SOCIETE FRANÇAISE POUR LE DROIT INTERNATIONAL

COLLOQUE D'AIX-EN-PROVENCE

LE DROIT INTERNATIONAL FACE AUX ENJEUX ENVIRONNEMENTAUX

Paris
EDITIONS PEDONE
13 rue Soufflot
2010

Cet ouvrage constitue les actes du 43ème colloque de la Société française pour le droit international qui s'est tenu à Aix-en-Provence du 4 au 6 juin 2009

Société française pour le droit international

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Les organisateurs remercient pour leur soutien financier et matériel :

- l'Université Paul Cézanne Aix-Marseille III,
- la Faculté de droit et de science politique d'Aix-Marseille,
- le Centre d'études et de recherches internationales et communautaires,
- la Société française pour le droit international,
- l'Organisation Internationale de la Francophonie,
- la Ville d'Aix-en-Provence,
- la Communauté du Pays d'Aix,
- la Région Provence-Alpes-Côte d'Azur,
- l'Association pour l'Enseignement et la Recherche en Relations Internationales
- les Editions Pedone

I.S.B.N. 978-2-233-00590-8

THE ROLE OF EXPERTS IN INTERNATIONAL ADJUDICATION

par

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The debate about the proper role of science and scientists in courtrooms is nearly three century old. It began during the 18th century, when the scientific revolution of the age of Enlightenment swept away metaphysics and relegated the scientist-philosopher to the cabinet of curiosities.[1] Since then, courts have struggled to develop criteria to evaluate the credibility of experts and the facts they present with varying results.[2] Common problem as it may be, civil and common law legal systems have developed somewhat different legal approaches to the question of who should bring experts to the courtroom. Generally, in common law legal systems experts tend to be brought to the courtroom by the parties (experts ex parte), while in civil law legal systems experts are more often than not court-appointed (experts ex curia).[3] Of course, this note addresses international adjudication. International law, being a legal system on its own right, which is not the mere juxtaposition of the two main world legal traditions, approaches the issue at hand in its own idiosyncratic way, making the experience of national courts of limited interest. Moreover, since only recently the caseload of international courts reached significant proportions, there is still little practice in this particular area of procedure.[4]

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* The author would like to acknowledge the assistance of Laura Cadra and Jenna Gilbert at Loyola Law School Los Angeles.

[1] Tal Golan, "Revisiting the History of Scientific Expert Testimony", *Brooklyn Law Review*, Vol. 73 (2007-2008), pp. 879-942, at 881.

[2] For a careful analysis of the often uneasy relationship between science and the law, particularly in the context of the U.S. judicial system, see the special symposium issue of the Brooklyn Law Review, Vol. 73 (2007-2008).

[3] Eric Barbier de la Serre; Ms Anne-Lise Sibony, "Expert Evidence Before the EC Courts", *Common Market Law Review*, Vol. 45 (2008), pp. 941-985. Of course, in practice, the way the various legal systems deal with expert evidence is more complex than that, as de la Serre and Sibony explain in note 5-6. Ibid.

[4] Yet, albeit international courts and tribunals still have little practice, the question of expert witnesses and their proper role has been a long-standing issue in international arbitration. See, in general, Claus Von Wobeser, "The Arbitral Tribunal-appointed Expert", in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (2007), pp. 801-812; Kap-You (Kevin) Kim and John P. Bang, "Commentary on Using Legal Experts in International Arbitration", in ibid. at pp. 779-785; Gabrielle Kaufmann-Kohler, "Arbitration and the Need for Technical or Scientific

Besides, it should be noted that albeit this symposium is dedicated to international environmental law, litigation of environmental issues before international adjudicative bodies tends to be a relatively rare occurrence.[5] Therefore, to avoid too narrow a scope, it is necessary to touch on the practice of international courts other than those that adjudicate, or could adjudicate, international environmental disputes, such as international criminal courts. Yet, that being said, it is necessary to warn that the sheer variety of international courts and tribunals and their procedural law and practice make it difficult to articulate firm overarching conclusions about the role of experts in international adjudication, environmental or otherwise. Some international courts, like the European Court of Justice, for instance, might face technical questions requiring sophisticate scientific expertise more often than others, such as the International Court of Justice. There are few systematic and analytical compilations of the role of experts in international adjudication, and those few indicate that international courts' practice is rather heterogeneous.[6]

Despite these necessary caveats, in general it seems that resort to experts by the bench (ex curia) is a relatively rare occurrence. Courts accessible by private parties, such as the courts of regional economic integration agreements or human rights bodies, seem to resort to ex curia experts more frequently than courts that adjudicate disputes between sovereign states, such as the International Court of Justice or the International Tribunal for the Law of the Sea. Still, in either case, resort to ex curia experts is sporadic.[7] Much more frequent in both cases is the resort to experts ex parte.

