

Adjudicating Conflicts Over Resources:

The ICJ's Treatment of Technical Evidence in the Pulp Mills Case

Juan Guillermo Sandoval Coustasse & Emily Sweeney-
Samuelson*

Table of Contents

A. Introduction	450
B. History of the Conflict	451
C. The International Court of Justice's Treatment of Scientific and Technical Evidence	454
I. The Court's Options under its Statute	455
1. The ICJ Chamber for Environmental Matters	455
2. Article 50 Experts	456
II. ICJ Treatment of Complex Scientific Evidence Prior to the Pulp Mills Case	457
III. The Court's Treatment of Complex Evidence in the Pulp Mills Case..	459
IV. Treatment of Scientific or Technical Evidence in Other International Tribunals	462

* Authors Emily Sweeney-Samuelson and Juan Guillermo Sandoval Coustasse are 2011 *Juris Doctor* candidates at Georgetown University Law Center. Mr. Sandoval Coustasse (LL.B., Universidad de Chile, 2005) will be joining the Washington, D.C. office of Chadbourne & Parke LLP in September 2011 as an associate attorney. The authors would like to thank our friends Paz Zarate, for her encouragement in writing this paper, and Takao Yamada, for his invaluable editorial input.

D. The Case for Greater ICJ Engagement with Scientific and Technical Evidence.....	464
I. The Specter of Fragmentation in International Environmental Dispute Resolution	464
II. Extreme Proposals to Improve IEL Dispute Resolution: A World Environmental Court and an ICJ Scientific Advisory Body.....	465
III. The Benefits of Greater Transparency in Adjudicating Conflicts Over Resources	467
E. Conclusion	469

Abstract

Conflicts over resources and the consequences of utilizing those resources can ignite social and political demonstrations, especially when the conflict is over a shared resource. Solving those conflicts requires both an institution and a procedure that are not just binding but also legitimate in the eyes of the constituencies. An important aspect of a legitimate procedure is that it correctly establishes the facts.

The International Court of Justice is successful in many ways, but it has fallen short in complex fact-finding on occasion, as scholars have noted. The recent *Case Concerning Pulp Mills on the River Uruguay* is an example of this shortfall. The case involved concerns over the environmental consequences of installing two pulp mills on the Uruguayan shore of the river that separates Argentina from Uruguay. A controversial point of the decision, as highlighted by the separate opinions of various judges, is how the Court established the facts of the case; in particular, the role of experts. The separate opinions raised fundamental questions as to the fitness, capacity and even will of the Court to decide a controversy based on complex evidence.

The criticism points to an evident risk: The Court might not be properly equipped to solve disputes that require deeper technical analysis. However, should it refrain from deciding such disputes, the authoritative status of the Court may be threatened. As a result, a disruption in the evolution of international law could occur. The ICJ is the preeminent contributor to international jurisprudence, and the interplay of several specialized tribunals, for instance, could result in inconsistent decisions on the same principles and forum shopping.

To lessen these risks, an effort towards transparency and legitimacy is needed. In particular, international conflicts over shared resources, as in the *Pulp Mills* case, or over actions of a State affecting resources located in another, can have serious domestic ramifications and affect the global environment. Transparency in the handling of evidence can promote legitimacy for the Court as a venue for these types of disputes, and for governments when facing domestic enforcement of an ICJ decision.

A. Introduction

Conflicts over resources and the consequences of utilizing those resources can ignite social and political demonstrations, especially when the conflict is over a shared resource. Solving those conflicts requires both an institution and a procedure that are not just binding but also legitimate in front of the constituencies. An important aspect of a legitimate procedure is that it correctly establishes the facts. This process must achieve transparency and technical adequacy.

The recent *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [*Pulp Mills* case] involved concerns over the environmental consequences of installing two pulp mills on the Uruguayan shore of the river that separates Argentina from Uruguay. These concerns led not only to political and diplomatic activity but also to strong demonstrations including barricading bridges that connect the two countries, with the economic consequences that the blockade of trade routes entails. Pursuant to the conflict resolution clause in a treaty regarding the rights and duties of each country on conservation, utilization and development of the river, the controversy was submitted to the International Court of Justice (ICJ). The Court passed judgment on 20 April 2010.

A controversial point of the decision, as highlighted by different judges in their dissenting and separate opinions and declarations, is how the Court established the facts of the case; in particular, the role of experts. Those judges raised fundamental questions as to the ability of the Court to decide a controversy based on complex evidence. The criticism points to an evident risk: The Court might not be properly equipped to solve disputes that require deeper technical analysis. We submit that the Court can adjudicate these disputes, but that some cases require the Court to solicit expert opinions about complex evidence. We specifically focus on international environmental disputes, which tend to involve such evidence.

Should the Court refrain from facing the challenges posed by addressing scientific and technical evidence, countries might refer these kinds of disputes to other courts or tribunals. This is problematic in the context of international conflicts over resources, because an effort towards uniformity, transparency, and legitimacy is in the interests of states. Conflicts over shared resources, as in the *Pulp Mills* case, or over actions of a State affecting resources located in another, can affect a State's economic viability and its long-term environmental health. A number of judicial fora have jurisdiction over international environmental disputes, and there are no rules of coordination between them. As a result, a variety of interpretations of the same principles could impede the goal of uniformity in international environmental law (IEL).

This paper explores how the ICJ, in the *Pulp Mills* case and others, has shown reluctance to adequately consider complex technical and scientific knowledge, and some of the potential consequences of this tendency. Part B presents the *Pulp Mills* case in its political and economic contexts. Part C first reviews the Court's faculties to call experts according to its statute, then describes how it has used such faculties in prior cases, explores the Court's treatment of technical evidence in the *Pulp Mills* case, and relates how other international adjudicative bodies treat cases that require interpreting complex evidence. Finally, part D discusses potential consequences of the Court's reluctance to use its faculty to appoint experts in such cases: fragmentation of the developing legal field of International Environmental Law, extreme proposals to improve international environmental dispute resolution, and lack of transparency and legitimacy of the Court's judgments in the public eye.

B. History of the Conflict

According to the Treaty on Borderlines in the Uruguay River, signed on April 7, 1961, Argentina and Uruguay share a border that runs down the Uruguay River, as described in Article 1 of the treaty.¹ The treaty provided that the parties would execute a statute to arrange mechanisms for the best and most rational means of joint exploitation of the river.² The Statute, known as the Statute of 1975, regulates, among other matters, the utilization of the water, the preservation, utilization, and exploitation of further natural resources, and pollution.³

After decades of peaceful relations, in 2003 Uruguay authorized a Spanish company to construct and operate a pulp mill on its side of the River Uruguay.⁴ In February of 2005, Uruguay authorized a Finnish company to proceed with a similar project in a nearby area.⁵ These mills were part of the largest capital investment in

¹ 'Treaty on Borderlines in the Uruguay River, Argentina - Uruguay, 7 Apr. 1961' available at <http://www.parlamento.gub.uy/htmlstat/pl/tratados/trat13462.htm> (last visited 14 March 2011), Art. 1.

