Court-Appointed Expert

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A. Introduction

1 Experts are appointed only occasionally by international courts and tribunals. More commonly, international courts and tribunals will receive expert evidence via pleadings and parties’ own expert witnesses (→ Expert Witness). In certain instances they may receive scientific or technical evidence through the consultation of international organizations. However, provision for the court appointment of → experts is made in the governing documents of most international courts and tribunals, either in their constitutive instruments or through their rules of procedure. The power to appoint experts may be express, or may be an inherent power of the court or tribunal (Brown, 2007, 115–16). Alternatively, the power to appoint experts may be an implied power, as it helps ensure that international adjudicators are in a position to perform their function of resolving the parties’ disputes on the basis of all relevant data and in the knowledge that the court or tribunal is equipped to understand its legal significance (White, 1965, 73, 80–81, 116). The possibility of appointing experts helps ensure that international courts and tribunals have the capacity to obtain independent advice on scientific or technical matters, and by steering the consultative process potentially to interact more directly with experts and obtain further advice on the matters perceived by the court or tribunal to be of most significance.

B. Principles

2 The acceptability and usefulness of processes for the taking of evidence from court-appointed experts can be viewed as resting on three main pillars: the independence of experts, fairness to the parties, and a good understanding of the relationship between the roles of the expert and the court or tribunal. The independence of court-appointed experts is central to the effectiveness of this means of obtaining technical and scientific input. The way in which they are selected and inducted into their role and any immunities or protection afforded them will contribute to helping ensure that experts’ independence is maintained. The legitimacy of the resulting judgment or award will turn equally on adopting modalities for the consultation of experts that ensure an appropriate opportunity for the parties’ involvement. Fairness to the parties will require affording them the opportunity for comment on the experts’ reports, and provision for the parties to question experts in a formal hearing is also common. Maintaining due process will help alleviate the diminution in parties’ sense of control over the presentation of their cases that is engendered when a court appoints its own expert. There will be circumstances where the parties’ cooperation is important to the success of an enquiry or expert opinion, particularly where a → site visit is needed (Tams, 2006, 1116–17). Litigants have a duty to collaborate with international courts and tribunals on matters concerning evidence and proof, flowing from a general duty to act in good faith in international dispute settlement (Kolb, 2006, 793–835, 828; Devaney, 2016, 196–202).

3 As to their respective roles, the role of the court-appointed expert is traditionally understood in terms of a relatively clear cut distinction between matters of fact, on which an expert will advise, and the determination of the relevance and significance of these matters for the case at hand, which is a matter for the court or tribunal (White, 1965, 11–12, 163–81). Courts have been advised to limit experts to points that could be ‘susceptible to resolution by reference to reasonably and well established scientific and technical standards’ (Sandifer, 1975, 467; Devaney, 2016, 237–40). This may be most achievable in relation to expertise on technical matters such as valuation and damages, or specific aspects of boundary delimitation or demarcation. However, contemporary practice suggests that matters may be more complex in relation to law’s interaction with scientific knowledge in many areas now subject to regulation under international law. Among the more challenging cases for international courts and tribunals consulting court-appointed experts are those where fact and law may not readily be separable, and experts’ views may feed...
into the interpretation or understanding of applicable rules (Foster, 2011, 137-48). Experts’ scientific opinions potentially play an important role also in disputes involving scientific uncertainties, where the state of science may be such that the information that would ideally be imparted to the court or tribunal simply does not exist. It may be helpful to recall that it is generally more for their expertise or opinion as to the facts that scientific experts are consulted (Tams, 2006, 1111) in contrast with technical experts charged with a specific task (Anderson, 2007, 510). All these factors, sometimes combining, accentuate the significance of court-appointed experts’ independence and of provisions to ensure fairness to the parties.

C. Rules and Practices

1. International Court of Justice

4 Article 48 of the Statute of the International Court of Justice (‘ICJ Statute’) provides for the Court to make all arrangements connected with the taking of evidence. Proceedings in contentious cases before the → International Court of Justice (ICJ) are adversarial and much of the practice in relation to receipt and use of expert evidence concerns evidence from the parties (→ Experts: International Court of Justice (ICJ)). However, the Court enjoys the power under Article 50 of the ICJ Statute at any time to ‘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’. Article 67 of the 1978 ICJ Rules of Court, corresponding to Article 52 of the 1972 Rules and Article 57(1) and (2) of the 1946 Rules (Rosenne, 2016, 1370), specifies that, after hearing the parties, the Court is to issue an order to this effect. Article 50 replicates Article 50 of the Statute of the Permanent Court of International Justice (‘PCIJ Statute’), believed to have been derived from Article 90 of the 1907 Hague Convention for the Pacific Settlement of Disputes (White, 1965, 36). Article 50 is applicable, arguably, also in advisory proceedings (Tams, 2006, 1117).

5 Experts’ independence, and that of persons appointed to carry out an enquiry, is upheld by means of the solemn declaration they may be required to make under Article 67 of the 1978 ICJ Rules of Court. Article 67’s provision in this respect incorporated the Court’s practice in the → Corfu Channel Case (Rosenne, 2016, 1370, 1374). The terms of such declarations have varied (Rosenne, 2016, 1374). The selection of experts is left to the Court. However, in practice, the Court has usually sought States’ advice on the appointment of experts (White, 1965, 44; Tams, 2006, 1114-15). In the Corfu Channel Case the Court asked the Registrar to seek from a number of governments not participating in the case the names of naval officers who might be ‘willing to assist the Court’ at the merits stage (Corfu Channel Case, United Kingdom v Albania, Order of 17 December 1948). The Committee of Experts was comprised of three naval officers, from Denmark, Norway, and Sweden. It was further envisaged that the parties would be given the opportunity to agree on the names of the experts who would assess the compensation due to the United Kingdom, as well as the subject of their opinion (Rosenne, 2016, 1371). However Albania declined to participate further in the proceedings. The Court then appointed a Committee of Experts comprising two officers of the Dutch Navy to carry out this task. While carrying out their tasks, experts and members of a commission of enquiry are expected to enjoy the same privileges and immunities as other experts appointed by the United Nations, including personal inviolability and immunity for legal process (White, 1965, 186; Tams, 2006, 1115; Art 5 (a) (iii) United Nations General Assembly (‘UNGA’) Resolution 90 (I), 1946). Where appropriate they will be paid from Court funds (Art 68 ICJ Rules of Court).
Fairness to the parties is generated by ensuring they have the opportunity to provide input or comment on pivotal issues. Article 67 (1) of the 1978 ICJ Rules of Court specifies that the Court will lay down the procedure to be followed in the enquiry or expert opinion, in addition to the number of individuals to be appointed, their mode of appointment, and the definition of the enquiry or expert opinion. Article 67 (1) has been considered an improvement on the 1936 Rules of Court of the Permanent Court of International Justice, which did not make it clear that the Court is empowered to determine the procedure to be followed by the experts (Rosenne, 1957, 158). The parties are to be heard before the Court issues its order under Article 67 (1). In Corfu Channel the Court involved the parties in drawing up the order appointing experts, though neither party suggested questions to be put to the experts (Rosenne, 2016, 1370–71). Article 67 (2) requires that every report or record of an enquiry or expert opinion be communicated to the parties, who also are to be given the opportunity to comment upon it. Receiving the comments of the parties may introduce difficulties into the settlement of scientific and technical disputes, as the Court is restricted by its inability to return to the experts in the course of its deliberations in order to benefit from their knowledge and insights in evaluating the parties’ remarks (Gaja, 2017, 417–18). It appears that the parties were given no opportunity to comment on the expert’s report in the Gulf of Maine Case (Rosenne, 2016, 1372), although in that case the expert had been appointed pursuant to the parties’ special agreement, and the parties had specified the individual to be appointed. The expert was available for consultation throughout the proceedings and even participated in the Chamber’s deliberations (Riddell and Plant, 2009, 64–65; Rosenne, 2016, 1370). Contrastingly in Corfu Channel the parties had the opportunity at the merits stage to comment on the expert’s initial report in their oral reply and rejoinder, and were permitted to file additional observations on the same experts’ second report following a site visit (Rosenne, 2016, 1371). In Corfu Channel the Court accorded ‘great weight’ to the experts’ opinion, considering that their on-site examinations had been carried out in such a way as to guarantee the correctness and the impartiality of their conclusions (Corfu Channel Case, 21–22). The experts’ reports were annexed to the judgment, together with their answers to questions posed by the judges.