Expertise", in International Bureau of the Permanent Court of Arbitration (ed.), *Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures* (2002).

[5] That, of course, depends on how international environmental disputes are defined. To one extreme, if by environmental dispute one means all disputes over the allocation of natural resources, including land, then most if not all conflicts since the dawn of mankind are "environmental". However, if one restricts the focus to disputes arising out of environmental degradation, then one could probably count only a dozen or so of cases having been litigated before international adjudicative bodies. See, in general, Cesare Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (Kluwer, 2000); Aaron Schwabach, Mildred Vasan, *International Environmental Disputes: A Reference Handbook* (ABC-CLIO 2006); Cairo Robb (ed.), *International Environmental Law Reports: Early Decisions* (vol. 1), (CUP 1999).

[6] Amongst the most useful and recent see Louis Savadogo, "Le recours des jurisdictions internationales á des experts", *Annuaire français de droit international*, vol. 50 (2005) pp. 231-258. Savadogo analyzes the practice of the International Court of Justice, Court of Justice of the European Communities, including its Court of First Instance, European Court of Human Rights, the International Tribunal for the Law of the Sea, the Iran-US Claims Tribunal, the International Criminal Tribunal for Yugoslavia, the WTO dispute settlement system. For specific studies on selected courts see: Gillian White, "The use of experts by the International Court", in Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty years of the International Court of Justice:* essays in honour of Sir Robert Jennings (1996) pp. 528-540; Joost Pauwelyn, "The Use of Experts on WTO Dispute Settlement", *International and Comparative Law Quarterly*, vol. 51 (2002), pp. 325-364; Melanie Klinkner, "Proving Genocide ? Forensic Expertise and the ICTY", *Journal of International Criminal Justice*, vol. 6 (2008) pp. 447-466; Philippe Léger, "L'expertise judiciaire dans le contentieux communautaire", in Mario Monti (ed.), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher* (2007); de la Serre and Sibony, supra note 3.

[7] Savadogo, supra note 6, at 233-238.

I would like to put forward five main reasons why ex curia experts are rare sightings in international adjudication and why, in general, science seems to play a minor role in international adjudication as compared to the role it plays in national litigation.

The first one is rather theoretical and philosophical and goes to the core of the purpose of international adjudication. At the national level, it can be said that "the basic purpose of a trial is the determination of truth."[8] Of course, some might object that absolute truth and objectivity cannot be achieved in an essentially polarized environment as courtrooms are, or that objectivity is attainable only in cases where observable phenomena have been long studied and recorded. But theoretical quibbles aside, at a minimum factually correct verdicts are what national courts usually strive to achieve. In this context, there is no question that the testimony of scientific experts can be enormously useful, if not essential. Conversely, perhaps with the only exception of international criminal courts, it can be argued that the ultimate purpose of international adjudication is not establishing facts, or truths, or even The Truth, but rather to settle the dispute. That, at least, is the original rationale for the creation of international courts and tribunals. Establishing facts does not necessarily lead to the settlement of the underlying dispute. Counter intuitively, it can exacerbate it and make settlement unattainable. Fully aware of what their ultimate mission is, and of the hazard of pursuing objectivity and truth to its ultimate logical consequences, international judges might pause before often seeking assistance of scientific experts.

There is more to that. It suggests a second possible explanation. All international courts and tribunals are final, last-instance, jurisdictions. There is no appeal against their rulings and, to the extent there is any, it is always a superior appellate chamber of the very same court or tribunal having the last word.[9] Typically, revision is allowed only when new evidence have been discovered which was not available at the time of the decision and is sufficiently important to have probably influenced it. Interpretation cannot add or detract from the decision. To paraphrase a famous quip by U.S. Supreme Court Justice Robert H. Jackson, international courts are not final because they are infallible; they are infallible because they are final.[10] It is exactly the awareness of one's finality that makes one's fallibility ultimately immaterial. Granted, not even last-instance jurisdiction international courts can be completely callous to objective truths and facts. After all, international courts, not having own or automatic law

[8] Tehcan v. United States, 382 U.S. 406, 416 (1966).

[9] Of course, some international courts have two levels of jurisdiction. This is the case of all international criminal tribunals, obviously, since the right to appeal is a fundamental human right. However, this is also the case of the WTO dispute settlement system, where awards of arbitral panels can be appealed before the WTO Appellate Body, or the Court of Justice of the European Communities where, in certain cases, decisions of the Court of First Instance can be appealed before the European Court of Justice, or the European Court of Human Rights, where chambers' decisions can be appealed, in certain circumstances, before the Grand Chamber.