² *Id.*, Art. 7; 'Statute of the River Uruguay, Argentina - Uruguay, 19 Nov. 1973' available at <http://www.caru.org.uy/publicaciones/publicaciones.html> (last visited 14 March 2011), Art. 1.

³ *Id.*; See also E. J. de Arechaga, 'Argentina v. Uruguay at the International Court of Justice: Pulp Mills on the River Uruguay', 21 *International Law Practicum* (2008), 58.

⁴ B. Spiegel, 'River of Discontent: Argentina and Uruguay Before the International Court of Justice', 14 *Law and Business Review of the Americas* (2008), 797, 797.

⁵ A. Alvarez-Jimenez, 'Inter-State Environmental Disputes, Provisional Measures and the International Court of Justice's Order in the Case Concerning Pulp Mills on the River Uruguay', 25 *Temple Journal of Science, Technology and Environmental Law* (2006), 161, 163, (citing *Request for the Indication of Provisional Measures*, ICJ

Uruguay's history,⁶ expected to increase Uruguay's gross domestic product by two percent and to directly or indirectly create approximately 2,500 new jobs.⁷ The pulp mills were part of Uruguay's attempt to recover from the devastating consequences of the 2001 economic crisis in Argentina.⁸ Argentina's government and citizens, however, were incensed by Uruguay's actions, as the pulp mills discharge effluents into the shared River Uruguay near Argentine population centers, and Uruguay's proposed measures to reduce the environmental impact were perceived as inadequate.⁹

In 2005,¹⁰ over 40,000 citizens of Argentina and members of environmental groups blocked the San Martin Bridge over the river in an attempt to halt construction of the mills.¹¹ After diplomatic efforts to resolve the dispute between the two governments failed,¹² Argentina filed a request for provisional measures with the International Court of Justice in May 2006.¹³ Argentina claimed Uruguay had violated the Statute of 1975 on two grounds. It claimed a violation of Uruguay's obligation to adopt all necessary measures for the optimum and rational utilization of the river, including preserving the environment and preventing pollution. Additionally, Argentina claimed that Uruguay had violated its obligation to provide prior notice of any proposed project that might affect the river in order to allow assessment of any potential harm.¹⁴ Thus, according to Argentina, by

Order (13 July 2006) available at <http://www.icj-cij.org/docket/files/135/11235.pdf?PHPSESSID=8003f66f4687531c17fb12e76c8c494d> (quoting Argentina's arguments in its claim) (last visited 28 April 2011)).

⁶ V. Lee, 'Enforcing the Equator Principles: an NGO's Principled Effort to Stop the Financing of a Paper Pulp Mill in Uruguay', 6 *Northwestern University Journal Of International Human Rights* (2008), 354, 359.

⁷ *Id.* 360; Spiegel, *supra* note 4, 799.

⁸ Lee, *supra* note 6, 359.

⁹ Lee, *supra* note 6, 360.

¹⁰ Buenos Aires Herald 'Pulp Mills Case: a Chronology' (20 April 2010) available at <http://www.buenosairesherald.com/BreakingNews/View/31197> (last visited 14 March 2011).

¹¹ Spiegel, *supra* note 4, 814.

¹² Spiegel, *supra* note 4, 802.

¹³ 'Pulp Mills on the River Uruguay (Argentina v. Uruguay), Application Instituting Proceedings' (4 May 2006) available at <http://www.icj-cij.org/docket/files/135/10779.pdf?PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 20 April 2011).

¹⁴ *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment (20 April 2010) available at <http://www.icj-cij.org/docket/index.php?p1=3&k=88&PHPSESSID=943a133bed0fec9e626e825f8852f259&PHPSESSID=943a133bed0fec9e626e825f8852f259&case=135&code=au&p3=4&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 14 March 2011), para. 22 [*Pulp Mills* judgment].

authorizing the construction and future commissioning of two pulp mills on the River Uruguay, Uruguay should be found liable under international law.¹⁵

Locals on both sides of the river¹⁶ and environmentalists continued their demonstrations in different forms and intensities during the course of the conflict and its judicial developments.¹⁷ During the four years after the Court received the *Pulp Mills* case, there were protests and blockades,¹⁸ a failed attempt to resolve the dispute under the auspices of the King of Spain,¹⁹ and each party's requests for provisional measures were denied.²⁰ Finally, the International Court of Justice

¹⁵ *Id.*, 1, 22.

¹⁶ R. Pierri, 'Uruguay: Pulp Factions: Uruguay's Environmentalists v. Big Paper' (16 January 2006) available at <http://www.corpwatch.org/article.php?id=13111> (last visited 22 April 2011).

¹⁷ See, e.g., L. Vales, 'Una Ciudad que Tiene a su Rio al Frente' (8 January 2006) available at <http://www.pagina12.com.ar/diario/elpais/1-61444-2006-01-08.html> (last visited 22 April 2011); Clarin.com, 'Los Ambientalistas Redoblan la Presion y Cortan Dos de los Pasos a Uruguay' (16 February 2006) available at <http://edant.clarin.com/diario/2006/02/16/um/m-01143037.htm> (last visited 22 April 2011); La Nacion, 'Volvieron a Cortar la Ruta Hacia Uruguay' (5 April 2006) available at http://www.lanacion.com.ar/nota.asp?nota_id=794842 (last visited 22 April 2011); Helsing Sanomat, 'Pulp Mill Dispute Between Argentina and Uruguay Intensifies', (12 April 2006) available at <http://www.hs.fi/english/article/Pulp+mill+dispute+between+Argentina+and+Uruguay+intensifies/1135219507760> (last visited 22 April 2011); La Nacion, 'Gualeguaychu Retomo sus Protestas Contra las Papeleras' (14 July 2006) http://www.lanacion.com.ar/nota.asp?nota_id=823281 (last visited 14 March 2011); D. T. Florotto, 'Nueva Campaña Contra las Papeleras' (7 August 2006) available at http://www.lanacion.com.ar/nota.asp?nota_id=829558 (last visited 22 April 2011); Center for Human Rights and Environment, 'Tens of Thousands March ... Again to Oppose Botnia Pulp Mill' (27 April 2008) available at http://www.cedha.org.ar/en/more_information/tens.php (last visited 22 April 2011).

¹⁸ M. K. Lee, 'The Uruguay Paper Pulp Mill dispute: Highlighting the Growing Importance of NGOs and Public Protest in the Enforcement of International Environmental Law', 7 *Sustainable Development Law & Policy* (2006) 1, 71, 72, (arguing that the "large-scale protests were essential in speeding diplomatic and litigation efforts surrounding the paper mills.").

