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TITOLO DELLA TESI

**BETWEEN SCIENCE AND LAW: THE USE OF EXPERTS
BEFORE THE INTERNATIONAL COURT OF JUSTICE**

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ABSTRACT

The aftermath of the *Pulp Mills* judgment raised questions about the inadequacy of instruments at the International Court of Justice's disposal to deal with disputes having science-heavy or factual-complex evidence involved. In other words, the questions was whether and to what extent a court of law, especially one with some diplomatic contours as the ICJ, could properly grapple with complex evidence when called to settle a scientific dispute. In recent times, several disputes brought before the Court have touched upon scientific evidence and highly technical matters. Accordingly, the question sparked interest in the scholarship. The problem of how courts of law operate whenever they meet science can be traced back to the eighteen century, almost as a consequence of the industrial revolution, and has been present ever since. The ways to deal with those problems depend, to a certain extent, on the contours of the legal system in which they arise. While the Anglo-Saxon system favoured the use of party-appointed experts, *le juge de la codification* of *civil law* systems would not conceive the idea of letting the parties almost exclusively responsible for identifying the "truth". Both systems had problems in taming science within the courtrooms. Paradoxically, since the evidentiary system of the International Court of Justice appears to be a blend between the two systems, it is not a surprise to see some of those problems being mirrored in the international level. Although the appearance of experts before international courts is not a recent feature, the growing number of technical questions underlying disputes shed new lights on the potential problems arising with their appearance. This seems to be true particularly if one considers that experts can perform different functions before international tribunals. In the context of the ICJ, experts (a) may offer technical assistance to the parties in their pleadings appearing as members of the defensive teams; (b) may be called by the parties to give evidence before the Court in the quality of pleaders; (c) can be called through an specific procedure and be tested by the technique of cross-examination; (d) can help the Court to gather the factual information of a dispute (*fact-finding* function); (e) can be called in order to help the Court to understand the technical or scientific evidence put forward by the parties in a dispute (*fact-assessment* function); and (f) can perform an specific technical function related to their knowledge such as the preparation of maps or helping the parties to demarcate their boundaries.

In the light of these potential and varied functions, an examination of the instruments at the ICJ's disposal might prove to be useful in the context of the growing numbers of scientific disputes. In order to perform this examination, this study is structured in three parts. The first chapter offers a perusal of instruments for the use of experts available to the ICJ to deal with technical and scientific evidence. The primary focus is to draw a framework on the limits and the problems related to each instrument employed by the Court. In the second chapter, the examination targets to other two tribunals dealing with interstate disputes. The idea of examining the rules and the case law of other tribunals has as main purpose the comparison between instruments. Given the several possibilities of international adjudicative bodies to examine, my focus will be on two tribunals which are, to more or less extent, more similar to the context in which the ICJ operates: the International Tribunal for the Law of the Sea (ITLOS) and interstate arbitration. In the third chapter, I examine three procedural values which appear strictly connected to the appearance of experts in a judicial proceeding, namely transparency, due process and the independence and impartiality of the adjudicative body. Drawing from the practice of the ICJ and the comparison between legal instruments, I test each instrument at the Court's disposal in the light of such values. I conclude with some suggestions on how the ICJ could improve, taken these procedural values into account, its method of employing experts to deal with technical and scientific evidence.

If one looks to the way the Court and the parties availed themselves of experts in its recent case law (2006-2016), it appears to exist a continuous development and refinement of the techniques and procedures regarding experts. Comparing the procedures employed by the parties and by the Court in the *Pulp Mills* case (whose oral hearings took place in 2009) with those in the *Whaling* (2014) and *Costa Rica v. Nicaragua* (2016, still pending) cases, one can identify a more active approach assumed by the Court. The evolutionary approach finds confirmation in the fact that the Court, for the first time since the *Corfu Channel* case, has resorted to article 50 and nominated two independent experts to gather evidence *in locu*.

This "evolution" might be attributed to two relevant factors. First, one is left with the impression that a prolific dialogue has occurred between parties, Court and scholarship. The second factor contributing to the amelioration of the procedure on experts is due to the fact that disputes touching upon technical issues were and are still being brought by States before the ICJ.

The argument developed in this thesis is that whatever should be the avenue explored by the Court, it should be put to the test of three procedural values: transparency, due process and independence. That would certainly add, to a greater or lesser extent, to the fairness of the proceedings, to the correctness of the judgment, to the effectiveness of the decision-making process and, ultimately, to the over-arching legitimacy of the judicial activity. The second main general proposal espoused by this thesis after the examination conducted is that the Court would benefit from a blended approach to the problem, combining techniques of *common law* and *civil law*, or more specifically, combining the use of *ex parte* and *ex curiae* experts when dealing with cases of a complex background. That seems to be the successful lesson taught by arbitral tribunals settling interstate disputes. A combined approach would also shield the Court from criticisms which allege that the method of testing evidence by the use of party-appointed experts is too heavily influenced by the *common law* system. The combined use of experts does not only strike a balance between the civil law and common law approaches to the procedure, but also between the values to be protected by the proceedings. In practical terms, the ICJ seems to be well equipped to improve the cross-examination of party-appointed experts with the use of assessors or *ex curiae* experts so as to receive technical advice. This solution would not require to Court to adopt a measure too far-off from its present procedure. If it is true that there is a strong likelihood that technical and scientific matters might appear again in the docket of the World Court, then it seems also true that experts still have an important role to perform in the proceedings before the ICJ. Testing the procedures for refining the fact-finding and fact-assessment by the Court through procedural values might constitute an adequate and useful way for refining the procedure regarding the appearance of experts.

*“Quando ti metterai in viaggio per Itaca
devi augurarti che la strada sia lunga,
fertile in avventure e in esperienze.*

*I Lestrigoni e i Ciclopi
o la furia di Nettuno non temere,
non sarà questo il genere di incontri
se il pensiero resta alto e un sentimento
fermo guida il tuo spirito e il tuo corpo.
In Ciclopi e Lestrigoni, no certo,
nè nell’irato Nettuno incapperai
se non li porti dentro
se l’anima non te li mette contro.*

*Devi augurarti che la strada sia lunga.
Che i mattini d’estate siano tanti
quando nei porti - finalmente e con che gioia -
toccherai terra tu per la prima volta:
negli empori fenici indugia e acquista
madreperle coralli ebano e ambre
tutta merce fina, anche profumi
penetranti d’ogni sorta; più profumi inebrianti che puoi,
va in molte città egizie
impara una quantità di cose dai dotti.*

*Sempre devi avere in mente Itaca -
raggiungerla sia il pensiero costante.
Soprattutto, non affrettare il viaggio;
fa che duri a lungo, per anni, e che da vecchio
metta piede sull’isola, tu, ricco
dei tesori accumulati per strada
senza aspettarti ricchezze da Itaca.
Itaca ti ha dato il bel viaggio,
senza di lei mai ti saresti messo
sulla strada: che cos’altro ti aspetti?*

*E se la trovi povera, non per questo Itaca ti avrà deluso.
Fatto ormai savio, con tutta la tua esperienza addosso
già tu avrai capito ciò che Itaca vuole significare”
(Itaca - Costantino Kavafis)*

*“There is no luckier thing that can happen to a young person setting out in life than that
some giant in the field should choose to bestow friendship and to spare the time to
talk”. (Rosalyn Higgins about Oscar Schachter)*

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INTRODUCTION

In April 2010 the International Court of Justice (ICJ) rendered a judgment which would inaugurate a wide debate on the relationship between science and law. The *Pulp Mills* case was, from this viewpoint, a watershed. In that occasion, the Court, while admonishing the parties for the way they presented technical evidence¹ as not being the most adequate considering the special circumstances of the dispute, also employed a dubious instrument for getting scientific input – the so-called *ghost experts*². A significant amount of criticism accompanied the judgment – either by scholars, either by dissenting voices within the courtroom.

The *Pulp Mills* judgment and criticism that followed raised questions about the inadequacy of instruments at the Court's disposal to deal with disputes having science-heavy or factual-complex evidence involved. In other words, the questions was whether and to what extent a court of law, especially one with some diplomatic contours as the ICJ, could properly grapple with complex evidence when called to settle a scientific dispute.

Since *Pulp Mills* several disputes brought before the Court have touched upon scientific evidence and highly technical matters. Accordingly, the question sparked interest in the scholarship. The growing attention on how an international tribunal confronts the issue can be identified also beyond the ICJ. For instance, in January 2015, a delegation of judges from the International Court of Justice visited Hamburg to hold a meeting with their counterparts of the International Tribunal from the Law of the Sea

¹ On the framework of the evidence law before the ICJ see A Riddell and B Plant, *Evidence Before the International Court of Justice* (BIICL 2009); M Benzing, 'Evidentiary Issues' in A Zimmerman and others (eds), *The Statute of the International Court of Justice: a Commentary* (OUP 2012) 1234; E Valencia-Ospina, 'Evidence before the International Court of Justice' (1999) 1 *Forum du Droit International* 202, 205; H Thirlway, *The International Court of Justice* (OUP 2016) 99; M Lachs, 'Evidence in the Procedure of the International Court of Justice' in *Essays in honour of Judge Taslim Olawale Elias* (Nijhoff 1992) 265-276; L Ferrari-Bravo, *La prova nel processo internazionale*, (Jovene 1958); NH Alford, 'Fact-finding by the World Court' 4 *Villanova Law Review* 38. Specifically on the adversarial framework of evidence of ICJ, see S Rosenne, *The Law and Practice of the International Court* (Martinus Nijhoff 2006)1338ff; JJ Quintana Aranguren, *Litigation at the International Court of Justice: Practice and Procedure* (Brill 2015) 383ff; R Kolb, *The International Court of Justice* (Hart 2012) 930; C Santulli, *Droit du contentieux international* (LGDJ-Montchrestien 2005); JF Lalive 'Quelques remarques sur la preuve devant la Cour Permanente et la Cour Internationale de Justice' (1950) 7 *Annuaire suisse de droit international* 77-103; Rosenne, 'Fact-finding before the International Court of Justice' in S Rosenne (ed) *Essays on International Law and Practice* (Brill 2007) 31M Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten: The law of evidence before international courts and arbitral tribunals in inter-state disputes* (Springer 2010).

² Simma B, 'The International Court of Justice and Scientific Expertise' (2012) 106 *Proceedings of the Annual Meeting* (American Society of International Law) 230.

(ITLOS), which was named “Legal and practical issues involved in the handling of law-of-the-sea cases”³. One of the topics of this meeting was the handling of evidence in technical disputes. Equally noteworthy is the fact that in the occasion of the celebration of the 70th anniversary of the International Court of Justice, a wide group of *legal* experts, scholars, judges and practitioners gathered together in the Great Hall of Justice and one of the themes discussed was precisely fact-finding, “notably in scientific-related disputes”⁴. These two events are indicative of a broad interest on the topic.

The problem of how courts of law operate whenever they meet science can be traced back to the eighteenth century, almost as a consequence of the industrial revolution, and has been present ever since⁵. The ways to deal with those problems depend, to a certain extent, on the contours of the legal system in which they arise. While the Anglo-Saxon system favoured the use of party-appointed experts⁶, *le juge de la codification*⁷ of *civil law* systems would not conceive the idea of letting the parties almost exclusively responsible for identifying the “truth”. Both systems had problems in taming science within the courtrooms. Paradoxically, since the evidentiary system of the International Court of Justice appears to be a blend between the two systems⁸, it is not a surprise to see some of those problems being mirrored in the international level. As aptly observed by an author, “scientific disputes pose new challenges within the rationalist conception of adjudication in the international setting”⁹.

³ “President Golitsyn welcomes delegation of judges of the International Court of Justice to Hamburg”, ITLOS/Press 223 – 27 January 2015 (available at https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_223_EN.pdf).

⁴ L Malintoppi, ‘Fact Finding and Evidence Before the International Court of Justice (Notably in Scientific-Related Disputes)’ (2016) 7 JIDS.421-424.

⁵ See, generally, T Golan, *Revisiting the History of Scientific Expert Testimony* (2008) 73 *Brooklyn Law Review* 881; D Dwyer, *The Judicial Assessment of Expert Evidence* (CUP 2008); JH Langbein, ‘Historical Foundations of the Law of Evidence’ (1996) 96 *Columbia L Rev* 1168.

⁶ T Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Harvard University Press 2007).

⁷ JOLOWICZ, *On Civil Procedure*, Cambridge, 2000, p. 185; LECLERC, *Le juge et l’expert: Contribution à l’étude des rapports entre le droit et la science*, Paris, 2005; ANSANELLI, *La consulenza tecnica*, in: *La prova nel processo civile* (Taruffo ed.), Milano, 2012, p. 993.

⁸ In this regard, Lachs pinpointed that “[i]t has been recalled on several occasions that the Court aimed to ‘hold a middle course between those two systems’. This goal has been maintained throughout the existence of the two Courts” (Lachs [n 1] 265). In this regard, see Riddell and Plant (n 1) 11-12; Valencia-Ospina (n 1) 203-204; Lachs (n 1)

⁹ CE Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (CUP 2011) 341.

Although the appearance of experts¹⁰ before international courts is not a recent feature, the growing number of technical questions underlying disputes shed new lights on the potential problems arising with their appearance¹¹. This seems to be true particularly if one considers that experts can perform different functions before international tribunals.¹² In the context of the ICJ, experts (a) may offer technical assistance to the parties in their pleadings appearing as members of the defensive teams; (b) may be called by the parties to give evidence before the Court in the quality of pleaders; (c) can be called through an specific procedure and be tested by the technique of cross-examination; (d) can help the Court to gather the factual information of a dispute (*fact-finding* function); (e) can be called in order to help the Court to understand the technical or scientific evidence put forward by the parties in a dispute (*fact-assessment* function); and (f) can perform an specific technical function related to their knowledge such as the preparation of maps or helping the parties to demarcate their boundaries.

In the light of these potential and varied functions, an examination of the instruments at the ICJ's disposal might prove to be useful in the context of the growing numbers of scientific disputes. An adequate use of experts might have an impact on the judicial activity of the ICJ in at least three aspects.

First, experts might assist the court in identifying the relevant facts of the dispute. As stressed by Hersch Lauterpacht "the manner in which facts are marshalled in relation to any particular topic may be decisive for the elaboration of the governing legal principles"¹³. Accordingly, an appropriate ascertainment of complex facts might allow the Court to properly exercise its judicial function of applying international law to

¹⁰ The argument has been calling attention of the legal literature in recent times. See, in this regard JR Rodriguez, *L'expert em droit international* (Pedone 2010). G White, *The use of experts by International Tribunals* (Syracuse University Press 1965); L Savadogo, *Le recours des juridictions internationales à des experts* (2004) 50 *Annuaire français de droit international* 231-258; JG Devaney, *Fact-finding before the International Court of Justice* (CUP 2016). On the appearance of experts in international decision-making process see M Ambrus and others (eds) *The role of 'experts' in international and european decision-making processes: advisors, decision makers or irrelevant actors?* (CUP 2014).

¹¹ "There is no question that modern international relations, and hence modern diplomacy and modern international litigation, is daily becoming increasingly concerned with scientific and technological facts. The law too, all law including international law, has to face this", in ROSENNE, *Fact-finding*, p.237.

¹² It has been similarly observed that "expert evidence is presented before a tribunal in cases involving complicated facts that require elucidation or solution by persons having, by virtue of their specialization, training, vocation or experience, a special and intimate knowledge of these or similar facts" (VS Mani, *International Adjudication: Procedural Aspects* (Nijhoff 1980) 234:).

¹³ H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 36.

these facts. It thus, contributes to the main function of the Court that is to settle disputes between States.

Second, an appropriate use of experts may enhance the authority of the judgment by increasing the perception that the assessment of the facts underlying the dispute has been conducted accurately and diligently.¹⁴ Additionally, given that “a decision which is not convincingly reasoned (...) will lack authority in the eyes of the parties”¹⁵, it could be equally held that that a decision which is not convincingly rooted on an accurate factual analysis of the would also lack authority in the parties' perception.

Third, in a context of potential competition among international courts, it is submitted that the Court should perform a guiding role. As observed by one author, “[t]he ICJ, to keep its place at the forefront of the international legal system, must act decisively and with deftness to find a solution to the challenge presented by [scientific] cases”¹⁶.

The last set of considerations regards the procedure adopted to examine the problem. From the outset, it should be observed that several approaches and methodologies might be employed to address the problem of use of experts by the ICJ. For instance, when the Court is called to settle complex disputes dealing with environmental issues, one could look at the problem through the lens of the precautionary principle, the uncertainty of evidence and its effects in the burden of proof¹⁷. The appearance of experts in the proceedings also touches upon the rationale of epistemic studies and the decision-making process adopted by international courts¹⁸.

¹⁴ On the issue of legitimacy see T Treves, ‘Aspects of Legitimacy of Decisions of International Courts and Tribunals’ R Wolfrum and V Röben (eds) *Legitimacy in International Law* (Springer 2008) 169 ff, and, more broadly T Franck, *The Power of Legitimacy among Nations*, (OUP 990).

¹⁵ JG Merrills, *International Dispute Settlement* (CUP 2011) 293.

¹⁶ D Peat, ‘The Use of Court-Appointed Experts by the International Court of Justice’ (2014) 84 *British Yearbook of International Law* 300.

¹⁷ That was the path followed by Caroline Foster (n 9) in her book. See also JE Vinales, *Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law* (2010) 43 *Vanderbilt Journal of Transnational Law* 437-507.

¹⁸ See in this regard the debate between MM Mbengue, *International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-finding in International Adjudication* (2011) 34 *Loyola* 53 Alvarez, ‘Are International Judges Afraid of Science?: A Comment on Mbengue’ (2012) 34 *Loyola of Los Angeles Intl & Comp L Rev* 84, see also J D’Aspremont and MM Mbengue, ‘Strategies of Engagement with Scientific Fact-finding in International Adjudication’ (2014) 5 *JIDS* 240–72. See also, PM Haas, ‘Ideas, experts and governance’ W G Wergner ‘The politics of expertise: applying paradoxes of scientific expertise to international law’ J Lawrence ‘The structural logic of expert participation in WTO decision-making process’, all in M Ambus and others (eds) *The role of 'experts' in International and European Decision-making processes* (CUP 2014); L Gradoni, *La science judiciaire à l’OMC ou les opinions du «juge Faustroll» autour des organismes génétiquement modifiés et de la viande de bovins*

Notwithstanding the vast array of options to speculate the handling of experts, in this work the problem will be addressed from the more traditional viewpoint, which considers experts as a procedural instrument available to the Court. I look at the problem from an evidentiary viewpoint. Moreover, it must be specified at this stage that the present study will focus on the role of experts in contentious proceedings – although experts may also be employed in the context of advisory proceedings.

In order to offer an answer the questionings abovementioned, this study is structured in three parts.

The first chapter offers a perusal of instruments for the use of experts available to the ICJ to deal with technical and scientific evidence. The primary focus is to draw a framework on the limits and the problems related to each instrument employed by the Court.

In the second chapter, the examination targets to other two tribunals dealing with interstate disputes. The idea of examining the rules and the case law of other tribunals has as main purpose the comparison between instruments. Given the several possibilities of international adjudicative bodies to examine, my focus will be on two tribunals which are, to more or less extent, more similar to the context in which the ICJ operates: the International Tribunal for the Law of the Sea (ITLOS) and interstate arbitration. In determining the exact scope of analysis, I chose not to focus on the vast amount of practice relating to the use of experts in the case law of the Dispute Settlement Body of the World Trade Organization¹⁹. Although some of the ideas arising from that context might have been useful, the particular characteristics of this compulsory judicial system and the law they it might not be an adequate element of comparison. Thus, it was left out of the examination.

traités aux hormones, in M Deguegue and C Moiroud (eds.) *Les OGM en questions. Science, politique et droit* (Sorbonne 2013)287-317; S Haack, *Evidence Matters: Science, Proof and Truth in the Law* (CUP 2014).

¹⁹ See, in this regard, DA Baker, M Goldstein, MJ Pereyra and C Wakoli, When Science Meets Law: the rule of law in the development of the panel's expert consultation process, in G Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (CUP 2015) 457 ff; M Cossy, 'Panels' consultations with scientific experts: the right to seek information under Article 13 of the DSU', in R Yerxa and B Wilson (eds) *Key Issues in Wto Dispute Settlement: The first ten years* (CUP 2005) 204-220; CA Thomas, 'On Facts and Phantoms: Economics, Epistemic Legitimacy, and Wto Dispute Settlement' (2011) 14 *Journal of International Economic Law* 295-328; P Lièvre and PC Mavroidis, 'Le recours à des experts et ses mésaventures en droit de l'OMC' in MA Frison-Roche and A Abello, *Droit et économie de la propriété intellectuelle* (LGDJ 2005) 201-220; J Pauwelyn, 'Expert Advice in WTO Dispute Settlement' in GA Bermann and PC Mavroidis, *Trade and Human Health and Safety* (eds) (CUP 2006) 235-256; GZ Marceau and JK Hawkins, 'Experts in WTO Dispute Settlement' (2012) 3 *JIDS* 493-507.

In the third chapter, I examine three procedural values which appear strictly connected to the appearance of experts in a judicial proceeding, namely transparency, due process and the independence and impartiality of the adjudicative body. Drawing from the practice of the ICJ and the comparison between legal instruments, I test each instrument at the Court's disposal in the light of such values. I conclude with some suggestions on how the ICJ could improve, taken these procedural values into account, its method of employing experts to deal with technical and scientific evidence.

CHAPTER 1

EXPERTS UNDER THE STATUTE, RULES, AND IN THE PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE

1. Introduction

The International Court of Justice has at its disposal several tools and mechanisms to assess or produce evidence²⁰. In particular, in the course of its seventy years of existence, the World Court²¹ has developed a significant procedural practice relating to the use of experts. The main purpose of this chapter is to identify and illustrate this practice.

Experts may perform different functions in a international judicial proceeding. Just to offer some examples, experts may be called by the parties to illustrate the technicalities underlying their arguments; they may help the court to produce the evidence that was not sufficiently presented by the parties; experts may also evaluate the evidence that was produced during the proceedings and. All these two functions have been performed by different categories of experts in a considerable number of cases before the ICJ. Even if there is already a significant amount of practice relating to the use of experts, some points remain open to discussion.

The present chapter aims not only at presenting the relevant Court's practice, but also at identifying the main legal problems raised in connection to the use of experts. It will analyze each category of experts existing in the Court's practice. It is possible to identify at least five different categories of expert: (1) the party-appointed expert; (2) the expert counsel; (3) the independent expert envisaged in article 50 of the Statute; (4) the invisible or "phantom" expert; (5) assessors envisaged under article 30 of the Statute and (6) the expert appointed by the Court to help the parties to implement

²⁰ As "evidence" it is understood the generic name for the adversarial presentation of facts underlying a dispute. In this sense, S Rosenne, 'Fact-finding before the International Court of Justice' in S Rosenne (ed) *Essays on International Law and Practice* (Brill 2007) 31. On the evidence before the International Court of Justice see, generally, M Bezing, 'Evidentiary Issues' in A Zimmermann and others (eds) *The Statute of the International Court of Justice: A Commentary* (OUP 2012); A Riddell and B Plant, *Evidence Before the International Court of Justice* (BIICL 2009); JG Devaney, *Fact-Finding before the International Court of Justice* (CUP 2016); M Lachs, 'Evidence in the Procedure of the International Court of Justice' in *Essays in honour of Judge Taslim Olawale Elias* (Nijhoff 1992) 265-276; JJ Quintana, *Litigation at the International Court of Justice* (Brill 2015).

²¹ About the continuity of the two Courts: S Rosenne, *The Law and Practice of the International Court 1920-2005* (Brill 2006) 73 ff. See also O Spiermann, Historical Introduction in Zimmermann and others (n 1) 69-70.

the Court's judgment. These six categories together form what can be called the ICJ's framework of expertise.

The analysis of each category of expert shall be carried out in the following way. In the first place, the respective normative base shall be identified. This will be followed by the study of the relevant practice of the PCIJ and of the ICJ. When examining this practice special attention will be paid to the Court's criteria about the probative weight given to experts and the role they performed in settling a certain dispute.

The analysis of this general framework of expertise shall permit to identify the problems, the criticism and the shortcomings inherent in the use of these different categories of experts.

2. The general regime of expertise in the ICJ: the six categories.

The Statute of the ICJ contemplates the possibility of having recourse to experts in three provisions. Article 43 establishes that experts can be heard in the oral proceedings. Article 50 empowers the Court to entrust any "individual, body, bureau, commission, or other organization" with giving an expert opinion. Article 51 is related to the questions that can be asked to experts and witnesses.

Having regard to the Court's practice, it is possible to identify six different ways in which experts can participate in the proceedings. Despite the different doctrinal views over the characterization of these figures, the main distinction between them is whether or not their presence is requested by the parties or by the Court: *experts ex parte* or *experts ex curiae*.

Since the parties have a major role in the production of evidence in ICJ proceedings, in the next paragraph I will start the analysis of the relevant practice by presenting the means at the disposal of the parties for having recourse to *expertise*. I will then address the instruments available to the Court.

The parties have at their disposal different options to handle technical or scientific evidence in the proceedings. Experts can be nominated by the parties as witnesses (a) or as counsels (b).

The Court has basically two ways of using experts: as "informal" or "invisible" experts (c) or as independent experts under Article 50 (d).

The last section will address the experts that the Court appoints to assist the parties in implementing its judgments(e).

a. Experts *ex parte*.

Article 43 of the Court's Statute provides that "the oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates". The parties have basically two possibilities to use experts during the oral proceedings²²: a) experts appointed by the parties to testify before the Court following a specific procedure (hereinafter called party-appointed experts) and; b) experts who are part of a delegation, or as they are commonly called, "expert counsel".

2.1. Party-appointed experts.

2.1.1. Witnesses, Witnesses-Expert and Experts (Arts 57 and 64 of the Court's Rules).

The resort to witnesses and experts in the oral proceedings is not recurring in the practice of the ICJ²³. As Rosenne remarked "it was rare for an international tribunal to obtain evidence from witnesses"²⁴. Yet, in recent times, the growing number of disputes raising technical and scientific questions has enhanced the role of witnesses and experts in the proceedings before international tribunals. This is particularly true when one observes that also *affidavits*²⁵ sometimes can be considered, as mentioned by

²² Rosenne (n 21) 1137.

²³ Up until the moment this thesis was written, the 12 cases (out of more than a hundred cases in the Court's docket) that have involved the examination of witnesses or experts are: (1) *Corfu Channel (United Kingdom v. Albania)*, (2) *Temple of Preah Vihear (Cambodia v. Thailand)*; (3) *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, (4) *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, (5) *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*; (6) *Continental Shelf (Libyan Arab Jamahiriya/Malta)*; (7) *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (8) *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, (9) *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, (10) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide case (Bosnia and Herzegovina v. Serbia and Montenegro)*; (11) *Whaling in the Antarctic case (Australia v. Japan: New Zealand intervening)*, (12) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide case (Croatia v. Serbia)*. In the case law of the Permanent Court of International Justice, witnesses were heard in the German Interests in Polish Upper Silesia case (P.C.I.J., Series A, Judgment n° 7).

²⁴ Rosenne (n 21) 1307.

²⁵ According to two authors, affidavits "are a hybrid form of evidence most frequently used in common law jurisdictions which consist of evidence given under oath before a notary or another public official recorded by him in a formal instrument drawn up in accordance with the provisions of the

judge Torres Bernárdez, “as a form of witness evidence, but one not tested by cross-examination”²⁶.

The Statute of the ICJ, in the abovementioned Article 43, distinguishes between witnesses and experts. This distinction can also be found in Article 64 of the Court's Rules, which establishes that witnesses and experts have to make different solemn declarations before their appearance in the Court. Article 64 sets forth that

[u]nless on account of special circumstances the Court decides on a different form of words,

(a) every witness shall make the following declaration before giving any evidence: 'I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth';

(b) every expert shall make the following declaration before making any statement: 'I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth, and that my statement will be in accordance with my sincere belief'.

The text differentiates the duties of witnesses and experts. It is expected that witnesses provide evidence regarding the facts of a controversy, whereas experts provide their opinion according to their “sincere belief”, on the basis of their specific knowledge. As the Court had opportunity to clarify, the witness is “called to establish facts within her personal knowledge which might help the Court to settle the dispute brought before it”²⁷, while experts are called “to assist the Court in giving judgment upon the issues submitted to it for decision”²⁸ or “to give to the Court a precise and concrete opinion upon the points submitted to them”²⁹.

In this context, a third hybrid figure emerged in the Court's practice, that of the witness-expert³⁰. In cases where a person gives its declaration about certain facts but also assesses these facts from a technical or scientific point of view, this person is

national law of the deponent or of the party deposing the affidavit. In short, an affidavit is testimonial evidence in written form” (A Riddell and B Plant, *Evidence Before the International Court of Justice* (BIICL 2009) 279). About the use of affidavits in international tribunals, see C Amerasinghe, *Evidence in International Litigation* (Nijhoff 2005) 189-203; M Bezing, ‘Evidentiary Issues’, in Zimmerman and others (n 21) 125.

²⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Judgment) [2001] ICJ Rep 40, Dissenting opinion of Judge Torres Bernárdez, para 36.

²⁷ *Questions of Mutual Assistance in Criminal Matters case (Djibouti v. France)* (Judgment) [2008] ICJ Rep para 12.

²⁸ *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)* (Judgment) [1985] ICJ Rep para 65.

²⁹ *Corfu Channel case* (Order of 17th December) [1948] ICJ Rep 126. These two quotations were used by the Court in reference to experts nominated by the Court. However, they seem to apply more broadly to all experts, including experts appointed by the parties.

³⁰ S Talmon, ‘Article 43’ in Zimmerman and others (n 1) 1160. See also S Murphy, ‘The ELSI Case: An Investment Dispute at the International Court of Justice’ (1999) 16 *Yale Journal of International Law* 391,443.

invited to make a declaration as a witnesses, in the sense of Article 64 (a), and also as an expert, in the sense of Article 64 (b). As defined by President Higgins, “the term [expert-witness] refers to a person who can testify both as to knowledge of facts, and also give an opinion on matters upon which he or she has expertise”³¹.

However, as was stressed by some authors³², the boundaries of this distinction are hard to draw in practice. As pointed out by Tams, even the distinction between experts and witnesses “has often become blurred”³³, especially in disputes that deal with facts of technical nature. There is no procedural distinction between the two figures apart from the declarations that have to be made by them. In the context of the *South West Africa* cases, Sir Percy Spender delineated the main consequence of this distinction:

It is not possible, it seems to me, for a witness, who has been sworn as an expert and also as a witness of fact to, as he goes along, indicate: now I am speaking as to fact, now I am giving an expert opinion; and it is inevitable that the person who is giving evidence as an expert will both deal with facts and also express his opinion upon the facts. (...) There is, moreover, no reason why that person should not give evidence as an expert, notwithstanding the fact that he happens to be a governmental official. That may bear upon the weight to be given to his evidence, but it does not bear upon the admissibility of his evidence³⁴.

The main distinction between experts and witnesses is, therefore, the probative weight that the Court can give to their statements, depending on the nature of their testimonies.

In four recent cases (*Bosnian Genocide*, *Whaling in Antarctic*, *Croatian Genocide* and *Construction of a Road in Costa Rica*), the three terms (“experts”, “witnesses” and “witness-experts”) were employed by the Court. In the *Whaling in Antarctic* and in *Construction of a Road in Costa Rica* cases, the Court referred only the term “expert”. In the cases on genocide, the two categories “witness” and “expert witness” were used.

³¹ R Higgins, *Speech by H.E. Judge Rosalyn Higgins to the Sixth Committee of the General Assembly* (2 November 2007) 7. The speech of Judge Higgins offers an example of a situation in which this mixed figure can be used: “The category of ‘witness-expert’ is not actually mentioned in the Statute or the Rules, but was recognised in the Corfu Channel case and subsequently used in the Temple of Preah Vihear case and South-West Africa cases. The term refers to a person who can testify both as to knowledge of facts, and also give an opinion on matters upon which he or she has expertise. In the *Bosnia v. Serbia* case, the witnesses and experts were examined and cross-examined in court. We heard testimony as to the structure of the military organizations, the relationship between the army of Republika Srpska and the Yugoslav army, the destruction of cultural heritage, and estimations of the war casualties”.

³² In *Riddell and Plant* (n 1) 32: “The fragility of the boundary between opinion and fact has caused difficulty in some cases, and has led to the creation of the third hybrid category of witness-expert”.

³³ C Tams, ‘Article 51’ in Zimmermann and others (n 20) 1263.

³⁴ *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*(Pleadings, Oral Arguments), Documents, CR 1965/2, p. 123. Emphasis added.

For the purposes of this work, while the focus will be on experts, i.e. persons who “give an opinion on matters upon which he or she has expertise”, the figures of witnesses, experts and witness-experts shall be analyzed together.

2.1.2. Procedure for appointment and examination.

The Statute and Rules of the Court contain provisions governing the treatment of evidence given by witnesses and experts³⁵. However, the procedure of presentation and examination of witnesses and experts during the oral part of the proceedings does not follow a pre-determined path. In fact, the rules about the examination of witnesses and experts are very general and they essentially allow the Court to define the path to be followed. As provided by Article 58 (2) of the Court's Rules:

[t]he order in which the parties will be heard, the method of handling the evidence and of examining any witnesses and experts, and the number of counsel and advocates to be heard on behalf of each party, shall be settled by the Court after the views of the parties have been ascertained in accordance with Article 31 of these Rules.

Essentially, this provision prescribes that an *ad hoc* procedure will be established by the Court for each case after consultation with the parties. The recent (*Croatian*) *Genocide* case showed that during the proceedings the parties can change their views as regards the number and the method of presentation of witnesses and witnesses-experts³⁶.

When witnesses or experts are indicated by the parties “before the opening of the oral proceedings”³⁷, through a document containing “indications in general terms of the point or points to which their evidence will be directed”³⁸, they will present their evidence during the oral proceedings. In the *Bosnian Genocide* case, the parties were required to provide the Court “at least three days before the hearing of each witness, expert or witness-expert, a one-page summary of the latter’s evidence or statement”³⁹.

³⁵ Arts. 57, 58, 63, 65, 70 and 71 of the Rules.

³⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide case (Croatia v. Serbia)* [2015] ICJ Rep paras 17-33.

³⁷ Article 57, ICJ Rules.

³⁸ Art. 57, ICJ Rules: “Without prejudice to the provisions of the Rules concerning the production of documents, each party shall communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce or which it intends to request the Court to obtain. This communication shall contain a list of the surnames, first names, nationalities, descriptions and places of residence of the witnesses and experts whom the party intends to call, with indications in general terms of the point or points to which their evidence will be directed. A copy of the communication shall also be furnished for transmission to the other party”.

³⁹ *Bosnian Genocide case* (n 23) para 53.

In the *Whaling* and *Croatian Genocide* cases, the parties had to submit to the Court in advance the content of their statements in written form.

The Rules also assures the parties the possibility to appoint an expert or a witness⁴⁰ not only before the beginning of the hearings, but also *during* the hearings⁴¹. It must be mentioned that this last option is more restrictive than the first, since the Court or the other party can block this appointment, as it is provided by Article 63.1 of the Rules. The Court once denied the right of the party to appoint a witness deeming “the evidence to be obtained from Mrs. Borrel did not appear to be that of a witness called to establish facts within her personal knowledge which might help the Court to settle the dispute brought before it”⁴².

Despite the broad powers that the Court has to determine the procedure to be followed, the parties maintain a number of rights. One of them is the right to comment upon the expertise presented. This main right is expressed in Article 51 of the Statute and also in Articles 58 and 65 of the Rules.

Article 51 provides:

[d]uring 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.

According to Article 58,

[t]he Court shall determine whether the parties should present their arguments before or after the production of the evidence; the parties shall, however, *retain the right to comment on the evidence given*.

Finally article 65 prescribes:

[w]itnesses and experts *shall be examined by the agents, counsel or advocates of the parties under the control of the President*. Questions may be put to them by the President and by the judges.

These three rules might be considered as a guarantee of the principle of due process since they recognize the parties' right to contest and contradict the testimony of witnesses and experts during their examination.

The method of examination of experts is of extreme importance because it serves to test the evidence presented by them. That is the reason why the examination of experts has been conducted since the first case in which the parties appointed witnesses

⁴⁰ The parties' right to indicate witness or experts stems from Article 43 of Court's Statute.

⁴¹ This right is assured by Article 63, 1, of Court's Rules: “The parties may call any witnesses or experts appearing on the list communicated to the Court pursuant to Article 57 of these Rules. If at any time during the hearing a party wishes to call a witness or expert whose name was not included in that list, it shall so inform the Court and the other party, and shall supply the information required by Article 57. The witness or expert may be called either if the other party makes no objection or if the Court is satisfied that his evidence seems likely to prove relevant”.

⁴² *Mutual Assistance in Criminal Matters case* (n 27) para 12.

and experts, the *Corfu channel* case⁴³. Nonetheless, it is interesting to note that agents and counsels are responsible for examining the witnesses and experts, but experts cannot examine experts in order to challenge the data presented. As noted by Tams, experts “will often be instrumental in preparing the examination [of other experts]”⁴⁴, but they are not allowed to ask questions. A possible explanation for this phenomenon might be that the examination of experts by other experts may escape from the control of the parties. In a context of technical disputes which growingly requires the confrontation between experts, that seems to be a shortcoming of the present rules.

Based on a system similar to that applied before *common law* courts⁴⁵, the presentation and examination of witnesses and experts in four recent cases adhered the following procedure of cross-examination⁴⁶:

1° The party that called the witness or expert performs the examination-in-chief. This stage can be skipped if the witness confirms his or her own previous written statement.

2° The other party has the option to cross-examine the expert and the testimony. As we see further ahead, to waive the right of cross-examination might carry some implications.

3° The party that called the witness or expert can perform the re-examination. This is a recent development in the Court's procedure⁴⁷.

4° The judges question the witnesses and experts.

The procedure above delineated is the one followed in the Court's recent practice. It can be changed depending on the necessities of each case: as mentioned before, the method of examination of witnesses and experts is “highly flexible”⁴⁸. In general, this four-step procedure has been regarded by commentators as an improvement in the Court's procedure⁴⁹ since it favours the testing of the evidence

⁴³ *Corfu Channel case* (n 23) 7.

⁴⁴ Tams (n 33) 1266.

⁴⁵ Tams (n 14)1268.

⁴⁶ *Bosnian Genocide case* (n 23) para 58; *Whaling in the Antarctic* (n 23) para 20; *Croatian Genocide* (n 4) para 33. In the *Croatian Genocide* case, the first phase was slightly changed since the witnesses were not examined by the party that had appointed them, but in fact were only asked to confirm his or her written testimony or statement.

⁴⁷ The first case in which the re-examination was performed is the *Bosnian Genocide case* (n 4) para 57.

⁴⁸ Tams (n 33) 1268.

⁴⁹ J D'Aspremont and MM Mbengue, ‘Strategies of Engagement with Scientific Fact-finding in International Adjudication’ (2014) 5 *JIDS* 240–72.

presented by experts but also the right to reply, essential component of the principle of due process.

Besides, the active approach taken by judges in asking questions to experts and witness in recent cases is a sign of a more proactive role of the Court in examining the evidence. Performing this examination, the Court seems to distinguish from the previous reluctant approach in which judges avoided to ask questions “suggesting that this may reveal their line of thought and perhaps prematurely put on guard one or both parties as to the reasoning they may follow in the final decision”⁵⁰.

2.1.3. Assessing the role of party-appointed experts in the Court’s case law.

Until very recently, the presence of witnesses or witness-experts in the proceedings before the ICJ were seen with some degree of skepticism because of the “limited reliance” that the Court appeared to place on them⁵¹. Moreover, it was generally associated with an unnecessary slowness in the proceedings⁵². Some authors called it “superfluous” and of “questionable value”⁵³. In this sense, Talmon argued that

[w]itnesses will often duplicate what has been pleaded already by the parties. A lot of time and effort is usually spent on calling into question the credibility and reliability of the other party’s witnesses. It is thus not surprising that the Court has made little to no reference to the testimony of witnesses in its judgments⁵⁴.

During its first forty years of activities of the Court, only in six cases the parties appointed experts or witness. However, in none of them did experts perform a crucial or fundamental role. In fact, very little reference was made to their presence or their examination during the oral proceedings. It is interesting to note that, in all of these six cases, the parties had experts who were also part of their delegations as “expert assessors”, a variant of the expert counsel which is enlisted in the party’s defensive team.

The first case in which the parties appointed experts was the *Corfu channel* case. The Court did not give authoritative weight to the evidence given by party-appointed experts in its judgment but it took into account the fact that they disagreed. The observed that “certain points have been contested between the Parties which make

⁵⁰ Lachs (n 1) 269.

⁵¹ Tams (n 33) 1263.

⁵² R Kolb, *The International Court of Justice* (Hart 2013) 971.

⁵³ Talmon (n 30) 1158.

⁵⁴ *Ibid.*

it necessary to obtain an [independent] expert opinion”⁵⁵. Thus, in the first case in which experts were appointed by the parties their disagreement led the Court to nominate its own independent experts to clarify the controversial technical points in dispute.

The second case in which the parties appointed experts to participate in the oral hearings was the case concerning the *Temple of Preah Vihear (Cambodia v. Thailand)*⁵⁶. This was the first case in which a witness gave evidence both in the quality as witness and as expert. The Judgment did not make any reference to this distinction nor did the parties mention it. Besides, the Court did not address in the judgment the role played by experts and witnesses for the assessment of facts.

However, some judges emphasized the fact that on certain issues experts have shown an agreement⁵⁷. Interestingly, some judges raised the issue as to what approach the Court should assume when confronted with a disagreement between the opinions of the experts⁵⁸. For instance, judge Wellington Koo observed that “[t]he conflicting character of the two expert recommendations presents a perplexing problem, and the difficulty has been further increased by the outcome of the examination and cross-examination of the experts and witnesses at the oral hearing”⁵⁹. He also noted:

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 in the present case⁶⁰.

The words of judge Koo are quite incisive about the problem that the Court would later characterize as “the clash of expert opinions”, a problem that appears relatively often when experts from different parties appear before the Court. In the specific case of *Preah Vihear*, the main disagreement between experts was about the correct lines to be traced in interpreting cartographical maps and geological documents.

⁵⁵ *Corfu Channel* [Order] (n 29)124.

⁵⁶ *Temple of Preah Vihear* (n 23) 8.

⁵⁷ *Temple of Preah Vihear* (n 4), Dissenting Opinion of Sir Percy Spender, 122, and Dissenting Opinion of Judge Wellington Koo, 51.

⁵⁸ *Ibid.*

⁵⁹ *Temple of Preah Vihear* (n 4), Judge Wellington Koo Dissenting Opinion, 99.

⁶⁰ *Temple of Preah Vihear* (n 4), Judge Wellington Koo Dissenting Opinion 100.

The problem underlined by judge Koo is a problem that the Court has also faced in its more recent judgment.

During the oral phase of the *South West Africa* cases a great number of persons was called to witness and the oral hearings took more the two months⁶¹. Professors from different universities, sociologists and ethnologists testified before the Court in order to define the status of the relationship between South West Africa and South Africa. Despite of this massive use of experts of witnesses by the parties, the Court made no reference to the appearance of the experts in its judgment. As a result, besides other critics to the appearance of witnesses⁶², scholars started to question the necessity of having experts and witnesses in the proceedings, especially due to the fact that the hearings in the *South West Africa* cases prolonged extensively the duration of the case.

The only significant point about the weight of the evidence presented by experts was made, again, by a few judges in their individual opinions. They took into consideration statements that were given by experts and that were not contested by the other party. In this regard, judge Tanaka noticed that one of the parties “neither produced any evidence in contradiction thereof nor disputed [the testimony given by a witness-expert] in cross-examination”⁶³. Judge van Wyk assumed the experts' “uncontested testimony”⁶⁴ to be true.

In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, technical questions arose regarding the delimitation of the area of the continental shelf between the parties. Both parties had experts in their delegations and an expert was called by Libya to testify pursuant to Articles 57, 63 and 65 of the Rules. It is interesting to note that the Court took into consideration the fact that experts appointed by Tunisia had made declarations against the argument sustained by this State. In the words of the Court:

To appreciate the Libyan argument, it is first necessary to set out briefly a comparatively recently developed theory known as "plate tectonics", presented to the Court by Libya. Before doing so, however, the Court would mention that Tunisia has criticized the Libyan argument for its reliance upon that theory.

⁶¹ South West African cases, I.C.J. Reports 1966, Pleadings, vol. VIII, pp.56-84.

⁶² About the South West African cases, Leo Gross wrote that “[t]he Court could exercise a more effective control over the conduct of oral hearings and the presentation of experts and witnesses without interfering with the right of the parties to make as full a statement of their case as they deem necessary. But the Court could ask the parties to elucidate the points which in the Court's views need clarification”. See GROS, *The International Court of Justice and the United Nations*, RCADIH, 1967, p. 431.

⁶³ South West African cases, I.C.J. Reports 1966, Judge Tanaka Dissenting Opinion, p. 322.

⁶⁴ South West African cases, I.C.J. Reports 1966, Judge van Wyk Separate Opinion, p. 178.

However, *the Court notes that the experts consulted by Tunisia agree with the international geological community on the basic principles of plate tectonics*; Tunisia has rather disputed some of the deductions sought to be made from the theory, and contended that the reference to it is irrelevant in the present case⁶⁵.

Thus the Court gave relevance to the fact that an expert or witness made declarations contrary to the official position sustained by the party that appointed him. As it will be shown, the same approach was taken by the Court in subsequent cases.

Another problem raised by the case concerned the existence of a disagreement between experts on certain scientific issue. This issue was addressed by judge *ad hoc* Jiménez de Aréchaga. According to him, “the Court was placed in the situation of being asked to decide this case exclusively on the basis of the conflicting scientific evidence presented to it by expert oceanographers and geologists”⁶⁶. The Court was however able to avoid the problem, since, as noted the judge, “the decision of this case is to be based on legal principles, putting aside the expert evidence submitted by the Parties”⁶⁷.

a. The evaluation of witnesses in the *Nicaragua* Case.

Despite the fact that in the *Nicaragua* case there were no questions of a scientific nature in dispute and therefore no experts presenting evidence, the way in which in this case the Court dealt with the witnesses presented is relevant for several reasons. One of these reasons is the fact that the Court identified some general criteria for evaluating the probative weight of witness testimony.

On account of the absence of the United States in the proceedings, the Court was particularly cautious with the evidence presented by Nicaragua⁶⁸, which called five witnesses to testify before the Court⁶⁹. Another consequence of the Defendant's non-appearance was the absence of cross-examination of the witnesses. The Court, nonetheless, noticed that “the evidence of the witnesses presented by the Applicant at the hearings was not tested by cross-examination; however, those witnesses were subjected to extensive questioning from the bench”⁷⁰.

⁶⁵ Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, para. 52. Emphasis added.

⁶⁶ Continental Shelf, Judgment, Jiménez de Aréchaga separate opinion, para. 38.

