Reappraising The Role of Experts in Recent Cases Before the International Court of Justice

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Abstract

Experts have played a prominent role in recent proceedings before the International Court of Justice ('the Court', 'the ICJ'). Against the backdrop of high-profile criticism of the Court's fact-finding process, recent cases before the Court have produced a number of notable developments which can be seen as significant steps in the right direction. Issues remain, however, largely due to a lack of conceptual clarity regarding the role that both party and Court-appointed experts should play in proceedings, caused by rudimentary procedural provisions in the Court's constitutive instruments. This article advances a number of proposals for reform, in the form of two Practice Directions, which set out modalities for the examination of party-appointed experts and the appointment of the Court's own experts, as well as providing reasoned guidance on the independence of experts. These proposals not only flesh out the role of the expert, but also show how the Court can accommodate the principles of party autonomy and the proper administration of justice which operate upon it.

Keywords: International Court of Justice, Experts, Fact-Finding, Evidence, Procedure.

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I. Introduction

The Court continues to be consistently tasked with handling factually-complex cases.[1] In this context it is hardly surprising that experts have played a prominent role in proceedings before the Court in recent times. However, despite a number of steps in the right procedural direction, such as an end to the practice of experts appearing as counsel, [2] and the Court's appointment of its own experts *proprio motu* to assist it in the fact-finding process in the *Maritime Delimitation* case, [3] a number of problematic issues remain that the Court must address.

The root of these issues is the rudimentary provisions of the Court's constitutive instruments which fail to provide conceptual clarity with regard to the role of both party and Court-appointed experts. The uncertainty created by these skeletal provisions is compounded by the operation of the principle of the party autonomy which has long enabled a range of different conceptions of the role of the expert to flourish. Nevertheless, recent cases demonstrate that the Court's handling of expert evidence cannot be guided by the wishes of the parties alone, and that it is incumbent on the Court, in accordance the principle of the proper administration of justice, to more fully substantiate the role of experts in proceedings before it. The tension between these two fundamental guiding principles is the 'red thread' common to all of the issues examined below, and for this reason specific attention is devoted to delving deeper into how these principles operate and interact in Section III.

The present article advocates a number of procedural reforms in the form of two

[1] The concept of factually complex cases includes cases that concern any sort of abundant, specialised or technical facts. Other commentators have written on how the Court has dealt with scientific evidence, see, e.g. Makane Mbengue, 'Scientific Fact-finding by International Courts and Tribunals' 3 *Journal of International Dispute Settlement* 509; Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press, 2011) 10. However, the concept of factually-complex cases employed here is intended to cover more than just scientific evidence, drawing on literature which has shown how international courts and tribunals have encountered difficulties in relation to other epistemic fields such as economics and history, see, e.g. C.A. Thomas, 'Of Facts and Phantoms: Economics, Epistemic Legitimacy and WTO Dispute Settlement', *Journal of International Economic Law*, 14(2), 295-328; Scott Brewer, 'Scientific Expert Testimony and Intellectual Due Process' 107 *Yale Law Journal* 1589.
[2] See generally Giorgio Gaja, 'Assessing Expert Evidence in the ICJ' (2016) 15 *The Law and Practice of International Courts and Tribunals* 409, 411–412.
[3] See International Court of Justice, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua),* Orders of 31 May 2016 and 16 June 2016.

Practice Directions which would provide greater guidance to the parties, through specifying more clearly what is expected of both party and Court appointed experts. Practice Direction XIV, regulating party-appointed experts, sets out a modality for the examination of experts in proceedings, and provides guidance to the parties as to the extent to which parties' experts must be independent. Practice Direction XV provides similar guidance to the parties regarding the procedure for the appointment of Court-appointed experts.

The article is structured as follows. Sections II.A and II.B, addressing party and Court-appointed experts respectively, explore the aforementioned positive procedural developments in recent cases. Next, Sections II.A (1) and II.B (1) analyse the problematic issues that remain, and make proposals for reform in the form of two Practice Directions. These are set out in Sections II.A (2) and II.B (2). Finally, Section III provides some reflections on the Court's guiding principles, namely party autonomy and the proper administration of justice, and their relationship to the reforms proposed.

II. The Court's Handling of Experts Post-*Pulp Mills*: An Apparent Response to Merited Criticisms

In the past decade or so a number of high-profile criticisms have been levelled at the Court's approach to fact-finding, including with regard to the issues of experts appearing as counsel,[4] and the use of *experts fantômes*.[5] It is not the intention of the present article to demonstrate why such criticisms of the Court's fact-finding practice are merited since other commentators have gone to great lengths to do just that.[6] Rather, the article proceeds from the premise that there is merit in such criticisms, and

[4] The most problematic issue with experts presenting evidence to the Court as counsel lies in the fact that only experts put forward by the parties in accordance with Article 43(5) of the Court's Statute come within the scope of Articles 57, 58, 63 and 64 of the Rules. This, in essence, means that due to their status as counsel rather than experts, these individuals are able to avoid cross-examination by the other party, ICJ, *Libya/Malta Continental Shelf Case, Pleadings, Vol IV 518–19;* Christian J Tams, 'Article 51' in Andreas Zimmermann et al (ed) *The Statute of the International Court of Justice: A Commentary*, (Oxford University Press, 2019) 1303*;* Sir Arthur Watts, 'Burden of Proof and Evidence Before the ICJ' in Fiedl Weiss (ed) *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May, 2000) at 299.

[5] Informal consultation of experts by the Court circumvents the procedure laid down in the Court's constitutive instruments and raises a number of serious issues, including the fact that the parties may not even be aware that the judges are receiving expert assistance or the identity of the experts being consulted. This is not to mention the fact that the parties in such circumstances are completely unable to have any say in, or to challenge, the substance of the assistance given to the Court by these experts (a right which would otherwise be available to the parties under Article 67(2) of the Court's Rules in accordance with the procedure envisaged for Court-appointed experts); see ICJ, *Pulp Mills* Case, Judgment (Joint Dissenting Opinion of Judges Al-Khasawneh and Simma), 2010, para 14,*;* Christian J Tams and James G Devaney, 'Article 50' in Andreas Zimmermann et al (ed) *The Statute of the International Court of Justice: A Commentary,* (Oxford University Press, 2019) 1118.

[6] Issues of evidence and fact-finding are increasingly in the minds of international legal practitioners. A significant amount of scholarship written in the last decade including, inter alia; Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (London, British Institute of International and Comparative Law 2009); Loretta Malintoppi, 'Fact Finding and Evidence Before the International Court of Justice (Notably in Scientific-Related Disputes)' 7 *Journal of International Dispute Settlement* 421, Amelia. Keene, 'Outcome Paper for the Seminar on the International Court of Justice at 70: In Retrospect and in Prospect' (2016)7 *Journal of International Dispute Settlement* 238, James G Devaney, *Fact-Finding Before the International Court of Justice*, (CUP, 2016), Kenneth J. Keith, 'The Development of Rules of Procedure by the World Court Through Its Rule Making, Practice and Decisions', (2018) *Victoria of Wellington Law Review*, vol. 49, no. 4, 511-532, Mohammed Bennouna, 'Experts before the International Court of Justice: What For?', *Journal of International Dispute Settlement* (2018) 9, 345-351, James Flett, 'When is an Expert not an Expert?', *Journal of International Dispute Settlement* (2018) 9, 352-360, Geoffrey Senogles, 'Some Views from the Crucible; The Perspective of an Expert Witness on the Adversarial Principle', *Journal of International Dispute Settlement* (2018) 9, 361-366, Joan E. Donoghue, 'Expert Scientific Evidence in a Broader Context', *Journal of International Dispute Settlement* (2018), 9, 379-387, Isabelle Van Damme, 'The Assessment of Expert Evidence in International Adjudication' (2018) *Journal of International Dispute Settlement*, 9, 406, Kate Parlett, 'Parties' Engagement with Experts in International Litigation' (2018) 9, *Journal of International Dispute Settlement*, 440-452, Brendan Plant, 'Expert Evidence and the Challenge of Procedural Reform in International Dispute Settlement', (2018) *Journal of International Dispute Settlement*, 9, 464-472, Laurence Boisson de Chazournes et al, 'One Size Does Not Fit All – Uses of Experts before International Courts and Tribunals: An Insight Into Practice' (2018) *Journal of International Dispute Settlement*, 9, 477-505.

seeks to examine the Court's recent practice in light of such criticisms, before making the case for future reform as part of a continued effort to address problematic fact-finding issues.

The following sections draw on relevant cases that have come before the Court since *Pulp Mills*, beginning with the *Whaling in the Antarctic* case which raised a broad range of factually complex issues as the Court was tasked with considering Japan's claims that its whaling programme was lawful as it was conducted for scientific purposes. In addition, the following sections examine the practice of a number of cases between Costa Rica and Nicaragua which have taken up a significant amount of the Court's attention since *Pulp Mills*. To give a brief primer which may be helpful in the coming sections as we examine the various developments relating to fact-finding, as stated above, the Court has dealt with four cases between these two States in recent times. The first, *Certain Activities,* was brought by Costa Rica against Nicaragua in November 2010, and concerned sovereignty over disputed territory on the border between these two States, and Nicaraguan activities carried out in this area including the dredging of a number of 'caños' in what the Court would ultimately find to be Costa Rican territory.[7] Subsequently, one year later in December 2011 Nicaragua brought the *Construction of a Road* case against Costa Rica, concerning the harmful effects of a road which Costa Rica had constructed along the Rio San Juan (which represents the boundary between these two States),[8] passed using emergency legislation and crucially, in contravention of international law; without conducting an environmental impact assessment.[9] The Court joined these two cases in April 2013.[10]

Later, in February 2014 Costa Rica brought the *Maritime Delimitation* case against Nicaragua regarding the delimitation of the maritime boundary between these two

[7] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, ICJ Reports 2015, p. 665.*
[8] Ibid.
[9] Ibid., para 173.
[10] For an explanation of the process of Joinder, see: Santiago Torres Bernárdez and Makane Moïse Mbengue, 'Article 48' in Andreas Zimmermann (et al) (eds) *The Statute of the International Court of Justice: A Commentary,* (Oxford University Press, 2019) paras 33-34.

