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Evidence: International Tribunal for the Law of the Sea (ITLOS)

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A. Introduction

1. The Good Administration of Evidence

1 In international adjudication, evidence embraces the information, whatever the format, 'submitted to an international court or tribunal by parties to a case or from other sources, or collected by the court itself, with a view to establishing or disproving alleged facts' (Wolfrum, 2007, 341). Within the considerable mass of evidence considered by a court or tribunal, some elements, taken more often together than separately, stem out as proof of the alleged facts. Proof is thus a narrower category, understood as evidence convincing enough to establish a fact as true, or to produce belief in its truth.

2 Unlike domestic legal systems, in particular of common law tradition, the international adjudicatory system has developed few compulsory rules concerning production, admissibility, and weight of the evidence submitted, or the → *standard of proof* retained by a court. This is particularly true for judicial institutions like the → *International Tribunal for the Law of the Sea (ITLOS)* and the → *International Court of Justice (ICJ)*, which decide disputes between States: their sovereignty acts as a shield protecting them from rules of evidence which would be too intrusive. Therefore, ITLOS does not have a power of injunction and, whenever it intervenes on issues of evidence, it must seek to preserve equality between the parties (→ *Equality of Arms: International Adjudication*).

3 At the same time, the Tribunal has a duty to decide the case submitted to it on sound legal and factual bases. The principle of the proper administration of justice allows judicial institutions to strike a balance between sovereignty-related constraints, on the one hand, and efficiency of the proceedings and protection of the procedural rights of the parties, on the other. This general principle grants these tribunals → *inherent powers*, necessary to supplement the Statute and the Rules so as to ensure the proper conduct of the proceedings (on the role of inherent procedural powers, see *M/V Louisa Case*, Judgment (Separate Opinion of Judge Cot), 2013). Based on this general principle, the Tribunal attempts to preserve equality between the parties, including the possibility for each of them to comment on all the evidence on file, be it either submitted by the other party or otherwise introduced in the proceedings.

4 Reliance on inherent powers is a necessary approach given that, following the ICJ loose model, the Statute, 1982 ('ITLOS Statute') and the Rules, 1997 ('ITLOS Rules') of ITLOS contain rather general rules on the production and assessment of evidence. Article 27 ITLOS Statute (identical to Art 48 Statute of the ICJ, 1945 ('ICJ Statute')) provides that the Tribunal 'shall ... make all arrangements connected with the taking of evidence'. In organizing the written and the oral phase of the proceedings, the ITLOS Rules give some details on the Tribunal's powers with respect to evidence (see for instance Arts 71-73 and 77 ITLOS Rules). The ITLOS Guidelines concerning the Preparation and Presentation of Cases contain formal requirements for the presentation of written and oral pleadings, but they add no further condition on the production of evidence. However, these rules have an indirect impact on evidence, given that these provisions 'are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contention' (*Military and Paramilitary Activities in and against Nicaragua*, 1986, at 26, para 31).

5 In light of the scarcity of written rules on the production of evidence, jurisprudence inevitably plays an essential role. The developments below deal with the rules and standards of evidence developed in the case law of the ITLOS. They are largely common to

those before the ICJ, which is unsurprising considering the similarity of provisions in the Statute and the Rules.

2. The Purpose of Evidence in Inter-State Litigation

6 The purpose of the → *fact-finding* process in inter-State litigation is less about establishing an objective truth than about creating a ‘legal’ or ‘procedural truth’. The evidence is selected and submitted in support of a legal argument. As Kelsen noted, ‘[i]n the sphere of law, the fact “exists”, even if in the sphere of nature the fact has not occurred’ (1957, at 17).

7 Selection of evidence is therefore a natural component of the production of proof. A historian and a lawyer would not necessarily choose the same documents to depict the same event. In legal argument, the selection of facts is made or should be made according to their relevance for establishing the legal truth pursued, and every piece of evidence should be scrutinized through this lens—unless one intends to confuse the other party and the judge, a smokescreen is an evidentiary technique used quite often.

8 Furthermore what lawyers commonly call findings of fact may in reality amount to legal or evaluative determinations, in which the substantive truth is only partly at stake. Concepts like negligence, → *estoppel*, reasonableness (→ *Reasonableness in International Law*), and existence of a → *dispute*, imply an evaluation of the factual situation according to a legal standard that is singularly vague. In some situations, the fact to be proven is an institution of domestic law, like → *nationality* for instance: the conditions for the realization of this legal institution are established by national legal orders, but they play a role in the application of the international rules which refer to it. In these cases, the postulate → *jura novit curia* does not apply, and the meaning and scope of domestic law must be proven before international courts.