¹⁹ M. Valente & D. Montero, 'Another Stab at Resolving Pulp Mill Conflict' (17 April 2007) available at <http://ipsnews.net/news.asp?idnews=37384> (last visited 22 April 2011).

²⁰ Alvarez-Jimenez, *supra* note 5, 161; Spiegel, *supra* note 4, 800-813; E. Jimenez de Arechaga, 'Argentina v. Uruguay at the International Court of Justice: Pulp Mills on the River Uruguay', 21 *International Law Practicum* (2008), 58, 60-61.

issued its judgment on 20 April 2010.²¹ Local residents and protesters had gathered overnight to await the public reading of the judgment.²²

Not gathered, but dispersed around the world, the international environmental legal community had also eagerly awaited the decision. The *Pulp Mills* case was recognized as an ideal opportunity for the Court to continue developing and strengthening rules and concepts of international environmental law.²³ It was a moment in which the Court was also expected to demonstrate its capacity to adjudicate this type of conflict. Some scholars were not optimistic on this point; one wrote, “[The Court’s] actions thus far invite doubts about the ICJ’s efficacy in adjudicating transboundary water pollution disputes.”²⁴

C. The International Court of Justice’s Treatment of Scientific and Technical Evidence

The particular challenges associated with understanding and evaluating scientific and technical evidence require the legal system to adopt tools and mechanisms designed to confront and overcome these challenges. In the context of dispute settlement, these challenges require courts to have access to experts and expertise in subjects outside the courts’ core competency. The Statute of the International Court of Justice has two mechanisms designed to address scientific and technical evidence: the capacity to create specialized chambers on particular matters and the capacity to appoint experts. While the Court has yet to receive a case in the Chamber for Environmental Matters, it has previously appointed experts to assist with complex evidence, although not as often as it has been requested to. Other international dispute settlement bodies, most of which were created after the Court, recognize and take advantage of their capacity to engage subject matter experts. This willingness to engage acknowledges that the expertise of the courts is not unlimited, but it supplements and focuses that expertise by relying on other individuals or entities better suited to evaluate scientific data.

²¹ *Pulp Mills* judgment, *supra* note 14.

²² Buenos Aires Herald, ‘ICJ rules Uruguay breached River Treaty; Botnia to Continue Operating for no pollution detected’ (21 April 2010) available at <http://www.buenosairesherald.com/BreakingNews/View/31195> (last visited 14 March 2011).

²³ L. Trevisan, ‘The International Court of Justice’s Treatment of “Sustainable Development” and Implications for Argentina v. Uruguay’, 10 *Sustainable Development Law & Policy* (2009) 1, 40.

²⁴ K. Halloran, ‘Is the International Court of Justice the Right Forum for Transboundary Water Pollution Disputes?’, 10 *Sustainable Development Law & Policy* (2009) 1, 39 (internal citations omitted).

I. The Court's Options under its Statute

The ICJ is not immune to the difficulties of adjudicating environmental disputes in general. There are significant scientific uncertainties in many environmental disputes, and these create evidentiary difficulties that often require input from outside experts.²⁵ The Statute of the Court provides for two mechanisms to aid the Court in its evidentiary determinations. The Court can create chambers to foster a better understanding of certain matters, or simply solicit expert opinions when necessary.

1. The ICJ Chamber for Environmental Matters

The Court recognized the importance and particularity of environmental disputes by creating a permanent Chamber for Environmental Matters in 1993, with seven judges including the ICJ President and the Vice President and five other judges elected periodically.²⁶ This was possible because Article 26(1) of the Statute of the Court allows the creation of chambers for specific categories of cases. Parties are free to refer their cases to this chamber, but none have done so to date.²⁷ If parties continue to bring environmental disputes to the full Court, the Court must be willing to consider the scientific evidence and to base judgments on such evidence when appropriate. As environmental science and technology continues to advance, it may be more difficult to avoid such issues. Scholars have asserted that in future disputes, "the relative merits of the competing scientific views advanced by the parties will likely be a major point to be decided by the tribunal."²⁸ Regardless of whether future cases are referred to the Chamber for Environmental Matters or not, the Court has an excellent tool for evaluating complex scientific or technical evidence in Article 50 of its Statute.

²⁵ See, e.g., L. Savadogo, 'Le Recours des Juridictions Internationales à des Experts', 50 *Annuaire Français de Droit International* (2004), 231.

²⁶ P. H. F. Bekker, 'Practice Before the International Court of Justice', in B. Legum (ed.), *International Litigation Strategies and Practice* (2005), 224, fn. 10.

²⁷ "Under Article 26(1) of the Statute the Court may form one or more chambers of at least three judges to deal with particular categories of cases, such as cases relating to labour, transit, and communication.", A. Riddell & B. Plant, *Evidence Before the International Court of Justice* (2009), 15.

²⁸ J. E. Vinuales, 'Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law', 43 *Vanderbilt Journal of Transnational Law* (2010) 2, 437, 476-478.

2. Article 50 Experts

Article 50 of the Statute of the Court establishes that “[t]he 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”²⁹. The expert opinion can adopt different forms, “be it an investigation, a written report, or oral testimony”³⁰. The procedures by which the Court can exercise this power are regulated in Article 51 of the Statute of the Court and Article 67 of the Rules of the Court, which establish the appointment, process, and publicity considerations to be given to such expert opinions when they have been requested on the Court’s own initiative.³¹

The Court itself and the judges sitting on her bench are not in an adequate position to value, assess and weigh all the complex technical and scientific evidence, particularly of the type and amount presented by the parties in the *Pulp*

²⁹ ‘Statute of the International Court of Justice’ available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 22 April 2011), Art. 50 [ICJ Statute].

³⁰ Riddell & Plant, *supra* note 27, 64.

³¹ ICJ Statute, *supra* note 29, Art. 51: During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

‘Rules of the Court’ (1978) available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 14 March 2011), Art. 67:

1. If the Court considers it necessary to arrange for an enquiry or an expert opinion, it shall, after hearing the parties, issue an order to this effect, defining the subject of the enquiry or expert opinion, stating the number and mode of appointment of the persons to hold the enquiry or of the experts, and laying down the procedure to be followed. Where appropriate, the Court shall require persons appointed to carry out an enquiry, or to give an expert opinion, to make a solemn declaration.

2. Every report or record of an enquiry and every expert opinion shall be communicated to the parties, which shall be given the opportunity of commenting upon it.

Mills case.³² It is for this type of case that the broad powers granted in Article 50 were conceived.³³

II. ICJ Treatment of Complex Scientific Evidence Prior to the Pulp Mills Case

Prior to the *Pulp Mills* case, to decide environmental disputes that involve significant scientific or technical evaluation, the ICJ has either called on experts to gather or evaluate evidence, or avoided coming to a conclusion about any matters that would require such reports.³⁴

Despite the broad powers granted to it in the Statute and the Rules, the Court has only chosen of its own accord to appoint experts in two cases: the *Corfu Channel* case and the *Gulf of Maine* case.³⁵ The Court documents in the different cases show various attitudes toward the proper use of expert reports. In *Corfu Channel*, the Court specified:

“VI. Experts shall bear in mind that their task is not to prepare a scientific or technical statement of the problems involved, but to give to the Court a precise and concrete opinion upon the points submitted to them.

