

## The Expert in the International Adjudicative Process: Introduction to the Special Issue

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### ABSTRACT

In the past decade, international courts and tribunals have been increasingly facing scientific and technical issues in their case law, and international disputes have seen greater resort to expert opinion, both by parties and adjudicators. Despite the increasing use of the expert in various kinds of international disputes, there has not been a corresponding coherence in practice governing different aspects of expert use, or clarity in the rules and practices to be followed in this respect. The present journal issue includes diverse contributions from authors on the aforementioned theme and offers challenging views and opinions on the topic.

To further dialogue on various aspects of working with experts in disputes, especially cutting across different fora, a symposium was organized in April 2017, at the Max Planck Institute Luxembourg. This symposium provided a platform for the exchange of ideas on topics of considerable debate and divergent views. The interaction of participants highly experienced and specialized in their field also provided an in-depth practical and theoretical analysis of the topic under discussion. A comparative perspective, crucial to a holistic appraisal of the subject, was the hallmark of this discussion, due to the diverse professional backgrounds of the participants. The symposium highlighted and confronted, among other issues, varying views on the appointment of experts, their roles and obligations; the modes of using experts within the framework of the proceedings; and the means of assessing expert evidence available to the judge.

The symposium was part of a research project on ‘Experts and International Courts and Tribunals’, funded by the Swiss National Science Foundation (SNSF),<sup>1</sup> and conducted at the Faculty of Law of the University of Geneva. The research conducted under the aegis of the project aimed to identify and analyse practices across various international jurisdictions in relation to experts appearing in disputes before

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the said jurisdictions. The research has illuminated the core areas of disagreement and disparity among participants in international dispute settlement, such as the efficacy of cross-examination, the preference for party-appointed over tribunal-appointed experts and their expected roles and duties, as well as the areas which, by broad consensus, are in need of reform, such as the use of ‘phantom experts’ and transparency in a court or tribunal’s use of experts.

The symposium provided opportunity for further in-depth discussion and examination of these aspects of expert use in international disputes. Speakers experienced in investment and trade disputes, those who have been involved with the Court of Justice of the European Union (CJEU), the Law of the Sea Tribunal as well as the International Court of Justice—in capacities of judges, counsel as well as experts—brought the necessary diversity of experience, along with academic scholars, to the debates at the symposium. A majority of these speakers, as contributors to this special issue of the *JIDS*, have also brought the same diversity of opinion to the debates in this journal, while at the same time expanding on the thoughts expressed at the symposium.

Across a broad spectrum of dispute settlement fora, the authors raise issues concerning the various forms in which experts may be involved in a dispute and the procedures that govern their involvement, judicial assessment of expert evidence including questions such as admissibility and weight of such evidence and a related concern for independence and impartiality of experts that may have a bearing on admissibility of their evidence. The thread that ties these inquiries together is the extent to which the use of experts affects various aspects of an international dispute, from the pre-hearing phase, until judicial decision-making. There is a need to delineate the roles and responsibilities of experts from those exercised by judges and arbitrators in a dispute settlement function. The contributions brought together in this special edition of the journal confront these issues and help us to further consider how to address them.

The papers in this special issue have thus been broadly classified into four sections, based on the different aspects of expert use they analyse. Each section consists of two to four contributions. Thereafter, a jointly authored paper by Professors Boisson de Chazournes and Mbengue, and Guillaume Gros and Rukmini Das, highlights the conclusions they have drawn from the empirical research they have conducted, under the aegis of the SNSF project.

## 1. CONTRIBUTIONS BY SYMPOSIUM SPEAKERS

### A. Different Forms of Expert Involvement

The expert is an actor with a plurality of forms. A single term encompasses a multiplicity of practical expressions. He or she may be appointed by the judge, by the parties as a witness, as a counsel, or may sit with the judge or even in certain instances be a judge. Some of them apparently intervene at the fringe of the legal framework, being invisible, without formal recognition or public involvement. Each of these is an expert, the modality of intervention relates *in fine* to a specific type of justice either more inquisitorial or more adversarial. There may be advantages of using one form of experts over another, or of using two or more of them in conjunction. The authors of this section describe according to different perspectives and conceptions, these different types of use, and make a critical assessment in context of the adversarial principle.

