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Recourse to Legal Experts for the Establishment and Interpretation of Customary Norms in Investment Law

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1 Introduction

This chapter will scrutinise the recourse to legal witnesses on points of international law through the lens of specific texture of customary international law. A general question raised is that of the legal basis and legitimacy of the recourse to international law expert witnesses in investment arbitration, but answering it requires distinguishing between different sources of international law and paying a specific attention to customary rules. Indeed, the formal justification and legitimacy of the practice of expert witnesses on issues of international law may well depend on the type of norms involved. The recourse to legal expertise may be more justified – and thus more legitimate – for the establishment or interpretation of customary norms than for the interpretation of treaty norms. This entails a secondary question to which little attention has been paid other than in passing in international law: whether customary international law is a matter of fact that must be pleaded before investment tribunals or a matter of law that must be raised in argument by the parties in their submissions is a central question. To answer the question, a close look will be paid to the way international customary law is proved before investment tribunals. The question relates more generally to the issue of custom determination or custom interpretation.

The lack of scholarly attention on the dichotomy may be due to the absence of procedural consequences attached to the distinction between points of law and points of fact in general international litigation.[1] The distinction, however, takes on a particular significance in the face of a rising practice to plead and prove points of international law before investment

[1] The distinction is only applicable in international legal regimes which are equipped with an appellate system such as the WTO dispute settlement system.

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tribunals through party-appointed legal expertise.[2] Instead of being scrutinised to assess its consequences on the system, this well-established practice is taken notice of, matter of factly, without much questioning of its legal basis or legitimacy, at most noticing its 'oddness' or 'strangeness'.[3] And yet, especially in a civil lawyer's eyes, the trend does not seem consistent with the ancient adage *iura novit curia* according to which the judge 'knows' the applicable law while the parties have to prove, including through expert witnesses, the facts of the case.[4] Legal experts, acting as party-appointed witnesses, whether they testify before the tribunal or simply provide a written statement, become, from a procedural point of view, a means of evidence of the applicable law. Even within common law systems which tend to be more adversarial and in which the *iura novit curia* is not applied systematically, it is commonly admitted that 'expert testimony is used […] to demonstrate facts that could not be demonstrated to a factfinder without some special skill or discipline'.[5] But international law, even in its customary form, is not a fact that must be proved but a law that must be applied to given facts.

The maxim *iura novit curia* produces most of its effects in the context of due process of law requirements as it answers the question whether the adjudicator can raise on her own motion legal arguments that have not been put forward by the parties.[6] It thus regulates the powers of the adjudicator as to the determination of the law. But it can also be relevant to determine whether the parties must only argue the applicable law in their submissions, or whether they can go as far as to plead and prove it through recourse to legal expert witnesses. It must however be conceded that the difference between proving and arguing, which is applicable in some legal systems,[7] is based on the existence of rules of admissibility of

[2] A Newcombe, 'The Strange Case of Expert Legal Opinions in Investment Treaty Arbitrations' (*Kluwer Arbitration Blog,* 18 March 2010). <http://arbitrationblog.kluwerarbitration.com/2010/03/18/the-strange-case-of-expert-legal-opinions-in-investment-treaty-arbitrations/> accessed 1 June 2022.

[3] ibid.

[4] Relying on the law of procedure in France and Switzerland, see C Jarrosson, 'L'expertise juridique' in C Reymond (ed), *Liber amicorum Claude Reymond: Autour de l'arbitrage* (Litec Paris 2004) 127–51. *Da mihi factum dabo tibi jus* is the other formulation of the same principle.

[5] TE Baker, 'The Impropriety of Expert Witness Testimony on the Law' (1992) 40 UKanLRev 325, 331.

[6] JDM Lew, 'Iura Novit Curia and Due Process' (Queen Mary Law Research Paper Series No 72/2010, 1 January 2011) <http://dx.doi.org/10.2139/ssrn.1733531> accessed 1 June 2022; M Kurkela & S Turunen, *Due Process in International Commercial Arbitration* (OUP 2010) 178 ff.

[7] Such as the Canadian legal system.

evidence. International law does not impose limitations on admissibility of evidence: 'International tribunals … have generally had the power to decide for themselves what is admissible as evidence and have taken a liberal approach to the matter'.[8] Therefore, the question whether a customary rule must be treated as fact or law for evidentiary purposes is more an issue of legitimacy than of legality.

This chapter will retain a formalist approach of that source of law which will then be completed by a more realist appraisal of the practice allowing to encompass sociological justifications, which may better account for the increase in the recourse to legal experts on international law issues in investment arbitration. Part 2 will present and comparatively assess the abundance of the recourse in investment arbitration to legal witnesses on issues of international law; Part 3 will then proceed to a theoretical analysis which will test the hypothesis according to which recourse to international law witnesses in investment arbitration could be justified when dealing with customary international law; it will appear that, at most, customary norms may have been the Trojan horse of the recourse to international law experts in investment arbitration because international law witnesses are seldom relied on for the purposes of ascertaining the contents or even the meaning of customary international law. Since the theoretical hypothesis does not pass the empirical test, Part 4 will offer an alternative justification that has more to do with the sociology of investment law and with its constant search for legitimacy than with any formal analysis of the sources of law.

2 The Puzzling Practice of Extensive Use of International Law Expert Witnesses in Investment Arbitration

2.1 A Well-Established Practice of Legal Opinions in Investment Arbitration

There is a growing recourse to legal experts, generally party-appointed expert witnesses, for the purposes of establishing the contents or the meaning of a given international law norm in investment arbitration. Far from receding, the practice is so frequent that a database on international investment arbitration provides the possibility to search for cases by the names of experts who provided a legal opinion,[9] notwithstanding the fact that the

[8] CF Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff 2005) 164.

[9] Italaw, 'Expert (Legal Opinion)' (*Italaw*, 2022) <www.italaw.com/browse/expert-legal-opinions> accessed 1 June 2022.