VII. Experts shall not limit themselves to stating their findings; they will also, as far as possible, give the reasons for these findings in order to

³² ‘Pulp Mills on the River Uruguay (Argentina v. Uruguay)’, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma 2, 4 (20 April 2010) available at <http://www.icj-cij.org/docket/index.php?p1=3&k=88&PHPSESSID=943a133bed0fec9e626e825f8852f259&PHPSESSID=943a133bed0fec9e626e825f8852f259&case=135&code=au&p3=4&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 14 March 2011) [*Pulp Mills* Simma dissent].

³³ ‘Pulp Mills on the River Uruguay (Argentina v. Uruguay)’, Joint Dissenting Opinion of Judge ad hoc Vinuesa 20, 95 (20 April 2010) available at <http://www.icj-cij.org/docket/index.php?p1=3&k=88&PHPSESSID=943a133bed0fec9e626e825f8852f259&PHPSESSID=943a133bed0fec9e626e825f8852f259&case=135&code=au&p3=4&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 14 March 2011) [*Pulp Mills* Vinuesa dissent].

³⁴ See, e.g., ‘Gabcikovo-Nagymaros Project (Hungary v. Slovakia)’, ICJ Judgment (25 September 1997) available at <http://www.icj-cij.org/docket/files/92/7375.pdf?PHPSESSID=28603ba2fcd80708f3e139f144b510a4> (last visited 6 April 2011), para. 54.

³⁵ G. White, ‘The Use of Experts by the International Court of Justice’, in V. Lowe & M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996), 528, 528-530.

make their true significance apparent to the Court. If need be, they will mention any doubts or differences of opinion amongst them.”³⁶

This directive instructs the experts to advise the Court rather than to simply provide information. It seems to show a desire to cautiously appraise all possible points of view.

“Judge E?er [sic] noted in his Dissenting Opinion [...]: ‘According to a quite general rule of procedure, the Court is not bound by the opinion of experts. The Court may accept or reject it; but it must always give sufficient reasons.’³⁷”³⁸ This perspective on freedom to reject an expert opinion would reduce any perceived risk in appointing experts to inform the Court in complex cases. Moreover, should the Court use its faculties under Article 50 of the Statute of the Court, the parties would be granted an opportunity to participate by commenting on the conclusions reached by the experts, as well.

In the *Gulf of Maine* case, the disputing parties gave the Court little choice but to appoint an expert for assistance in charting a maritime boundary. The Special Agreement between the parties directly requested the appointment, and the expert’s task was clearly defined and his report informative and precise.³⁹ Other cases with Special Agreements⁴⁰ between the parties required the Court to appoint experts, due to mandatory language in the agreements.⁴¹ In other cases, when a party requested that the Court obtain an expert opinion, the Court rejected these requests either by declaring further evidence to be unnecessary or declining to reach the issues for which expert testimony was contemplated.⁴² In the *Gabcikovo-Nagymaros* case, for example, the Court simply avoided ruling on the complex

³⁶ *Corfu Channel*, Order of 17 December, ICJ Reports 1948, 126-127. Riddell & Plant, *supra* note 27, 330, interpret the Order as a deferral to the experts’ judgment: “It is interesting to note that on this occasion the Court appeared to want the opinions of the experts on what the correct answer should be, rather than assistance with clarifying the issues so that the Court could decide the conclusions for itself.”

³⁷ *Corfu Channel Assessment of the Amount of Compensation Due from the People’s Republic of Albania*, ICJ Reports 1949, 253.

³⁸ Riddell & Plant, *supra* note 27, 330.

³⁹ White, *supra* note 35, 531-532.

⁴⁰ Special Agreements between the parties to a dispute are the mechanisms by which some cases are submitted to the ICJ. ‘Statute of the International Court of Justice’ (2010) available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&PHPSESSID=943a133bed0fec9e626e825f8852f259> (last visited 22 April 2011), Art. 40(1); Rules of Court, *supra* note 31, Art. 39(1).

⁴¹ ‘Case Concerning Delimitation of Maritime Areas between Canada and the French Republic’, 31 *International Legal Materials* (1992) 5, 1145; ‘Guinea/Guinea-Bissau Arbitration’, 25 *International Legal Materials* (1986) 2, 251, 255.

⁴² White, *supra* note 35, 534-538.

scientific issues, despite the abundance of evidence provided by the disputing parties. The Court concluded that “it [was] not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded”⁴³.

In a few cases requiring technical determinations where the Court has chosen not to consult experts using its Article 50 power, technical errors are apparent in the judgments.⁴⁴ Border lines were seemingly charted or detailed incorrectly both in the *Cameroon-Nigeria* case (2002) and the *Qatar-Bahrain* case (1994).⁴⁵ These missteps effectively highlight the potential benefits of expert input for the Court.

III. The Court’s Treatment of Complex Evidence in the Pulp Mills Case

In the *Pulp Mills* case, the International Court of Justice was called to decide on whether Uruguay had breached its procedural obligations under the Statute of 1975 and on whether Uruguay had breached its substantive obligations under the same instrument.⁴⁶ The second of these questions required the Court to assess complex technical evidence in order to make a determination on whether Uruguay had breached its obligations to contribute to the optimum and rational utilization of the river,⁴⁷ to ensure that the management of the soil and woodland does not impair the regime of the river or the quality of its waters,⁴⁸ co-ordinate measures to avoid changes in the ecological balance,⁴⁹ and, in particular, to prevent pollution and preserve the aquatic environment, assessing the effects of the discharges on the quality of the waters of the river, on biodiversity, and on air pollution.⁵⁰

Both parties submitted copious amounts of factual and scientific material in support of their claims,⁵¹ including reports and studies prepared by experts that

⁴³ Gabčíkovo-Nagymaros Project, *supra* note 34.

⁴⁴ ‘Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)’, ICJ Judgment (10 October 2002) available at <http://www.icj-cij.org/docket/files/94/7453.pdf> (last visited 8 April 2011) [Cameroon-Nigeria-case]; ‘Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)’, ICJ Judgment (1 July 1994) available at <http://www.icj-cij.org/docket/files/87/6995.pdf> (last visited 8 April 2011) [Qatar-Bahrain-case].

⁴⁵ Riddell & Plant, *supra* note 27, 348-349.

⁴⁶ *Pulp Mills* judgment, *supra* note 14, 67-158.

⁴⁷ *Id.*, 169-266.

⁴⁸ *Id.*, 178-180.

⁴⁹ *Id.*, 181-189.

⁵⁰ *Id.*, 190-264.