The Court consulted experts using the Article 67 procedure in 2016 in the case concerning the Maritime Delimitation in the Caribbean Sea and the Pacific Ocean, Costa Rica v Nicaragua, 2018, paras 10–21, 31–37; Order of 31 May 2016 and Order of 16 June 2016) (see Maritime Delimitation in the Caribbean Sea and the Pacific Ocean and Land Boundary in the Northern Part of Isla Portillos Cases). The Court appointed two experts to conduct a site visit in order to collect all the factual elements needed to determine the starting point of the parties’ maritime boundaries, especially in relation to the state of the coast between the points suggested respectively by the parties. The parties were invited to express their views on the question of appointment, the number and mode of appointment of the experts, and the procedure to be followed, as well as to comment on one another’s views on these matters. While Nicaragua considered there was no need for a site visit, Costa Rica proposed the appointment of a committee of three geographers. Costa Rica proposed that a number of matters be covered in the experts’ terms of reference. Deciding that an expert opinion would be obtained, the Court requested the parties’ observations on the two experts whom it was intended be appointed. Costa Rica had no objection to their appointment. Nicaragua made no specific observations but, like Costa Rica, expressed full readiness to assist the Court’s experts. In the event two site visits were required. The parties were provided the opportunity to comment on the experts’ opinions in writing and in oral proceedings. The Court found that the assessment made by the experts, which the parties had not challenged, dispelled all uncertainty about the configuration of the coast and enabled the Court to make various determinations necessary for the resolution of the
The Court retains a broad margin of discretion in applying Article 50 ICJ Statute (Tams, 2006, 1113; Devaney, 2016, 24). The Permanent Court of International Justice (PCIJ) appointed experts only once, to assist with the calculation of compensation in the case concerning the Factory at Chorzów (Germany v Poland), 1928. The ICJ has done so three times, in Corfu Channel, Gulf of Maine, and Maritime Delimitation in the Caribbean Sea and Pacific Ocean. In a small number of cases where it has not done so individual judges have expressed the view that the Court ought to have invoked Article 50 (Temple of Preah Vihear, Cambodia v Thailand, Merits, 1962, Judgment (Dissenting Opinion of Judge Wellington Koo), para 55; Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States, Merits, Judgment (Dissenting Opinion of Judge Schwebel), 1986, para 132; Kasikili/Sedudu Island, Botswana v Namibia, Judgment (Separate Opinion of Judge Oda), 1999, para 6; Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Qatar v Bahrain, Merits, Judgment (Dissenting Opinion of Judge Torres Bernárdez), 2001, para 41; Pulp Mills on the River Uruguay, Argentina v Uruguay, Judgment (Joint Dissenting Opinion of Judges Al-Khasawneh and Simma), 2010, paras 2–25, Judgment (Declaration of Judge Yusuf), 2010, paras 1–14, Judgment (Dissenting Opinion of Judge ad hoc Vinuesa), 2010, para 95. The Court may take the view that it is in a position to decide a case without appointment of an expert or undertaking an enquiry despite a request from one of the parties (Land, Island and Maritime Frontier Dispute, El Salvador and Nicaragua (intervening) v Honduras, 1992, paras 22, 65; Certain Activities Carried Out by Nicaragua in the Border Area, Costa Rica v Nicaragua, 2015, paras 30, 33). The PCIJ twice rejected such requests (Sandifer, 1975, 333–34).


Depending on which has jurisdiction, the court or tribunal hearing a case under the United Nations Convention on the Law of the Sea (‘UNCLOS’) may be the ICJ, the International Tribunal for the Law of the Sea (ITLOS), or an arbitral tribunal constituted under either Annex VII or Annex VIII of UNCLOS. Article 289 of UNCLOS provides that

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, Art 2, to sit with the court or tribunal but without the right to vote (Gautier, 2018).

However Article 289 UNCLOS is generally not referred to or relied upon by ITLOS or Annex VII arbitral tribunals, and has so far gone unused (Levine and Schofield, 2018, 129). There may be various reasons for this. Article 289 specifies the selection of no fewer than two experts, and where there are two experts rather than one a tribunal may be concerned that each may be perceived to hold views that are closer to one party's positions than the other’s (Treves, 2012, 485). The fact that scientific and technical experts can be expected to sit with a tribunal may further generate some discomfort for tribunals operating under UNCLOS, because of the uncertainty it may create concerning their role (Treves, 2012, 485).

In cases where the ITLOS is the adjudicating body, Article 15 of the Rules of the Tribunal (‘ITLOS Rules’), which were adopted under Article 16 Statute of the International Tribunal for the Law of the Sea, apply. ITLOS has also developed provisions in its Rules to govern the appointment and consultation of experts (Experts: International Tribunal for the Law of the Sea (ITLOS)). The importance of experts’ independence is underlined in
Article 15 (3) ITLOS Rules, which states that ‘[e]xperts shall be independent and enjoy the highest reputation for fairness, competence and integrity’. Their impartiality is reinforced through the requirements that they make a solemn declaration in the terms set out in Article 79 (b) ITLOS Rules. Experts are to be paid where appropriate out of the funds of the Tribunal under Article 83 ITLOS Rules. Fairness to the parties is facilitated under Article 82 of the Tribunal’s Rules, the terms of which parallel exactly Article 67 ICJ Rules. Art 82 (1) ITLOS Rules provides for the Tribunal to hear the parties before issuing an order to arrange for an inquiry or expert opinion, while Article 82 (2) provides for every report or record of an inquiry or expert opinion to be communicated to the parties who are to be granted the opportunity to comment upon it. The parties are to be consulted in the selection of experts. As is envisaged in Article 289 UNCLOS, experts are to be chosen preferably from the lists maintained under Article VIII UNCLOS, comprising experts nominated by States Parties in the fields of fisheries, protection, and preservation of the marine environment, marine scientific research, and navigation. Nominated experts’ competence in the legal, scientific or technical aspects of the field must be established and generally recognized and they must enjoy the highest reputation for fairness and integrity. Article 15 (3) ITLOS Rules iterates the preference for experts to be chosen from the relevant Annex VIII list. In preparing its rules, the Tribunal deleted a provision in the Preparatory Conference Draft Rules referring to appointment by secret ballot (Rao and Gautier, 2006, 38). Experts appointed otherwise than under Article 289 UNCLOS will not sit with the Tribunal or participate in its deliberations, the records of which, under Article 42 (3), will contain no details of the discussion nor the views expressed but only the title or nature of the subject or matters discussed and the results of any vote.

