

DECLARATION OF JUDGE YUSUF

1. I concur in the Judgment, but have some reservations regarding the manner in which the Court decided to handle the abundant factual material presented by the Parties. I am of the view that the Court should have had recourse to expert assistance, as provided in Article 50 of its Statute, to help it gain a more profound insight into the scientific and technical intricacies of the evidence submitted by the Parties, particularly with regard to the possible impact of the effluent discharges of the Orion (Botnia) mill on the living resources, quality of the water and the ecological balance of the River Uruguay.

2. The Parties to the present case have submitted to the Court extensive and complex technical and scientific material related to effluent discharges, water quality, chemical substances, the capacity of the river to receive contaminants, its hydrodynamic and geomorphological characteristics, and the parameters used for determining the existence of pollution. In addition, they provided voluminous data, gathered by their respective experts and consultants, on the results of their monitoring before and after the start of the operation of the mill, using different methods and modelling approaches. This factual information relates to a wide range of scientific and technical fields including hydrology, hydrobiology, river morphology, water chemistry, soil sciences, ecology and forestry.

3. Furthermore, both in the written and oral pleadings, the Parties presented many contradictory assertions and divergent approaches in terms of data collection and scientific methodologies for their interpretation. Thus, for example as regards the flow of the river, the hydrodynamic data presented by the Parties proved very difficult to compare because they were derived from monitoring at different stations, at different depths, and on different dates. Similarly, with respect to water quality, the Parties used different sampling techniques at different locations and depths, to obtain the data presented to the Court, thus complicating the comparability of the results submitted by them.

4. Notwithstanding these factual complexities, the Court states, in paragraph 168 of the Judgment, with regard to the manner in which this material is to be handled by it, that:

“It needs only to be mindful of the fact that, despite the volume

and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.”

5. It is of course true that it is the responsibility of the Court to determine the facts and to assess their probative value, but this does not prevent it from taking advantage of its powers to order an enquiry or to seek expert opinion in the handling of the complex technical and scientific material submitted to it in this case. The Court, in order to exercise its function of resolving disputes, needs to ensure not only to be in possession of all the available facts relevant to the issues before it, but also to understand fully their actual meaning for the proper application of the law to those facts. The rationale behind the provisions on enquiry and the seeking of an expert opinion in the Statute and in the Rules of Court is to allow the Court to obtain the necessary assistance and support in acquiring such full knowledge of the facts.

6. This case offered a unique opportunity for the Court to use the powers granted to it by Article 50 of its Statute, as well as by Article 67 of the Rules of Court. It is a case where the decisions and conclusions of the Court largely depend on a correct appreciation of the scientific and technical facts. It is true that on many occasions in the past the Court was able to resolve complex and contested factual issues without resorting to Article 50 of the Statute. Yet, in a case such as this one concerning the protection of the environment and the prevention of pollution, specialized scientific expertise can provide the Court with the insights necessary to make a thorough appraisal of the merits of the scientific and technical material submitted by the Parties.

7. It cannot be expected that expert opinions or scientific assessments commissioned by the Court will always arrive at uniform conclusions, but the adversarial process by which the Parties are given an opportunity to comment on such opinions provides the Court with further insight into the relevance and significance not only of the factual material presented by the Parties, but of the expert opinion as well. Moreover, the use of an enquiry or an expert report by the Court has the advantage of enhancing the confidence of the Parties in the technical evaluation by the Court of the factual and scientific information provided by them and ensuring transparency.

8. Surely, the grounds invoked by the Court, in the *Nicaragua*

case¹, not to have recourse to its power under Article 50 of the Statute do not apply to this case, there being no similar practical difficulties regarding the River Uruguay. Rather, the reluctance of the Court in the present case is reminiscent of that commented upon by Judge Wellington Koo, almost 60 years ago, in a dissenting opinion:

“All the foregoing questions are of a technical character and call for an independent expert or experts to supply reliable answers. I am of the opinion that the Court would have been well advised, under Articles 44 and 50 of the Statute, to send its own expert or experts to investigate on the spot and make a report of their observations and recommendations, as was done in the *Corfu Channel* case (*I.C.J. Reports 1949*). Such a report would have been of great assistance to the Court in deciding the case by law on the basis of all the relevant facts of a technical as well as other character. I for one feel unable to reach a final conclusion satisfactory to myself without knowing the answers to the technical questions which I have defined above and which, in my view, bear a vital importance for a correct determination of one of the crucial issues on the present case.” (*Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 100, para. 55.)