States both in the Caribbean Sea and the Pacific Ocean.[11] Finally, in January 2017 Costa Rica brought the *Isla Portillos* case to ask the Court to determine the land boundary between these two particular States in this contested geographical area – a task rendered particularly difficult by the mobile geographical nature of the Isla Portillos which is bounded by the San Juan River (deflected by a sandspit of variable length at the north-western extremity), the Caribbean Sea, and the Los Portillos/Harbour Head Lagoon (itself separated from the Caribbean sea by a sandbar). Costa Rica alleged that Nicaragua had contravened the Court's earlier *Certain Activities* judgment and violated Costa Rican sovereignty.[12] The Court would join the *Maritime Delimitation* and *Isla Portillos* cases in February 2017.[13] Drawing on these cases, the following section seeks to examine a number of pertinent issues which arose in the course of these proceedings.

A. Party-Appointed Experts

As stated above, the first area in which we appear to have seen a positive change in practice relates to the presentation of experts as such by parties, subject to cross-examination before the Court. Since the *Pulp Mills* case, experts have generally been put forward by the parties in accordance with Articles 63 and 65 of the Court's Rules. The *Whaling in the Antarctic* case marked an important post-*Pulp Mills* moment, in this respect, with the President setting out clearly how he envisaged the examination of party-appointed experts to be conducted in these proceedings.[14]

To elaborate, in the *Whaling in the Antarctic* case party-appointed experts submitted opinions during the written stage of proceedings before being cross-examined on these opinions during the oral phase of proceedings. Australia called Mr. Marc Mangel, Distinguished Research Professor of Mathematical Biology and Director of the Center for Stock Assessment Research, University of California, Santa Cruz, and

[11] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of the Isla Portillos (Costa Rica v. Nicaragua), Judgment, ICJ Reports*.
[12] Ibid.
[13] Ibid, p. 91.
[14] *ICJ Pleadings, Whaling in the Antarctic, Australia v Japan: New Zealand intervening,* 2016, CR 2013/9, 27 June 2013, at 38.

Mr. Nick Gales, Chief Scientist of the Australian Antarctic Program.[15] Japan also called an expert, Mr. Lars Walløe, Professor Emeritus of the University of Oslo and Scientific Adviser to the Norwegian Government on Marine Mammals.

The experts called by each party made a declaration under Article 64(b) of the Court's Rules and were first of all examined by counsel for the party calling them for up to half an hour (the examination-in-chief), before being cross-examined by counsel for the other party. Experts typically responded to questions put to them by counsel for the party they had been called by before being cross-examined by counsel for the other party, who had sixty minutes to do so. One exception to this practice was Professor Walløe, who, rather than responding to a series of questions from Mr. Vaughan Lowe, counsel for Japan, opted for the 'less interactive' option (as President Tomka wryly noted)[16] of reading a prepared statement, before being cross-examined by Mr. Justin Gleeson.[17] Finally, judges were given the opportunity to put their own questions to the experts, an opportunity which a notable number grasped.[18] Throughout the proceedings, the President oversaw the examination of the experts, having taken care to set out the process that the examination would take in advance.[19]

Australia's cross-examination of Japan's expert, Professor Walløe, is a prime example of the benefits that cross-examination brings to the Court.[20] During the course of one

[15] Australia called these experts during the public hearings of 27 June 2013. Mr. Mangel was cross-examined by experienced counsel Professor Philippe Sands QC as counsel for Australia and then cross-examined by Professor Vaughan Lowe QC, counsel for Japan. Mr Gales was cross-examined by Mr. Justin Gleeson SC for Australia and cross-examined by Professor Vaughan Lowe for Japan, before finally being re-examined by Mr. Gleeson. These two experts also answered questions from a number of judges on the spot, ICJ, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), ICJ Judgment of 31 March 2014*, para 20.

[16] *ICJ Pleadings, Whaling in the Antarctic*, (*Australia v Japan: New Zealand intervening),*CR 2013/14, 3 July 2013, at 23.

[17] Ibid.

[18] See para 21 of the Judgment; Questions were asked of Australia's expert Professor Mangel by Judges Bennouna, Cançado Trindade, Greenwood, Donohue, Keith, and Owada, *ICJ Pleadings, Whaling in the Antarctic, CR 2013/9,* 27 June 2013 63, 64, 67, 69 and 70 respectively. Judges Greenwood, Cançado Trindade, Yusuf, Bennouna, Keith and Charlesworth asked questions of Japan's expert. See ICJ Pleadings, Whaling in the Antarctic, CR 2013/14, 3 July 2013 49–50, 50–3, 53–5, 55–7, 57–9 respectively.

[19] *ICJ Pleadings, Whaling in the Antarctic*, (*Australia v Japan: New Zealand intervening),*CR 2013/9, 27 June 2013, 38.

[20] On this, see further: Albert Jan Van den Berg, *Arbitration Advocacy in Changing Times,* (Kluwer, 2011), Doak Bishop and Edward G. Kehoe (eds), *The Art of Advocacy in International Arbitration,* (Second Edition, Juris, 2010), and Kaj Hobér and Howard S. Sussman, *Cross-Examination in International Arbitration* (OUP, 2014).

hour's cross-examination of this expert, Gleeson undertook the task of challenging the authority of this individual. Gleeson did so by impugning both the independence of the Professor Walløe as well as engaging substantively with the evidence, seeking to pick holes and draw out inconsistencies in the picture that the expert had previously painted.[21]

To elaborate a little further, Gleeson first of all raised the fact that Professor Walløe had repeatedly professed to be an independent expert, and asked him whether he would stand by this statement.[22] After the Professor stood his ground, Gleeson then brought to the attention of the Court a number of facts intended to cast doubt on Professor Walløe's independence.[23] These included the fact that he had previously been awarded the highest commendation that Japan can possibly bestow on a foreign civilian, and had collaborated over a long period of time with Japanese scientists with regard to certain aspects of the design of the Japanese scientific whaling programme, JARPA II.[24] After doing so, Gleeson again invited Professor Walløe to withdraw his claim of independence, but the expert snapped back, that he was at least more independent than Australia's expert, Dr. Gales. However, by this stage it was clear that, at the very least, some seeds of doubt as to Professor Walløe's independence had been sown. Throughout the course of his patient and skilful cross-examination, Gleeson managed to draw the expert into showing that rather than presenting independent expert evidence for the benefit of the Court, the expert naturally had an interest in defending his own reputation and life's work.[25] This again cast doubt upon the reliability of Professor Walløe's expert testimony.

Turning our focus to subsequent cases, experts were also called by the parties two years later in the course of the *Certain Activities* and *Construction of a Road* joined proceedings. In *Certain Activities,* Costa Rica called Mr. Thorne[26] and Nicaragua called Mr. van Rhee and Mr. Kondolf. [27] In the *Construction of a Road* case,

[21] Ibid., at 23.
[22] Ibid.
[23] Ibid., at 23-4.
[24] Ibid., at 24.
[25] Ibid.
[26] *ICJ Pleadings, Certain Activities, (Costa Rica v. Nicaragua)* CR 2015/2, 14 April 2015, at 21.
[27] Nicaragua called Mr. Cornelis van Rhee who was cross-examined by Mr. Wordsworth and re-examined by Mr. Reichler, see *ICJ Pleadings, Certain Activities, (Costa Rica v. Nicaragua)* CR 2015/6, 17 April 2015, at 24 et seq. Judge Gaja asked a question of Mr. van Rhee (at 36). Nicaragua

Nicaragua called a number of experts, including Mr. Weaver, Mr. Kondolf, Mr. Andrews and Mr. Sheate.[28] For their part Costa Rica called Mr Cowx and Mr. Thorne as experts.[29] During the course of proceedings several judges put questions directly to the experts which were answered orally.[30] In the case of Nicaragua's expert, Dr. Weaver, Costa Rica exercised its discretion not to cross-examine this expert, and much was made of this by Nicaragua, in an attempt to portray this as an admission that this expert's evidence was beyond challenge (an accusation which Katherine Del Mar, appearing on behalf of Costa Rica, denied, arguing that it would simply not advance Costa Rica's case to do so and it was their right not to cross-examine an expert).[31] Judge Bhandari nevertheless chose to ask several questions of Dr. Weaver.[32]

Despite the relatively smooth nature of the examination of experts in the *Whaling* case, a few more problematic issues did arise in the course of the joined proceedings in the *Certain Activities/Construction of a Road* cases that are worthy of our attention.[33] For instance, Mr. Wordsworth, for Costa Rica, objected on several occasions to the manner in which counsel for Nicaragua was conducting the examination of Costa Rica's expert, Professor Thorne.[34] Wordsworth repeatedly

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also called Mr. Mathias Kondolf who was cross-examined by Mr. Wordsworth (37 et seq) then later Nicaragua did not exercise the option of re-examining this expert. Judge Greenwood (47), Vice-President Yusuf (49), Judge Xue (49), and Judge Robinson (52) asked questions of this expert.

[28] See *ICJ Pleadings, Construction of a Road, (Nicaragua v. Costa Rica)* CR 2015/8, 20 April 2015, at 35: Nicaragua called Dr. Weaver (at 35) who Costa Rica chose not to cross-examine. However, Judge Bhandari did ask this expert a question (at 36), and Mr. Kondolf who was cross-examined by Mr. Wordsworth (38 et seq) and re-examined by Mr. Reichler, see: *ICJ Pleadings, Construction of a Road, (Nicaragua v. Costa Rica)* CR 2015/9, 20 April 2015, at 10 et seq. Judge Greenwood asked Mr. Kondolf a question (at 17) as did Judge Xue (19), Judge Bhandari, (20), Judge Robinson (21), and Judge Tomka (22). Nicaragua also called Mr. Andrews who was cross-examined by Mr. Wordsworth (25 et seq) whilst Nicaragua did not choose to re-examine this expert. A question was posed to Mr. Andrews by Judge Bhandari (33). Finally, Mr. Sheate was put forward by Nicaragua (at 35 et seq) and cross-examined by Mr. Kohen, and questions were asked of this expert by Judges Bhandari (at 43) and Bennouna (at 44).