11 In cases where an arbitral tribunal constituted under Annex VII of UNCLOS is the adjudicating body, the tribunal will adopt its own Rules of Procedure, in accordance with Article 5 of Annex VII. Annex VII tribunals can be expected to draw on models such as the Optional Rules of the Permanent Court of Arbitration (‘PCA’) and the Arbitration Rules of the United Nations Commission on International Trade Law (‘UNCITRAL Rules’), while bearing in mind specific needs in the arbitration before them. In the → Guyana v Suriname Maritime Boundary Arbitration, Article 11 (3) of the Arbitral Tribunal’s Rules of Procedure stated: ‘After having obtained the views of the Parties, the Arbitral Tribunal may upon notice to the Parties appoint one or more experts to report to it, in writing, on specific issues to be determined by the Tribunal. A copy of the expert’s terms of reference, established by the Arbitral Tribunal, shall be communicated to the Parties.’ The identical formula was employed in Article 12 (4) of the Rules of Procedure in the → Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India). The South China Sea Arbitral Tribunal’s Rules of Procedure provided in Article 24 (1) that ‘[a]fter seeking the views of the Parties, the Arbitral Tribunal may appoint one or more independent experts. That expert may be called upon to report on specific issues and in the manner 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.’

12 Fairness between the parties may be protected by providing explicitly for objections to experts’ qualifications, independence, or impartiality (eg Art 24 (2) South China Sea Rules of Procedure), as well as affording experts the opportunity to express their views on any written report, and to examine any document relied upon in such a report (eg Art 24 (4) and (5) South China Sea Rules of Procedure). Following delivery of a report, experts may be subject to questions at a formal hearing if requested by a party or considered necessary by the Tribunal, with the parties permitted to present their own expert witnesses to testify on the points at issue. There is some doubt as to whether tribunal-appointed experts will in all instances be required to report in writing. For instance Article 24 (1) of the South China Sea Tribunal’s Rules of Procedure states that an expert might be called upon to report on specific issues in the manner to be determined by the Tribunal. Like provision is seen...
elsewhere. Article 24 (1) of the Rules of Procedure for the Arctic Sunrise arbitration, in which two experts were appointed to help assess compensation, is similarly phrased. In the context of maritime boundary limitations it has been observed that much of the value of appointing an independent expert would be lost if there were no free communication between a tribunal and its expert hydrographer, or if she or he were confined to written comments (Levine and Schofield, 2018, 125). Allowing for this expressly may have been a consideration in crafting the Rules in these cases.

13 Disputants’ duties of cooperation with Annex VII tribunals are referred to in Article 6 of Annex VII, which states that: ‘The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, in accordance with their law and using all means at their disposal, shall: a) provide it with all relevant documents, facilities and information; and b) enable it when necessary to call witnesses or experts and receive their evidence and to visit the localities to which the case relates’. Tribunals may reiterate in their rules of procedure the parties’ duties of cooperation with experts pursuant to Article 6 of Annex VII. The Barbados v Trinidad and Tobago Tribunal did so in Article 11 (5) of its Rules of Procedure. The Guyana v Suriname Tribunal did likewise and further emphasized these duties in its procedural orders (Art 11 (4) Guyana v Suriname Rules of Procedure). Article 12 (5) of the Rules of Procedure in the Bay of Bengal Maritime Boundary Arbitration provided similarly. Tribunals’ rules of procedure may also invoke Article 6 of Annex VII to the effect that the parties are to give the expert any relevant information or produce for his or her inspection any relevant document or goods, and are to afford an expert all reasonable facilities in the event of a site visit. The South China Sea Tribunal did so in Article 24 (3) of its rules.

14 Experts have been appointed in a small number of Annex VII UNCLOS cases. The Barbados v Trinidad and Tobago tribunal appointed an expert hydrographer, appending his technical report to its award (Barbados v Trinidad and Tobago, 2006, para 37). In the Guyana v Suriname case two experts were appointed, for different purposes. The Tribunal appointed a hydrographer to assist as required in the preparation of the Award and as necessary in the drawing and explanation of the parties’ maritime boundary line or lines in a technically precise manner (Guyana v Suriname, Procedural Order No 6, 2006; Guyana v Suriname, 2007, para 108). The Tribunal’s hydrographer was sent on a site visit after the hearing in order to address a discrete question of fact (Guyana v Suriname, 2007, para 309; Daly and others, 2014, 118–19). His technical report was appended to the decision. The hydrographer was the same individual who had been appointed in Barbados v Trinidad and Tobago. In addition to appointing a hydrographer, the Tribunal appointed an independent expert tasked with examining the relevance of and redactions from documents sought by Guyana to which Suriname already had access in the files of the Netherlands Ministry of Foreign Affairs (Guyana v Suriname, 2007, paras 111–20, 123–26, 827). The same hydrographer was again appointed in the Bay of Bengal Maritime Boundary Arbitration, with the parties’ agreement, the Tribunal having provided also a copy of his curriculum vitae and proposed terms of reference (Bay of Bengal Maritime Boundary Arbitration, Bangladesh v India, 2014, paras 15–17). His technical report was attached to the Tribunal’s award. In both Barbados v Trinidad and Tobago and Guyana v Suriname, expert conferences were held in advance of hearings, with the participation of the tribunals’ own experts, to help clarify the issues on which there was agreement and reasons for remaining disagreement (Levine and Schofield, 2018, 123).

15 In the South China Sea Arbitration (Philippines v China), given China’s non-participation, the Annex VII Tribunal charged with deciding the case took multiple steps to test the evidence, including by appointing independent experts and putting questions to counsel and experts (South China Sea Arbitration, Philippines v China, 2016, paras 15, 131, 144). The South China Sea Tribunal invited the parties’ views in relation to the appointment of a hydrographer and the Philippines suggested a list of appropriate qualifications (South
China Sea Arbitration, Philippines v China, 2016, paras 54–58). Following the merits hearing the Tribunal advised the parties, and received the Philippines’ approval, of its intentions to appoint an expert on navigational safety and three experts on coral reefs who prepared an opinion jointly (South China Sea Arbitration, Philippines v China, 2016, paras 84–90). In the case of each appointment the Tribunal received the approval of Philippines, having provided the parties with the experts’ curricula vitae, declarations of independence, and terms of reference. The Tribunal clarified the terms of reference in respect of the hydrographer’s appointment in response to the Philippines’ request to specify that the expert was to respect that it was the Tribunal, and not the expert, that would make any determination as to legal questions. The hydrographer’s terms of reference set out his role in ‘reviewing and analysing geographic and hydrographic information, photographs, satellite imagery and other technical data in order to enable the Arbitral Tribunal to address the status of the features named in the Philippines’ Submissions or any other such feature determined to be relevant’. In light of China’s non-participation, he was also tasked with assisting with a ‘critical assessment of relevant expert advice and opinions submitted by the Philippines’ (South China Sea Arbitration, Philippines v China, 2016, para 133). The experts’ reports were provided to the parties for comment (South China Sea Arbitration, Philippines v China, 2016, paras 91–95). The Philippines had no comments. China made no response in regard to the experts’ appointment or their reports.

In cases where a special arbitral tribunal constituted under Annex VIII of UNCLOS is the adjudicating body, it is unlikely that it will be necessary for the tribunal to appoint experts, as the tribunal will itself be composed of experts in relevant fields. However, Annex VIII special tribunals may make provision for this when they draw up their rules of procedure in accordance with Article 4 of Annex VIII. Article 6 of Annex VII, outlining parties’ duties of cooperation with tribunals, applies mutatis mutandis. Experts may also be appointed by an Annex V Conciliation Commission, as seen in the Conciliation between Timor-Leste and Australia.

