THIRD BI-ANNUAL CONFERENCE OF ABLOS
EXPERT EVIDENCE BEFORE THE ICJ

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The position under the Court's Statute and Rules

The issue of expert evidence before the International Court of Justice is not a new one. Article 50 of the Statute of the Court states that:

> "The Court may, at any time, entrust any individual, body, bureau, commission, or other organisation that it may select, with the task of carrying out an enquiry or giving an expert opinion."

Article 51 of the Statute goes on to state:

> "During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the Rules of Procedure referred to in article 30."

Article 30 states that the Court shall frame rules, and in particular rules of procedure for carrying out its functions. It also states that the Court's Rules may provide for assessors to sit with the Court (or its chambers) without the right to vote. Article 9 of the Rules sets out the procedure for the appointment of assessors.

The Rules of Court, drawn up under the powers conferred by the statute, contain a section (Subsection 2) dealing with The Written Proceedings and a further section (Subsection 3) dealing with The Oral Proceedings. There is no reference in the Articles dealing with The Written Proceedings to expert evidence. This is dealt with in the section dealing with The Oral Proceedings which comprise Articles 54 to 72. The essence of those Rules may be summarised as follows:

1. With regard to experts called by the parties, notice must be given to the court and to the other side of the names and details of experts to be called. This can be done either before the commencement of proceedings or, provided no objection is raised, during the course of the proceedings themselves.

2. The Court itself has the power under Article 67 to arrange for an expert opinion to be given. (Under Article 68 the expenses of the expert witness can be paid out of the funds of the Court).

3. Under Article 62 the Court may call upon the parties to produce "such evidence … as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, *or may itself seek other information for this purpose.*" (emphasis added)

4. Article 64(b) sets out the declaration experts are to make to the Court before making any statement:

> "I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth and that my statement will be in accordance with my sincere belief."

5. Article 65 provides that experts shall be examined by the agents, counsel or advocates of the parties under the control of the President of the Court. Questions may also be put to them by the President and by the Judges. The Article goes on to state that before testifying, witnesses shall remain out of Court.

It is noteworthy that when the Court considers it necessary for an expert opinion to be obtained, it should first hear the parties on the subject and then issue an Order defining the subject of the enquiry or expert opinion, stating the number and mode of appointment of the persons to hold the enquiry or of the experts and laying down the procedure to be followed. Where appropriate, the Court has powers to require persons appointed to give an expert opinion to make a solemn declaration. Article 67 also provides that every expert opinion shall be communicated to the parties who shall be given the opportunity of commenting upon it.

There is thus a distinction to be drawn between three different types of situation as far as experts are concerned:

1. Experts are called by the parties, on notice, who give their evidence to the Court having given the solemn declaration: they may be subjected to cross-examination and questioning by the Judges, in a situation where the expert has not heard any preceding evidence.

2. Experts who are required by the Court to attend under Article 62. The Article also provides for the Court itself to arrange for the attendance of the expert to give evidence in the proceedings. This is a request made by the Court to the parties to produce such a witness.

3. The third situation is that which arises under Article 67 where the Court considers it necessary for an independent expert opinion to be taken, having heard the parties. The parties are then to be given the opportunity to comment upon the expert opinion under Article 67(2).

The position outside the Rules

The three categories of expert set out above are those contemplated in the Rules. However, two further categories of expert seem to have emerged in recent years who appear to fall without the scope of the Rules.

The first of these is the expert who testifies on behalf of a party under the guise of being counsel or advocate. This seems to be an increasingly common phenomenon. The advantage to the party is that its expert evidence can in this way be provided in a form which is not open to a direct challenge in Court. The advocate-expert cannot be cross-examined by the other side in Court, although questions could be asked by the Judges. These will fall into the same category as any other questions, i.e. if the Court has questions to raise on specific aspects of a party's case, these will generally be given orally and in writing during the course of the hearing or at the end. Usually the parties are given a reasonable time to consider their response which is given in writing. There is thus little opportunity to delve below the surface of an expert's opinion in any direct way.

The substance of the expert's views will often be incorporated in the pleadings; this means that the questioning of an expert's opinion has, in effect, to be carried out by means of the written proceedings. This is extremely limiting. Under Article 49 of the Rules it is stipulated that a Memorial shall contain

> "a statement of the relevant facts, a statement of law and the submissions".

The Counter Memorial shall contain

> "an admission or denial of the facts stated in the Memorial; any additional facts, if necessary; observations concerning the Statement of Law in the Memorial; a Statement of Law in answer thereto; and the submissions. If a Reply and Rejoinder are authorised by the Court, they are required not merely to repeat the parties' contentions, but to be directed to bringing out the issues that still divide the parties."

From this it is clear that there is no real scope for an expression of expert opinion in the written proceedings. Instead, that opinion becomes a Statement of Fact.

One way in which an expert opinion might form part of the written proceedings would be if it were to be annexed to a pleading. Article 50 of the Rules makes it clear, however, that the documents contemplated as annexures to pleadings are certified copies of:

> "relevant documents adduced in support of the contentions contained in the pleadings."