Judge Bennouna after carefully delineating the limit of the function of an expert in a judicial context addresses the advantages and disadvantages of the different forms of expert involvement in context of the International Court of Justice. He notes certain limits to a pure adversarial approach of fact-finding especially with regard to scientific uncertainty. He argues however in favour of the limited added value of the court-appointed expert and advocates for its cautious use.

James Flett makes the plea that a sound conceptual clarification is necessary to effectively grasp the practice of using experts and would help resolving substantial issues. By relating the function of an expert to the functions of the other judicial actors, he identifies a negative definition, determining what an expert is not or should not do. He identifies the remaining (limited) functions of the expert, the primary one being organizing facts and evidence. Against this background Flett analyses the World Trade Organization (WTO) practice, and concludes that both adjudicators and counsel should keep in mind that the role of an expert is limited to 'provid[ing] assistance'.

As a counterpoint, Geoffrey Senogles offers a valuable perspective by giving the practical analysis of an expert on the adversarial production of expert evidence. Senogles offers a critical assessment of the different procedural methods existing to implement the adversarial principle in the production of expert evidence, rooted in practical experiences. He demonstrates that an adversarial approach without constraints can lead the experts to forget their function of assistance to the judge by sustaining entrenched positions and concentrating on discrediting the expert of the opposing party.

Cherise Valles, after acknowledging the technical or scientific complexity of the disputes brought to the WTO, draws a comprehensive picture of the types of expert involvement including recourse to international organizations. By doing so, she points the paradox in WTO practice that no economic expert was ever appointed despite the parties including increasing number of economic technical evidence. The role of the secretariat in this perspective is then critically discussed as well as the importance of the standard of review applied when dealing with factual complexity.

## **B. Judicial Assessment of Expert Evidence**

This section debates the means of introducing expert knowledge into the judicial decision and the potential development of legal criteria to handle scientific categories. Judgments from different international fora reveal varied approaches to handling expert evidence, in terms of using it to arrive at a decision, incorporating it into the steps in the judicial process. There seems to be an absence of a consistent approach in terms of admissibility of such evidence, weight given to it, or otherwise assessing it, across fora and sometimes within the same judicial forum.

Judge Donoghue clearly notes that every case involving expert evidence does not call for passing judgement on scientific questions, since the mandate of the international judge is to settle legal disputes. Addressing a case according to this specific mandate allows judges to not adjudicate on the substance of matters of scientific uncertainty. Judge Donoghue demonstrates that when it comes to scientific fact-finding, the methodology of judicial assessment does not differ from fact-finding in general. Especially, similarly to other facts judges make use of 'second order indicators' when assessing scientific expert evidence. Generally, it is argued that

increased scientific fact-finding should not be an objective in itself for international courts and tribunals.

For Kate Cook, the ‘best available science’ (BAS) standard is increasingly present in international law, and is likely to become a parameter of assessment for the legality of national measures with scientific components. In this regard, the Paris climate agreement provides the most important illustration. Cook explains that if the agreement comes under judicial review, this will encompass an appraisal of the BAS as a determinant of the disputed measures. The assessment of expert evidence by international courts and tribunals will potentially be influenced by the formalization of this standard. The ITLOS has already made use of the BAS standard, the absence of which should trigger the application of the precautionary principle.

As demonstrated by Isabelle van Damme, rules regarding evidence, admissibility, standard of proof and standard of review are underdeveloped in international law. At the same time, she notices the diversity in the use of expert evidence and its respective difference in treatment. Based on an analysis of the WTO and CJEU practice, van Damme advocates then for the determination of ‘essential procedural guarantees’ with regard to the assessment of expert evidence, as well as the reassessment of the use of party-appointed and ex-curia experts. In that respect, she concludes that before international courts and tribunals a balance should be identified between equity and transparency on one side and flexibility on the other.