⁶⁷ Ibid, para. 39.

⁶⁸ Military and Paramilitary, Judgment, para. 59.

⁶⁹ Ibid, para. 66.

⁷⁰ Ibid, para. 67.

In the first place the Court emphasized the importance of the “objectivity” of the information given by witnesses:

The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact; it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself⁷¹.

With regard to the weight to be given to a certain testimony, the Court also drew an important distinction:

In the general practice of courts, two forms of testimony which are regarded as *prima facie* of superior credibility are, first the evidence of a disinterested witness - one who is not a party to the proceedings and stands to gain or lose nothing from its outcome - and secondly so much of the evidence of a party as is against its own interest⁷².

For this reason, when the Court evaluated the testimony given by members of Nicaragua's government, it considered “that the special circumstances of this case require it to treat such evidence with great reserve”⁷³. The criterion developed by the Court in this case has subsequently been followed by other international tribunals⁷⁴.

Once again if ones try to transpose the criteria established by the Court to experts rather than witnesses, the question becomes that of determining which kind of expert testimony can be regarded as *prima facie* of superior credibility. It may be argued, for instance, that a disinterested expert and an expert that offers evidence against the interest of the parties that called him can be regarded as having a “superior credibility”.

b) The use of experts in the *Elettronica Sicula S.P.A.* (ELSI) case.

A complex dispute involving Italian procedural law, bankruptcy and dissolution of business corporations, the *ELSI* dispute involved the participation of witnesses and experts testifying on behalf of both parties in dispute. The United States of America claimed that Italy had damaged its foreign investment with respect to an Italian company which had Americans shareholders. As a consequence, Italy would

⁷¹ Ibid, para. 68.

⁷² Ibid, para. 69.

⁷³ Ibid, para. 70.

⁷⁴ AMERASINGHE, *Evidence in International Litigation*, Leiden, Martinus Nijhoff, 2005, p.

have violated certain provisions of the Treaty of Friendship, Commerce and Navigation between the two Parties. In order to cope with the technical evidence in the case, the United States called two witnesses and an expert; Italy called an expert⁷⁵, who was cross-examined by the parties and answered questions asked by the Court.

The ELSI case was the first one in which the Court (more precisely, an *ad hoc* chamber of the Court) made a distinction between “counsels”, “witnesses” or “experts”. In the specific case, when Mr. Giuseppe Bisconti was addressing the Court on behalf of the United States (as a counsel) with regard to matters of fact within his knowledge as a company lawyer, the Italian agent requested the Chamber of the Court to treat Mr. Bisconti as a witness. The President of the Chamber acceded to this request and thus Mr. Bisconti was cross-examined and made the solemn declaration reserved to witnesses⁷⁶.

According to Murphy, besides the probative value that the difference between counsel and witness entails, this status' modification raises a practical question, namely “[c]ross-examination disrupts the flow of a party's presentation and tilts the presentation in the direction sought by the other party. In the ELSI case, the use of witnesses who were subject to cross-examination compromised the ability of the United States to present a clear, uninterrupted presentation of the facts”⁷⁷.

The Court did not offered any indication in the judgment about the value of the experts. Once again, some indications can be found in judges' opinions, and particularly in the dissenting opinion of Judge Schwebel. According to him, the parties' experts disagreed regarding their financial analysis and legal conclusions, but not only. In judge Schwebel opinion “the experts of Italy differed between themselves”⁷⁸. However, the majority of the Chamber did not take notice of this disagreement.

c. The use of witnesses and expert witnesses in the *Genocide* cases.

In the two *Genocide* cases before the ICJ (Bosnia and Herzegovina v. Serbia and Montenegro, henceforth the *Bosnian Genocide* case; and Croatia v. Serbia, henceforth the *Croatian Genocide* case) the parties had recourse to witnesses,

⁷⁵ Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989, para. 15.

⁷⁶ Ibid, para. 8.

⁷⁷ MURPHY, op. cit, p. 444.

⁷⁸ Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989, Judge Schwebel Dissenting Opinion, p. 104.

witnesses-experts and experts. The function of these categories during the proceedings was essential to furnish the Court with elements of fact that aimed to prove the constituent elements of genocide, in particular the "*dolus specialis*". While the Court in the past had little interaction with the witnesses testifying before it, in this case the Court has assumed a more active approach with regard to witnesses: judges asked more questions to the witnesses and experts, particularly regarding the method used to obtain the information; at the same time, the Court offered more indications on the evidential weight and the role of witnesses and experts in the Court's decision.

A specific problem appears regarding the examination of witnesses in the *Croatian Genocide* case. In that instance, the parties agreed that some of the witnesses did not need to be cross-examined⁷⁹. Croatia waived its right to cross-examine all of Serbia's witnesses. As a consequence their evidence to the Court was presented only in the form of written testimony. In turn, the Court stated that it did not wish to question the witnesses and witness-experts that the parties were not intending to cross-examine. A member of the Court asked the parties how this evidence should be treated⁸⁰. The Court did not clarify if there was a difference in the evidential weight of a witness statement not cross-examined as opposed to an affidavit, as it had been suggested by Serbia. Recalling its previous decisions, the Court observed that "affidavits will be treated 'with caution'"⁸¹, adding that "[i]n determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made"⁸².

⁷⁹ Ibid, para. 20.

⁸⁰ Ibid, para. 194: "During the oral proceedings, a Member of the Court put a question to the Parties concerning the probative value to be given to the various types of statements annexed to the Parties' written pleadings, according to whether or not the author had been called to give oral testimony and cross-examined by the opposing Party. In reply, Croatia maintained that all the statements had the same probative value, but that it was for the Court to determine what weight should be given to them, on the basis of the criteria set forth in the 2007 Judgment. Serbia, for its part, drew a distinction between the statements of individuals called to give oral testimony in these proceedings, whether or not they had been cross-examined, and the statements of individuals who were not so called. According to the Respondent, whereas the former should all be accorded the same probative value, the latter should be treated as out-of-court statements and assessed as such in light of the criteria established in the 2007 Judgment, in the same way as all other documentary evidence furnished by the Parties. Serbia stated that the Court should nonetheless give special attention to the evidence given before the ICTY and to testimonies before national courts. It added, finally, that the unsigned statements and those produced in unknown circumstances, as well as the statements prepared by official bodies whose impartiality had not been established, should be disregarded".

⁸¹ *Croatian Genocide*, Judgment, para. 196, referring to *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, para. 244.

⁸² *Croatian Genocide*, Judgment, para. 196.

The absence of cross-examination appears to have had consequences in the Court's evaluation. For instance, the Court concluded that “the statement of Stjepan Peulić, a witness called by Croatia to give oral testimony but whom Serbia did not wish to cross-examine (...) and whose accounts have not been otherwise contradicted, may be given evidential weight”⁸³. The fact that the Court took into consideration the absence of cross-examination of a certain witness rather than refuting their testimony was repeated in two other passages of the judgment⁸⁴. Nonetheless, when analysing Serbia's allegations, even if it mentioned the fact that “Croatia waived its right of cross-examination”⁸⁵, the Court made a general statement pointing out that it

will accord evidential weight to the statements by the eight individuals called by Serbia to testify before it. However, it should be emphasized that the fact that Croatia declined to cross-examine those witnesses in no sense implies an obligation on the Court to accept all of their testimony as accurate. Moreover, Croatia clearly stated that its decision not to cross-examine the witnesses did not mean that it accepted their testimonies as accurate; on the contrary, it expressed significant reservations in relation to some of them⁸⁶.

In the *Genocide cases* the Court referred to its previous case law to assess the evidential weight of testimonies. As recognized by judge Donaghue, “[i]n past cases, the Court has provided guidance about the criteria that it uses to evaluate witness statements”⁸⁷. For instance, the Court referred to the fact that it must assess whether statements “were made by State officials or by private persons *not interested in the outcome of the proceedings* and whether a particular affidavit attests to the existence of facts or represents *only an opinion as regards certain events*”⁸⁸. The Court also stated that “testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, [is not] of much weight”⁸⁹.

In the same sense, the Court, referring to the *Nicaragua* case, stated that it

will treat with caution evidentiary materials specially prepared for this case and also *materials emanating from a single source*. It will prefer *contemporaneous evidence from persons with direct knowledge*. It will give

⁸³ Ibid, para. 236.

⁸⁴ Ibid, para. 260, 328.

⁸⁵ Ibid, para. 458.

⁸⁶ Ibid, para. 459.

⁸⁷ Croatian Genocide, Judgment, I.C.J. Reports 2015, Declaration of Judge Donaghue, para. 3.

⁸⁸ Croatian Genocide, Judgment, para. 196, referring to Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*), Judgment, I.C.J. Reports 2007, para. 244.

⁸⁹ Croatian Genocide, Judgment, para. 196, referring to *Nicaragua*, Judgment, I.C.J. Reports 1986, para. 68, referring to *Corfu Channel*, I.C.J. Reports 1949, p. 17

particular attention to reliable *evidence acknowledging facts or conduct unfavorable to the State represented by the person making them*⁹⁰.

The three aforementioned criteria (direct knowledge, unfavorable statements and materials emanating from a single source) were used in different occasions in the *Bosnian* and *Croatian* Genocide cases.

The Court applied these criteria, for instance, when it had to ascertain whether Serbia and Montenegro (the Respondent) had supplied militarily the army of Republika Srpska (VRS). The Court noted that “the Respondent generally denies that it supplied and equipped the VRS”, but “one of the witnesses called by the Respondent (...) testified that the army of the Republika Srpska was supplied from different sources ‘including but not limited to the Federal Republic of Yugoslavia’”⁹¹.

In several occasions in the *Croatian Genocide* case the Court gave evidential weight to statements made by persons who had direct access to the facts, recognizing that it was “bound to give some evidential weight”⁹² to this kind of testimony. On the other hand, the Court did not give evidential weight to statements when the witness “does not appear to have witnessed [a fact] directly”⁹³. This does not invalidate the evidential weight of the witness testimony in general, but only regards those facts whom he or she did not directly witness.

The second reference to its own case law concerned the special value given to cross-examined evidence which comes from other international bodies. In the *Bosnian Genocide* case, the Court pointed out that:

The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties⁹⁴.

And in the *Croatian Genocide* case, the Court said that:

The Court considers that it must give evidential weight to the first of the above-mentioned documents, by reason both of the independent status of its author, and of the fact that it was prepared at the request of organs of the United Nations,

⁹⁰ *Bosnian Genocide* case, Judgment, I.C.J. Reports 2007, para. 213, referring to *Nicaragua* case, Judgment, I.C.J. Reports 1986, para. 64. Emphasis added.

⁹¹ *Bosnian Genocide* case, Judgment, I.C.J. Reports 2007, para. 239.

⁹² *Croatian Genocide*, Judgment, para. 222.

⁹³ *Croatian Genocide*, Judgment, para. 343.

⁹⁴ *Bosnian Genocide* case, Judgment, I.C.J. Reports 2007, para. 213, referring to *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, para. 61. See also paras. 78-79, 114 and 237-242.

for purposes of the exercise of their functions. The Court notes that Croatia has not disputed the objective nature of that report, even though it does not agree with certain of its factual findings⁹⁵.

In the *Bosnian Genocide* case, the Court gave “special attention” to, among others, two kinds of evidence: the testimonies and evidence presented in the International Criminal Tribunal for the former Yugoslavia (ICTY), and the Final Report of the United Nations Commission of Experts nominated by the Security Council to analyze breaches committed in the territory of the former Yugoslavia⁹⁶. The Court recognized that “[t]he fact-finding process of the ICTY falls within this formulation, as ‘evidence obtained by examination of persons directly involved’, tested by cross-examination, the credibility of which has not been challenged subsequently”⁹⁷. These two groups of evidence (ICTY judgments and hearings, U.N. Commission of Experts) were very frequently used by the Court as were the testimonies given by the witnesses who participated in the elaboration of those documents.

The same happened in the *Croatian Genocide* case, where the Court gave special attention both to ICTY judgments and to the Report on the situation of human rights in the territory of the former Yugoslavia. The Court also gave “evidential weight to certain statements cited by Serbia from persons who *directly witnessed such attacks* and gave evidence before courts in Serbia and Bosnia and Herzegovina during the years following Operation *ìStorm*”⁹⁸.

In the *Bosnian Genocide* case the Court also gave especial attention to the evidence presented by one of the experts appointed by Bosnia who already had participated in the ICTY proceedings. As stated by the Court, “Mr. Riedlmayer’s report together with his testimony before the Court and other corroborative sources detail the destruction of the cultural and religious heritage of the protected group in numerous locations in Bosnia and Herzegovina”⁹⁹. Despite the fact that Serbia and Montenegro contested the evidence presented by him through cross-examination, the Court considered that “Mr. Riedlmayer’s findings do constitute persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia and Herzegovina albeit in a limited geographical area”¹⁰⁰.

⁹⁵ Croatian Genocide, Judgment, I.C.J. Reports 2015, para. 459.

⁹⁶ S/1994/674/Add.2.

⁹⁷ Bosnian Genocide case, Judgment, I.C.J. Reports 2007, para. 214.

⁹⁸ Croatian Genocide, Judgment, para. 484.

⁹⁹ Ibid, para. 341.

¹⁰⁰ Ibid, para. 343.

To appoint an expert that had already presented a report before other tribunals and to submit him to cross examination was an interesting strategy used by the Bosnia. The fact that Mr. Riedlmayer had already presented a report on the occasion of the Milošević trial before the ICTY would be enough to take that report into consideration as evidence. In calling him to testify and, therefore, submitting him to cross-examination, the Applicant played a card that might have enhanced the value of the expert's testimony, thus being qualified by the Court as “persuasive evidence”.

Another element that can be stressed is the parties' main function in defining the procedure to be followed concerning the presentation and examination of experts and witnesses during the hearings. These choices proved to be fundamental and carried out consequences to the evidential evaluation of experts and witnesses. A clear example was the waiving of the right of cross-examination in the *Genocide* case by Croatia.

e The use of experts in the Whaling in the Antarctic case.

The *Whaling in the Antarctic (Australia v. Japan)* was another case in which “vast amounts of highly technical scientific evidence”¹⁰¹ was adduced before the Court, whose task was to verify whether the Japanese whaling programme (JARPA II) could be considered as “for the purposes of scientific research” under the terms of Article VIII of the Whaling Convention¹⁰². In this case the parties had recourse to experts appointed in accordance with Articles 57 and 64 of the Court’s rules. The Court’s criticism of the use of expert counsels in the *Pulp Mills* case seems to have been taken into account by the parties in the *Whaling in the Antarctic* case and neither party resorted to expert counsel.

With regard to the party-appointed experts, the first issue which is worth examining concerns the selection of the individuals appointed as experts. One may wonder whether the expert's backgrounds have any impact on the conviction of the

¹⁰¹ The words are from President P. TOMKA, *Speech by H.E. Judge Peter Tomka to the Sixth Committee of the General Assembly* (31 October 2014).

¹⁰² *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ Reports 2014. For an overall assessment of the case, see C.R. PAYNE, “Australia v. Japan: ICJ halts Antarctic whaling”, in *American Society of International Law Insights*, 2014; C. GRAY, “The 2014 Judicial Activity of the International Court of Justice”, *American Journal of International Law*, 109 (2015), 589-602 and F. L. BORDIN, “Procedural Developments at the International Court of Justice”, *The Law and Practice of International Courts and Tribunals*, 14 (2015) and N. Klein, “Whales and Tuna: The Past and Future of Litigation between Australia and Japan”, *The Georgetown international environmental law review*, 21 (2009).

Court. In this respect, it may be interesting to note that one of the experts appointed by Australia was a member of the Australian government¹⁰³. From a theoretical viewpoint, it could be suggested that this close relationship with the government could undermine the evidential weight of this expert opinion.

A different question is whether it would be appropriate for the parties to appoint, as experts, individuals who were directly involved in the case, having acted as experts of one of the parties in relation to the programme or activity which gave rise to the dispute. Thus, for instance, Japan had refrained from appointing as experts (or witnesses) the Japanese scientists who were involved in JARPA II. One might suggest that their presence would have been useful in order to better understand the scientific premise of the programme. The Court did not fail to notice their absence. However, it is hard to infer from the judgment what would have been the Court's preference on this point. When examining the use of lethal methods in the JARPA II program the Court stressed that it "did not hear directly from Japanese scientists involved in designing JARPA II".¹⁰⁴ A member of the Court asked Japan what analysis it had conducted on the feasibility of non-lethal methods prior to setting the sample sizes for each year of JARPA II. Japan did not offer any documents to clarify this issue and, eventually, the Court concluded that "[t]he absence of any evidence pointing to consideration of the feasibility of non-lethal methods was not explained".¹⁰⁵ From these two passages, one is left with the impression that the Court tacitly criticized the absence of a *certain* type of expert, i.e. an expert that had participated in the JARPA II program and which Japan could have utilised to sustain its position. In this respect, the "non-explanation" of this absence appears to have weakened Japan's argument. However, as a counter-argument, one could say that the decision not to appoint Japanese experts who had participated in the development of the JARPA II program was justified by the need to avoid a "biased witness".¹⁰⁶ In particular, it could be argued that, if Japan had appointed experts who

¹⁰³ The expert is the Chief Scientist of the Australian Antarctic Program, who, in his words is the "leader of a major national science program".

¹⁰⁴ *Whaling in the Antarctic*, cit., 270, para. 138.

¹⁰⁵ *Whaling in the Antarctic*, cit., 271, para. 141.

¹⁰⁶ The criterion which undermines the weight of the evidence presented by this kind of witness appeared in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, para. 70: "[a] member of the government of a State engaged, not merely in international litigation, but in litigation relating to armed conflict, will probably tend to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause" and is combined with the assumption that "[t]he Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to

had participated in the JARPA II program, the Court would have given little evidential weight to the evidence presented by them since, as the Court had noted in a previous case, “a member of the government of a State (...) tends to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause”.¹⁰⁷

The last observation raises a general issue about the possibility of transposing some of the criteria established by the Court with regard to the evidential weighing of “ordinary” witnesses to that of witness-experts¹⁰⁸. The judgment did not say anything on this point. Interestingly, the Court appeared to take into consideration the fact that the expert’s opinion diverged from the position taken by the State that appointed him. Thus, the Court took into account the criticism of the expert appointed by Japan, Mr. Walløe, with reference to the transparency of the activities performed by the JARPA II programme.¹⁰⁹ The idea of giving relevance to expert opinions which contradict the State’s position can be compared to the criterion according to which weight must be given to declarations made by State’s officials when these declarations are unfavourable to the State.¹¹⁰

With regard to the Court’s general approach to the assessment of expert opinions, an aspect which emerges from the judgment is that the Court seemed to give particular importance to the existence of an agreement between the opinions expressed by the experts appointed by the parties. For instance, when assessing the transparency of the Japanese programme, the Court observed that “[t]he evidence shows that the JARPA II Research Plan lacks transparency in the reasons for selecting particular sample sizes for individual research items. This is a matter on which the experts called by the two Parties agreed, as described above”.¹¹¹ It also emphasized that “the process used to

the State represented by the person who made them. They may then be construed as a form of admission" (ibid, para. 64).

¹⁰⁷*Military and Paramilitary Activities in and against Nicaragua*, cit., para. 70.

¹⁰⁸ On this issue, see L.C. LIMA, "The Evidential Weight of Experts before the ICJ: Reflections on the Whaling in the Antarctic Case", *Journal of International Dispute Settlement*, 6 (2015), 621-635.

¹⁰⁹*Whaling in the Antarctic*, cit., 275, para 159.

¹¹⁰*Military and Paramilitary Activities in and against Nicaragua*, cit., para 64: "The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them".

¹¹¹*Whaling in the Antarctic*, cit., 283, para. 188.

determine the sample size for Minke whales lacks transparency, as the experts called by each of the Parties agreed”.¹¹²

By the same token, the Court gave relevance to the fact that the opinion expressed by an expert appointed by a party had not been contested by the other party. Thus, when assessing whether the number of whales killed was reasonable according to the scientific purposes of the JARPA II programme, the Court, referring to the opinion expressed by the expert appointed by Australia, noted the fact that “Japan did not refuse this expert opinion”.¹¹³

It is certainly not surprising that the Court attached importance to the existence of an agreement between experts or to the fact that the opinion of one expert was not contested by a party. If the parties bear the burden of proof, it is fair to give importance to the agreement of the experts presented by them in regard to the facts and circumstances of the case. Put differently, it seems quite logical that when the experts appointed by the parties share a scientific evaluation it is difficult for the Court to take a different view. However, the overall impression is that the evidential weight given by the Court to expert opinions was directly related to the extent that they allowed the Court to identify the emergence of a *consensus* regarding a certain fact or scientific data. Using this logic, the interest in having experts in the proceedings lies in the fact that they also allow the existence of an agreement with regard to the scientific facts in dispute to be revealed. Accordingly, the evidential weight of expert opinions appears to be closely connected to their contribution to the emergence of that agreement. In this respect, the “search” for consensus appears, to some degree, to have a greater role than the “search” for scientific truth. This seems to conform to the adversarial logic that governs the Court’s proceedings.

Having said this, two observations are in order. First, it is clear that the importance attached to the emergence of a *consensus* regarding a certain fact or scientific data should not diminish the role played by the Court in the assessment of the evidence. Significantly, in its judgment in *Whaling in the Antarctic*, the Court appears to have made recourse to technical arguments which had not been previously discussed between the experts. Secondly, it might well be that the agreement of the experts do not reflect the agreement of the parties, for instance because the opinion of one expert contradicts the views expressed by the party who appointed him. It may also be that the

¹¹²*Whaling in the Antarctic*, cit., 292, para. 225.

¹¹³*Whaling in the Antarctic*, cit., 283, para. 190.

expert opinions reveal a consensus over a view which does not entirely reflect that of either parties. In both cases it seems reasonable that the Court attaches importance to the agreement of the experts irrespective of the position of the parties.

As noted by some authors,¹¹⁴ a problem arises when experts take different positions on controversial questions of technical and scientific nature, a situation which has been labelled by the Court as “the clash of expert opinions”.¹¹⁵

In the past, as the *Gabčíkovo-Nagymaros Project* and *Pulp Mills* cases show, when confronted with divergent scientific evidence, “the Court [did] not find it necessary to resolve the clash of expert opinions”¹¹⁶ and clearly stated the “[t]he Court is unable to accept the position that in order to decide this case, it must first make a determination upon a disagreement between scientists of distinction as to the more plausibly correct interpretation of apparently incomplete scientific data”¹¹⁷. Some authors suggested that in those situations, the Court prefers to circumvent the problem and rely on legal techniques.¹¹⁸

This approach was also followed in the *Whaling in the Antarctic* case. In order to avoid taking a position on issues over which experts had expressed divergent views, the Court referred to different arguments. For instance, with regard to the problem of the reliability and value of data collected in JARPA II, the experts appointed by the parties offered contradictory opinions and the Court considered that “[t]his disagreement appears to be about a matter of scientific opinion”¹¹⁹. With regard to the experts’ disagreement about the determination of the criteria in order to establish the meaning of the expression ‘scientific research’, in the sense of Article VIII of the Whaling Convention, the Court relied on the distinction between questions of fact and questions of law. It found that since the interpretation of the expression ‘scientific research’ was a

¹¹⁴*Pulp Mills on the River Uruguay*, cit., Separate Opinion of Judge CANÇADO TRINDADE, paras. 148 and 151. T. SCOVAZZI, “Between Law and Science: Some Considerations Inspired by the Whaling in the Antarctic Judgment”, QIL-Questions of International Law, 14 (2015), <www.qil-qdi.org/between-law-and-sciencesome-considerations-inspired-by-the-whaling-in-the-antarctic-judgment-2/> accessed 04/04/2016.) 28; FOSTER, cit., 5; PEAT, cit., 280ff.

¹¹⁵*Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, 2008 ICJ Reports 2008, 12, para. 147.

¹¹⁶ *ibid.*

¹¹⁷ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports 1982, 18, para. 41.

¹¹⁸ A. RIDDELL and B. PLANT, *Evidence Before the International Court of Justice* (London, BIICL 2009), 199.

¹¹⁹ *Whaling in the Antarctic*, cit., 269, para 134.

question of law,¹²⁰ it was for the Court to solve this question, without decisively taking into consideration the indications offered by the experts. In the Court's view, even if, "as a matter of scientific opinion, the experts called by the Parties agreed that lethal methods can have a place in scientific research, while not necessarily agreeing on the conditions for their use", "[t]heir conclusions as scientists, however, must be distinguished from the interpretation of the Convention, which is the task of this Court".¹²¹

As a general assessment, however, in comparison with the approach taken in the past practice, it was rightly observed that "the Court's change of approach in the Whaling in the Antarctic case is to be welcomed, as it offers the opportunity for a more rigorous treatment of complex scientific evidence"¹²².

f. The *Certain Activities* and *Construction of a Road* cases.

Technical questions were raised during the joint proceedings of the cases *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. The first case concerned, *inter alia*, Nicaragua's violations of international obligations as a result of its dredging activities performed in the Colorado River. The second case was related to Costa Rica's violation of its obligations through the construction of a road along the San Juan River. Both parties had scientific advisers and experts as part of their delegations, but they also nominated party-appointed experts to present reports and to be cross-examined during the hearings in accordance with Articles 57 and 64 of the Court's rules. The use of experts in these cases demonstrates some similarities with the use of experts in the *Whaling in the Antarctic* case.

One interesting feature of this case relates to the appointment of experts. Before the oral hearings on the *Construction of a Road* case, Nicaragua suggested the

¹²⁰M.M. MBENGUE, "Between Law and Science: A Commentary on the Whaling in the Antarctic Case", *QIL-Questions of International Law*, 14 (2015), 8–9 <www.qil-qdi.org/between-law-and-science-a-commentary-on-the-whaling-in-the-antarctic-case-2/> accessed 04 April 2016.

¹²¹*Whaling in the Antarctic*, cit., para 82.

¹²²C. GRAY, cit., 597.

appointment of “a neutral expert on the basis of Articles 66 and 67 of the Rules”.¹²³ Costa Rica did not agree with the request and, in response, asserted “that there [was] no basis for the Court to exercise its power to appoint an expert as requested by Nicaragua”. It was not the first case in which the Court was asked by one of the parties to appoint experts to collaborate with respect to an assessment of the factual background of a dispute¹²⁴. Nor was it the first time that the Court preferred not to appoint neutral experts without offering the reasons for its decision. It is clearly a matter for speculation, but the disagreement between the parties on the appointment of experts is probably factor taken into account for the decision not to appoint independent experts.

On the one hand therefore, the Court preferred not to appoint independent experts, on the other, the Court assumed a more active role in indicating the kind of expert evidence it would be interested in hearing from. Through its Registry and at the beginning of the proceedings, the Court suggested that the parties call experts who offered technical support to the legal teams in the writing phase:

the Registrar informed the Parties that the Court would find it useful if, during the course of the hearings in the two cases, they could call the experts whose reports were annexed to the written pleadings, in particular Mr. Thorne and Mr. Kondolf. The Registrar also indicated that the Court would be grateful if, by 15 January 2015 at the latest, the Parties would make suggestions regarding the modalities of the examination of those experts¹²⁵.

Putting it another way, the Court suggested to the litigants that they should repeat the approach taken by the parties in the *Whaling in the Antarctic* case. It appears that there is a line of continuity in the Court’s thinking, in terms of the Court’s discouragement of the use of expert counsel in the *Pulp Mills* case and its active statement of willingness to receive a certain kind of expert evidence in the *Certain Activities* and *Construction of a Road* cases. In doing so, one could argue that the Court seems to indicate a “preferable practice” with regard to the appointment of experts. Moreover, the Court nominally pointed out whom it would find particularly useful to hear during the oral phase. A second unfolding conclusion of this passage of the judgment reinforces the idea that it is not sufficient that the parties adduce technical and

¹²³*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, ICJ Reports 2015, para 30.

¹²⁴On the list of cases in which the appointment of experts was suggested but was not endorsed by the Court, see J.J. Quintana, *Litigation at the International Court of Justice* (Leiden, Brill, 2015), 456.

¹²⁵*Certain Activities, Construction of a Road*, cit., para. 30.

scientific evidence through written evidence and reports; instead it made clear that this evidence should be properly tested by the procedure of cross-examination.

Another issue related to evidence raised in this case was the availability of the parties in relation to the organization of a site visit – an issue connected to the *Gabčíkovo-Nagymaros Project* case. Although there was an agreement between the parties as to the possibility of the Court carrying out a site visit, Nicaragua "reiterated its proposal that the Court appoint an expert to assess the construction of the road, and suggested that the expert be included in the Court's delegation for any site visit"¹²⁶. Costa Rica replied to this proposal stating that "the appointment of an expert by the Court was unnecessary"¹²⁷. Ultimately, "the Registrar informed the Parties that the Court had decided not to carry out a site visit". One could only speculate whether the absence of agreement between the parties on the site visit was decisive in the Court's decision not to perform it. It is also a matter of speculation whether the fact that Costa Rica refused the appointment of experts carried any particular significance for the Court.

As to the role of experts in the cases at issue, it appears that they performed a relevant function, especially if one considers that the Court made reference to the evidence presented by them in several passages of the Judgment. In particular, the agreement between party-appointed experts was referred to on two occasions. Firstly, the Court gave weight to it in order to determine the existence of a certain factual situation with relation to the use of one of the *caños*¹²⁸. Secondly, experts were used to confirm that the activities carried out by Nicaragua "would not have a significant impact on the flow of the Colorado River". Indeed, the Court observed that "this conclusion was later confirmed by both Parties' experts".¹²⁹ The Court concluded that

"[h]aving examined the evidence in the case file, *including the reports submitted and testimony given by experts called by both Parties*, the Court finds

¹²⁶*Certain Activities, Construction of a Road*, cit., para. 33.

¹²⁷ *Ibid.*

¹²⁸ The Court's exact words were: "The Court notes that the existence over a significant span of time of a navigable caño in the location claimed by Nicaragua is put into question by the fact that in the bed of the channel there were trees of considerable size and age which had been cleared by Nicaragua in 2010. Moreover, as was noted by Costa Rica's main expert, if the channel had been a distributary of the San Juan River, "sediment would have filled in, or at a minimum partially-filled, the southern part of the lagoon". Furthermore, the fact that, as the Parties' experts agree, the caño dredged in 2010 no longer connected the river with the lagoon by mid-summer 2011 casts doubt on the existence over a number of years of a navigable channel following the same course before Nicaragua carried out its dredging activities. This caño could hardly have been the navigable outlet of commerce referred to above". (*Certain Activities, Construction of a Road*, cit., para. 90).

¹²⁹*Certain Activities, Construction of a Road*, cit., para. 105.

that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm, either with respect to the flow of the Colorado River or to Costa Rica's wetland"¹³⁰.

In referring to the agreement between the party-appointed experts, the Court seems to reiterate the criterion adopted in the *Whaling in the Antarctic* case which consists of attributing evidential weight to the *consensus* emerging between the parties through the expert opinions.

On the other hand, the Court did not refer to experts' opinions only when agreement had been reached between them. The Court took note and seemed to attribute evidential weight to the declaration contrary to the interests of the party which appointed the expert, thus reiterating the approach taken in *Whaling in the Antarctic*. In relation to Costa Rica's allegation of harm caused by Nicaragua's dredging activities, the Court used the statement of "[Costa Rica's] main expert [observing] that 'there is no evidence that the dredging programme has significantly affected flows in the Río Colorado'"¹³¹.

In the *Construction of a Road* case, the Court made reference to the evidence presented by experts in three passages without giving any evidential weight to them¹³². Indeed, the Court seemed to pay careful attention to the language they used when the statements of the experts coincided with those of the party. The Court seemed to be aware that the expert evidence presented by party-appointed experts corresponded to the positions sustained by the States. This correspondence between expert-opinion and State-argument seems to reinforce the doubt cast on the impartiality of an expert nominated by a party in the proceedings.

If, on one hand, the agreement between the experts was relevant to determining the existence of some sediment eroding from the road to the river, on the other hand the disagreement between experts was also noted by the Court:

"The Court further observes that there is considerable disagreement amongst the experts on key data such as the areas subject to erosion and the appropriate erosion rates, which led them to reach different conclusions as to the total amount of sediment contributed by the road".

The Court preferred to avoid making a deliberation on the value of the conflicting opinions by observing that:

The Court sees no need to go into a detailed examination of the scientific and technical validity of the different estimates put forward by the Parties' experts.

¹³⁰*Certain Activities, Construction of a Road*, cit., para. 105 (emphasis added).

¹³¹*Certain Activities, Construction of a Road*, cit., para. 119.

¹³²*Certain Activities, Construction of a Road*, cit., paras. 177, 182, 183.

Suffice it to note here that the amount of sediment in the river due to the construction of the road represents at most 2 per cent of the river's total load, according to Costa Rica's calculations based on the figures provided by Nicaragua's experts and uncontested by the latter (see paragraphs 182 to 183 above and 188 to 191 below)¹³³.

In the last part of this passage, the Court referred once more to the criterion which takes into account uncontested expert evidence, which was also used in the *Whaling in the Antarctic* case.

One can argue that the main open question relates to the event that there is disagreement between the party-appointed experts. This question was not resolved by the Court in the *Certain Activities and Construction of a Road* cases. However, it does not appear that the problem of conflicting expert-opinions was a central issue in these cases. In examining the quantity of sediment added to the river, the Court concluded that, on the ground that the construction of the road was contributing at most to 2 per cent of the river's total load, "significant harm cannot be inferred therefrom"¹³⁴. Unlike *Whaling* case, where the Court had preferred not to resolve the question at stake by referring to questions of law, the Court resolved the disagreement by referring to the evidence adduced before it.

2.1.4. Assessment.

Some conclusions can be drawn from the examination of the Court's case law regarding the use of experts, witnesses and expert-witnesses in the sense of Article 64 of the Rules of the Court.

Firstly, there has been a growth in the use of experts, witnesses and witnesses experts in the Court's case law.

Secondly, the Court seems to have found an adequate procedure for the appointment and examination of the experts, which is structured in the four aforementioned phases. This procedure guarantees an intense participation of the parties from the beginning of the proceedings, when defining the procedure to be followed. It also guarantees the active participation of the Court. The growing number of questions coming from the bench to witnesses and experts appear to confirm this more proactive role of the Court. The recent trend to combine written statements and oral examination,

¹³³*Certain Activities, Construction of a Road*, cit., para 186.

¹³⁴*Certain Activities, Construction of a Road*, cit., para. 194.

particularly in the *Croatian Genocide* and *Whaling* cases, which was defended in doctrine¹³⁵, has contributed to the improvement of the procedure because at the same time that it serves the reliability of the evidence presented, it guarantees the due process by allowing the right to comment the evidence presented.

Thirdly, since the *Nicaragua* case and especially after the *Genocide* and *Whaling* cases, it can be noted that the criteria used to evaluate the evidential weight of testimonies before the Court have been substantially clarified. This criteria help the parties to make a better use of experts in their cases.

The use of experts, witnesses and expert-witnesses leaves some questions still open, however.

The first question concerns the independence of experts and witnesses. These experts and witnesses are not paid by the Court and are, in most of the cases, paid by the parties to offer their testimony before the Court. It is true that, unlike counsels, they are cross-examined. However, at the end of the day, they are always speaking on behalf of the party who appointed them.

The most fundamental problem that the use of experts and witnesses seems to reveal is the so called question of "clash of expertise". The problem is not new; it dates from the *Corfu channel* case and it occurred in a great number of cases. The problem was formulated by Kolb in the following words: "Experts tend to neutralize each other, each side producing those who support its case. The technical nature of their evidence does little to help the members of the Court, since they lack the necessary expertise to evaluate it"¹³⁶.

The criticism advanced by Kolb reveals two dimensions of the problem. The first is the clash *per se*, that means, the tendency of experts to contradict each other when they appear in the proceedings. The second dimension is the fact that the Court, when confronted to such a clash of opinions, does not possess the instruments necessary to evaluate or assess this technical divergence. In short terms, the Court cannot decide over the technical disagreement.

Manfred Lachs had already identified this problem in the nineties. He offered a possible solution to the problem:

¹³⁵ RIDDELL, PLANT, *op. cit.*, p.327: "The potential utility of combining the two through the use of witness statements and depositions should be explored by the Court, since testimony is inherently valuable, but in its current form it is not as effective as it could potentially be".

¹³⁶ KOLB, *The International Court*, p. 977.

How far the Court should rely on these or other experts is a question of discretion, as it has happened in the past that experts of parties supporting the claims of each of them rely on different theories and offer explanations which are the result of different reasoning. In such instances, the Court might have to call on an expert for its own purposes in deciding the dispute, not only between the parties, but between the other experts appearing before it¹³⁷.

However, it appears that the solution indicated by Lachs has not been followed by the Court. In fact, the disagreement of the experts indicated by the parties is a constant in cases raising problems related to scientific evidence. As we have seen, the most recent example occurred in the *Whaling in Antarctic* case.

It is true that in certain cases “the Court [did] not find it necessary to resolve the clash of expert opinions”¹³⁸. It remains, however, that the question of the clash of expertise is still an open one.

2.2. Expert counsels.

With the purpose of strengthening their arguments from a technical point of view, the parties under a dispute before the Court have been frequently making recourse to experts counsels. The expert counsel integrates the team of lawyers of a State and can plead before the Court in such a role. It is not rare to find in the list of a State’s counsels a list of “Scientific Advisors or Experts”¹³⁹ or “Expert Advisor”¹⁴⁰. These experts have essentially two functions. The first is to contribute to the legal defense of the party by providing assistance on technical issues arising in connection to the dispute. The second is to offer the Court their *expertise* as a way to reinforce the party’s arguments. In Rosenne’s words “[p]leadings cannot always be left to professional attorneys, especially when technical questions are involved”¹⁴¹.

From the normative point of view, the use of an expert counsel is implicitly admitted in Articles 42, paragraph 2, and 43, paragraph 5, of the Statute. These provisions set forth the possibility that the parties “may have the assistance of counsel or advocates before the Court”. Nothing excludes the possibility that the party’s

¹³⁷ LACHS, Evidence, 273.

¹³⁸ Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports, 2008, para. 147.

¹³⁹ Pulp Mills, Judgment, pp. 22, 25.

¹⁴⁰ Whaling in Antarctic, Judgment, p.7.

¹⁴¹ ROSENNE, The Law and Practice, p. 1137.

delegation includes the presence of experts that participate in the oral phase before the Court¹⁴².

An expert counsel differs from an expert witness in that the assessment of a witness must be made according to a specific procedure, which does not apply to expert counsels. In particular the requirement of cross-examination is not provided for in respect to the latter kind of expert. Another element of distinction is the fact that the Rules do not require that expert counsels make the solemn declaration which is contemplated by article 64 of the Rules. This solemn declaration is recognized by the Court as an important element that creates a link between the Court and the experts. As stressed by judge Greenwood, “a witness or expert owes a duty to the Court which is reflected in the declaration required by Article 64 of the Rules of Court. The duties of someone appearing as counsel are quite different”¹⁴³.

Because they are accorded the same treatment as the party’s counsels, it may be asked what is probative value of statements rendered by expert counsels. The Court had addressed this issue only in few cases. During the hearing of the *Armed Activities on the Territory of Congo* case (Congo v. Uganda), after the plead of a member of Uganda’s defense team about technical questions, president Shi stressed the fact that the expert took the floor as a counsel and advocate and was be treated as such¹⁴⁴. In an earlier case, the *Frontier Dispute* (Burkina Faso/Mali) case, the president of the Chamber, Bedjaoui, observed that in regard to the probative value of an expert counsel “the person in question would be considered by the Chamber as speaking on behalf of the party he represented, and not as making a personal statement as expert”¹⁴⁵. Very recently, in the *Whaling in Antarctic* case, the Court adopted the same approach when it stated that “the Court has decided that the material prepared by Professor Zeh and attached to the letter from the Agent of Japan dated 31 May 2013 will not be treated as expert evidence but rather as any other observations of the Government of Japan”¹⁴⁶.

¹⁴² There is a specific provision in article 43, 5, of the Court’s Statute that “[t]he oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates”. The Statute does not specify if the expert in this case is an expert appointed by the party under a formal procedure or an expert of the group of lawyers.

¹⁴³ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, Separate Opinion of Judge Greenwood, para. 27.

¹⁴⁴ CR 2005/7, 18 April 2005, p.53.

¹⁴⁵ C2/Cr.86/12, 26/06/1986, para. 59.

¹⁴⁶ I.C.J., *Whaling in Antarctic*, Extract of letters dated 21 June 2013 from the Registrar to the Agents of the Parties.

In regard of their probative value, Murphy sustained that “[w]hether the ICJ actually sees a probative difference in information presented in the form of a statement by counsel or advisers, as opposed to a statement by an expert witness, is unclear”¹⁴⁷. However, it seems that the fact that the Court operated a distinction in recent judgments allows one to argue that they have a different probative value. It is true, however, that, as Bezing wrote, “the exact role of party-appointed experts has not been specifically addressed by the Court”¹⁴⁸.

The question of the relevance of expert counsels as a means of proof was squarely addressed by the Court in the *Pulp Mills* case (Argentina v. Uruguay). This case raised highly complex scientific evidence. For different reasons, it prompted a wide debate over the use of experts before the Court¹⁴⁹. Among other issues, the Court had to verify the existence of environmental damage caused by the installation of a pulp mill on the border of Uruguay River. The Court preferred not to indicate its own experts (using the possibility envisaged in article 50), and it decided the case by simply relying on the proofs presented by the parties. In a well-known passage, the Court stated:

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 appropriate¹⁵⁰.

Besides all the technical proofs presented before the Court through documents, the parties also made use of experts that pleaded before the Court as counsels. As such, they could not be cross-examined. The Court’s reaction to the parties’ approach was the following one:

[r]egarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court¹⁵¹.

¹⁴⁷ MURPHY, *The ELSI Case*, p.444.

¹⁴⁸ BEZING, *Evidentiary Issues*, p. 1218.

¹⁴⁹ See COUTASSE, SWEENEY-SAMUELSON, *Adjudicating Conflicts over Resources: The ICJ’s Treatment of Technical Evidence in the Pulp Mills Case*, in 3 *Goettingen Journal of International Law* 447, 2011.

¹⁵⁰ I.C.J. Reports 2010, para. 168.

¹⁵¹ *Pulp Mills*, Judgment, para. 167. The Court’s reprimand seemed to be heard. In the next case involving complex scientific issues appeared before the Court, the *Whaling in Antarctic* case, even if the parties had appointed “scientific experts” to integrate their delegations, these experts do not

Thus, the Court clearly distinguished between expert witnesses and expert counsels. The consequence of this distinction in terms of evidentiary weight level is that it is possible to affirm that experts witnesses have a higher probative value in comparison to experts counsels, particularly because of the possibility of cross examination. The value of the expert witnesses opinion is not valuable only by itself, but as a result of the process of examination by the parties and also by the Court.

In another passage of the judgment, the Court addressed the question of the probative value of the different “interpretations” given by the expert’s counsels. The Court said: “in assessing the probative value of the evidence placed before it, the Court will principally weigh and evaluate the data, rather than the conflicting interpretations given to it by the Parties or their experts and consultants”¹⁵². This passage highlights another element. In cases in which scientific questions are at stake, it is expected that both parties will offer scientific expertise to prove their arguments on questions of fact and, consequently, the Court will be faced with conflicting expert evidence. In these situations, the probative value of the expert’s counsels tend to be almost pointless. This appears to be the final conclusion arrived at by the Court. The absence of *expertise* in a case can be inadvisable but their presence is not decisive if presented in such a way.

Whether parties will continue to use expert counsels or not, the position held by the Court in respect to their use by the parties shows the importance assigned by the Court to elements such as the possibility of cross-examining experts.

II) Experts *ex curiae*.

2.3 Invisible Experts, informal experts or experts “*fantômes*”.

In order to evaluate technical and complex evidence underlying a case, the ICJ has made recourse to a figure known as the invisible experts, “*experts fantômes*”¹⁵³ or

participate in the oral phase as counsels. The parties preferred to appoint expert witnesses, as mentioned in the previous sections.

¹⁵² Ibid, para. 236.

¹⁵³ The words are from judges Simma and Al-Khazawneh in their joint dissenting opinion in the case Pulp Mills. See Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, Joint dissenting opinion of Judges Simma and Al-Khazawneh, p. 114.

internal ‘unofficial’ experts¹⁵⁴. As the name suggests, this category of experts are invisible and it is not well known when they were or were not used by the ICJ; also unknown is the content of their reports. Nevertheless, it is known that sometimes, during the deliberation stage, the Court utilized the assistance of experts who do not officially participated in the procedure. The main “proofs” of their existence are references made by some judges¹⁵⁵ or by the Court’s Registrar. In the words of a former President of the Court, Jennings,

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 parties¹⁵⁶.

The actual Registrar of the Court, Couvreur, explained that this kind of experts is employed by the Registry as “agents of short duration”, who do not participate in the procedures. Their function is to assist the Registrar or the judges in an individual way. An example referred by Couvreur was the study of cartographic material in cases dealing with territorial and maritime delimitation¹⁵⁷.

This kind of expert is not expressly contemplated by the Rules or the Statute. However, the Court’s power to make use of them could, in theory, be based on a broad reading of article 62 of Court’s rules, which states:

1. The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose.

Thus, it could be held that the Court would not be acting beyond its powers when it seeks qualified information with the purpose to elucidate any aspect of the matter in issue. Other problems may appear, however.

¹⁵⁴ This term is used by BENZING, *Evidentiary Issues*, p.1218.

¹⁵⁵ Judge Simma “confessed” the use by the Court, arguing that “[t]o mention them does not breach confidentiality”. See SIMMA, *Fact Finding*, in *Proceedings of the 106th Annual Meeting of the American Society of International Law*, March 28-31, 2012, p. 231.

¹⁵⁶ JENNINGS, *International Lawyers and the Progressive Development of International Law*, in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, 1996, p. 416.

¹⁵⁷ COUVREUR, *Le règlement juridictionnel*, in SFDI (ed.), *Le processus de délimitation maritime: étude d’un cas fictif*, Colloque international de Monaco du 27 au 29 mars 2003, 2004, p. 384. The complete quotation: “Enfin, il arrive aussi que des experts soient engagés par le Greffe de la Cour à des fins purement internes. Ces experts ne participent pas à la procédure en tant que telle, n'apparaissent pas à l'audience, et ne produisent pas de rapport officiel. Leur statut est équivalent à celui d'agens du Greffes engagés pour de courtes durées ou de consultants. Ils sont tenus aux mêmes exigences de compétence technique et au même devoir de confidentialité que ceux-ci. Aucune mention de leur intervention n'apparaît donc dans la décision ou dans un autre document public. Leur rôle est d'assister la Cour en tant que telle, ses membres à titre individuel, et le Greffe à des fins techniques diverses, telles que par exemple l'étude du matériau cartographique fourni par les parties ou l'établissement de cartes ou de croquis particuliers”

The way in which the Court made use of this category of experts has been criticized because it does not observe to the criteria of transparency and procedural fairness¹⁵⁸. When the Court employs experts *fantômes*, the parties a) do not know the identity of these experts (and one can argue that sometimes experts can be influenced in their specific beliefs and research choices); b) do not know the opinion given by the experts to the Court; c) do not know the doubts and questions that the judges have, which is an important element in regard to the full comprehension of the facts and the thinking of the Court; and finally d) do not have the opportunity to offer any counter-arguments against the proof presented by these experts.¹⁵⁹

In addition, besides these shortcomings, even when the Court did use invisible experts, their presence is not a guarantee of a full understanding of the complex and scientific facts in dispute. This point was made by judge Simma and Al-Khasawneh in their joint dissenting opinion in the *Pulp Mills* case¹⁶⁰. They keenly criticized the Court's methods of fact-assessing, holding that

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 it¹⁶¹.