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contents of many of the opinions have not been made public and can only be used to the extent that they are cited within the award. These legal 'witnesses' are either general authorities recognised in international law or experts of international investment law who may act as counsel or even arbitrators in other cases.[10] Their identification in the awards is not always consistent: they are oftentimes simply presented as authors of 'legal opinions' and, as such, they may be distinguished, in the same award, from 'witnesses' and 'expert opinions'.[11] In other cases, among experts on international law, a difference is established, mainly for fees and expenses purposes, between 'consulting experts' and 'testifying experts'.[12] In the same case, the individual contribution of experts of international law can be labelled 'opinion', 'legal opinion' or 'expert opinion', which are all introduced under a general heading of 'witnesses' testimony'. The latter, thus, conflates all types of witnesses, whether they are experts in international law, domestic law or of technical matters.[13] They can more generally be included in a wider category of expert witnesses which includes three types of experts: international law experts, national law experts and quantum/industry experts.[14]

The battle of legal experts on issues of international law started with the *Loewen* case, in which Christopher Greenwood and Sir Ian Sinclair, besides other legal experts, wrote legal opinions for the two parties.[15] But the *Yukos* arbitration case is one of the most salient examples of a battle of experts on international law issues, even though many of the opinions by international law experts also related to aspects of comparative constitutional law, on the conclusion of treaties, or on the comparative law of foreign relations.[16] Overall, many legal opinions deal with issues of domestic law

[10] M Langford, D Behn & R Lie, 'The Revolving Door in International Investment Arbitration' in A Føllesdal & G Ulfstein, *Judicialization of International Law: A Mixed Blessing?* (OUP 2018) 145–6.

[11] *Jan de Nul v Egypt* (Award of 6 November 2008) ICSID Case No ARB/04/13, 27.

[12] *Siag v Egypt* (Award of 1 June 2009) ICSID Case No ARB/05/15, 165–6.

[13] *Yukos Universal Ltd v Russia* (Interim Award on Jurisdiction and Admissibility of 30 November 2009) UNCITRAL, PCA Case No 2005–04/AA227, 46 ff.

[14] Langford & ors (n 10) 145–6.

[15] *Loewen Group, Inc and Raymond L Loewen v USA* (Award of 26 June 2003) ICSID Case No ARB(AF)/98/3.

[16] *Yukos Universal Ltd v Russia*; see also, among others, the awards in *Pezold v Zimbabwe* (Award of 28 July 2015) ICSID Case No ARB/10/15; see also in *Chevron* where the expert opinions of J Paulsson & NJ Schrijver were not made public, nor were they referenced in the final award, in *Chevron Corporation and Texaco Petroleum Corporation v Ecuador* (Award of 31 August 2011) UNCITRAL, PCA Case No 34877. Notice, however, that in the *Pezold* case, the majority of the experts were 'quantum experts' who had to assess the damage as a matter of fact. Their expertise was not in international law issues.

which the members of the tribunal may not be familiar with and which are, at least formally, applied as mere facts in the dispute[17] or as issues of financial assessment.[18] But a great number tackle issues of international law for which it could be expected that the tribunal has the required expertise.[19]

This practice is quite unique and specific to investment arbitration. It is inexistent before international courts and tribunals.[20] It must be stressed, however, that this scarcity of the practice is not the result of an exclusionary rule since the admissibility of evidence in international law is as liberal before investment tribunals as before any other international court or tribunal.[21] Nothing precludes the parties from presenting expert witnesses on international law before the International Court of Justice (ICJ), for instance, except for a sense of impropriety in front of a court which is composed of at least 15 highly reputed experts of international law. Articles 50 and 51 of the ICJ Statute refer to the recourse to experts without distinguishing between the types of experts or the issues on which they can be called upon. Rule 57 of the ICJ relates the presentation of witnesses and experts to 'any evidence' that a party wishes to produce, thus linking evidence – and factual matters – to the appointment and approval by the Court of expert witnesses. However, the relationship is implicit and the appointment of experts is not limited by an objective of evidence production. Equally, if not even more clearly, nothing in the ICSID rules seems to limit the appointment – by the parties or the tribunal – of experts.[22]

[17] Thus, for instance, Alain Pellet, Martti Koskenniemi and Georg Nolte provided opinions on the provisional application of treaties in, respectively, French, Finnish and German constitutional law in the *Yukos* case *Yukos Universal Ltd v Russia* (Interim Award on Jurisdiction and Admissibility of 30 November 2009) UNCITRAL, PCA Case No 2005–04/AA227 [323–4]. In the same series of cases, several experts of Russian constitutional law were presented for the same domestic law issues.

[18] See, for example, the legal opinion of Alejandro Arraez in *Victor Pey Casado v Chile* (Opinion of Alejandro Arraez and Associates of 3 September 2002) ICSID Case No ARB/98/2.

[19] In the *Yukos* case for instance, the international law experts outnumbered the technical and the domestic law experts.

[20] See, *infra*, rare cases of expert opinions for the purposes of establishing a customary rule.

[21] On the liberal approach of evidence in international litigation, see Amerasinghe (n 8) and D Sandifer, *Evidence Before International Tribunals* (UVA Press 1975); but also, underlining the difficulties arising from an excessively liberal approach, C Brower, 'Evidence Before International Tribunals: The Need for Some Standard Rules' (1994) 28(1) Int'l L 47.

[22] While Rule 35 on 'Examination of Witnesses and Experts' is limited to the examination before the Tribunal, Rule 36 does refer to the admission of 'evidence given by a witness or expert', ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (adopted 25 September 1967, entered into force 1 January 1968) rules 35–6 (hereinafter ICSID Arbitration Rules).

In fact, the rules tackle the situation of witnesses and that of experts in the same provisions, thus suggesting that there is no procedural difference between the two categories. The 2013 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules provide a more detailed regime for the expert witnesses appointed by the parties. Encompassed in a section on 'evidence', Article 27 refers to 'witnesses, including expert witnesses who are presented by the parties to testify … on any issue of fact or expertise'.[23] The formulation suggests that an expert contribution could be on issues other than of fact. Nothing in the applicable procedural rules seem to limit the appointment by the parties of international law experts as expert witnesses.

The scarcity of legal experts before international tribunals is thus the result of parties' self-restraint, rather than of any regulation by international tribunals. Before the ICJ, the instances in which the parties have introduced expert witnesses on issues of law are very rare. Most of the legal testimonies deal with issues of domestic law which are seen by international judges as issues of fact that can be proved by recourse to expert witnesses.[24] That analysis is applicable to other international tribunals, including the WTO dispute settlement in which, however adversarial the proceedings,[25] the parties do not appoint legal expert witnesses on issues of international law, as they would appoint expert witnesses on issues of domestic law or on technical matters. The only

[23] UNCITRAL, 'Arbitration Rules of the United Nations Commission on International Trade Law' (15 December 1976) UN Doc A/31/98, 31st Sess Supp No 17, as amended in 2010 (A/RES/65/22) and 2013 (A/RES/68/109), Art 27 (UNCITRAL Rules).