[29] See *ICJ Pleadings, Construction of a Road, (Nicaragua v. Costa Rica)* CR 2015/12, 24 April 2015, at 10, Costa Rica called Mr. Cowx who was cross-examined by Mr. Loewenstein for Nicaragua and re-examined by Dr. Parlett (at 15) and a question was posed by Judge Bhandari (at 18), and Mr. Thorne (at 20) who was cross-examined by Mr. Reichler and re-examined by Mr. Wordsworth, and a question was subsequently posed by Judge Tomka (at 51 et seq).

[30] Ibid. In accordance with Article 61, paragraph4, of the Rules of Court.', ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, ICJ Reports 2015*, p. 665, para 46.

[31] See *ICJ Pleadings, Construction of a Road, (Nicaragua v. Costa Rica), CR 2015/11, 23 April 2015* at 29.

[32] Ibid., at 36.

[33] Ibid., at 10.

[34] Ibid.

voiced his opposition to the manner in which Mr Reichler, appearing for Nicaragua, was conducting re-examination of this expert. The source of Wordsworth's objections was that Reichler was pursuing a line of questioning that was tantamount to another examination-in-chief, as opposed to being strictly limited to issues that had already been covered in the course of cross-examination.[35] In doing so, Wordsworth argued, Reichler was seeking to gain a procedural advantage. Despite the fact Reichler rejected these suggestions, the President nevertheless felt it necessary to step in to remind counsel of the procedure that the Court had set out at the beginning of the proceedings (which the parties had agreed to previously through correspondence), and more specifically that counsel should only ask questions relating to issues that were the subject of cross-examination, and not introduce new issues.[36]

In the course of the oral proceedings in the *Construction of a Road* case, the reports prepared by experts for both parties played a central role. For example, Nicaragua relied extensively on a report commissioned by its own expert specifically for the case, Dr Kondolf,[37] and counsel for Costa Rica also went to great length to engage with and address issues in the expert reports of both parties.[38]

In contrast to the *Whaling in the Antarctic* proceedings, there was one slight alteration in the proceedings in the context of *Certain Activities* and *Construction of a Road.* A sign of the Court's active involvement in proceedings before it came on 5 December 2014 when the Court informed the parties that it 'would find it useful if, during the course of the hearings in the two cases, they could call the experts whose reports were annexed to the written pleadings, in particular Mr. Thorne and Mr Kondolf.'[39] It should perhaps be noted at this juncture that the Court's involvement, indicating which experts it would like to see put forward, could be seen as an astute move from the Court to avoid any difficulties that could have arisen had either party chosen not to put forward for examination certain experts whose opinions they had relied upon. This

[35] Ibid.
[36] Ibid., at 15.
[37] *ICJ Pleadings, Construction of a Road, (Nicaragua v. Costa Rica), CR 2013/28, 5 November 2013, April 2015.*
[38] Ibid. And in fact Nicaragua listed a number of experts as 'Scientific Advisers and Experts' as part of their legal team, although they did not subsequently present evidence to the Court as counsel.
[39] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, ICJ Reports 2015*, p. 665, para 31.

is due to the fact that, unlike the Court which has the power to request information from, and call experts and witnesses of, the parties under Article 49 of the Court's Statute and Articles 61 and 62 of its Rules, the parties themselves do not have the power under the Court's constitutive instruments to ask questions of, or call witnesses or experts of the other party for examination.[40]

The Court at this stage invited the views of the parties to put forward suggestions for the 'modalities for examination of these experts'. This suggests that while the Court adopted broadly similar approaches in the *Whaling* and *Construction of a Road/Certain* Activities cases, it is still keen to ensure that the parties have a degree of flexibility with regard to the procedure for the examination of experts in cases before it. The Court then asked the parties to inform it of the experts that they wished to call and asked the parties to submit a summary of the expert's testimony that they were to present. In doing so, the Court introduced a significant amendment to the previous examination-in-chief, cross-examination and re-examination practice, by replacing the examination-in-chief with a written summary of the experts' evidence.[41] As such the examination of the parties' experts in the course of the hearings would begin with cross-examination.[42]

Finally, and most recently, in the context of the *Maritime Delimitation/Isla Portillos* joined cases it should be noted that neither Costa Rica nor Nicaragua called experts to be examined during the oral proceedings. This is perhaps due to the fact the Court had already appointed its own experts, tasking them with producing a report on a number of questions posed by the Court (an issue to which we will return in Section III.B.). But whatever the reason may be, it is at least significant to note that after extensive examination of experts in the course of the oral proceedings in the cases immediately preceding this, no experts were examined in these proceedings.

[40] See ICJ, *Haya de la Torre Case* (Columbia v. Peru), Pleadings, Part II, at 132-3, 151.
[41] Ibid., para 34.
[42] José Quintana, 'Cuestiones de procedimento en los casos *Costa Rica c. Nicaragua* y *Nicaragua c. Costa Rica* ante la Corte Internacional de Justicia' *ACDI - Anuario Colombiano de Derecho Internacional*, Vol. 10, 2017, 146.

1. Analysis and Proposal for Reform

To briefly recapitulate, as a result of the Court's dicta in *Pulp Mills,* today it is able to see the credibility and reputation of experts tested, as well as the substance of their expert evidence, through cross-examination in oral proceedings before it. This is a significant development from the previous practice of experts appearing as counsel and the resulting 'merry contradiction' of expert views. [43] In addition, we may be seeing the beginnings of a settled pattern in terms of the procedure for the examination of these experts.

However, issues remain. The following section will explore two in particular, namely the procedure for the presentation of expert evidence by parties, and the requirements of independence and impartiality for experts. The common root of these issues, to which we will return below, is the minimalist evidentiary provisions of the Court's constitutive instruments. Consequently, the Court would benefit from providing the parties with further guidance on these two issues, namely as to how it would like to see examination of experts conducted in cases before it, and what those experts are permitted to do in assisting the parties. This clarification would be beneficial not only to the parties themselves but also to the judges on the bench who come from different legal cultures and would benefit from the development of a detailed and consistent practice for the examination of experts in cases before it.

First of all, in light of the Court's recent practice in *Certain Activities* and *Construction of a Road* outlined above, parties would benefit from the Court setting out in a Practice Direction how it wishes the examination of experts to proceed in cases before it. Before setting out the proposed Practice Direction, perhaps a word is necessary as to why this is proposed as opposed to amendment of the Court's Statute or Rules. First of all, in very simple terms, there is no realistic prospect of revising the Court's Statute, given the traditionally conservative attitude of the Court towards doing so in the past,[44] and the fact that the procedure for doing so is the same as that required for amending the UN Charter.[45]

[43] Bruno Simma, 'The International Court of Justice and Scientific Expertise' (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 231.
[44] Plant, *supra* note 6, at 465.
[45] Article 108 UN Charter.

In contrast, although the Court has the ability to make its own Rules,[46] in practice the Court has displayed a preference for providing procedural guidance to parties on issues such as those examined in the present article in the form of Practice Directions. This is despite the fact Practice Directions are not mentioned anywhere in the Court's Statute, were and only introduced as recently as 2001, ostensibly to merely interpret or supplement, but not amend existing Rules. Nevertheless, Practice Directions have quickly come to shape proceedings before the Court.[47] As Jennings, Higgins and Tomka have stated, 'parties have certainly decided to accord them great weight and wish to comply with them…'[48] These same authors encapsulate the role of practice directions as 'essentially indications from the Court as to how it expects the parties to proceed in a variety of matters—practical matters, not usually covered by the Rules, which are not a convenient vehicle for this purpose.' This would achieve the aims laid out above, whilst avoiding the arduous task of amending the Court's Statute, and is a suggestion that has been supported by other commentators such as Quintana, who has stated that:

> '[q]uizá sería conveniente que la Corte considere adopter un directriz práctica sobre este aspect del procediminto, en la cula se aclaren cuáles son las reglas del jeugo a las que los Estados litigantes deben someterse si escogen recurrir a este medio de prueba. Sin embargo, dada la reticencia tradicional de la Corte a introducer cambios a sus instrumentos reguladores, es más realista aguardar a que la cuestíon surja nuevamente en cases futuros y registrar la forma como la Corte decide manejarla.'[49]

This having been said, the Court should ensure that it retains a degree of discretion as to how proceedings are conducted, both for its own sake, and also to accommodate the wishes of the parties who may seek to take greater control over the examination of witnesses in certain cases. This is an issue to which we will return below when we consider the best way to strike a balance between the principles of party autonomy and the proper administration of justice in section III.

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[46] Hugh Thirlway, 'Article 30', Andreas Zimmermann et al (ed) *The Statute of the International Court of Justice: A Commentary*, (Oxford University Press, 2019), 594.
[47] Thirlway, 'Article 30' ibid., Robert Jennings, Rosalyn Higgins and Peter Tomka, 'General Introduction' Andreas Zimmermann et al (ed) *The Statute of the International Court of Justice: A Commentary*, (Oxford University Press, 2019), 89.
[48] Ibid.
[49] Quintana *supra* note 42, at 150.