The two judges argued that in some cases the consultation of this category of experts may be excusable “if the input they provide relates to the scientific margins of a case”; however, they stressed that the situation changes when the case deals with complex scientific evidence¹⁶². In their opinion, in adopting this solution, the Court was neglecting two essential values to guarantee the good administration of justice: transparency and procedural fairness, which are important because “they require the Court to assume its overall duty for facilitating the production of evidence and to reach the best representation of the essential facts in a case, in order best to resolve a dispute”¹⁶³.

Another problem that arises because of the use of this kind of experts is related possibility of invisible experts committing errors in the performance of their functions.

¹⁵⁸ *Pulp Mills*, Jugment, Simma and Al-Khasawneh opinion, para. 14.

¹⁵⁹ See FOSTER, *New clothes*, 2013, p. 31; BROWN, *A common law*, 2007, p. 113; SIMMA, *Fact finding*, p. 231.

¹⁶⁰ Judge Simma “confessed” the use by the Court, arguing that “[t]o mention them does not breach confidentiality”. See SIMMA, *Fact Finding*, in *Proceedings of the 106th Annual Meeting of the American Society of International Law*, March 28-31, 2012, p. 231.

¹⁶¹ *Pulp Mills*, Jugment, Simma and Al-Khasawneh opinion, para. 14.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

Due to it, some argue that when the Court made use of experts *fantômes* “it does manifest itself when the Court delivers its judgment”¹⁶⁴. The cases referred to are *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* and *Land and Maritime Boundary between Cameroon and Nigeria*¹⁶⁵, both dealing with boundaries. According one author, in the case *Land and Maritime Boundary (Cameroon v. Nigeria)*, the Court reached different conclusions from that submitted by the parties, suggesting, therefore, that it had recourse to its own experts in that delimitation. The author sustained that “[t]he feeling of the parties is that it would have been difficult for the members of the Court to reach those conclusions without some sort of technical assistance” and, on account of it, he argued that the Court “has shown itself to be particularly vulnerable to making errors in its depiction of maritime boundary lines” because of a possible inadequate use of experts¹⁶⁶. Other authors made reference to the Court’s technical “errors” originated from bad use of expertise¹⁶⁷. This is a criticism that derives from the scarce transparency in this procedure.

The fact that the experts *fantômes* exist and have been used by the Court is a clear sign demonstrating the Court’s need of technical input. As pointed out by Simma “the Court on its own could not possibly assess and weigh such complex evidence without expert assistance”¹⁶⁸. One could ask why the Court still utilizes this kind of figure to aid in the deliberation despite the criticism directed against this figure. The Court never indicated it explicitly, but it is possible to speculate. The experts *fantômes* offer the Court some advantages in contrast to other procedures contemplated in the Statute and the Rules: essentially, time and flexibility in the proceedings. The process of nomination and examination of the expert phantom is, in theory, faster than any procedure available and allows the judges a direct and flexible approach to the proofs presented. In particular, it allows the Court to call who it wants, in the way it wants, to answer whenever questions it wants. The utilization of experts *fantômes* is a quick and flexible way to furnish the Court with high technical assistance.

¹⁶⁴ DANIEL, Expert evidence before the ICJ, Paper presented at the Third Bi-Annual Conference of ABLOS, 2003, p. 1.

¹⁶⁵ Ibid, p. 4.

¹⁶⁶ Ibid, p. 5.

¹⁶⁷ COUTASSE, SWEENEY-SAMUELSON, *Adjudicating Conflicts*, pp. 459, 468.

¹⁶⁸ SIMMA, *Fact Finding*, p. 231.

Despite these advantages, this method has the already indicated limits and, putting into a balance, it is a question of choice between celerity and flexibility, on the one hand, and transparency and judicial fairness, on the other.

2.4. Court-appointed experts under article 50 of the Statute.

2.4.1. Article 50 of the Statute.

Under Article 50 of its Statute, the Court “may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion”. Connected to the idea of a permanent judicial body in contrast to arbitration, the Court was endowed with efficient instruments in order to seek by itself relevant evidence. This stronger evidentiary power granted to the tribunal may be regarded as reflecting a civil law approach to the proof¹⁶⁹. Article 50 provides the Court with powers to control the proceedings and interfere directly in the production of evidence. These powers are now considered inherent to the judicial functions.¹⁷⁰ In this vein, Anzilotti deemed that Article 50 mirrored “a general principle of procedure”.¹⁷¹

The power conferred to the Court by Article 50 is further regulated in a number of provisions of the Court’s Rules. The provision which relates specifically to the experts appointed by Article 50 is Article 67 of the Rules:

Article 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.

¹⁶⁹ PEAT, The use of court-appointed experts by the International Court of Justice, in *British Yearbook of International Law*, 2014, pp.3-5; ROMANO, The role of experts, p. 1.

¹⁷⁰ BROWN, The common law, pp.112-118.

¹⁷¹ P.C.I.J., Series D, No. 2, 3rd Add., p. 247. In fact, when Anzilotti said so he was arguing reform of the Rule’s provisions to the power of nomination experts. Anzilotti said that “It was of no great consequence whether these power were derived from Article 50 or from a general principle of procedure not stated in the Statute. In any power, the Court had power to order an expert report. That was a power which it might or might not exercise at its discretion”.

Article 50 gives the Court a broad power to appoint individual, body, bureau, commission, or other organization that it may select to conduct an inquiry or give a specific technical opinion. In doing so, the provision does not set out a specific procedure to be followed nor establishes the number of experts¹⁷² or institutions that the Court can consult while making use of these powers. In fact, the expert procedure shall be settled *ad hoc* through an order, according to paragraph 1 of Article 63 of the Rules. The vagueness of this provision implies that a wide discretion is given to the Court on all these matters. Moreover, while the parties have the right to appoint their own experts, they do not have a right to have experts appointed by the Court. It is up to the Court to take this decision. There is no kind of restriction as to the subject matter over which the Court may decide to have recourse to experts. The Court can have an *expertise* on different matters, such as maritime delimitation, environmental damage, whale hunting or even linguistics. It has been argued, for instance, that the powers given to the Court by Article 50 could also be used in obtaining an expert opinion on a question of municipal law¹⁷³.

The text of Article 50 does not fix a time limit within which recourse to experts must be made. Even after the hearing of the party-appointed experts¹⁷⁴, the Court has the possibility to nominate its own experts. The *Corfu Channel* case is a precedent in this respect. As noted by an author, “[r]esort to independent experts in addition to, or in the absence of, experts called by litigating states is well established as an acceptable and helpful procedure in appropriate cases”¹⁷⁵. Moreover, the independence of the experts is an element of legitimacy of the procedure¹⁷⁶. In conclusion, the Court has full control over the use of experts under Article 50. As Tams observed, “it is clear that when applying Art. 50, the Court enjoys a wide margin of discretion and retains a considerable degree of control”¹⁷⁷.

The only limitation to the exercise of the power under Article 50 concerns the issue of jurisdiction. It is clear that the Court cannot appoint experts to assess questions

¹⁷² However, it is possible to find nowadays discussions about how the Court should use Article 50 to appoint experts. One option is held by Caroline Foster, who argues that experts should be consulted individually, see FOSTER, *The new clothes*, p.15.

¹⁷³ WHITE, 1965, p.48.

¹⁷⁴ SIMMA, 2012, 232

¹⁷⁵ WHITE, *The use of experts*, 1996, p. 529.

¹⁷⁶ FOSTER, *New Clothes for the Emperor? Consultation of Experts by the International Court of Justice*, in *Journal of International Dispute Settlement*, 2013, p. 6. In her words “The Court’s legitimacy is most likely to be enhanced through the taking of independent expert evidence”.

¹⁷⁷ TAMS, *Article 50*, p. 1255.

of facts over which the Court does not have jurisdiction. The question of jurisdiction was raised in the *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya, Application for Revision and Interpretation)*. Tunisia asked the Court to appoint experts to determine the exact co-ordinates of its frontier with Lybian Arab Jamahiriya, a matter already dealt with in the previous judgment on the merits of the dispute. The Court observed that Article 50 “must be read in relation to the terms in which jurisdiction is conferred upon the Court in a specific case; the purpose of the expert opinion must be to assist the Court in giving judgment upon the issues submitted to it for decision”¹⁷⁸. Therefore, the Court held that if experts were appointed in this case the Court would be extending its jurisdiction.

Article 67 of Court’s Rules establishes that the Court, before appointing experts, must hear the views of the parties. It is not clear, however, for which purposes the Court shall hear the parties. Taking the Court’s practice into account, it can be argued that the purpose is to hear the parties’ views over the exact question that the experts will be called upon to address. Nonetheless, it cannot be excluded that the parties could have a say on all the three elements that the Court has to decide, namely a) the subject of the enquiry or the expert opinion, b) the number and mode of appointment of the experts c) the procedure to be followed. The relevant practice does not clarify what is the parties’ role in this respect.

Article 67 of the Rules also confers to the parties the right to comment upon the expert’s reports. This assures that something similar to a cross-examination takes place. In this respect, it enhances the probative value of the expert report.

It is interesting to note that the procedure established by the Rules in regard to Article 50 allows for transparency and the parties’ participation in the experts examination. Both aspects are highly commendable. This also explains why recently a large part of the legal literature advocates a greater use of this provision¹⁷⁹.

2.4.2. The use of article 50’s experts by the Court.

¹⁷⁸ Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985,p.228, para. 65.

¹⁷⁹ See item (d.3) below.

Despite the wide discretion granted under article 50, the ICJ has not made frequent recourse to independent experts in practice. In fact, the cases are only four: i) the *Chorzow Factory* case, from 1928; ii) the *Corfu Channel* case, from 1949; iii) the *Gulf of Maine* case, from 1984; and the *Costa Rica v. Nicaragua* case¹⁸⁰, now pending before the Court.

The practice concerning the application of Article 50 can essentially be divided in two categories. The first category refers to cases in which the task assigned to experts by the Court is that of producing evidence. The second category relates to cases in which experts have been given a more limited role, such as that of assisting the Court in the assessment of the evidence produced by the parties or that of helping the Court in the assessment of the amount of reparation to be given by one of the parties.

a. Chorzow Factory case.

The *Chorzow Factory* case was the first case in which the Court made use of its power to nominate independent experts. In this case, the Permanent Court of International Justice recognized that Poland had violated German national's rights when expropriating a German-owned industrial property inside Poland¹⁸¹. After the merits' judgment, the Court, by an Order dated 13th September 1928, nominated experts to enable "the Court to fix, with a full knowledge of the facts (...) the amount of the indemnity to be paid by the Polish Government to the German Government"¹⁸². Three experts were nominated to answer the specific questions asked by the Court in the order; the governments of Germany and Poland each appointed an assessor to follow the experts' inquiry. The experts never delivered their report because the parties reached an extrajudicial agreement over the question of reparation.

The *Factory at Chorzow* is a classical case in which an international court uses experts to determine the precise amount of restitution to be paid, a frequent situation in the arbitral practice¹⁸³. In cases involving the estimation of values to be due and the assessment of the amount of damages, "the employment of independent expert

¹⁸⁰ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* (Order 16 June) [2016] (available at <http://www.icj-cij.org/docket/files/157/19054.pdf>) 1

¹⁸¹ *Factory at Chorzow case (Germany v. Poland)*, PCIJ, Series A, No. 17, Merits, p. 63.

¹⁸² *Factory at Chorzow case (Germany v. Poland)*, PCIJ, Series A, No. 17, Order from 13 September 1928, p. 100.

¹⁸³ WHITE, *The use of experts*, 1963, pp. 128-149.

assistance is frequently desirable and sometimes obligatory, if the tribunal is to discharge its function satisfactorily”¹⁸⁴.

In regard to the nomination of experts, there is no clear indication in the Court’s documents about how the experts were chosen or whether the parties had participated in that process. However, it is noteworthy that the parties in their pleadings asked to have recourse to experts to assess the amount due. The Court probably took this into account when decided to appoint the experts at the compensation phase.

On account of the absence of an experts’ report in this case, any indication about the value of their opinion is also lacking. However, some elements can be extracted from the judges’ individual opinions. For instance, it is interesting to note that a judge questioned “whether it is worth while to delay the settlement of the case and to incur the difficulties connected with an expert report”¹⁸⁵. In judge Nyholm’s opinion, the amount of evidence put before the Court was sufficient to allow it to give an immediate decision. Besides, he argued that after the presentation of the experts’ opinion the Court could reopen the discussion of the merits¹⁸⁶. Another interesting opinion is that of Lord Finlay. In his dissenting opinion he sustained that specific questions should not have been asked to the experts. For this reason he disagreed with the Court’s judgment.

b. The *Corfu Channel* case.

In spite of this precedent in the PCIJ, the *leading* case, one that still remains a benchmark¹⁸⁷ on the question of the use of experts by the ICJ, is the *Corfu Channel* case. This case is considered as “the outstanding example of the use of experts by the ICJ”¹⁸⁸. The case is especially important because the Court made use of experts in two different situations. They were used not only for evaluating the compensation (as in the *Factory at Chorzow*), but also for determining the facts underlying the dispute.

In this case, two British destroyers struck mines in Albanian waters and suffered damage, including loss of life. One of the questions that the Court had to address was whether or not Albania participated in the laying of the mines in the

¹⁸⁴ Ibid, p. 128.

¹⁸⁵ Factory at Chorzow case, PCIJ, Series A, No. 17, Observations by M. Nyholm, p. 93.

¹⁸⁶ Ibid.

¹⁸⁷ ROSENNE, 2007.

¹⁸⁸ WHITE, The Use of Experts, p. 107.

channel and/or whether or not Albania was aware of it. In order to provide an answer to this question, the Court had to assess a range of technical issues as, e.g., the exact position of the swept channel or the type of mines laid in the water.

Summing up the procedure, the United Kingdom filled its application in May 1947 and, after the written proceedings and the hearing of parties' experts, an expert committee was appointed by the Court in December 1948. The first report of the committee was delivered in January 1949. A site visit by the experts was carried out in the same month. In February 1949 the parties submitted considerations about the reports presented and some Judges addressed questions to the expert committee. After the Judgment two other experts were nominated to help the Court in the compensation phase.

The Court stressed the fact that a huge amount of evidence had been put before it by the parties, including maps, photographs and sketches¹⁸⁹. As mentioned, both parties made use of expert witnesses. However, the Court, after noting that some points were contested by the parties¹⁹⁰, found that it was "necessary to obtain an expert opinion"¹⁹¹. Here lies an important element that can be extracted from the *Corfu Channel* case: the disagreement of the parties about technical questions and the appointment by the Court of its own independent experts as a response to that disagreement¹⁹².

In July 1948, the Registrar informed the Danish, Norwegian and Swedish ambassadors at The Hague and the Foreign Minister of the Netherlands that the Court or the parties of the Corfu Channel case "may find it necessary to have recourse to experts on a number of difficult points"¹⁹³. The Registrar asked the ministers to "draw up a list of naval officers who, if necessary, would be available for this kind of work"¹⁹⁴. During a meeting on 16th November, President Guerrero informed the parties' Agents that the Court was considering appointing its own experts, but a decision had not yet been taken.

¹⁸⁹ About the standard of proof in this case, see DEL MAR, *The International Court of Justice and standards of proof*, in BANNELIER, CHRISTAKIS, HEATHCOTE, *The ICJ and the Evolution of International Law: The enduring impact of the Corfu Channel case*, New York, 2011, pp.

¹⁹⁰ *Corfu Channel case*, Judgment of April 9th, 1949: I.C.J. Reports 1949, p.9.

¹⁹¹ *Corfu*, Judgment, p. 9.

¹⁹² And especially the disagreement of expert's parties, as was pointed by judge Winiarski in its dissenting opinion. See I.C.J. Reports 1949, Judgment, Dissenting opinion of Judge Winiarski, p. 46.

¹⁹³ *Corfu Channel case*, Correspondence, Tome V, p. 170.

¹⁹⁴ *Ibid.*

On that occasion the President also informed that the Court would transmit to the parties a copy of a draft order and hear oral argument upon it¹⁹⁵.

Thereafter, by an Order of 17th December 1948, the Court made use of the powers provided by articles 48 and 50 of its Statute and appointed three naval experts¹⁹⁶.

The Court's method in choosing the experts was not completely transparent. As previously mentioned, it is possible to find in the Court's correspondence letters from the Registrar addressed to the Foreign Offices of different States asking for indications on naval experts. Nevertheless, neither in the Court's judgment nor in the Order are there indications on the criteria employed to choose the experts. Also, there are no indications whether the parties participated in the process of appointing the experts. It is established, however, that the parties participated in the elaboration of the questions submitted to Court's experts¹⁹⁷.

The mentioned Order listed eight specific questions that had to be answered by the experts after the analysis of the documents put before the Court. Besides the questions, the Order also set forth some procedural steps to be followed by the Registrar, such as for instance those concerning the access to the documents or the time-limit to deliver the report. The Order also established general guidelines to be followed by the experts when executing their functions. Two of them deserve particular attention:

“VI. The 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. The 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 make their true significance apparent to the Court. If need be, they will mention any doubts or differences of opinion amongst them.”¹⁹⁸

The judges' intentions in drawing these two “guidelines” were, above all, to set precise limits to the work that the experts were called upon to perform. Point VI recalled the experts' functions in the proceedings, i.e., to answer precisely the questions addressed to them, avoiding a general analysis of the evidence. Point VII had essentially

¹⁹⁵ Ibid, p. 210.

¹⁹⁶ “The duty of giving the expert opinion shall be entrusted to a Committee of Experts composed of Commodore J. Bull, of the Royal Norwegian Navy, Commodore S. A. Forshell, of the Royal Swedish Navy, and Lieutenant-Commander S. J. W. Elfferich, of the Royal Netherlands Navy.”, in Corfu Channel case, Order of December 17th, 1948: I.C.J. Reports 1948, p. 124.”, p.126, para. 11.

¹⁹⁷ Corfu, Correspondence, pp. 210, 227 and 230.

¹⁹⁸ Corfu, Order, p.126.

two functions. When the Court asked the experts to “give reasons” for their opinions, it meant they had to offer technical opinions based upon scientific knowledge. The second element that must be highlighted here is the consideration that highly complex factual situations can carry some degree of indetermination and uncertainty and the Court was aware of it.

Summing up, the Order asked the experts to perform an “assisting function” in the proceedings, that means, to analyze all the documentation offered by the parties and also the evidence produced by the experts appointed by the parties. It was a specific function of assessment and evaluation of evidence that already was at the Court’s disposal.

However, the report presented to the Court on 8th January 1949 made clear that some of the conclusions drawn by the expert committee “cannot be made without inspection of the locality”¹⁹⁹. Because of it, by a decision dated 17th January 1949, the ICJ requested the experts to make “any investigations and, so far as possible, any experiments which they may consider useful with a view to verifying, completing and, if necessary, modifying the answers given in their Report filed by them on January 8th, 1949”²⁰⁰.

The expert committee visited the Corfu Channel and investigated *in loco*, presenting a second report on 8th February 1949. Thus, it is possible to affirm that the experts in the *Corfu Channel* case performed two different functions: first to evaluate the evidence (phase 1) and then to produce evidence by visiting the locations where the minefield was laid to offer the Court relevant data in dispute (phase 2).

As regards to the procedure of examining the reports, the same decision from 17th January established the right of the parties to comment upon the experts’ observations. Besides, the Court’s experts were accompanied to the sites by one expert of each party²⁰¹. These two elements shows that the parties were offered the possibility to participate to the work of the experts and to comments their views.

¹⁹⁹ Corfu, Judgment, p. 147.

²⁰⁰ Corfu, Judgment, p. 151.

²⁰¹ Corfu, Correspondence, p. 259. The United Kingdom Agent, Sir W. E. Beckett, wrote to the Registrar that “I would like to add that the Government of the United Kingdom attaches great importance to the experts of the Parties travelling under the auspices of the Court and considers that they should accompany the Court’s experts in all official occasions throughout these visits.”

After the presentation of the second report, occurred on 8th February 1949, some judges asked the experts individual questions. The experts were not examined in an oral proceeding, but offered written answers to the judges' queries.

In some passages of the report the experts were strongly emphatic about the conclusions they arrived at. They used expressions as "we consider it beyond any doubt that", "[o]ur conclusion, therefore, is definite", "[t]here is no doubt that", "[t]he only remaining possibility"²⁰². At the same time, the experts made it clear when they did not have at their disposal sufficient data to answer a specific question²⁰³, and when questions "cannot possibly be answered"²⁰⁴.

The Court expressly recognized the high evidentiary value of the experts' reports. In a well known passage it observed that "[t]he Court cannot fail to give great weight to the opinion of the Experts who examined the locality in a manner giving every guarantee of correct and impartial information"²⁰⁵.

In doing so, the Court established an important precedent in regard to the evidentiary value of experts.

Two elements arise from the examination of the dissenting and individual opinions. The first one is the general agreement about the importance of the experts' opinion as a way of proof. The second element that was stressed by several judges is that an opinion given by an expert is not absolute.

Judge Azevedo, although giving much importance to experts' opinions²⁰⁶, pointed out that some conclusions cannot be drawn from them and stressed that there is "always a risk of error"²⁰⁷. Likewise, Judge Krylov remarked that the experts' opinions operate in the field of probability²⁰⁸. Also, as stated by Judge Badawi Pacha in its dissenting opinion, "[o]n every side, then, there are unknown and vague facts, and this is why, when the Experts state that the operation must have been observed from a

²⁰² These expressions, inter alia, are all found in the first expert report that is found in Corfu Channel, Judgment, pps. 144-148.

²⁰³ The experts affirmed that "[w]e are not in a position to give even an approximate date for the minelaying" and also "[w]e are not in the possession of sufficient information as to conditions when the mines were laid to give a more definite statement", in Corfu Channel, Judgment, p. 146 and 150 respectively.

²⁰⁴ Corfu, Judgment, p. 146.

²⁰⁵ Corfu Channel, Judgment, p.21.

²⁰⁶ I.C.J. Reports 1949, Judgment, Dissenting opinion of Judge Azevedo, paragraphs 5 and 18.

²⁰⁷ Ibid, para. 20.

²⁰⁸ Dissenting opinion of Judge Krylov, p. 71.

certain point under certain conditions, they merely express a scientific probability or certainty, provided all the required conditions are fulfilled”²⁰⁹.

Furthermore, *ad hoc* judge Ečer strongly criticized the conclusions at which the experts arrived. In his opinion “we are in the sphere of indirect evidence, indications and presumptions. The conclusions of the Experts themselves are based on indications, presumptions and conjectures”²¹⁰. That is the reason why, in the judge’s opinion, “[a]ccording 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”²¹¹. Summarizing, judge Ečer argued that the opinion presented by the experts are circumstantial, being based on an ensemble of conditions that do not offer “direct evidence” that Albania knew about the minefield.

The *Corfu Channel* case, being the only case where the Court employed independent experts for an *in locu* examination, also offers a contribution to the discussion about the duration of the expertise’s proceeding. If one considers that the experts were nominated in December, that they presented their last report in February and were queried by the judges in the same month, it is possible to affirm that the procedure related to the experts’ participation did not necessarily take an extensive amount of time.

Once determined Albania’s responsibility in the minelaying, it was up to the Court to determine the exact amount of compensation owed by the country to the United Kingdom. The United Kingdom presented its claim and Albania did not appear in this phase of the proceedings, arguing that the Court did not have jurisdiction over the determination of compensation. In the Court’s opinion the “estimates and figures submitted by the Government of the United Kingdom raise questions of a technical nature which call for the application of Article 50 of the Statute”²¹².

By an Order of 19 November 1949, the Court appointed two Dutch experts with the specific purpose to examine the “the figures and estimates stated in the last submissions filed by the Government of the United Kingdom regarding the amount of its claim for the loss of the *Saumarez* and the damage caused to the *Volage*”²¹³. Once

²⁰⁹ *Corfu Channel*, Judgment, Dissenting Opinion of Judge Badawi Pacha, p. 62.

²¹⁰ *Corfu Channel*, Judgment, Dissenting Opinion of Judge Ečer, p. 118.

²¹¹ *Corfu Channel*, Compensation, Dissenting Opinion of Judge Ečer, p.253.

²¹² *Corfu Channel* case, Order of November 19th, 1949: I.C.J. Reports 1949, p. 238

²¹³ *Ibid.*

again it is impossible to find any indication in the Court's decision or in its correspondence about the criteria which were employed for the selection of experts.

It is interesting to note that in the Order the Court made express reference to the fact that "the Government of the People's Republic of Albania has failed to defend its case and whereas, therefore, the Agent of the Government of the United Kingdom has asked that the Court decide in favor of the claim of his Government"²¹⁴. Therefore, it is possible to argue that the Court appointed experts to mitigate Albania's absence in the proceedings. They were used as an instrument to verify the exactness of the documents presented by the United Kingdom. In their conclusions, the experts asserted a higher value of the damages than that claimed by the United Kingdom. The Court decided to maintain the amount asked by UK taking into consideration the principle *ne ultra petita*²¹⁵.

c. The Gulf of Maine case

The second case in which the Court made use of the power offered by Article 50 in ICJ's case law dates back to 1984 in the context of the *Gulf of Maine* case. In this case, Canada and the United States asked the Court to delimit the maritime boundary that divides the continental shelf and fisheries zones of the two countries. Through a Special Agreement, the parties established that "[t]he Parties shall request the Chamber to appoint a technical expert nominated jointly by the Parties to assist it in respect of technical matters and, in particular, in preparing the description of the maritime boundaries and the charts referred to in paragraph 2"²¹⁶. The Special Agreement also contained instructions that had to be observed by the experts²¹⁷. These instructions were of a technical nature and included the choice of the common values to be used or specifications concerning the use of specific computer programs.

By an Order made by the Chamber on 30th March 1984, a British naval officer was appointed as technical expert to assist the Chamber in respect of technical matters and, in particular, of the preparation of the description of the maritime boundary and the

²¹⁴ Ibid.

²¹⁵

²¹⁶ Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 253.

²¹⁷ Article IV of the Special Agreement. In *Gulf of Maine*, Judgment, p. 254.

charts referred to in Article II, paragraph 2, of the Special Agreement²¹⁸. The same Order established that the expert had to be present at the oral proceedings, being available for consultations with the Chamber if necessary²¹⁹. The choice of the expert occurred through a parties' joint letter dated 12 October 1983; the Court only homologate it according to the Order. As in the *Corfu Channel* case, the expert report was attached to the Judgment.

It is interesting to note that the expert appointed in this case could be consulted by the Chamber "as it may deem necessary for the purposes of this Article" the Court's deliberations, unlike the experts of the *Corfu Channel* case. For this reason, when performing its solemn declaration, besides the normal text foreseen in article 63, the expert had to add that he "will refrain from divulging or using, outside the Chamber of the Court, any documents or information of a confidential character which may come to my knowledge in the course of the performance of my task"²²⁰. Also, it must be stressed that the parties had no opportunity to make any comments on the expert report. This happened essentially because of the nature of its participation in the proceeding.

The parties did not show any disagreement as regards the use of the expert in this case. The *Gulf of Maine* case is a case in which the experts' participation is limited and also controlled by the terms established by the parties in the special agreement. In this case the expert performed functions which were substantially very similar to those performed by the experts appointed for the purposes of assisting the parties in the implementation of the judgment²²¹.

d. The *Costa Rica v. Nicaragua* case.

The ICJ has decided, for the third time in its history, to use the powers granted to it by article 50 and appointed two experts through an Order with the view to

to collect, by conducting a site visit, all the factual elements relating to the state of the coast between the point located on the right bank of the San Juan River at its mouth and the land point closest to Punta de Castilla, as those two points can be identified today.²²²

²¹⁸ Delimitation of the Maritime Boundary in the Gulf of Maine Area, Appointment of Expert, Order of 30 March 1984, I.C.J. Reports 1984, p. 166.

²¹⁹ Ibid, p. 177.

²²⁰ Ibid.

²²¹ This function shall be analyzed in the point f) of this chapter.

²²² *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*(Order of 31 May) [2016] (available at <http://www.icj-cij.org/docket/files/157/19030.pdf>).

It was the second time that the Court use experts to perform a *in locu* visit and gather evidence to decide a dispute. The procedure followed by the Court seems particularly interesting for some reasons. I will dwell upon some of them but, since the dispute is still pending, the totality of the examination remains limited.

The first interesting point lies in the fact that it sheds some light on possibilities resorted to an expert in the contentious proceedings before the Court. It is a function related to the gathering of evidence and factual elements in order to ascertain the facts of a given dispute. The function seems to be particularly relevant when one considers that the parties “were unable to reach agreement on the starting point of the maritime boundary”²²³. Unless the Court decides otherwise, the function to be performed by the two experts is essentially connected to fact-finding and not the assessment of the evidence. It is not possible to conclude drawing from the elements given by the two orders whether the two experts will also participate in the assessment of the evidence. It would be particularly interesting to understand how these experts will be employed in the future and also the evidential weight attributed to them.

A second interesting point regards the procedure followed by the Court in order to identify the necessity of an expertise and the role of the parties in establishing the procedure. While in the past the Court has refrained from appointing experts when one of the parties was manifestly contrary to such a situation, in the present dispute the Court has appointed experts even if one of the parties argued that “there was no need to carry out a site visit, asserting that, since the location of the starting-point of the land boundary on the Caribbean coast”²²⁴. This seems to be an important fact which demonstrates that the decision of appointment of parties does not completely depend on the agreement of the parties in regard, particularly if the Court deems that

there are certain factual matters relating to the state of the coast which may be relevant for the purpose of settling the dispute submitted to it, which concerns in particular the delimitation of the maritime boundary between the Parties in the Caribbean Sea, and that, with regard to such matters, it would benefit from an expert opinion.²²⁵

It remains to be seen the exact functions these experts will perform in the settlement of the dispute.

Curiously, the first Order was the information of the decision (“The Court to arrange for an expert opinion”) and the second Order (16 June) is the responsible for the appointment of experts.

²²³ *Memoria della Costa Rica*, p. 6, para. 8.

²²⁴ *Costa Rica v Nicaragua* (n 222) 2 para 6.

²²⁵ *Costa Rica v Nicaragua* (n 222) 2 para 8.

2.4.3. Assessment

Some conclusions can be drawn after the analysis of the ICJ's case law in regard to the use of the independent experts set out in Article 50.

The first is that the Court has used experts to produce evidence only in two occasions, the second one still pending before the Court. The fact that the Court rarely participated actively in the process of production of evidence shows the reluctance of the Court to play a major role in this respect.

Despite the scarce practice, in all the four cases it was possible to identify that the parties had participated actively in the procedures. The parties had a role in determining the questions to be made to the experts, in the phase in which the experts went *in locu*, and also in commenting the expert report. At the same time, it must be recognized that the way in which the Court had made use of this instrument conforms to the basic principles of procedure like the good administration of justice, transparency and judicial fairness.

In regard to the probative value of the reports of Article's 50 experts, it is clear that because of its nature and of the role played by the parties in the proceedings this category of experts has great evidential value.

2.5. Assessors

Assessors are mainly the product of a common law tradition, markedly developed in the legal practice of the United Kingdom²²⁶. By definition, an assessor is a "person learned in some particular science of industry, who sits with the judge on the trial of a cause requiring such special knowledge and gives his advice"²²⁷. Notwithstanding the predominance of the use of party-appointed experts in common

⁽²²⁶⁾ In the United Kingdom, for instance, the civil procedural rule governing the appearance of assessors in the proceeding is the CPR 35.15 (available at www.justice.gov.uk/courts/procedure-rules/civil/rules/part35). On the use of assessors in that legal system, see BLOM-COOPER, *Assessors*, in: *Experts in Civil Courts* (Blom-Cooper ed.), Oxford, 2006, pp. 237-268 and DICKEY, *The Province and Function of Assessors in English Courts*, *Modern Law Review*, vol. 33 (1970), pp. 494-507. On the historical development of the instrument, see DWYER, *The Judicial Assessment of Expert Evidence*, Cambridge, 2008, pp. 266-269.

²²⁷ BLACK, *Black's Law Dictionary*, New York, 1968, p. 151. Another interesting definition is "(...) in English law [the term assessor] denotes a person who, by virtue of some special skill, knowledge or experience he possesses, sits with a judge during judicial proceedings in order to answer any questions which might be put to him by the judge on the subject in which he is an expert" (DICKEY, *op. cit. supra* note 9, p. 501).

law courts – as is clearly favoured by the adversarial system – assessors are employed in certain specific situations, particularly in nautical disputes²²⁸ and patents proceedings²²⁹. They can sit with the judge during oral hearings or provide assistance during the production of the judgment. Thus, their role is more closely linked to fact-assessment than to fact-finding. There may be cases, however, in which assessors participate in the gathering of evidence underpinning a case²³⁰.

The origins of the assessor at the international level can be traced to interstate arbitral practice. One of the first references concerned the use of assessors by one of the commissions established by article 7 of the Jay Treaty of 1794. On that occasion, the Commissars recognised their inability to decide the exact value of the damages suffered by American ship-owners due to the capture of the vessels by the United Kingdom. Clearly inspired by the practice of the Admiralty Court of the United Kingdom²³¹, the Commissars appointed two assessors, one of each nation, to help the commission. Similarly, the Treaty of Washington, which governed the *Alabama Claims Arbitration*, provided in its article X²³² that the arbitral tribunal appoints a "Board of Assessors" to calculate the amount owed by the United Kingdom to the United States. It is conceivable that the role of assessors in these two leading cases of international arbitration during the XIXth century led to the insertion of this instrument in the 1907 Hague Convention for the Pacific Settlement of International Disputes. Curiously however, the Hague Convention provided for the potential of assessors being appointed by the parties to assist Commissions of Inquiry²³³, but not arbitral tribunals. The possibility of having recourse to assessors was also examined during the debates concerning the creation of the International Court of Prizes. In particular, article 18 of the proposed Convention relating to the creation of an International Prize Court

²²⁸ MANDARAKA-SHEPPARD, *Modern Maritime Law*, New York, 2013, p. 6, explains the use of assessors in the Admiralty Court by distinguishing nautical assessor and expert witness in the following terms: "[t]he nautical assessor is not to be confused with the expert witness; he is not subjected to cross-examination, but the judge has discretion to choose between the opinion of differing nautical assessors".

²²⁹ DWYER, *op. cit. supra* note 9, p. 187.

²³⁰ On the issue, see DICKEY, *op. cit. supra* note 9, p. 494.

²³¹ DE LAPRADELLE, POLITIS, *Recueil des Arbitrages Internationaux*, Paris, 1905, p. 43.

²³² Article X provided as follows: "[i]n case the Tribunal finds that Great Britain has failed to fulfil any duty or duties as aforesaid, and does not award a sum in gross, the High Contracting Parties agree that a Board of Assessors shall be appointed to ascertain and determine what claims are valid, and what amount or amounts shall be paid by Great Britain to the United States on account of the liability arising from such failure, as to each vessel, according to the extent of such liability as decided by the Arbitrations".

²³³ Article 10 of the 1907 Convention for the Pacific Settlement of International Disputes provides that "[i]f the parties consider it necessary to appoint Assessors, the Convention of Inquiry shall determine the mode of their selection and the extent of their powers."

provided that the belligerent captor was “entitled to appoint a naval officer of high rank to sit as Assessor, but with no voice in the decision”²³⁴.

Assessors were permanently introduced into the realm of international litigation in the Statute of the Permanent Court of International Justice (PCIJ). A commentator considered the inclusion of assessors in the Statute “something of an anomaly, resulting from an historical accident”²³⁵. That is so because if one looks at the debates within the Advisory Committee of Jurists, oddly enough, the reference to “assessors” can be found in discussions about the composition of the Court rather than in discussions about evidentiary matters. Throughout the debates, it emerged clearly that the position of an “assessor” should be different from that of a judge, with assessors only being endowed with “advisory powers”²³⁶. In the final version of the Statute of the PCIJ, assessors were entrusted with the function of assisting the work of special chambers addressing particular matters (labour, communication and transit)²³⁷. In practice, assessors were never used by the PCIJ²³⁸, arguably because of the rare recourse

²³⁴ Art. 18 read as follows “[t]he belligerent captor is entitled to appoint a naval officer of high rank to sit as Assessor, but with no voice in the decision. A neutral Power, which is a party to the proceedings or whose subject or citizen is a party, has the same right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed”. On the issue, see SCOTT, *The Hague Peace Conferences of 1899 and 1907*, Baltimore, 1909, p. 487.

²³⁵ THIRLWAY, *op. cit.* supra note 2, p. 528.

²³⁶ In this vein, Bernard Loder observed that “if, for the reasons presented by M. de Lapradelle, the institution of assessors were accepted, they should not be given deliberative but only advisory powers.” (*Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists*, 1920, p. 199).

²³⁷ In accordance with Article 26 of the Statute of the PCIJ “(...) [t]he Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. (...) On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests. (...) The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of ‘Assessors for Labour cases’ composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labour Office. The Governing Body will dominate, as to one-half, representatives of the workers, and as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles”. Article 27 reads as follows: “[t]he Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. (...) When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote. (...) The technical assessors shall be chosen for each particular case in accordance with the rules of procedure under Article 30 from a list of ‘Assessors for Transit and Communications cases’ composed of two persons nominated by each Member of the League of Nations”. On the issue, see STAUFFENBERG, *Statut et règlement de la Cour permanente de justice internationale: éléments d'interprétation*, Berlin, 1934, pp. 160 ff.

²³⁸ In the Order nominating tribunal-appointed experts in the *Factory of Chorzow* case, the PCIJ decided that “[e]ach of the Parties shall have the right to appoint, within fifteen days from the date of that order, an assessor who will take part in the work of the committee in an advisory capacity” (P.C.I.J. Series A N° 17, p. 101.). However, these were not assessors within the meaning of Article 30. Such assessors were never appointed since the parties reached an agreement before the work of the committee of experts.

to the technical chambers of the Court. When, in 1945, the Statute was revised, the possibility of using assessors was extended to the full Court²³⁹.

2.5.2. Assessors under article 30 of the Statute.

Article 30(2) of the Statute of the ICJ states that “[t]he Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote”. Article 9 of the Rules of the Court complements this provision by regulating the use of assessors in contentious proceedings. This provision equally applies to chambers and to advisory proceedings²⁴⁰.

The nomination process for an assessor is regulated in detail. Article 9(2) of the Rules states that the President of the Court is responsible for “tak[ing] steps to obtain all the information relevant to the choice of the assessors”, who “shall be appointed by secret ballot and by a majority of the votes of the judges composing the Court for the case”. There is no specific provision providing for involvement of the parties in the selection of assessors. However, article 9(2) could be interpreted to the effect that the “information relevant to the choice of assessors” which the President must obtain, also includes the views of the parties as regards their selection.

Article 30 of the Statute does not specify the exact stage of the proceedings when assessors are appointed. The only temporal restriction results from article 9(1) of the Rules, according to which “the Court may, either *proprio motu* or upon a request made not later than the closure of the written proceedings (...) decide to appoint assessors to sit with it without the right to vote”²⁴¹. This restriction applies only to the parties and deals with the “request”, rather than the period in which assessors may be

²³⁹ United Nations Committee of Jurists, Documents of the United Nations Conference on International Organization, vol. XIV, p. 111. During the debates of the Committee, Fitzmaurice "suggested that the American text be changed to take out the words 'to sit with such chambers' and that the rules might provide for such assessors to sit either in such chambers, or with the full Court in appropriate cases without the right to vote".

²⁴⁰ Article 9(1) and article 9(4) of the Rules of the Court. These provisions are in consonance with article 68 of the Statute of the Court which prescribes that "in the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable". On the issue of assessors in the chambers of the Court, see PALCHETTI Article 26, in: *The Statute of the International Court of Justice: A Commentary* (Zimmermann, Oellers-Frahm, Tomuschat, eds.), Oxford, 2012, p. 487. On the use of assessors in advisory proceedings, Gross observed that assessors "has never been used in contentious cases but (...) may assume importance in connection with a wider use of the advisory function by regional organizations and specialized agencies." GROSS, *The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order*, American Journal of Int. Law, vol. 65 (1971), p. 277.

²⁴¹ Emphasis added.

appointed by the Court itself. Therefore, assessors may be appointed to sit with the Court during all the phases of the proceedings. The participation of assessors in the deliberation stage is expressly regulated by article 21 of the Rules of the Court which recognizes that “only judges, and the assessors, if any, take part in the Court's judicial deliberations”. As observed by an author, “the assessor may participate in the private deliberations of the Court and in this fashion, presumably, in the drafting of the judgment”²⁴². However, if an assessor is appointed with the specific task of giving the Court technical or scientific input, it is expected that the assessor would refrain from participating in those parts of the deliberations unrelated to these matters.

As previously mentioned, assessors have not yet been used in the practice of the ICJ, nor of its predecessor. Their potential role in a case has received occasional mentions by individual judges. For instance, in his separate opinion in the *Western Sahara* advisory opinion, Judge Petréen regretted that “the Court did not feel the need to seek other information than that submitted to it by the interested States. It did not arrange for experts in Islamic law or in the history of northern Africa to sit with it as assessors, as its Statute would have allowed”²⁴³.

A possible reason for the non-use of assessors can be traced to the fact that assessors are too close to being adjudicators: they sit with the judges, evaluate the technical arguments submitted by the parties and are not subjected to any form of control from the parties²⁴⁴. Their roles lies ambiguously in the middle, between an expert advising the Court and a non-voting adjudicator. This impression is reinforced by the content of the solemn declaration assessors have to make before exercising their activities. Similar to the solemn declaration made by judges rather than that of experts, the Rules establish that assessors must perform their duties “honourably, impartially and conscientiously, and that [they] will faithfully observe all the provisions of the Statute

²⁴² GROSS, op. cit. supra note 23, p. 278.

²⁴³ I.C.J. Reports 1975, p. 113. Judge Petréen went further stating that “[i]t is common knowledge that its internal practice does not provide for the appointment of juges-rapporteurs. It is true that each judge has had to struggle - as far as his knowledge of languages would allow - through the immense literature existing on the questions of African history to which reference was made, and has been able to inform his colleagues of the fruit of his reading. It is nevertheless striking that the Advisory Opinion should be based almost exclusively on the documents and arguments submitted by the interested States, which are accepted or dismissed in the light of an examination of the evidence adduced. One does not find here the margin of uncertainty in which an advisory opinion ought to leave the facts which have neither been proved nor disproved”.

²⁴⁴ On this point, but with regard to the experts of article 289 of UNCLOS, see TREVES, Law and Science in the Interpretation of the Law of the Sea Convention, Journal of Int. Dispute Settlement, vol. 3 (2012), pp. 483-491.

and of the Rules of the Court"²⁴⁵. This declaration differs from the one that article 50 experts must make, being instead very close to the ones the judges and the registrar are required to make. This seems to reflect the fact that assessors' position in the Court's organization is closer to that judges or officials in the registry than that of an article 50 expert occasionally appointed by the Court.

In principle, both assessors and Court-appointed experts may be used for assisting the Court in dealing with scientific and technical issues²⁴⁶. Unlike experts *ex parte*, the fact that they are not appointed by one of the litigating parties makes their expert opinion, at least theoretically, more impartial. Yet, despite some common features, they appear to perform slightly different functions. Taking into account the distinction between the production of evidence and the assessment of evidence²⁴⁷, it can be argued that the function of assessors appears to be closely related to the assessment of the evidence, while the function of experts envisaged in article 50 is broader as it includes the obtaining and production of such evidence. This is confirmed by the practice of the Court, particularly in the *Corfu Channel* and *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* cases. In those instances, article 50 experts were called to gather evidence, rather than to closely assist the Court in assessing and evaluating evidence.

There are also differences in the procedure governing the activity of these two figures. The first difference lies in the fact that assessors can sit with the Court, even during deliberations. Another difference relates to the possibility for the parties to comment on their opinions. While article 67(2) of the Rules of the Court envisages the right of the parties to comment upon the content of the contribution offered by experts, as "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"²⁴⁸, nothing is said in this respect in article 30 of the Statute nor in article 9 of the

²⁴⁵ Article 9 (5) of the Rules of the ICJ.

²⁴⁶ To THIRLWAY, *op. cit. supra* note 2, p. 528, for instance, "[t]he nature of [assessor's] role remains slightly obscure: in particular, it is unclear in what respects they differ from experts appointed by the Court".

²⁴⁷ WOLFRUM, *Taking and Assessing Evidence in International Adjudication*, in: *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Ndiaye, Wolfrum eds.) Leiden, 2007, p. 345.

²⁴⁸ It is not clear, though, if Article 65 of the Rules, which prescribes that "witnesses and experts shall be examined by the agents, counsels or shall be examined by the agents, counsel or advocates of the parties under the control of the President", applies only to party-appointed experts or also to the Court-appointed experts. In the *Corfu Channel* case – the only instance in which the Court appointed experts under article 50 – the parties submitted their views with regard to the report presented

Rules with regard to assessors. This is a point to which I shall revert later. At present, it may be interesting to note that in practice, the differences between assessors and Court-appointed experts may be blurred. Thus, in the *Gulf of Maine* case the way the expert was employed bore some similarities with an assessor. The order nominating a single expert in that instance established that the expert's purpose was "to assist the Chamber in respect of technical matters and, in particular, in preparing the description of the maritime boundary and the charts referred to in (...) the Special Agreement"²⁴⁹. In addition, the order established that the expert "shall further be available for such consultations with the Chamber as it may deem necessary"²⁵⁰. The expert prepared the report and the charts which were annexed to the final judgment, and yet the parties had no opportunity to comment upon them. For these reasons some commentators suggested that the expert in the case was actually an assessor as opposed to an article 50 expert²⁵¹. However, the Chamber of the Court expressly referred to article 50 instead of article 30 of its Statute in the order nominating that expert.

The need for technical inputs explains the use by the ICJ of another category of expert, the so-called "invisible experts" or "ghost experts". As observed by Thirlway, "such an expert has not, strictly speaking, 'sat with the Court', but has been consulted by its members, and in particular by the Drafting Committee, in preparing the judgement"²⁵².

Although criticized for its lack of transparency and possibly in contravention of the requisites of due process²⁵³, the employment of invisible experts demonstrates the Court's willingness of having technical input *after* the closing of the oral hearings.

by the three experts nominated, but they were not cross-examined at the hearing (I.C.J. Reports 1949, p. 9).

²⁴⁹ I.C.J. Reports 1984, p. 166.

²⁵⁰ I.C.J. Reports 1984, p. 167.