[10] The exact quote was "We are not unaware that we are not final because we are infallible; we know that we are infallible only because we are final." Justice Jackson's concurrent opinion in Brown v. Allen, 344 U.S. 443 at 540 (1953).

enforcement means rely on their sheer power of legal suasion to ensure compliance. Factually correct verdicts tend to have greater suasion powers than those which are simply fiats. But, in the rarified spaces of legal reasoning where international courts usually operate, diplomatic expedience and legal coherence, as opposed to factual adherence, carry greater weight.

Third, one must always be cognizant of the fact that international courts operate in a polity essentially different from the one in which their national peers operate. State sovereignty is inescapable and it affects how international courts approach the question of the proper role of experts. On the one hand, it makes international courts reluctant to rely on experts ex curia, who, for instance, might offer an interpretation of facts, or an assessment of causation, embarrassingly different from the ones put forward by the experts of the parties. On the other hand, it makes courts reluctant to conduct vigorous examination of both qualifications and deposition of ex parte experts.

Fourth, the sporadic resort to ex curia experts can be explained by a certain unwillingness of international judges to abdicate their judicial function, to let experts enter their own province. Of course, no international court is bound by expert opinions, not even those they sought and appointed. Experts are just witnesses and their deposition is evidence that the court will weigh along with much other evidence coming from other admissible sources. However, when disputes hinge on highly technical matters, hiring an expert might be tantamount to delegating decision of the case to a single ad hoc technical adjudicator. Indeed, some have wondered whether then it would not make more sense having the experts directly on the adjudicating panel.[11]

In highly technical cases, de facto delegation is unavoidable.[12] For instance, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures in essence provides that trade-restrictive measures, such as import bans, aimed at protecting human, animal, or plant health, are allowed only if there is sound scientific evidence demonstrating the existence of a risk.[13] For over ten years, the EU, on the one hand, and the United States and Canada, on the other, have been locked in a trade dispute over the EU ban of import of beef from hormone-treated cattle. Canada and the United States argued that the ban was not justified because it did not present a risk to consumers' health. The dispute was adjudicated, in two successive rounds, by the WTO dispute settlement system. Yet, what the panel in charge of deciding the dispute was called to answer in essence was a very specific one: may the presence of certain animal growth hormones – namely oestradiol 17β, progesterone, testosterone, zeranol,

[11] Marc Iynedjian, "The Case for Incorporating Scientist and Technicians into WTO Panels", *Journal of World Trade*, vol. 42 (2008), pp. 279-297.

[12] There are other examples of similar disputes in the WTO context including disputes over the risks of genetically modified organism and asbestos. *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (DS291, 292, 293); *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (DS135).

[13] Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments--Results of the Uruguay Round, 33 I.L.M. 1125 (1994), art. 2 and 5.

trenbolone acetate and melengestrol acetate- in meat and meat products present a risk to consumers' health? The whole dispute boiled down to a yes or no answer to this specific question, a question that a lawyer or international economist can hardly answer, but a scientific expert could. When the expert has been retained by the adjudicating panel, there is a presumption that he or she is *super partes* and that his or her knowledge is beyond question. Thus the expert's word may go a long way, possibly all the way to the ultimate decision. Adjudicators are not in a position to assess the validity of the opinion given by the expert.

Of course, not all cases are that extreme, but in general international courts are likely to be careful not to ask experts the ultimate question, the one whose answer might decide the case.[14] They are likely to keep experts confined to marginal or technical questions that do not go to the core of the dispute, such as interpretation of maps or geological data or order of battle structure of certain military units. As a matter of fact, typically expertise is sought in all areas of human knowledge except in law.[15] Judges must and want to retain control of the ultimate decision as to what the law requires and whether a breach has occurred.

Finally, there is a practical and hard-boiled reason why courts might hesitate in retaining their own experts but prefer letting parties bring scientists to the courtroom: compensation for experts ex curia is paid out of the court's own budget, while the parties pay for their own experts. Most international courts operate on a tight budget, with little room for unexpected expenses. This considerably narrows the capacity of courts to retain experts case by case as needed.

In conclusion, there is no easy answer to the question of what should be the proper role of experts in international adjudication. Despite clamors from many quarters that more science is needed in international adjudication, and certain diffidence towards international judges who are necessarily rather ignorant of the most arcane points of disciplines as diverse as biochemistry, meteorology, cartography, calligraphy, and so on, there seems to be much wisdom in the arms-length to which international judges appear to keep experts. Let the parties bring their own experts. Let the experts duel and the judges decide who is most trustworthy. After all, scientific claims can be absolutely true or false; the objectivity of scientists is another matter. Scientific progress is based on the axiom that everything can be put into question. It requires time, trial, and error.