3. The World Trade Organization and the North American Free Trade Agreement

The World Trade Organization (WTO) dispute settlement system has developed its own processes for the appointment of panels and consultation of independent scientific experts pursuant to Article 13 of the WTO Dispute Settlement Understanding (‘DSU’), proprio motu or at the suggestion of a disputing party (Baker and others, 2015; Foster, 2011, 114–23) (Experts: Dispute Settlement of the World Trade Organization (WTO)). Article 13 (1) of the DSU provides that ‘[e]ach panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate….’ Article 13 (2) states more particularly that ‘[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter….’ Article 11 (2) of the WTO Agreement on Sanitary and Phytosanitary Measures (‘SPS Agreement’) specifies that ‘[i]n a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute….’ Appointment of scientific experts has taken place primarily in SPS cases (Valles, 2018, 367). WTO panels also seek the advice of other international organizations under these provisions (Goldstein, 2018, 429–30; Baker and others, 2015, 436; Foltea, 2012) and occasionally seek expert advice on technical matters from qualified individuals. The Appellate Body has highlighted Panels’ discretion to decline taking action under Article 13. Article 13 (2) goes on to envisage that panels may request an advisory report in writing from an expert review group, and rules for establishing such groups are set out in Appendix 4 to the DSU. Article 11 (2) of the SPS Agreement also envisages the use of an advisory
technical experts group, as do Article 14 (2) and Annex 2 of the Agreement on Technical Barriers to Trade (‘TBT Agreement’).

18 These procedures have gone unused. Panels, supported by the secretariat, have developed a comprehensive de facto standard procedure for the consultation of experts (Boisson de Chazournes and others, 2018). The WTO procedure for consultation of experts involves two stages: a written consultation followed by a joint meeting between the panel, the experts, and the parties (Foster, 2011, 114–20). Several scientific experts are consulted in each dispute, but it is considered more helpful to consult them as individual experts, rather than as an expert group (Foster, 2011, 167–69). Subsequent delay may be avoided by panels’ inclusion of provisions for expert consultation in their standard working procedures from the outset, although the need for experts may only become apparent at a later stage, for instance after panels’ receipt of the parties’ first submissions (Baker and others, 2015, 438). Panels’ working procedures are annexed to their reports.

19 The significance of ensuring experts’ independence and fairness to disputants is appreciated in the WTO context, given the compulsory and binding character of WTO dispute settlement processes, and that panels operate as part of an intergovernmental institution oriented around the more political task of the ongoing negotiation of trade policy. To ensure their independence, and consistent with Appendix 4 to the DSU and Annex 2 to the TBT Agreement, experts of standing and experience are selected, and experts are required to serve in an individual capacity rather than as a representative of any organization or government (Baker and others, 2015, 439). The parties are consulted on the need for expert advice, the areas of science from which experts should be drawn, and the organizations and individuals who might be approached in order to obtain names of potential experts. Panels provide the parties with the experts’ curricula vitae and disclosure forms and the opportunity to comment on or object to individual experts’ appointment, although final decisions on the need for expert evidence and on selection rest with the panel (Baker and others, 2015, 439–40; Foltea, 2012, 251, 263–64, 265–68, 271).

20 The parties are involved at each stage of the expert consultation process. As the stage of the written consultation with the experts, the parties may be asked for comments on the questions a panel intends to put to experts. The parties will receive copies of the experts’ answers to the panel’s questions and may be provided the opportunity to comment on these. Prior to the joint meeting, the parties may be invited to send questions to the experts, to allow the experts more time to prepare the responses they will give at the meeting. The parties will also have the opportunity to ask questions of the experts at the joint meeting and to witness the panel’s questioning of the experts. Full transcripts are generated and checked (Baker and others, 2015, 440–41). Panels may rely on experts’ advice in determining the issues before them (Foster, 2011, 121–23) but panels retain the responsibility for making an objective assessment of the facts of a case under Article 11 DSU. The Appellate Body has rejected at least one challenge asserting that a panel had failed to discharge this responsibility and delegated its fact-finding function by virtue of the questions posed to its experts (India ‒ Measures Concerning the Importation of Certain Agricultural Products, 2015, paras 5.283–5.286). Connections between questions of fact and law may be particularly close in the types of dispute determined in the WTO and experts’ views may also feed into the legal determinations made by panels and the Appellate Body (Foster, 2011, 77–78, 139–43).

21 The appointment of experts to assist adjudicators is also provided for in trade disputes arising under the → North American Free Trade Agreement (1992) (‘NAFTA’). Article 2014 of NAFTA provides for panels, of their own initiative or at a party’s request, to seek information and technical advice from any person or body deemed appropriate, provided the parties agree and subject to such terms and conditions as the parties agree. Under Art
2015 there is additionally the possibility of seeking a written report from a scientific review board on any factual issue concerning environment, health, safety, or other scientific matters, subject to terms and conditions as the parties may agree. The board is to be selected from among highly qualified independent experts in scientific matters following consultation with the parties and relevant scientific bodies. Such bodies, together with the procedure to be followed, are identified in the Model Rules of Procedure for NAFTA Chapter 20 (Appendix 1; see also Rules 38–48). The parties are to be given advance notice of and the opportunity to comment on the factual issues to be referred to the board as well as a copy of the board’s report and the opportunity to provide comments on it. The panel is to take these into account when preparing its report. The secretariat will assist and compensate experts (Model Rules of Procedure for NAFTA Chapter 20, Rule 61).

4. The European Court of Justice Model

22 The Statute and Rules of Procedure of the European Court of Justice (‘ECJ’) set out the Courts’ power to commission expert advice, though, in practice, this is not common (Van Damme, 2018, 409). Article 25 of the Statute of the Court of Justice of the European Union provides that ‘[t]he Court of Justice may at any time entrust any individual, body, authority, committee or other organization it chooses with the task of giving an expert opinion’. Articles 63 and 64 (2) (d) and 70 (1) of the Rules of Procedure of the Court of Justice provide specifically for the Court to make an order, after hearing the Advocate General, commissioning an expert’s report as a measure of inquiry, defining his or her task, and setting a timeframe. The report will be served on the parties. Article 32 of the Statute and Article 70 (2) of the Rules of Procedure of the Court of Justice provide for the Court to examine an expert. The parties will be given notice to attend and the President will put questions to the expert of his or her motion or at the request of one of the parties. The other Judges, and the Advocate General, may do likewise, as may the representatives of the parties subject to the control of the President. The hearing may be preceded by the expert’s receipt of and response to questions (Lasok, 2017, 945). Under Article 74 of the Rules of Procedure of the Court of Justice the expert will be provided the opportunity to check and sign the minutes drawn up by the Register before they are finalized and served on the parties. Articles 91, 92, and 96 of the Rules of Procedure of the General Court provide for the Court to make an order, after hearing the parties, commissioning an expert’s report, defining his or her task and setting a timeframe. Article 96 envisages that the General Court (‘GC’) may order the examination of the expert, and the procedure at the hearing will be as above. Minutes shall be drawn up in accordance with Rule 211 of the Practice Rules for the Implementation of the Rules of Procedure of the General Court. Letters rogatory for the examination of experts may be issued by either Court (Art 29 ECJ Statute; Art 101 Rules of Procedure of the General Court).