²⁵¹ ROSENNE, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, Leiden, 1983, p. 32; RIDDELL, PLANT, *op. cit. supra* note 3, p. 335.

²⁵² THIRLWAY, *op. cit. supra* note 2, p. 529. See also JENNINGS, *International Lawyers and the Progressive Development of International Law*, in: *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Makarczyk ed.), Leiden, 1996, p. 416.

²⁵³ The main criticism to the use of invisible experts appeared in the joint dissenting opinion of judges Simma and Al-Khasawneh in the *Pulp Mills* case (I.C.J. Reports 2010, p. 114, para. 14), according to whom "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". A similar criticism can be found in the opinions of other judges, such as Cançado Trindade, Yusuf and Vinuesa. See also COUTASSE, SWEENEY-SAMUELSON, *Adjudicating Conflicts over Resources: The ICJ's Treatment of Technical Evidence in the Pulp Mills Case*, *Goettingen Journal of International Law*, vol. 3 (2011), p. 447 and PEAT, *op. cit. supra* note 3, p. 288.

Significantly, assessors could perform the same function; but compared to invisible experts, they would have the advantage of offering a more transparent contribution to the work of the ICJ.

2.6. The experts appointed after the judicial phase.

Besides the experts set forth in Article 50 of the Court's Statute, the Court appointed experts to help the parties in the execution of the Judgment. The Court stressed that the function of these experts was not “to assist the Court in giving judgment upon the issues submitted to it for decision”²⁵⁴, but actually to assist the parties in implementing its Judgment.

The two cases in which this kind of experts were appointed by the Court were *Frontier Dispute (Burkina Faso/Mali)* and *Frontier Dispute (Burkina Faso/Niger)*. In both cases, by virtue of a previous agreement, the parties requested the Court to nominate, in its Judgment, three experts to assist them in the demarcation of the frontiers defined in the Judgment²⁵⁵. The Court accepted the task but preferred to execute it through an Order after ascertaining the views of the Parties, “particularly as regards the practical aspects of the exercise by the experts of their functions”²⁵⁶.

The first element that can be drawn from this limited practice is that, as stressed by the Court, this kind of expert is not an expert in the sense of Article 50 and, thus, does not fall within the scope of Article 68 of the Court's Rules²⁵⁷. The Court also pointed out that “there is nothing in the Statute to prevent the Court from exercising this power, the very purpose of which is to enable the Parties to achieve a final settlement of their dispute in implementation of the Judgment which it has delivered”²⁵⁸ and, finally, it underlined that “the Court has already exercised such a power in the past”²⁵⁹.

²⁵⁴ Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985, p. 228, para. 65.

²⁵⁵ *Frontier Dispute (Burkina Faso/Mali)*, Judgment, para. 176; *Frontier Dispute (Burkina Faso/Niger)*, Judgment, para. 113.

²⁵⁶ *Ibid.*

²⁵⁷ Article 68 of Court's Rules says that “[w]itnesses and experts who appear at the instance of the Court under Article 62, paragraph 2, and persons appointed under Article 67, paragraph 1, of these Rules, to carry out an enquiry or to give an expert opinion, shall, where appropriate, be paid out of the funds of the Court”.

²⁵⁸ *Frontier Dispute (Burkina Faso/Mali)*, Nomination of Experts, Order of 9 April 1987, I.C.J. Reports 1987, p. 8; and *Frontier Dispute (Burkina Faso/Niger)*, Order of 12 July 2013, Nomination of Experts, I.C.J. Reports 2013, p. 227.

²⁵⁹ *Frontier Dispute (Burkina Faso/Niger)*, Order 2013, p.227.

These indications can raise some questions about the powers of the Court on the appointment of experts. Apart from the power under Article 50 the parties may confer to the Court a different power regarding to the appointment of experts. These experts do not enter in any of the categories examined previously. As indicated before, this power is directly related to the parties' participation in the proceedings and it serves to make effective the parties' rights in the proceedings.

It was argued that the fact that the Court used this power through an Order could mean that this power could found its legal basis in Article 48 of the Court's Statute²⁶⁰ which establishes that “the Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence”. However, the Court did not mentioned this provision.

The limited practice regarding this category of experts may raise doubt on the procedures followed by the Court for the identification of these experts. Since it occurs essentially by agreement between the parties, one might speculate that they might perform an active role in this process. The absence of public elements on this issue does not allow much speculation.

²⁶⁰ TORRES BERNÁRDEZ, Article 48, in ZIMMERMANN, TOMUSCHAT E OELLERS-FRAHM, *op. cit.*, p. 1190.

CHAPTER 2

THE USE OF EXPERTS BY OTHER INTERNATIONAL TRIBUNALS

1. Introduction: methodological approach.

Comparisons between international tribunals have proven to be an useful instrument in order to assess and, ultimately, improve the activity of a given international tribunal¹. The purpose of this chapter is to employ this instrument in order to identify how other international tribunals dealing with interstate disputes employ the available instruments granted by their rules and developed by their practices.

The two “judicial bodies” analyzed were the International Tribunal for the Law of the Sea (ITLOS) and the interstate arbitration. The first on account of the similarities between the ICJ. ITLOS is a permanent tribunal, working under a sovereign-guided logic, which works under the strict logics of its permanent rules and presumably taking into account its own developed case law. The choice of arbitration is justified by the fact that arbitral tribunals have been called to settle dispute possessing a high level of complexity. Besides, arbitration is at the origins and come of its logic until the present day permeates the logic of the permanent international judicial settlement².

2. The use of experts in Inter-state Arbitration.

The origins of modern inter-state adjudication might be traced directly to the phenomenon of international arbitration³. Steadily employed by States throughout the

¹¹ C Brown, *A Common Law of International Adjudication* (OUP 2007) 83-118.

² S Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body?* (Springer 2014).

³ For the purposes of this chapter, when the term "arbitration" is employed it makes reference to inter-state arbitration. This term can be distinguished from commercial arbitration or investor-state arbitration, modalities of arbitration not examined in this work. With regard to the bridge between international arbitration to international adjudication, see, generally O Spiermann, *International legal argument in the Permanent Court of International Justice: the rise of the international judiciary* (CUP 2005), S Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body?* (Springer 2014) and AA Cançado Trindade, "Reflections on a Century of International Justice and Prospects for the Future" in G Gaja and JG Stoutenburg (eds) *Enhancing the Rule of Law through the International Court of Justice* (Brill 2014) 1-32. On interstate arbitration, in general, see JG Merrills, *International Dispute Settlement* (CUP 2011) 83-115 and JL Simpson and H Fox, *International Arbitration: Law and Practice* (Stevens and Sons 1959).

XIXth century to settle their disputes⁴, international arbitration developed its own *praxis*, literature and discourses. It represented, for a long period, the jurisdictional power of international law⁵. The trend favouring the use of international arbitration culminated in the adoption, in 1899 and 1907, of the Hague Peace Convention for the Pacific Settlement of Disputes (Hague Conventions) which, *inter alia*, set up the Permanent Court of Arbitration⁶ (PCA) and also crystallized a definition of arbitration which is accepted hitherto: “the settlement of differences between States by judges of their own choice and on the basis of respect for law”⁷.

As the definition highlights, the choice of arbitration, together with the rules of procedure that arbiters will apply, is the cornerstone of international arbitration. In practice, the greater discretion to establish the procedure has implied a greater discretion to engage experts. That is perhaps the reason why arbitral tribunals, unlike the ICJ, are so prone to resort to independent experts in order to obtain technical and scientific assistance. As noted by two authors "arbitral tribunals may in principle play a particularly useful role where extensive fact-finding is required, whereas it has been suggested that the ICJ has preferred to base its judgments upon largely uncontested facts rather than to engage extensively in the fact-finding commonly expected of a tribunal of first instance"⁸.

Just by way of illustration, in two of the most well known arbitrations of the XIXth century, experts played an important part. In one of the commissions established by Article 7 of the *Treaty of Jay* of 1794, the commissars understood that they could not decide themselves the exact value of the damages suffered by American ship owners due to the capture of the vessels by the United Kingdom. Therefore, clearly inspired by the practice of the Admiralty Court of the United Kingdom⁹, the commission designated two assessors, one of each nation, to help the commission to perform its task. Still within the context of the *Treaty of Jay*, another commission, the one responsible for the

⁴ H La Fontaine, *Pasicrie Internationale: Histoire Documentaire des Arbitrages Internationaux* (Stampfli & Cie 1902) 8; A de Lapradelle and N Politis, *Recueil des Arbitrages Internationaux* (Pedone 1905).

⁵ N Politis, *La justice internationale* (Hachette 1924).

⁶ Article 20 of the 1899 Hague Convention.

⁷ Article 15 of 1899 Article 15 of the 1899 Hague Convention for the Pacific Settlement of Disputes and repeated in Article 37 of the 1907 Hague Convention.

⁸ C Gray and B Kingsbury, "Developments in Dispute Settlement: Inter-state Arbitration Since 1945" (1992) 63 *British YearBook of International Law* 117.

⁹ A de Lapradelle and N Politis, *Recueil des Arbitrages Internationaux* (Pedone 1905) 43.

identification and description of the *River Saint Croix*¹⁰, employed experts to describe geographical indications and prepare maps concerning the dispute¹¹. In a similar vein, the Treaty of Washington, which governed the *Alabama Claims Arbitration*, prescribed in its Article X the power of the Arbitral Tribunal to appoint a "board of Assessors" to calculate the amount due by the United Kingdom to the United States on account of its violations of neutrality obligations during the American secession war.¹²

These emblematic cases, in conjunction with others that emerge from the early practice¹³, demonstrate the need that international arbitrators obtain technical *input*, which explains the frequent recourse to expertise. The historical dimension of the phenomenon may offer indications about the development of certain institutes, the introduction of specific procedures in international adjudication, and even shed some light on the reasons why a certain kind of expert rather than others was favoured during a particular period of time. Nonetheless, a deep examination of the features of the use of experts in the historical experience falls outside the scope of this work. Given the flourishing practice of arbitral tribunals in recent times, especially under the auspices of the Permanent Court of Arbitration (PCA)¹⁴ and triggered by the Annex VII of the United Nations Conventions on the Law of the Sea (UNCLOS)¹⁵, the focus of the examination will be narrowed to inter-state arbitrations occurred in the second half of the XXth Century¹⁶.

Two preliminary observations are in order. The first relates to the role and rules of the PCA in managing inter-state arbitrations. The second observation relates to the rules of evidence governing the field of interstate arbitration.

¹⁰ *River Saint Croix Commission* (UK/US) (1978)28 RIAA 1-4.

¹¹ A de Lapradelle and N Politis, *Recueil des Arbitrages Internationaux* (Pedone 1905) 8-9.

¹² "In case the Tribunal finds that Great Britain has failed to fulfil any duty or duties as aforesaid, and does not award a sum in gross, the High Contracting Parties agree that a Board of Assessors shall be appointed to ascertain and determine what claims are valid, and what amount or amounts shall be paid by Great Britain to the United States on account of the liability arising from such failure, as to each vessel, according to the extent of such liability as decided by the Arbitrations".

¹³ See DV Sandifer, *Evidence before International Tribunals* (Kraus 1971) 233.

¹⁴ Y Li and CM Ng, "More in 2013 than Ever Before: Inter-State and Investor-State Arbitrations at the Permanent Court of Arbitration" (2013) 26 Hague Yearbook of International Law 496-515; JJ van Haersolte-van Hof, "The Revitalization of the Permanent Court of Arbitration" (2007) 54 *Netherlands International Law Review* 395-413; H Jonkman, *The role of the Permanent Court of Arbitration in international dispute resolution* (2000) 279 *Recueil des cours*.

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¹⁶ Some exceptions will be introduced in certain occasions, such as the examination of the *Trail Smelter* (U.S./Canada) arbitration, whose arbitral award was rendered in 1943; and the examination of the *Abyei* arbitration, a conflict between a State (Government of Sudan) and a (yet) non-state actor (Sudan People's Liberation Movement/Army).

Along with investor-state arbitration, interstate arbitration is an important part of the docket of PCA. Several of the most relevant arbitrations dealing with expert evidence were conducted under the auspices of that institution. Not only the Rules of the PCA have been gaining a prominent role in influencing arbitral agreements (or *compromis*), but there also seems to exist an established practice with regard to the use of experts in arbitral tribunals established under its architecture. Therefore, it is relevant to examine the rules of the PCA with regard to the appointment of experts¹⁷. Accordingly, when examining each category of expert, I will refer to the respective regulation in the PCA rules. It is important to recall, however, that when the parties go to arbitration, these rules, which are adopted in the form of an arbitral *compromis* or, in recent practice, each tribunal's "rules of procedure", may be modified and adapted to the particular circumstances of a case.

Another particular feature to be taken into account regards the role of the International Bureau of the CPA. To some extent, the functions exercised by the Bureau are similar to those of the Registrar in permanent tribunals. It is not rare to find in the rules of procedure of tribunals a rule granting to the PCA Registry the function to "maintain an archive of the arbitral proceedings and provide appropriate registry services as directed by the Arbitral Tribunal." In addition, such services include assisting arbitrators and the parties with the identification and appointment of experts. This task is improved by the maintenance, by the PCA, of a list of experts envisaged in the Option Rules for disputes relating to Natural Resources/Environment and relating to Outer Space Activities – to which I will revert later.

The second point which deserves attention is that, unlike permanent tribunals, the rules of evidence governing international arbitration possess an *ad hoc* character. Hence, as observed by an author, "an obvious advantage of arbitration, as opposed to adjudication, is that the parties may choose their own rules of procedure and tailor them to the specific needs of a given case"¹⁸. Nonetheless, it is possible to identify some general practices with regard to evidentiary issues which, some authors consider as

¹⁷ With regard to the several instruments governing the activity of the PCA, the attention will be focused on the following instruments: a) the relevant rules contained in the 1899 and 1907 Hague Conventions; b) 2012 Rules of PCA; c) the 1992 PCA Optional Rules for Arbitrating Disputes between Two States; d) the 2001 PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment; e) the 2011 PCA Optional Rules for Arbitration of Disputes Relating to Outer Space Activities.

¹⁸ L Malintoppi, "Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication" (2006) 5 LPICT 143.

constituting inherent powers of arbitral tribunals¹⁹. To some extent, these practices are reflected in the rules prepared by the International Law Commission²⁰, UNCITRAL, and in the Rules of the Permanent Court of Arbitration. Just to take some examples of general evidentiary rules, one may refer to the power of arbitral tribunals to "arrange all the formalities required for dealing with the evidence"²¹, to the obligation of the parties to co-operate with the tribunal in the production of evidence²² and the power of the tribunal to perform site visits²³. Of particular interest is the rule which prescribes that "the tribunal shall be the judge of the admissibility and the weight of the evidence presented to it"²⁴. Through this rule, a written-form of the practice developed in ICJ's case law, the two criteria thereby expert evidence can be analyzed are incorporated in the arbitral practice: admissibility and evidentiary weight.

In parallel to these established rules and trends, as remarked by an author, "most arbitral tribunals will consult the parties at an early stage of the proceedings to understand their expectations as to the manner in which evidence is to be presented, and set forth in a procedural order some additional rules that take these expectations into account"²⁵. While this is true, it should also be noted that the arbitral practice has not developed completely innovative forms of experts. The categories of expert used by arbitral tribunals do not depart from that established in the Statute and practice of the International Court of Justice. Rather the contrary, it seems to exist some correspondence between arbitral practice and the permanent judicial settlement of interstate disputes in relation to the categories of experts employed by international tribunals. What seems to differ, however, is the frequency with which these different categories are employed.

Before examining the different categories of experts appearing in interstate arbitral practice, a terminological clarification is required. International tribunals refer to "experts", "technical assistants", "scientists", "expert witnesses" without drawing a clear

¹⁹ C Brown, *A Common Law of International Adjudication* (OUP 2007) 83-118.

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²¹ Article 49 of the 1899 and Article 74 of 1907 Hague Conventions for the Pacific Settlement of International Disputes.

²² Article 21.2 of the International Law Commission Model Rules of Arbitral Procedure (1958), ILC Year Book, 1958, vol. II.

²³ Article 21.4 of the ILC Model Rules of Arbitral Procedure. Article 27.3 2012 PCA Rules. On this particular issue, see C Brown, *A Common Law of International Adjudication* (OUP 2007) 96.

²⁴ Article 21.1 of the ILC Model Rules of Arbitral Procedure. A similar, but more specified, rule can be found in Article 27.4 of the 2012 PCA Rules: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered".

²⁵ B Daly and others, *A guide to the PCA Arbitration Rules* (OUP 2014) 100.

distinction between them. Therefore, it seems useful to maintain the same categories employed when examining the practice of the ICJ and of other permanent adjudicative bodies. Since similar categories display similar traits and present similar problems, the practice of international arbitration will be divided in (2.1) expert counsels; (2.2) party-appointed experts; (2.3) expert-arbitrators, a category which does not exist in the practice of the ICJ; (2.4) tribunal-appointed experts and; (2.5) experts appointed after the adjudicatory phase.

2.1. Expert counsel.

One of the most recurrent practices in interstate arbitration consists in nominating scientists, historians, geographers, hydrographers, cartographers to integrate the defensive team of the parties²⁶. As a matter of fact, ancient and recent arbitral practice confirm that it is difficult to find a defensive team in an arbitration without a "technical adviser" or "expert adviser". At times, these experts presented evidence orally before the Court without being cross-examined²⁷. Sometimes, they submit their written reports and participate during the hearings without pleading.²⁸ The absence of general rules governing the appearance of such experts in arbitration leaves to the parties a greater discretion in choosing how they will be assisted by them.

Two questions have arisen in practice regarding the use of such a category of experts. The first regards the independence and impartiality of such an expert. The second is the role that expert counsels can perform during an arbitral proceeding.

2.1.1. Independence and impartiality of experts counsels.

While the presence of expert counsels assisting the parties is not envisaged in the general rules of international arbitration, the appearance of such a category of experts is sometimes identified in arbitral *compromis*. The content of these rules offer some indications about the role that expert counsels perform in the proceedings.

²⁶ Just for some illustrative examples, experts integrated the parties' delegation in the *Trail Smelter* (1941), *Lac Lanoux* (1957), *Rann of Kutch* (1968), *Rainbow Warrior* (1990), *Barbados and Trinidad and Tobago* (2006), *Guyana and Suriname* (2007) and *Abyei Arbitration* (2009).

²⁷ *Affaire de la délimitation de la frontière maritime entre la Guinée et la Guinée-bissau* (1985) 19 RIAA.

²⁸ *Bay of Bengal Maritime Boundary* (Bangladesh v. India) (UNCLOS Annex VII Arb. Trib. July 7, 2014)

In the *Gulf of St Lawrence* arbitration, the *compromis* expressly provided that "chaque agent ainsi désigné sera habilité à nommer un adjoint pour agir à sa place le cas échéant et pourra être assisté de conseils, d'experts et du personnel qu'il jugera nécessaires"²⁹. In a similar fashion, in the *Rainbow Warrior* affair, the agreement provided that "each Government shall be represented at the oral hearings by its Agent or deputy Agent and such counsel and experts as it deems necessary for this purpose"³⁰. The last passage, which can be found in other agreements³¹, seems to convey the idea that this expert *represents* the interests of a party in the dispute. This idea is similarly expressed in the *Canada/France Arbitration*, where the award expressly prescribed that "les conseils et conseillers ci-après ont présenté des exposés oraux et donné *des avis d'expert au nom des Parties*"³².

These normative excerpts allow some speculation about the impartiality and independence of such experts. If expert counsels "represents" and give evidence "in the name of the parties", it seems difficult to consider them fully impartial and independent. However, in opposition to the ICJ, the established use of expert counsel has not given rise to reactions in the arbitral practice. Differently from the *Pulp Mills* case, where the Court squarely reprimanded the use of expert counsels, such a problem did not appear yet in interstate arbitrations.

Two are the possible reasons for explaining such situation. The first is that in international arbitration the parties are the ultimate masters of the procedure and have a broader power in establishing the way they will adduce evidence. Thus, if the parties agree in not prolonging the proceedings with sessions of examination and cross-examination of experts and favour only the presence of written expert reports, there is no reason why an arbitral tribunal should offer resistance. Moreover, arbitrators are not necessarily interested in setting out a procedural precedent. While the ICJ in the *Pulp Mills* was concerned in identifying a practice which it "would have found more useful"³³ and thereby established a procedural precedent, this concern is not generally shared by

²⁹ Art. 4 Arbitral Agreement. *Filleting within the Gulf of St. Lawrence* (Canada/France) (1986) RIAA 227 (emphasis added). Similarly, Art. 6.5 Arbitral Agreement. *Delimitation of maritime areas between Canada and France* (1992) XXI RIAA 272.

³⁰ Article 5.7. Arbitral Agreement. *Rainbow Warrior Affair* (1990) 20 RIAA 220.

³¹ In the *Affaire de la délimitation de la frontière maritime entre la Guinée et la Guinée-bissau* (1985) 19 RIAA, Article 6 of the Arbitral Agreement provides that "les Parties peuvent être représentées à la procédure orale par leurs agents et par tous conseillers et tous experts qu'elles peuvent désigner."

³² *Delimitation of maritime areas between Canada and France* (1992) 21 RIAA 275 para 6 (emphasis added).

³³ *Pulp Mills*, p. 72, para 167.

arbitrators. The second reason seems to be that, since arbitral tribunals are usually assisted by independent experts, expert counsels are not the only source of technical knowledge. Therefore, *arguendo*, arbitrators would not be concerned about the source of such an evidence since they have their own impartial source of technical or scientific knowledge to weigh such evidence.

2.1.2. The role performed by expert counsels.

It is difficult to precise the importance that expert counsels have had in forming the conviction of arbitrators on the technical features of a dispute. Little reference has been made to the evidence by them presented in arbitral awards. Nonetheless, some indications can be identified.

Firstly, arbitral tribunals seem to take into account when expert counsels do agree in relation to a certain fact. In *Barbados and Trinidad and Tobago*³⁴, for instance, the arbitral tribunal constituted under Annex VII UNCLOS used the agreement of the parties' experts to reinforce its decision with regard to the method of the delimitation of the EEZ and the continental shelf. The tribunal observed that "technical experts of the Parties have also been in agreement about the identification of the appropriate base points and the methodology to be used to this effect"³⁵. The criteria of giving weight to the agreement between parties' experts corresponds to the attitude adopted by the ICJ with regard to party-appointed experts: the tribunal can use their agreement to reinforce a certain factual element.

Another example on how the experts' agreement was used can be identified in the *Delimitation Continental Shelf (United Kingdom/France)* arbitration³⁶. In that instance, the arbitral tribunal asked the parties to identify precisely the respective terminal points of each of the agreed segments in the English Channel and to give the relevant coordinates of the median line in those segments. The experts of the parties held meetings together in order to identify the points of agreement and disagreement³⁷.

³⁴ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them* (2006) 27 RIAA 147-251.

³⁵ *Barbados/Trinidad and Tobago* (2006) 27 RIAA 231 para 307.

³⁶ *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (1978) 28 RIAA 3-413.

³⁷ *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (1978) 28 RIAA 63 para 116.

The agreement of the experts of the parties was decisively taken into account by the tribunal, which has made several references to the "line already agreed between the experts" throughout the award. The points which the experts of the parties disagreed on were then settled by the tribunal.

In a very similar fashion, in the recent *Guyana/Suriname Maritime Boundary* arbitration, which will be examined further on in this chapter, at the second hearing, the expert hydrographer appointed by the tribunal held a meeting with the expert counsels of the parties and asked them information which was further provided. Again, the expert counsel was a fundamental instrument of collaboration with the tribunal-appointed expert in order to settle the dispute.

In sum, if, as recognized by the ICJ, "negotiations may help demonstrate the existence of the dispute and delineate its subject-matter"³⁸ by ascertaining the respective positions of the parties, it appears that expert counsels may help to precise the factual content of a dispute and delineate the respective positions of the parties with regard to technical issues.

2.2. Party-appointed experts.

In the context of international arbitration, for party-appointed expert it should be understood the expert which is nominated by a party to give oral evidence during a hearing and it is examined or is, at least, made available for cross-examination³⁹. Although some international rules and *compromis* may refer to them as "expert witnesses" or "independent expert witnesses" the term *party-appointed expert* avoids misinterpretation with other categories of experts⁴⁰. In addition to the cross-examination, sometimes these experts are required to make a solemn declaration, which

³⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*[2011] ICJ Rep 84 para 30.

³⁹ The first provision somewhat related to the appointment of expert counsels is Article 90 of the 1899 Hague Convention of Peaceful Settlement of Dispute which, regulating the "Arbitration by Summary Procedure" established that "The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts should be called. The Tribunal has, for its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful".

⁴⁰ Since there is a distinction between experts and witnesses in the rules of some international tribunals, the expert witness is, then, the expert which gives evidence on questions of fact and questions of expertise. In the arbitration practice, however, this distinction does not seem to be relevant: when the parties agree to appoint individuals to be heard in public hearings, it seems that the kind of the evidence presented by them is not decisive to its classification (factual or expertise). In some arbitrations, such as *Guinea-Bissau and Senegal*, the tribunal made a clear differentiation between experts and witnesses.

would reinforce their independence in relation to the parties. In practical terms, it could be contented that party-appointed experts are expert counsels which, through a specific procedure of swearing and public examination, acquire some independence and impartiality.

The presentation of oral evidence by experts was not very frequent in the early practice of international tribunals⁴¹. Some examples can be referred to in recent practice, however. In the *Guinea-Bissau/Senegal Arbitration*, in addition to the expert counsels integrating the defensive teams, Guinea-Bissau appointed an expert who answered to questions put by its own counsel⁴². In the *Taba Arbitration*, Egypt and Israel appointed experts which were cross-examined by the parties. The dissenting arbitrator in this case mentioned the testimony of one of the experts several times⁴³, considering it a "very trustworthy expert witness"⁴⁴ and its testimony consisting in "convincing expert evidence"⁴⁵. In both cases the Tribunal did not refer to the evidence presented by the experts in the award.

Several PCA rules regulate the appearance of witnesses (including "expert-witnesses") during the oral phase of the proceedings⁴⁶. These rules do not set out a specific procedure for expert's examination in the oral hearings. The procedure seems to vary significantly according to the agreement between the parties. In *Abyei Arbitration*, experts made oral presentations (sometimes very similar to those made by counsels), followed by one round of cross-examination. In the *Guyana/Suriname*, the examination of experts followed the four-step procedure according to which the expert is examined and cross-examined twice and judges can put question to the expert⁴⁷. In the *South*

⁴¹ Some exceptions can be identified, though. A notorious example is the examination of experts in the *Trail Smelter* arbitration.

⁴² *Delimitation of maritime boundary between Guinea-Bissau and Senegal* (1989) 20 RIAA 125-126 para 13.

⁴³ *Case concerning the location of boundary markers in Taba between Egypt and Israel* (1988) 20 RIAA 1-118, paras 13, 67, 77, 83, 99, 104, 156.

⁴⁴ *Case concerning the location of boundary markers in Taba between Egypt and Israel* (1988) 20 RIAA 87 para 77.

⁴⁵ *Case concerning the location of boundary markers in Taba between Egypt and Israel* (1988) 20 RIAA 88 para 83.

⁴⁶ Article 17.3 contains the general provisions related to the necessity to conduct oral hearings on request from a party. Article 27 disposes the rules of evidence and the power of the tribunal to request evidence from the parties. Article 28 elaborates on the oral hearings, and sets out that "2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal. 3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire".

⁴⁷ *Guyana/Suriname*.

China Sea, party-appointed experts made an oral presentation in the first round of hearings and, due to the absence of one of the parties, were not cross examined. Judges put several written questions to those experts⁴⁸, which had the opportunity to answer them orally in the second round of the hearings. As these examples demonstrate, the rite of examination changes according to the parties' will and the circumstances of each case.

When it comes to who can act as party-appointed experts, an interesting rule can be found in Article 27(2) of 2012 PCA Rules. It reads as follows:

Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise *may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party*. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them⁴⁹.

This rule is interesting for two reasons. First, an individual which is "in any way related to a party" cannot be qualified as a expert witnesses. The second reason lies in the possibility of presenting writing statements. I will examine them separately.

As to the first part of Article 27(2), clearly inspired in the respective UNCITRAL Rule⁵⁰, it highlights the importance that may acquire the existence of a relation between the expert and a party. The purpose is to ensure that an expert who testifies before an arbitral tribunal possesses a component of impartiality and independence with regard to the party which appoints him or her. Interestingly, the rule does not only foresee an impact in the evidential weight to be given to the testimony of the expert which "relates to a party" – as provided by the practice of the ICJ⁵¹. It also prevents the expert from testifying, thus amounting to a question of admissibility. Problems of parties contesting the admissibility of an expert drawn on such a rule have not yet appeared in arbitral practice.

As to the second part of Article 27(2), it seems to reflect another recent development of arbitration, that is the close connection between expert report and oral

⁴⁸ Twelve questions were asked to one of the experts, twenty-two questions are put to the other. The content of the questions is not available in the website of the PCA when this work was written. However, by the answers given orally, is possible to identify the content of such questions. They range from technical questions, questions related to previous publications of the experts, questions about the methods from achieving those results, about the accuracy of the data by them offered and even about the background of the experts.

⁴⁹ Emphasis added.

⁵⁰ Article 27 of the 2010 UNICTRAL Arbitral Rules.

⁵¹ LC Lima, "The Evidential Weight of Experts before the ICJ: Reflections on the Whaling in the Antarctic Case" (2015) 6 Journal of International Dispute Settlement 621-635.

testimony. In some recent cases, even before the ICJ, experts who testify before the Tribunal have presented a written report at the beginning of the proceedings. In some circumstances, expert which testifies *must* have presented a written report. Three clear examples can be find in the Rules of Procedure of *South China Sea, Guyana/Suriname* and *Abyei* arbitration, which clearly prescribed that "no expert witness may be heard unless he or she has provided a written expert report, which shall form part of the pleadings and shall stand as his or her evidence in chief"⁵².

This rule may lead one to wonder whether the testimony of the party-appointed expert shall be exclusively connected with the report presented. This issue was raised in the *Guyana/Suriname* arbitration. In that instance, Guyana appointed an expert to testify before the Tribunal, which was examined and cross-examined in two rounds of examinations. During the cross-examination, counsel for Suriname started to ask questions not directly related to the written report presented by the expert. President Nelson intervened and observed that "I just would like to make the point that the function of this expert witness is to deal with his report and questions on report, and it's not to be assumed that he knows much about what has been depicted here, so I would like you to bear that in mind"⁵³. This pronouncement may convey the impression that, unless otherwise agreed, the range of issues which the expert can touch upon is circumscribed by the written report. One can only wonder whether such an approach will become an established practice and, if so, will be followed by the ICJ.

Although not vast, the appointment of this category of experts by the parties raised some interesting problems that find correspondence to the employment of party-appointed experts before the ICJ: the question of impartiality of a party-appointed expert and the value attributed to their views. I will scrutinize them in turn.

2.2.1. The question of impartiality of a party-appointed expert.

While the specific procedure of oral examination, cross-examination and public oath can be considered elements which enhance the impartiality and independence of the party-appointed expert, doubts can always be casted by virtue of the connection between expert and party. That is usually a strategy that the opposite party employs to

⁵² Article 23(4) *South China Sea* arbitration Rules of Procedure, Article 12(4) *Guyana/Suriname*.

⁵³ Hearing 3, (p. 510).

reinforce its arguments and undermine the authority of the expert statement. Notably the reasons that might lead to contest the impartiality of a party-appointed expert lie in the fact that parties usually contact the expert during the preparation of his/her written report, pay for its services and, in some cases, even prepare the expert for the oral hearings. Some elements related to this topic appeared in arbitral practice.

In some circumstances, the way in which party-appointed experts appeared before the tribunal could give rise to doubts on their impartiality. For instance, it is possible to find party-appointed experts integrating the defensive team of the parties which are examined before the arbitral tribunal. That was the case in the *Abyei Arbitration*. Here the distance between a party-appointed expert and a counsel seems to abridge, in spite of the cross-examination. Nonetheless, this did not prevent the Tribunal to quote the content of the testimony of party-appointed experts several times.

In *Guyana/Suriname*, where an expert was appointed by Guyana, counsel for Suriname argued that "being an expert is one thing, being an advocate is another, and we would suggest that the Tribunal look with considerable caution when Dr. Smith, the expert geographer, becomes Dr. Smith, the advocate"⁵⁴. However, the tribunal did not make any remark on this issue. On the contrary, it took into account the written report presented to it when determining the geographical configuration of the relevant coastlines⁵⁵. The tribunal's attitude seems to be important for two reasons. The first is that the tribunal gave weight to information offered by the party-appointed expert when it concurred with the information agreed by the parties. The second interesting element regards the language chosen by the tribunal when referring to the expert appointed by Guyana. It expressly called it "independent", without making any reference to the discussion held by the parties during the hearings about its independence. It is not easy to identify the reasons why the Tribunal held the expert independent. It is not even clear if the use of the expression "independent" carries a particular meaning.

Another situation related to the independence and impartiality of a party-appointed expert occurred in the *South China Sea* arbitration. In that instance, Philippines – which had technical experts integrating its defensive team – nominated two expert witnesses to present evidence orally. Following the procedure set out in the Rules of Procedure, the experts presented written reports and asked questions posed by

⁵⁴ (December 14, 2006 p 905).

⁵⁵ *Delimitation of the Maritime Boundary between Guyana and Suriname* (2007) 30 RIAA104 para 376.

the Tribunal. As already mentioned, these experts had no apparent connection with Philippines. In his pleading, counsel for Philippines reinforced the independence of those experts when he contended that

"we consider the two experts to be independent, and specifically in the sense that they have been asked to give their own statements, based on their own views and their own expertise. They will be speaking in that context, and they will also be available on Monday to respond to any questions that the Tribunal would like to put directly to them as experts"⁵⁶.

Still in the oral hearings, before requiring the solemn declaration, president Mensah reinforced that "as has been said by [the counsel for Philippines], you are appearing here as an expert independent witness"⁵⁷. During the oral hearings, counsel for Philippines, in order to reinforce the authority of an argument, mentioned the information contained in an article published by one of the experts which "was written in 2013, before Professor Schofield was consulted by the Philippines". The fact that the expert sustained a certain position before the contact with one of the parties seems to reinforce his impartiality.

This case may highlight the fact that a party may have an interest in showing the independence and impartiality of a party-appointed expert. This can be done by different means, ranging from the choice of experts, to their availability to offer evidence to the tribunal. There are other possible strategies that parties could find useful in order to demonstrate the impartiality of the expert witness, especially by choosing an expert not connected to the government appointing it. In this sense, international tribunals can have a role. For instance, the PCA maintains two lists of experts for Environmental and Outer Space disputes. As remarked in the introduction of such a documents "the parties are free to choose expert witnesses from the PCA Panel of Scientific and Technical Experts constituted under the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment"⁵⁸.

2.2.2. The use of the evidence offered by party-appointed experts.

Being a recent practice of international tribunals, it is not easy to find clear indications in arbitral awards about the relevance of the information presented by party-

⁵⁶ Reichler, Day 3, pag 2.

⁵⁷ Mensah, Day 3, pag 36.

⁵⁸ *Introduction*, Optional rules for arbitration of disputes relating to natural resources and/or the environment.

appointed experts. In addition to importance attached to the agreement of the parties in *Guyana/Suriname* case, two other criteria may be identified, relating respectively to the case when the evidence offered by the experts coincide with the position sustained by the party which appointed them and to the case when the evidence offered by them is contrary to the interests of the that party.

The *Abyei* arbitration seems to be the most clear example on how an arbitral tribunal extensively makes recourse to the reports and oral evidence presented by a party-appointed expert. In several passages reconstructing the complex factual background of the territorial dispute over the Abyei region, the Tribunal relied on the reports (and information emerging from the cross-examination) from experts from both sides.

As to the case when the evidence is contrary to the position sustain by the party which nominate the expert, the most clear example occurred when the Tribunal affronted the question on the presence of a certain group (Ngok) over a certain area (goz). Reconstructing Sudan's arguments, one of which is that SPLM/A relied extensively on Ngok oral evidence, the Tribunal did not fail to note that "the oral evidence produced by the SPLM/A is inaccurate and unreliable and even according to Professor Daly, the SPLM/A's own expert, 'there is no way precisely to delimit the northern border of the Ngok territory in the goz.'"⁵⁹.

2.3. Expert arbitrator.

In few cases, where highly technical facts underpin the dispute, it is possible that the tribunal is composed not only of jurists. Technicians may also sit on the bench of the tribunal. In such a cases, the expert does not only assist the tribunal, it integrates the tribunal and is bestowed with deciding powers.

A most illustrative example in the second half of the XXth century happened in the *Palena* case, where Queen Elisabeth II was chosen to arbitrate a boundary dispute between Argentina and Chile. In that instance, the Queen appointed a tribunal constituted by three arbitrators: a jurist and two experts versed in geography and

⁵⁹ *Abyei Arbitration (Sudan/Sudan People's Liberation Movement/Army)* Award 2009 121 para 341.

cartography⁶⁰. Another case in which an expert appeared as an arbitrator occurred in the *Indus Waters Kishenganga Arbitration (Pakistan v. India)*. The dispute concerning India's construction of an hydro-electric project designed to divert waters from a dam site on the Kishenganga/Neelum was solved by a tribunal constituted under the auspices of PCA. In addition to the highly elevated number of witnesses and experts, one of the seven arbitrators was not a lawyer, but a "highly qualified engineer"⁶¹.

Although the practice of expert arbitrators may be rare, the *Palena and Waters Kishenganga* case allows some speculation on this category of expert. Two aspects merit to be highlighted. The first regards the site visit, the second the relationship between "legal" arbitrator and "technical" arbitrator and how this method of using experts could be transposed to the ICJ.

With regard to the site visit, it is interesting to note the potential effect of having an expert arbitrator integrating the tribunal. If it is true that site visits are an instrument that enhances the appraisal of the realities and technical idiosyncrasies of a dispute⁶², the fact that an arbitrator is an expert in geography or geomorphology seems to enhance the potential effect of this instrument. Undoubtedly the arbitral tribunal would be equipped with highly technical knowledge to assess the evidentiary framework of the dispute.

It seems troublesome to transpose the category of deciding-expert to the context of the ICJ. The Statute envisages two possibilities of changing the Court's composition for that purpose: the appointment of assessors or the nomination of a "technical" judge *ad hoc*. As to assessors, Article 30(2) of the Statute of the ICJ is clear in establishing the absence of the right to vote. When it comes to judges *ad hoc*, Article 31(6) imposes the requirement of fulfillment of the conditions to regular judges. One of these conditions, set forth in Article 2 of the Statute, relates to the legal background of judges having "qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law". In addition to these normative barriers, there is also a problem of judicial policy that touches the relationship between science and law. If it is true that the reticence in appointing independent experts under Article 50 by the ICJ can be

⁶⁰ Sir Arnold Macnair was the legal expert, Mr. L. P. Kirwan, Director and Secretary of the Royal Geographical Society, and Brigadier K. M. Papworth, an expert in cartography.

⁶¹ Art. 4(b)(ii) 1960 Indus Waters Treaty.

⁶² MA Becker and C Rose, "Investigating the Value of Site Visits in Inter-State Arbitration and Adjudication" (2016) 0 JIDS 1-31.

attributed to the fact that judges of ICJ do not want experts "deciding" a case, the measure of introducing deciding arbitrators would properly configure the reason for such a reticence.

2.4. Tribunal-appointed experts.

Differently from the practice of the International Court of Justice, the appointment of experts is a constant feature of interstate arbitration⁶³. If one considers that a meaningful number of arbitrations dealt with territorial and maritime delimitations, the need for technical *input* may be easily explained.

The power of arbitral tribunals to appoint experts and the modality thereby they will perform their functions are usually provided by Rules of Procedure or by the *compromis*. Frequently the power to appoint experts is envisaged in *compromis* even if the tribunal decide not to have recourse to such a power⁶⁴. This fact suggests a certain acceptance of the presence of experts in the proceedings. Moreover, as noted by some authors⁶⁵, the right of the tribunal to appoint experts seems to be an inherent power connected with its judicial function.

Another rule frequently inserted in arbitral agreements provides that the "Tribunal désignera, après consultation avec les Parties, un expert technique pour l'aider"⁶⁶ or that "the Court may employ experts, following prior consultation of the Parties"⁶⁷. In general the parties show a willingness of having independent experts in the proceedings. This fact is of some important since, in some cases before the ICJ, while one of the parties is interested in having experts in the proceedings, the opposition by the other party seems to be taken into account by the ICJ in not appointing an

⁶³ Experts were appointed in, at least, 14 arbitral cases: *Trail Smelter Arbitration (EUA v. Canada)* (1938), *Argentina-Chile Frontier Dispute* (1966), *Beagle Channel Arbitration (Chile-Argentina)* (1977), *Continental Shelf Delimitation (UK v. France)* (1978), *Maritime Boundary Delimitation (Guinea v. Guinea-Bissau)* (1985), *Taba Arbitration (Egypt v. Israel)* (1988), *Maritime Boundary Delimitation (Guinea-Bissau v. Senegal)* (1989), *Delimitation of maritime areas between Canada and France* (1992), *Mount Fitzroy (Argentina and Chile)* (1994), *Maritime Delimitation (Eritrea and Yemen)* (1999), *Barbados/Trinidad and Tobago* (2006), *Guyana/Suriname* (2007), *Abyei Arbitration* (2009), *Bay of Bengal (Bangladesh/India)*(2014).

⁶⁴ *Chagos Marine Protected Area (Mauritius v. UK)*, PCACase No. 2011-3 (UNCLOSAnnex VII Arb. Trib. Mar. 18, 2015), at <http://www.pca-cpa.org>.

⁶⁵ Brown.

⁶⁶ Article 2, *Compromis. Delimitation of maritime areas between Canada and France* (1992) 21 RIAA.

⁶⁷ *Compromis, Article XIV. Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy (Argentina and Chile)* (1994) 22 RIAA 3-149

expert⁶⁸. The most recent example of such an attitude can be found in the *Certain Activities/Construction of a Road* cases: while Nicaragua suggested the use of independent experts, Costa Rica refused it and the Court preferred not to appoint experts.

Article 29 of the 2012 PCA Rules governs the appointment of experts in that instance:

After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

This rule contemplates the general practice of previous consultation with the parties⁶⁹ and the obligation the parties to cooperate with the experts giving "any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them"⁷⁰. Still with regard to cooperation between parties and experts, the same rule envisages the possibility of conflicts between the parties and the expert. In that situation, it prescribes that "any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision"⁷¹.

Article 29 also establishes the procedure for the participation of the expert in the proceeding. According to it, the expert shall produce a written report, that shall be communicated to the parties, "which shall be given the opportunity to express, in writing, their opinion on the report"⁷². It also establishes the right of the parties to "examine any document on which the expert relied in his or her report". The rule also envisages the possibility, upon requirement of a party and acceptance by the tribunal, that "the expert shall, after delivery of the report, participate in a hearing where the parties have the opportunity to put questions to him or her and to present expert witnesses in order to testify on the points at issue"⁷³.

The procedure prescribed by Article 29 can be traced to the general practice of appointment of experts before international tribunals. To some extent, it reflects the procedure adopted by the ICJ in the *Corfu Channel* case. The innovative element resides in the last part of the provision, which prescribes the possibility of a further

⁶⁸ Cases. Especially in the recent Costa Rica/Nicaragua.

⁶⁹ Para 1, Article 28 of the 2012 PCA Rules.

⁷⁰ Article 29.3, 2012 PCA Rules.

⁷¹ Article 29.3, 2012 PCA Rules.

⁷² Article 29.4, 2012 PCA Rules.

⁷³ Article 29.5, 2012 PCA Rules.

confrontation between the court-appointed expert and party-appointed experts. Such a rule appears to be inspired by the practice of commercial and investment arbitration⁷⁴, where several modalities of expert confrontation are a commonplace. There is no relevant practice in interstate arbitration.

It is interesting to note that the "rebirth" of the Permanent Court of Arbitration occurred concomitantly with a greater use of court-appointed experts by arbitral tribunals constituted under that institution. This fact is specially eloquent if one consider that, in the same period, the ICJ had little recourse to these experts. This is illustrated by the fact that, in the recent practice, experts were appointed by arbitrators in the *Eritrea/Yemen* (1999) *Barbados/Trinidad and Tobago* (2006), *Guyana/Suriname* (2007), *Abyei Arbitration* (2009), *Bay of Bengal* (2014) and *South China Sea* (2016). Furthermore, some cases currently in the PCA docket involve maritime boundary and technical questions⁷⁵, reason which allows one to expect more experts being appointed in the future.

Given the vast practice with regard to the appointment of experts by arbitral tribunals, the examination of such a practice will be divided in sensitive topics instead of a case-by-case examination. It will be examined, then, issues with regard to the method of appointment of experts (2.4.1); the function that experts performed in arbitral proceedings (2.4.2); the importance attributed to tribunal-appointed experts by arbitral tribunals (2.4.3); issues arising from the parties' obligation to cooperate with experts (2.4.4) and finally some issues related to the power of arbitral use experts in site visits (2.4.5).

2.4.1. Methods of choice and appointment of tribunal-appointed experts.

The choice and appointment of experts to assist arbitral tribunals give rise to a set of questions. A first question that deserves examination is (a) the method whereby experts are chosen and nominated by arbitral tribunals. Two are the main possibilities to that effect: experts chosen by the parties and experts chosen by the tribunal. A second question (b) regards the criteria, if any, adopted by international arbitrators, to choose

⁷⁴ See ND O'Malley, *Rules of Evidence in International Arbitration: an annotated guide* (Routledge 2012) and G Pring and C Pring, "Twenty-first century environmental dispute resolution – is there an 'ECT' in your future?" (2015) 33 *Journal of Energy and Natural Resources Law* 24-25.

⁷⁵ Such as, for instance, *Arbitration under the Timor Sea Treaty* (Timor-Leste v. Australia) and *Arbitration Between the Republic of Croatia and the Republic of Slovenia*.

experts. A related problem touches upon the question of potential conflicts between experts which participated in previous arbitrations (c). At the end, the phenomenon of "listing" of experts will be examined (d).

(a) Who appoints an expert?

The first possibility of appointment of experts is through nomination by the parties. Besides the early practice of the *Treaty of Jay* arbitration, the main example is the *Trail Smelter* arbitration⁷⁶ where each of the parties designated a scientist to help the tribunal in collecting and assessing the evidence related to transboundary air pollution produced by a Canadian smelter. In that case, the two experts (both of them of American nationality) offered an important assistance to the tribunal in assessing the degree and impact of the air pollution caused by an smelter. The *Trail Smelter* seems to be the only case where the two experts assisting the tribunal were directly chosen by the parties.