Jose Alvarez uses the *Philip Morris v Uruguay* ICSID case to explore the concept of objectivity in a judicial context through the treatment of expert evidence. This case involved a considerable amount of expert evidence, the assessment of which was a crucial element of the decision. If it provided the judges with the occasion to distinguish ordinary ‘witnesses’ from ‘experts’, Alvarez points out the relative failure of the Tribunal to make ‘law ascertainment’ its exclusive domain. In this respect, the significance of legal experts, be it in international law or Uruguayan law, is somewhat problematic with regard to respect of the principle ‘*iura novit curia*’. Alvarez also identifies the absence of a specific test for expert evidence, as conceived in the US domestic system. When considering a risk of judicial ‘fragmentation’, he argues that a common set of rules with regard to assessment of expert evidence, identified cautiously, would be a factor fostering coherence in international jurisprudence.

### C. Qualities of Experts and Admissibility

It is hardly disputed that an individual to be called an expert ought to possess certain qualities or characteristics that qualify him or her as such. In addition to specific knowledge and abilities, other qualities, often described as ‘ethical’, should characterize the expert in a judicial process, the most common among them being related to independence and impartiality. Requirements of independence and impartiality are not only found in common and civil law domestic systems, but also appear to be universal and are usually found in rules and statutes of most international fora. However, their definitions and scope remain imprecise. In practice, their implementation and means of testing appear unsettled, thus questioning their significance regarding experts in international law.

In this context, Marisa Goldstein, in describing the procedures for selection and consultation of various forms of experts in WTO dispute settlement, highlights how the selection process of each kind of expert has specific issues of impartiality and due process attached to it. She describes how, at every stage of the process, especially that of expert selection, consultation, and utilization of expert input, panels try to ensure the independence of those experts.

As Philippe Gautier demonstrates, through reference to rules and case law, the International Tribunal for the Law of the Sea, too, plays a significant role in ensuring the independence of experts and the impartiality and credibility of expert statements. Gautier also elaborates on the parties' role in this regard, which, though limited, has been expanded through the use of innovative procedures such as *voir dire* (rarely used in international disputes).

In context of inter-state and investor-state disputes, Kate Parlett identifies the safeguards and limitations to the possibility that an expert's views might be unduly influenced by a party or its counsel. She argues that in practice, the effectiveness of these safeguards will ultimately depend on the ethical standards observed by parties, their counsel and the experts themselves.

With a specific focus on investor-state arbitration, Mélida Hodgson and Melissa Stewart examine, in light of current practices, the lack of standards in existing rules to assess the credibility of expert opinions. They then propose that standards be adopted to determine the admissibility, or qualification, of credible expert testimony.

In all these contributions, what appears as a common thread is the recognition that there is an undoubted necessity for the experts to possess certain ethical traits, as well as a need to ensure that the experts possess them.

#### **D. Concluding Observations and Suggestions for Reform**

Brendan Plant, in addressing reform in the expert evidence regime, highlights the specificity of international adjudication by emphasizing its flexibility. He explains how this flexibility complicates all prospects of procedural reform, each reform being able to potentially disturb the institutional balance agreed upon by states. Thus, reforming expert evidence regimes by modifying statutes and rules could prove ineffective. Some practitioners and adjudicators nevertheless acknowledge a need to adapt the system to accommodate the evolution of disputes towards increasing factual complexity. Plant suggests that this adaptation could be achieved through change in practices, fostered by adjudicators. He adds that these evolved practices should include a more transparent approach to the presentation and assessment of expert evidence.

Jean-Marc Sorel concluded the symposium and notes by that the scope for reform lies perhaps less with the role of the expert and more with the expected role of the judge. He is of the opinion that a balance must be reached between confidence in the experts and increase in procedural safeguards to control them.

## **2. CONTRIBUTION BY THE PARTICIPANTS IN THE SNSF PROJECT ON EXPERTS**

Laurence Boisson de Chazournes, Makane Mbengue, Rukmini Das and Guillaume Gros, conclude this special issue with a paper on the regime of expert use in international disputes with insights from interviews with judges, practitioners and experts.

In this article, the authors provide their analysis of the practical understanding of expert use in international disputes by judicial actors. This analysis is drawn from their exploration of questionnaires and interviews they conducted under the aegis of the SNSF project. These findings provide an understanding of the practices with respect to the kind of experts used, the methods of oral interaction, the assessment of evidence as well as areas of concern that are ripe for reform in a comparative perspective.