Introduction: Courts and Tribunals and the Treatment of Scientific Issues

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Courts and tribunals are increasingly facing scientific issues in their case law. This situation raises many questions that are evidence-related. They are also linked to the exercise of the dispute settlement function and its various facets. The present agora includes diverse contributions from authors on the aforementioned theme and offers challenging views and opinions on the topic. Across a broad spectrum of dispute settlement fora, the authors raise issues concerning proportionality and precaution, as well as recourse to external bodies such as institutional experts and technical bodies, which influence or interface with courts and tribunals. The thread that ties these inquiries together is the degree of judicial review that should be exercised, taking into account the difficulty of reading scientific truth and the need to deal with scientific uncertainty. In this context experts play an important role. However, there is a need to delineate their role and responsibilities from those exercised by judges and arbitrators in a dispute settlement function. The five contributions reunited in this agora confront these issues and help us to further consider how to address them.

Yuka Fukunaga analyses scientific issues in the context of the WTO—in particular, the SPS agreement—and investment arbitration through the standard of review lens. She argues that, in light of the fact that there are ‘different truths’, and considering the relevant case law (especially the EC-Hormones suspension case), it is not for a panel to be deciding about science. The standard of review should be limited to examining the reasonableness of the method used to assess the facts, and not the facts in themselves. One can point to the specificities of the SPS agreement and of its provisions to justify this attitude.

Interestingly, as highlighted by Fukunaga, investment tribunals have pursued the same attitude. It appears that a subject-area approach might be a factor of explanation. For health and environmental matters, the regulator is expected to execute his due diligence obligations. Fukunaga suggests that good faith, coherence, objectivity, proportionality and reasonableness—rather than an examination of the underlying facts—should constitute the judicial test. A similar observation could be made for other public policy matters, be they human rights-related or culture-related. The value added of SPS is that it contains a procedural regulatory mechanism for exercising due diligence. It would be important that such a mechanism is more widely disseminated in its application.
Caroline Foster, referring to the precautionary principle and its scientific uncertainty component, makes the plea that adjudication be plainly exercised and not transform itself into a review process. She argues that courts and tribunals should engage in science so as to ensure the maintenance of the rule of law. To this end, considerations of international law—especially the precautionary principle—should be taken into consideration.

It is true that the precautionary principle has not yet been fully grasped as such by courts and tribunals. It seems that it is not really the science in itself that serves as a kind of paralysing factor, but more the reluctance of courts and tribunals to enter into the realm of the uncertain contours of science. Foster sees a risk of a shift towards establishing a balance of interests or resorting to the proportionality test without taking a clear side on a health or an environmental problem. While she concludes that a fluid proportionality test is ultimately preferable to rigid standards of review and domestic public law concepts, Foster advises that we should not assume a proportionality analysis to be the most appropriate tool to resolve the issues at stake in such cases.

One procedural trick to this end might be linked to the reversal of the burden of proof. The plea in favour of safeguarding the adjudication is found in particular with investment tribunals, which have not yet engaged themselves in the review path. The question which comes to mind is whether this functional shift is only linked to issues of uncertainty—and if so, why? This leads also to ask ourselves which are the methods for courts and tribunals to adjudicate these types of disputes. The insights given by Tullio Treves are helpful in this respect.

Treves makes the point that scientific uncertainty can lead to a decision by a court. There are different ways to look at and assess the interactions between science and law. Treves deals with the relationship between a court and a scientific body. In the case of Myanmar/Bangladesh, one issue entailed the sharing of competences between the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf. What is notable is that the Commission had yet to fulfil its role of reviewing and recommending the geologic extent of the parties’ respective continental shelves. However, the Tribunal distinguished between the notion of entitlement to the extended continental shelf and the outer limits of that shelf. More broadly, the Tribunal asserted that the proper interpretation and application of the Convention provisions on the continental shelf requires both legal and scientific expertise. As the Tribunal easily satisfied itself of the existence of this continental shelf, we must ask how scientific uncertainty might function in practice as a determinant element for deciding upon the sharing of competences. A corollary question is how to assess scientific certainty, especially in cases where there is no geophysical evidence.

This also raises the issue of the interface between a court or a tribunal and a scientific or technical body in the context of a treaty system. Should a tribunal be the body to decide about the type of relations to be put in place with other bodies, be they scientific, technical or political?

Questions concerning standards of review may become more complex when the technical nature of a dispute requires an adjudicating body to resort to
expert analysis. Gabrielle Marceau and Jennifer Hawkins, concentrating on WTO procedure, highlight that the resort to experts is linked to the core function of WTO panels: to make an objective assessment of the matters before them. Noteworthy is the fact that in the WTO context, there is a sort of institutional incentive to resort to experts as panels have a right to seek information, including, *inter alia*, to hold consultations with experts. In some agreements, such as the SPS and the TBT agreements, this incentive is even made a requisite.

Despite the role of expert sources in forming objective assessments of facts, the authors observe a subjective element in this process as well. Different conceptions of ‘expert’ input may or may not encompass every form of outside information a panel solicits. Panels’ resulting disclosure of expert or non-expert sources bears important consequences for transparency and legitimacy in the WTO dispute settlement system.

Experts in WTO dispute settlement include international institutions, and this emphasizes their profile as expertise-gatherers and expertise-conveyors. As to whether they can be classified as experts in the same sense as those bound by impartiality and independence requirements—this question might deserve further attention.

Makane Mbengue further examines resort to experts by drawing a contrast between the traditional fact-finding role of international courts and tribunals and the uncertainties that scientific fact-finding must grapple with in contemporary disputes. Mbengue argues that the elements of scientific fact-finding in dispute settlement take on a more complex and controversial nature that has required courts and tribunals to develop new tools, including recourse to experts skilled in assessing scientific uncertainty. While judges and arbitrators have established coherent principles when weighing factual certainties, the prevalence of uncertainties in cases with technical dimensions has become part of the judicial function.

By embracing an evolutionary approach to the inherent fact-finding capacities of courts and tribunals, Mbengue attempts to quell doubts that have been raised as to the role of international adjudicators in assessing the probative value of scientific data. However, in advocating for a case-by-case approach to the precise manner in which courts and tribunals should rely upon experts, the nature of this balance may prove as uncertain as the facts themselves. It remains to be seen to what extent courts and tribunals can achieve a dialogue to shield *ad hoc* approaches to the use of experts from issues of fragmentation and unpredictability in international dispute settlement.

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