⁵¹ ‘Pulp Mills on the River Uruguay (Argentina v. Uruguay)’, Separate Opinion of Judge Keith (20 April 2010) available at <http://www.icj-cij.org/docket/index.php?p1=3>

contained conflicting claims and conclusions.⁵² The Court disregarded a discussion on the authority of the expert evidence presented by the parties and proceeded to draw its own conclusions on the facts that it considered relevant.⁵³ To make this determination over the disputed facts, the Court did not appoint its own experts.

In its judgment, the International Court of Justice found that Uruguay had breached its procedural obligations under the Statute of 1975 for not providing prior notice of the planned pulp mills,⁵⁴ but that Uruguay had not breached any substantive obligations under the Statute.⁵⁵ Press coverage of the judgment focused on what was considered the authorization of the Court for the pulp mills' operations to continue, because the river was not being polluted in violation of the Statute.⁵⁶

Probably the most controversial point of the decision, as highlighted by different judges in their dissenting and separate opinions and declarations, is how the Court established the facts of the case to make the determination that Uruguay was not in breach of its substantive obligations, especially its environmental obligations; in particular, the role of experts. Judges Al-Khasawneh, Simma, Cançado Trindade, Yusuf, and Vinuesa raised fundamental questions as to the fitness, capacity, and even will of the Court to decide a controversy based on complex evidence.

As Judge Vinuesa recalls from the language that the Court used in the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn,”⁵⁷ and thus it is not surprising that other members of the bench express that “exceptionally fact-intensive” cases, like the one at hand, “raise serious questions as to the role that scientific evidence can play in an international judicial institution,”⁵⁸ calling for a critical review of the Court's practices and capacity when dealing with complex evidence.

&k=88&PHPSESSID=943a133bed0fec9e626e825f8852f259&PHPSESSID=943a133bed0fec9e626e825f8852f259&case=135&code=au&p3=4&PHPSESSID=943a133bed0fec9e626e825f8852f259 (last visited 14 March 2011), para. 3-6 (listing and describing the evidence presented by the parties) [*Pulp Mills* Keith opinion].

⁵² *Pulp Mills* judgment, *supra* note 14, 165-166.

⁵³ *Id.*, 168.

⁵⁴ *Id.*, 282.

⁵⁵ *Id.*, 282.

⁵⁶ BBC News, ‘Uruguay Can Continue Pulp Mill Operations, Court Rules’ (20 April 2010) available at <http://news.bbc.co.uk/2/hi/8632933.stm> (last visited 22 April 2011).

⁵⁷ *Pulp Mills* Vinuesa dissent, *supra* note 33, 20, 99.

⁵⁸ *Pulp Mills* Simma dissent, *supra* note 32, 2, 3.

In their joint dissenting opinion, Judges Al-Khasawneh and Simma are categorical in asserting that the Court “has had before it a case on international environmental law of an exemplary nature – a ‘textbook example’, so to speak, of alleged transfrontier pollution – yet, the Court has approached it in a way that will increase doubts in the international legal community whether it, as an institution, is well-placed to tackle complex scientific questions”⁵⁹.

For sound judicial practice and to fulfill its responsibilities, the Court should be in a position to assess the value and scientific import of evidence presented, whatever the volume and level of complexity.⁶⁰ The *Pulp Mills* case was particularly laden with complex and conflicting evidence presented by the parties,⁶¹ and Judges Al-Khasawneh and Simma assert that the Court evaluated the case’s evidence in a methodologically flawed manner.⁶²

It would be unreasonable to expect a judge to independently evaluate, for example, “claims as to whether two or three-dimensional modeling is the best or even appropriate practice in evaluating the hydrodynamics of a river, or what role an Acoustic Doppler Current Profiler can play in such an evaluation. Nor is the Court, indeed any court save a specialized one, well-placed, without expert assistance, to consider the effects of the breakdown of nonylphenoethoxylates, the binding of sediments to phosphorus, the possible chain of causation which can lead to an algal bloom, or the implications of various substances for the health of various organisms which exist in the River Uruguay”⁶³. Adjudicating disputes like the *Pulp Mills* case, in which referring technical or scientific questions is fundamental, demands expert assistance.⁶⁴ The judges of the Court are to evaluate if the parties’ claims are well-founded, and not to perform a technical or scientific determination of the facts.⁶⁵

The main concern of the judges writing separately in the *Pulp Mills* case is that by overlooking the possibility of calling experts under the faculties that Article 50 of the Statute of the Court provides, the Court “willingly deprives itself of the

⁵⁹ *Id.* (internal citations omitted).

⁶⁰ *Pulp Mills* judgment, *supra* note 14, 52, 168.

⁶¹ ‘Pulp Mills on the River Uruguay (Argentina v. Uruguay)’, Separate Opinion of Judge Cançado Trindade (20 April 2010) available at <http://www.icj-cij.org/docket/index.php?p1=3&k=88&PHPSESSID=943a133bed0fec9e626e825f8852f259&PHPSID=943a133bed0fec9e626e825f8852f259&case=135&code=au&p3=4&PHPSID=943a133bed0fec9e626e825f8852f259> (last visited 14 March 2011), para. 148; *Pulp Mills* Keith opinion, *supra* note 51, 3-6 (noting the conflicting interpretations of the copious scientific and technical data submitted to the Court by the parties’ experts).

⁶² *Pulp Mills* Simma dissent, *supra* note 32, 1, 2.

⁶³ *Id.*, 2, 4.

⁶⁴ *Id.*, 2, 3.

⁶⁵ *Id.*, 2, 4.

ability to fully consider the facts submitted to it,”⁶⁶ and does not benefit from the advantages of using its faculty by letting the parties participate in the process from the selection of the experts to the possibility of commenting on their conclusions.⁶⁷

The decision of the Court not to call experts under Article 50 of its Statute shows that the Court did not address facts and evidence in a “convincing manner to establish the verity or falsehood of the Parties’ claims,” and the resulting judgment is of precarious legitimacy.⁶⁸ The frustration of the international legal community with how the Court handled the factual determinations of this case comes from what it seems to be: “a wasted opportunity for the Court, in its ‘unfettered discretion’ to avail itself of the procedures in Article 50 of its Statute and Article 67 of its Rules, *and establish itself as a careful, systematic court which can be entrusted with complex scientific evidence [...]*”⁶⁹.

IV. Treatment of Scientific or Technical Evidence in Other International Tribunals

The faculty that Article 50 of the Statute of the Court grants to the judges of the International Court of Justice is not only previously invoked by the ICJ, but it is also part of other international tribunals’ faculties and practice. Several international dispute resolution entities have the capacity to appoint their own experts to ensure the necessary scientific support in resolving environmental disputes. Examples include the following:⁷⁰

The International Tribunal for the Law of the Sea (ITLOS) may appoint at least two scientific or technical experts chosen in consultation with the disputing parties, to sit with the tribunal but without the right to vote.⁷¹

A tribunal of the Permanent Court of Arbitration may upon notice to the parties appoint one or more experts to report to it on specific issues.⁷² The same ability is granted in the United Nations Commission on International Trade Law

⁶⁶ *Id.*, 4-5, 13.