B. The Respective Roles of the Parties and of the Tribunal

9 It is widely accepted that international litigation follows the adversarial system, in which evidence is freely produced by the parties, with the role of the Tribunal being mainly to evaluate the information received and to ensure the → *fairness* of the process. However, the ITLOS Statute and the ITLOS Rules—like those of the ICJ—leave room for more proactive involvement of the bench in the production of evidence.

1. A System of Free (Voluntary) Production of Evidence by the Parties

10 State parties to a case before the ITLOS enjoy wide discretion in the production of evidence. In inter-State litigation, the principle of *actori incumbit probatio* puts the burden of proof not on the applicant, but on both parties for their respective claims and legal arguments.

11 Evidence is submitted by both parties essentially during the written phase and takes the form of → *documentary evidence*, a concept broadly understood since, alongside written documentation properly speaking, it may contain videos, testimonies, or expert reports. New evidence may be exceptionally submitted during the hearings, either under the form of witness or expert testimonies or even of a new written document (Art 71 ITLOS Rules). The production of evidence at this late stage is however more strictly controlled (see paras 31–

34 below), simply because it affects equality between the parties, impairing their capacity to adequately respond.

12 This system of free production of evidence puts in the hands of the State the defence of its rights and interests. No doubt that the State is in the best position to fulfil this task, not least because it holds most of the relevant evidence. The problem is when a party selects the evidence not according to its relevance for the legal truth, but to further its cause, withholding important elements from the other party and the tribunal. Such a behaviour raises concerns of fairness in international adjudication (Reichler, 2013, 48).

13 To repair this fundamental flaw, judgments which are otherwise binding and final, may in principle be revised, in case of the 'discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Tribunal and also to the party requesting revision' (Art 127 ITLOS Rules inspired by Art 61 ICJ Statute). Before ITLOS, a request for revision may only be made 'before the lapse of ten years from the date of the judgment' (Art 127 ITLOS Rules), a restriction which fully confirms Kelsen's observation on the immutability of the legal truth (see para 6 above; → *Revision of Judgment: International Tribunal for the Law of the Sea (ITLOS)*).

14 Neither the ICJ nor ITLOS have so far revised any of their judgments, and unlike the ICJ, which was seized of two requests for revision (*Application for Revision of the Judgment of 11 July 1996*, 2003; *Application for Revision of the Judgment of 23 May 2008*, 2018) none has so far been submitted to the Tribunal. Of course, the standard for revision is extremely high (→ *Revision of Judgment: International Court of Justice (ICJ)*). But the absence of requests also suggests that the evidentiary process functions well overall.

15 There are several ways to get round and neutralize the risk of concealment of important pieces of evidence by one party: the other party may wittingly point out the gaps in the story and attempt to replace them by inferences of fact. An alert judge will probably choose to decide the dispute on an alternative legal basis, to which the unknown fact would be less relevant. Indeed, like the ICJ (*Corfu Channel Case*, 1949, at 21; → *Evidence: International Court of Justice (ICJ)*), ITLOS also prefers to base its decisions on facts that appear undisputed between the parties.

16 The *M/V Louisa Case* raised several issues concerning evidence and it will be referred to elsewhere in this analysis. Retention of evidence was one of them. In this case, the lawyers for Saint Vincent and the Grenadines, the flag state, claimed that the ship conducted exploratory surveys of hydrocarbon deposits on the basis of a permit issued by the Spanish authorities. Spain, on the other hand, contended that the detention of the *Louisa* had taken place in connection with criminal proceedings for illegal archaeological trafficking of objects taken in Spanish internal and territorial waters. The true nature of the research activities in the Bay of Cadiz was finally revealed by a contract, put on record only after the closure of hearings. In the end, the Tribunal rejected the application for lack of jurisdiction and thus avoided any pronouncement on the legality of the ship's activities, which would have required re-opening the proceedings (*M/V Louisa Case*, Judgment, para 47 and Separate Opinion of Judge Cot, para 78; Gautier, 2018, 438–39).

2. The Tribunal's Limited Investigative Powers

17 According to Article 77 (1) ITLOS Rules (identical to Art 62 ICJ Rules), 'the Tribunal may at any time call upon the parties to produce such evidence or to give such explanations as the Tribunal 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'. The Tribunal has used these powers, but with caution.

