1997 I.C.J. 7, ¶ 53 (acknowledging that safeguarding ecological balance is an essential interest of all States with significance for present and future generations), with *Pulp Mills on the River Uruguay*, Judgment ¶¶ 239,

conclusions that captured the essence of sustainable development it would have used Article 50 to commission an independent enquiry and asked the experts to analyze the mill's impact on future generations.¹⁰³

CONCLUSION

Pulp Mills on the River Uruguay identifies current systemic weaknesses in the ICJ's approach to complex environmental disputes. For the ICJ to reach reliable legal conclusions it cannot simply draw conclusions only from the attorneys' submissions and unsubstantiated, contradictory data. If the ICJ truly sought to provide a conclusive determination of the actual and future environmental impact of the Botina Mill, with due regard to Uruguay's substantive obligations, then the court should have used its power to request additional expert testimony from the parties or commissioned independent expert enquiry. These additional submissions would have substantiated some of the parties' submissions and verified the data from which the ICJ could best draw legal conclusions. Additionally, the ICJ could have directed experts to analyze the long-term impacts of the mill in light of the principle of sustainable development. Instead, the ICJ reached its legal determination—allowing the mill to continue to operate—without ensuring protection of the “quality of life of both present and future generations.”

250 (examining only past dissolved oxygen and phosphate levels without discussing future long-term impacts).

¹⁰³ See Rules of Court, *supra* note 4, arts. 62, 67.