⁶⁷ *Id.*, 4-5, 13.

⁶⁸ *Id.*, 6, 17.

⁶⁹ *Id.*, 6, 17 (emphasis added).

⁷⁰ *Vinales*, *supra* note 28, 478-479 (emphasis added).

⁷¹ United Nations Convention on the Law of the Sea (10 December 1982), Art. 289, 1833 U.N.T.S. 397.

⁷² Permanent Court of Arbitration, ‘Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment’ (19 June 2001) available at <http://www.pca-cpa.org/upload/files/ENV%20CONC.pdf> (last visited 14 March 2011), Art. 27(1).

(UNCITRAL) Arbitration Rules⁷³ and the International Bar Association Rules on the Taking of Evidence in International Arbitration,⁷⁴ and a similar procedure that explicitly includes environmental expertise is available to North American Free Trade Agreement (NAFTA) Tribunals, with slightly more deference to the disputing parties' wishes.⁷⁵

The World Trade Organization (WTO) dispute settlement panels have options similar to the ICJ's. Article 13(2) of the Dispute Settlement Understanding states, "Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4."⁷⁶ Experts have been vital resources in WTO cases involving scientific knowledge,⁷⁷ and are held to high standards of independence and impartiality.⁷⁸ Judges Al-Khasawneh and Simma suggest that the ICJ could call on experts more often, as some WTO panels do to their benefit.⁷⁹

Recognizing the importance of the needs of courts and tribunals to resort to experts for technical and scientific assistance highlights the courts' and tribunals' specific role in dispute resolution. The freedom to appoint experts is codified for a broad variety of international tribunals, indicating that the judges may focus on applying legal principles rather than attempt to make determinations outside their area of expertise or avoid evaluating complex evidence altogether.

⁷³ UNCITRAL Arbitration Rules, GA Res. 31/98, 15 December 1976, Art. 27(1); UN GAOR, 31st Session, Supplement No. 17, UN Doc A/31/17, 15 December 1976.

⁷⁴ International Bar Association [IBA], 'IBA Rules on the Taking of Evidence in International Arbitration' (29 May 2010) available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444> DC (last visited 8 April 2011), Art. 6(1).

⁷⁵ 'Canada-Mexico-United States: North American Free Trade Agreement Ch. 11, Art. 1133, 17 December 1992', 32 *International Legal Materials* (1993) 2, 289.

⁷⁶ 'Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round, Art. 13(2)', 33 *International Legal Materials* (1994) 5, 1125.

⁷⁷ M. T. Grando, *Evidence, Proof, and Fact-finding in WTO Dispute Settlement* (2009), 340.

⁷⁸ *Id.*, 341-342.

⁷⁹ *Pulp Mills* Simma dissent, *supra* note 32, 15.

D. The Case for Greater ICJ Engagement with Scientific and Technical Evidence

The Court's reluctance to resort to its ability to appoint experts under Article 50 of the Statute may affect its reputation as an entity well equipped to resolve evidentiarily complex international disputes, such as conflicts involving environmental science. Disengaging the Court from international environmental disputes could increase uncertainty and lack of uniformity in the developing field of international environmental law. Even if the Court does begin to engage scientific expertise, a failure to do so in a manner that allows for transparency will injure the Court's legitimacy and further undermine the political and normative aims that led to the Court's creation in the first place.

I. The Specter of Fragmentation in International Environmental Dispute Resolution

Despite their similar abilities to summon experts, highlighted above, the group of coexisting international adjudicative bodies that have jurisdiction to decide environmental disputes differ widely in procedure, scope for remedy, and primary purpose. They include permanent and ad hoc courts, arbitral tribunals, regional and global courts, and judicial bodies with general or with highly specialized subject matter jurisdiction.⁸⁰ Different tribunals could treat identical disputes differently, and the ICJ is not an appeals court from all of the others. The international judicial system, as a collection of international and transnational adjudicative bodies, is not yet a mature system with highly articulated rules that regulate the relationships among them.⁸¹ The relationships are ambiguous and the lack of precedential rules makes it possible for different courts to decide similar matters differently or to base their judgments on different rules in similar disputes.⁸² While this is not indisputably an undesirable situation, it does counter the formation of a unified body of law in a freshly developing field like international environmental law. Adjudication in these international dispute resolution bodies affects more than the particular controversy; by adjudicating a dispute, judges contribute to the development of the international legal field in question.⁸³

⁸⁰ Tim Stephens, *International Courts and Environmental Protection* (2009), 304.

⁸¹ J. S. Martinez, 'Towards an International Judicial System', 56 *Stanford Law Review* (2003) 2, 429, 431.

⁸² *Id.*

⁸³ C. P. R. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', 31 *New York University Journal of International Law and Politics* (1999) 4, 709, 751.

A proliferation of courts with jurisdiction over international environmental disputes can counter the desired uniformity of any international legal field by adopting approaches from their respective competencies that might not advance accepted international environmental rules and principles.⁸⁴ Without a chance to stabilize the emerging international law rules with a consistent jurisprudence, this situation presages uncertain results; the wide selection of methods and fora to resolve IEL disputes could delay the consolidation of a uniform body of law.⁸⁵ IEL is a fairly young discipline, and its rules are still being formed.⁸⁶ Reinforcing and clarifying those rules through litigation in a respected forum as authoritative as the ICJ could have the advantage of promoting consistency and cohesiveness, so that rules are disseminated, accepted and followed to the greatest possible extent.⁸⁷ The Court should embrace opportunities to contribute to this process, even when an environmentally significant case includes technical aspects.

The Pulp Mills case was a missed opportunity for the ICJ to further IEL jurisprudence with a unified voice. Instead, the Judges recognized that inadequate use of experts decreased the legitimacy of this judgment, and drew attention to this in their dissenting and separate opinions. Without public or even internal confidence in the ICJ's fact finding processes, pressure may increase to create a separate world environmental court or to bring disputes to other courts when possible. Both results would add to the fragmentation of the field.

II. Extreme Proposals to Improve IEL Dispute Resolution: A World Environmental Court and an ICJ Scientific Advisory Body

The ICJ, as the foremost world court, is best positioned to be the most authoritative voice in international environmental law.⁸⁸ It plays an important role in recognizing and articulating customary international law, which is essential to

⁸⁴ Stephens, *supra* note 80, 304.

⁸⁵ S. M. Hinde, 'The International Environmental Court: Its Broad Jurisdiction as a Possible Fatal Flaw', 32 *Hofstra Law Review* (2003) 2, 727, 748-749.

⁸⁶ "[...] a few years from now the body of case law will probably require us to address how to maintain coherence among the various fora at which international environmental issues are litigated.", P. Sands, 'International Environmental Litigation and its Future', 32 *University of Richmond Law Review* (1999) 5, 1619, 1641.