23 Experts advising the ECJ or the GC may be heard on oath (Art 28 ECJ Statute; Art 71 ECJ Rules of Procedure; Arts 96–97 Rules of Procedure of the General Court). Under the Statute, Member States are to treat any violation of an oath as if the offence had been committed before one of its own courts (Art 30 ECJ Statute), with the rules of the GC providing for the Court to report any case of perjury to the competent authority of the Member State (Art 98 Rules of Procedure of the General Court). The costs of expert opinions are included in the Courts’ recoverable costs and allocated to disputing parties. One or more of the parties may be requested to lodge security for the costs of the expert’s report. As well as any fees payable for their services, experts are entitled to reimbursement for travel and subsistence, and an advance payment may be made toward the latter items (Arts 73, 144–45 ECJ Rules of Procedure; Art 100 Rules of Procedure of the General Court). Parties may object to the selection of an expert within two weeks of his or her appointment on the basis that he or she is not a competent or proper person, or for any other reason (Art 72 ECJ Rules of Procedure; Art 99 Rules of Procedure of the General Court). However, the
usual procedure appears to be that the parties should agree between themselves on who is to be appointed, and only if they fail to agree will the Court appoint one or more persons, with the alternative being the selection of two experts, one by each of the parties (Lasok, 2017, 943). It is understood that the role of experts is to give an opinion on questions of fact, although on occasion an expert may be called upon to examine questions of mixed fact and law. It will remain for the Court to decide such questions (Lasok, 2017, 946).

24 The Statute and Rules of Procedure of the European Free Trade Association ('EFTA') Court provide in similar terms for the Court to commission experts’ reports as a measure of inquiry, having heard the parties, or for taking of expert evidence by letters rogatory (Arts 22, 24, 26, 28–29 Protocol 5 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the Statute of the EFTA Court ('EFTA Court Statute'); Arts 50, 53–54, 57–59 EFTA Court Rules of Procedure). Provisions in the Rules of Procedure of the Court of Justice of the Economic Community of West African States ('ECOWAS') also have some similarity with the European Courts’ rules. The Statute of the Community Court of Justice of ECOWAS ('ECOWAS Court Statute') provides that: ‘The Court may, in any circumstance, and, in accordance with its Rules of Procedure, order any manner of judicial enquiry summon any person, organisation or institution to carry out any enquiry or give an expert opinion’ (Art 16 ECOWAS Court Statute). The Court’s Rules of Procedure provide for the Court, having heard the parties, to commission an expert report as a measure of inquiry, defining his or her tasks and setting a timeframe (Arts 41, 45 ECOWAS Court Rules of Procedure). The expert is to be under the supervision of the Judge-Rapporteur, who may be present during the expert’s investigations (Art 45 (2) ECOWAS Court Rules of Procedure). If the expert so requests, the Court may also order the examination of witnesses (Art 45 (4) ECOWAS Court Rules of Procedure). Experts will make a solemn declaration before commencing their work (Art 45 (8) ECOWAS Court Rules of Procedure) and may testify as witnesses under oath (Art 17 ECOWAS Court Statute). Costs are recoverable. Experts summoned by the Court will be entitled to reimbursement of travel expenses and the Registry may make a payment towards these expenses in advance (Art 47 ECOWAS Court Rules of Procedure). The parties may be requested by the Court to lodge security for the costs of the expert report (Art 45 (4) ECOWAS Court Rules of Procedure). Article 6 of the Court’s Instructions to the Chief Registrar and Practice Directions state that the Chief Registrar shall, on the instructions of the President of the Court, draw up a list of experts. The parties may object to an expert within two weeks of his or her appointment on the basis that he or she is not a competent or proper person, or for other reasons (Art 46 ECOWAS Court Rules of Procedure). Should the Court decide to examine the expert, the parties will be given notice to attend (Art 45 (6) ECOWAS Court Rules of Procedure), and may put questions to the expert subject to the consent of the President (Art 45 (7) ECOWAS Court Rules of Procedure). Minutes will be kept of every hearing (Art 49 ECOWAS Court Rules of Procedure) which the parties may inspect together with any expert report (Art 49 (2) ECOWAS Court Rules of Procedure). Expert evidence may also be obtained through letters rogatory (Art 48 ECOWAS Court Rules of Procedure; see also Art 18 ECOWAS Court Statute).

5. International Human Rights Courts

25 The European Court of Human Rights (ECtHR) may pursue the examination of admissible cases by undertaking an investigation as need be, with parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (European Convention on Human Rights; ‘ECHR’) to furnish all necessary facilities (Art 38 ECHR). In most instances the Court will already have before it the facts of the case as established by domestic courts (Rainey and others, 2017, 27) but in other situations the Chamber dealing with the case may adopt the investigative measures it considers will clarify the facts, including deciding to hear as an expert any person whose presence or
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26 The Chamber may take evidence by delegating to one or more judges the responsibility of conducting an inquiry, including carrying out an on-site investigation (Rule A1 (3) ECtHR Rules Annex). The President of the Chamber may invite any third party to participate in an investigative measure (Rule A1 (6) ECtHR Rules Annex). Experts’ attendance during site investigations may be requested by the head of the delegation and parties to the ECHR are, on request, to take all reasonable steps to facilitate attendance (Rules A5 (5) ECtHR Rules Annex). The Registrar’s summons of an expert is to indicate the object of the inquiry, expert opinion, or other investigative measures ordered by the Chamber or the President of the Chamber as well as any provision for payment (Rule A5 (2) ECtHR Rules Annex). The Chamber will decide whether costs are to be borne by the → Council of Europe (COE) or awarded against the applicant (Rule A5 (6) ECtHR Rules Annex) Before carrying out his or her tasks, an expert is to make a solemn declaration (Rule A6 (2) ECtHR Rules Annex). The obligation of parties to the ECHR to assist the Court is reiterated in the Court’s Rules of Procedure, and elaborated in respect of site visits. All adequate security arrangements are to be afforded by the party in whose territory on-site proceedings take place and the party concerned has the responsibility to take steps to ensure that no adverse consequences are suffered by any person or organization on account of any evidence given or assistance provided to the delegation (Rule A2 ECtHR Rules Annex). Delegates may question experts, and subject to the control of the head of the delegation they may also be examined by the representatives of the parties (Rule A7 (1) and (2) ECtHR Rules Annex). Experts will not be admitted to the hearing room before giving evidence, and may be heard in the parties’ absence when required for the proper administration of justice (Rule A7 (3) and (4) ECtHR Rules Annex). Objections to experts will be determined by the head of the delegation, but the delegation may hear for the purposes of information any person not qualified to appear as an expert (Rule A7 (5) ECtHR Rules Annex). The Registrar will provide a verbatim record of any proceeding concerning an investigative measure by a delegation, including the text of statements, questions, and replies. A copy will be received by the parties, who will be permitted, with time limits, to make corrections, subject to the control of the Registrar and head of delegation, provided the corrections do not affect the sense and bearing of what was said (Rule A8 ECtHR Rules Annex).