9. Similarly, in his separate opinion on the *Kasikilil/Sedudu Island (Botswana/Namibia)* case, Judge Shigeru Oda made the following observation:

“The criteria for determining the ‘main’ channel may well be settled by law, with the assistance of scientific knowledge, but the determination of the ‘main channel’ as a boundary by employing the said criteria, in any specific geographical situation, is far from being a legal function. I would recall that, at the time of the meeting in Kasane of the Presidents of Botswana and Namibia in May 1992, the two States tried to settle the matter as a *technical* problem that could be solved by the expertise of *technical* experts (see paragraphs 13 and 14 of this opinion). The Judgment deals with these two matters in its paragraphs 20 to 40 and attempts to rule on them, relying only on the information given in the written and oral pleadings by the respective Parties, but without the benefit of objective scientific knowledge, which it could have obtained itself but chose not to.” (*Kasikilil/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1119, para. 6; emphasis in the original.)

¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 61.

10. In view of the persistent reticence of the Court to use the powers conferred upon it by Article 50 of the Statute, except in two cases², the question arises as to whether there is a risk that the resort to an expert opinion may take away the role of the judge as the arbiter of fact and therefore undermine the Court's judicial function? My answer is in the negative. First, it is not for the expert to weigh the probative value of the facts, but to elucidate them and to clarify the scientific validity of the methods used to establish certain facts or to collect data. Secondly, the elucidation of facts by the experts is always subject to the assessment of such expertise and the determination of the facts underlying it by the Court. Thirdly, the Court need not entrust the clarification of all the facts submitted to it to experts in a wholesale manner. Rather, it should, in the first instance, identify the areas in which further fact-finding or elucidation of facts is necessary before resorting to the assistance of experts.

11. As was observed by the Arbitral Tribunal in the *Laguna del Desierto* case:

“When the question relates to whether a given industrial activity produces harmful polluting effects for third parties, or whether the collapse of a building was due to faulty construction, or whether a product has the chemical composition stated in its packaging, the judge has recourse to an expert on the subject and asks him to make analyses and studies and produce conclusions. It is absurd to think that the judge has delegated his responsibility to the expert.” (United Nations, *Reports of International Arbitral Awards (RIAA), Application for revision and subsidiary Interpretation of the Award of 21 October 1994 submitted by Chile (Argentina, Chile), 13 October 1995*, Vol. XXII, p. 162, para. 40.)

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

13. In light of the above, it is my view that there is reason for concern when in a case as factually and scientifically complex as the present one, the Court fails to use its power to seek the assistance of a commission of enquiry or an expert opinion under Article 50 of the Statute, since errors

² In the *Corfu Channel* case, the Court resorted to the appointment of experts at two different stages in the proceedings: *Corfu Channel (United Kingdom v. Albania), Order of 17 December 1948, I.C.J. Reports 1947-1948*, p. 124 (naval expertise); and *Corfu Channel (United Kingdom v. Albania), Order of 19 November 1949, I.C.J. Reports 1949*, p. 237 (amount of compensation). See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Appointment of Expert, Order of 30 March 1984, I.C.J. Reports 1984*, p. 165.

in the appreciation or determination of facts can substantially undermine the credibility of the Court, and discourage parties to disputes involving scientific and technological issues from turning to the Court.

14. As States continue to bring cases involving complex scientific and technological aspects before the Court, they will need to see that the facts related to their case are fully understood and appreciated by the Court. It would therefore serve the Court well in the future to make better use of the powers granted to it by its Statute to deal with fact-intensive and scientifically complex cases and to develop, for that purpose, a clear strategy which would enable it to assess the need for an expert opinion at an early stage of its deliberations on a case.

(Signed) Abdulqawi Ahmed YUSUF.