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[14] As a matter of fact, in international criminal courts the so-called "ultimate issue rule" bars experts from giving an opinion on the ultimate issue in the case at hand, the issue that the judges are called upon to determine. For instance, an expert witness cannot be asked to assess who is responsible of certain crimes, or, more indirectly, whether the indictee was in effective control of the military unit that committed the crimes. See *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14, Transcript, 28 January 2000, pp. 13-89. The same issue was raised before the Special Court for Sierra Leone in the *Prosecutor v. Brima et al.* case, Transcript, 12 October 2005, p. 11 ff. On the "ultimate issue rule" in international criminal courts see Knoops, Geert-Jan Alexander, "The Proliferation of the Ultimate Issue Rule Pertaining to Expert Witnesses Testimony before International and Internationalized Criminal Courts : Pitfalls and Paradoxes", *The Global Community*, vol. 2005 (2006) pp. 281-292.

[15] As a partial exception, it should be mentioned that knowledge of a particular national legal system might be relevant in some cases, particularly commercial arbitrations, and an expert deposition might thus be warranted.

All of that is hardly compatible with the dictates of the adjudicative process.[16] The adjudicative process may demand scientific answers when none are yet warranted. That is yet another reason why environmental disputes are better kept out of international courtrooms.[17]

ABSTRACT

Resort to experts by international judges (ex curia) is a relatively rare phenomenon in international adjudication. Much more frequent is resort to experts by the parties (ex parte). This short note suggests five possible reasons why.

First, experts are retained to establish facts or scientific truths. However, perhaps with the exception of criminal jurisdictions, the ultimate aim of international adjudication is not so much establishing facts or truths, but to settle disputes; establishing facts does not necessarily lead to the settlement of the underlying dispute.

Second, all international courts and tribunals are last instance jurisdictions. It is precisely the finality of international judges that makes their fallibility ultimately immaterial.

Third, international tribunals decide on matters that often affect directly sovereign states' interests. International courts and tribunals are thus reluctant to rely on experts ex curia because they might offer an interpretation of facts, or an assessment of causation, embarrassingly different from the ones put forward by the experts of the sovereign parties.

Fourth, the sporadic resort to ex curia experts can be explained by a certain unwillingness of international judges to abdicate their judicial function, to let experts enter their own province by giving them the last word.

Fifth, most international courts operate on a tight budget, with little margin for variable and unplanned expenses. While experts ex curia are paid from the courts' budget, the parties pay for their own experts.

[16] The Trail Smelter arbitration is usually pointed out in literature as an example of how sound and useful science can be done in the context of an international litigation. However, it is usually equally neglected that the Trail Smelter arbitration took almost two decades to run its course, during which an unprecedented study of the atmosphere over a very large area was undertaken. The arbitral tribunal ultimately issued two awards: first an interim award, and then a final award, but only after several years and lengthy, extensive scientific research. On the details of the Trail Smelter saga see Cesare Romano, *The Peaceful Settlement of International Environmental Disputes, supra* note 5, at 261.

[17] Ibid. at 328 FF.

RESUME

Le rôle des experts dans l'adjudication internationale

Le recours aux experts par les juges internationaux (ex curia) est un phénomène relativement rare entre les cours et tribunaux internationaux. Beaucoup plus fréquent est le recours à des experts *ex parte*. Cette constatation soulève soulève cinq explications possibles.

Premièrement, les experts sont consultés pour déterminer les faits ou des vérités scientifiques. Pourtant, peut-être à la seule exception des juridictions pénales internationales, le but ultime de l'adjudication internationale n'est pas établir des faits ou des vérités, mais plutôt régler le différend. L'établissement des faits ne conduit pas nécessairement à la solution du litige sous-jacent.

Deuxièmement, tous les cours et tribunaux internationaux sont des jurisdictions de dernière instance. C'est exactement la conscience de leur finitude qui rend la faillibilité des juges internationaux en fin de compte sans grande importance.

Troisièmement, les tribunaux internationaux tranchent des questions qui touchent directement des États souverains. Les tribunaux internationaux sont réticents à faire appel à des experts *ex curia*, car ils pourraient offrir une interprétation des faits, ou une évaluation de la causalité, trop différente de celles avancées par les experts des parties.

Quatrièmement, les juges internationaux sont généralement peu disposés à renoncer à leurs fonctions judiciaires, à laisser entrer les experts de leur propre province.

Cinquièmement, la plupart des tribunaux internationaux ont un budget serré, avec peu de marge pour dépenses imprévues. Les experts ex curia sont payés sur le budget propre de la Cour, tandis que les parties assument et payent leurs propres experts.