27 The → Inter-American Court of Human Rights (IACtHR) has the power on its own motion to obtain any relevant evidence or opinion, including by requesting information or a report (Art 58 Rules of Procedure of the Inter-American Court of Human Rights (‘IACtHR Rules’)), and may also seek information involving expert opinions when evaluating compliance with a → friendly settlement (Art 63 (2) IACtHR Rules). The Court may also request expert opinions in order to assess the gravity and urgency of the situation when considering ordering provisional measures (Art 27 (8) IACtHR Rules). However, expert witnesses’ and experts’ evidence may be more likely to be brought before the Court by the → Inter-American Commission on Human Rights (IACommHR) (Art 46 (1) IACtHR Rules; see also Art 72 IACommHR Rules). The Court is to be notified in advance of the possible appointment of experts and the object of their statements, and to be provided with their curricula vitae, in cases where the Inter-American public order of human rights is affected in a significant manner (Art 35 (1) (f) IACtHR Rules). The Court’s Rules of Procedure define an ‘expert witness’ as a person who, possessing particular ‘scientific, artistic, technical, or practical knowledge or experience, informs the Court about issues in contention inasmuch as they relate to his or her special area of knowledge or experience’ (Art 2 (23) IACtHR Rules). Express provision is made for the statements of expert witnesses, as well as those of
witnesses and alleged victims, to be received by the Court by electronic audio-visual means (Art 51 (11) IACtHR Rules).

28 Experts are required to take an oath or make a solemn declaration (Art 51 (4) IACtHR Rules). States are not to institute proceedings against witnesses, expert witnesses, or alleged victims, or their representatives or legal advisers, nor exert pressure on them or on their families on account of statements, opinions, or legal defences presented to the Court (Art 53 IACtHR Rules). Objections must be presented within ten days of a party’s receipt from the Court of a definitive list of the names of all those who will be making declarations in the proceedings (Art 48 (2) IACtHR Rules). Experts may be disqualified based on a range of grounds, including where the expert: a) is a relative of one of the alleged victims; b) is or has been a representative of one of the alleged victims in proceedings regarding the facts of the case; c) currently has, or has had, close ties with the proposing party; d) is, or has been, an officer of the IACtHR with knowledge of the case; e) is or has been an Agent of the respondent State in the contentious case in which his or her expert opinion is required; or f) has previously intervened, before any organ, whether national or international, in relation to the same case. The Presidency will communicate to the expert witness the objections that have been made and set a time limit for receipt of observations from the expert in response. All this will be communicated to all who form part of the proceedings, and the Court or presiding judge will decide on the matter (Art 48 (3) IACtHR Rules). A replacement expert witness may be accepted (Art 49 IACtHR Rules).

29 The Court will issue an order deciding on any objections, defining the object of the statement to be made by each declarant, requiring submissions of affidavits as appropriate, and summoning all those deemed appropriate to a hearing if necessary (Art 50 (1) IACtHR Rules). For declarants rendering their statements by affidavit, the parties may formulate questions in writing. The Presidency will determine their relevance and will also exclude leading questions and questions not referring to the established object of the statement. Opposing parties will be provided the opportunity to make observations, with certain time limits, on affidavits (Art 50 (5) and (6) IACtHR Rules). Declarants appearing at hearings may then be interrogated by the parties who have proposed them, by the Judges, and by the alleged victims or their representatives, the respondent State, and if applicable the petitioning State (Arts 51 (2) and 52 (1) and (2) IACtHR Rules). The Commission may interrogate the expert witness that it has proposed, and may also interrogate the expert witnesses of the other parties where their statements concern topics included in the statements of the Commission’s own expert witnesses, in cases where the IACtHR public order of human rights is affected in a significant manner and with the Court’s authorization (Art 52 (3) IACtHR Rules). The Presidency will decide the pertinence of all questions, and whether a party may be excused from answering, unless the Court deems otherwise (Art 52 (4) IACtHR Rules). Alleged victims and witnesses who have not yet rendered their statements may not be present at the hearing during the statements of other alleged victims, witnesses, or expert witnesses (Art 51 (6) IACtHR Rules).

30 The African Court on Human and Peoples’ Rights (AChPR) is empowered to hold an enquiry when deemed necessary, with which the States concerned are to assist by providing relevant facilities, and the Court may also receive expert testimony (Art 26 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights). The Court’s Rules of Procedure (‘AChPR Rules’) elaborate its power, of its own accord or at the request of a party or representatives of the AChPR, to obtain any evidence it considers may clarify the facts of the case, including by deciding to hear experts (Rule 45 AChPR Rules). The Court may also hear one or more Commissioners assisted by legal officers from the Commission’s Secretariat and/or experts designated or appointed by the Commission (Rule 43 (3) (b) AChPR Rules). Experts are to make an oath or solemn declaration before carrying out their tasks (Rule 46 (3) and (4) AChPR Rules).
The Court will rule on any challenge to an expert (Rule 46 (5) ACtHPR Rules). Experts may be questioned at hearings by the Presiding Judge, or any other Judge, and examined by the representatives of the parties, and if applicable the representatives of the Commission. They may be subject to cross-examination and re-examination (Rule 47 ACtHPR Rules). The Registrar is to make a verbatim record of the hearing including the texts of statements, questions, and answers. The record is to be sent to the parties to make corrections, with time limits and under the responsibility of the Registrar, provided these corrections do not affect the substance of what was said (Art 48 (1) and (2) ACtHPR Rules).

6. International Criminal Courts

31 In the international criminal courts evidence for trials is collected primarily by the Office of the Prosecutor (Combs, 2011). Chambers of the → International Criminal Court (ICC) may at any stage of the proceedings instruct an expert proprio motu as an alternative to directing the joint instruction of an expert by the participants (Regulation 44 Regulations of the Court (‘ICC Regulations’)). The Chamber may issue orders concerning an expert report’s subject, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented, and time limits (Regulation 44 (5) ICC Regulations). The Registrar is to maintain a list of experts, to be accessible to all the organs of the Court and to all participants. The Chamber may at its discretion allow expert evidence from persons not on the list (Regulation 44 (1) ICC Regulations). The Pre-Trial Chamber may of its own motion, or on request, order a medical, psychological, or psychiatric examination of an individual believed to have committed a crime within the Court’s jurisdiction who is about to be questioned by the Prosecutor or national authorities, taking into account whether the individual consents to the examination (Rule 113 (1) ICC Rules of Procedure and Evidence). For this purpose the Pre-Trial Chamber shall appoint one or more experts from the Registrar’s approved list, or an expert approved by the Pre-Trial Chamber at a party’s request (Rule 113 (2) ICC Rules of Procedure and Evidence). The Trial Chamber may likewise order a medical, psychological or psychiatric examination of the accused under the conditions in Rule 113 in order to satisfy itself that the accused understands the nature of the charges against him or her consistent with Article 64 (8) (a) of the Rome Statute of the ICC (‘ICC Statute’). Subsequent such examinations may also be ordered (Rule 135 ICC Rules of Procedure and Evidence). The Court may also appoint experts to assist in determining reparations (Rule 97 (2) ICC Rules of Procedure and Evidence). The Court’s Statute provides that States Parties shall comply with the Court’s requests for assistance to facilitate the voluntary appearance of present witnesses or experts (Art 93 (1) (e) ICC Statute). The Court shall have the authority to provide as assurance to a witness or expert appearing before the Court that he or she will not be prosecuted, detained, or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the individual’s departure from the State (Art 93 (2) ICC Statute; see also Rule 191 ICC Rules of Procedure and Evidence). Where the Court is assisting a State Party in an investigation into or a trial in respect of conduct constituting a crime under the Court’s jurisdiction or a serious crime under the requesting State’s national law, the Court may provide the State with, inter alia, copies of experts’ statements and requests (Art 93 (10) (b) (ii) (b) ICC Statute, subject to requirements for the protection of victims and witnesses).