[24] See, for example, *Right of Passage over Indian Territory (Portugal v India)* (Observations and submissions of the Government of the Portuguese Republic on the Preliminary Objections of the Government of India) [1957] VIII ICJ Rep 629, in which Portugal submitted the written testimony of a Chicago University Professor of Comparative Law in order to prove the existence of a general principle of law. But given that the Court identified a local custom in the case, it did not need consider the elements referring to a possible general principle of law. The scope of the analysis does not extend however to legal expertise on issues of domestic law as such that investment tribunals encounter very frequently. Because of its procedural status as a fact, domestic law before the international adjudicator may more legitimately be subject to legal expertise than international law itself. When in the logical position of a fact, domestic law cannot be covered by the *jura novit curia* principle. J Hepburn holds a different position in considering that in investment arbitration disputes the principle *iura novit curia* should apply not only to international law but also to domestic law because it is a matter of law, see J Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 120–37.

[25] Discussing the relative weight of 'adversarialism' v 'inquisitorialism', see J Pauwelyn, 'The Use of Experts in WTO Dispute Settlement' (2008) 51(2) ICLQ 325, 327.

way through which a legal opinion can be taken into account is through the *amicus curiae* brief.[26]

That the practice of appointing as expert witnesses international law scholars has not emerged does not mean, however, that parties before the ICJ or any other international tribunal do not rely on expert opinions of highly recognised international law experts. They do so by taking into consideration the parties' submissions and pleadings: highly recognised and respected authorities in international law are incorporated within the counsel team of each party, and are not introduced by the parties as 'objective' expert witnesses.

2.2 The Influence of Commercial Arbitration and of Domestic Courts

The trend towards legal testimonies on international law issues may well stem from a conflation of litigation methods by actors involved both in commercial and investment arbitration: in the former, a handful of arbitrators are not expected to know the dozens of applicable domestic legal systems that may be involved in the disputes to which they are appointed. The American Law Institute/International Institute for the Unification of Private Law (ALI/UNIDROIT) principles provide for instance that 'the court may appoint an expert to give evidence on any relevant issue for which expert testimony is appropriate, including foreign law',[27] thus

[26] Within the WTO dispute settlement system, opinions of legal experts can be encountered under the form of an *amicus curiae' submission*; see, for example, the *amicus curiae* of Robert Howse in WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body* (16 May 2012) WT/DS381/AB/R [8]. At the appellate level, and given the Appellate Body's limited scope of review, that an *amicus curiae* brief deal exclusively with issues of law is even an admissibility requirement, WTO, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Communication of the Appellate Body* (8 November 2000) WT/DS135/9 [7(c)].

[27] Article 22.4 of the ALI/Unidroit principles:

> The court may appoint an expert to give evidence on any relevant issue for which expert testimony is appropriate, including foreign law.
> 22.4.1 If the parties agree upon an expert the court ordinarily should appoint that expert.
> 22.4.2 A party has a right to present expert testimony through an expert selected by that party on any relevant issue for which expert testimony is appropriate.
> 22.4.3 An expert, whether appointed by the court or by a party, owes a duty to the court to present a full and objective assessment of the issue addressed.

See ALI & UNIDROIT, 'ALI/UNIDROIT Principles of Transnational Civil Procedure' (*UNIDROIT*, 2006) Art 22.4 <www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/> accessed 1 June 2022.

extending the scope of the expertise beyond factual matters.[28] That is consistent with the predominant common law conception of foreign law as a matter of fact, even when it is the applicable law.[29] As such, it can be submitted to a legal expert. That conception is not bluntly incompatible with the way things stand in civil law systems: foreign law is considered as law if it is the applicable law, but it can still be proved through recourse to party-appointed experts.[30] Thus, in commercial arbitration, the practice of party-appointed experts is widespread and justified as a means to prove domestic law with which the arbitral tribunal is not familiar.[31] However, there is less basis for an investment tribunal to rely on expert witnesses on issues of law when the applicable law is public international law.

The practice of appointing legal experts to establish international law rules may also result from the influence exerted by some domestic legal systems on investment arbitration. The use of legal experts to elucidate the contents of domestic law is inexistent or very rare before domestic jurisdictions, even in common law systems in which the adage *iura novit curia* is generally inapplicable, at least in civil proceedings.[32] In the United States, for instance, the recourse to legal expert witnesses to establish the meaning of domestic law is harshly criticised in the rare occasions where it has appeared.[33] In civil law systems, legal expertise on domestic law is not even conceivable anywhere else than in the parties' submissions.[34] However, some legal systems have seen the emergence of 'law expertise' within the judicial experts category for the purposes of establishing the

[28] G Cordero Moss, 'Tribunal's Power v Party Autonomy' in P Muchlinski, F Ortino & C Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP 2008) 1235.

[29] OC Sommerich & B Busch, 'The Expert Witness and the Proof of Foreign Law' (1953) 38 Cornell LRev 125, 128.

[30] On the ambiguous status of foreign law between the position of fact and that of law in civil law systems, see H Muir Watt & M Creach, 'Expertise sur la teneur du droit étranger' [2016] *Répertoire de droit international* (Dalloz 2016) 12.

[31] Even here, one would expect them to be appointed on the basis of their knowledge of the domestic law involved on a case-by-case basis. Such a guiding principle would probably avoid the concentration of all cases in the hands of a few arbitrators whose knowledge of the applicable law is only fictional and who cannot but rely on the legal witnesses on issues of domestic law.

[32] See, for instance, Joined Cases C-430/93 & C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECLI:EU:C:1995:185, Opinion of Mr Advocate General Jacobs [33], citing FA Mann, 'Fusion of the Legal Professions?' (1977) 93 LQR 367, 369.

[33] SI Friedland, 'Expert Testimony on the Law: Excludable or Justifiable?' (1983) 37 U Mia L Rev 451; Baker (n 5) 331.