One can only speculate on the reasons why this practice is not favoured in international arbitration. The most evident hypothesis lies in the fact that experts nominated by parties could taint the impartiality and neutrality of the work of the tribunal. However, the engagement of such experts in the *Trail Smelter* arbitrations does not seem to reinforce this argument. Not only the Tribunal praised the work of the experts in gathering data and preparing a report, but it also "expresse[d] the hope that the two Governments may see fit to make this valuable report available to scientists and smelter operators generally, either by printing or other form of reproduction"⁷⁷. Therefore, the appointment of experts by the parties appears to be a possible technique for appointment of experts still valid nowadays where difficult situations require a different approach to be taken by an arbitral or permanent tribunal. Although it might, theoretically, threaten the neutrality of the activity of the tribunal, it guarantees the parity of arms in the proceedings.

The second possibility for nomination of tribunal-appointed experts ascribes the choice to the own arbitral tribunal. This is the normal way in inter-state arbitration.

⁷⁶ On the case, see RA Miller, *Trail Smelter Arbitration*, MPEPIL 2007 and RM Bratspies and RA Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (CUP 2006).

⁷⁷ *Trail Smelter*, p.1967.

Article 29.2 of the 2012 PCA Rules regulates the appointment of experts by the tribunal. It reads as follows:

The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

Some interesting elements can be gleaned from this rule. First, the procedure not only involves the parties in choosing an expert, but also sets forth a procedure to object the tribunal's choice. Such a procedure can occur even *after* the nomination, provided that the party was not aware of the allegedly problems in the moment of the appointment. This rule seems to reflect the recent arbitral practice, where the choice of the experts and also the definition of the terms of the expertise are discussed (sometimes lengthy) with the parties⁷⁸.

In addition, the rule set three criteria for objecting to an expert: technical qualifications, impartiality and independence. In this sense, the rule seems to offer normative guidance on the qualities that experts should possess in order to perform their functions.

(b) How experts are chosen?

It is not immediately clear what are the criteria, if any, adopted by arbitrators in order to choose experts. In the recent practice of international arbitration, the PCA seems to possess an important role in assisting judges in the indication of experts. When it comes to the ICJ, the Registrar played an important function in contacting governments which were not parties to the proceedings in order to identify potential experts to be chosen by the Court⁷⁹.

The question of nationality of the experts was taken into account in the *Mount Fitzroy* arbitration. Perhaps in order to guarantee the impartiality of the experts, one of the dispositions agreed by the parties was that the "the Parties shall not use the services

⁷⁸ Guyana/Suriname, Abbey, Bay of Bengal.

⁷⁹ Corfu Channel.

of lawyers or experts who are nationals of States bordering on the Argentine Republic or the Republic of Chile or who have the same nationality as any of the judges appointed by common accord"⁸⁰. Apparently the nationality of an expert can, at least in theory, contribute to enhance the independence and impartiality of the choice. By contrast, in the referred *Trail Smelter* arbitration, although the dispute was between Canada and United States, Canada opted for nominating an expert of American nationality to assist the tribunal.

Not only nationality, but language seems to be an important element to the choice of arbitrations. In the same *Mount Fitzroy* arbitration, the expert nominated was a Spanish professor from Madrid, with Spanish being the national language of the parties. The linguistic skills of an expert seems to be a corollary of its technical qualifications and may prove to be important for its appointment.

(c) *An invisible college of experts?*

Another interesting issue related to the identity of experts is the fact that some names are quite recurrent in their function of assisting international courts and arbitral tribunals. One of the most evident examples regards an expert who was nominated to assist three arbitrations related to maritime and boundary delimitation: *Guinea/Guinea Bissau* (1985), *Guinea-Bissau/Senegal* (1989), and *Canada/France* (1992). Interestingly, the same expert acted as an expert in the *Gulf of Maine* case before the ICJ. A possible reason for such an appointment lies in the fact that in those arbitrations several judges of ICJ acted as arbitrators (President Lachs, President Bedjaoui, twice, and judge Gros), and in one of the cases the arbitral tribunal had the same Registrar as the Court (Torres Bernárdez). As a curiosity, it is equally interesting that the same expert acted previously as an expert counsel for the UK in an arbitration, in which the later judge and president Jennings acted as a counsel⁸¹.

More recently, the same expert, an hydrographer expert who had acted as a expert-counsel for Canada in the *Canada/France* arbitration, was appointed to assist the arbitral tribunal in three disputes: *Barbados/Trinidad and Tobago*, *Guyana/Suriname*

⁸⁰ *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy* (1994) 22 RIAA 9 para 5.

⁸¹ Commander Beazley, Expert Advisers, on behalf of the Government of the United Kingdom in the *Delimitation of the Continental Shelf (UK/France)* (1978) 18 RIAA 68.

and *Bay of Bengal*. In that instance, and considering that the arbitrators were not the same in those cases, it appears that the institution under which these arbitrations are constituted have an important role in suggesting the name of the experts.

The existence of an *invisible college*⁸² of independent experts does not seem to be particular problematic, in principle. As a matter of fact, if one considers that the same person is appointed to draft charters and maps, conduct site visits and assess the evidence presented by the parties, the logic conclusion appears to be that its work is satisfactory and its technical qualifications are unimpeachable. Another element that seems to enhance its technical qualifications refers to arbitrations with similar backgrounds, such as the *Guinea/Guinea Bissau* and *Guinea-Bissau/Senegal* arbitrations, where the same geographical aspects constituted the object of the dispute.

A possible problem might appear when the same expert has acted previously as expert counsel in arbitrations, thus giving rise to an eventual problem with regard to his/her impartiality. For instance, the expert who acted as a counsel for the UK against France in the *Maritime Delimitation (UK/France)*, later acted as an independent expert in the *Delimitation of Maritime Areas* between France and Canada. Nonetheless, the parties did not raise any objection in that circumstance. Had the parties identified a conflict of interests or considered that the expert could at any level act impartially, that situation could have been problematic.

One could trace a parallel between the practice of counsels who become judges with expert counsel who become tribunal-experts. It is true that, given the technical nature of the task to be performed by an expert, such a problem tends to be minimized. Moreover, the fact that the parties are usually heard in regard to the nomination of the experts also attenuates this potential problem. If the parties do not object the choice of a certain expert, its impartiality and independence hardly could be tainted by the previous participation. Be that as it may, this fact reinforces the importance of knowing the identity of the expert who assists the tribunal.

(d) Choosing experts from lists: a future practice?

A last question with regard to the method for choice of experts regards the list of experts maintained by the Permanent Court of Arbitration. A similar phenomenon happens in the context of the UNCLOS, and will be examined in the next section of this

⁸² Schachter, etc... Wait for Paolo cuts.

chapter. As referred previously, the PCA maintains two lists of permanent experts in two specific fields connected to two sets of optional rules (Environmental disputes and Space-related disputes). The rules establishing such lists read as follows:

The Secretary-General [of the PCA] will provide an indicative list of persons considered to have expertise in the scientific or technical matters in respect of which these Rules might be relied upon. In appointing one or more experts pursuant to paragraph 1 above, the arbitral tribunal shall not be limited in its choice to any person or persons appearing on the indicative list of experts⁸³.

The list is constituted by names appointed by States members of the PCA. At the moment it is not an extensive list⁸⁴. The maintenance and update of a list can be useful not only to arbitrators but also to the parties. Furthermore, at least theoretically, it enhances the legitimacy of the eventual choice. Nonetheless, and likewise ITLOS, the lists have never been used to appoint experts in interstate disputes.

2.4.2) The functions of tribunal-appointed experts.

In arbitral practice, tribunal-appointed experts were employed to execute several and distinct tasks, ranging from the preparation of a map of a frontier to assess the amount of air pollution produced by a smelter. In this section, I will try to illustrate the several possible functions to be carried out by tribunal-appointed experts when they are nominated to assist an arbitral tribunal. This survey allows a broader understanding of the possible uses of experts in interstate disputes.

The participation of tribunal-appointed experts in arbitral proceedings can be regulated by several instruments: arbitral agreements, specific orders and the expert's terms of reference. Sometimes the function to be carried out by experts is clearly specified in the arbitration agreement. For illustration, in the *Delimitation of the Continental Shelf (UK/France) compromis*, it was detailed that "the decision shall include the drawing of the course of the boundary (or boundaries) on a chart. To this end, the Court shall be entitled to appoint a technical expert or experts to assist it in preparing the chart"⁸⁵. Similarly, in the *Guinea-Bissau/Senegal Maritime Boundary*⁸⁶, the *compromis* set forth that the decision "doit comprendre le tracé de la ligne frontière

⁸³ Article 8.3 and Article 10.4 of the PCA Environmental Rules and the PCA Rules for Disputes relating to outer space activities, respectively.

⁸⁴ 17 States appointed names for the Environmental list, 15 to the Outer-Space list.

⁸⁵ *Delimitation of the Continental Shelf (UK/France)* (1978) 18 RIAA 6.

⁸⁶ Article 9(2) of the *Compromis. Delimitation of maritime boundary between Guinea-Bissau and Senegal* (1989) 20 RIAA 124.

sur une carte. A cette fin, le Tribunal sera habilité à désigner un ou des experts techniques pour l'assister dans la préparation de cette carte". The broad provisions contained in arbitral agreements usually grant great discretion to the arbitral tribunal in deciding the exact terms of participation of an expert in the proceedings.

Recent practice shows that the "terms of reference"⁸⁷ usually state the exact and detailed function to be carried out by experts. The terms of reference are usually the outcome of the preliminary contact between the experts and the tribunal. Hence, the great advantage of the use of terms of reference is that the mandate to be executed by the expert is previously established, thus contributing to the transparency of the proceeding.

It is possible to identify five main general functions carried out by experts in arbitral proceedings. They are the linguistic assistance (a); the fact-finding function (b); the fact assessment function (c); the fact-producing function (d); and helping the tribunal in the implementation of the award (e). The proposed framework of functions is not definitive nor the unique possible theoretical organization explain the functions performed by experts. As a matter of fact, these functions can be blended and experts might perform more than one function in the same arbitral proceeding. In any case, this division can be useful to illustrate the possible functions of experts in arbitral practice. I will examine each one of them in turn, trying to highlight the problems connected to each function.

a) Linguistic assistance.

Experts may be asked to offer linguistic assistance to arbitral tribunals. For instance, Article 7(2) of the *Guinea-Bissau/Senegal* arbitral agreement established that "le Tribunal, en tant que de besoin, pourvoira aux traductions et aux interprétations, sera habilité à engager le personnel de secrétariat, à nommer des experts, et prendra toutes mesures quant aux locaux et à l'achat ou à la location d'équipements"⁸⁸. In a similar way, in the *Argentina-Chile Frontier Case*, the arbitral tribunal made an order appointing the Cervantes Professor of Spanish in the University of London as "Court Expert in the Spanish language"⁸⁹.

⁸⁷ Article 29 2012 PCA Rules provides that "A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties."

⁸⁸ *Delimitation of maritime boundary between Guinea-Bissau and Senegal* (1989) 20 RIAA 119-213.

⁸⁹ *Argentine-Chile Frontier Case* (1966) 16 RIAA 109-182.

The practice of appointing expert for linguistic purposes does not seem to be a trend nowadays since that function has been incorporated by the institution which hosts the arbitration, especially the PCA. The linguistic requirement is sometimes an important component of the technical qualities of an expert since, as in *Guyana/Suriname* arbitration has indicated, they are sometimes required to deal with documents drafted in languages other than English and French.

b) Fact-finding function.

Usually performed with visits to *in situ*, the fact-finding function is characterized by the gathering of evidentiary data not known by the tribunal. Evidently, the scope and terms of this function varies according to the subject-matter of the tribunal. While in the *Corfu Channel* before the ICJ the fact-finding function required that the experts nominated by the Court visit the site in order to verify whether it would be feasible the mining of the channel by Albania, the fact-finding functions in arbitral tribunal usually conveys the character of collecting data related to territorial and maritime disputes. A clear exception is the obtaining of data related to the air pollution caused by a smelter in the *Trail Smelter* arbitration. Another clear example of fact-finding function occurred in the *Palena* arbitration, where the experts appointed by the tribunal (together with the expert arbitrators) executed a photographic survey of the disputed area⁹⁰.

In the *Guyana/Suriname Maritime Boundary* arbitration⁹¹, an expert hydrographer was appointed to assist the Court since the beginning of the proceedings. At the beginning of the hearings, the expert held a meeting with experts from the parties and asked them information about geographical coordinates and the situation of a specific marker. The exact location of the "Marker B" was not clear and the information provided by the parties contrasted. By an order, the Tribunal decided that "the Hydrographer shall, after inviting the Parties' representatives to be present, conduct a site visit in Guyana"⁹² and that

The Hydrographer's terms of reference for the site visit are to inspect what Guyana alleges to be Marker "B" and the surrounding area, as he deems appropriate, and to gather data relevant to the issues that have arisen as a result of

⁹⁰ Reference.

⁹¹ *Delimitation of the Maritime Boundary between Guyana and Suriname* (2007) 30 RIAA 1-144.

⁹² *Guyana/Suriname* (2007) 30 RIAA 31 para 120.

his question to the Parties of 20 December 2006 and the Parties' subsequent correspondence⁹³;

The tribunal-appointed expert conducted a site visit with the Registrar and with the representatives of the parties. After the visit, the expert prepared a report which was submitted to the parties. The parties made comments on it and a "Corrected Report" was submitted to the Tribunal. Both parties accepted the content of such a report⁹⁴. The same expert prepared a technical report which was annexed to the award containing the geographical description of the maritime boundary between the parties.

The *Guyana/Suriname* can be considered as a successful use of tribunal-appointed experts to perform a fact-finding function⁹⁵. Equally important is the fact that the right of the parties to comment upon the evidence gathered by the expert was also satisfied. Undoubtedly these proceedings contributed not only to a greater transparency of the proceedings but also for a better acceptance of the evidence gathered by the expert.

c) Fact-assessment function.

The fact assessment function can be understood as the assistance given by experts to adjudicators in understanding and evaluating the technical and scientific data underlying a dispute. As a commentator observed, "the tribunal-appointed expert may play a key role in improving the tribunal's understanding of the issues at hand and, if party-appointed experts have also reported on these issues, in facilitating the tribunal's evaluation of any diverging views"⁹⁶. Furthermore, this evaluation can also be translated in the assistance that experts may offer to adjudicators in order to prepare the questions to be posed to the parties.

As contented by this commentator, an important feature of this function represents offering to the arbitral tribunal the appropriate instruments to evaluate and effectively strike a balance between the technical arguments espoused by the parties. A interesting situation in relation to the fact-assessment function occurred in the *Delimitation of the Continental Shelf (UK/France) arbitration*⁹⁷. In this case, the arbitral

⁹³ Guyana/Suriname (2007) 30 RIAA 31 para 121.

⁹⁴ Guyana/Suriname (2007) 30 RIAA 31 paras 124 and 125.

⁹⁵ Riddell, Plant.

⁹⁶ B Daly and others, *A guide to the PCA Arbitration Rules* (OUP 2014) 116.

⁹⁷ *Delimitation of the Continental Shelf (United Kingdom/France)* (1978) 18 RIAA 3-413. On this case, see JG Merrills, "The United Kingdom-France continental shelf arbitration" (1980) 10 California Western international law journal 314-364; DA Colson, "The United Kingdom-France continental shelf arbitration" (1978) 72 AJIL 95-112.

tribunal was asked to identify the course of the boundary between the respective continental shelves of the parties. Both parties had technical advisors in their delegations and the tribunal appointed its own expert in the terms of the *compromis*. The tribunal, perhaps with the assistance of its own expert, requested the Parties to identify precisely the respective terminal points of each of the agreed segments in the English Channel and to give the relevant coordinates of the median line in those segments. The parties held meetings in order to trace a single line identifying the points of agreement and they also identified the points of disagreement. The Court observed that the parties "furnished the Court with a complete list of these base-points together with their coordinates, which were stated by the United Kingdom to have been agreed between the Parties' experts"⁹⁸. In addition, the arbitral tribunal further stated that "the Court, through its own expert, has confirmed the appropriateness of these salient points used by the Parties, and has verified the coordinates given by the Parties for each of the points"⁹⁹. This passage reveals a distinct aspect of the fact-assessment function that can be performed by an expert: the review and re-examination of the technical agreement reached by the parties during the proceeding.

A potential problem of this function relates to the transparency of such technical advice. In some occasions, it is possible to verify how the arbitral tribunal used the technical knowledge of the expert. For instance, the award in the *Guinea-Bissau/Senegal* arbitration referred to definitions and calculations described "selon l'expert du tribunal". By contrast, in other situations the analysis performed by an expert is not so crystal-clear. In circumstances in which there are conflicting technical evidence submitted by the parties, it would be interesting to have a written report on the content of the technical advice given by the tribunal-appointed experts.

d) The "fact-production" function.

Experts are regularly required to assist arbitral tribunals in calculating the coordinates of a boundary, to prepare maps illustrating the delimitation decided by the tribunal and to perform the test of proportionality required in maritime delimitations. In

⁹⁸ *Delimitation of the Continental Shelf (UK/France)* (1978) 18 RIAA 65 para 119.

⁹⁹ *Delimitation of the Continental Shelf (UK/France)* (1978) 18 RIAA 65 para 120. And also observed that "through its own expert, [the tribunal] has also checked the base-points on the respective coasts of the two countries which determine the location of the median line at Points A-D, E-F and G-J, and has at the same time verified the coordinates given by the Parties for each of the base-points".

executing these tasks, tribunal-appointed experts end up assisting the production of a new fact, which is the outcome of the judicial process.

Probably the most common function of experts in interstate arbitrations, tribunal-appointed experts were employed to perform such a functions in at least ten cases¹⁰⁰. These operations are usually assembled in a technical report which is annexed to the arbitral award. A clear example occurred in the dispute between *Barbados/Trinidad and Tobago* involving the delimitation of the exclusive economic zone and the continental shelf. Both parties had experts and the tribunal appointed a hydrographer to give assistance in dealing with the technicalities of the judgment¹⁰¹. In its report, annexed to the judgment, the expert described the geographic coordinates of the maritime boundary between the parties¹⁰². In other cases, the Tribunal explained in the award what was the exact function experts had performed. In the second stage of the *Eritrea/Yemen* arbitration, the Tribunal observed that "through its expert in geodesy [it] has calculated the ratio of the lengths of the coasts concerned, measured by reference to their general direction, and the ratio between the water areas it has attributed to the Parties"¹⁰³.

In *Canada/France*, the *compromis* provided for the appointment of a technical expert to assist the tribunal to trace the maritime spaces between the parties and to indicate the position of every point mentioned and their geographical coordinates¹⁰⁴. The expert was appointed at the beginning of the procedure and annexed a technical report to the award. With regard to the surface of the concerned zone, the tribunal observed that

"en ce qui concerne la superficie de la zone pertinent, les Parties ont présenté des chiffres différents, dont certains reposent sur une hypothèse. Mais l'expert géographique qui assiste le Tribunal a calculé que la superficie de la zone pertinente aux fins de la vérification des résultats, telle que cette zone a été déterminée par le Tribunal, est proche de 63 000 milles marins carrés. Le Tribunal

¹⁰⁰ *Delimitation Continental Shelf (UK/France)*, *Beagle Channel (Argentina/Chile)*, *Maritime Boundary (Guinea/Guinea/Bissau)*, *Delimitation of Maritime Areas (Canada/France)*, *Mount Fitzroy (Argentina/Chile)*, *Maritime Delimitation (Eritrea/Yemen)*, *Barbados/Trinidad and Tobago*, *Maritime Boundary (Guyana/Suriname)*, *Abyei Arbitration (Sudan/Sudan People's Liberation Movement/Army)*, *Bay of Bengal (Bangladesh/India)*, *South China Sea (Philippines/China)*.

¹⁰¹ "On 23 October 2005, after consultation with the Parties, the Tribunal appointed a hydrographer, Mr. David Gray, as an expert to assist the Tribunal pursuant to Article 11(4) of the Rules of Procedure." 160 para 37.

¹⁰²
¹⁰³ *Maritime Eritrea and Yemen (Maritime Delimitation) (Second Stage) (1999)* 22 RIAA 373 para 168.

¹⁰⁴ Article 2 of the *Compromis. Delimitation of maritime areas between Canada and France (1992)* 21 RIAA 271.

considère que ce calcul est bien fondé. (...) En conséquence, les exigences du test de proportionnalité, en tant qu'aspect de l'équité, ont été satisfaites"¹⁰⁵.

This passages indicates three important elements to the evaluation of the role of the independent experts in this case. The first regards the importance of the expert in order to perform a necessary step for the delimitation of maritime boundaries, i.e., the calculation of the values to perform the proportionality test. The second is that, when confronted with conflicting values, the tribunal preferred the evidence and calculation offered by its own expert. The third element refers to the consideration that "the Tribunal considers this calculation well founded". Through this expression, the tribunal reveals the control performed by the tribunal over the evidence presented by the expert.

e) Implementation of the award.

Experts can also perform an important post-adjudicatory function in the execution and implementation of the award. This specific function will be analyzed further ahead in the section designated to this category of expert.

2.4.3. Cooperation between parties and tribunal-appointed experts.

It is possible to identify, especially in recent practice, a growing cooperation between the tribunal-appointed experts and the parties to a dispute. This cooperation has two aspects that I will examine in this section: the obligation to cooperate with experts imposed to the parties (a) and the interaction between parties and experts during the proceedings (b).

(a) The obligation to cooperate.

The frequent use of experts in international arbitration demonstrates the importance of the rule which establishes the duty to cooperate with experts. This rule can be found in several Rules of Procedure of arbitral tribunals – even when experts are not used in the proceedings¹⁰⁶ – as well as in general instruments. In this vein, Article 29(3) of the 2012 PCA Rules sets forth that "the parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or

¹⁰⁵ *Delimitation of maritime areas between Canada and France* (1992) 21 RIAA 296 para 93.

¹⁰⁶ For a recent example,, in the Rules of the recent *Chagos Arbitration (UK v. Mauritius)* it was set out that "the Parties shall cooperate in pursuance of article 6 of Annex VII to the Convention with any expert(s) the Arbitral Tribunal may wish to appoint pursuant to paragraph 4 of this Article".

goods that he or she may require of them". This obligation seems to be connected with the general obligation of the parties to cooperate with tribunals in evidentiary matters.

Some problems have arisen in relation to the duty to cooperate with experts in arbitral tribunals. During the hearings of *Guyana/Suriname*, the expert appointed by the tribunal posed questions to the parties. In that occasion, technical questions appeared, as noted by the President of the Tribunal:

Now, there are a certain sort of questions that have been raised, quite a lot of them, and they are all of a technical nature, and that is for the Tribunal's expert hydrographer and others -- the respective hydrographer experts to discuss and if possible to provide responses to the questions. It would be helpful if the agents of the parties were to choose the experts who should attend¹⁰⁷.

In the subsequent day, the parties both demonstrated very willing to cooperate with the tribunal expert. However, counsel for Suriname noticed that the meeting could not be held immediately since the responsible for hydrographic expertise of its team was the Netherlands Hydrographic Service and it would take some days for bringing such an expert to Washington, where the hearings were being held. Counsel for Guyana objected, observing that Suriname's defensive team had been assisted by expert counsels who could participate in the joint meeting between experts. In deciding this controversy, the President of the Tribunal gathered with the Tribunal during the break. At the end of the hearing, the President announced that there will be a *preliminary* expert meeting in the following day. On its report of this preliminary meeting, the tribunal-expert clarified the information needed and the parties agreed to submit this information further.

(b) The interaction between parties and tribunal-appointed expert.

Another aspect in the *Guyana/Suriname* case related to the important role the party-appointed experts in interacting with the experts of the parties. This interaction occurred in a preliminary discussion and also during the site visits, which probably contributed to a better grasping of the technical components of the dispute. In this vein, and referring to this case, Judges Simma and Al-Khasawneh in their dissenting opinion in *Pulp Mills* pointed out that "the findings of the independent hydrographic expert were relied upon by the Tribunal in addition to the expert evidence submitted by the Parties in their pleadings" leading commentators to observe that the award was "based on a

¹⁰⁷ *Guyana/Suriname*, Hearing of December 7, 2006. 140-141.

sound understanding and acknowledgement of the relevant technical points in the dispute”¹⁰⁸.

Similarly, the arbitral tribunal benefited from the interaction between tribunal-appointed experts and parties in the *Bay of Bengal Maritime Boundary Arbitration*. The expert hydrographer not only assisted the tribunal from the beginning of the proceedings, but he also accompanied the tribunal during the site visits. At the end of the hearings, the expert put a question to the parties¹⁰⁹. The possibility of experts asking questions directly to the parties seems to be a new feature of adjudication. In the past practice, this prerogative was exclusively reserved to judges. This fact, together with the other examples analysed, seems to demonstrate that the outcome of the collaboration between parties and experts might contribute to better shape and precise the content of the technical evidence underlying a dispute. It also, to some extent, facilitates the appearance of an agreement on common factual elements between the parties.

2.4.4. Site visits.

The use of tribunal-appointed experts sometimes coincides, in ancient and recent practice, with the use of another procedural instrument at international courts' disposal, namely the visit of the locations related to the dispute. Although considered an inherent power of international tribunals¹¹⁰, the 2012 PCA Rules expressly provides for the possibility of the tribunal "after consultation with the parties, [to] perform a site visit"¹¹¹. When the arbitral tribunal is constituted under Annex VII of UNCLOS, it may avail itself, as happened in recent practice¹¹², of Article 6(b) of Annex VII which provides that “[t]he parties to the dispute shall facilitate the work of the arbitral tribunal” and shall “enable it when necessary [...] to visit the localities to which the case relates”.

Site visits might be of particular interest for two reasons. The first is that it creates a new opportunity for the parties to introduce technical evidence, sometimes rather informally, through explanations given by their experts. This can be sometimes problematic, however. In the *Bay of Bengal* arbitration, "Bangladesh expressed its

¹⁰⁸ Riddell and Plant, *op. cit.*, p. 356.

¹⁰⁹ (p.120).

¹¹⁰ Brown.

¹¹¹ Article 27(3) of the 2012 PCA Rules.

¹¹² Bay of Bengal, para 18.

concern regarding certain activities carried out by India during the site visit" and required the exclusion of certain material from the files of the case. After hearing India, "the Tribunal indicated that it did not intend to exclude material from the proceedings, but would determine the relevance, materiality, and weight of all evidence pursuant to article 12(1) of the Rules of Procedure"¹¹³. By this decision, the arbitral tribunal confirmed the admissibility of the evidence presented by the parties in the site visits.

The second element that seems to surface in the arbitral practice, especially in the recent one, is that the site visits favour collaboration between the independent expert and the expert counsels. Thus, in the *Guyana/Suriname* arbitration there was no clear agreement between the parties in relation to the site visit. As a matter of fact, Suriname "contended further that a site visit would have no value as it 'would not provide any enlightenment on the question of whether the current location of Marker "B" is the same as its original location". Nonetheless, the Tribunal ordered a site visit to be conducted by its independent expert, which happened only in Guyana. In *Guyana/Suriname*, the site visit and the report annexed by the expert seem to have been fundamental in order to identify the "Marker B" and, consequently, to trace the boundary between the parties.

2.5. Experts appointed after the adjudicatory phase.

Another category of expert employed by arbitral tribunals is the expert nominated to perform a specific task after the tribunal renders its award¹¹⁴.

There are no specific provisions for such an expert in the 2012 PCA Rules. Nonetheless, it can be argued that such a power is comprised in the general power of every international tribunal to appoint experts. This power can also be expressly prescribed in the arbitral agreement. For instance, in the *India/Pakistan Boundary* arbitration¹¹⁵, the special agreement between the two countries specifically provided that

"After the Tribunal has adjudicated upon the disputes, the boundaries shall be demarcated jointly by the experts of both Dominions. If there is any disagreement between the experts regarding the actual demarcation of the boundary

¹¹³ Bay of Bengal, para 23.

¹¹⁴ The most clear examples of such an use in the arbitral practice are the *Mount Fitzroy* arbitration and the *Iron Rhine Railway* arbitration, whose problems are analyzed subsequently.

¹¹⁵ *Boundary Dispute (India/Pakistan)* (1947) 21 RIAA 3.

in situ, such disagreement shall be referred to the Tribunal for decision and the boundary shall be demarcated finally in accordance with such decision".¹¹⁶

This excerpt is interesting not only because it expressly demonstrates the necessity for experts to complete the task of the tribunal, but also for the fact that it subjects the work of such experts to the authority of the tribunal in case of disagreement.

That excerpt also leads one to wonder about the limits of judicial function of an arbitral tribunal, which even after rendering a judgment can have authority to decide problems arising from the expert task. One might possibly content that, by bestowing part of its functions to an expert or a group of experts, the tribunal would be delegating part of its inherent judicial function, ie, deciding on the evidentiary background of a dispute. Such a problem arose in the *Mount Fitzroy* arbitration. In that instance, the arbitral tribunal appointed a geographical expert, which accompanied the tribunal in the site visit, helped the tribunal to identify the frontier between the parties and to set the coordinates in the award. In the *dispositif* of the award, the tribunal determined that

"the course of the line decided upon here shall be demarcated and this Award executed before 15 February 1995 by the Court's geographical expert with the support of the Mixed Boundary Commission.

The geographical expert shall indicate the places where the boundary posts are to be erected and make the necessary arrangements for the demarcation. Once the demarcation is completed, the geographical expert shall submit to the Court a report on his work and a map showing the course of the boundary line decided upon in this Award"¹¹⁷.

This fragment of the award reinforces the idea that the tribunal continues to have an authority over the expert even after rendering the award.

Unsatisfied with the outcome of that decision, Chile submitted a request of interpretation of the award alleging, *inter alia*, error of fact and that the arbitral tribunal "abandon[ed] its responsibility and delegat[ed] it to the geographical expert"¹¹⁸. The tribunal refused such an argument. It offered an interesting insight on the relationship between experts and tribunals when it explained that

This is what happens, moreover, in any dispute, be it national or international, when a technical question (physical, biological, mechanical, chemical, geographical, etc.) is the subject of argument. 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 on its packaging, the judge

¹¹⁶ *Boundary Dispute (India/Pakistan)* (1947) 21 RIAA 3.

¹¹⁷ *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy* (Argentina, Chile) (1994) 22 RIAA 53.

¹¹⁸ *Application for revision and subsidiary Interpretation of the Award of 21 October 1994 submitted by Chile* (Argentina, Chile) (1995) 22 RIAA 162 para 39.

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 in any of these cases it can be concluded that the judge has delegated his responsibility to the expert¹¹⁹.

Furthermore, the tribunal also observed that Chile "had a procedural opportunity to verify and monitor all the activities of the expert on the ground" and "it preferred to stay away", further concluding that "it does not now seem appropriate to use the extraordinary recourse of an application for revision to make good Chile's non-participation in the demarcation work".¹²⁰ One may wonder whether, had Chile participated in the demarcation work, the instrument of the revision of a judgment would be the appropriate one to contest the eventual error in an expert report. The international judicial practice before arbitral tribunals, ICJ or ITLOS does not offer conclusive elements on the issue. With regard to the *Mount Fitzroy* arbitration, although the Tribunal had criticized this attempt by Chile, it performed a judicial control over the report and the map presented by the expert. Having considered that "the report and map [prepared by the expert] so submitted are in conformity with the provisions of the Award of 21 October 1994", in the revision award the arbitral tribunal ordered a second post-adjudicatory task to the expert, namely "that the boundary posts are to be erected at the points marked on the ground by the expert, in accordance with the (...) coordinates"¹²¹.

The *Mount Fitzroy* arbitration reinforces and reveals important elements in regard to the expert which is entitled with a function in the post-adjudicatory phase. The first is that, even when the award is delivered, the activities of such an expert are still subjected to the judicial function performed by the tribunal. The expert had had to submit the result of its work to the tribunal with a report, which, ultimately, was approved by the tribunal. As the tribunal observed "by virtue of this approval the said map is now the cartographic expression of the Award"¹²².

The second element emerging from this case relates to the absence of a party in supervising the work of an expert. Since Chile had refused to participate in the demarcation work of the expert, it could not contest *via* request of interpretation such a

¹¹⁹ *Application for revision and subsidiary Interpretation of the Award of 21 October 1994 submitted by Chile (Argentina, Chile) (1995) 22 RIAA 162 para 40.*

¹²⁰ *Application for revision and subsidiary Interpretation of the Award of 21 October 1994 submitted by Chile (Argentina, Chile) (1995) 22 RIAA 174 para 90.*

¹²¹ *Application for revision and subsidiary Interpretation of the Award of 21 October 1994 submitted by Chile (Argentina, Chile) (1995) 22 RIAA 173 para 89*

¹²² *Application for revision and subsidiary Interpretation of the Award of 21 October 1994 submitted by Chile (Argentina, Chile) (1995) 22 RIAA 173 para 89.*

work. The last element which seems to have relevance consists in the rejection of the argument that the work of experts after the adjudicatory phase constitutes a delegation of powers: it is within the powers of the arbitral tribunal and within its judicial function's sphere.

A more recent arbitral decision which touched upon the issue was the *Iron Rhine Railway (Belgium/Netherlands)* arbitration¹²³. Although the arbitral tribunal did not appointed technical experts by itself, it assumed what was called as a "hybrid approach"¹²⁴ with regard to the technical evidence.

In a nutshell, the dispute concerned the reactivation of the Iron Rhine Railway in the Dutch territory. One of the thorny issues was to what extent should the costs be borne by Belgium or by the Netherlands. In its answer, the Tribunal "identified the principles of apportionment of costs in the various segments" of the railway, but it did proceed to the calculation of such costs. Connected with this point there was the question of compliance with environmental measures, as to which the Tribunal answered that "[it is not] the task of this Tribunal to investigate questions of considerable scientific complexity as to which measures will be sufficient to achieve compliance with the required levels of environmental protection. These issues are appropriately left to technical experts". The Tribunal, then, suggested that:

To that effect, the Tribunal recommends that the Parties promptly, and in any case not later than 4 months from the date of this Award, put into effect the conditions necessary for a committee of independent experts to be set up within the same time frame, unless the Parties agree otherwise, to engage in the task of determining:

1. the costs of the reactivation of the Iron Rhine railway;
2. the costs of the autonomous development; and
3. the particular, quantifiable benefits to the Netherlands – in financial terms – of the reactivation resulting from, in particular, improved road traffic circulation, enhanced road safety, reduced noise and the potential beyond currently anticipated autonomous development for additional use of the track by Netherlands trains. This committee of independent experts should conclude its findings as soon as possible, and in any case not later than 6 months from the date of its establishment.¹²⁵

The approach assumed by the Tribunal is interesting for two reasons. First, because it clearly refused to perform a technical task that was beyond its knowledge and function. The tribunal recalled that that was not something that the parties asked, and, since there were no experts assisting the tribunal in that case, it squarely recognized that

¹²³ *Iron Rhine Railway Arbitration (Belgium/Netherlands)* (2005) 27 RIAA 35-125.

¹²⁴ The words are from judges Simma and Al Khasawneh, in their joint dissenting opinion in the Pulp Mills case. Judge Simma was one of the arbitrators in this case.

¹²⁵ *Iron Rhine Railway Arbitration (Belgium/Netherlands)* (2005) 27 RIAA 120 para 235.

it was not its task to investigate "questions of considerable scientific complexity". As a consequence – and here lies the second reason justifying its importance – the tribunal drafted specific suggestions to the tasks to be performed by a group of experts after the rendering of the judgment.

This approach was praised in the literature. Judge Simma and Al Khasawneh in their joint dissenting opinion in the *Pulp Mills* case, observed that "the *Iron Rhine* Tribunal's hybrid approach for appointing experts is thus a positive example which could serve the Court; we see no reason why it cannot be considered under Article 50 of the Statute"¹²⁶.

2.6. Assessment.

The wealthy practice on the use of experts by arbitral tribunals offers indisputable food for thought, especially in comparison to the practice of the International Court of Justice. As has been noted by scholars, "where it is desired to entrust resolution of the dispute to persons with particular technical competence, arbitration by technical experts or by international adjudicators closely assisted by technical experts may be preferred to ICJ adjudication"¹²⁷. In a similar note of criticism, it was written that "whilst the ICJ has used experts to educate the judges on some basic notions of cartography and geology, it does not make full use of such experts in the same way as Arbitral Tribunals, and as a result the judgments given cannot benefit from the same detailed scientific consideration"¹²⁸.

The practice of arbitral tribunal reveals some distinctive features that differentiate it from the practice of the ICJ. Firstly, arbitral tribunals, perhaps inspired by the use of experts in commercial and investment arbitration, have developed innovative techniques in relation to the appointment, examination and use of independent experts. Some of these solutions might be useful if transposed to the context of the ICJ. For instance, the use of experts appointed by the parties in the *Trail Smelter* arbitrations or the drawing of specific suggestions to the use of experts in the post-adjudicatory phase in the *Iron Rhine Railway* could prove to be useful under certain circumstances. Perhaps with the exception of the category of experts-arbitrators,

¹²⁶ para 15.

¹²⁷ Gray, Kigsbury, 110.

¹²⁸ Riddell, Plant, 356.

none of the practices in relation to the use of experts in arbitration seems to fall off the powers possessed by the ICJ under Article 50 of its Statute. To some extent, it seems that the recent practice of the ICJ is already somewhat inspired by the flourishing use of experts by international tribunals. This seems to ring true in relation to a greater and more appropriate use of party-appointed experts and also with regard to the appointment of independent experts in the recent *Costa Rica v. Nicaragua* expert order.

Another important component of the arbitral practice is a greater focus on the transparency of the expert's participation. In almost every case where experts helped the tribunal, their identity was known by the parties and the content of their advice was disclosed. Sometimes parties had had the occasion to comment upon their conclusion. These measures had allowed the parties a greater participation in challenging the impartiality and independence of such experts .

The large use of experts by arbitral tribunals allows some speculation on two arguments sketched to offer the reasons why some international tribunals are so reticent in appointing expert. The first is that the parties were not willing to have experts in the proceedings. The second is that experts in the proceedings undermine the authority of adjudicators.

As to the first argument, as it was examined, parties largely favours the presence of experts in the proceedings – an information which should be considered in this regard is the reference to the power of appointing experts in arbitral *compromis* and the general agreement *in lite* to their nominations.

As to the second argument, it seems hard to sustain that their employment undermine the legal authority of the adjudicative body. Their functions are usually related to assistance and fact-finding rather than offering interpretations to sensitive legal points. Sometimes experts bear the character of a bridge between the parties and the tribunal in interacting with the parties' experts.

That gears onto the last remark, that is the dialogue between procedural instruments. Not infrequently tribunal-appointed experts were called to dialogue with other categories of experts: expert counsels and party-appointed experts. The main effect of this dialogue is adjudicators benefiting from several sources of technical and scientific input. This enrichment is welcomed and certainly contributes to the enhancement of the legitimacy of arbitral awards.

3. The experience of the International Tribunal for the Law of the Sea.

3.1. Scientific and technical evidence in ITLOS case law.

Technical and scientific issues do not rarely appear in the case law of the International Tribunal for the Law of the Sea (ITLOS or Tribunal), which is one of the main compulsory means for dispute settlement provided under the United Nations Convention on the Law of the Sea (UNCLOS or Convention)¹²⁹. The Convention covers a set of situations possessing a highly technical character¹³⁰. As observed by an author, "for at least a half century, the law of the sea has looked to science and applied scientific tests in several different contexts"¹³¹. As the Tribunal recently stated, some ITLOS provisions "contain elements of law and science, its proper interpretation and application requires both legal and scientific expertise".

In order to clarify the scientific and technical issues raised before ITLOS, some examples can be referred to by way of illustration. One of the first cases in which the Tribunal was called upon to settle a dispute involving scientific evidence was the *Southern Bluefin Tuna* cases¹³². New Zealand and Australia requested the prescription of provisional measures with regard to a dispute against Japan brought before an Annex VII arbitral tribunal. According to the requesting States, Japan had been violating a

¹²⁹ Part XV of UNCLOS and, in particular, its Article 287, disposes several procedures at parties' disposal in order to solve their disputes in a compulsory way. Subparagraph (1) of Article 287 sets forth that "When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein".

¹³⁰ CM Schofield and CH Carleton, 'Technical Considerations in Law of the Sea Dispute Resolution' in G O Elferink and D R Rothwell (eds), *Oceans Management in the 21st Century* (Brill 2004) 251-252. See also N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2004) and J Collier and V Lowe, *The Settlement of Disputes in International Law* (OUP 1999) 86 in which the authors commented upon the disputes arising from the fisheries' regulation on ITLOS: "The essence of such disputes would not be legal: there is relatively little room for argument over what the treaty obligations are. Rather it would concern the propriety of the State's exercise of discretion in determining the total allowable catch, its own harvesting capacity, and hence the surplus available to third States. Those are, clearly, matters requiring the expert interpretation of scientific evidence".

¹³¹ D Anderson, *Modern Law of the Sea - Selected Essays*, (Martinus Nijhoff 2008) 569. With regard to maritime delimitation, several technical features were appointed by M Pratt, 'The Role of the Technical Expert in Maritime Delimitation Cases' in R Lagoni and D Vignes (eds) *Maritime Delimitation* (Martinus Nijhoff 2006) 79.

¹³² *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Provisional Measures) (1999) ITLOS Rep.

number of UNCLOS provisions through unilaterally designing and undertaking an experimental fishing programme which would have been menacing a valuable migratory species of pelagic fish, the southern bluefin tuna. Japan, Australia and New Zealand considered that the "scientific evidence available" pointed out in different directions with regard to the dangers to the southern bluefin tuna stock. The Tribunal did not fail to ascertain the existence of "scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna". The Tribunal recognized, then, that

"although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock"¹³³.

Since the Tribunal understood that the Annex VII arbitral tribunal would have *prima facie* jurisdiction over the dispute¹³⁴, and that the parties "should act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna", it prescribed provisional measures requiring the parties not to take any actions which might prejudice a future decision.¹³⁵ The "precautionary approach" of the Tribunal was vastly commented on academic instance¹³⁶. The dispute, however, was not solved by the arbitral tribunal constituted under Annex VII, which declared it had no jurisdiction over the dispute¹³⁷.

Another example can be found in the proceedings on provisional measures in the *MOX Plant case*¹³⁸. The dispute concerned the authorization by the United Kingdom of the construction and operation of a plant to make mixed oxide fuel (MOX) at Sellafield, on the Irish Sea. According to Ireland, by authorizing the construction, the UK would have violated, *inter alia*, UNCLOS provisions relating to the marine environment of the Irish Sea. While the jurisdiction to settle the dispute belonged to an Annex VII arbitral tribunal, ITLOS indicated provisional measures, whose content aimed essentially at reinforcing the obligation of the parties to cooperate with the view

¹³³ *Southern Bluefin Tuna Cases*, para 80.

¹³⁴ On this issue, see S Rosenne, 'Provisional measures and prima facie jurisdiction revisited', in *Liber Amicorum Judge Shigeru Oda* (Kluwer 2002) 515-544.

¹³⁵ *Southern Bluefin Tuna Cases*, para 77.

¹³⁶ Treves, Boyle.

¹³⁷ Source. To a general assessment of the dispute, see S Rosenne, "Arbitrations under Annex VII of the United Nations Convention on the Law of the Sea" in TM Ndiaye and R Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007) 996.

¹³⁸ *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, [2001] ITLOS Reports. On the general questions concerning the case, see RR Churchill, 'MOX Plant Arbitration and Cases', [2007] MPEPIL.

of settling the dispute¹³⁹. In the *Mox Plant* case, there was scientific disagreement between the parties in relation to the existence and the degree of risk of pollution from the operation of the MOX plant¹⁴⁰. As seven of the judges noted in their joint declaration, the dispute was "characterized by an almost total lack of agreement on the scientific evidence with respect to the possible consequences of the operation of the MOX plant on the marine environment of the Irish Sea"¹⁴¹. Still, the Tribunal did not engage in the examination on the *prima facie* evidence and relied on the fact that the United Kingdom, during the oral hearings, made some assurances that there would be no activity in the MOX plant until the constitution of the Annex VII arbitral tribunal¹⁴². The Tribunal eventually concluded that

in the circumstances of this case, the Tribunal does not find that the urgency of the situation requires the prescription of the provisional measures requested by Ireland, in the short period before the constitution of the Annex VII arbitral tribunal"¹⁴³

What emerges clearly from the judgment and from individual opinions of some judges is that the existence of scientific disagreement and scientific uncertainty is not, by itself, a sufficient element to trigger a precautionary approach that would compel the Tribunal to prescribe conservatory provisional measures. The Tribunal mainly placed emphasis in the lack of the urgency justifying the indication of provisional measures. As observed by judge Mensah, "the evidence before the Tribunal does not suffice to show either that irreversible prejudice might occur to any rights of Ireland or that serious harm to the marine environment might occur, solely as a result of the commissioning of the MOX plant, *in the period between now and the constitution of the Annex VII arbitral tribunal*"¹⁴⁴.

Coming back to a more general assessment of the case law of ITLOS, it may be noted that, while in twenty years of activity (1997-2017) several disputes involving scientific questions were brought to ITLOS, ITLOS does not seem to have developed an unitary and uniform approach to the treatment of technical evidence. Different reasons could be given for explaining this feature. Firstly, as the two examples just mentioned clearly show, the Tribunal has had few occasions to address the merits of the disputes

¹³⁹ On this, see C Foster, *Science and the Precautionary Principle in International Courts and Tribunals* (CUP 2011) 44.

¹⁴⁰ *The MOX Plant Case*, paras 68 to 73.

¹⁴¹ *The MOX Plant Case*, Sep. Op. Joint Declaration Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson, Jesus.

¹⁴² *The MOX Plant Case*, paras 78, 79, 80.

¹⁴³ *The MOX Plant Case*, para 81.

¹⁴⁴ *The Mox Plant Case*, Sep Op Mensah (emphasis added).

brought before it. In most cases, the Tribunal dealt with questions of evidence in the context of proceedings related to provisional measures¹⁴⁵ or the prompt release of vessels¹⁴⁶. In relation to this kind of proceedings, the question of evidence has often a marginal importance and in any case the Tribunal approaches it on a "prima facie" basis¹⁴⁷. Moreover, since the cases submitted to the Tribunal have raised very different issues, this may have prevented the Tribunal from sketching an homogeneous approach.

Whatever the reasons, it remains that, when it comes to the treatment of evidence, notably technical and scientific evidence, a *case by case* approach seems to be the rule¹⁴⁸. This has allowed the Tribunal a certain flexibility, balancing the respect for the will of the litigants with an effective performance of its judicial function.

3.1.1. Common elements between ITLOS and ICJ.

When dealing with the problem of equipping the Tribunal with the means for handling scientific and technical evidence, the choice of those who shaped the rules of the Tribunal was to use the International Court of Justice as a referring model. Being both dispute settlement bodies entrusted with the task of settling interstate disputes¹⁴⁹, several provisions governing the procedure of ITLOS were modeled, almost *ipsis literis*, by the Statute and the Rules of the ICJ¹⁵⁰.

With regard to evidentiary questions, there are several common elements¹⁵¹. By way of illustration, one may mention the wide powers of the Tribunal to determine its

¹⁴⁵ In the sense of Article 290 of the UNCLOS.

¹⁴⁶ Following the proceedings envisaged in article 292 of UNCLOS.