⁸⁷ Enforcement of international environmental law is another issue, outside the scope of this paper.

⁸⁸ P-M. Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', 31 *New York University Journal of International Law and Politics* (1999) 4, 791, 798-799.

the development of any international law discipline.⁸⁹ It is longstanding and respected; in the *Honduras-Nicaragua* case, for example, “the ICJ’s credibility with all parties, based on the ICJ’s track record, provided the needed assurance that the dispute would be settled fairly.”⁹⁰ Creating a specialized separate court exclusively for the resolution of international environmental disputes has been proposed,⁹¹ but it would be a lengthy and unnecessary undertaking. It would not have the trusted history of the ICJ, nor its established authoritative position. Disputing parties have never used the ICJ Chamber for Environmental Matters, so the demand for a dedicated environmental court is not apparent.⁹² For the same reasons that some criticize the fragmentation of international environmental law, an exclusively environmental world court may be a less efficient and no more effective way forward in IEL dispute settlement.⁹³

An internal Scientific Advisory Body is a potential tool for the ICJ that could discourage fragmentation and decrease the frequency with which the Court would need to seek out experts or form *ad hoc* commissions to provide expertise in complex environmental cases. Advisory scientific bodies have been established under environmental treaties, most prominently as part of the United Nations Framework Convention on Climate Change [UNFCCC], to provide information and advice on scientific and technological matters relating to the Convention.⁹⁴ This type of permanent body could be formed for the ICJ, either under the framework of its existing Rules or by amendment to them,⁹⁵ and such a body could lead the Court to consult experts more often. However, this solution does not seem advisable for the ICJ. It is uncertain whether enough cases would emerge to justify the administrative burden of creating and operating a permanent advisory body, and such a body would dilute the purely adjudicatory character of the Court. The

⁸⁹ J. E. Vinuales, ‘The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment’, 32 *Fordham International Law Journal* (2008) 1, 232, 257-258.

⁹⁰ C. Leah Granger, ‘The Role of International Tribunals in Natural Resource Disputes in Latin America’, 34 *Ecology Law Quarterly* (2007) 4, 1297, 1317.

⁹¹ J. Pauwelyn, ‘Judicial Mechanisms: Is there a Need for a World Environment Court?’, in W. B. Chambers & J. F. Green (eds), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (2005), 150.

⁹² Riddell & Plant, *supra* note 27, 15.

⁹³ International Tribunal for the Law of the Sea [ITLOS], ‘Proceedings and Cases – List of Cases’ available at http://www.itlos.org/cgi-bin/cases/list_of_cases.pl?language=en (last visited 22 April 2011) (ITLOS is a tribunal created to resolve disputes in a single field of international law that has had only 18 cases submitted to it in its 14 years of existence).

⁹⁴ Vinuales, *supra* note 28, 454-456; United Nations Framework Convention on Climate Change, 24 March 1994, Art. 9(1), 1771 U.N.T.S. 107.

⁹⁵ Rules of the Court, Arts 9, 21(2); White, *supra* note 35, 540.

Court may also lose flexibility to seek more specialized outside experts for particular cases. The precedent set by creating one advisory body could suggest a need for additional ones for other fields of expertise, which would likely overwhelm the Court's resources.

The least radical solution to the Court's deficient fact finding is an increased use of its ability to consult experts under Article 50 of its Statute. Others have suggested instituting a mechanism similar to the Special Masters of the United States Supreme Court,⁹⁶ whereby a Master could be appointed to investigate a case and recommend findings of fact before the Court considers the case, but we suggest that of all the possibilities, the initial step of consulting experts more frequently may be the Court's only necessary adjustment.

III. The Benefits of Greater Transparency in Adjudicating Conflicts Over Resources

The legitimacy of international courts cannot be sufficiently drawn from the fact that they form part of the legitimation of public authority exercised by other institutions, be it States or international bureaucracies.⁹⁷ Even if international courts have a *per se* legitimacy attributable to the fact that they are not domestic courts, thus presumptively free from nationalistic bias,⁹⁸ that does not seem enough for the exercise of its adjudicative power. Among other considerations, transparency is one of the main factors that enhance the legitimacy of international courts.⁹⁹

It has been argued that oral proceedings provide the transparency that legitimates the adjudicative function of international courts.¹⁰⁰ However, this assessment is rather narrow as it does not cover the entire adjudicative process. Transparency is also required after the parties' proceedings before the court have

⁹⁶ C. Peck & R. S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (1996), 416; K. Highet, 'Evidence and Proof of Facts', in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads*, 8th ed. (1987), 355, 372. The Special Masters are similar to trial judges, appointed by the Supreme Court to perform fact-finding, gather evidence if necessary, and submit reports and recommendations to the Supreme Court on a particular case. Their input is advisory only. R. L. Stern & E. Gressman, *Supreme Court Practice* (2002), 576-578.

⁹⁷ A. von Bogdandy & I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (21 April 2010) available at <http://ssrn.com/abstract=1593543> (last visited 22 April 2011).

⁹⁸ E. A. Young, 'Institutional Settlement in a Globalizing Judicial System', 54 *Duke Law Journal* (2005), 1143, 1207.

⁹⁹ Bogdandy & Venzke, *supra* note 97, 27.

¹⁰⁰ *Id.*

concluded, while the court is deliberating and assessing the merits of the evidence provided by the parties. The faculties established in Article 50 enable the ICJ to make its evidence assessment public and transparent, for should it need further clarifications on the evidence the Court may call its own experts, involving the parties in the process and allowing them to review the experts' reports and conclusions.

The questionable handling of evidence in the *Pulp Mills* case undermines the legitimacy of both the Court and the decision. This is particularly true in light of the Court's willingness to use experts in other cases that require technical expertise, while consigning their testimony to unpublished reports shared only with the Court. Sir Robert Jennings, a former President of the Court, has claimed that "the Court has not infrequently employed cartographers, hydrographers, geographers, linguists, and even specialized legal experts to assist in the understanding of the issue in a case before it; and has not on the whole felt any need to make this public knowledge or even to apprise the parties."¹⁰¹ Also, "[t]he Court's Registrar, Philippe Couvreur, has defined the role of experts retained by the Court for purely internal consultation as that of temporary Registry staff members, entrusted with the giving of internal scientific opinions under the oath of confidentiality demanded of full-time Registry staff. As he explains, their conclusions would never be made public"¹⁰². Such secretive use of experts raises significant issues related to transparency and fairness:¹⁰³

"While such consultation of "invisible" experts may be pardonable if the input they provide relates to the scientific margins of a case, the situation is quite different in complex scientific disputes, as is the case here. Under circumstances such as in the present case, adopting such a practice would deprive the Court of the above-mentioned advantages of transparency, openness, procedural fairness, and the ability for the Parties to comment upon or otherwise assist the Court in understanding the evidence before it. These are concerns based not purely on abstract principle, but on the good administration of justice."¹⁰⁴

The use of invisible experts also creates problems where the Court has made technical errors in previous judgments, as noted above.¹⁰⁵ Had they used Article 50

¹⁰¹ *Pulp Mills* Simma dissent, *supra* note 32, 5, 14 (internal citations omitted).