Presently, '[t]he Statute and the Rules of Court are silent on the procedure to be followed for the hearing of witnesses, experts, and witness-experts'.[50] The only potentially relevant provision, Article 65 of the Rules, 'fails to address many of the more intricate problems' connected with the examination of experts.[51] As a result, the Court itself had to provide guidance to the parties in the *Corfu Channel* case, indicating a procedure that it has subsequently developed over time.[52] Given the issues that have arisen in relation to this procedure in recent cases, however, Tams is right in stating that it is necessary for the Court 'to move beyond this handful of rules; for example, by providing additional guidance to witnesses, experts, counsel, and judges alike as to what is expected of them with regard to testimony before the Court.'[53]

Accordingly, through a Practice Direction, a draft of which is set out below at Section A.2, the Court should provide guidance to the parties on how it would generally expect to see the process of cross-examination conducted in line with its recent practice. In short, the Court should stipulate that, in accordance with recent practice,[54] testifying experts must prepare a written summary of their expert evidence to be given to the Court and to the opposing Party on a date to be fixed before the oral proceedings commence (Practice Direction XIV (5)). Subsequently, experts will be cross-examined by counsel for the opposing party (Practice Direction XIV (6). This cross-examination will be strictly limited to issues contained within the expert's report or area of expertise. Finally, the party for whom the expert is appearing may conduct re-examination, again limited to those issues raised in the course of cross-examination (Practice Direction XIV (7)). Experts should remain available to the Court for questions, in relation to which the parties will be able to ask additional questions in relation to any issues that arise in the course of such questions from the Court (Practice Direction XIV (8)).

[50] See Article 58(2) Rules of Court.
[51] Tams, 'Article 51', *supra* note 4 at 1448.
[52] *South West Africa*, Pleadings, vol. X, p. 123, Durward V. Sandifer, *Evidence before International Tribunals*, (University of Virginia Press, 1975), 307.
[53] Tams, 'Article 51', *supra* note 4 at 1449.
[54] Ibid.

Next, it would also be beneficial for the Court to provide guidance on the issue of the extent to which party-appointed experts must be independent of the parties. At the moment the usual procedure for parties engaging expert assistance is to establish initial contact, discuss disclosure of potential conflicts, and enter into preliminary discussions relating to the scope of the expert opinion sought.[55] After the expert has drafted their report on the question or questions agreed with the party, it is 'refined' and then submitted to the Court as evidence.[56] Parlett has stated that '[i]t is common knowledge that counsel frequently work collaboratively with experts in fulfilling their task of providing their expert opinion to the court or tribunal'[57] and certain commentators support this as a beneficial practice in improving the readability of experts' reports.[58]

However, there are obvious issues with parties' engagement with experts with respect to the extent to which that expert's evidence can be considered independent or reliable. This is especially so given that commutations between counsel for parties and experts are not disclosed, creating suspicion that such experts cannot be considered anything more than mere 'hired guns.'[59] Of course, while there does not exist any universal code of ethics for practitioners or experts at the international level, counsel working with experts are still bound by their domestic rules governing their professional conduct. That said, these rules necessarily vary across jurisdictions, and as a result there is no guarantee of uniformity of treatment in this regard.[60] Individual experts, too, may be bound by ethics rules originating in their own professions, as well as being mindful of their own professional reputation. However, these safeguards are far from perfect, and create a kind of 'postcode' or professional lottery, depending on the specific obligations placed on an expert in the context of their own discipline.

[55] Parlett, 'Parties' Engagement with Experts in International Litigation', *supra* note 6, at 447. See also Laurence Boisson de Chazournes et al, 'One Size Does Not Fit All – Uses of Experts before International Courts and Tribunals', *supra* note 6, at 483.
[56] Parlett, ibid.
[57] Ibid.
[58] Brooks W. Daly and Fiona Poon, 'Technical and Legal Experts in International Investment Disputes' in Chiara Giorgetti (ed) *Litigating International Investment Disputes: a Practitioner's Guide (*Brill 2014) 362.
[59] Ibid., see also G De Berti, 'Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator?' (2011) *Austrian Yearbook on International Arbitration* 54.
[60] Parlett, *supra* note 6, at 449.

In recent cases, opinions prepared by experts have included declaration of independence and impartiality, as well as an undertaking to perform a duty which is owed to the Court.[61] However, such an obligation of independence is not included in the Court's Statute or Rules, and before the ICJ, unlike in other contexts,[62] no provisions exist in the Court's State or Rules which regulate parties' engagements with the experts they have appointed.[63]

It has been suggested that a requirement of independence may be inferred from the requirement to provide an opinion under oath.[64] However, the outer limits of this independence requirement, such as the extent to which such experts can be involved in preparing the party's submissions, are less than completely clear. The lack of a specific provision in this regard has allowed a plurality of different conceptions of the role of the party-appointed expert to be formed. For evidence of this, one need look no further than in a recent survey of those judges, [65] counsel and registry staff which reveals an 'absence of a clear and established framework for the use of experts, leaving substantial leeway for personal understanding, informed by personal experience and interpretation.' [66] This, in turn, means different understandings of the extent to which it is appropriate for an expert to be involved in the preparation of a party's submissions.

It is for this reason that the Court should provide guidance to the parties to the effect that any expert involved in the preparation of the parties' submissions should not be put forward as an expert for cross-examination. In other words, the Court should insist on a distinction between 'consulting' and 'independent' experts. In domestic judicial practice, 'consulting' (or 'dirty' experts as they are sometimes known), are those experts who are engaged by a party to assist it in the preparation of a case.[67] A

[61] Ibid.
[62] See, for example, 2013 IBA Guidelines on Party Representation, adopted by resolution of IBA Council 25 May 2013.
[63] Parlett, *supra* note 6, at 448.
[64] See Article 43(5), Statute of the Court, and corresponding Rules of the Court.
[65] Laurence Boisson de Chazournes et al, *supra* note 6.
[66] Ibid, 482.
[67] *ICJ Pleadings, Construction of a Road, (Nicaragua v. Costa Rica), CR 2015/12, 24 April 2015* at 20-1. ITLOS, *The M/V Louisa Case, (St Vincent and the Grenadines v. Spain),* 4 October 2012, 3 p.m., 1 at 12-13); *Arctic Sunrise Arbitration, (The Netherlands v. Russia),* Transcript (10 February 2015), 2 at 23-25), 3 (at 1-4); *The M/V Virginia Case*, (*Panama v. Guinea- Bassau)* P/V.13/C19/4/Rev.1 (4 September 2013, 10 a.m.), 31 (at 18-48).

consulting expert 'has no duty to the Court. He [sic] acts solely on behalf of the litigant. His role is to provide advice and formulate arguments in order to advance the case.'[68] In contrast, independent or clean experts are those who speak solely to their expertise, without a personal interest in the outcome of the case.[69]

This logically has the effect that parties retain certain experts to assist in the preparation of their case but then put forward a different expert for examination before the court who has not been previously involved. The rationale behind this practice is that the judge can have greater faith that the expert evidence that they hear is in fact impartial and that the expert is not merely a 'hired gun' with a personal interest in the outcome of the case. Parties are of course free to make use of experts to build their case and draft their written pleadings and to continue to consult those experts in the course of proceedings. In fact, in such factually complex cases of *Whaling in the Antarctic* and *Construction of a Road*, for instance, it would likely be impossible for counsel and agents to construct their case otherwise. However, in the famous words of Lord Wilberforce:

> expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect, but self-defeating.[70]

It is for this reason that the Court ought to indicate a similar preference in the context of hearings before it, as another way of preventing the 'merry contradiction' of experts, hired to speak to a certain position favourable to the party by whom they are paid (Practice Direction XIV (3)).[71] To this end, again, the adoption of a Practice Direction to provide guidance to the parties on how the Court envisages the role of experts, particularly considering the fact that the bench is made up of judges with

[68] Declan Kelly & Dan Butler, *Ethical Considerations in Dealing with Experts*, Hearsay [Queensland bar association journal], vol. 75 (June 2016).
[69] See, for example, in England and Wales, Civil Procedure Rules r. 35.3, David S. Caudill, '"Dirty" Experts: Ethical Challenges Concerning, and a Comparative Perspective on, the Use of Consulting Experts', *St. Mary's Journal on Legal Malpractice and Ethics*, Vol 8(2) 2018, 1. See also: Stephen D. Easton, "Red Rover, Red Rover, Send That Expert Right Over": Clearing the Way for Parties to Introduce the Testimony of Their Opponents' Expert Witnesses, 55 SMU Law Review, 1427, 1431-32 (2002).
[70] Lord Wilberforce stated in *Whitehouse v Jordan* [1981] 1 All E.R. 267 HL at 267B
[71] Flett *supra* note 6, at 354.

backgrounds in (sometimes significantly) different procedural cultures, is necessary. It is argued that the best way for the Court to do so would be to issue a Practice Direction as set out below which would make clear that party-appointed experts shall not have been involved in any capacity in drafting the written submissions of the parties, and may not act as an adviser to any party in the course of proceedings. In addition, in line with recent practice, the Practice Direction should stipulate that the written evidence of the parties should also contain a statement of independence and declare any interest in the proceedings (Practice Direction XIV (3)).[72]

[72] See existing Practice Directions, available at: https://www.icj-cij.org/en/practice-directions.

2. Draft practice direction XIV

1. Parties who rely on the evidence of experts in their written pleadings shall make these experts available for examination in the course of oral proceedings in accordance with Articles 63 and 65 of the Court's Rules.
2. Parties wishing to present expert evidence in the course of oral proceedings before the Court should present their experts for examination in accordance with Articles 63 and 65 of the Court's Rules.
3. Experts presented for examination in accordance with (2.) shall be independent of the parties. They shall not have been involved in any capacity in drafting the written submissions of the parties, and may not act as an adviser to any party in the course of proceedings, in order to ensure the independence and impartiality of the expert. The written evidence of the parties should contain a statement of independence and declare any interest in the proceedings.
4. Before giving oral evidence, experts shall make a declaration in accordance with Article 64(b) of the Court's Rules.
5. Testifying experts must prepare a written summary of their expert evidence to be given to the Court and to the opposing Party on a date to be fixed before the oral proceedings commence.
6. Subsequently, experts will be cross-examined by counsel for the opposing counsel. This cross-examination will be strictly limited to issues contained within the expert's report or area of expertise.
7. The party for whom the expert is appearing may conduct re-examination, again limited to those issues raised in the course of cross-examination.
8. Experts should remain available to the Court for questions, in relation to which the parties will be able to ask additional questions in relation to any issues that arise in the course of such questions from the Court.