There is also provision for extracts only to be annexed. This is the language of document annexures, not expert opinions.

One is left therefore with a situation where the only written expert opinions provided for in the Rules are those which are ordered by the Court itself under Article 67. This seeming omission in the Rules could usefully be addressed by the Court when next considering a revision to its Rules. In so doing, regard might be had to recent innovations regarding the practice and procedure concerning expert evidence adopted by the English Courts.

The second category of expert not directly referred to in the Rules of Court is the expert retained by the Court without notice to the parties. There is the reference in Article 62 of the Rules which has been highlighted above. This permits the Court "to seek other information". It is not at all clear what form this "other information" might take, but the use of the word "information" seems to imply, for example, reference to an archive. It seems highly questionable that this should be a reference to the retention of an expert without notice being given to the parties. This category of expert gives rise to even greater cause for concern, particularly amongst States minded to use the Court. There is no doubt that the Court is often confronted with highly complex technical evidence which is, from experience, rarely conclusive. Science contains as many uncertainties as the law. However, lawyers, for whatever reason, appear sometimes to accord scientific statements a rather exalted status. (No doubt, non-lawyers may do the same with statements of the law …).

What has happened in recent practice

It is believed by practitioners that there have been at least three instances in recently decided cases where the Court has sought expert evidence without reference to the parties. The identity of the experts consulted is kept secret and the nature of the advice given is also a secret. However, it does manifest itself when the Court delivers its judgment.

The cases in question are *Qatar/Bahrain* and *Cameroon/Nigeria*. The *Qatar/Bahrain* case was solely concerned with a maritime boundary. The *Cameroon/Nigeria* case involved both a land boundary and a maritime boundary.

In both cases the party put forward competing lines which were the subject of extensive written pleadings. In drawing up those pleadings, the parties received extensive assistance from experts as well as legal counsel. In neither case did the parties tender expert witnesses for cross-examination in Court. Their respective positions were argued before the Court by their advocates.

All of this is, today, quite normal. The Court had to evaluate the strength of the evidence put forward by each State in support of the lines for which it was contending. That is the classic task of the Court.

Matters become less easy, however, when issues of interpretation and technical complexity arise.

In the *Cameroon/Nigeria* case, an extensive land boundary, some 1800 kilometres long, formed part of the case. There were approximately 20 areas along that land boundary which gave rise to delimitation issues. Those issues themselves fell into two categories. On the one hand the instruments which purported to delimit the boundary could not be sensibly interpreted on the ground. On the other, the delimitation given in the instrument appeared to have been deliberately misinterpreted by one State or the other. Both categories of dispute gave rise to highly technical questions of interpretation of maps, aerial photography and geographical features both in a paper form and on site. The use of computer technology enabled Nigeria in particular to produce enhanced versions of maps including visual representations of the features depicted. Cameroon did not choose to

make use of such technology. One of the fears that Nigeria had was that its own use of the technology would pass unchallenged and, as a result, might lead to rejection by the Court. At one stage Nigeria considered asking the Court to appoint its own expert to assist it in its interpretation of the technical evidence. There is provision under Article 66 for a party to request the Court to undertake a site visit, but there is no provision under the Rules for the parties to ask the Court to assist itself by appointing its own expert.

In reaching its decision on the land boundary issues, the Court for the most part decided in accordance with the submissions of one party or the other. However, in a number of instances, the Court reached its own conclusion. The feeling of the parties is that it would have been difficult for the members of the Court to reach those conclusions without some sort of technical assistance. Indeed, the evaluation of the parties' technical evidence would itself, in the view of the parties, almost certainly have required expertise in realms outside the law.

The second area in which the Court has shown itself to be particularly vulnerable to making errors is in its depiction of maritime boundary lines. This occurred both in the *Qatar/Bahrain* case and in the *Cameroon/Nigeria* case.

In the *Qatar/Bahrain* case (so the writer is informed by one of the experts involved) the maritime boundary line the Court drew succeeds in passing over dry land belonging to each of the parties.

In the *Cameroon/Nigeria* case, the Court made a series of technical errors which have been written up in a chapter by Chris Carleton and Clive Schofield which will appear in a book entitled *Oceans Management in the 21st Century: Institutional Frameworks and Responses* shortly to be published by Kluwer. A brief visual presentation of the issues involved accompanies this paper.

Slides 1-7 give a general overview of the situation in the Gulf of Guinea, including limits of 200m claims and the oil concessions granted by Nigeria, Cameroon and Equatorial Guinea. In all cases there are areas of overlap. During the period the case was before the ICJ, Nigeria negotiated a single maritime treaty line with Equatorial Guinea and a Joint Development Zone with São Tomé e Príncipe. As can be seen, Cameroon's Claim Line, as presented to the Court, cut through not only Nigerian offshore concessions but also those of Equatorial Guinea. Slide 7 shows the areas won by Nigeria: it is estimated that the value of oil reserves in the disputed area could top US$30 billion.

It is perhaps instructive to appreciate how the situation which led to the Court's depiction arose.