[34] Jarrosson (n 4) 130.

specific and technical legal rules applicable to a profession,[35] while others use the *amicus curiae* proceeding as a means to provide legal expertise on domestic law.[36] But these developments confirm that issues of domestic law are not expected to be 'proved' through expertise. On the contrary, party-appointed legal experts on issues of foreign law are frequent, especially in common law systems in which foreign law is considered as a matter of fact even when it is the applicable law chosen by the parties.[37] However, it seems that even for the establishment of foreign law purposes, national judges aim at limiting their reliance on party-appointed legal experts for the establishment of points of law, even foreign law. They do so through the development of cooperation procedures between their respective institutions.[38]

The situation seems different when it comes to the recourse, before domestic tribunals, to legal experts to establish points of international law, even when the latter is part of the applicable law. There seems, however, to exist a sharp contrast between civil law and common law systems. On the one hand, the practice of expert witnesses on international law issues has not developed in civil law systems: the only way that 'law expertise' can be provided to the judge is through the *amicus curiae* mechanism.[39] The specific category of 'law expertise' that exists in some European countries does not seem to apply to general questions of law such as issues of international law. On the other hand, common law tribunals admit legal

[35] According to a report on European judicial systems, the 'law expertise' is admitted in at least 10 European countries (Estonia, Germany, Greece, Ireland, Malta, Netherlands, Norway, Poland, Russian Federation, Turkey), see CEPEJ, 'European Judicial Systems – Edition 2014 (2012 data): Efficiency and Quality of Justice' (*EEEI*, 9 October 2014) 441 ff <https://experts-institute.eu/wp-content/uploads/2018/03/extract-rapport-2014-en.pdf> accessed 1 June 2022.

[36] The old institution of the *amicus curiae* in the common law systems has always been used as a type of legal expertise. That is now also the case in some civil law systems in which the *amicus curiae* has been introduced. That is the case in France, for example, where the *amicus curiae* had been introduced in the 1990s. D Mazeaud, 'L'expertise de droit à travers l'*amicus curiae*' in MA Frison-Roche & D Mazeaud (eds), *L'expertise* (Dalloz 1995) 109, 118; H Muir Watt & M Creach, 'Notion d'expertise' [2016] *Répertoire de droit international* (Dalloz 2016) 10.

[37] Sommerich & Busch (n 29) 128. Even in systems in which the applicable foreign law is not considered as a pure matter of fact, the tribunals tend to treat it procedurally as a fact that must be established (Watt & Creach (n 30) 12).

[38] MJ Wilson, 'Demystifying the Determination of Foreign Law in US Courts: Opening the Door to a Greater Global Understanding' (2011) 46(5) Wake Forest LRev 887.

[39] Frision-Roche & Mazeaud (n 36) 109, especially at 11; R Encinas de Munagorri, 'L'ouverture de la Cour de cassation aux *amici curiae*' [2005] RTD civ 88.

expertise for the purposes of establishing the content of customary international law.[40] In the United States, for instance, a combination of domestic US rules of civil procedure and of the law of evidence has led to the conclusion that 'the court can receive expert testimony [on international law] but need not do so'.[41] This is related to a tradition of strong reliance on international law scholarship for the proof of customary norms.[42] Thus, expert affidavits are generally admitted by domestic courts for purposes of ascertaining customary international law.[43] They may, however, be deemed to 'lack the evidentiary value as proof of a [given] customary international law' rule.[44] That practice of relying on expert affidavits to determine the content of international law rules has also been recently observed as rising in Canadian case law, notwithstanding controversy as to the admissibility of legal expertise on issues of international law and as to the consequences at the appellate level of treating international law as a fact that is proved through expertise.[45]

It seems that it is under the influence of both this common law practice relating to international law and the commercial arbitration practice relating to foreign law that the recourse to legal experts on international law has emerged in investment arbitration: in the *Loewen* case, for example, both the government of the United States as the respondent and the Canadian investor may have found it natural to provide legal opinions from eminent international law experts for the purposes of ascertaining the content of a customary rule. But, it is not so much the mere emergence of the practice in regard to customary law, rather the generalisation beyond customary law that is puzzling.

[40] HJ Maier, 'The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary' (1996) *25* GaJInt'l & CompL 205, 212; HW Baade, 'Proving Foreign and International Law in Domestic Tribunals' (1978) 18(4) VaJInt'l L 619, 626. See, however, early cases in which the US Supreme Court had another position: 'Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations' *The Scotia*, 81 US 170 (1871) 188.

[41] Baade (n 40) 627.

[42] For a variety of examples of reliance on international law doctrine from several jurisdictions, see C Ryngaert & D Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 NILR 1, 15 ff.

[43] ibid 15.

[44] *Flores v Southern Peru Copper Corp*, 414 F.3d 233 (2d Cir 2003) [86].

[45] G van Ert, 'The Admissibility of International Legal Evidence' (2005) 84 CanBar Rev 31, 31–46; G van Ert, 'The Reception of International Law in Canada: Three Ways we Might Go Wrong' (*Canada in International Law at 150 and Beyond Paper No 2*, 2018) <www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.2web.pdf> accessed 1 June 2022.

3 The Specificity of Customary Norms as a Possible Justification

The question that needs to be answered is whether recourse to legal experts on issues of international law is justified when it is used for the discussion of the constitutive elements of a customary norm. Indeed, from a formalist perspective, before the establishment of the norm, the latter are factual elements that must be proved by the parties.

3.1 The Formalist Analysis: The Constitutive Elements of Custom as Facts That Must Be Proved

The specific nature of customary norms as regards the distinction of fact and law may thus provide a possible formalist explanation for the development of the practice of expert witnesses on international law issues. Customary rules are legal elements once they have been established through adjudication. But while in the process of being ascertained, their constitutive elements are nothing more than facts that have to be proved before the judge. Both practice and *opinio juris* are facts as long as they have not been recognised as being constitutive of a legal rule;[46] *opinio juris* is specific only in that it is an immaterial and psychological fact as opposed to practice, which is material. That the constitutive elements of customary rules are factual elements that must be proved can be drawn from the language of the ICJ as well as of the International Law Commission (ILC), which both use the language of fact-finding and evidence.[47] According to the ICJ, 'the Party which relies on a custom […] must prove that this custom is established […]'.[48] In its Conclusions and Commentaries on Identification of Customary International Law, the ILC underlines that the word 'evidence' is used as a 'broad concept relating to all the materials that may be considered as a basis for the identification of customary international law', and not in a 'technical sense'.[49] Such a cautious

[46] The immaterial or psychological nature of the *opinio juris* has led some scholars to consider it as a 'normative' element, while the practice is the only 'factual element' (J Kokott, *The Burden of Proof in Comparative and Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Kluwer Law International 1998) 225).

[47] For an analysis of the constitutive elements of custom as factual elements, see S El Boudouhi, *L'élément factual dans le contentieux international* (Bruylant 2013) 267–75.

[48] *Rights of Nationals of the United States of America in Morocco (France v USA)* (Judgment) [1952] ICJ Rep 176, 200.