B. Court-Appointed Experts

The second area in which there have been notable developments in recent cases is in relation to the Court's appointment of its own experts. As stated above, Article 50 of the Court's Statute (and the related Articles 62(2), 67 and 68 of its Rules) give the Court the power to appoint an expert, either on its own initiative or at the suggestion of the parties in order to assist it in its fact-finding process. Apart from the *Corfu Channel* case, the Court has traditionally been reluctant to make use of its power to appoint its own experts, save from a select number of questions where it was explicitly asked to do so by the parties themselves.[73] Rather, the Court has relied on the informal assistance of *experts fantômes* instead of making use of the formal procedure to appoint its own expert.

As previously stated, the use of *experts fantômes* in practice removes a right that the parties would otherwise have had if an expert were appointed under Article 67(2) of the Court's Rules, namely the right to comment on the substance of the expert evidence. Whilst no commentator or practitioner has explicitly spoken out in favour of the routine consultation of *experts fantômes*, it is fair to say that those who have commented on this issue have stopped short of saying that the Court should never informally consult experts. For instance, even Judges Simma and Al-Khasawneh, otherwise so strident in their criticism of the Court's fact-finding process in their joint dissenting opinion in the *Pulp Mills* case, stated that the use of such experts may be 'pardonable' if they were consulted on an issue that lay at the margins of the case.[74]

And more recently, a sitting judge has expressed the view that the consultation of *experts fantômes* is not necessarily problematic in each and every situation. Judge Bennouna has downplayed the role of these individuals, in fact even denying them the title of expert, designating them '…merely assistants to the Registrar who are

[73] See, for example, Article II (3) of the Special Agreement in ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Canada/United States of America*, 1984, 253; see also: ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Canada/United States of America*, Appointment of Expert, 1984; Technical Report annexed to the Judgment, 353 para 3. Finally, see the request made of the Chamber in (Art IV (3) Special Agreement in ICJ, *Frontier Dispute, Burkina Faso/Republic of Mali*, 1986, 558.

[74] ICJ, *Pulp Mills* Case, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 14; see also Simma, 'The International Court of Justice and Scientific Expertise' *supra* note 43, at 231.

recruited for a fixed period of time.'[75] This is despite the fact that Judge Bennouna's subsequent description of the duties of these individuals, namely consulting with individual judges to help them 'to understand and clarify certain technical or scientific elements at dispute in a given case', serving 'an important role in elucidating complex scientific concepts' is arguably the very definition of what a Court-appointed expert would do. To that end, it is difficult to see how one could seek to dismiss this practice as inconsequential for the reasons related to the proper administration of justice mentioned above.[76]

Any distinction between the informal consultation of experts on issues which lie at the margins of a dispute and those which form part of the crux is both impractical and problematic.[77] It is immediately apparent that issues are likely to arise as to whether an issue is marginal or important, and that often the characterisation of an issue as either one or the other will be very much in the eye of the beholder. More fundamentally, the fact that the parties are not privy to the drawing of this distinction, that they may have no input on what issues experts are being consulted on, no input on the substance of their advice, as well as no information on the identity of the expert being consulted (and their attending biases which are not capable of being tested, for instance, through cross-examination) means that any suggestion that the use of *experts fantômes* continue under any circumstances must be strongly resisted.

Returning to recent developments, while much of the following sections will be devoted to the Court's appointment of its own experts in the *Maritime Delimitation* case, [78] it is interesting to note that the issue arose in this context a couple of years earlier. Accompanying its Reply in the *Certain Activities* case, on 4 August 2014 Nicaragua suggested that the Court appoint 'a neutral expert on the basis of Articles 66 and 67 of the Rules.' On the 14 August, Costa Rica made its views known to the Court that it did not think that it was necessary at this time – a position that would be

[75] Bennouna, *supra* note 6, at 4.
[76] Ibid.
[77] Tams & Devaney, 'Article 50' 1118, Parlett, *supra* note 6, at 441, see also Malintoppi, *supra* note 6, at 421, 436–38; Daniel Peat (2014) 84 *British Yearbook of International Law*, 271, 300; JG Sandoval Coutasse and E Sweeney-Samuelson, 'Adjudicating Conflicts Over Resources: The ICJ's Treatment of Technical Evidence in the Pulp Mills Case' (2011) 3 *Goettingen Journal of International Law* 447.
[78] ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean, Costa Rica v Nicaragua*, 16 June 2016, Orders of 31 May 2016 and 16 June 2016.

markedly different in 2016 when the Court proposed appointing its own experts in the context of the *Maritime Delimitation* case. This did not stop Nicaragua again raising this issue at a later date, stating its willingness to assist any expert or experts that the Court would appoint.[79]

Subsequently, in 2016, by a letter of 13 April (formalised in a later order of 31 May the Court, citing Articles 48 and 50 of its Statute and Article 67 of its Rules) the Court informed the parties in the *Maritime Delimitation* case that it was:

> considering arranging for an expert opinion…entrusted to one or several experts asking such experts to collect, by conducting a site visit, all the factual elements relating to the state of the coast between the point located on the right bank of the San Juan River at its mouth and the land point closest to Punta de Castilla, as those two points can be identified today.[80]

The parties were given until 3 May to make their opinions known to the Court with regard to its proposed action. Costa Rica did so on 3 May, welcoming the Court's proposal and suggesting that it appoint a 'committee of three experts, composed of geographers who were independent of both Parties, and that the Parties should have the opportunity to make observations on the identity of the experts appointed.'[81] On this occasion, unlike two years earlier, it was Nicaragua's turn to be more skeptical. In its letter of 3 May, it stated that it considered that there was no need for a site visit to be carried out, arguing that starting point of the maritime boundary, one of the issues which the Court had indicated any potential expert would be asked to look at, was settled and that as such a site visit was unnecessary.[82] Nevertheless, Nicaragua stated that if the Court maintained its position that such a visit was indeed necessary, it would not stand in the way of the experts, and in fact would 'assist them to the fullest possible extent.'[83]

[79] ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of the Isla Portillos (Costa Rica v. Nicaragua), Judgment, ICJ Reports*, para 33.
[80] ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean, Costa Rica v Nicaragua*, Order of 31 May 2016.
[81] Ibid., para 5.
[82] Ibid., para 6.
[83] Ibid.

The Court indicated that it did believe that such site visits were necessary and that, having taken into account the views of the parties, it would proceed to the appointment of experts. It is interesting to wonder what the Court would have done if, say, Nicaragua had not agreed to the Court appointing its own experts, especially since the Court indicated that it wished its experts to conduct site visits, given that the Court does not have the power to compel states to comply in this regard by for example ordering a state to give its experts access to its territory. The Court's powers in this respect are dependent on the consent of the parties, and rely on the parties seeing their cooperation with the Court as being in their best interests.[84] A proposal is made in this regard in II.B.3 (Practice Direction XV (7)).

The Court then laid out the issues that it wished the experts to address, namely:

> "2 *(a)* What are the geographical co-ordinates of the point at which the right bank of the San Juan River meets the sea at the low-water line?
>
> *(b)* What are the geographical co-ordinates of the land point which most closely approximates to that identified by the first Alexander Award as the starting-point of the land boundary?
>
> *(c)* Is there a bank of sand or any maritime feature between the points referred to in subparagraphs *(a)* and *(b)* above? If so, what are their physical characteristics? In particular, are these features, or some of them, permanently above water, even at high tide? Is Los Portillos/Harbor Head Lagoon separated from the sea?
>
> *(d)* To what extent is it possible, or probable, that the area concerned will undergo major physical changes in the short and long term?"

The Court's order also stated that '[t]he Parties shall furnish any necessary assistance to the expert mission'[85] and reassured the parties that they will be 'given the opportunity of commenting upon [the experts' report]' in accordance with Article 67(2) of the Court's Rules.[86] Further, the order provides that stated that the experts 'shall be present, in so far as required, at the oral proceedings. They will answer

[84] Tams & Devaney, 'Article 51' 1310.
[85] ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean, Costa Rica v Nicaragua*, Order of 31 May 2016, para 6.
[86] Ibid., para 7.

questions from Agents, Counsel and Advocates of the Parties, pursuant to Article 65 of the Rules of Court.'[87]

The Court subsequently, by letters of 2 June 2016, informed the Parties that it had identified two potential experts to carry out the task it had previously outlined, namely Mr. Eric Fouache and Mr. Francisco Gutiérrez, renowned French and Spanish professors of geography with extensive experience with geomorphology, giving the parties the opportunity for the parties to communicate any observations they had as to these two individuals by 10 June 2016. Both parties replied by letter on 10 June 2016, with neither making any specific objection to these individuals, but rather reiterating their willingness to provide assistance to the Court in its fact-finding task. No information was given as to the process that the Court undertook to identify these individuals.

The Court took a relatively assertive approach with regard to what it asked of the parties. For instance, in a letter dated 5 July 2016, the Registrar of the Court corresponded with the parties, attaching an annex that contained 'documents they [the experts] will need before conducting the site visits' including maps, satellite images and aerial photographs.[88] The range of things that the Court asked of the parties is quite extensive, including a speedboat, the use of local topographers and even 'the assistance of two individuals (who would work for two days during each visit), equipped with hoes, picks and shovels, should they need to excavate a pit or trench to identify the boundary between the solid land of the headland.'[89] Regardless, the parties worked closely with the experts, providing on request specific information from the parties' own topographers before both site visits were conducted (one between 4 and 9 of December 2016, and the second between 12 and 17 March 2017, in order to visit the low-water mark in both wet and dry seasons).[90]

[87] Ibid., para 8.
[88] 5 July 2016, Registrar to the Agents of the Parties, correspondence related to the organization of the expertise ordered by the Court, available at https://www.icj-cij.org/en/.
[89] Ibid., Annex to the letter.
[90] See for example correspondence of 19 January 2017 and 24 January 2017, correspondence related to the organization of the expertise ordered by the Court, available at https://www.icj-cij.org/en/.