¹⁴⁷ According to judge Wolfrum in the *S/V Saiga*, *prima facie evidence* "is reserved for preliminary proceedings".

¹⁴⁸ On the treatment of evidence before international tribunals, see, generally, R Wolfrum, "Taking and Assessing Evidence in International Adjudication" in TM Ndiaye and R Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007) 341.

¹⁴⁹ However, differently from the ICJ, where only States can be parties in a dispute due to Article 34 of the Statute, in certain specific situations also non-state entities can use the Tribunal for the settlement of their disputes. On the issue, see B Vukas, 'The International Tribunal for the Law of the Sea: some features of the new international judicial institution' in PC Rao and R Khan (eds), *The international tribunal for the law of the sea: law and practice* (2001 Kluwer Law) 59–72 and also A Boyle, 'Dispute settlement and the Law of the Sea Convention: problems of fragmentation and jurisdiction' (1997) 46 ICLQ 37-54. To the moment, the contentious case law of ITLOS is essentially composed of disputes between States.

¹⁵⁰ P C Rao and P Gautier, *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff, 2006) viii.

¹⁵¹ As observed by R Wolfrum, "Taking and Assessing Evidence in International Adjudication" in TM Ndiaye and R Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007) 341.

own procedure and set out evidentiary issues through orders¹⁵², the absence of strict rules for the admissibility of evidence and the power of the Tribunal to call upon the parties to produce evidence¹⁵³. Furthermore, it appears that some non-written principles governing the evidentiary field in the ICJ also find their place in the practice of ITLOS, such as the duty of the parties to co-operate with the Tribunal in the production of evidence¹⁵⁴ and the principle of free assessment of evidence¹⁵⁵.

Commonalities can be also found with regard to the use of experts by the two judicial bodies. Given that resort to experts is the main procedural instrument to deal efficiently with technical and scientific evidence and to offer scientific input to a court or tribunal, it does not surprise that this instrument has a prominent place in the procedure before ITLOS. In spite of their "recognized competence in the field of the law of the sea"¹⁵⁶, judges from ITLOS are not necessarily versed in geomorphology, in financial assessment of nautical vessels nor in the analysis of the stocks of certain fish species. ITLOS' case law has demonstrated how even a specialized judge sometimes requires the assistance of experts to properly settle a dispute submitted to it by litigating parties.

In the following sub-paragraphs, each category of expert provided by the rules of ITLOS will be separately considered as well as the relevant practice. At the end, a general assessment will be outlined in which the possible points of connection between ITLOS and the ICJ will be highlighted.

¹⁵² Article 16 of ITLOS' Statute provides that "The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure". For its turn, Article 27 establishes that "the Tribunal shall make orders for the conduct of the case, decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence".

¹⁵³ Article 77 (1) of the Rules of the Tribunal sets forth that "The Tribunal may at any time call upon the parties to produce such evidence or to give such explanations as the Tribunal may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose".

¹⁵⁴ On the issue, see G Niungeko, *La preuve devant les juridictions internationales* (Bruylant, 2005)165ff.

¹⁵⁵ See M Benzing, 'Evidentiary Issues' in A Zimmerman and others (eds), *The Statute of the International Court of Justice: a Commentary* (OUP 2012) 1234; R Kolb, *The International Court of Justice* (Hart 2012) 930; C Santulli, *Droit du contentieux international* (LGDJ-Montchrestien 2005) 532–33; Riddell and Plant (X) 187. The principle was crystallized in some international documents, such as art 63(2) of the Rules of Procedure and Evidence of the International Criminal Court which so dispose: 'A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69'. On the issue, see M Klamberg, *Evidence in International Criminal Trials* (Martinus Nijhoff 2013). However, there are no provisions in the Statute or in the Rules establishing a rigid criteria for the weighing of the evidence presented by the parties or obtained by the Court.

¹⁵⁶ Article 2 of ITLOS Statute.

3.2. Forms of Expertise in the Law and Practice of ITLOS.

Five are the main sets of rules governing ITLOS procedural law: i) the Law of the Sea Convention; ii) its Statute, part of UNCLOS; iii) the Rules of the Tribunal, as amended on 17 March 2009; iv) Resolution on the Internal Judicial Practice of the Tribunal, adopted on 31 October 1997; v) and the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, adopted on 14 November 2006.

From the outset, it should be noted that, unlike the ICJ, the Statute of the Tribunal does not contain specific provisions regarding the use of experts or determining which categories of experts are at the Tribunal's disposal. As a matter of fact, the Statute contains few procedural provisions; ITLOS procedural law is essentially governed by the Rules of the Tribunal, in conformity with the principle according to which it is for the Tribunal to "make all arrangements connected with the taking of evidence"¹⁵⁷. This allows the Tribunal to update and modify its rules of procedure easily – the last version of the Rules of the Court are from 2009. Whereas to modify the Statute of the ICJ, which contains the main rules with regard to experts, it is required the modification of the United Nations Charter, modifying the ITLOS procedure only requires the amendment of the Rules by the Tribunal. This flexibility is also strengthened by Article 11 of the Resolution on the International Judicial Practice, which provides that "the Tribunal may decide to vary the procedures and arrangements set out above in a particular case for reasons of urgency or if circumstances so justify". For this reason, it seems right to affirm that the procedure regarding experts can be adapted depending on the circumstances of a given situation or on agreement between the parties. However, in spite of its broad powers regarding the adaptability of its procedure¹⁵⁸, the Tribunal has always demonstrated a rather traditional approach to issues of evidence and, particularly, issues regarding the appearance of experts in the proceedings.

¹⁵⁷ Article 27 of Statute of ITLOS. The same provision can be found in Article 48 of the Statute of the ICJ.

¹⁵⁸ On the issue, see H Caminos, 'The International Tribunal for the Law of the Sea: an overview of its jurisdictional procedure' (2006) 5 LPICT 13-27 and T Treves, 'The procedure before the International Tribunal for the Law of the Sea: the Rules of the Tribunal and related documents' (1998) 11 Leiden Jrn Int Law 565-594.

Equivalently to ICJ, the main categories of experts provided for in ITLOS rules are: (1) the party-appointed experts (or expert-witnesses); (2) the independent experts appointed by the Tribunal; (3) experts appointed under Article 289 of UNCLOS to sit with the tribunal. In addition to those categories envisaged by the Rules, it will also be examined the practice regarding (4) the expert counsel and (5) the experts appointed after the judicial phase. It is not clear whether *ghost experts* were ever used by the Tribunal and therefore this category will not be addressed.

3.2.1. Party-appointed experts.

Party-appointed experts are the most recurrent category of expert employed in ITLOS case law¹⁵⁹. In almost every case raising technical or scientific issues the parties nominated an expert to give oral evidence before the Tribunal¹⁶⁰.

Similarly to the ICJ Statute, ITLOS Rules set forth that "the oral proceedings shall consist of the hearing by the Tribunal of agents, counsel, advocates, witnesses and experts" (Art. 44)¹⁶¹ and that witnesses and experts shall be indicated "in sufficient time before the opening of the oral proceedings" and "with indications of the point or points to which their evidence will be directed" (Art. 72)¹⁶². The same provision also establishes that copies of these documents shall be received by the opposite party. This provision essentially aims at ensuring the respect of the principle of parity of arms: the other party needs to be enabled to properly answer to the evidence that will be presented. This principle is also expressed in Article 73 of the Rules of the Tribunal,

¹⁵⁹ Party-appointed experts were used in *M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*; *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures; *The "Camouco" Case (Panama v. France)*, Prompt Release; *The "Monte Confurco" Case (Seychelles v. France)*, Prompt Release; *The "Grand Prince" Case (Belize v. France)*, Prompt Release; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures; *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*; *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*; *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*; *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, now pending.

¹⁶⁰ The greatest exception was the *The MOX Plant Case (Ireland v. United Kingdom)* case, a technical case where none of the parties appointed witnesses of experts, but technical experts appeared as counsel although without pleading before the Tribunal. Cf. *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures [2001] Minutes of the Public Sitings held on 19 and 20 November and 3 December 2001.

¹⁶¹ Article 44 of ITLOS Rules of the Tribunal.

¹⁶² Article 72 of the Rules of the Tribunal.

which provides the right of a party to comment upon the evidence presented by the other party¹⁶³.

The Rules of the Tribunal also incorporate specific provisions for the situation in which the parties wish to call a witness or an expert in the course of the hearings whose name was not included in the list previously indicated following Article 72. In this respect, Article 78¹⁶⁴ of the Rules of the Tribunal specifies that the party who wish to call an expert not indicated previously

"shall make a request therefore to the Tribunal and inform the other party, and shall supply the information required by article 72. The witness or expert may be called either if the other party raises no objection or, in the event of objection, if the Tribunal so authorizes after hearing the other party".

Two are the main rights that seem to be protected by these provisions. The first is the right of the parties to be heard in regard to the evidence that the other party wishes to produce. The second is the right of the parties to indicate experts even if the other party objects to the appointment. It is clear, however, that the final decision on whether or not an expert should be heard remains with the Tribunal, according to the circumstances of a case.

Once indicated, party-appointed experts will be heard and examined during the oral hearings. According to the Rules of the Tribunal, the method of examination of the party-appointed experts is determined by the Court on a case-by-case basis, after consultation with the parties¹⁶⁵. From this point of view, the method of examination generally employed by ITLOS is identical to the one used in *common law* courts and recently adopted by the ICJ: first, there will occur the examination by the party which appointed the expert; then, the cross-examination by the other party will take place; finally; finally, the Court will have the possibility of putting questions¹⁶⁶. In his separate opinion in the *M/V Louisa* case, judge Cot, after noting that the procedures for the

¹⁶³ Article 73 reads as follows: "1. The Tribunal shall determine whether the parties should present their arguments before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given. 2. The Tribunal, after ascertaining the views of the parties, shall determine the order in which the parties will be heard, the method of handling the evidence and examining any witnesses and experts and the number of counsel and advocates to be heard on behalf of each party".

¹⁶⁴ Article 78 reads as follows: "1. The parties may call any witnesses or experts appearing on the list communicated to the Tribunal pursuant to article 72. If at any time during the hearing a party wishes to call a witness or expert whose name was not included in that list, it shall make a request therefore to the Tribunal and inform the other party, and shall supply the information required by article 72. The witness or expert may be called either if the other party raises no objection or, in the event of objection, if the Tribunal so authorizes after hearing the other party".

¹⁶⁵ Article 73 (2) of the Rules of the Tribunal.

¹⁶⁶ That was the procedure adopted in the last judgement of the Tribunal, the *M/V "Virginia G" Case (Panama/Guinea-Bissau)* (Judgment of 14 April 2014) ITLOS Reports 2014.

examination of witnesses "are modelled on the common-law rules but are not as rigorous", emphasized that such procedure "clearly favours the party with full mastery of the techniques of adversary procedure"¹⁶⁷. However, it may be noted that the fact that judges tend to be active, in asking questions to witnesses and experts, especially in recent cases¹⁶⁸, is an element which distinguishes the procedure before ITLOS from the traditional *common law* system, in favour of incorporating elements rooted in the *continental tradition*¹⁶⁹.

In the practice of ITLOS three interesting problems emerged with regard to the use of party-appointed experts. They concerned a) the use of *voir dire* in order to preliminarily challenge the reliability of an expert; b) the important role played by article 72 in protecting the right of the other party to be prepared to comment upon the evidence adduced; and c) the importance attributed by the Tribunal to the evidence presented by party-appointed experts. I will examine each one of these problems in turn.

a. The *voir dire* in the Southern Bluefin Tuna case.

In principle, party-appointed experts who testify before the Tribunal are considered as independent experts. The impartiality of their testimony is reinforced by the solemn declaration they are asked to swear before testifying¹⁷⁰. In municipal law, specially American law, the impartiality of a witness or expert who is going to testify before a court can be challenged through a specific procedure called *voir dire*, which is "a preliminary examination to test the competence of a witness or evidence"¹⁷¹. Albeit rare in international tribunals¹⁷², the *voir dire* was used once before ITLOS.

¹⁶⁷ *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)* (Merits, Sep. Op. Cot) [2013] ITLOS Rep para 58. In the concrete case, judge Cot observed that "[i]n the Louisa case, the Spanish side did not object to the wording of questions put by the American counsel unless it considered the honour of the Kingdom of Spain to be at stake".

¹⁶⁸ By way of illustration, in the *M/V "Virginia G" Case (Panama/Guinea-Bissau)*, para. 37, eight judges posed questions to six witnesses and experts.

¹⁶⁹ On the issue, see G Gros, 'The ICJ's handling of Science in the Whaling in the Antarctic Case: A Whale of a Case?' (2015) 6 JIDS 9.

¹⁷⁰ The solemn declaration contained in article 79 of the Rules of ITLOS was drafted in similar terms of those that of ICJ.

¹⁷¹ BA Garner (ed) *Black's Law Dictionary* (West 2009) 1710.

¹⁷² As observed prof. James Crawford observed that "[t]his is an unusual procedure in an international tribunal. States are normally entitled to seek independent advice from qualified persons, and Professor Beddington's CV is contained at the end of his report. However, in his own time or, if the Tribunal has time, in the Tribunal's time, my friend is entitled to put any questions to Professor Beddington that are relevant to his testimony today, and I am perfectly happy to give him the opportunity to do so" (p.34)

In the *Southern Bluefin Tuna* case, Australia and New Zealand called an expert under article 72 of the Rules of the Tribunal. These States had their own scientists integrating their legal team. However, they also decided to adduce "scientific evidence from an independent British scientist"¹⁷³ in order to strengthen their scientific argument that the stocks of tuna would be affected by the Japanese program. By agreement of the parties, it was decided that, before the examination and cross-examination of such an expert, Japan would be given the opportunity of examining the expert's "capability and credibility to offer specialized expertise on matters relevant to the case"¹⁷⁴. As President Mensah observed, "the purpose of the present proceeding is to enable [the parties] to put in context something connected with the suitability of expertise"¹⁷⁵.

Two problems seem to emerge in relation to this procedure. The first concerns the reasons that could affect the suitability of an expert. The second regards the possible consequence of such a procedure. The Tribunal offered some elements in relation to the first; the second remains a matter for speculation.

With relation to the first problem, during the *voir dire* the counsel for Japan questioned the fact that the British expert had received material from the parties before his testimony. There was an implicit suggestion that this fact would have some impact on expert's impartiality. On this issue, President Mensah made the following observation: "I think we are dealing here with the question of whether this expert can be accepted as an independent expert. If he is an independent expert, the fact that he had material sent to him by the parties would not be either extraordinary or improper"¹⁷⁶. By this observation, the President clearly excluded that the previous contact between the expert and the parties could be a reason for considering an expert as being non-independent. In a later case, judge Cot observed that this contact could be seen as a problematic to a judge coming from a *civil law* background¹⁷⁷.

That gears to the second problem. Had the Tribunal considered that the expert were not independent, it is not immediately clear what would have been the

¹⁷³ This term was used by the Counsel of Australia, prof. James Crawford.

¹⁷⁴ Mr Slater, Counsel for Japan, 35.

¹⁷⁵ 35.

¹⁷⁶ 40.

¹⁷⁷ Judge Cot commented upon a similar situation, with regard to witnesses. In his words, "[i]n the civil law tradition, contact between witness and counsel before the hearing is strictly prohibited. Common law requires a party calling a witness to indicate the general sense of the testimony so as to allow the opposing party to prepare its cross-examination. Witness-proofing, i.e., counsel's preparation of the witness, is even compulsory in United States law. This would be considered a criminal offence in France!" *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)* (Merits, Sep. Op. Cot) [2013] ITLOS Rep12 para 41.

consequence. President Mensah spoke about "acceptance as an independent expert". Two possibilities can be sketched. First, it could be said that the expert is not allowed to testify because it cannot be considered independent. Alternatively, the fact that the experts is not considered to be independent does not prevent him/her from testifying but this testimony would be given little evidentiary weight by the Tribunal. In other words, the main issue is whether the testimony could be regarded as being admissible or not. Considering that there are very few rules concerning the admissibility of evidence before international tribunals, it seems unlikely that an expert appointed by a State could not be allowed to testify.

Incidentally it can be noted that in the *Southern Bluefin Tuna* case, the Tribunal did not clarify what importance it attached to the evidence presented by the expert since there is no direct reference to such evidence in the judgment.

Even so, it remains the question, already raised in relation to the practice of ICJ, of how to assess the independence of party-appointed expert. Theoretically, an expert or a witness which is not directly interested in the outcome of a dispute is a witness with a higher credibility. As observed by an author, "expert witnesses are not disqualified by the mere fact that they are government officials of the party which called them. However, the international court or tribunal may take this position into consideration when evaluating the evidence and deciding upon the probative value of the testimony"¹⁷⁸. Furthermore, and especially from the perspective of a lawyer schooled in the continental system, it is difficult to determine the degree of interest of an expert which was paid by a client to testify before a court.

In sum, the procedure of *voir dire* had no apparent impact in the *Southern Bluefin Tuna* case and it is hard to identify the criteria by which an expert could be disqualified. Expert credibility seems to be a matter which touches upon the evidential weight to be given to its testimony. This does not exclude that a procedure for testing the independence of a party-appointed expert could be used again in the future.

b. The importance of the requisite of previous information under Article 72 and the distinction between witnesses and experts in the *S/V Saiga*.

¹⁷⁸ R Wolfrum, "Taking and Assessing Evidence in International Adjudication" in TM Ndiaye and R Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007) 351.

In the *M/V 'Saiga' (No 2)* case¹⁷⁹, two interesting questions related to the use of party-appointed experts have arisen: the importance of article 72 of the Rules in order to protect the right of the parties to comment upon the evidence presented by the other party and the distinction between witnesses and experts. In spite of the existence of a similar provision to Article 72 in the Statute of the ICJ¹⁸⁰, in the practice of the Court a similar problem never appeared and the Court has been rather flexible in relation to the strict division between expert and witness.

In a nutshell, the object of the dispute concerned the arrest and detention of the oil tanker *Saiga*, a vessel registered in Saint Vincent and the Grenadines (SVG), by Guinea. The reconstruction of the factual background of the case required not only a proper establishment of the facts, through the hearing of witness, but also an examination of the Guinean legal system, which was provided by an expert in Guinean law. Following the proceedings provided in Article 72 of the Rules of ITLOS, the parties in the *Saiga* case informed the Tribunal about the exact content of the testimonies to be given by their witnesses and experts. During the oral hearings, the expert called by Guinea to present legal evidence¹⁸¹ addressed factual questions related to detention of the vessel *Saiga*. In particular, he testified on issues that had been dealt with in the testimony of a witness called by SVG. The counsel for SVG objected to such testimony. In his words, "[t]he evidence now given has nothing to do with any of those questions. It comes as a complete surprise. (...) To present this account without any warning, written or oral (...) is in flagrant violation of the Rules of Procedure." President Mensah agreed with this argument and observed that

"It has now been brought to my attention, and I think it is very pertinent, that in fact [the expert] has now been asked to give evidence on a completely different subject matter. (...) This concerns not only the other party. If the Tribunal had been aware that information was to be given and evidence was to be addressed to matters involving his relationship with the authorities in Guinea, quite clearly the Tribunal would have been interested to know the reaction of Saint Vincent and the Grenadines. In the event, neither the Tribunal nor, I presume, the other party, could have known that this matter was going to be put in evidence. Therefore I believe that the evidence that you are now adducing from [the expert] is not the evidence that you informed the Tribunal you would be asking of him. That

¹⁷⁹ *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits, Verbatim Records) ITLOS/PV.99/9, 12.

¹⁸⁰ The reading of Article 72 of the Rules of ITLOS is extremely similar to those of Article 57 of the Rules of the ICJ.

¹⁸¹ The expert would testify "about the laws and regulation of Guinea, the enforcement rules of Customs laws, the applicability of the laws to The Saiga and the legal measures taken against fishing vessels. ". The Presidente of the tribunal went further and said "This is expert evidence". *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits, Verbatim Records) ITLOS/PV.99/9, 11.

evidence cannot, therefore, be permitted to be given because it would be contrary to the Rules of the Tribunal. I think that it is also fair to say that it will be unfair not only to the other party but also to the Tribunal. It is, in effect, a surprise to all of us"¹⁸².

President Mensah made also a distinction in relation to the content of the evidence that was given. Since the expert was supposed to testify on matters of Guinean law, the President stated that:

"This is expert evidence. In your letter you said there would be witnesses and experts and I have actually marked "experts". That would be the correct designation. The evidence that you are adducing now is not expert evidence but factual evidence relating to the events leading to the arrest of M/V SAIGA. You can question Mr Bangoura on the issues in respect of which you have previously informed the Tribunal. Therefore, the information that he has given and the evidence that he has given up until now will, in my view, be struck off the record because it is contrary to the Rules of the Tribunal. That is my ruling"¹⁸³.

President Mensah's statement addressed a number of interesting issues concerning, a) the importance of the Article 72 on the content of the testimony, b) the identification of what constitutes "expert evidence", and c) the role of the President of the Tribunal in deciding these questions.

With regard to the first issue, it is interesting to note that the strict application of Article 72 led the President of the Tribunal to limit the testimony of the expert to the questions previously indicated by the party and restricted within his expertise. Equally interesting is the fact that the President stressed that the widening of the content of the testimony would have the effect not only of violating the right of the other party but also of breaching the limitations imposed by the Tribunal for the proper development of the proceedings. This demonstrates that the question at stake is not only the parity of arms, but also the proper performance by the Tribunal of its judicial function.

With regard to the second issue, it seems that the question of what clearly constitutes expert evidence¹⁸⁴ is not as important as the respect of Article 72. In dealing with such issue, President Mensah took a different approach from that adopted by President Spender in the *South West Africa* cases before the ICJ. While President Spender understood that "it is inevitable that the person who is giving evidence as an

¹⁸² *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits, Verbatim Records) ITLOS/PV.99/9, 12. (Emphasis added)

¹⁸³ *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits, Verbatim Records) ITLOS/PV.99/9, 12. (Emphasis added)

¹⁸⁴ In principle, the main distinction between witnesses and experts in ITLOS rules is the same that on ICJ, fact that witnesses testify on matters of fact while experts testify on matters of their expertise. This distinction is also made in their solemn declarations. While witnesses "declare upon [their] honour and conscience that [they] will speak the truth, the whole truth and nothing but the truth", experts' testimony will also "be in accordance with [their] sincere belief", in the sense of Art. 79. Rules of the Tribunal.

expert will both deal with facts and also express his opinion upon the facts" and that "[t]hat may bear upon the weight to be given to his evidence, but it does not bear upon the admissibility of his evidence"¹⁸⁵, President Mensah stressed such a distinction. Nonetheless, given that in most recent cases ITLOS allowed testimonies touching upon both factual and technical questions¹⁸⁶, in the quality of expert-witnesses, the importance of the distinction between factual evidence and expertise in the *M/V Saiga* case appears to diminish.

A third issue is the broad powers of the President in deciding such matters. The legal basis for such power is probably Article 12 of the Rules of the Tribunal. This provision establishes that "the President of the Tribunal shall preside at all meetings of the Tribunal. He shall direct the work and supervise the administration of the Tribunal". In the *Saiga* case, Guinea accepted the decision of the President. Had Guinea objected to the President's decision, the question would arise whether the full Tribunal or the president would rule on the issue. Since according to Article 78 of the Rules it is the Tribunal (and not the President) that wields the power to decide whether or not a witness and expert shall be heard without the previous indication, it is suggested that it is for the Tribunal ultimately to decide on such matters.

c. The importance given to the expert opinion by the Tribunal in the assessment of facts.

Although party-appointed experts appeared in a significant number of cases before ITLOS, the Tribunal has made little reference, at least directly, to the evidence given by them in its decisions. Thus, it is not easy to delineate the general criteria resorted to by the Tribunal for the assessment and evaluation of the testimony given by party-appointed experts.

The Tribunal tends to give weight to an expert testimony when the opinion expressed by an expert appointed by a party had not been contested by the other party. This criterion clearly finds correspondence in ICJ case law. In the "*Camouco*" case¹⁸⁷, the evidence given by one of the experts called by Panama to determine the replacement

¹⁸⁵ *South West Africa cases* (Ethiopia v. South Africa; Liberia v. South Africa), Pleadings, Oral Arguments, Documents, CR 1965/2, p. 123.

¹⁸⁶ *M/V "Virginia G" Case (Panama/Guinea-Bissau)* (Judgment of 14 April 2014) ITLOS Reports 2014.

¹⁸⁷ *The "Camouco" Case (Panama v. France)*, (Judgment of 7 February 2000) ITLOS Reports 2000.

value of the *Camouco* vessel was not contested by France. The Tribunal took note of this fact¹⁸⁸. In the same sense, judge Treves emphasized that "[t]he expert of Panama has assessed such value before the Tribunal (...) without France raising objections"¹⁸⁹. Ultimately, the evidence given by the expert was taken into account in order to determine the bound for financial security set out in Article 282 of UNCLOS.

Similarly, in the *Monte Corfuco* case¹⁹⁰, the parties presented conflicting evidence on the exact value of the vessel. In assessing the several figures placed before it, the Tribunal gave weight to the expert testimony offered during the oral proceedings "on behalf of the Applicant *and not challenged by the Respondent*"¹⁹¹. After comparing the value presented "to the amount for which the vessel was sold" in the past, the Tribunal concluded its reasoning by considering "that this assessment is reasonable".

Another case in which uncontested evidence played an important was the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, which will be analyzed further ahead.

3.2.2. The Expert counsel.

The appearance of *expert counsel*, i.e. experts acting on behalf of a party and pleading before the tribunal in such quality, is not very frequent before ITLOS. Indeed, in the *Land Reclamation* case, the expert which Malaysia had used as technical adviser and which during the oral hearings had made a statement as a member of the delegation of Malaysia, was later "converted" to party-appointed expert and, consequently, sworn before the Tribunal and was cross-examined¹⁹² by Singapore.

It is not rare, however, to find experts and technical assistants offering advice to the defensive teams. There are no rules regulating their appearance. Article 53 of the Rules simply establishes that "the parties may have the assistance of counsel or advocates before the Tribunal". It does not mention experts giving assistance to the

¹⁸⁸ *The "Camouco" Case (Panama v. France)*, (Prompt Release, Judgment of 7 February 2000, Dis. Op. Treves) ITLOS Reports 2000, para 69.

¹⁸⁹ *The "Camouco" Case (Panama v. France)*, (Prompt Release, Dis. Op. Treves) [2000] ITLOS Reports, para 8.

¹⁹⁰ *Monte Corfuco case (Seychelles v. France)*.

¹⁹¹ *The "Monte Confurco" Case (Seychelles v. France)*(Prompt Release) [2000] ITLOS Report, para 84.

¹⁹² *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order, (2003) ITLOS Rep 14 para 20.

parties. Experts who integrate the legal team are to be assimilated to counsels or advocates. Nonetheless, most of the cases before ITLOS had technical or scientific advisors in such a quality. It is certainly a way to add epistemological legitimacy to the position of the State.

An interesting problem relating to this category of expert arose in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal*, decided in 2012. Differently from the majority of cases which dealt with technical or scientific evidence, this is a case decided on the merits and, therefore, with a proper and definitive examination of the evidence adduced to the Tribunal. In principle, it may be assumed that an expert counsel would offer evidence that is not completely impartial. However, in *Bangladesh/Myanmar* ITLOS relied considerably upon the evidence offered by an expert integrating a legal team.

As in almost every case of maritime delimitation, the dispute touched upon strict geographical and geological considerations. With regard to the presentation of the technical evidence by the parties, it should be noticed that only Bangladesh had experts integrating their legal teams. In particular, the two experts which had written the technical reports presented by Bangladesh were included as "Independent Experts" in the defensive team¹⁹³. Their "independence" was contested by Myanmar during the oral hearings¹⁹⁴. Counsel for Myanmar argued that "we have noted with a certain amused surprise that the Applicant, at least during the hearing, added to the list of its counsel the name of two geology professors, which is its right, calling them 'independent experts'. The concept of 'independent experts' who are members of a legal team is very interesting"¹⁹⁵.

¹⁹³ Although they did not plead before the Court in the quality of counsels, they remained present at the Tribunal during the proceedings, a fact that was noticed by judge Lucky in his dissenting opinion (para. 10).

¹⁹⁴ (),

¹⁹⁵ ITLOS/PV.11/7/Rev.1, 4. and Professor Muller "I would like to emphasize, however, that Dr Parson is a member of the 23 team of counsel and advocates for Bangladesh, not an "independent" expert" (ITLOS/PV.11/11/Rev.1, 7). Professor Pellet also mentioned Professor Alan Boyle criticism from the delegation from Bangladesh when it mentioned Alan Boyle: "as Professor Boyle says, 'we have our experts, so why the devil don't you have yours?' (...) Simply put, unlike Bangladesh, we did not think it appropriate to introduce our own consultants as independent experts. That being so, in spite of the show put on by our opponents revelling in the contributions of their experts, if we left aside the question of geological discontinuity, which is not relevant, I do not see a great deal of difference between the information appearing in the summary of Myanmar's submission to the CLCS and Annex 16 to the Counter-Memorial, and what Dr Parson pleaded last week on behalf of Bangladesh, relying on their consultants' reports.(ITLOS/PV.11/15/Rev.1, 11).

The counsel seemed to have in mind the debate on expert-counsels which arose out of the *Pulp Mills* case before the ICJ. In that instance, as already examined¹⁹⁶, the technical evidence was presented by experts acting as counsels for the parties and pleading before the ICJ. The ICJ did not make observations on the independence of such experts¹⁹⁷, but concluded that they "should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court"¹⁹⁸.

However, the Tribunal did not extract any inference from the fact that Bangladesh's experts were not presented according to Article 72 of the Rules nor did it raise the question of their independence¹⁹⁹. As a matter of fact, in its paragraph 444, the judgment makes direct reference to the reports written by the experts²⁰⁰ – which were not defied by Myanmar. When dealing with the question of the delimitation of the area beyond 200nm, the Tribunal observed the presence of "significant uncertainty as to the existence of a continental margin in the area in question". Then, it relied on experts reports in order to describe the "unique situation" which characterizes the Bay of Bengal. In particular, the Tribunal observed that

"as confirmed in the experts' reports presented by Bangladesh during the proceedings, which were not challenged by Myanmar, the sea floor of the Bay of Bengal is covered by a thick layer of sediments (...) having accumulated in the Bay of Bengal over several thousands of years"²⁰¹

It then quoted directly the reports to support this finding. That led the Tribunal to conclude that

"In view of *uncontested scientific evidence regarding* the unique nature of the Bay of Bengal and information submitted during the proceedings, the Tribunal is satisfied that there is a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200 nm"²⁰².

¹⁹⁶ Chapter 1.

¹⁹⁷ *Pulp Mills*, para 168, 72.

¹⁹⁸ *Pulp Mills*, para 167, 72.

¹⁹⁹ The only judge who commented upon the evidence given by the experts was judge Lucky, that in his dissenting opinion stated as follows: "In the instant case the experts in their reports show no personal interest in the outcome of the dispute. They are not employees of the Bangladesh Government. The analysis was apparently conducted with care and supported by references. The reports are complete and thorough, clear and cohesive. The data were not challenged or contradicted. The conclusions in the reports are specific and accurate". Judge Lucky also commented on the independence of the experts: "So, in my opinion while they are not so-called "independent experts" in the strict legal process because their reports form part of the pleadings of Bangladesh, their opinions must be respected and I accept them as part of the evidence to be considered".

²⁰⁰ Para 444.

²⁰¹ Para 444. (Emphasis added)

²⁰² Para 446. Emphasis added.

In other words, the uncontested scientific evidence adduced by the experts integrating the defensive team helped the Tribunal to identify the existence of Myanmar's continental shelf beyond 200 nautical miles – a essential issue of the dispute.

On account of the Tribunal's approach in the *Bangladesh/Myanmar* case, it is difficult to affirm that experts integrating the legal team of a party has little role to play when scientific and technical evidence underlies a dispute. It is clear that their importance in that specific case was enhanced by the fact that Myanmar did not contested the evidence presented by them nor asked to cross-examine them. This fact was expressly taken into account by the Tribunal. As also noted by Treves²⁰³, the fact that the expert evidence was not contested was crucial.

Interestingly, unlike in the *Pulp Mills* case, in the present case the experts did not *properly* acted as counsels since they did not plead before the Tribunal. They wrote reports and followed the hearings. This aspect must be taken into account when considering the weight attached to their opinion by the Tribunal. This aspect was emphasized by judge Lucky in his dissenting opinion. According to him

"the experts in their reports show no personal interest in the outcome of the dispute. They are not employees of the Bangladesh Government. The analysis was apparently conducted with care and supported by references. The reports are complete and thorough, clear and cohesive. The data were not challenged or contradicted. The conclusions in the reports are specific and accurate"²⁰⁴

Judge Lucky appears to refer to two categories of elements. The first category relates to elements pertaining to the personal background of the experts and to their relationship with the State which appointed them. Some of the criteria were already highlighted in the case law of the ICJ, such as the fact that witnesses/experts are employees of the Government and the absence of personal interest in the outcome of the dispute. The second category is related to the quality of the evidence itself, such as the accuracy of the information and the technical grounds on which the report is based. One could argue that the fact that Myanmar contested only the first category of elements (the "independence" of the experts), but did not challenged the second category of elements (the scientific information related to the continental shelf) led the Court to attribute some importance to their opinions.

²⁰³ Treves 491.

²⁰⁴ Lucky p.61.

3.2.3. Tribunal-appointed experts.

The appointment of *ex curiae* experts has been regarded as an inherent power of international tribunals.²⁰⁵ It is thus not surprising that this power is fully contemplated in ITLOS rules. Article 77 (2) of the Rules of the Tribunal envisages that "the Tribunal may, if necessary, arrange for the attendance of a witness or expert to give evidence in the proceedings". This provision shall be read together with subparagraph 1 of the same Article, which provides that "the Tribunal may at any time call upon the parties to produce such evidence or to give such explanations as the Tribunal may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose". As it has been noted, Article 77 sets out "several ways in which the Tribunal may adopt an active role and seek information in the form of written or oral evidence"²⁰⁶. It reflects an approach which could be regarded as more "continental" if compared to the adversarial party-appointed experts.

Article 82 of the Rules of the Tribunal sets out the procedure for the appointment of experts, which is, *ipsis literis*, the procedure established in Article 67 of the ICJ's Statute:

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

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

Even though the Tribunal has been very active in using its powers under Article 77 to ask information to the parties²⁰⁷, it has never used its powers to call witnesses or experts to produce evidence in the proceedings. Similarly to the ICJ, the reasons for this non-use of Tribunal-appointed experts are a matter for speculation.

²⁰⁵ C Brown

²⁰⁶ Rao, Gautier, p. 219.

²⁰⁷ The Tribunal invoked Article 77 in *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Provisional Measures and in *The "Volga" Case (Russian Federation v. Australia)*, Prompt Release. On the issue see, Rao, Gautier, 219-221.

A first reason that could explain why ITLOS has never appointed independent experts is that circumstances have not so required. As pointed out by an author, since "the great majority of Applications [before ITLOS] have been ones of an urgent nature, notably applications for the prompt release of a vessel and its crew under article 292 and applications for provisional measures"²⁰⁸, the Tribunal has not yet had the opportunity to decide a case where a fact-intensive and science-heavy factual background required the use of such experts.

Another element that can explain the non-use of Tribunal-appointed experts before ITLOS is the fact that these experts shall, according to Article 83 of the Rules, "where appropriate, be paid out of the funds of the Tribunal"²⁰⁹. This provision could be read together with Article 49 of the Rules of the Tribunal prescribes that "the proceedings before the Tribunal shall be conducted without unnecessary delay or expense". Given that the parties have, until now, appointed several experts and witnesses under the procedures of Article 72 of the Rules, a change in this procedure and, consequently, a raise in the costs of a proceeding, could explain the caution in the appointment of experts by the Tribunal.

Lastly, one may mention the view according to which international judges are reluctant to appoint experts because they are worried to lose ground in the decision-making process²¹⁰. If one deems this view convincing, it could be said that the reticence tends to be greater in the context of ITLOS since the Law of the Sea generally touches upon questions with a higher technical nature.

3.2.4. Experts appointed under Article 289 of UNCLOS.

Considered as an important innovation through which "the concept of enlisting qualified scientific experts in a binding decision-making process has been introduced

²⁰⁸ D Anderson, (n), 523. On the prompt release cases, see M White, "Prompt Release Cases in ITLOS" in TM Ndiaye and R Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007) 1025; as for provisional measures, see P Tomka and GI Hernández, "Provisional Measures in the International Tribunal for the Law of the Sea" in HP Hestermeyer and others (eds) *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff 2012) 1763.

²⁰⁹ Article 83 reads as follows: "Witnesses and experts who appear at the instance of the Tribunal under article 77, paragraph 2, and persons appointed by the Tribunal under article 82, paragraph 1, to carry out an inquiry or to give an expert opinion, shall,"

²¹⁰ JE Alvarez, 'Are International Judges Afraid of Science? A Comment on Mbengue' (2011) 34 *Loy. L.A. Int'l & Comp. L. Rev.* 81 and J D'Aspremont and MM Mbengue, 'Strategies of Engagement with Scientific Fact-finding in International Adjudication' (2014) 5 *JIDS* 240–72.

into modern international law"²¹¹, a third category of expert that can appear in the proceeding to assist ITLOS in disputes involving scientific or technical evidence is that comprising the experts foreseen on Article 289 of UNCLOS. This provision reads as follows:

In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex VIII, article 2, to sit with the court or tribunal but without the right to vote.

In addition, the resolution on the internal judicial practice of the Tribunal prescribes the possibility of experts being consulted by the Drafting Committee responsible for the tailoring of the judgment²¹².

This category of experts corresponds to the category of Assessors provided by the Statute of ICJ²¹³: they sit with the judges during the oral proceedings, take part in the private deliberations²¹⁴ and, like judges, receive all the documents related to the case in advance²¹⁵. The solemn declaration to be made by experts under Article 289 of the Convention are not similar to those made by party-appointed and tribunal-appointed experts, but to that made by judges, like that of Assessors before the ICJ²¹⁶.

The main difference between experts under Article 289 of the Convention and Assessors provided by the Statute of the ICJ is the fact that scientific or technical experts shall be "chosen preferably from the relevant list prepared in accordance with Annex VIII, article 2" of the Convention. Annex VIII is the part of UNCLOS which provides a particular procedure for "Special Arbitration", i.e., arbitration following

²¹¹ S Rosenne, 'Fact-finding before the International Court of Justice' 245.

²¹² Article 10 of the Resolution on the internal judicial practice of the Tribunal.

²¹³ In this vein: "At the ninth and resumed ninth sessions (both 1980), it was pointed out that the experts to be appointed under article 289 are not ordinary experts acting as witnesses before the court or tribunal and presenting to the court or tribunal an expert opinion which may be challenged by any party and which may be contradicted by another expert opinion. The experts under article 289 are in fact 'assessors', within the meaning of Article 30, paragraph 2, of the Statute of the International Court of Justice". NORDQUIST, *United Nations Convention on the Law of the Sea, 1982: a commentary*-, vol. V, Leiden, 1989, pp. 441ff

²¹⁴ Article 42 (2) of the Rules of the Tribunal sets forth that "Only judges and any experts appointed in accordance with article 289 of the Convention take part in the Tribunal's judicial deliberations. The Registrar, or his Deputy, and other members of the staff of the Registry as may be required shall be present. No other person shall be present except by permission of the Tribunal".

²¹⁵ Article 10 the Resolution on the internal judicial practice of the Tribunal of the sets forth that "experts appointed under article 289 of the Convention for a particular case before the Tribunal shall be sent copies of the written pleadings and other documents in the case in good time before the beginning of the deliberations".

²¹⁶ Article 15 (3) of the Rules of the Tribunal.

special procedures²¹⁷. One of the distinctive features of this kind of arbitration is that, in addition to adjudicators versed in law, the arbitral tribunal is also composed of experts. The main idea conveyed in this annex was to prepare permanent lists or expert-arbitrators which States can use in case of a technical dispute on one of the areas envisaged. Four are the lists of experts provided under Article 2, in four different areas: (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, and (4) navigation, including pollution from vessels and by dumping. Each list is drawn up and maintained by a different international organization²¹⁸. However, States are responsible for the indication of the names who will integrate the list²¹⁹.

The rationale behind Article 289 is quite clear. When a dispute involves technical and scientific matters, the composition of the Tribunal may be adapted in order to cope with the technical or scientific necessity. Moreover, the Tribunal may receive inputs from these experts in the deliberation process and not only during the hearings. This is one of the most important distinctive features of this category of expert. However, unlike the arbitral tribunals provided by Annex VIII of the Convention, the experts nominated under Article 289 are not arbitrators and perform a "subsidiary" function in the decision-process. They do not decide the dispute but rather offer their technical contribution to the judges which will decide the dispute. Indeed, they lack the right to vote.

Theoretically, the existence of a pre-established list of recognized authorities on each field facilitates the process of choice and appointment of experts. This, in turn, could contribute to the celerity of the proceedings for nomination. At the same time, the fact that the pre-established list was tailored by an external process of composition enhances the legitimacy of the choice of the tribunal. In this regard, little doubt could

²¹⁷ On the issue, see M H Nordquist, *United Nations Convention on the Law of the Sea, 1982: a commentary - Volume V* (1989 Martinus Nijhoff) 441ff.

²¹⁸ Article 2 of Annex VIII of UNCLOS: "The lists of experts shall be drawn up and maintained, in the field of fisheries by the Food and Agriculture Organization of the United Nations, in the field of protection and preservation of the marine environment by the United Nations Environment Programme, in the field of marine scientific research by the Intergovernmental Oceanographic Commission, in the field of navigation, including pollution from vessels and by dumping, by the International Maritime Organization, or in each case by the appropriate subsidiary body concerned to which such organization, programme or commission has delegated this function".

²¹⁹ According to Article 2 of Annex VIII of UNCLOS, every State Party "shall be entitled to nominate two experts in each field whose competence in the legal, scientific or technical aspects of such field is established and generally recognized and who enjoy the highest reputation for fairness and integrity".

be raised on the criteria for the selection of experts by the Tribunal. A third virtue of the pre-established list is that it adds transparency to the process of nomination of experts. In other words, the parties are enabled to know in advance the *numerus clausus* list of possible experts which could sit with the Tribunal. By contrast, a pre-established list of experts only appointed by States could raise some doubt on the independence of the same experts.

It must be stressed, though, that the language of Article 289 is clear in establishing the use of the permanent list of experts as optional. If the Tribunal deems appropriate, other experts could sit with the Tribunal. The word "preferably", which is repeated in the respective provision in the Rules of the Tribunal, is clear to that effect. In sum, the power conferred to the Tribunal under Article 289 is not conditioned to the existing lists.

Article 289 also provides the right of each party to request the appointment of experts to sit with the Tribunal. Naturally, the right to request the appointment does not mean a necessary obligation for the Tribunal. This right of the party has a temporal limitation since the request "shall, as a general rule, be made not later than the closure of the written proceedings"²²⁰. However, it is specified that "the Tribunal may consider a later request made prior to the closure of the oral proceedings, if appropriate in the circumstances of the case".

The procedure for appointment of experts laid down in Article 15 of the Rules of the Tribunal confers to the President of the Tribunal the power to propose the names. The parties shall be heard before the proposal. The same provision describes the qualities that an expert must possess ("be independent and enjoy the highest reputation for fairness, competence and integrity") and reinforces that such an experts "shall be chosen preferably from the relevant list prepared in accordance with that annex".

It could be interesting to identify the reasons for which the Tribunal (likewise the Court) never appointed experts under Article 289. According to Treves, "the scientific or technical experts as envisaged in Article 289 are too close to being judges or arbitrators: they sit with the tribunal and are to be drawn from the lists set out in Annex VIII for selecting specialized arbitrators, who should have not only technical, but also legal expertise"²²¹. Indeed, Article 2 (3) of Annex VIII prescribes that experts

²²⁰ Article 15 (1) of the Rules of the Tribunal.

²²¹ Treves 485.

should possess "competence in the *legal*, scientific or technical aspects of such field"²²². Treves's view finds confirmation if one glimpses on the composition of the lists²²³. The lists are composed not only by professors, scientists and members of technical agencies from governments, but also by legal scholars, diplomats and barristers. Added to the possible loss of influence that judges would have in the outcome of the dispute, it could be added that the appointment of experts would also have a financial impact on the budget of the Court.

A last point which deserves attention is the fact that the provision of Article 289 could also be used if the International Court of Justice were to have jurisdiction over a dispute. Since the ICJ is one of the possible compulsory means set out in UNCLOS²²⁴ for the settlement of disputes arising from the application and interpretation of the Convention, a dispute arising from UNCLOS which involves technical and scientific matters can be brought before the ICJ and, in this case, the dispute can require the appointment of experts or Article 289. As articulated by Treves, in such a case "the rules concerning the appointment of 'assessors' under Article 30, paragraph 2, of the Statute will in all likelihood apply, as far as they are compatible with Article 289"²²⁵.

There are no apparent conflicts between Article 289 and the Statute and Rules of the ICJ. Despite the absence in the ICJ's Rules of a requirement of prior consultation of the parties on the nomination of assessors or on their number (Article 289 prescribes "no fewer than two "), Article 289 should apply being the *lex specialis* which governs this particular situation. In the same vein, Article 293 of UNCLOS provides that "a court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention". Then, the silence of the ICJ Rules on Assessors would be filled by the letter of Article 289.

Conversely, no provision in the Statute or in the Rules prevents the ICJ from using the list of experts established in Annex VIII if a dispute requires the appointment

²²² Emphasis added.

²²³ The lists are available at the website of the Division for Ocean Affairs and the Law of the Sea of UN: http://www.un.org/Depts/los/settlement_of_disputes/experts_special_arb.htm. Last updated: 4 February 2014. Last Access: 30 November 2015.

²²⁴ Articles 286 and 287 (b) of UNCLOS.

²²⁵ T Treves, 2012, 485. This view is reinforced by the discussions about the Article during the *travaux préparatoires* when there was a discussion on the changing of the term "experts" to Assessors and it was said that "such an addition was not necessary as the International Court of Justice, when exercising jurisdiction under article 289, was not precluded from applying the provisions of its statute concerning assessors in a manner compatible with the provisions of article 289" (A/CONF.62/L.59 (1980), XIV Off. Rec. 130 (President) para 9 (h)).

of an expert in one of the four areas. Indeed, the use of this pre-established list of experts could be a way to legitimize the choice of experts in future.

3.2.5.. Experts appointed after the judicial phase.

As demonstrated in the *Frontier Dispute (Burkina Faso/Mali)* and *Frontier Dispute (Burkina Faso/Niger)* cases, experts may have a role also after the judicial phase in order to implement the judgment rendered by an international court. Likewise in the ICJ rules, there are no specific provisions in ITLOS' governing instruments envisaging such possibility. However, in the *Land Reclamation by Singapore in and around the Straits of Johor*²²⁶ case, experts were used as an instrument to catalyze the cooperation between the parties. As a commentator noticed, the Tribunal showed "a hybrid recourse to experts' advice"²²⁷. Although the situation in the *Land Reclamation* was not exactly similar to that in the *Frontier Disputes* case before the ICJ, this case demonstrates how the Tribunal can make recourse to experts as an instrument to cope with scientific uncertainties.