[49] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 117, 127, fn 680.

approach aims at setting aside any exclusionary rules that would derive from other legal systems, but the reference to 'evidence' as well as the use of the word 'prove' point nevertheless to the factual nature of the constitutive elements which are submitted to the burden of proof.[50]

Relying on expert testimony for the purposes of ascertaining practice and *opinio juris* can be accounted for in that

> [a]ccess to the norms of traditional customary international law is supposed to require that the facts of national practice and decision be discovered, interpreted and described in much the same manner as a sociologist or anthropologist collects and characterizes other facts of human activity.[51]

The distinction that is made in the US law between adjudicative and legislative facts may well be relevant for the analysis of customary international law: the constitutive elements of a customary norm could be compared to 'legislative facts' that may, but must not, be proved through recourse to legal expert witnesses.[52] Even in this latter case, it may be argued that expert witnesses may not need to be legal experts, at least not international law experts, but experts of the field in which the alleged customary norm emerges. Thus, in the *South West Africa* cases, the ICJ heard several expert testimonies of renowned scholars provided by South Africa as evidence. Among them, Professor ST Possony, from Stanford University, provided expertise in political history for the purposes of discarding the existence of a customary rule on racial discrimination.[53] Since the expert testimony deals with the facts on which a customary rule would be based, it need not be a legal expertise. The constitutive elements in that case were to search in the general practice of international relations rather than in a legal practice.[54] But the recourse to the expertise was justified in that it could, by providing elements of practice within international relations, help the adjudicator determine what the applicable rule is. When it comes to investment arbitration, even the cases which could be expected to give rise to a genuine expert opinion

[50] *Cargill, Inc v Mexico* (Award of 18 September 2009) ICSID Case No ARB(AF)/05/2 [273].

[51] For an analogy between legislative facts in US law and constitutive elements of CIL, see Maier (n 40) 209.

[52] Baade (n 40) 626–7.

[53] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Judgment) [1966] ICJ Rep 6, 7, 10; see also, in the same case, *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Pleadings, *South West Africa*, vol XI) 643–708.

[54] The same reasoning could be applied to general principles of law on which expert witnesses could be called to testify on issues of comparative law for the purposes of proving the existence of a general principle of law. See for instance the *Right of Passage over Indian Territory (Portugal v India)* (Judgment) [1960] ICJ Rep 6.

on the contents of a given customary norm prove to go well beyond that assessment of the contents of the law.[55] No example was found in which an expert legal opinion was used for the purposes of the determination or the interpretation of a customary rule. That may well be due to the fact that the recourse to customary law in international investment law remains mostly ancillary and is not seen as a decisive factor.

Moreover, in most investment arbitration cases, the customary rules that are invoked do not lie simply in the practice of international relations, but rather in treaty rules or rules which exist in other legal systems. Thus, because the constitutive elements of the customary norms invoked in investment law are other norms of international law – bilateral investment treaties, multilateral treaties – the testimony of experts on issues of international law may appear justified. Experts in political history, international relations or geography could certainly not bring a useful testimony as to the correct understanding of the rule of denial of justice, for example.

This could seem consistent with the ILC's approach which has established in Conclusion 14 of its *Draft Conclusions on the Identification of International Law* that 'teachings of the mostly highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law'.[56] If legal expert testimonies are considered as live or ad hoc testimonies of the 'most highly qualified publicists', then their contribution would be accounted for by Conclusion 14 of the ILC Draft Conclusions. While the provision does not deal with the procedural status of expert testimonies, they could well be considered as subsidiary means to establish a customary rule. To come to that conclusion, the ILC relied not only on ICJ case law[57] but also on the American Supreme Court which had considered since its very first recognition of customary international law that the work of 'jurists and commentators … provide trustworthy evidence of what the law really is'.[58] The ILC does

[55] Because it required an assessment of the contents of the denial of justice principle in international law, the *Loewen* case could have given rise to a genuine expert opinion dealing with practice and *opinion juris* as factual constitutive elements of a customary principle. And yet, the opinion dismisses the practice and *opinio juris* part rather expeditiously while focusing on legal characterisation of the facts *(Loewen Group, Inc and Raymond L Loewen v USA* (Opinion of Richard B Bilder (on international law governing state responsibility for treatment of foreign investors) of 16 March 2001) ICSID Case No ARB(AF)/98/3 [34]).

[56] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 117, 150.

[57] *SS 'Lotus' (France v Turkey)* (Judgment) [1927] PCIJ Series A No 10, 27 & 30.

[58] *The Paquete Habana*, 175 US 677 (1900) 700.

not, however, distinguish the specific situation where the 'highly qualified publicists' are introduced in the proceedings as expert witnesses from the general situation in which the teachings of those experts would be relied on in the written proceedings. It seems that the reference to the 'highly qualified publicists' in Conclusion 14 is redundant with Article 38(1)(d) of the ICJ Statute: the opinion of 'highly recognized publicists' is not more useful to establish customary rules than it is to determine any other rule of international law. In other words, it is not the specificity of customary rules which accounts for the reference by the ILC to this subsidiary means of establishing international law. At no point does the ILC mention that the specific nature of customary law makes the contribution of 'highly recognized publicists' especially relevant or more relevant than for treaty law for instance. Thus, if the recourse to legal expert testimonies were to be analysed as a subsidiary means for the determination of customary international law, it would be on the basis of Article 38(1)(d) of the ICJ Statute. This may explain the discussion of legal doctrine in the parties' and tribunals' reasoning on the substance, but it does not provide a clear basis for the procedural status – as expert witnesses – of that legal doctrine in the proceedings.

As to the interpretation of customary international law, the recourse to expert witnesses would be justified if it were to be admitted that interpreting amounts to establishing new constitutive elements.[59] If, on the contrary, interpretation of customary law is considered as a different cognitive process based not on the establishment of constitutive elements but on teleological and systemic reasoning,[60] then there would not be any need to rely on the live or ad hoc testimony of a legal expert to establish the meaning of a customary rule. The adjudicating authority as well as the parties' counsel are expected to be self-sufficient in teleological and systemic legal reasoning. While 'highly recognized publicists' could still be relied on as subsidiary means of establishing international law, that would have nothing to do with the specific need of establishing the constitutive elements of a customary rule. In other words, legal expertise as a means of proving

[59] While it is not the place here to discuss whether interpretation of an existing rule can amount to ascertaining new constitutive elements, that could be argued where the 'interpretation' amounts to a new rule of customary international law. For instance, asking whether State immunity must be understood as applying to jus cogens violations could be a matter of interpretation but it is in fact about identifying a new rule of customary law according to which *jus cogens* violations constitute an exception within the general rule of State immunity.