In the end, the Court's experts produced a detailed, 92-page report addressing the questions asked of it by the Court. The report is extensively documented, with pictures relating to each step of their site visits, explaining their methodology and how they came to the conclusions that they did.[91] The experts detailed (providing accompanying photographs) the exact methods that they employed, for instance, locating the exact position of certain markers, even when they enjoyed less than complete success:

> 40. …we formed a line and started probing the sand with iron rods, Unfortunately, the equipment was rather inadequate. The corrugated rods not being easy to handle or sharp enough, they did not penetrate the ground more than 50 cm. Some workers helped the search with shovels.
> 41. We found nothing and decided to go back to the lodge.[92]

Subsequently, by letter dated 30 April 2017, Costa Rica communicated its observations on the experts' report.[93] Later, Nicaragua communicated that it had no observations on the experts' report and saw no need to examine the experts in the course of oral proceedings, a point with which Costa Rica agreed.[94] The sole question to the experts from the bench came from Judge Tomka also submitted a written question to the experts before the beginning of oral proceedings, to which he received a written reply.[95]

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[91] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean, (Costa Rica v. Nicaragua),* Expert Opinion, Professor Eric Fouache and Professor Francisco Gutiérrez, 30 April, 2017, available at: https://www.icj-cij.org/en/.
[92] Ibid., paras 41 and 42.
[93] *Case Concerning Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua), joined with the Case Concerning Land boundary and in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Observations of Costa Rica upon the Report prepared by the Court-appointed Experts,* 30 April 2017, available at: https://www.icj-cij.org/en/.
[94] See *Response to the Comments of Costa Rica on the Report Submitted on 30 April 3017 by the Experts Appointed by the Court in the Case Concerning Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua),* 1 June 2017.
[95] *Question put to the Experts by Judge Tomka,* 12 June 2017, available at : https://www.icj-cij.org/en/ Judge Tomka's question, and *Response to the question of Judge Tomka on the Report submitted on 30 April 2017 by the experts appointed by the Court,* available at: https://www.icj-cij.org/en/.

1. Analysis and Proposal for Reform

In the course of proceedings Nicaragua's agent, Mr Arguello Gómez, commented favourably upon what he termed certain 'unusual steps' that the Court had taken in the course of the *Maritime Delimitation* proceedings, including the Court's *proprio motu* decision to appoint its own experts.[96] Despite the unusual nature of the Court's practice in this regard, it is clear that the Report of the experts played a significant role in the oral proceedings. In fact, it was treated by the parties almost as impartial fact-finding upon which it could rely to support its arguments when it suited it to, with both parties making repeated reference to the Report to bolster their arguments.[97]

Similarly, in the Court's Judgment in *Maritime Delimitation/Isla Portillos,* the Court made several references to the experts' opinion, relying on the fact-finding that they had carried out.[98] Judge Gevorgian even remarked upon the Court's reliance on this report, stating that:

> '[i]n support of the opposite conclusion that the geomorphological changes occurred in the area render Punta de Castilla and General Alexander's line irrelevant *the Judgment heavily relies on two factual findings made by the Court-appointed experts…*'.[99]

Overall, it can be said that the Court's experience with its own experts in this case was a positive one. Neither Nicaragua nor Costa Rica objected to the procedure by which the experts were appointed, their identity or how they went about undertaking the task set for them by the Court. Instead, both parties cooperated fully with the Court and its experts, acceding to the vast majority of their requests. A quirk of these proceedings was that the Judges who (being permanent members of the Court at that time) had been so critical of the Court's fact-finding approach in *Pulp Mills,* Judges Simma and Al-Khasawneh, were both judges appointed *ad hoc* in this case. It is perhaps

[96] *ICJ Pleadings, Maritime Delimitation in the Caribbean Sea and in the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), CR 2017/10, 6 July 2017 at* 10.
[97] Ibid., at paras 19, 26.
[98] Ibid, para 71, see further Separate Opinion of Judge Xue, paragraphs 6, 12, 14,
[99] ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua),* and ICJ, *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua),* ICJ Reports, Judgment, 2 February 2018, Declaration of Judge Gevorgian, para 4, see also para 77, 86, 104 (emphasis added).

interesting (if nothing more) to note that neither commented, either positively or negatively, on the Court's fact-finding process in this particular context.

Despite the Court's positive experience with appointing its own experts in the context of the *Maritime Delimitation* case, in the 2018 compensation proceedings relating to the *Certain Activities* judgment, the Court took the decision not to appoint its own experts to assist it in calculating the compensation that Nicaragua was to pay Costa Rica. To some this may have come as a surprise, especially since it was the first time in the history of the Court that it awarded compensation for 'pure environmental damage', (in the Court's words 'damage caused to the environment, in and of itself',[100] i.e. without any reference having to be made to market value or economic use[101]) and many hoped Court would provide example with regard to method for evaluating this compensation[102] (given variation in method that exists in other contexts[103]).

It is, of course, necessary to point the difference in context here. At this juncture Costa Rica was seeking damages for harm, and as such there is arguably a stronger argument that it ought to have put forward evidence of its claim. Nevertheless, it is worth pointing out that the Court's methodology at this stage of the case has been criticised. In the course of its Judgment, the Court examined the different methods advocated by the parties for the calculation of the compensation that Nicaragua was to pay. The parties themselves advocated distinct methodologies for the assessment and calculation of this compensation. The Court, for its part, stated that it would not

[100] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica,* ICJ Reports, 2 February 2017.
[101] ICJ, *Certain Activities,* Separate Opinion of Judge Donoghue, at 1.
[102] Jason Rudall, 'Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, *American Journal of International Law,* (2018) Vol. 1 288, see also Monaliza Da Silva, 'Compensation Awards in International Environmental Law: Two Recent Developments' (2018) 50 *New York University Journal of International Law and Politics*, 1417, and Diane Desierto, 'Evidence but not Empiricism? Environmental Impact Assessments at the International Court of Justice in Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica), *EJIL: Talk!* February 26, 2016.
[103] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica,* ICJ Reports, 2 February 2017, Dissenting Opinion of Judge ad hoc Dugard.

'choose between them or use either exclusively for the purposes of valuation.'[104] Rather, the Court stated that it would 'take into account' the methodologies of parties '[w]herever certain elements of either method offer a reasonable basis…'[105] This approach the Court described as making an 'overall assessment', which it claimed was tailored to the 'specific facts of the case'.[106]

However, this overall approach was not universally welcomed, not even by the Court's own judges.[107] For instance, Judge Gevorgian's Declaration criticized the judgment for its 'insufficient' reasoning in not addressing certain issues 'and merely conclud[ing] (without further explanation) that Nicaragua's activities "have significantly affected the ability of the two impacted sides…"'[108] Similarly, Judge Donoghue criticised the Court's methodology which she felt was constructed in such a manner so as to avoid the necessity of the Court engaging in further fact-finding.[109] Of course, not having taken part in the relevant judicial process, it is difficult for any commentator to definitively conclude that the Court has employed such avoidance techniques.[110] However, when sitting judges make remarks of this ilk, this is hard to ignore. Criticism has also come from international legal scholarship with regard to the Court's 'opaque' methodological approach, with Rudall lamenting that 'it is unfortunate that international courts and tribunals will garner only limited guidance from the methodology adopted by the ICJ in valuing environmental damage.'[111]

As such, questions may be asked as to why the Court took this decision, given its earlier practice in separate proceedings involving the same parties. Similarly, it is unclear why the Court decided to only have written proceedings at this stage and no oral examination of experts to assist it in determining what would be an appropriate

[104] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica,* ICJ Reports, 2 February 2017, para 52.
[105] Ibid.
[106] Ibid., para 78.
[107] See, for instance, ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica,* ICJ Reports, 2 February 2017, Dissenting Opinion of Judge Ad Hoc Dugard, at para 7.
[108] Ibid., Declaration of Judge Gevorgian, para 8.
[109] Ibid., Separate Opinion of Judge Donoghue, para 32 (emphasis added). Reminiscent of Thomas Franck, 'Fact-Finding in the I.C.J.' in Lillich RB (ed), *Fact-Finding Before International Tribunals* (Irvington-on-Hudson NY, Transnational 1992) 28.
[110] Devaney, *supra* note 6, at 29.
[111] Rudall, *supra* note 115, 292.

methodology to employ, and ultimately a reasonable amount of compensation to order.[112] Ultimately, it would be beneficial to know the reasoning behind the Court's decision not to appoint its own experts for the limited purpose of assisting at this stage of the proceedings. This decision has been questioned by commentators, especially in light of the fact that in previous cases where the Court has awarded compensation it has appointed its own experts to assist it in doing so.[113] Even Judge Bennouna, who we by now know to be a sceptic of the use of experts, has spoken of the usefulness of such experts in such circumstances, referring to the 'significant benefit' which the Court may derive from a Court-appointed expert 'assessing monetary value of the expropriated property…damage to property…or damage to the environment'.[114] Plainly, faced with methodological disagreement relating to an issue which the Court has not previously pronounced on, we do not know whether or not the Court had any 'informal' or spectral assistance 'behind the scenes'. Nevertheless, it merits repeating that the Court would in such circumstances, in the interests of due process and the proper administration of justice, be better advised to appoint its own experts rather than employing 'informal' help without the parties' knowledge.

To be clear, it is not argued that the Court need appoint its own expert in every case that comes before it. There are advantages and disadvantages to the Court appointing its own experts under Article 50. An obvious drawback of the Court appointing its own expert is that the Court must pay for his or her services out of its own budget.[115] In fact, the Court has explicitly acknowledged that it may have to appoint and pay for its own experts in future cases in requesting an increase in its budget from the General Assembly.[116] Furthermore, experts appointed by the Court very much rely on the consent of the parties if they wish to, for example, request information from the parties, travel to the site or access any area which is the subject of a factual dispute.[117]

[112] *Corfu Channel Case, Judgment of December 15th, [Compensation] 1949: ICJ Reports 1949,* p. 244
[113] Jason Rudall, *supra* note 115, at 293.
[114] Bennouna, *supra* note 6, at 6.
[115] Article 68 ICJ Statute. In the context of the *Maritime Delimitation* case, the expense of the services of the Court's experts was submitted to the United Nations General Assembly for approval, see: UNGA Resolution 71/272 (23 December 2016), at VIII.
[116] 'Proposed programme budget for the biennium 2018-2019', Part III, International justice and law, Section 7, International Court of Justice, A/72/6 (Sect. 7) at 7.17.
[117] Tams, 'Article 51' 1310.