In this case, Malaysia requested the Tribunal to prescribe provisional measures suspending the land reclamation activities that were being performed by Singapore in the vicinity of the maritime boundary between the two States²²⁸. An expert was called by Malaysia and cross-examined by Singapore, The Tribunal made no direct reference to the evidence adduced by him. In the order granting provisional measures, the Tribunal held that

"the evidence presented by Malaysia does not show that there is a situation of urgency or that there is a risk that the rights it claims with respect to an area of territorial sea would suffer irreversible damage pending consideration of the merits of the case by the Annex VII arbitral tribunal"²²⁹.

Eventually, the Tribunal relied essentially on the assurances that Singapore offered to Malaysia during the proceedings regarding the activities of the land reclamation. Interestingly, during the hearings, the parties agreed to "jointly sponsor and

²²⁶ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures [2003] ITLOS Rep.

²²⁷ F Jacur, 'Remarks on the Role of Ex Curia Scientific Experts in International Environmental Disputes' in N Boschiero and others (eds) *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Springer 2013) 449.

²²⁸ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures [2003] ITLOS Rep 16 para 23.

²²⁹ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures [2003] ITLOS Rep 22 para 72.

fund a scientific study by independent experts on terms of reference to be agreed by the two sides"²³⁰. Ultimately, the Tribunal prescribed provisional measures under article 290.5 of UNCLOS, determining that

"Malaysia and Singapore shall cooperate and shall, for this purpose, enter into consultations forthwith in order to (a) establish promptly a group of independent experts (...) to conduct a study (...) to determine (...) the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation (...)"²³¹.

The report and proposals provided by the independent expert group were adopted by the parties in a Settlement Agreement and later used by the Annex VII arbitral tribunal and incorporated to the award²³². They proved to be fundamental to the settling of the dispute.

It is true that in this case the agreement between the parties played an important role in favouring the recourse to experts. However, ITLOS also used its powers to protect the mandate of experts when it held that

"having regard to the obligation of the parties not to aggravate the dispute pending its settlement, the parties have the obligation not to create an irremediable situation in particular not to frustrate the purpose of the study do be undertaken by a group of independent experts"²³³.

According to an author, the approach taken by ITLOS in *Land Reclamation* constitutes a "new method of exercising the [power to seek expert opinions] in collaboration with the parties"²³⁴ and this collaborative approach "promotes party contact, and encourages the parties to engage in negotiation, thus increasing the likelihood of the dispute being resolved amicably"²³⁵. The approach adopted by ITLOS seems, to a certain extent, similar to ICJ's appointment of experts when the parties so require. However, the Tribunal seems to have gone further when it prescribed measures for the protection of the activity of such experts. Indeed, the power of the Tribunal to

²³⁰ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures [2003] ITLOS Rep 24 para 86. Just to illustrate this compromise, one of the statements made by the Agent of Singapore, Mr. Koh, during the hearings was formulated as the follows: "Is Singapore willing to let our experts meet with their experts in order to narrow the gap between our respective scientific advisers? Yes, we are. Is Singapore willing to co-commission and co-finance a new scientific study by independent experts? Yes, we are. Is Singapore willing to undertake that it will take any necessary mitigation measure to avoid damage to Malaysia? Yes, we are". [PV.03/05, E, p. 36–39].

²³¹ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures [2003] ITLOS Rep 27.

²³² *Case concerning Land Reclamation by Singapore in and around the Strait of Johor, Malaysia v Singapore*, Award on Agreed Terms, The Hague, 1 September 2005, para 19.

²³³ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures [2003] ITLOS Rep 25 para 90.

²³⁴ C Brown (n) 116.

²³⁵ C Brown 117.

help the parties to the establishment of a group of experts and to protect their activities through provisional measures can be a useful tool when complex technical issues are involved in the dispute. However, this situation can hardly be imagined in the absence of a previous agreement or an obligation to cooperate between the litigant parties.

4.3. Assessment

The similarities, correspondences and commonalities between ITLOS and ICJ allow the drafting of some conclusions, especially on those points which can be relevant for the practice of ICJ.

With regard to the instruments at the Tribunal's disposal, it does not seem that ITLOS is better equipped than the ICJ to deal with scientific evidence. The major difference between the judicial bodies is that under article 289 of UNCLOS there exists a permanent list of experts. The possibility of having recourse to such list may contribute to a greater transparency of the method of appointment of experts. This possibility could also add some speed to the procedure of choice of experts. The fact that the Tribunal had never used the list, though, does not allow further speculation on the impact they could have in a dispute..

Another interesting aspect relates to Tribunal-appointed experts. The absence of tribunal-appointed experts or experts under the meaning of article 289 demonstrates that ICJ's reluctance in appointing *ex curiae* experts is shared by the Tribunal. More broadly this seems to be a general feature of tribunals settling interstate disputes.

The Tribunal seems to favour the use of party-appointed “independent” experts in order to obtain scientific evidence, an instrument vastly employed by the parties. The *voir dire* in the *Southern Bluefin Tuna* and the exchange of views in the *Bangladesh/Myanmar* revealed the difficulties that arise when experts directly collaborate with the parties. The main issue related to the question of the independence of experts. In both cases, however, such issue was approached in term of weigh of the evidence and not in terms of admissibility. Here, again, the approach seems to be the same as that of the ICJ. Nonetheless, expert evidence presented in the *Bangladesh/Myanmar*, which was not tested through cross-examination, proved to be useful to the Tribunal. That appears to contradict *Pulp Mills* and the favored use of party-appointed experts cross-examined in the *Whaling* and *Certain Activities/Road* cases.

A most general question that can be here speculated regards the future use of experts and the relationship of these two judicial bodies. The potential overlapping jurisdiction between ICJ and ITLOS may lead, in the future, to an eventual competition on which tribunal handles more appropriately technical and scientific evidence. This seems to be true particularly if one thinks that the use of experts is a common feature in cases concerning maritime delimitation. To attenuate this problem, the initiatives of dialogue, “in particular on legal and practical issues involved in the handling of law-of-the-sea cases”²³⁶, such as the working meeting that members of both judicial bodies held recently, seems to be welcomed.

²³⁶ "President Golitsyn welcomes delegation of judges of the International Court of Justice to Hamburg" ITLOS/Press 223 – 27 January 2015.

CHAPTER 3

THE ROLE OF FUNDAMENTAL PROCEDURAL VALUES IN THE USE OF EXPERTS BEFORE THE ICJ

1. Introduction: general principles of procedure or procedural values?

The path followed hitherto has focused on the examination of specific procedural issues related to the use of experts before the ICJ and other international tribunals. This perusal was instrumental not only to the identification of the relevant rules and practices concerning the appearance of experts in interstate litigation but also, concomitantly, to the recognition of some legal principles and procedural values that are of great relevance when experts are involved in a judicial proceeding.

In addition to Statute and Rules, proceedings before the International Court of Justice are governed by, in the words of the ICJ, some "general principles of procedural law"¹ which aim to guarantee its fairness and the good administration of international justice². Not infrequently, some of these principles find expression in specific provisions in the Rules and Statute. Just to offer a glaring example, one can safely contend that article 2 of the ICJ Statute, together with other provisions of the Rules, embodies the principle of judicial independence. In other circumstances, they correspond to general normative propositions inherent to the judicial function of the Court³. The existence and the nature of such principles, as well as their position within a legal theoretical framework has been largely discussed.⁴ However, little consensus

¹ The expression was used by the Court in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application to Intervene, Judgment, I.C.J. Reports 1990, p. 136, para. 102 and in *South West Africa (Second Phase)*, Judgment of 18 July 1966, ICJ Rep. 1966, p. 39. See E Lauterpacht, *Principles of procedure in International Litigation*, RC, vol. 345 (2009), pp. 437–484 and Quintana, *Litigation at the International Court of Justice*, 2015, pp. 147 ff; F Terré 'Théorie générale de la procédure et droit international public' *Revue de droit suisse* 93 (1974) 41.

² R Kolb, 'La maxime de la "bonne administration de la justice" dans la jurisprudence internationale' (2009) 27 *L'Observateur des Nations Unies* 5-21. Generally, see Sarvarian and others, *Procedural Fairness in International Courts and Tribunals* (BIICL 2015).

³ See G Hernandez, *The International Court of Justice and the Judicial Function* (OUP 2014) 281ff and C Brown, *A common law of international adjudication* (OUP 2007) 55ff.

⁴ For instance, R Kolb, 'General Principles of Procedural Law' in A Zimmermann and others (eds) *The Statute of the International Court of Justice: A Commentary* (OUP 2012); H Thirlway, 'Procedure of International Courts and Tribunals', in R Bernhardt (ed) III *EPIL* (1992) 1128 and, for a critical view, J Kammerhofer and A de Hoogh, *All Things to All People? The International Court of Justice and its Commentators* (2008) 18 *EJIL* 971-984. See also, more broadly, G Gaja, *General Principles of Law* [2013] *Max Planck Encyclopedia of Public International Law* and BI Bonafe and P Palchetti, 'Relying on General Principles in International Law' in C Brolmann and Y Radi (eds) *Research Handbook on the Theory and Practice of International Lawmaking* (Elgar 2016) 160ff.

seems to have been so far reached on their exact nature. What is important to underline, though, is the existence of certain overarching normative propositions that go beyond the Statute and the Rules of the ICJ and can have a bearing on the manner through which the Court conducts its proceedings.

If the clear content and the exact role of these principles is still disputed, a tentative explanation might be the rare recourse the Court has made to them in order to solve procedural problems, which generally find their solution in the Rules. As observed by one author, “many procedural problems, perhaps the majority, resolve themselves into questions of interpretation of the Statute, and are thus governed by the law of interpretation of treaties”⁵. Questions of interpretation also arise in relation to the determination of the specific content of these procedural principles. When one considers the problems arising from the use of experts before the ICJ, the extent to which they can be solved by the application and interpretation of the Statute and Rules appears to be limited: there are not many rules and their content is very precise and concise. Additionally, at least in the case of the Rules, these provisions were drafted in the middle of the 70’s, when most of the new problems of international adjudication were not yet known. At the same time, while several procedural principles might play a relevant role when experts are involved in a proceeding, the indeterminacy of their exact content may prove to be hard to overcome. That increases the role of the Court in interpreting such a rules. The Court has more terrain for judicial law-making in order to fill the potential normative gaps. In this exercise, it is submitted that the Court should follow some general principles and procedural values. In doing so, the Court would be adding to the legitimacy of the judgment and also of its activity – certainly at the eyes of parties, but also from at the eyes of the public.

At this stage a preliminary remark is in order. A distinction may be tentatively introduced between the use of general principles as a set of normative propositions and their use as guidelines. The dividing line, if any, seems to be that while the second can be considered as hypothetical ideal to be reached, a north to be followed, the first seems to display a more delineated content – even if not as clear as a positive rule. To explain this distinction, one could refer to the elaboration tailored by judge *ad hoc* Dugard, according to whom

⁵ HWA Thirlway ‘Procedural law and the International Court of Justice’ in V Lowe and M Fitzmaurice (eds) *Fifty Years of the International Court of Justice* (CUP 1996) 389-405.

The judicial decision is essentially an exercise in choice. Where authorities are divided, or different general principles compete for priority, or different rules of interpretation lead to different conclusions, or State practices conflict, the judge is required to make a choice. In exercising this choice, the judge will be guided by principles (propositions that describe rights) and policies (propositions that describe goals) in order to arrive at a coherent conclusion that most effectively furthers the integrity of the international legal order⁶.

An interesting element that can be identified in Dugard's opinion is the presence of "policies" as elements guiding the judicial choice and, ultimately, the activity of a court. The idea of policies can be similarly applied to the notion of procedural values: they are propositions describing the main goals of the procedure.

By the term "procedural values" I intent to comprise standards that are either general principles of procedural law (e.g. independence of the judicial body) or principles that are not yet recognized as such (e.g. the requirement of the transparency of the proceedings). My main objective is not to elaborate deeply on the nature of these values or on the precise relationship of such values with other rules, but to understand what role they play when experts appear in the judicial process. Put in other words, the main purpose of this chapter is to broad the spectrum of the examination and focus on more theoretical implications of the use of experts before international judicial proceedings. The broader aim of such an inquiry is to explore how these values could be improved and protected in a dispute before the ICJ.

This chapter shall focus on three main issues which may arise in relation to the participation of experts to the proceedings, namely (I) the transparency of the proceedings, (II) the role of the principle of due process and (III) the independence and impartiality of the experts. I will deal with problems hindering the observance of such values and explore the available possibilities to improve their observance.

A last methodological clarification is due with regard to the language of this chapter. With the purpose of avoiding repetition, when I use the notion of *ex curiae* experts the categories of experts to which I refer are the independent experts nominated by a tribunal to perform an inquiry (e.g. envisaged in article 50 of ICJ's Statute) and the experts that can sit with the Court to offer technical assistance (assessors or the experts employed by arbitral tribunals). The use of the term *ex parte* experts comprises the party-appointed expert which testifies before the Court and is submitted to a process of

⁶ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (2006) ICJ Rep 89, Separate Opinion Judge Dugard, para 10.

cross-examination and also the experts which assist the legal team without being cross-examined (*expert counsel*).

2. The problem of transparency.

One of the procedural values closely related to the appearance of experts in a judicial proceeding is the transparency of the proceedings. Even if transparency does not constitute the major characteristic of the work of international tribunals – as observed by Weiler, international courts operate in an "diplomatic *ethos* of confidentiality, [...] the hallmark of diplomacy"⁷ – it appears to exist a trend that considers transparency as an important (even necessary) value of international adjudication⁸. This growing trend seems to stem from, *inter alia*, the public function that international courts and tribunals are growingly called to exercise⁹.

Paradoxically, the concept of transparency in international law is not as transparent as one could expect. This seems to be so due to the absence of general normative guidelines dealing with the issue. In spite of the uncertainty on whether transparency constitutes a general principle of international law¹⁰, or whether it is a more global concept, a value to be taken into account by international institutions¹¹, it is nevertheless possible to transpose the notion to the context of international adjudication¹². Several rules in the Statutes and Rules of international courts privilege, by way of example, the publicity of the proceedings, the publication of the judgments and of the arguments sustained by the parties and the disclosure of sensitive information. However, as observed by Neumann and Simma, "the question may thus be asked to what extent this multiplicity of rules and norms may be conceived of as

⁷JHH Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement* (2001) 9/00 Harvard Jean Monnet working paper 6.

⁸As Arman Sarvarian observed, "[several] arguments point to the general trend of transparency becoming an important element of fairness in international law" (A Sarvarian, 'Procedural Fairness in International Courts and Tribunals' in Sarvarian and others, *Procedural Fairness in International Courts and Tribunals* (BIICL 2015) 4).

⁹In this regard see, generally A Von Bogdandy and I Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (OUP 2014).

¹⁰On the issue, see A Peters, *The Transparency Turn of International Law* (2015) 1 Chinese journal of global governance 3-15 and T Neumann and B Simma, 'Transparency in International Adjudication' in A Bianchi and A Peters, *Transparency in International Law* (CUP 2015) 436.

¹¹A Bianchi and A Peters, *Transparency in International Law* (CUP 2013).

¹²T Neumann and B Simma, 'Transparency in International Adjudication' in A Bianchi and A Peters, *Transparency in International Law* (CUP 2015) 436.

forming a comprehensive, overarching legal principle of international adjudication”¹³. In the absence of a straightforward and definitive answer to such a question, transparency can be generally understood, for the purposes of the present chapter, as "a culture or scheme in which relevant information (on law and politics) is available"¹⁴. As this definition may suggest, the key element of transparency as a legal value in a judicial context seems to be represented by the availability of relevant information to the actors involved in the litigation – to the parties, to the judges, to other States and, ultimately, to the general public.

In the context of the ICJ, where “proceedings before the Court are accompanied by elements of publicity”¹⁵, it can be argued that the normative basis for transparency can be traced to its public nature, i.e., the fact that it is an organ of a public international organization, settling disputes arising from States and whose proceedings are open to the public.¹⁶ Accordingly, article 46 of the Statute of the Court determines that the hearings shall be public, a norm which reverberates in other provisions of the Rules¹⁷. Such a provision seems to have been inserted in the Statute in order “to prevent secret proceedings which bear the risk of not guaranteeing a fair trial for the parties”¹⁸. Although these rules do not expressly refer to a general principle of transparency, it is conceivable to argue that they, to some extent, incorporate and embody such a principle. By the same token, some individual judges referred to the importance and even the necessity of the transparency of the proceedings in their individual opinions¹⁹.

¹³ T Neumann and B Simma, 'Transparency in International Adjudication' in A Bianchi and A Peters, *Transparency in International Law* (CUP 2015) 439.

¹⁴ A Peters, *The Transparency Turn of International Law* (2015) 1 Chinese journal of global governance 4.

¹⁵ S Rosenne, *The Law and Practice of the International Court* (Martinus Nijhoff 2006), 13.

¹⁶ R Kolb, *The International Court of Justice* (Hart 2013) 955.

¹⁷ Article 46 provides that "[t]he hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted" and finds correspondence in Article 59 of the Rules. Article 93 and 94 of the Rules establish that the reading of the judgments shall be read publicly.

¹⁸ S von Schorlemer 'Article 46' in A Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2012)1197–1206.

¹⁹ For instance, judge Gaja observed in a recent decision that “over the years the Court has increased the transparency of its deliberations” (Order of 7 December 2016, Request for the indication of provisional measures, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*). In the same sense, judges Simma and Al-Khasawneh mentioned that “[t]ransparency and procedural fairness are important because they require the Court to assume its overall duty for facilitating the production of evidence and to reach the best representation of the essential facts in a case, in order best to resolve a dispute” (*Case concerning Pulp Mills on the River Uruguay* (2010) ICJ Reports 14, Joint Dissenting Opinion of Judges Simma and Al-Khasawneh, para 13).

As rightly observed by one author, it is impossible to verify an *absolute* principle of transparency with regard to the ICJ proceedings²⁰. Even the publicity of the hearings prescribed by article 46 has its exceptions²¹. Evidently there is some room for confidentiality and secrecy in the work of the ICJ²². In spite of that, when it comes to the introduction of experts in the proceedings, it seems defensible that the more transparency the better. As it will be examined, greater transparency means not only the observance and the feasibility of the full exercise of the rights to comment upon the evidence, but it also means greater fairness in the proceedings and greater correctness in the outcome. Therefore, with regard to experts, the availability of information required by the principle of transparency can be examined in relation to, at least, three issues: (a) the process of choice of experts; (b) the transparency of the content of expert advice and (c) the way in which the expert evidence contributed to the reasoning of the Court.

2.1. Transparency on the choice of experts.

The manner through which an international court or tribunal chooses the expert who is going to assist it in gathering or assessing the evidence underlying a dispute may have important implications on the way a judgment is perceived by the parties. When a court of law nominates a third person (or group of persons) to participate in the proceedings, it introduces a novel element in the decision-making process. While the set of rules determining the identity of the judges and their process of choice is clear for litigating parties and the public²³, the same does not ring true for experts *ex curiae*. Even though this new person will not directly influence the outcome of the dispute, it can be sustained that there will be a presumption that adjudicators will attribute great

²⁰ T Treves 'Trasparenza e confidenzialità degli atti di parte davanti alla Corte internazionale di giustizia e al Tribunale internazionale del diritto del mare' in *Divenire Sociale e Adeguamento del Diritto - Studi in Onore di Francesco Capotorti* (Giuffrè 1999) 533.

²¹ The reading of such a rule is clear in establishing that the general rule is publicity "unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted".

²² As noted by Sir Arthur Watts "[t]he ways in which the Court operates are partly a matter of public record, and partly a matter of private deliberation, of which inevitably much less is publicly known". A Watts 'The International Court of Justice: Efficiency of Procedure and Working Methods-Report of the Study Group Established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law' in D Bowett, *The International Court of Justice: process, practice and procedure* (BIICL 1997) 44. Similarly, Guillaume pointed out that "the secrecy of deliberations is a crucial guarantee of a judge's independence" (G Guillaume, "Some thoughts on the Independence of International Judges vis-à-vis States" (2003) 2 *Law and Practice of International Courts and Tribunals* 165).

²³ KJ Keith, *International Court of Justice: Reflections on the Electoral Process* (2010) 9 *Chinese Journal of International Law* 49-81.

weight to their technical opinion. In addition, it seems to be particularly relevant when one considers that, in some circumstances, experts not only provide reports but also may participate in the Court's deliberations or in the drafting committee responsible for the tailoring of the judgment. Therefore, given the alleged and potential importance that experts might perform in a judicial proceeding, it is arguable that letting the parties, other interested States and the public know their identities and their process of choice entails a greater contribution to the transparency of the proceedings.

A clear harm to the transparency of the proceedings occurs when the Court decides to use *invisible experts* to get scientific or technical assistance. Although their contribution might be essential to a proper assessment of the evidence put before the Court and by the correctness by the judgment itself, the fact that neither the parties nor the public know their presence or their identities is, rightly, a source of strong criticism²⁴. This is evidently a trite remark well discussed in the scholarship. However, a less explored argument with regard to their use is the fact that neither the parties nor the public know exactly how they are selected by the Registrar to assist the court. This fact may arguably be considered a threat to the transparency of the proceedings.

With regard to the other experts *ex curiae*, also in this case the process of nomination does not seem to have followed a transparent method of choice.

In the *Corfu Channel* case, when the Court identified its necessity of having "recourse to experts on a number of difficult points", the Registrar of the Court wrote to the representatives of four governments at the Hague (Denmark, Sweden, Norway and the Netherlands) asking for names of "experts qui devraient être des spécialistes de questions maritimes, et en particulier de mouillage de mines et de déminage"²⁵. From the correspondence, it is not clear whether the parties were aware of such arrangements or had participated in the decision-making process. The method adopted by the Court then may seem justifiable in the light of the historical context. It seems reasonable to think that, in 1948, the Registrar would follow a diplomatic path and ask for technical assistance from states which would probably dispose of well trained naval officers. Had a similar method been adopted in recent times, it could constitute a potential source of criticism with regard to the respect of the transparency of the proceedings if the parties were not informed on the steps adopted by the Registrar.

²⁴ On the criticism to the category of invisible experts, see Chapter 1.

²⁵ *Corfu Channel Case (UK v Albania)* (Correspondence) [1949] ICJ Rep 4, 170.

Since the parties were responsible for the appointment of the expert which assisted the ICJ in the *Gulf of Maine* case²⁶, no harm to transparency, at least with regard to the knowledge of the parties, seems to emerge in this case. This precedent may lead one to argue that when cases are brought by Special Agreement, the problem of method of choice of experts tends to be minimized.

In the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, the Court informed the parties that it decided to appoint their own experts and that it “had identified two potential experts to carry out the expert mission thus decided”²⁷. In the Order there is no information available on how the Court had identified the two potential experts. From the point of view of the transparency of the proceedings, it would be laudable the identification of the criteria adopted by the Court in order to identify, choose and appoint such experts. By contrast, one can speculate on the reasons leading the Court not to disclose such an information. A first possible reason might be the absence of rules requiring the Court to do so. A second reason could be a question of judicial economy: since the process of appointing an expert might be considered in the outskirts of the dispute, little time should be spent in such a process. Whatever the reason, this solution is criticizable. It must be observed, however, that while the Court did not reveal the way it chose the expert nor gave the parties the opportunity to participate in such a choice, the ICJ offered to the parties the possibility to comment upon the Court’s choice. This is more a matter of guaranteeing the right of due process, to which I will revert later.

In the light of the previous practice of the Court, and considering the practice of other international tribunals previously examined, the main question to be raised is whether a *case by case* approach in choosing the experts for giving assistance in a dispute is the best option or whether it would be preferable that the Court follows pre-established criteria. The fact that the method based on a case by case approach has not given rise to specific problem may be regarded as indicative that it is working. However, the appearance of problems connected to the nomination of such experts cannot be excluded – as it frequently happens in municipal law systems.

²⁶ *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Order of 30 March) [1984] ICJ Rep 166, the Court observed that “by a joint letter dated 12 October 1983 the Agents of the Parties, after referring to Article II, paragraph 3, of the Special Agreement, requested the appointment of Peter Bryan Beazley, a Commander (retired) in Her Britannic Majesty’s Navy, as the technical expert contemplated by the said Article II”.

²⁷ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* (Order 16 June) [2016] (available at <http://www.icj-cij.org/docket/files/157/19054.pdf>) 1.

One may propose a set of potential solutions in relation to the methods for selecting experts in a transparent way. Just to give some examples, the Court could consult international organizations, other international tribunals, academic institutions or private enterprises in order to list the possible names. Alternatively, the parties could suggest names to the Court, or the parties could nominate two possible experts which, together, could nominate the expert who is going to assist the Court. Finally, the Court could select names from previous lists maintained by other tribunals/organizations, such as the lists of experts maintained by the PCA or by the Annex VIII of UNCLOS. What all these methods have in common is the publicity of the path followed by the Court. It is not submitted that the Court should follow a pre-established path in order to identify its experts. What is submitted is that the parties and the public should know *how* (the method) and *why* (the criteria adopted for the decision making) certain experts were chosen to assist the Court.

When it comes to experts *ex parte*, it is up to the parties, as a matter of judicial strategy, to reveal the reasons why certain experts were chosen to present evidence before the Court. It may nonetheless be argued that, if the parties made clear the reasons why they performed such a choice, this would certainly contribute to the transparency of the proceedings and as well to the enhancement of the evidential value attributed by the Court to their testimonies.

A different situation occurs when the parties omit to call as expert someone whose presence appears to be appropriate. For instance, in the *Whaling in the Antarctic* case, it may be observed that Japan had refrained from appointing as experts (or witnesses) the Japanese scientists who were involved in JARPA II programme. One might suggest that their presence would have been extremely useful in order to better understand the scientific premise of the programme. The Court did not fail to notice their absence. However, it is hard to infer from the judgment what would have been the Court's preference on this point. When examining the use of lethal methods in the JARPA II programme the Court stressed that it "did not hear directly from Japanese scientists involved in designing JARPA II"²⁸. A member of the Court asked Japan what analysis it had conducted on the feasibility of non-lethal methods prior to setting the sample sizes for each year of JARPA II. Japan did not offer any documents to clarify this issue and, eventually, the Court concluded that "[t]he absence of any evidence

²⁸ *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Judgment) [2014] ICJ Rep 226, para 138.

pointing to consideration of the feasibility of non-lethal methods was not explained”²⁹. From these two passages, one is left with the impression that the Court tacitly criticized the absence of a certain type of expert, i.e. an expert that had participated in the JARPA II programme and which Japan could have utilized to sustain its position. In this respect, the ‘non-explanation’ of this absence appears to have weakened Japan’s argument. However, as a counter-argument, one could say that the decision not to appoint Japanese experts who had participated in the development of the JARPA II programme was justified by the need to avoid a “biased witness”³⁰. In particular, it could be argued that, if Japan had appointed experts who had participated in the JARPA II programme, the Court would have given little evidential weight to the evidence presented by them since “a member of the government of a State (. . .) tends to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause”.³¹

b) Transparency on the content of expert advice.

The transparency of the content of the experts’ advice constitutes perhaps the most relevant issue in relation to the transparency of experts’ participation to the proceedings. That is so because knowing such an advice is not only a contribution to the transparency *per se*, but it is also a necessary step to the sound exercise of the right to comment upon the evidence presented. Therefore, the awareness on the content of the evidence given by an expert can be considered an element which contributes to the due process and the fairness of the proceedings.

When it comes to *ex parte* experts, there are no apparent issues relating to the transparency of their advice. Consequently, it competes also to the parties, through the procedure of cross-examination, to extract sensitive information from the appointed

²⁹ *Whaling in the Antarctic* (n 28)2828 para 141.

³⁰ The criterion which undermines the weight of the evidence presented by this kind of witness appeared in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 para 60 (Hereafter ‘Nicaragua case’): “[a] member of the government of a State engaged, not merely in international litigation, but in litigation relating to armed conflict, will probably tend to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause’ and is combined with the assumption that ‘[t]he Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission” (para. 64).

³¹ *Nicaragua case* (n 30) para 70.

expert. Likewise, the Court can put questions to party-appointed experts in order to test the evidence presented by them and ask for clarification of unexplored topics. Additionally, it is worth remembering that, depending on the circumstances of a given case, and depending on the role of the experts in the context prior to the judicial proceeding, it is always available to the Court the possibility of resorting to the power provided under article 49 of the Statute, by which it can "call upon the agents to produce any document or to supply any explanations". Through this possibility, the Court may avoid a harm to the transparency of the content of expert *ex parte* advice. When these experts plead as counsels, this power is obviously diminished and, thus, the transparency threatened.

When it comes to *ex curiae* experts, the main harm to transparency of the proceedings occurs when the parties are not allowed to have access to the content of the advice given by *invisible* experts. Since the exact content of their advice was never made clear, it is possible only to speculate on their functions: their advice could range from the interpretation and assessment of the evidence presented by the parties, the explanation of precise concepts involved in the dispute and even the calculation or preparation of coordinates and maps related to the dispute. Thus, the potential of their advice is decidedly high. As a consequence, the parties' right to comment upon the evidence given is also curbed. It was authoritatively argued that "[w]here technical matters are involved, the tribunal should be assisted by a qualified expert or experts whose identity, terms of reference and reports the parties should be made aware."³² In the case the Court decide, in the future, to appoint assessors, a harm to the transparency may be envisaged. That is because there are no rules granting to the parties the right to know the content of their advise. That would, naturally, impinge upon the right of the parties to comment on the evidence presented by them.

It is worth stressing that the disclosure of the report produced by assessors would not be incompatible with the requirement of the secrecy of the deliberations. While such requirement is expressly mentioned by the Rules of the ICJ³³, article 21 of the Rules also provides that "[t]he Court may however at any time decide in respect of its deliberations on other than judicial matters to publish or allow publication of any

³² E Lauterpacht, 'The role of the international judge' in *Le procès international: Liber Amicorum Jean-Pierre Cot* (Bruylant 2009) 191.

³³ Article 21 of the Rules of the Court establishes that "[t]he deliberations of the Court shall take place in private and remain secret. The Court may however at any time decide in respect of its deliberations on other than judicial matters to publish or allow publication of any part of them".

part of them". It might be argued that an assessor's opinion is to be regarded as part and parcel of the judicial deliberations, and therefore it is covered by secrecy. Admittedly, there seems to exist a considerable margin for interpreting what does constitute "deliberations on judicial matters". Considerations of transparency should lead to privilege a narrow interpretation of the term, thereby suggesting that the advice given on the factual background of a dispute shall be available to the parties. In this sense, an amendment of the Rules clarifying this point would be commendable.

A similar issue may arise in situations in which experts are called to help international courts and tribunals in drawing lines and preparing maps of a certain dispute. The reasons why the Court does not make this information available are not clear. Certainly, greater transparency about the individuals assisting the Court in performing such functions would be welcomed, also in order to understand the exact function these experts performed in the proceedings. That would not only help the parties and the public to understand how specific information got in the judgment, but it would also eliminate any doubts about the specific function a third person perform in a judicial proceeding.

From the point of view of transparency, undoubtedly the experts provided by article 50 are those who best observe its requisites. Article 57 of the Rules of the Court expressly sets forth that "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". In this sense, the disclosure of the information and the experts reports in the *Corfu channel* case constitutes a good example of the observance of the transparency of the proceedings in relation to the content of the expert advice. The manner in which the Court will handle the issue in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* may offer food for thought in this regard.

Whatever the outcome, one could speculate whether the right of the parties to have access to the expert opinion offered by article 57 of the Rules should not be extended in a general way in order to comprise every form of expertise inserted in the judgment. An eventual reform of the Rules of the court should take this possibility into account.

c) Transparency on how the experts have contributed to the reasoning of the Court.

It can be argued that, generally, a court of law should be clear on how it uses the evidence presented by the parties in establishing the facts underlying a dispute. In such a circumstance, the requirements of transparency blend with those imposed by the requirement to state the reasons of a judgment, the *devoir de motivation*. According to one author, “la motivation doit indiquer les faits que le juge a considéré comme démontrés, les preuves admises et les raisons pour lesquelles il rejette les autres dont la véracité lui a semblé douteuse”³⁴. In other words, since there are no strict rules on international law on how judges should weigh the evidence presented by the parties, conversely there exists a greater necessity to explain the criteria used to perform such a weighing. Ultimately, especially in the context of international tribunals, the motivation of the judgments, also in the factual ground, constitutes an element which contributes to the fairness and legitimacy of the whole procedure³⁵. The function of such a principle is threefold, according to judge Guillaume: to assure States that the international judge is adjudicating a dispute within its competence; to convince the parties that the judgment is well-reasoned and, as a byproduct, it plays the precedential function³⁶. In this line, one author has argued that “[l]a motivation des décisions de la CIJ constitue l'un des composants de la notion de procès équitable qui, sans appartenir à la terminologie des ses arrêts, transparait dans le procès devant la Court”³⁷.

Together with article 56 of the Statute of the ICJ, which prescribes that “the judgment shall state the reasons on which it is based”, para. 1 of article 95 of the Rules of the Court, establishes that a judgment “shall contain (...) a statement of the facts [and] the reasons in point of law”. Nonetheless, these rules did not set a clear obligation to the Court to demonstrate how the evidence presented contributed to the establishment of a certain fact. Neither the Statute nor the Rules of ICJ provide rules or criteria for the assessment of the evidence presented before the Court, with all the rules and criteria for

³⁴ E Jouannet, “La preuve comme reflet des évolutions majeures de la société internationale” in H Ruiz Fabri and JM Sorel (eds) *La preuve devant les juridictions internationales* (Pedone 2007) 242.

³⁵ In this sense, see LF Damrosch, ‘Article 56’ in A Zimmerman and others (eds), *The Statute of the International Court of Justice: a Commentary* (OUP 2012); H Ruiz Fabri and JM Sorel (eds) *La motivation des décisions des juridictions internationales* (Pedonne 2008); H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 36; E Lauterpacht (n 1) observed that one of the main elements of the international judge or arbitrator is “[t]o produce a properly reasoned decision and, where the exercise of discretion is required or permitted, to state the factors that have motivated the decision”.

³⁶ G Guillaume, “Commentaire” in H Ruiz Fabri and JM Sorel (eds) *La motivation des décisions des juridictions internationales* (Pedonne 2008) 91.

³⁷ G Cahin, ‘La motivation des décisions de la cour internationale de justice’ in H Ruiz Fabri and JM Sorel, *La motivation des décisions des juridictions internationales* (Pedone 2008)10.

weighing the evidence instead being developed by the Court through its case law³⁸. Nor did they set that, when the Court is confronted with complex or uncertain facts, it would be under an obligation to demonstrate how it established such facts. It remains that greater indications on the factors which contribute to the reasoning of the Court or to the formation of the conviction of judges are welcomed. This seems to be particularly true in cases where scientific evidence is concerned. Another argument which enhances the importance of the correct establishment of facts is that “the role of evidence before the Court becomes central in establishing a faithful historical record, in addition to assisting the Court in ascertaining the facts relevant to its legal decision with a view to reaching a just and well-reasoned outcome”.³⁹ Greater indications on how some facts were established also reinforce the faithfulness of the judgment as a historical record.

In the past, the ICJ has had only few occasions to evaluate and to weigh the evidential value of expert opinions.

As to experts *ex curiae*, in the *Corfu Channel case*, when referring to the independent experts appointed under Article 50, the Court stated that ‘it cannot fail to give great weight to the opinion of the Experts who examined the locality in a manner giving every guarantee of correct and impartial information’⁴⁰. In some passages of the judgment, the Court referred to the statements made by these experts in order to establish a certain fact⁴¹. The language used by the Court when referring to the evidence presented by the experts confirms the fact that great weight was attributed to their findings. For instance, the Court used the opinion of the experts to “confirm” the evidence produced by one party⁴², or to establish in a definitely manner a certain disputed fact⁴³.

Still with regard to Article 50’s experts, the Court seems to have developed another way to attribute greater weight to their expertise: by appending their technical report to the judgment. This is what happened in the *Gulf of Maine* and the *Corfu Channel* cases. As demonstrated in Chapter 2, this technique is also skillfully used by

³⁸ On this issue, see K Del Mar, ‘Weight of Evidence Generated through Intra-Institutional Fact-finding before the International Court of Justice’ (2011) 2 JIDS 393.

³⁹ P Tomka and V J Proulx, ‘The Evidentiary Practice of the World Court’, in JC Sainz-Borgo (ed) *Liber Amicorum Gudmundur Eiriksson* (2016 University for Peace Press) 3.

⁴⁰ *Corfu Channel case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 21.

⁴¹ *Corfu Channel case* (n 40) 13, 14, 20, 38.

⁴² *Corfu Channel case* (n 40) 14.

⁴³ *Corfu Channel case* (n 40) 13: [t]he documents produced by the United Kingdom Government and the statements made by the Court’s Experts and based on these documents show that the minefield had been recerttly laid. This is now established”.

arbitral tribunals. Undoubtedly this technique contributes to a greater transparency of the proceedings.

Less transparent is the way in which the Court uses the evidence presented by experts *ex parte*. Two recent cases in the case law of the Court seem to be of great relevance to exemplify its approach: the *Whaling in Antarctic* case, the *Certain Activities and Construction of a Road* cases⁴⁴.

The cases exhibit some commonalities. For instance, it can be said from the outset that, unlike in other cases, in these judgments the Court did not expressly identify general criteria relating to the evidential weight to be given to expert opinions. There are no statements in the judgment openly identifying factors that increase or decrease the evidential weight of an expert opinion. However, the Court has apparently used some of the criteria it generally applies to evaluate witness evidence⁴⁵. For instance, it seems to have attributed greater weight to uncontested opinions⁴⁶, to the agreement of expert's opinions⁴⁷ and when their statements were contrary to the positions defended by the party which have appointed them⁴⁸.

A more problematic situation seems to appear when the Court does not clearly dissociate the experts opinion from the positions sustained by the party which had appointed them. In some passages of the judgment the Court has referred to expert's opinions when they coincide with the position assumed by the State which had appointed them without attributing any particular weight. Thus, it is not clear whether

⁴⁴ *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* and *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* cases (Judgement of 16 December) [2015] (Available at <http://www.icj-cij.org/docket/files/152/18848.pdf>) (hereinafter *Construction of a Road and Certain Activities cases*).

⁴⁵ On this issue, see LC Lima 'The Evidential Weight of Experts before the ICJ: Reflections on the Whaling in the Antarctic Case' (2015) 6 *Journal of International Dispute Settlement* 621-635.

⁴⁶ *Whaling in the Antarctic* (n 28) para 190: "When assessing whether the number of whales killed was reasonable according to the scientific purposes of the JARPA II programme, the Court, referring to the opinion expressed by the expert appointed by Australia, noticed the fact that 'Japan did not refuse this expert opinion'"

⁴⁷ *Whaling in the Antarctic* (n 28) para 188: "[t]he evidence shows that the JARPA II Research Plan lacks transparency in the reasons for selecting particular sample sizes for individual research items. This is a matter on which the experts called by the two Parties agreed, as described above" (para 188). It also emphasized that "the process used to determine the sample size for Minke whales lacks transparency, as the experts called by each of the Parties agreed" (para 225). *Construction of a Road and Certain Activities cases* (n 44) 105: "[h]aving examined the evidence in the case file, including the reports submitted and testimony given by experts called by both Parties, the Court finds that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm, either with respect to the flow of the Colorado River or to Costa Rica's wetland".

⁴⁸ In relation to Costa Rica's allegation of harm caused by Nicaragua's dredging activities, the Court used the statement of "[Costa Rica's] main expert [observing] that 'there is no evidence that the dredging programme has significantly affected flows in the Río Colorado'". *Construction of a Road and Certain Activities cases* (n 44) 119.

these references were taken into account by the Court or whether they were only the reconstruction of the positions of the parties. This ambiguity renders the exact evidential weight of *ex parte* experts less transparent.

The analysis conducted so far leads to the conclusion that a greater transparency on the weighing of expert opinion have two immediate consequences. Firstly, it contributes to the legitimacy of the decision rendered by the Court. Moreover, the parties are thus made aware as to how exactly the Court used the evidence presented by them and, ultimately, can assess this use. This also add to the predictability as to the manner in which the Court treats, assess and evaluates the evidence to be presented by experts.

3. The right to comment on the expert's evidence: assuring due process.

Once the content of the expert evidence is made readily available to the parties to a dispute, the following step is to assure the right of the parties to comment on the evidence presented by such experts. This gears onto the question of the observance of the due process of law and, as a consequence, the fairness of the proceedings.

The idea of “due process of law” can be traced back to the protection of individual rights within the State environment⁴⁹. According to such an idea, which became one of the linchpins of the modern legal thought⁵⁰, every judicial proceeding has to observe a minimum set of criteria that protect an individual in the course of that proceeding; it serves to avoid abuses from State authorities and to assure an equal and fair treatment for individuals. Only through the observance of these criteria a proceeding could be considered as being “fair”⁵¹.

This legal notion could hardly be transposed to international law without adaptations – there is no risk of an abusive authority unfairly conducting the proceedings between litigating States. Nonetheless, it can be held that the requirement

⁴⁹ The expression is generally associated to article of the Universal Declaration of Human Rights, which prescribes that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

⁵⁰ P Atiyah, *Law and Modern Society* (OUP 1983) 42.

⁵¹ In this regard, see HC Black, *Black's Law Dictionary* (West 1968) 590 and L May, *Global Justice and Due Process* (CUP 2011) 107. For an historical account on the development of the notion in common laws systems, see ET Sullivan and TM Massaro, *The Arc of Due Process in American Constitutional Law* (OUP 2013) 1-37.

of due process of law in the context of an international judicial proceeding settling interstate disputes is to be construed taking into account values closely connected to the identity of the litigants, sovereign States, which are equal before the judge. As the Court once observed, "[t]he principle of the equality of the parties follows from the requirements of good administration of justice"⁵². Accordingly, the parties will be given equal opportunities to defend their case and to answer to the arguments of the other party, i.e., respecting the principle of the equality of arms⁵³. Connected to the equality of arms, another arguable criterion which composes the idea of due process of international law is the guarantee that the parties are to be able to comment on all pieces of evidence presented before the Court.

The principle which assures to the parties the right to comment upon the evidence presented seems to become more influential when it comes to technical or scientific evidence. Given the theoretical assumption that judges are not ideally trained in complex scientific or technical matters, it is arguable that assuring greater participation to the parties does not only serve to protect their procedural rights. It also adds to the correctness of the judgment. It allows the testing of the evidentiary material put before the Court by the parties through the method of cross-examination.

Since the right to comment upon the expert advice and cross-examination may be regarded as two essential elements of the principle of due process, I will examine each one of these elements in turn.

3.1. The right to comment upon expert advice.

The Statute of the Court is silent on the right of the parties to comment on the evidence put before the Court. The Rules, however, in several provisions guarantee the right to comment on the evidence presented. Just to mention some examples, the Rules assure to the parties the possibility of making comments on new documents introduced⁵⁴ or on the information offered by a public international organization⁵⁵. In

⁵² *Judgments of the Administrative Tribunal of the ILO upon Complaints made against Unesco* [1956] ICJ Rep 86.

⁵³ According to Thirlway, the principle assures that "the two (or more) parties have been given an equal opportunity to present their evidence and their arguments" (H Thirlway, 'Procedural Fairness in the International Court of Justice' in Sarvarian and others (eds) *Procedural Fairness in International Courts and Tribunals* (BIICL 2015) 244).

⁵⁴ Rules of the ICJ, article 56, para 3.

⁵⁵ Rules of the ICJ, article 69, para 2.

the same vein, article 58 of the Rules sets out the right of the parties to comment on the evidence produced when it states that

“[t]he Court shall determine whether the parties should present their arguments before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given”.

Similarly, article 67 of the Rules provides that “[e]very 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*”. Article 63 gives to the Court the power to, “at the request of one of the parties or proprio motu, take the necessary steps for *the examination of witnesses otherwise than before the Court itself*”. While article 67 and article 63 envisage a very precise situation in which the parties have the right to comment upon the evidence presented by *ex curiae* and party-appointed experts, respectively, it is not clear whether article 58 assures a general right to comment upon technical evidence.

The silence of the Rules leaves it open the question as to the extent to which the parties have the right to comment with regard three categories of experts: *invisible experts*, expert counsels and assessors.

Since the content of the advice of the invisible experts is not known, the parties are not materially allowed to offer any answer or input on the advice given by these experts. The harm to due process when they are employed appears to be flagrant. Similarly, when *expert counsels* plead on behalf of the parties on technical issues, the right of the opposite party to comment upon the evidence is equally restrained. The ideal scenario, as noticed by the Court in the *Pulp Mills* case, is that expert counsels should “be submitted to questioning by the other party as well as by the Court”⁵⁶. The appearance of these two categories of experts in a proceeding prevent either the opposite party, either the Court, of directly testing the evidence presented. While it seems to be clear that the evidential weight to be given to the *expert counsel* presenting evidence in this manner seems to be diminished, it is impossible to verify the impact that *invisible experts* may have in the formation of the conviction of the judge.

With regard to assessors, although the present Rules do not expressly recognize the right of the parties to comment upon the assessors’ contribution, there seems to be some merit in the view that the parties should be given this possibility. Should the parties be given the opportunity to comment upon an assessor’s contributions, some

⁵⁶ *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 72 para 167.

minor adjustments in the Court's procedure would be necessary. In this respect, the solutions envisaged in commercial arbitration, in the Rules for experts of the Permanent Court of Arbitration⁵⁷, or in some domestic legal systems⁵⁸, could be a useful source of inspiration. For instance, as it was argued elsewhere⁵⁹, where assessors are appointed by the Court at the initial stage of the proceedings or during the written phase, it would be advisable that they prepare a report on the content of their technical advice, to be submitted to the parties before the opening of the oral hearings. This would give the parties the opportunity to comment upon the report during the oral hearings and even potentially use it in support of their respective positions.

When assessors offer advice to the Court during and after the oral phase, the possibility of the parties commenting upon their advice may present difficulties that are not easily overcome – particularly due to the secrecy of the deliberations and the fact that, in principle, with the end of the oral hearings, there is no option for the presentation of comments by the parties. However, a number of solutions can be envisaged in order to tackle these obstacles. One such solution is elaborated by the Chartered Institute of Arbitrators in relation to the use of assessors in commercial arbitration. It provides that "(...) [w]here assessors give advice to the tribunal following the conclusion of the oral hearing, a convenient mode of ensuring that the parties have an opportunity to comment on that advice is to reduce it to writing and to send it, together with a draft of the proposed technical sections of the award, to the parties for their comments before the award is issued"⁶⁰. In other words, the proposal provides for a round of written comments by the parties, aimed exclusively at commenting on the report of the assessors. Although this would require an extension of the duration of the adjudicative procedure, such inconvenience may be regarded as inevitable when the Court is called to settle science-heavy or highly technical disputes.