[60] P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 126.

the existence of an international rule would apply to the establishment of customary rules but not to their interpretation, which is not to be treated differently from the interpretation of any other rule of international law.

3.2 Testing the Hypothesis in Investment Arbitration Practice: The Proof of Customary Norms as the Trojan Horse of Legal Expertise on International Law

Taking customary international law seriously would entail presenting evidence of its constitutive elements when its contents or its interpretation are discussed among the parties. One could intuitively, and naively, expect that many international law expert opinions in investment arbitration deal with contested customary rules of investment law. That expectation stems from the observation of what happens elsewhere: while the practice of expert testimonies on issues of customary law has not been developed before the ICJ,[61] the case law of the world court shows that there is room for improvement when it comes to providing 'evidence' of the existence of customary rules since it 'rarely presents a documented examination of a broad cross-section of the international community's members'.[62] That usually results in scholarly discussions following statements of the ICJ on the existence or the inexistence of customary norms.[63] The ICJ is thus regularly criticised for not providing sufficient proof of the practice or *opinio juris* it relies on to declare the existence or inexistence of customary rules.[64] Thus, one could expect that if expert witnesses on issues of law were – in an unforeseeable future – to become common practice before the ICJ, that would certainly have to be on elusive and moving aspects of customary law, rather than on issues of treaty interpretation, for example. In that regard, investment arbitration could be expected to be the laboratory for innovative examination of evidence of difficult customary law questions. Could investment arbitration succeed where the ICJ seems to fail?

An examination of the opinions requested from legal expert witnesses shows that there is no reason for such hope. The necessity to prove the

[61] However, see Section 2.1.

[62] J Charney, 'Universal International Law' (1993) 87(4) AJIL 529, 537.

[63] S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) EJIL 417.

[64] See *Ahmadou Sadio Diallo (Republic of Guinea v Congo)* (Preliminary Objections) [2007] ICJ Rep 582 (*Diallo* case) on whether over thousands of BITs can be interpreted as *opinio juris* giving rise to a new customary rule.

existence of a customary rules may appear, at best, as the Trojan horse of the recourse to legal experts for the purposes of adjudicating an issue of international law. Indeed, the recourse to legal experts on issues of international law goes well beyond the proof of customary rules, and in fact is seldom justified by the needs of ascertainment or interpretation of the latter. There is no correlation between the recourse to legal expert witnesses and the need to prove the existence of a customary rule of international law. No expert opinion on international law seems to have been required with the purpose of helping the tribunal assess the existence of a customary rule. That is mainly due to the fact that investment tribunals very seldom, if ever,[65] assess by themselves the existence of a customary rule. *Pope and Talbot v Canada* is a case in which the reliance by the parties and the Tribunal on international law expert opinions could have been useful. It could have balanced the rather egregious reasoning of the Tribunal which discarded the requirement of *opinio juris* to conclude whether a new customary rule existed.[66] But the practice of resorting to international law experts had not developed then and no expert opinions on international law were presented by the parties. But even since the emergence of the expert legal opinions, it seems that the rare cases in which there is discussion by the tribunal of the content of a given customary norm, be it for its determination or for its interpretation, are not the ones for which the parties deem it necessary to present expert witnesses on international law. For purposes of determination of content of a given customary rule, investment tribunals thus rely exclusively on principles formerly set by other international courts or the legal doctrine. In *ADC v Hungary*, international law expert witnesses could have been deemed necessary to help the Tribunal determine the standard of compensation for an unlawful expropriation as a customary norm the limits of which could have been discussed. Instead, in order to determine the standard of damages, the Tribunal simply relied on a wide amount of documentary authorities – ie established case law of the ICJ and highly recognised legal doctrine, rather than on expert witnesses, which had not been produced by the parties otherwise than in their legal submissions.[67] *Mondev* is one of the rare

[65] OK Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19(2) EJIL 301, 311.

[66] *Pope & Talbot Inc v Canada* (Award in Respect of Damages of 31 May 2002) UNCITRA [62]; P Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (CUP 2018) 141.

[67] *ADC Affiliate Ltd et al v Hungary* (Award of 2 October 2006) ICSID Case No ARB/03/16, [479 ff].

investment cases which explicitly discusses, for interpretive and not ascertainment purposes, the constitutive elements of custom, and especially *opinio juris*.[68] And yet, no international law expert witnesses were presented by the parties on that matter,[69] possibly due to the authority and reputation of the highly recognised expertise of the three arbitrators.[70] Similarly, in *Sempra v Argentina*, the opinions of international law witnesses could have been deemed necessary because what was involved was a general rule of international law, ie, the state of necessity. The establishment of the conditions and limits of such a rule could well have called for the objective, if not independent, opinion of international law expert witnesses to assess the State practice and *opinio juris* on that matter, independently from the facts of the case.[71] However, and because the debate on the contents on the state of necessity rule is considered to have been settled in a final manner by the ILC, what was expected from legal experts' opinions was a more general view on the way the treaty rule should be articulated with the customary rule to determine which of the two should prevail, the customary norm setting a higher threshold for the state of necessity to be successfully invoked by the State. In other words, the expert opinions did not deal with the factual question of the contents of the customary rule of state of necessity, but rather with a purely legal question of interpretation of a treaty provision in light of a similar customary rule and of legal characterisation of the financial crisis in Argentina in that regard.[72] As to the *Yukos* series in which a great number of eminent international law expert witnesses appeared, none of the issues involved by the opinions covered customary international law. Most of the substance of the opinions dealt with comparative constitutional law applied to the law of treaties.[73] Once

[68] *Mondev International Ltd v USA* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2, 110–13.

[69] Legal experts, among which a US judge, were heard in that case as witnesses on issues of domestic law.

[70] Sir Ninian Stephen, Stephen Schwebel and James Crawford.

[71] *Sempra Energy v Argentina* (Award of 28 September 2007) ICSID Case No ARB/02/16 and ARB/03/02.

[72] See opinions of José Alvarez (for the investor) and Anne-Marie Slaughter and William Burke-White (for Argentina) in *Sempra* and *Camuzzi*; *Sempra Energy v Argentina* (Opinion of José E Alvarez of 12 September 2005) ICSID Case No ARB/02/16 [46 ff]; *Sempra Energy v Argentina* (Opinion of Anne-Marie Slaughter and William Burke-White of 19 July 2005) ICSID Case No ARB/02/16 [19 ff, 46 ff]; *Camuzzi v Argentina International SA* (Opinion of José E Alvarez of 12 September 2005) ICSID Case No ARB/03/02 [46 ff]; *Camuzzi International SA v Argentina* (Opinion of Anne-Marie Slaughter and William Burke-White of 19 July 2005) ICSID Case No ARB/03/02 [19 ff, 46 ff].