Additionally, under Article 67(2) of the Rules the expert must share their evidence with the parties who are given the opportunity to express their views on it, although crucially they are not permitted under the Court's constitutive instruments to cross-examine the Court's expert.[118] This is a clear distinction between experts put forward by the parties and the Court's own expert or experts. It is for this reason that it is proposed below that the President may permit the parties to examine its experts (Practice Direction XV (9)). Instituting a presumption in favour of the questioning of these experts, at the discretion of the President, would provide all involved with the benefits of questioning set out above.

Nevertheless, despite these drawbacks, it is maintained that in the right situations the benefits of appointing its own experts outweigh the costs described above. These benefits include its own experts assisting the Court in comprehending complex factual issues which arise in the course of proceedings or which, for example, the parties' experts are examined on.[119] For instance, there is some doubt as to the extent to which the Court's own experts remained involved in the *Maritime Delimitation* case – did the Court have continued access to the experts, for example, during their deliberations? Or was their only role to write the report that they were asked to by the Court in its Order of 31 May 2016. Continued access to these experts would have been helpful to the Court, and avoided the need for any recourse to *experts fantômes* (if indeed there was any in this case). The advantage that continued access to its own experts has, compared to for example assessors (provision for which is made in the Court's constitutive instruments[120]) is that the role of the expert is necessarily limited, and there is little danger of them being seen as additional judges.

The appointment of its own expert would also allow the Court to actively engage with the parties in the course of proceedings through, for instance, using those fact-finding

[118] Although the Court allowed the parties to question its experts in the *Maritime Delimitation* case, see footnotes 84 and 85 above, and it would seem likely that this will be the approach of the Court in the future.
[119] Philippe Couvreur, 'Le Règlement Juridictionel' in Institut du droit économique de la mer (ed), *Le Processus de delimitation maritime étude d'un cas fictive: colloque international Monoco 17-29 mars 2003* (Paris, Pedone 2004) 382.
[120] See Article 30(2) Statute, C. Payne, 'Mastering the Evidence: Improving Fact-Finding by International Courts' (2011) 41 *Environmental Law Journal* 1191, 1217; Lucas Lima, 'Expert Advisor or Non-Voting Adjudicator? The Potential Function of Assessors in the Procedure of the International Court of Justice' (2016) 99 *Rivista Diritto Internationa*l, 1123–46.

powers it possesses to request information from the parties or by asking questions. [121] In asking probing and useful questions, the use of its own expert can only be advantageous. Encouraging dialogue between the bench and the parties and their expert would provide the Court the opportunity to 'discover more about the essence of the issue under dispute and to help deal with issues requiring particular clarification.'[122]

As a result, the Court may wish to think about a Practice Direction regarding the appointment of its own experts. To this end, the Court should provide further guidance regarding the procedure for the appointment of the its own experts. Presently, much like the situation with regard to the procedure for the examination of party-appointed experts examined above in Section A, the Court's constitutive instruments again contain only rudimentary guidance on the appointment, role and examination of Court-appointed experts.[123] Nevertheless, in looking at the most recent appointment of Court-appointed experts in *Costa Rica v Nicaragua*, it appears that the procedure for the appointment of its own expert was one which worked well in the context of this case. In certain cases the procedure for the appointment of the expert may be determined by the parties in their compromis[124] or in the international agreement containing the compromissory clause giving the Court jurisdiction.[125] In other cases where the decision lies with the Court itself, certain other procedures have been suggested, including the establishment of a standing 'Scientific Advisory Body'[126] or the institution of pre-hearing conferences whereby the Court could enlist the fact-finding assistance of international organizations from relevant epistemic communities.[127] Judge Bennouna has eschewed such suggestions, instead arguing for as great a degree of flexibility for the Court as possible.[128] Practice does suggest that

[121] See Article 49 ICJ Statute, Article 62(1) Rules of Court.
[122] Foster, *supra* note 1, at 134.
[123] Tams, 'Article 51', 1451.
[124] PCA, *In the Matter of the Indus Waters Kishenganga, Arbitration before the Court of Arbitration Constituted in Accordance with the Indus Waters Treaty 1960 between the Government of India and the Government of Pakistan Signed on 19 September 1960, between the Islamic Republic of Pakistan and the Republic of India, Partial Award, 18 February 2013*, para 14.
[125] See the Compromis in ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America), Merits, Judgment of 12 October 1984, [1984] ICJ Rep 246*, 253 (Compromis, art II.3), where the USA and Canada jointly requested that the Court appoint a technical expert in order to assist in delimiting the maritime boundary.
[126] Sandoval Coutasse and Sweeney-Samuelson, *supra* note 89 at 466–67.
[127] Peat *supra* note 89, at 300–02.
[128] Bennouna, *supra* note 6, at 5.

the Court is capable, through the Registry, of identifying appropriate experts to assist it, as the *Costa Rica v Nicaragua* case has shown. To that end, again standardization and codification of the Court's practice would provide a measure of certainty for the Court itself and predictability for the parties in future case.

Finally, we must recognise concerns raised by commentators such as Peat about the importance of the Court maintaining a bright line between the Court's judicial function and the role of the expert or experts that it has appointed.[129] The Court must ensure that it does not become vulnerable to accusations of having delegated its judicial function to its experts, and ensure that it retains control over the 'ultimate issue' in the case as final arbiter of the law (Practice Direction XV (8)).[130] This is an issue which has arisen in other contexts,[131] and which was mentioned by Judge Yusuf in the *Pulp Mills* case, who downplayed the danger of the undue influence of experts, stating that 'the elucidation of facts by the experts is always subject to the assessment of such expertise and the determination of the facts underling it by the Court'.[132]

In short, drawing on recent practice, rather than instituting a new pre-trial procedure, or establishing a Scientific Advisory Body, it is much more likely that the Court will continue to make incremental changes on a case-by-case basis in consultation with the parties, taking their wishes into account. As a result, the following proposals are offered, in the form of a Practice Direction, as the more realistic way to bring about necessary procedural reform.

[129] Peat, *supra* note 89, at 301-2, Foster, *supra* note 1, at 78; Alan Boyle and James Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems' (2013) *Journal of International Dispute Settlement*, 273.
[130] Caroline Foster, 'New Clothes for the Emperor? Consultation of Experts by the International Court of Justice' (2014) *Journal of International Dispute Settlement* 139, Francesa Romanin Jacur, 'Remarks on the Role of Ex Curia Scientific Experts in International Environmental Disputes' in Nerina Boschiero et al (eds), *International Courts and the Development of International Law* (Berlin, Springer, Asser Press 2013), 444; Boyle and Harrison, *supra* note 141, at 271.
[131] See, for example, ICTY, Prosecutor v. Kordic and Cerkez, IT-95-14, Transcript, 28 January 2000 13–89; see also ICTY, Prosecutor v. Kovacevic IT-97-24-T, Transcript, 6 July 1998 13305–7.
[132] *Pulp Mills* Case, Declaration of Judge Yusuf at para 10.

2. Draft Practice Direction XV

1. The Court, when exercising its powers to appoint an expert or commission of inquiry to assist it in accordance with Article 50 of its Statute and 62(2), 67 and 68 of its Rules, will first of all consult the parties to gather their views on both the necessity and scope of the proposed action.
2. Should the Court consider that the appointment of its own experts is necessary, taking into account the views of the parties, the President will cooperate with the Registry in identifying a suitable candidate or candidates.
3. The Court will then invite the views of the parties on the individual or individuals proposed by the President, giving clear reasons for any objections they may have.
4. Parties may object to the identity of one of the experts on the following grounds (a) lack of competence, (b) conflict of interest, in accordance with the appearance of bias standard, or (c) that a different individual would be better suited.
5. In the case of a formal objection, the parties will enter into good faith consultations with the President in order to identify a suitable replacement.
6. Failure to agree on the part of one or both of the parties will not prevent the Court from appointing an expert under Article 50 of its Statute.
7. The parties will cooperate in good faith with the expert or experts appointed by the Court, providing reasonable access to any relevant *situ* as well as any reasonable logistical or technical assistance which the expert or the Registry may request.
8. The President, in consultation with the parties, will clearly delimit the task or tasks set for the parties, which, crucially, should not include any issue which would fall within the Court's own judicial function.
9. The parties have the right to comment on any report of the Court's experts, as well as the right to question the expert.

III. Reflections on the Court's Guiding Principles and the Reforms Proposed

Any proposal for procedural reform relating to the World Court is usually met with concern that fettering the flexibility that States currently enjoy will make resort to the Court somehow less attractive. Such concerns are par for the course, and to a large degree understandable. The following section addresses these concerns by briefly showing that deference to the wishes of the parties, in accordance with the principle of party autonomy, cannot be the Court's lodestar in each and every situation. Rather, the Court, as a court of law, must also be guided by the principle of the proper administration of justice in all that it does.

In the course of considering various issues regarding the use of expert evidence before the Court, the preceding sections have highlighted evergreen examples of a tension which lies at the heart of the operation of the Court. This is the tension created by the competing nature of two principles which guide the Court in proceedings before it, namely the principles of party autonomy (which allows parties a large measure of discretion as to how their dispute should be settled) and the proper administration of justice (which seeks to ensure the coherence, predictability and fairness of procedural aspects of proceedings). It is necessary to consider both principles in turn.