¹⁰² *Id.*

¹⁰³ See generally A. K. Schneider, 'Democracy and Dispute Resolution: Individual Rights in International Trade Organizations', 19 *University of Pennsylvania Journal of International Economic Law* (1998) 2, 587, 613.

¹⁰⁴ *Pulp Mills* Simma dissent, *supra* note 32, 5, 14 (internal citations omitted).

¹⁰⁵ ICJ Treatment of Complex Scientific Evidence Prior to the *Pulp Mills* Case, *supra*.

experts in formulating those judgments, such errors could have potentially been corrected, or at least the parties would have had a chance to comment on the expert reports. If the errors did survive, the blame would fall on the experts instead of the Court, and criticism would be limited to their choice of experts rather than perceived general incompetence or perceived bias. Greater use of Article 50 experts would quell doubts about the Court's ability to handle cases with complex scientific evidence and further encourage the use of the Court in the resolution of disputes.

If the Court were to change its existing practice and consult experts publicly, it is possible that it would be open to criticism that the experts will play too great a role in judicial decision or perhaps usurp the decision making authority of the Court itself. However, while acknowledging this criticism, it is important to note that, while experts would indeed influence the Court's judgments, the Judges are not likely to blindly accept an expert's opinion in the absence of any support. A public and transparent process such as the one in Article 50 would allow the parties to refute the erroneous assertion before the final decision, likely limiting the possibility that a judge would follow an expert into an obviously misguided judgment.¹⁰⁶ It is also possible that the dialogue between experts would make scientific errors more unlikely, but if an error survived to the judgment stage, the role of experts would at least be discernible rather than unknown and undisclosed. In addition, the public use of experts would encourage trust in ICJ decisions involving complex scientific evidence, as Judges Al-Khasawneh and Simma imply in their *Pulp Mills* dissenting opinion.¹⁰⁷

E. Conclusion

The *Pulp Mills* case was a complicated dispute on multiple levels. It was never possible to produce an outcome that would be satisfying to outraged local communities, at a diplomatic level, and in its repercussions for Argentine-Uruguayan bilateral trade. The attempts to unravel this Gordian knot throw into relief the problems associated with conflicts over resources.

In circumstances where ordinary citizens are directly affected by judicial determinations, but where these determinations require advanced technical expertise, the ICJ risks ill-formed and problematic decisions when the case proceeds without the input of experts. These decisions can then have significant negative impact on the way citizens and governments view the competency and legitimacy of the Court's decisions and even of the Court itself. Such a negative

¹⁰⁶ Rules of the Court Art. 67(2).

¹⁰⁷ *Pulp Mills* Simma dissent, *supra* note 32, 17.

impression would raise practical problems, as States may hesitate to bring cases involving scientific evidence to the ICJ when they have a choice of fora, as well as portend negative consequences for broader notions of international justice: its greatest symbol would be tarnished unnecessarily.

In this paper we have examined the complexities that the case presented for the International Court of Justice, both in its internal operations and the transparency and legitimacy repercussions. In doing so, we have noted that Article 50 of the Statute of the Court provides the judges with a powerful tool to appoint independent experts to evaluate opposed evidence. In the case at hand the parties submitted copious amounts of evidence that conflicted with the evidence presented by the other party. The Court, however, did not resort to its Article 50 faculty, and thus seriously undermined the credibility of its judgment by failing to attempt rigorous factual accuracy.

Reviewing the Court's jurisprudence, we found that Article 50 experts have been called upon voluntarily only in two cases, despite the potential for expert assistance recognized in many other cases by the disputing parties, scholars and dissenting Judges. The ICJ's practice of rarely using its Article 50 power to obtain expert evidence,¹⁰⁸ and of often rejecting requests from disputing parties to do so,¹⁰⁹ is troubling. The Court has significant responsibility for shaping international law, and their decisions in environmental cases involving complex scientific or technical information are as influential as other ICJ judgments and should be investigated with care. Expert testimony is an accepted tool for judges, sanctioned in the rules of many international tribunals. There is no need for the Court to be reluctant to call for experts, particularly when it could minimize controversy over their judgments as they shape the jurisprudence of international environmental law.¹¹⁰

Contrast this reluctance with the willingness of other international adjudicative bodies to call upon experts more readily than the ICJ. Some international environmental treaties have also created advisory scientific bodies, and the ICJ could do the same, but such resource-heavy solutions as an advisory

¹⁰⁸ White, *supra* note 35.

¹⁰⁹ See, e.g., 'Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)', ICJ Judgment (11 September 1992) available at <http://www.icj-cij.org/docket/files/75/6671.pdf> (last visited 21 April 2011), 361 para. 22, 400 para. 65; 'Award of the Arbitral Tribunal of 17 September 2007 in the Matter of an Arbitration between Guyana and Suriname [UNCLOS Annex VII]' available at http://www.pca-cpa.org/showpage.asp?pag_id=1147 (last visited 28 April 2011).

¹¹⁰ Calling experts could also minimize the risk of embarrassing technical errors such as those the Court seems to have made in the *Cameroon-Nigeria* case (2002) and the *Qatar-Bahrain* case (1994), *supra* note 44.

body or an entirely new environmental world court are unnecessary and inadvisable. The simplest way for the Court to improve fact finding is to call for expert reports in individual cases. While there are those who criticize the use of experts on the basis that involving more technical experts risks having the Court's decision-making ability usurped, the openness of other adjudicative bodies would suggest that this is not the case.

In continuing to adjudicate conflicts over resources without resolving the central factual disputes, the International Court of Justice risks affecting the legitimacy of the judgment and the status of the Court as one called upon to solve those disputes. The Court can ill afford to take such risks with its technical acumen. Several international bodies are currently equipped to call on experts to assist with technically or factually complex disputes. However, this array of tribunals deciding international environmental matters could result in a fragmentation of substantive law. The lack of binding precedent between the different courts and tribunals could result in different, or even contradictory, rules; thus, the standards for environmental protection would not be certain, with the consequent adverse result for international environmental law overall in lowered certainty and, therefore, enforceability.

The ICJ is far too important as both a symbol and as a practical means for defusing and resolving complex international disputes to risk its legitimacy in this area. Were the ICJ to be gradually lowered in status, it would cause a great increase in the number of conflicts being resolved with no public knowledge. Our goal is not simply to criticize the Court; we would like to contribute to the larger objectives of raised awareness and trust of public international law among the global population, and to continue to promote the best possible adjudicative process in international dispute resolution.