⁵⁷ Article 29 of the 2012 PCA Arbitral Rules, inspired on the UNCITRAL Rules, sets forth several procedures fostering the interaction between the parties and the tribunal with regard the nomination and the participation of the experts in the proceedings.

⁵⁸ Article 4 of CPR 35.15 sets forth that "[i]f an assessor prepares a report for the court before the trial has begun (a) the court will send a copy to each of the parties; and (b) the parties may use it at trial".

⁵⁹ LC Lima, 'Expert advisor or non-voting adjudicator? The potential function of Assessors in the procedure of the international court of justice' (2016) 99 *Rivista di Diritto Internazionale* 1123-1146.

⁶⁰ This suggestion was sketched in the 'Guidelines on the use of Tribunal-Appointed Experts, Legal Advisers and Assessors' (Practice Guideline 10, para. 5.4) elaborated by the Chartered Institute of Arbitrators (available at www.ciarb.org/guidelines-and-ethics/guidelines/practice-guidelines-protocols-and-rules).

In an overall assessment of the present practice and problems faced by the ICJ in this regard, it is submitted that parties should be given the opportunity to comment upon every expert report or every expert advice offered to the Court. This would be in consonance with the general obligation laid down in article 58 of the Rules, as well as the specific obligation related to expert reports established by article 67, para 2. Moreover, assuring the right to comment of the parties seems to fulfill the requirements imposed by the principle of due process of law.

3.2. Advantages and shortcomings of cross-examining party-appointed experts.

Examination and cross-examination of witness and experts are a recent feature of international adjudication. The technique of testing witness in court through intense questioning, essentially developed within common law legal systems⁶¹, was not favoured in past practice of international tribunals mainly because of the little engagement these adjudicative bodies had with factual issues⁶². In consonance with the adversarial character of the proceedings in the *common law* experience, the main purpose of cross-examination seems to be

“to elicit information concerning the facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted”, and at the same time “to cast doubt upon the accuracy of the evidence-in-chief given against such party”⁶³.

In spite of these allegedly reciprocal advantages, the resorting to cross-examination in municipal level gives rise to some difficulties when it comes to scientific evidence. Indeed, either in English or American systems, the introduction and testing of scientific evidence through cross-examination has revealed some inherent problems of the adversarial system⁶⁴. For instance, the contested expert opinions may lead the lay

⁶¹ On the issue, see T Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Harvard University Press 2007) and D Dwyer, *The Judicial Assessment of Expert Evidence* (CUP 2008) 300 ff.

⁶² On the “lack of testimonial evidence in the ICJ” see A Riddell and B Plant, *Evidence Before the International Court of Justice* (BIICL 2009) 308ff. See also DV Sandifer, *Evidence before International Tribunals* (The Foundation Press 1939) 206.

⁶³ C Tapper, *Cross and Tapper on Evidence* (OUP 2007) 336. On the issue, see also A Keane and P McKeown, *The Modern Law of Evidence* (OUP 2012) 191 ff.

⁶⁴ According to an author, who examined the problems of scientific experts in common law courtrooms, some problems are “the embarrassing display of disarrayed definitions, contradictory opinions, and inconsistent experimental results; the double standard of the legal community, which prided itself on its adversarial ideology, but interpreted scientific disagreements as signs of moral corruption; the equally ironic partisanship of the scientific experts, who prided themselves on their collaborative ideology and unprejudiced search for truth, but performed in court as zealous advocates; the manipulations by the legal counsels who controlled the proceedings and conducted the questioning of the experts; the inability

jury to an inconclusive assessment of the evidence or may require the intervention of the judge in the case of abuse – which, at least in theory, could be considered contrary to the neutrality of the judges with regard the assessment of evidence in that system. Yet, in the context of the ICJ, the absence of a lay jury responsible for assessing the facts and the mixed character of the proceedings with *civil law* elements seems to pose different questions when the experts are called by the parties to present technical evidence.

From the outset, it is worth noting that the Rules contain no indication about the method for examining, cross-examining and re-examining party-appointed experts. This did not prevent the Court from developing its own method for cross-examination of experts presenting evidence orally before the Court, pursuant to the general power granted to the Court by article 63 of the Rules. The procedures of examining party-appointed experts followed in the *Whaling in Antarctic*, the *Certain Activities and Construction of a Road* cases seems to confirm this point⁶⁵. What is interesting to underline, though, is the fact that, in the two recent cases mentioned above, the Court seems to have indicated a preference of testing evidence by the method of cross-examination. Through its Registry and at the beginning of the proceedings, the Court even *suggested* that the parties should call experts who offered technical support to the legal teams in the writing phase:

“the Registrar informed the Parties that *the Court would find it useful if*, during the course of the hearings in the two cases, they could call the experts whose reports were annexed to the written pleadings, in particular Mr. Thorne and Mr. Kondolf. The Registrar also indicated that the Court would be grateful if, by 15 January 2015 at the latest, the Parties would make suggestions regarding the modalities of the examination of those experts”⁶⁶.

It is not surprising that the Court seems to have favoured such a method for testing complex evidence. The clearest advantage of conducting the procedure of cross-examination is the possibility to test the evidence presented in the light of an adversarial logic. In this vein, it is conceded that through the process of cross-examining experts the Court is allowed to identify the coherence (and the incoherence) of certain factual positions. This appears to be confirmed by the fact that the Court seems to attribute a greater weight to the agreement of experts in both cases.

of the lay jury to appraise the conflicting scientific claims” (T Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Harvard University Press 2007) and D Dwyer, *The Judicial Assessment of Expert Evidence* (CUP 2008) 108).

⁶⁵ The way in which the Court has took into account and weighed the evidence presented by party-appointed experts was object of examination in Chapter I

⁶⁶ *Construction of a Road and Certain Activities cases* (n 44) 30. Emphasis added.

By favouring the cross-examination of experts and asking the parties to submit their experts to cross examination, the Court seems to favor also the observance of the principle of due process. Allowing the parties to test the evidence put before the Court seems to be a good way to guarantee the participation of the parties and also the correctness of the judgment. However, there are two issues that seem to arise when cross-examination is used to test complex evidence in the context of ICJ. The first (a) is the potential difficulties arising from the absence of clear rules on cross-examination. The second (b) is the reproduction of the shortcomings arising from municipal law, especially the potential risks of clash of expert opinions and, therefore, the overlapping of expertise. I will revert to these two arguments in turn.

* * *

(a) The assumption that the ICJ's procedure strikes a balance between *civil law* and *common law* systems stems not only from article 9, which urges for the assurance of the "whole the representation of the main forms of civilization and of the principal legal systems". It can also be traced to several features of the Statute, Rules and the jurisprudence of the Court⁶⁷. One of the possible consequences of a disequilibrium in the reception of techniques from different legal systems is the risk of favouring the party which better controls the techniques in which a specific procedure was modeled. This question was explored by judge Cot in his separate opinion in the *M/V Louisa* case before ITLOS. After noting that the procedures for the examination of witnesses "are modelled on the common-law rules but are not as rigorous", judge Cot emphasized that such procedure "clearly favours the party with full mastery of the techniques of adversary procedure"⁶⁸. Such an imbalance would jeopardize the parties' right of full defense and, ultimately, the principles of due process.

An element that would attenuate the alleged disequilibrium is the fact that, in the process of examination of party-appointed experts, judges are also allowed to ask questions to experts. Such a possibility would, at least in theory, avoid that the outcome of the procedure of cross-examination were exclusively controlled by the parties. Furthermore, it is noteworthy that, considering the practice until now developed by the

⁶⁷ See E Valencia-Ospina, 'Evidence before the International Court of Justice' (1994) International Law FORUM du droit international 202-207.

⁶⁸ *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)* (Merits, Sep. Op. Cot) [2013] ITLOS Rep para 58. In the concrete case, judge Cot observed that "[i]n the Louisa case, the Spanish side did not object to the wording of questions put by the American counsel unless it considered the honour of the Kingdom of Spain to be at stake".

Court, party-appointed experts usually submit a previous written report to the judges. Equipped with these reports, judges are theoretically best prepared for formulating questions. Another element which seems to attenuate the potential disequilibrium is that the parties usually have lawyers coming from both legal traditions integrating their legal teams⁶⁹.

In any case, clearer rules on the conduction of cross-examination might be a way to curb an eventual disequilibrium. In this sense, according to Malintoppi,

“[t]he Court could provide greater guidance to the parties in setting forth specific rules for cross-examination, ie prohibition of leading questions, possibility for counsel to raise objections and in what circumstances, clear guidelines on interaction with the witness outside the courtroom, etc. This may also be of particular assistance for counsel who are not trained in the common law tradition”⁷⁰.

It could also be added that, even the counsel who is trained in the common law tradition would benefit from clarity in the rules.

The absence of clear rules on how to perform the cross-examination may lead to other problems as well. While the cross-examination conducted in the *Whaling* case occurred without obstacles, the same does not ring true to that in the *Certain Activities and Construction of a Road* cases⁷¹. In the last cases, the cross-examination was characterized by constant objections from the counsels. This led to an intervention by the President recalling the parties to follow the rules. An author criticized the fact that

“President was forced to intervene and remind counsel of the procedure that the Court had set out at the beginning of the proceedings and to urge counsel to restrict their line of questioning to those issues that were the subject of the cross-examination”⁷².

In its judgment, the Court made no commentaries nor drew inferences from such an episode. Nonetheless, it seems reasonable to think that clearer rules on the limits and possibilities of cross-examination might help to avoid future complications on this issue.

⁶⁹ On this issue see, for instance, M Lachs, ‘Evidence in the Procedure of the International Court of Justice’ in *Essays in honour of Judge Taslim Olawale Elias* (Nijhoff 1992) 265-276.

⁷⁰ L Malintoppi, ‘Fact Finding and Evidence Before the International Court of Justice (Notably in Scientific-Related Disputes)’ (2016) 7 *JIDS* 427. Similarly, J Devaney, ‘Evidentiary Fairness and Experts in International Tribunals’ in A Sarvarian and others (eds) *Procedural Fairness in International Courts and Tribunals* (BIICL 2015) 197, to whom “in order for cross-examination to function properly all involved must know exactly what is required of them – witnesses, experts, counsel and judges alike. As such, it is becoming increasingly clear that the Court’s relaxed approach of generally sketching out the procedure (examination-in-chief, cross-examination and re-examination) at the beginning of the case does not provide enough guidance to those not familiar with the process of cross-examination (or those seeking to exploit the room for manoeuvre left by the generic nature of the Court’s approach)”.

⁷¹ J Devaney (n 70) 197.

⁷² J Devaney, (n 70) 198.

(b) As discussed before, one of the *rationales* behind the cross-examination in municipal legal systems is the idea that, if effectively conducted, a likely outcome of such a process is the emergence of the “truth”. As enthusiastically defended by one author in the past, cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth”⁷³. However, the truth might prove to be hard to discover when its content is composed by technical or scientific elements and, therefore, some problems might arise in the performance of the cross-examination.

As noted by some authors⁷⁴, a problem may arise when experts take different positions on controversial questions of technical and scientific nature, a situation which has been labeled by the Court as “the clash of expert opinions”⁷⁵. As an American judge, referring to his own national experience, once observed, “[w]hen there are expert witnesses on opposite sides, who therefore clash, often they cancel each other out in the eyes of the jurors”⁷⁶. The situation does not seem to be different in the context of international litigation. Practice reveals that only rarely a legal team is not assisted by an expert. International tribunals seem to have developed some techniques in order to deal with conflicting expert opinion⁷⁷. For instance, when the “clash” arises, the instrument of cross-examination seems to be particularly important for determining the existence of a “common evidentiary ground” by the identification of points in which the party-appointed experts agree. Another technique is the weighing of the evidence by virtue of the interest/impartiality of the experts. Obviously, none of these techniques are absolute or definitive to deal with the problem of technical or scientific evidence.

What seems to emerge is that, in the circumstances of clash of expert opinions, although observing fully the requirement of due process, the technique of cross-examination of party-appointed experts may reveal to be insufficient in order to

⁷³ J. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1923), rev. edn Tiller (Boston: Little, Brown, 1983) 1367.

⁷⁴ Pulp Mills case (n 56), Separate Opinion of Judge Cancado Trindade, paras 148 and 151. T Scovazzi, ‘Between Law and Science: Some Considerations Inspired by the Whaling in the Antarctic Judgment’ (2015) 14 QIL-Questions of International Law 28 <www.qil-qdi.org/between-law-and-sciencesome-considerations-inspired-by-the-whaling-in-the-antarctic-judgment-2/> accessed 31 August 2015 28; C Brown, *Common Law of International Adjudication* (OUP 2007) 113; C Foster, ‘New Clothes for the Emperor? Consultation of Experts by the International Court of Justice’ (2013) 5 JIDS 5; D Peat, ‘The use of Court-Appointed Experts by the International Court of Justice’ (2014) 84 BYIL) 280ff.

⁷⁵ *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12 para 147.

⁷⁶ R Posner, *Reflections on Judging* (Harvard University Press 2013) 294.

⁷⁷ G Gaja, *Assessing Expert Evidence in the ICJ* (2016) 15 *The Law and Practice of International Courts and Tribunals* 409-418.

properly tackle the scientific schism. This situation may lead one to wonder whether the procedure of examination of party-appointed experts may be conducted in different way or may be improved in order to respect the observance of the principle of due process. I will revert to this question later.

4. The problem of the independence and impartiality of experts.

The requisites of independence and impartiality are keystones of the idea of a fair trial and have been largely explored in the international legal literature⁷⁸. According to such requisites, a permanent international tribunal, in order to perform its functions properly and soundness, must function without the influence of States and without biases of any sort. The perception of impartiality and independence of a certain tribunal may impact directly in its role within the legal system. As pointed out by Guillaume, independence and impartiality impinge on “the trust of those subject to its jurisdiction”⁷⁹; thus, they are elements which contribute to the legitimacy and the effectiveness of the tribunal.

There seems to be little doubt in considering independence and impartiality of an adjudicative body as general principles of international law – either because they are usually set forth in several rules of international tribunals, or because they find correspondence in municipal legal systems⁸⁰. Nonetheless, most of the rules dealing with these requisites at the international level usually address almost exclusively the manners through which judges are nominated, selected, and tenured. For instance, in the context of the International Court of Justice, in addition to article 2 of the Statute, the

⁷⁸ See, for instance, H Lauterpacht, *The Function of Law in the International Community* (OUP 2011) 210-245; E Brown Weiss ‘Judicial Independence and Impartiality: A Preliminary Inquiry’ in LF Damrosch (ed) *The International Court of Justice at a Crossroads* (Transnational Publishers Dobbs Ferry NY 1987) 123–54; D Zimmerman, *The Independence of International Courts* (Hart 2014); R Mackenzie and P Sands, ‘International Courts and Tribunals and the Independence of the International Judge’ (2003) 44 *Harvard International Law Journal* 271-285; B Olbourne, ‘Independence and Impartiality : International Standards for national Judges and Courts’ (2003) 2 *Law and Practice of International Courts and Tribunals* 97; G Guillaume, ‘Some thoughts on the Independence of International Judges vis-à-vis States’ (2003) 2 *Law and Practice of International Courts and Tribunals* 163-168; C Brown, ‘The Evolution and Application of Rules concerning Independence of the “International Judiciary” ’ (2003) 2 *Law and Practice of International Courts and Tribunals* 63; C Santulli, ‘Les juridictions interetatiques a vocation universelle (CIJ et TIDM)’ in H Ruiz Fabri and JM Sorel (eds), *Indépendance et impartialité des juges internationaux* (Pedone 2010) 225ff; KJ Keith, ‘International Court of Justice: Reflections on the Electoral Process’ (2010) 9 *Chinese Journal of International Law* 49-81; K Oellers-Frahm, ‘International Courts and Tribunals, Judges and Arbitrators’ *Max Planck Encyclopedia of Public International Law*, 2013.

⁷⁹ Guillaume (n 78)163.

⁸⁰ UN Basic Principles on the Independence of the Judiciary.

independence and impartiality of judges are assured by a set of provisions of the Statute and Rules (such as, for instance, articles 17 and 24, dealing with the incompatibilities of the judicial function).⁸¹

The judge is certainly at the focus of the notion of independence and impartiality of an international tribunal. However, as observed by some scholars⁸², the extent to which an international tribunal can be perceived as independent depends on a number of factors, which amplifies the range of application of these principles. It seems reasonable to consider that these ideas have an overreaching scope of application. In its own perception, the ICJ pointed out that it is not the single judge, but the whole “Court [which] acts (...) independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute”.⁸³ Therefore, together with the rules addressing directly adjudicators, there are undoubtedly other factors that contribute to enhancing or diminishing the independence and impartiality of an international tribunal. This argument seems to find confirmation in article 5 of the 2011 resolution of the *Institut de droit international* on the ‘Position of the International Judge’, which sets forth that

“[t]he independence of courts and tribunals depends not only on the procedures of selection of judges and their status, but also on the way in which the court or tribunal is organized and operates”.⁸⁴

In this light, it can be held that the way an international Court uses, employs and manages the experts which appear before it may constitute factors influencing the perception of independence and impartiality of a given tribunal. Every category of expert introduces into the judicial process an innovative element through its views and opinions. Experts interact, directly or indirectly with the evidentiary body of a dispute. The way the Court upholds the experts’ views, give weight to these views and assure that they are not biased contributes to the overall perception of independence and impartiality of the Court.

⁸¹ On the question of independence and impartiality of the ICJ, see MJ Aznar-Gómez, ‘Article 2’ in A Zimmermann and others (eds) *The Statute of the International Court of Justice: A Commentary* (OUP 2012) and GI Hernandez, ‘Impartiality and Bias at the International Court of Justice’ (2012) 1 *Cambridge Journal of International and Comparative Law* 183-207.

⁸² E Benvenisti and GW Downs, ‘Prospects for the Increased Independence of International Tribunals’ (2011) 12 *German Law Journal*, 1057-1081; A Von Bogdandy and I Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (OUP 2014) 156.

⁸³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding SC Res. 276* (Advisory Opinion) [1970]ICJ Rep 16, 23 para 29.

⁸⁴ Institut de Droit International ‘Rhodes Resolution on the Position of International Judges’ (9 September 2011).

Similarly to the rules employed by some national systems to avoid expert bias, the International Court of Justice seems to have developed some techniques in order to deal with this issue. In this regard, it must also be recalled that the rules of the ICJ do not foresee a specific procedure for contesting the admissibility of expert evidence – which does not necessarily prevent the Court from doing it in the future. Therefore, when there are signs of partiality and dependence of any specific expert, these issues would usually impact on the weighing of the evidence. As previously mentioned, the ICJ has not offered much with regard the general criteria it adopts in order to weigh the evidence adduced before it. It usually adopts a *case by case* approach. Nonetheless, some criteria were offered by the Court along its case law when assessing witnesses and experts and they are useful in order to verify what elements might be adequate to improve the impartiality and independence of the involvement of experts in the proceedings. The investigation here conducted shall focus, then, on factors that contribute to the perception of independence and impartiality of experts and the procedural techniques at the Court’s disposal in order to deal with potential bias.

Before dealing directly with the abovementioned elements, a distinction must be drawn for the present purpose between independence and impartiality. As observed by an author, “essentially, judges are independent if there is no external source of control of influence which prevents them from acting in an autonomous fashion; and they fulfill their role with impartiality if there is no bias in the disposal of a case”⁸⁵. In other words, while independence means the absence of connections that may be regarded as improper for the exercise of the judicial function, impartiality requires the absence of bias pulling the adjudicator’s intentions towards one of the parties. In general terms, this distinction can, to great extent, be applied when it comes to experts. While the independence of an expert can be assessed by the absence of improper connections compromising the participation of the experts in a proceeding, his/her impartiality may be verified by the absence of elements pulling his/her technical or scientific opinion towards one of the parties.

4.2. Factors enhancing and diminishing independence and impartiality of experts.

⁸⁵ Brown (n 3) 75.

There are some elements that can enhance and diminish the perception of independence and impartiality of an expert. In relation to the independence, given that it has to do mainly with the incompatibilities of the function, it is necessary to distinguish between the incompatibilities applicable to *ex parte* and *ex curiae*.

Since *ex parte* experts are part of the strategy of the parties in order to best present its arguments and evidence, it is up to the party to ensure that there are no incompatibilities which should prevent a certain individual from acting as the party's expert. The Court will take into account this issue when determining the extent to which it can rely on the evidence presented by the expert. In this respect cross-examination is an important component in that it permits to identify any elements of bias. This logic seems to be confirmed by the approach assumed by the Court in the *Pulp Mills* case. In that occasion, the Court observed that

“As for the independence of such experts, the Court does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties”.⁸⁶

Aside to avoiding the discussion on the independence of experts, the excerpt seems to confirm the fact that the Court, when possibly faced with a question of independence of experts, may deal with the issue by engaging in a discussion on the merits, reliability and authority of the evidence – in other words, weighing the evidence adduced.

When it comes to *ex curiae* experts, the question of incompatibilities appears more relevant. Since it seems to exist a presumption that greater weight shall be given to the experts appoint by the own Court, the Court should be more careful in the process of choice and appointment of experts or assessors. The absence of pertinent practice only allows little speculation on the issue. For instance, it is interesting to note that the Court avoided – for obvious reasons – to appoint experts having the same nationality of the litigants. In the same way, it is defensible to think that the Court should avoid appointing experts which had previously participated to some extent in the dispute (unless the parties agrees otherwise) or which have offered assistance in similar issues and whose opinion could be, to some extent, compromised⁸⁷. In this regard, in order to avoid problems with independence of *ex curiae* experts, the present practice of the

⁸⁶ *Pulp Mills* (n 56) para 168. Emphasis added.

⁸⁷ In this regard, see F Mégret, 'International Judges and Experts' Impartiality and the Problem of Past Declarations' (2011) 10 *Law and Practice of International Courts and Tribunals* 31-66.

Court of consulting the parties in relation to the names it intends to appoint is welcomed and in conformity with the requirements determined by that principle.

Whereas it seems to exist no problems regarding the independence of experts which appear before the ICJ, the same is not necessarily true in relation to their potential impartiality. This is so especially because it is not easy to assess the factors that may contribute to the perception of impartiality of a given expert. As observed in chapter one, the Court seemed, to some extent, to employ the criteria it uses to assess witness testimony in order to evaluate the evidential weight of an expert opinion given by experts *ex parte*. As observed by one author regarding the witness which testify before an international court,

“in general, in so far as they can be established, the antecedents and character of a person would influence the probative value to be attributed to his testimony, and if conscious untruth is found in a testimony, no weight will be attached to such statements”⁸⁸

The most obvious source of bias to experts is its connection to the client – a problem well detected before national courts⁸⁹. As observed an American judge in relation to his national context, “[a] lawyer is not allowed to pay a lay witness to testify; the potential for corruption is obvious. But he may pay an expert witness — and the potential for corruption is obvious”⁹⁰. This quote seems to embody the idea that *ex parte* experts may be considered “hired guns” working for their clients and not necessarily for the “scientific interest”. In other words, their scientific opinion risks to be conditioned to the interests of the party which has appointed them.

That seems to be the major risk of employing exclusively party-appointed experts in order to furnish technical and scientific evidence to the Court: forming the evidentiary background of a case only based on a potentially biased source of technical and scientific evidence. The fact that the ICJ has relied mainly in the agreement between experts or used their statements when contrary to the interests of the party which appointed them seems to be an indicative that the Court is aware of this risk. That allows one to conclude that, in the light of their potential harm to the impartiality of the judgment, party-appointed experts have a restricted role in the proceeding.

⁸⁸ B Cheng, *General principles of law as applied by international courts and tribunals* (Grotius 1987) 314-315.

⁸⁹ See, in this regard, SR Barley and G Kunda, *Gurus, Hired Guns and Warm Bodies: Itinerant Experts in a Knowledge Economy* (Princeton University Press 2004); RA Posner, ‘The Law and Economics of the Economic Expert Witness’ (1999) 13 *Journal of Economic Perspectives* 91-99; D Dwyer, *The Judicial Assessment of Expert Evidence* (CUP 2008) 334 ff.

⁹⁰ R Posner, *Reflections on Judging* (Harvard University Press 2013) 294.

4.3. Procedures envisaging to attenuate biases: the oath and the cross-examination.

The Statute, Rules and practice of the Court envisage two particular proceedings aiming at assuring the independence or impartiality of experts when they appear before the Court: the solemn declaration (or oath) that an expert is obliged to make before testifying and the procedure of cross-examination, already examined.

While cross-examination might constitute a skillful way for testing the reliability and also the origins of the evidence adduced by experts, one can wonder to what extent the solemn declaration contributes to enhancing the impartiality and independence of experts. It can be conceded that the solemn declaration might have some influence. Experts which testify before an UN Court under oath may certainly feel less inclined to make imprecise statements or assertions not coherent with his/her scientific findings. They are recalled either of their obligations to their own conscience and to their field of work as scientists, but also to their obligations to the own Court as agents of the judicial process. However, in practical terms, it is difficult to precise what are the real implications of the solemn declaration beyond the symbolic legitimization of the process. As held by an author,

“oaths and presumptions have developed in the western legal tradition primarily to handle situations where the court has felt that reliable factual evidence has come to an end, but that the interests of justice would not best be served by ending deliberations”⁹¹.

The historical root of the solemn declarations reinforces the argument that its usefulness has a limited scope. It has been argued that “an oath always enhances the probative value of a statement whether emanating from a disinterested person, or from an interested party”⁹². However, in the practice of the ICJ little elements seems to support such an assertion. While the Court in its recent case law has insisted in the cross-examination as a necessary element for testing the evidence presented, there are no elements that allow further conclusions on the specific weight that solemn declarations carries before the Court.

⁹¹ D Dwyer, *The Judicial Assessment of Expert Evidence* (CUP 2008) 216. On this question, see also J Beardsley ‘Proof of Fact in French Civil Procedure’ (1986) 34 *American Journal of Comparative Law* 459–86, 472.

⁹² Cheng (n 88) 313.

In spite of the indetermination of the weight the oath by itself can carry with regard the impartiality and independence of experts, there are some interesting elements that can be highlighted when comparing the different categories of experts . The Rules of the Court determine that either experts *ex curiae* and *ex parte* should make solemn declarations when they appear before the Court. The content of such declarations is distinct and enables some speculations. For instances, very similarly to the oaths of municipal legal systems, party-appointed experts are required, according to article 64(b) of the Rules, to assert that:

“I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth, and that my statement will be in accordance with my sincere belief.”

One may suggest that when the Rules requires the party-appointed expert to testify “in accordance with *my* sincere belief”, this provision has as purpose to stress the dissociation between expert and the appointing party. This argument would reinforce the alleged impartiality of party-appointed experts. Thus, after the oath, the party-appointed expert could be considered not as an interested member of the defensive team of a State, but an independent scientist having an individual belief on the discussed topic. One should be note, however, that there are no other textual elements recalling independence or impartiality.

When it comes to experts *ex curiae*, the reference to impartiality is textually present in almost all the categories. For instances, assessors are required under article 8.5 of the Rules to make a declaration very similar to those made by judges:

“I solemnly declare that I will perform my duties as an assessor honourably, *impartially* and conscientiously, and that I will faithfully observe all the provisions of the Statute and of the Rules of the Court.”⁹³

When it comes to Court-appoint experts in the sense of article 50, article 67 of the Rules sets forth the requirement of those experts making a solemn declaration, without specifying its specific form – probably in order to allow the Court to adapt the declaration in consonance to the necessities of the case. For that reason, the declarations have changed a little over the years. For instance, in the *Corfu Channel* case, the declaration was

“I solemnly declare upon my honour and conscience that I will perform my duties in all sincerity and will abstain from divulging or using, outside the Court, any secrets of a military or technical nature which may come to my knowledge in the course of the performance of my task.”

⁹³ Emphasis added.

In the recent *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*, the requirement of impartiality was introduced and Court-appointed experts were required to swear⁹⁴ that

“I solemnly declare, upon my honour and conscience, that I will perform my duties as expert honourably and faithfully, *impartially* and conscientiously, and will refrain from divulging or using, outside the Court, any documents or information of a confidential character which may come to my knowledge in the course of the performance of my task”.⁹⁵

A glimpse on the texts of all solemn declarations reveal some interesting commonalities and distinctions aiming at guarantee the independence and impartiality of these experts. The evident common element is that all declarations appeal to the psychological effect invoking honour and conscience of experts.

However, it seems relevant that in the recent *ex curiae* experts’ declarations and in the one envisaged for assessors, the “impartiality” is a necessary textual element prescribed by the oath. It could be argued that, on account of its similarity with the oath made by judges⁹⁶, these categories of experts are more connected with the impartiality and independence required by the whole adjudicative body. This point is strengthened by the fact that Court-appointed experts are also required to swear upon their duty of confidentiality on the issues disclosed by the parties.

The last point that could be explored with regard the oath is whether the categories of experts which are not required to perform the solemn declarations may be considered more or less impartial because of the absence of this ritualistic procedure.

For instance, in relation to the *expert counsel*, the absence of an oath might lead to the conclusion that they are not as independent and impartial as other kind of experts are. Against this argument lies the fact that, when the Court criticized their use in the *Pulp Mills* case, although the Court mentioned the absence of cross-examination, it made no reference to the absence of the solemn declaration. In relation to municipal legal systems, “parties do not take an oath, although non-parties do, since the factual statements of parties do not constitute evidential material in the same way that the

⁹⁴This declaration resembles the one made in the *Gulf of Maine* case, where the expert was required to state that “I solemnly declare, upon my honour and conscience, that I will perform my duties as technical expert honourably and faithfully, impartially and conscientiously and will refrain from divulging or using, outside the Chamber of the Court, any documents or information of a confidential character which may come to my knowledge in the course of the performance of my task”.

⁹⁵ Emphasis added.

⁹⁶ Article 4.1 of the Rules sets forth that “The declaration to be made by every Member of the Court in accordance with Article 20 of the Statute shall be as follows: ‘I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously’”.

statements of third parties do”⁹⁷. If this statement can be held true with regard the procedure of the ICJ, the opinion expressed by an *expert counsel* can be regarded as less weighty than those of the experts which have sworn before the Court.

A more sensitive point lies in the contribution given by the *invisible* expert. It is not clear whether, when they were hired to help the Court by the Registry in a given case, *invisible* experts made any kind of solemn declaration. Since, theoretically “*leur statut est équivalent à celui d'agens du Greffes engagés pour de courtes durées ou de consultants*”⁹⁸, presumably they are required to make the solemn declaration prescribed in article 25.2 of the Rules before the President of the Court. If one looks at the content⁹⁹ of such a declaration, though, it will find no textual elements recalling their impartiality or their duties to be faithful of their scientific opinions – elements present in the other declarations – but only duties of loyalty and confidence to the Court. What emerges clear after this examination is that even by its solemn declaration the category of *invisible expert* appears scarcely compatible with the ordinary standards of independence and impartiality.

⁹⁷ D Dwyer, *The Judicial Assessment of Expert Evidence* (CUP 2008) 200.

⁹⁸ P Couvreur, “*Le règlement juridictionnel*” in SFDI (ed.), *Le processus de délimitation maritime: étude d’un cas fictif*, Colloque international de Monaco du 27 au 29 mars 2003, 2004, p. 384.

⁹⁹ The content of the declaration prescribed in article 25.2 is “I solemnly declare that I will perform the duties incumbent upon me as an official of the International Court of Justice in all loyalty, discretion and good conscience, and that I will faithfully observe all the provisions of the Statute and of the Rules of the Court”.

CONCLUSIONS

The first impression gathered from the examination of the rules and the practice of the ICJ is that the use of experts seems to be allocated in the permanent tension between systems of *common law* and *civil law*. This seems to be confirmed by the blending appearance of experts *ex curiae* and experts *ex parte* in the proceedings – either visibly or invisibly. Some of the problems arising in the Court’s practice mirror the problems faced in national legal systems regarding experts; some of the Gordian knots are the same insurmountable difficulties appearing in those contexts. Nonetheless, given the special features of the litigation between sovereign States, the conclusion that the Court should tackle the problems the same way municipal courts do seems less obvious.

If one looks to the way the Court and the parties availed themselves of experts in its recent case law (2006-2016), it appears to exist a continuous development and refinement of the techniques and procedures regarding experts. Comparing the procedures employed by the parties and by the Court in the *Pulp Mills* case (whose oral hearings took place in 2009) with those in the *Whaling* (2014) and *Costa Rica v. Nicaragua* (2016, still pending) cases, one can identify a more active approach assumed by the Court. The evolutionary approach finds confirmation in the fact that the Court, for the first time since the *Corfu Channel* case, has resorted to article 50 and nominated two independent experts to gather evidence *in locu*.

This “evolution” might be attributed to two relevant factors.

First, one is left with the impression that a prolific dialogue has occurred between parties, Court and scholarship. On the one hand, the parties to cases have taken into account the Court’s criticism to consult experts in the *Pulp Mills* judgment. Parties have been avoiding to use them as pleaders before the ICJ since. On the other hand, the Court seems also to have taken note of the critique made by judges and scholars on its potential but scarce use of article 50 by appointing experts in the *Costa Rica v. Nicaragua* case. Moreover, it has also improved its method for testing evidence by favouring a four-step method of cross-examination employed in the *Whaling in the Antarctic* case and repeated in the *Certain activities* and *Construction of a Road* cases.

The second factor contributing to the amelioration of the procedure on experts is due to the fact that disputes touching upon technical issues were and are still being brought by States before the ICJ. Given that the Court’s activity essentially depends on

the trust of its “clients”, it seems right to assert that the subject-matter of the abovementioned cases offered to the Court a real occasion to develop its procedure. It can be held that further developments on this issue depend on the subject-matter of the disputes brought before the Court. Bearing this in mind, one might expect further contributions to the question with the outcome of the *Costa Rica v. Nicaragua*, *Nicaragua v. Colombia* and in the *Waters of Silala* cases¹.

* * *

The comparison between the ICJ and the two potential judicial options to litigate interstate disputes, namely ITLOS and international arbitration, have also offered interesting elements regarding the treatment of technical and scientific evidence by the Court. These elements relate to the questions of whether these tribunals have more efficient instruments to deal with this kind of evidence and whether they have developed special techniques in employing these instruments.

In relation to ITLOS, it seems difficult to consider any potential advantage that the Tribunal would have in relation to the ICJ. The correspondence of instruments and practices between the two judicial bodies does not allow further assertions. The major difference between these judicial bodies is that under article 289 of UNCLOS there exists a permanent list of experts. In theory, the possibility of having recourse to such list may contribute to a greater transparency on the method of appointment of experts. The fact that the Tribunal has never resorted to this list or to article 289 does not permit further speculation. Furthermore, the fact that States continue to bring their maritime disputes to the ICJ is indicative of their reliance on the methods developed by the Court’s case law in dealing with the identification and the drawing of the maritime coordinates².

The potential and theoretical advantages that interstate arbitration possess in comparison to the ICJ do not seem to be related to a particular technique developed by arbitration, but rather with the inherent flexibility which characterizes this model of

¹ *Dispute over the Status and Use of the Waters of the Silala* (Chile v. Bolivia) (Application of 6th of June) [2016] (available at <http://www.icj-cij.org/docket/files/162/19020.pdf>); *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*(Application of 25 of February) [2014] (available at <http://www.icj-cij.org/docket/files/157/18344.pdf>); *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (Application of 16th September) [2013] (available at <http://www.icj-cij.org/docket/files/154/17532.pdf>).

² The *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*(Application of 28th August) [2014] (available at <http://www.icj-cij.org/docket/files/161/18362.pdf>) and *Nicaragua, and Nicaragua v. Colombia* cases offers confirmation of this confidence.

dispute settlement. Firstly, perhaps inspired by the use of experts in commercial and investment arbitration, arbitral tribunals have developed innovative techniques in relation to the appointment, examination and use of independent experts. Some of these solutions might be useful if transposed to the context of the ICJ. For instance, the use of experts appointed by the parties in the *Trail Smelter* arbitrations or the drawing of specific suggestions to the use of experts in the post-adjudicatory phase in the *Iron Rhine Railway* could prove to be useful under certain circumstances. None of the practices in relation to the use of experts in arbitration seems to fall outside the powers retained by the ICJ under article 50 of its Statute. As demonstrated in chapter 2, to some extent it seems that the recent practice of the ICJ is already somewhat inspired by the flourishing in the use of experts by international tribunals.

Additionally, the recent practice, developed under the auspices of the PCA, of having experts sitting with the arbitrators³ and helping them with the technicalities of the judges appears to be an improvement in the techniques concerning the use of experts. Nothing prevents the ICJ from adopting a similar approach. Instead, the resort to assessors provided by article 30 or the broad powers granted to the Court by article 50 of the Statute seems to offer legal basis for consolidating such a procedure. The hypothesis that these experts may have an “excessive influence on the outcome of the dispute”⁴ does not seem to be confirmed by the practice of arbitral tribunals and might be attenuated by assuring greater transparency on their advice.

* * *

After examining the practice of the ICJ in the light of selected procedural values touching upon the core issues of expert evidence (transparency, due process and impartiality) it was possible to draw some conclusions with regard to each of the available instruments that the Court can avail itself to deal with technical and scientific evidence.

The recourse to *expert counsels*, an enshrined practice of litigants before international tribunals, seems to be slowly and gradually finding its term. The non-observance of the requisites imposed by the principle of due process, added to the impossibility of enhancing the evidential weight of its testimony by cross-examination, makes this category of experts a scarcely useful instrument at the parties’ disposal. Nonetheless, their relevance is not to be entirely denied. One could conjecture the

³ Notably in the *Guyana/Suriname, South China Sea*

⁴ G Gaja, ‘Assessing Expert Evidence in the ICJ’ (2016)15 LPICT 418.

hypothesis of parties resorting to them when the evidence introduced are uncontested. Their presence before the Court, although questionable in terms of time and strategy, would serve to confirm and illuminate the Court on the technical issues of the dispute as a part of the didactical strategy of a legal team. However, in the case of eventual challenge by the opposite party, it would obviously be advisable to have them called to testify in the quality of *party-appointed experts* in the terms of article 63 of the Rules.

The second category of *ex parte* experts appears to be in ascension. *Party-appointed experts* have been used by international tribunals not only because they respect the adversarial rationale of the procedure, but also because they serve as an instrument that aligns itself with the principles of transparency and due process. Their oath and cross-examination contributes to testing the content of their scientific opinion and to assure their independence. The recourse to party-appointed experts still presents two inherent shortcomings. First, the risk of favouring the party which better masters the proceeding of cross-examination, essentially based in *common law* courts. Second, when dealing with sensitive and disputed issues, this system may give rise to an unsolvable clash of expertise. Anglo-American law systems also have problems in dealing with this clash. Secondly, there is an overreliance on cross-examination as the method to find the truth. However, in cases where the evidentiary background of a dispute were to be more complex, there is the risk of having this evidence exclusively constructed by the parties; in other words, the performance of experts and counsels counts heavily in determining the outcome of the process of identification of the “truth”. A good performance in conducting cross-examination might become a condition to the process of identifying and assessing the scientific fact. The high number of interventions by counsels in the cross examination of party-appointed experts in *Costa Rica v. Nicaragua* seems to confirm this hypothesis.

As broadly argued in doctrine, *Court-appointed experts* envisaged in article 50 constitutes one of the best ways for tackling complex evidentiary backgrounds. The possibilities for its use, the transparency of the procedure, the possibility of the parties to interact with the information adduced by them, their independence and impartiality are factors that seem to favour their use in a proceeding. Nonetheless, their costs to the budget of the Court (an issue recently flagged by the President of the Court to the General Assembly) and prolongation of the duration of the judgment associated to their use might be factors to be taken into account prior to their appointment. The Court might be required to balance these latter elements with the need of receiving impartial

scientific input according to the circumstances of a given case. While the duration of a judgment might be an important element in assessing the activity of an international court, science-heavy and factually complex disputes could agree to take these shortcomings in order to add to the legitimacy of the judgment.

There seems to be little doubt that *invisible experts* remain a highly criticizable instrument. Their harm to transparency, due process and potential threat to the independence of impartiality seems to be enough arguments to suggest that the Court should not resort to this category in complex evidentiary contexts. The remaining question is to what extent the Court should avail itself of *invisible experts* when they are required to perform minor functions such as the drawing of the maps or “determining the precise geographic coordinates of certain points clearly identified by the Court”⁵. The interrogative could be reversed. Why should the Court avoid letting the parties know when it uses external experts to perform such a function? That would not only add to the transparency of the whole proceeding, but it would also facilitate the parties/public assessment of their work. It also allows the identification of any potential bias or imprecision. The requirement of due process would be equally met.

Another interesting category which should be explored by the Court is the employment of assessors prescribed in article 30 of the Statute. This category of experts draws near the practice of arbitral tribunals of having experts sitting with the court. It may also satisfy the identified necessity of technical input demonstrated by the Court in appointing invisible experts. In practical terms, assessors are already present — what seems to be necessary is a refinement of the procedure. Appropriate use of article 30 can contribute to a greater observance of the requirements of transparency and due process. Furthermore, the Court’s governing instruments enable a varied and flexible use of assessors to cope with the evidence-heavy background of a dispute — whether combined with other categories of experts, or otherwise.

* * *

Scholars have put forward several suggestions on how to improve the treatment of technical and scientific evidence by the ICJ. The most frequent proposition sustains that the ICJ should made greater resort to independent experts under article 50 of the Statute⁶. Obviously, the independent experts envisaged in this rule have their clear

⁵ Gaja (n 4) 413.

⁶ A Riddell, ‘Scientific Evidence in the International Court of Justice – Problems and Possibilities’ (2009) 20 Finnish Yearbook of International Law 229; MM Mbengue, *Scientific Fact-*

advantages in a scenario in which the only evidence before the Court is conflicting evidence adduced by the parties.

Two other suggested solutions advanced by scholars involve article 50, but do not envisage the appointment of experts in a traditional way. The first is the suggestion elaborated by Keith Highet that the Court should employ “special masters” in a similar way as the US Supreme Court does⁷. The second suggestion, formulated by Daniel Peat, envisages the ICJ using a pre-trial chamber for evidentiary purposes which would deal with technical evidences prior to the judgment by the full Court⁸. Both solutions may be commendable in specific circumstances, particularly if the parties have agreed with such procedures. None of them presents particular difficulties with regard to the requirements of transparency, due process and independence/impartiality. Their only apparent shortcoming is that they draw too far from the present practice of the ICJ. Additionally to these proposals, greater attention has been paid to the possibility of appointing assessors as a potential way to curb the deficiencies created by the assessment of scientific evidence before the Court⁹.

Notwithstanding these suggestions, other solutions could envisage a more direct contact between experts, facilitated by the Court – solutions which find inspiration in the practice of interstate arbitration, municipal legal systems and commercial arbitration. It has been rightly argued that “more judicial interaction with experts should facilitate in-depth understanding of the science”¹⁰. For instance, the cooperation between experts in the *Guyana/Suriname* case may be followed to the extent that the Tribunal-appointed experts mediated the meetings between the party-appointed experts. It is not impossible to conjecture a pre-trial meeting between party-appointed experts and a Court-appointed expert (or assessor) purported to identify

finding at the International Court of Justice: An Appraisal in the Aftermath of the Whaling Case (2016) 29 *Leiden Journal of Int. Law* 529-550; C Foster, *Science and the Precautionary Principle in International Courts and Tribunals* (CUP 2011) 341-348; L Malintoppi, ‘Fact Finding and Evidence Before the International Court of Justice (Notably in Scientific-Related Disputes)’ (2017) 7 *JIDS* 421 JG Devaney, *Fact-Finding before the International Court of Justice* (CUP 2016).

⁷ K Highet, ‘Evidence and Proof of Facts’ in LF Damrosch (ed), *The International Court Of Justice At A Crossroads* (American Society of International Law 1987) 372.

⁸ D Peat, “The Use of Court-Appointed Experts by the International Court of Justice”, 84 *British Yearbook of International Law* (2014) 300-302. According to the author, such a pre-trial Chamber “would involve a separate pre-trial process led by three members of the Court, to determine the facts pertinent to the selection and application of the rules of law necessary for the Court to perform its function in the case at hand” (301).

⁹ Gaja (n 4) 418 and LC Lima, ‘Expert advisor or non-voting adjudicator? The potential function of Assessors in the procedure of the international court of justice’ (2016) 99 *Rivista di Diritto Internazionale* 1123-1146.

¹⁰ Foster (n 6) 342.

points of agreement and crystallize points of disagreement. That would facilitate the work of the Court in identifying the well-appreciated points of agreement between experts. Stressing expert disagreement would also allow the Court to avoid ruling in matters still disputed scientifically. The adoption of a similar methodology seems to be consonant with the requirements of transparency and due process of the proceedings.

Another possible means to improve due process through the examination of experts is the so called “hottubing” technique, “a unique process whereby the court takes concurrent testimony from both sides’ experts, while the experts sit together in the courtroom’s jury box”¹¹. In the case of the ICJ, the process of hottubing could be conducted by the president, assisted by a Court-appointed expert or assessor. The adoption of such a method for examination of experts seems also to be in accordance with due process, transparency and impartiality and would furnish the Court with reliable and discussed expert evidence.

* * *

The argument developed in this thesis is that whatever should be the avenue explored by the Court, it should be put to the test of three procedural values: transparency, due process and independence. That would certainly add, to a greater or lesser extent, to the fairness of the proceedings, to the correctness of the judgment, to the effectiveness of the decision-making process and, ultimately, to the over-arching legitimacy of the judicial activity.

The second main general proposal espoused by this thesis after the examination conducted is that the Court would benefit from a blended approach to the problem, combining techniques of *common law* and *civil law*, or more specifically, combining the use of *ex parte* and *ex curiae* experts when dealing with cases of a complex background. That seems to be the successful lesson taught by arbitral tribunals settling interstate disputes. A combined approach would also shield the Court from criticisms which allege that the method of testing evidence by the use of party-appointed experts is too heavily influenced by the *common law* system. The combined use of experts does not

¹¹ G Pring and C Pring, ‘Twenty-first century environmental dispute resolution – is there an ‘ECT’ in your future?’ (2015) 33 Journal of Energy & Natural Resources Law 25. On the issue, see also S Rares, ‘Using the “Hot Tub” How Concurrent Expert Evidence Aids Understanding Issues’, paper presented by Justice Rares at the New South Wales Bar Association Continuing Professional Development seminar: Views of the “Hot Tub” from the Bar and the Bench (available at <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-raises/raises-j-20131012>).

only strike a balance between the civil law and common law approaches to the procedure, but also between the values to be protected by the proceedings.

In practical terms, the ICJ seems to be well equipped to improve the cross-examination of party-appointed experts with the use of assessors or *ex curiae* experts so as to receive technical advice. This solution would not require the Court to adopt a measure too far-off from its present procedure.

If it is true that there is a strong likelihood that technical and scientific matters might appear again in the docket of the World Court, then it seems also true that experts still have an important role to perform in the proceedings before the ICJ. Testing the procedures for refining the fact-finding and fact-assessment by the Court through procedural values might constitute an adequate and useful way for refining the procedure regarding the appearance of experts.

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