32 Provision was made for the → International Criminal Tribunal for the Former Yugoslavia (ICTY) and the → International Criminal Tribunal for Rwanda (ICTR) also to take evidence from court-appointed experts, with Rule 74 bis of the Rules of Procedure of each of these ad hoc Tribunals specifying that ‘A Trial Chamber may, proprio motu or at the request of a party, order a medical, psychiatric, or psychological examination of the accused. In such a case, unless the Trial Chamber otherwise orders, the Registrar shall entrust this task to one
or several experts whose names appear on a list previously drawn up by the Registry and approved by the Bureau.

7. The Permanent Court of Arbitration

Article 90 of the 1907 Hague Convention for the Pacific Settlement of International Disputes envisaged the appearance and questioning of experts whose appearance might be considered useful. Article 90 formed part of the Convention’s Chapter IV provision for arbitration by summary procedure, proposed by the French delegation for settlement of difficulties of a technical nature (White, 1965, 34–36). Appointment of experts for standard chapter III arbitrations such as the Lighthouses Arbitration between France and Greece relied rather on a tribunal’s inherent or implied powers (White, 1965, 36). Specific provision for the appointment of experts was made in successive Rules of Procedure of the PCA. The adoption of the UNCITRAL Arbitration Rules in 1976 (‘1976 UNCITRAL Rules’) provided a model in its time and the adoption of the revised 2010 UNCITRAL Arbitration Rules (‘2010 UNCITRAL Rules’) provided impetus for the revision of the PCA Rules, producing the optional 2012 PCA Rules (Daly and others, 2014, 6). Prior PCA Rules were consolidated in the 2012 PCA Rules, with Article 29 making provision for the appointment and written reports of experts. Article 29 draws on Article 29 of the 2010 UNCITRAL Rules, with the exception of Article 29 (5) of the 2012 Rules which is based on Article 26 (2) of the UNCITRAL Model Law on International Commercial Arbitration and provides for a tribunal to request the presence of a tribunal-appointed expert at a hearing when the tribunal considers it necessary. This differs from Article 29 (5) of the 2010 UNCITRAL Rules, which provide only for the hearing of the expert at a party’s request. Experts’ fees and expenses are allocated as part of the costs of the arbitration, with the parties being required to make an advance deposit for these charges (Arts 40–43 2012 PCA Rules). Experts are expected to be impartial and independent, and in principle before accepting an appointment are to submit to the tribunal and the parties a statement of their impartiality and independence (Art 29 (2) 2012 PCA Rules).

The parties are to be consulted by the tribunal on the appointment of the experts, and the arbitral tribunal will communicate to them the expert’s terms of reference (Art 29 (1) 2012 PCA Rules). Objections to experts’ qualifications, impartiality, or independence may be put forward by the parties within the timeframe specified by the tribunal and the tribunal will decide promptly whether to accept such objections (Art 29 (2) 2012 PCA Rules). These provisions reflect both the 2010 UNCITRAL Rules and practice under previous PCA Rules (Daly and others, 2014, 118). The parties are to give the expert any relevant information or produce for the expert’s inspection any relevant documents or goods required (Art 29 (3) 2012 PCA Rules). The tribunal is to send copies of the expert’s report to the parties and give them the opportunity to express their written opinion on it, as well as to examine any document relied upon by an expert (Art 29 (4) 2012 PCA Rules). If there is a hearing, the parties will also have the opportunity to put questions to the expert and to present their own experts to testify to the points at issue (Art 29 (5) 2012 PCA Rules).

In order to ensure that a tribunal receives all necessary assistance, experts’ tasks and roles may be crafted with some breadth. Procedural provision for consultation with experts may also be made in advance, before the need for experts can be confirmed. This was the case in the → Abyei Arbitration, conducted under the PCA’s 1993 Optional Rules for Arbitrating Disputes between Two Parties of which Only One is a State (→ Optional Rules for Arbitrating Disputes between Two Parties of which Only One is a State: Permanent Court of Arbitration (PCA)) and relying on Article 27 of the Rules (Abyei Arbitration, The Government of Sudan/The Sudan People’s Liberation Movement/Army, Final Award, 2009, paras 74–77). The experts were to assist with defining the boundaries of the Abyei area, as well as to ‘make themselves available to assist the Tribunal as required by it in the

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preparation of the Award’ (Abyei Arbitration, The Government of Sudan/The Sudan People’s Liberation Movement/Army, Procedural Order No 2, 2009, paras 3.1–3.2; Award, 2009, para 77). The parties were provided the opportunity to comment on the experts’ terms of reference in draft before the Court’s procedural order was adopted. The possible appointment of an expert was also anticipated in an arbitration conducted under the PCA's 1992 Optional Rules for Arbitrating Disputes Between Two States (→ Optional Rules for Arbitrating Disputes Between Two States: Permanent Court of Arbitration (PCA)), relying on Article 27 of these rules, which is also similar to Article 29 of the 2012 Rules. The Tribunal’s order envisaged that in addition to the functions envisaged in Article 27 the expert would provide ongoing assistance to the Arbitral Tribunal in respect of any question within the expert’s field of expertise that might arise in the course of the proceedings. Further, any expert was to be free to attend the hearing and deliberations of the Arbitral Tribunal, as the Tribunal deemed necessary (Daly and others, 2014, 117). The PCA also has experience with the appointment of expert arbitrators, in the → Indus Waters Kishenganga Arbitration (Pakistan v India), where the dispute settlement provisions in the Indus Waters Treaty required one of the seven members appointed to the Court of Arbitration to be selected for his expertise as a highly qualified engineer (Indus Waters Kishenganga Arbitration, Pakistan v India, 2013, para 14; Levine and Peart, 2019, 228).

36 Sensitivity concerning non-delegation to experts could arise in cases heard under the PCA’s 2001 Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (→ Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment: Permanent Court of Arbitration (PCA)), where questions of mixed fact and law might be likely to assume significance, or under the 2011 Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (→ Optional Rules for Arbitration of Disputes Relating to Outer Space Activities: Permanent Court of Arbitration (PCA)). Articles 27 (5) and 29 (7) of these rules provide respectively for the Secretary-General to 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, although the arbitral tribunal is not to be limited in its choice to any person or persons appearing on the indicative lists of experts.

37 The PCA administers arbitrations also under the UNCITRAL Rules (see below) and has also devised ad hoc procedural regimes and rules for arbitrations it is administering that are governed by treaties, including the Annex VII arbitrations under UNCLOS (Daly and others, 2014, 4). These have included the Barbados v Trinidad and Tobago arbitration, the Guyana v Suriname arbitration, the Bay of Bengal Maritime Boundary Arbitration, and the South China Sea arbitration.

8. Investment Arbitration

38 Disputes over the fulfillment of investment protection obligations in bilateral and multilateral treaties will be determined in reliance on the applicable rules of procedure, commonly including the Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes (‘ICSID Arbitration Rules’), or the UNCITRAL Rules together with the national law of the seat of the arbitration (Williams and Kawharu, 2017, 735). Alternatives include the Rules of the International Chamber of Commerce or the Rules of the Stockholm Chamber of Commerce (‘SCC’). An arbitration may be administered by the → International Centre for Settlement of Investment Disputes (ICSID), the PCA, or elsewhere. Article 29 of the 2010 UNCITRAL Rules provides for the consultation of tribunal-appointed experts, building on Article 29 (2) of the 1976 UNCITRAL Rules with the addition of new content in Article 29 (2) on experts’ independence and impartiality. The ICSID Arbitration Rules set out tribunals’ powers to conduct site visits and on-site inquiries (Arts 34 (2) (b) and 37 (1) ICSID Arbitration Rules; see also Art 43 (b)
ICSID Convention. The parties are under an obligation to cooperate with the tribunal in relation to site visits and inquiries (Rule 34 (3) ICSID Arbitration Rules) and are entitled to participate Rule 37 (1) ICSID Arbitration Rules). Costs form part of the expenses of the arbitration (Rule 34 (4) ICSID Arbitration Rules). Provisions in governing treaties may also apply. For instance, Article 1133 NAFTA specifically envisages, without prejudice to the appointment of other bodies of experts, the appointment of one or more experts to report in writing on any factual issues concerning environmental, health, safety, or other scientific matters, at a Tribunal’s own initiative in NAFTA investment disputes. Scholars have emphasized the need for investment treaty tribunals to exercise their fact-finding powers of their own motion where called for in the circumstances, including where questions of international public policy are involved (Schill, 2011, 38). Tribunals are conscious of avoiding the inappropriate delegation of arbitral authority and the importance of reaching their own conclusions even when advice is taken (Experts: Investment Arbitration).