The Court's Statute and its Rules, as amended, are designed to lay out a general framework for the conduct of proceedings. As shown above, the Court's constitutive instruments create what has been termed 'neither a strict adversarial nor an inquisitorial model and can best be described as a modified adversarial procedure firmly based on party autonomy and initiative in matters of evidence'.[133] This means, in effect, that not only must the Court not overstep what is requested of it by the parties (in accordance with the *ne ultra petita* principle), but that the Court's fact-finding process must be conducted with the wishes of the parties in mind.[134] The most straightforward example in this regard relates to party agreement on the facts. If parties agree on a particular set of facts, the Court will take notice of these facts and

[133] Markus Benzing, 'Evidentiary Issues' in Andreas Zimmermann et al (ed) *The Statute of the International Court of Justice: A Commentary,* (Oxford University Press, 2019) 1377.
[134] Ibid., 1375, see also Robert Kolb, *The International Court of Justice* (Hart 2014) 941–2.

not seek to independently establish them.[135] More generally, should parties agree to pursue a certain procedural direction in the course of proceedings, the Court will be guided by the parties, so long as this direction remains within the limits of its constitutive instruments.[136]

Not only do the provisions of the Statute and the Rules themselves afford sovereign States a large measure of discretion with regard to, for example, who they put forward as an expert, or the length of their submissions, the Court has also in practice taken a largely deferential approach to sovereign States in disputes before it. A State wishes to put evidence of questionable providence before the Court? 'Who are we to refuse?' the Court has traditionally replied. That is not to say that the Court does not care about the providence of such information, but it has generally considered it an issue of fact-assessment, rather than admissibility, in order to avoid having to refuse the wishes of a sovereign State. As Plant has stated, the margin of discretion that States are afforded in line with the principle of party autonomy means that 'parties are free to bring whatever information they consider useful, presented in virtually any manner they think best, in order to substantiate their factual allegations.'[137] Similarly, imagine a State is in the sole possession of certain (potentially important) information which it indicates it will not disclose. Will the Court ask the State for such evidence? Once in a blue moon, perhaps. But what if the State refuses? Will the Court use its powers to draw adverse inference from such refusal? Most likely it will not, but rather find some justification for not having to do so.[138]

None of this is necessarily problematic, it should be stressed. The Court's jurisdiction is consensual. The parties before it sovereign. And indeed any attempt to intervene proactively in proceedings involving sovereign States risks advantaging one State over another, thus jeopardising the cardinal principle of sovereign equality. [139] In addition, the flexibility afforded by the Court in not strictly applying procedural rules but by seeking to accommodate the wishes of the parties as far as possible 'allows the participants in international dispute settlement…to employ whatever means are

[135] Ibid.
[136] Ibid.
[137] Plant, *supra* note 6, at 465.
[138] Devaney, *supra* note 6, at 27.
[139] Plant, *supra* note 6, at 465.

necessary in the specific circumstances of each case to obtain the information necessary to ascertain the facts at issue in the dispute.'[140] Consequently, flexibility is not only of the 'central features'[141] or 'guiding principles'[142] of proceedings before the Court, (especially in relation to the fact-finding process),[143] but it also should inform any contemplated reforms.

Party autonomy, however, is not the only principle which guides the application of the relevant procedural provisions which govern the settlement of disputes by the Court. The Court must also take into consideration what it has variously termed in its jurisprudence the 'proper',[144] 'good'[145] or 'better'[146] administration of justice. This principle, although little studied,[147] permeates everything that the Court does procedurally. As Kolb has stated, '[t]here is no action by the Court, be it normative, administrative, or decisional, which would not be profoundly influenced by considerations relating to the proper administration of justice.'[148] This principle fulfils different functions in proceedings before the Court, including as a '(sometimes decisive) criterion in a balancing-up process concerning divergent interests' which is relevant for present purposes when considering the balance that must be struck with regard to party autonomy.[149] Further, it can also serve as a 'polar star in a legislative process, when the Court adopts new rules, in its Rules or Practice Directions' or a 'simple support or explanation for a provision in the Rules or in the Statute whose aim is to secure a proper unfolding of procedure.'[150]

[140] Ibid.
[141] Ibid.
[142] Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 366.
[143] Plant, *supra* note 6, at 465. 465.
[144] See, for instance, ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits*, Judgment: ICJ Reports 1986, p. 14, 26, para. 31, see also: ICJ, T*erritorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), p. 420, 434, para. 36, Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment: ICJ Reports 1964, p. 6, 42.
[145] ICJ, *Territorial and Maritime Dispute*, Preliminary Objections, ICJ Reports (2007), p. 832, 851–2, paras. 50–1.
[146] ICJ, *Bosnian Genocide*, Order of 17 December 1997, ICJ Reports (1997), p. 243, 257, para. 30.
[147] See Robert Kolb, 'La maxime de la "bonne administration de la justice" dans la jurisprudence internationale'(2009)' *L'Observateur des Nations Unies* 27.
[148] Robert Kolb, 'General Principles of Procedural Law', in Andreas Zimmermann et al (ed) *The Statute of the International Court of Justice: A Commentary*, (Oxford University Press, 2019) 977.
[149] Ibid.
[150] Ibid.

The principle of the proper administration is undoubtedly a flexible one, which almost defies abstract definition in terms of its essential content. That, however, is almost the point, given that it is designed to leave 'a certain margin of discretion to the Court and lend…itself to application in the most different matters of procedural law' and which is particularly important where the provisions of the constitutive instrument are rudimentary, as is the case with regard to the evidentiary provisions in the Court's constitutive instruments.[151] The principle is open-ended in order to allow the Court to adapt to changes as they emerge and require attention, such as the phenomenon of consistently factually complex nature of cases coming before it. [152] As Kolb states:

> 'the principle essentially means that the Court has the ultimate power and responsibility to ensure that the justice it renders abides by the highest standards of judicial procedure and that at the same time it takes duly into account the legitimate concerns of all the parties to the proceedings.'[153]

In short, sometimes the proper administration of justice, and all that it entails, cannot easily be reconciled with the principle of party autonomy. Drawing on examples mentioned above, the Court may struggle with the 'merry contradiction' of party-appointed experts appearing as counsel in cases before it. It may find it difficult to ensure that it delivers a judgment which is well-founded in fact and law in a procedurally fair manner, and may consequently decide that parties should not pursue such strategies in the future but rather put forward experts for cross-examination, in the interests of the proper administration of justice.

Similarly, the Court may wish to allow parties a large measure of discretion as to the method for cross-examination, but issues which arise in the course of cross-examination in cases before it may prompt the Court to attempt to develop a more predictable modality for the conduct of cross-examination. Of course, it may ultimately be that in subsequent cases the pendulum will swing back and the Court may wish to become once again more deferential to the wishes of the parties, and disregard the practice it has been developing, but nevertheless the potential for tension between facilitating the wishes of the parties in order to ensure the timely resolution

[151] Ibid.
[152] Ibid., Keith, *supra* note 6, at 512.
[153] Ibid.

of an international dispute lest it escalate to something more serious (or the principle of party autonomy in other words) and developing procedural rules which are predictable and fair in accordance with the proper administration of justice, is clear.

It is the task of the Court, in practical terms, in cases which come before it, to manage this tension as well as it possibly can. In doing so, it is likely that greater weight ought to be afforded to one or other of the principles which operate upon the Court. For instance, given the intention of both those States which brought the Court into existence, and those which (still) consent to appear before it, greater weight may need to be given to the principle of party autonomy at times. The Court should, in the words of Lauterpacht, always attempt to avoid making determinations on procedural technicalities, but rather seek to ensure procedurally fair means of settling the dispute that exists between the parties to the case before it.[154]

But by the same token, practice has shown us that too much deference to States creates procedural weaknesses. This circle can be squared through careful and thoughtful consideration of individual procedural issues as and when they arise. It is for these reasons that amendment of the Court's Statute and Rules is not advocated. Rather, the issues of Practice Directions are, as a neat compromise between the principles of party autonomy and the proper administration of justice – providing guidance to the parties as they do as to how the Court would like to see proceedings conducted before it, whilst also leaving room for maneuver for particular cases for which such procedures would not sit comfortably, or for parties who wish to do things rather differently. This is undoubtedly a delicate task, but it is the one that the Court has been doing since the establishment of the Permanent Court, and it has been doing so in a relatively satisfactory manner. But as the Court is consistently faced with handling factually complex cases, it must change and adapt, whilst never losing sight of those guiding principles which operate upon it. This does not require wholesale reform but rather case-by-case, intelligent and considered change of the kind proposed in the preceding sections.

[154] Lauterpacht, *supra* note 164, at 366.

IV. Conclusion

Disputes coming before the ICJ today are consistently complicated, and the complex facts at issue are being increasingly contested. Since the *Pulp Mills* case there have been a number of notable developments in the Court's use of experts, such as the apparent end to experts as counsel and the appointment of the Court's own experts in *Maritime Delimitation* case. In light of merited criticisms that have been levelled at the Court's use of experts in the past, such developments can be seen as significant steps in the right direction. Issues remain, however, such as the conduct of cross-examination and the uncertainty surrounding the continued consultation of *experts fantômes.* Accordingly, suggestions for reform have been made, in the form of two Practice Directions, which would allow the Court to accommodate the competing principles of party autonomy and the proper administration of justice. One glance at the Court's docket reveals a number of cases likely to require the Court to deal with complex factual issues on the horizon. These include two maritime delimitation cases involving Somalia and Kenya,[155] and Nicaragua and Colombia,[156] and two cases involving Bolivia and Chile relating to, among other things, the use of the waters of the Silala.[157] As such, we will watch with great interest to see how the Court will deal with the challenges that await it, including how deftly it will deal with expert evidence, simultaneously accommodating the wishes of the parties while ensuring the proper administration of justice.

[155] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya),* see: https://www.icj-cij.org/en/case/161.
[156] ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia),* see: https://www.icj-cij.org/en/case/155.
[157] ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* see: https://www.icj-cij.org/en/case/153 and ICJ, *Dispute Over the Status and Use of the Waters of the Silala (Chile v. Bolivia),*see: https://www.icj-cij.org/en/case/162.