[73] *Yukos Universal Ltd v Russia.*

more, the extensive resort to legal experts in that case does not seem justified by the need to prove the existence nor the interpretation of a given customary norm.

The preliminary conclusion that can be drawn from these observations is that customary international law in investment arbitration has not yet reached the point where the parties would see it as the issue that is worth investing on several costly testimonies by international law experts. Despite the wishes of reputed scholars which have not been confirmed by the ICJ,[74] the potentialities of customary law have not yet been fully realised in investment arbitration. Its scope remains mainly interpretative when it comes to the settlement of disputes, which are almost exclusively based on treaty rules.

4 The Realist Appraisal: The Paradox of the Struggle for Legitimacy

The paradox of the struggle for legitimacy lies in the following: on the one hand, expert witnesses on international law issues are appointed to give more moral weight to the decision of arbitral tribunals whose legitimacy has often been discussed. The conclusion that can be drawn from the above analysis on the recourse to international law experts for the purposes of establishing or interpreting customary rules is that the search for more legitimacy is the rationale of that practice, rather than a genuine need of technical expertise. The practice could have been justified by procedural or technical reasons regarding customary rules. On the other hand, the abundance of the recourse to expert witnesses, the uniqueness of which sets apart investment arbitration from other international dispute settlement systems, may contribute to enhancing the legitimacy crisis. Presenting expert witnesses on issues of international law aims at weighing on the tribunal's decision-making process through authoritative opinions. But that adds further complexity and cost to proceedings for which the costs are one of the controversial aspects.[75] In that regard, it

[74] AF Lowenfeld, 'Investment Agreements and International Law' (2003) 42 ColumJ Transnat'l L 123; SM Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 ASIL Proc 27; JE Alvarez, 'A Bit on Custom' (2009) 42 NYU JIntlL & Pol 17; but see the decision of the International Court of Justice in the *Diallo Case*.

[75] In the discussions within UNCITRAL Working Group III on the Reform of ISDS, costs are one of the major issues that have been raised. Arguing that recourse to legal expert testimonies entails more costs and complexity than integrating the given experts within the team

would be interesting to see if the practice of legal expert testimonies would be as abundant with a quasi-permanent court of investment disputes as set out in the EU-Canada CETA or in the hypothetical multilateral investment court that is being discussed at UNCITRAL since 2017.

Given that it is not justified by the nature of the norms invoked, ie by customary nature of the involved norms, the frequent recourse to expert witnesses in investment arbitration has to be accounted for by other considerations. The fact that this trend is unique in international litigation and exclusive to investment arbitration raises the question of the features of that field that have led to its development. The experts are party appointed but, unlike parties' counsels, they are presented as objective observers.[76] The appointment of legal experts on international law issues by the parties may aim at more authority of the point of view that is defended, as if the authority of the arbitrators, as opposed to that of other 'institutionalized' members of international tribunals, were deemed insufficient and needed to be buttressed by opinions of other legal experts, whatever the expertise in international law of the arbitrators. The 'orator-like role' of these specific witnesses has been pointed out as being 'part of a symbolic strategy'[77] which aims at bringing more legitimacy to the process. This can be compared with the role of *amicus curiae* before some domestic tribunals who do not otherwise admit expert witnesses on issues of domestic law: they have been described as 'experts of prestige',[78] the difference being here that these expert opinions are paid for.

It is somehow ironic that the efforts towards more legitimacy could result in exactly the opposite situation where the legitimacy could be more fragile with the extensive recourse to party appointed legal experts on international law. According to the above distinction between issues of fact, subject to expertise, and issues of law, reserved to the tribunal, relying on expert witnesses for the purposes of clarifying issues of international law amounts for the arbitral tribunal to acting as a mere umpire between

of the parties' counsel, see DF Donovan, 'Re-examining the Legal Expert in International Arbitration' in HKIAC (ed), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan* (Wolters Kluwer 2019) ch 11; and
B Berger, 'The Use of Experts in International Arbitration: Specific Issues Relating to Legal Experts' in S Besson & H Frey (eds), *Expert Evidence: Conflicting Assumptions and How to Handle them in Arbitration* (Juris Publishing 2021) ch 6.

[76] Note, however, that just as it has happened that an *ad hoc* judge can decide against the appointing party before the ICJ, it can also happen that an expert witness may testify against the appointing party at least partially. See the case of Schearer in *Siag v Egypt* [474].

[77] Langford & ors (n 10) 145–6.

[78] Mazeaud (n 36) 109, especially at 11.

the parties, rather than as a proactive adjudicative authority, to a degree that is not encountered even in common law systems. It has already been pointed out in another context that relying heavily on party appointed legal experts 'adds an adversarial spin to the proceedings'.[79] It makes the system appear as an inherently adversarial system in which even the applicable law is subject to assessment by the parties and their appointed expert testimonies.

The trend ultimately raises the question of the type of legal expertise that is required from investment arbitrators. It has been stated, in the context of commercial arbitration and in relation with foreign law, that the *iura novit arbiter* principle raises the question of the 'burden of education' to determine 'how the arbitrators are to gain the necessary expertise in the applicable material law to fulfil their mission to resolve the dispute in accordance with it'.[80] Since investment arbitration is deeply embedded in public international law, members of arbitral tribunals are expected to have enough knowledge of international law for the recourse to legal experts as objective experts on international law issues not to be necessary. It is, however, striking that legal experts on points of international law are used even before arbitrators whose expertise in international law is not to be doubted, such as highly recognised public international law academics or former judges, and until recently, current[81] judges of the ICJ. The added value of such expertise is yet to be proven given that it is easy for the 'experts' sitting on the arbitral tribunal to discard it using the same type of legal reasoning but with a more authoritative position. This is what happened for instance in the *CME Czech Republic BV* where the Tribunal considered that the opinion of Professor Schreuer is 'inconsistent with the general principles of international law found by the Tribunal'.[82] Thus, the

[79] Wilson (n 38) 909.

[80] Kurkela & Turunen (n 6) 178 ff.

[81] ICJ, 'Speech by HE Mr Abdulqawi A Yusuf, President of the International Court of Justice, on the occasion of the Seventy-Third Session of the United Nations General Assembly' (*Statements by the President*, 25 October 2018) 12 <www.icj-cij.org/public/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf> accessed 30 July 2022: 'Members of the Court have come to the decision, last month, that they will not normally accept to participate in international arbitration. In particular, they will not participate in investor-State arbitration or in commercial arbitration'.