9. The Iran-US Claims Tribunal

The Final Rules of Procedure of the Iran-United States Claims Tribunal (‘Iran-US Claims Tribunal Rules’), developed by modifying the UNCITRAL Rules, provide for the reference of technical issues to independent experts (Art 27 Iran-US Claims Tribunal Rules). The Iran-United States Claims Tribunal has made use of independent experts in a number of cases (Aldrich, 1996, 343–47, 348, 353, 479), as have specialized tribunals previously (White, 1965, 50–53).

D. Conclusion/Evaluation

International courts and tribunals are equipped to appoint and consult experts where the circumstances so require. Their rules and practice reflect a solid appreciation of the need to ensure experts’ independence and fairness to the parties, and the need for international courts and tribunals to assume responsibility for their own findings. Appreciating more closely the complex ways in which courts’ and tribunals’ interaction with experts can contribute to the resolution of a dispute according to law calls for further study, but at a foundational level court-appointed expert evidence is presently understood as a way to help international courts and tribunals obtain all relevant facts and understand fully their relevance to the case (Simma, 2012, 232).

The additional expense and time associated with appointing experts (Baker and others, 2015, 441–42; MacLennan, 2000, 286; Levine and Schofield, 2018, 123) make it important to ensure that the procedures employed for their consultation are well designed. Potential procedural developments include pre-trial procedures and other alternatives (Rosenne, 1999, 247–48; Peat, 2014, 299–302; Malintoppi, 2016, 438–39). The extent to which such two-step procedures should separate out the process of determining the facts from the legal evaluation of a case needs to be carefully considered (Foster, 2011, 158–65); an international court or tribunal’s direct involvement in pre-trial conferences may be important (Foster, 2011, 123–25).

The question of the best methods for consulting court-appointed experts forms part of the broader topic of how international courts and tribunals may best handle technical and scientific matters. The idea that assistance may be sought informally from individuals with particular technical knowledge has raised concerns about ‘phantom’ experts (Phantom Expert) (Boisson de Chazournes and others, 487; Bennouna, 2018, 348; Parlett, 2018, 445). Members of international courts and tribunals have discussed the advantages and disadvantages of court-appointed experts (Bennouna, 2018), with scholars encouraging more attention to this option (Schofield and Carleton, 2004, 251; Riddell and Plant, 2009, 73–75; Foster, 2014; Malintoppi, 2016; Devaney, 2016, 217–19), together with a more proactive approach to expert evidence and fact-finding more generally (Plant, 2018, 468;
Devaney, 2016, 219–35). Others have raised concerns that a court or tribunal might feel overly obliged to accept the views of court-appointed experts (Boisson de Chazournes and others, 2018, 482, 486, 489–91, 498, 500; Donoghue, 2018, 386–87; Plant, 2018, 464). Greater levels of interaction between courts and tribunals and experts, including both party-appointed experts (Levine and Schofield, 2018) and court-appointed experts (Foster, 2014), may help adjudicators gain a stronger appreciation of a case’s factual dimensions.

**Cited Bibliography**


GM White, *The Use of Experts by International Tribunals* (Syracuse University Press Syracuse 1965).


A Riddell and B Plant, Evidence Before the International Court of Justice (British Institute of International and Comparative Law 2009).


J Devaney, Fact-Finding before the International Court of Justice (CUP Cambridge 2016).


Further Bibliography


Cited Documents

a) Treaties


Statute of the Permanent Court of International Justice (adopted 16 December 1920, entered into force 20 August 1921) 6 LNTS 389.

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.


WTO Agreement on Technical Barriers to Trade (signed 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120.


**b) Other Instruments**

**ACtHPR:**

African Court on Human and Peoples’ Rights, Rules of Court (adopted 2 June 2010 to replace the Interim Rules of the Court and the Commission).

**ECJ:**


**ECOWAS Court:**


ECOWAS, Instructions to the Chief Registrar and Practice Directions (adopted 4 June 2012).
ECtHR:

EFTA:

IACommHR:

IACtHR:
Rules of Procedure of the Inter-American Court of Human Rights (approved 28 November 2009).

ICC:


ICJ:

UNGA Res 90 (I), ‘Privileges and Immunities of Members of the International Court of Justice, the Registrar, Officials of the Registry, Assessors, the Agents and Counsel of the Parties and of Witnesses and Experts’ (11 December 1946) UN Doc A/RES/90(I).

ICSID:

ICTR:

ICTY:
**Iran-United States Claims Tribunal:**


**ITLOS:**


**NAFTA:**


**PCA:**

PCA Arbitration Rules 2012 (effective 17 December 2012).

PCA Optional Rules for Arbitrating Disputes between Two States (effective 20 October 1992).

PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State (effective 6 July 1993).

PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (PCA Environmental Arbitration Rules) (effective 19 June 2001).

PCA Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (PCA Environmental Arbitration Rules) (effective 6 December 2011).

**PCIJ:**

PCIJ Rules of Court (adopted 11 March 1936).

**UNCITRAL:**


**UNCLOS Annex VII Arbitrations:**


**Cited Cases**

Abyei Arbitration, Sudan v Sudan People’s Liberation Movement/Army, Procedural Order No 2, Permanent Court of Arbitration, 16 April 2009.


Arctic Sunrise Arbitration, Netherlands v Russia, Award on the Merits, 14 August 2015, PCA Case No 2014-02.


Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, *Bangladesh v India*, Final Award, 7 July 2014, ICGJ 479 (PCA 2014).

Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, 2016, PCA Case No 2016-10.


Factory at Chorzów (Germany v Poland), Claim for Indemnity-Merits, 13 September 1928, PCIJ Series A No 17.


Indus Waters Kishenganga Arbitration, Pakistan v India, Partial Award, Permanent Court of Arbitration, 18 February 2013.


Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Qatar v Bahrain, Merits, 16 March 2001, [2001] ICJ Rep 40; 40 ILM 847.


South China Sea Arbitration, Philippines v China, Award, 12 July 2016, PCA Case No 2013-19.


Further Cases

Land Reclamation by Singapore in and around the Straits of Johor, Malaysia v Singapore, Order, Provisional Measures, 8 October 2003, ITLOS Case No 12; (2005) 126 ILR 487.

Land Reclamation by Singapore in and around the Straits of Johor, Malaysia v Singapore, Award, Permanent Court of Arbitration, 1 September 2005, (2005) 27 RIAA 133.


Perenco Ecuador Limited v Ecuador, Interim Decision on the Environmental Counterclaim, 11 August 2015, ICSID Case No ARB/08/6.