The maritime boundary aspect of the *Cameroon/Nigeria* case was driven by the issue of sovereignty over the Bakassi peninsula, a collection of islands forming a roughly triangular land mass at the southern tip of the common boundary of Nigeria and Cameroon. That boundary follows the *thalweg* of the River Akpayafe to the north of Bakassi. Cameroon's case, supported by treaty evidence, was that the boundary continued down the western side of Bakassi with a modified median line taking the line through a wide estuary and out to sea to "Point G" (Slide 11) depicted in the

Maroua Declaration signed by the two Heads of State in 1975. Nigeria's case was that the relevant treaties had never been observed in practice and that all the evidence pointed to historical consolidation of and acquiescence in Nigeria's title to Bakassi as demonstrated by extensive evidence of administrative acts carried out by Nigeria to do with the territory in question, which is occupied almost exclusively by Nigerians. Nigeria therefore contended for a boundary which ran down the median line of the channel running to the east of Bakassi.

Nigeria, in preparing its case, made extensive use of technical experts and was able to produce very accurate depictions of coastline and any lines which needed to be drawn in the sea. However, because Nigeria was contending for a line running down the eastern coast of Bakassi, no detailed or technical evidence was presented by Nigeria regarding the western line. Cameroon did not feel the need to adduce such evidence itself relying, as it did, on the line depicted on an Admiralty Chart and the co-ordinates given on that chart.

Article 16 of UNCLOS provides for lines of delimitation to be drawn and shown on charts "of a scale or scales adequate for ascertaining their position". In the alternative, "a list of geographical co-ordinates of points, specifying the geodetic datum, may be substituted".

In arriving at its decision, the Court chose to use the largest scale chart available for the area in question, Admiralty Chart 3433 (Slide 8). This, indeed, was the chart that was used by the respective Heads of State when they signed the Maroua Declaration. That Declaration, which was signed by the two Heads of State in 1975, was found by the Court to be a valid Treaty and took the line down to Point G (Slide 12). It was therefore a logical choice for the Court. However, the Court combined the chart method with the geographical co-ordinate method provided for in Article 16 and this, in the opinion of many, is where the Court came unstuck.

The co-ordinates which the Court gave in its judgment for calculation of its median line appear to have been derived purely from the chart. Unfortunately, the chart has no known datum and so what the Court has effectively done is to give geographical co-ordinates without the datum Article 16 provides for.

The Court chose West Point and East Point (Slide 12) as its base points for calculating the commencement of the median line: this was dubbed by the Court "Point X" (Slide 13). According to the Court, Point X is situated at co-ordinates 8°21'20" longitude east, 4°17'00" latitude north. Even using Chart 3433 "at face value" it is apparent that there is an arithmetical error when the mid-point is scaled off: Point X should be at 8°21'30" east, not 20". Applying WGS 84 to the Chart in order to give it a notional datum, Point X would be approximately 75 metres further east on the Court's (erroneous) calculation. Using the correct co-ordinates, Point X would be 300 metres further east. The position of Point X is, of course, vital in determining just where the continuation of the boundary line ("a loxodrome having an azimuth of 187°52'27"") runs.

The situation is further complicated by the fact that the depiction of the coastlines given on the chart are now considerably out of date. This is a coast which is subject to constant drift and erosion. Modern satellite imagery shows just how far the coast

has moved since the chart was drawn up (Slide 17). Using the revised co-ordinates an adjusted coastline would give, Point X would move a full 700 metres further east (Slide 19).

All of this might not matter too much were it not for the fact that there are oil concessions to the south of Bakassi. The effect of the Court's judgment has been to draw a line straight through a Nigerian-operated oil field which is not, it is thought, the result that the Court intended. The different lines and their effect on the Bogi oil field are also shown on Slide 19.

Conclusion

The Cameroon/Nigeria Maritime Boundary Judgment raises a number of issues relating to expert evidence. It is thought that the Court probably did take expert advice before pronouncing its line, but the expert him or herself would have found him or herself in a difficult position had he or she taken into account all the factors which have now been made apparent. The issue of shifting coastlines was not drawn to the Court's attention by the parties for the reasons indicated above. The accuracy of chart 3433 was not the subject of any detailed submissions. In one sense, therefore, the Court was entitled to make the decision that it did. The lingering question is whether, with adequate expert guidance, the Court could have taken all the various factors of play into account in order to arrive at an accurate depiction of the boundary, thus allaying subsequent debate and possible dissension.

Note 1: For an excellent survey of expert evidence in the first fifty years of the Court, see *The Use of Experts by the International Court* by Gillian White in *Fifty years of the International Court of Justice, Essays in Honour of Sir Robert Jennings*, edited by Vaughan Lowe and Malgosia Fitzmaurice, published by the Cambridge University Press.

Note 2: My thanks are due to Chris Carleton and Dick Gent of the United Kingdom Hydrographic Office, who were Nigeria's hydrographic experts in the *Cameroon* case for the technical input and to Robin Cleverly, now of UKHO too, who was also one of Nigeria's experts and produced the slides.