[82] *CME Czech Republic BV v Czech Republic* (Final Award of 14 March 2003) UNCITRAL [§ 452]: the 'legal expert' on international law, prof Schreuer, presented legal arguments which were easily set aside by the tribunal (composed of W Kühn, I Brownlie & S Schwebel). This disqualification of the opinion as 'unsustainable in fact and law' could be attributed to the fact that the arbitrators and the expert had the same legal skills. That was not the case of the other legal witnesses presented for purposes of interpreting domestic law in the same case.

international adjudicator, even in investment arbitration, whether judge or arbitrator, should be 'the sole authority on the law and its interpretation'.[83] But that cannot, however, be more than a matter of impropriety since there exist no exclusionary rules of evidence.

What adds to the legitimacy crisis relating to expert witnesses on international law is not only the fact that they are 'interrogated' on issues of international law, which the tribunal should be familiar with, but also the extent and scope of their opinion. While we have seen that these expert witnesses do not fit in any given procedural category, one cannot ignore the limitation that is usually imposed on expert opinions before tribunals, be they international or national; the expert is usually not expected to apply the law to the facts of the case but only to bring clarifications on some – usually factual – aspects of the dispute. Expert witnesses do not fulfil the same function as counsels whose mission is to provide a convincing legal characterisation of facts. In investment arbitration, on the contrary, it appears in some cases that there is no substantive difference between expert witnesses and the counsel of the parties, except for the pretence to objectivity of individuals, whatever their eminence and integrity, who are paid by the parties to support their point of view.[84] In many cases, the questions that are asked to the legal expert amount to the very same ones that the Tribunal is expected to settle in the award. What is often asked of the legal experts is not an exposition or a clarification on the content of a given rule of international customary law, or even of treaty law, but rather the application of a given rule to the particular facts of the case. This has been observed in cases in which the international law expert witnesses in investment arbitration intervened on 'pedestrian' points[85] that did not require for a clarification of a well-established rule but rather for the application of the rule to the facts of the case. Thus, in *Chevron v Ecuador*, the legal expert Jan Paulsson is asked 'by counsel for Chevron to opine on whether the Lago Agrio litigation has rendered Ecuador responsible for a denial of justice under public international law'.[86] The same exhaustive opinion on all legal and factual aspects of the case was given by Bilder in his opinion on *Loewen*: instead of simply interpreting the North American

[83] Baker (n 5) 362.

[84] Expert witnesses, unlike the parties, are cross-examined but legal expert witnesses also have the same rights to due process as the parties since they are often presented along each submission of the parties.

[85] Langford & ors (n 10) 316.

[86] *Chevron Corporation and Texaco Petroleum Corporation v Ecuador (II)* (Opinion of Jan Paulsson of 12 March 2012) PCA Case No 2009–23 [8].

Free Trade Agreement (NAFTA) provisions which were discussed, or simply clarifying the contents of the denial of justice principle from a customary law perspective, as could be expected from a genuine legal expert testimony, the expert opinion dwells on the legal characterisation of each fact of the case so as to come to the conclusion that the principle had not been violated by the American judges. In other words, the expert witness is asked to do the same legal characterisation of facts that the counsel and the tribunal must do, instead of being simply called to clarify the content of a norm, as expert witnesses are usually expected to do without interfering with the adjudicatory function of the tribunal, at least, as conceived in systems in which experts are judge-appointed.[87] The request of opinion may not concern the whole dispute but nevertheless the expert witness is systematically asked to assess the facts of the case in light of their legal expertise, ie to adjudicate the situation *in lieu* of the tribunal, even though the latter is not bound by the opinions.[88] And yet, even in common law systems, the expert testimony is inadmissible according to the rules of evidence if it goes as far as applying the disputed international law rule to the facts of the case.[89]

5 Conclusion

At a time where there is concern about ISDS and reform proposals, it is doubtful that the practice of party appointed experts on international law issues meets the legitimacy requirements that many States and civil society have voiced over the last years. One hypothesis that could justify such a practice is where such expert witnesses would intervene exclusively on issues of customary international law which may call for international

[87] While such a restriction of the scope of the expertise is not explicit in international law, the International Court of Justice is however cautious so as to ask very specific factual questions the answer to which will not prejudge its legal characterisation of the facts of the case. See, for example, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* (Order of 31 May 2016) [2016] ICJ Rep 235 (appointment of experts).

[88] An example of a situation where the request of opinion did not cover the whole dispute but only one aspect on which the expert had to assess and legally characterise the facts of the case: *Ecuador v USA* (Expert Opinion of Prof Alain Pellet of 23 May 2012) PCA Case No 2012–5 [39]. Yet, even though covering only part of the whole dispute, the opinion is drafted as if it were part of a judicial opinion.

[89] From a decision of the Canadian Federal Court: *Boily v HMTQ* 2017 FC 1021 [25]: 'Prothonotary Morneau, Mr. Boily and the Crown all agree that pages 10 to 12 of the Report (at least in part) provide an opinion on the relevant international law *as it applies to Mr. Boily's case*. This type of legal analysis cannot be the subject of expert evidence and was rightfully deemed inadmissible by Prothonotary Morneau' (emphasis added).

legal expertise for the ascertainment of the legal rules. Since the ascertainment requires an assessment of practice and *opinio juris* as constitutive factual elements, it could be reasonably expected that the parties and the tribunal rely on the objective opinions of expert witnesses. While such a hypothesis remains a desirable evolution in investment arbitration, which would make the assessment of customary rules more accurate than that of the ICJ, the role of customary international law within investment arbitration remains for now limited in that regard. That does not mean, however, that the role of custom in investment law has become irrelevant as was suggested by the Organisation for Economic Cooperation and Development (OECD) a few years ago,[90] but rather that it is not seen by the parties as decisive enough as to call for the appointment of one or several expert witnesses for the purposes of establishing its contents. The recourse to expert witnesses on issues of international law could thus become in the future an indicator of the importance of customary rules: if the tribunal were to examine the application of a customary norm that is not only of interpretative value, chances are that parties would provide expert witnesses discussing that point.

[90] OECD, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (OECD Working Papers on International Investment 2004/04, 2004) 2; P Dumberry, 'Are BITs Representing the "New" Customary International Law in International Investment Law' (2010) 28 Penn State Int Law Rev 675, 697.