(a) Methods of Inquiry: General Powers

(i) Factual Questions

18 Probably because some of the cases it deals with, like the prompt-release cases, do not involve the fundamental interests of a State, but its commercial interests or those of shipowners, ITLOS has been less reluctant than the ICJ to use its investigative powers. Yet the practice is far from the system of discovery known in some domestic legal systems: the Tribunal prefers to ask factual questions rather than to order the production of evidence.

19 Some of the questions put by the Tribunal simply seek clarification (see for instance *Enrica Lexie Incident, Italy v India*, Oral Proceedings (Question to India posed by Judge Cot, Question to Italy posed by Judge Cot), 2015). Others require one of the parties to produce documentation (*Tomimaru Case*, Oral Proceedings (Questions and Request for Documents to the Parties), 2007; *M/V Virginia G Case*, Oral Proceedings (Questions to the Parties), 2014; *M/V Louisa Case*, Oral Proceedings (Questions to the Parties), 2013; *M/T San Padre Pio Case*, Oral Proceedings (Questions to the Parties), 2019; *Hoshinmaru Case*, Oral Proceedings (Questions to the Parties), 2007; *Juno Trader Case*, Oral Proceedings (Questions to the Parties), 2004; *MOX Plant*, Oral Proceedings (Questions to the Parties), 2001; *Grand Prince Case, Belize v France*, Oral Proceedings (Questions to the Parties), 2001; *Monte Confurco Case*, Oral Proceedings (Questions to the Parties), 2000; *Southern Bluefin Tuna Cases*, Oral Proceedings (Questions to the Parties), 1999).

20 In cases of maritime delimitation, which involve determinations of sovereignty and sovereign rights, the Tribunal has used these investigative techniques with parsimony, leaving the parties the burden of proving their legal title. While in *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* ('*Ghana v Côte d'Ivoire*'; → *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*), the Chamber sought clarification about the fishing legislation and activities in the disputed area, which the Parties promptly provided, in the end this proved to be irrelevant (*Ghana v Côte d'Ivoire*, 2017, paras 146–48).

21 These inquisitorial or rather Socratic methods of fact-finding may be met with reluctance, especially if these questions are put during or at the end of the oral proceedings, when the parties no longer have the possibility to fully apprehend and discuss the new information stemming from the responses. The problem is not so much the questions themselves, rather it is the late stage at which they are asked, especially as nothing prevents the Tribunal from addressing them to the parties in advance of the oral hearings. On the contrary, according to Article 68 ITLOS Rules, the Tribunal holds initial deliberation after the closure of the written proceedings and before the opening of the hearings and this may be a better moment to collect the factual questions envisaged by the judges and to transmit them to the parties.

(ii) Production of Documents

22 The Tribunal undoubtedly has the power to make requests for evidence and it has in fact done so. In the cases referred to above (see para 19), the Tribunal requested documentation, which was public, but not readily available. In other requests, the required documents were an attempt by the Tribunal to restore equality between the parties. Thus, in the *Louisa* case, the Tribunal requested the production of a contract to which St Vincent

and the Grenadines had referred to in its pleadings, without however producing it (*M/V Louisa Case*, Judgment, para 36).

23 In the *Norstar* case, Panama sought to obtain an order of discovery for a broad-ranging category of unspecified documents—the unknown unknowns. For that purpose, it filed a document entitled ‘Request for Evidence’, asking the Tribunal ‘to order Italy to provide certified copies of files concerning the M/V *Norstar* allegedly held by different authorities of Italy’ (*M/V Norstar Case*, Judgment, 2019, para 95). Italy objected on the grounds that Panama had embarked on a ‘fishing expedition’, trying ‘to shift the burden of proof on to the defendant’ (*M/V Norstar Case*, Verbatim Record, 14 September 2018, at 24). At the same time, Italy offered to cooperate by sharing with Panama ‘a list of the documents that Italy’s files contain, subject to conditions of reciprocity with Panama with respect to its own files. It would then consider *a specific and qualified request from Panama*’ (*M/V Norstar Case*, Judgment, para 95). The *Norstar* judgment does not provide any definitive answer to the question of whether the parties have a duty to comply with a demand for document production. The Tribunal refrained from making a request, for various reasons. First, Italy was cooperative and open to providing Panama with specific and qualified documents, but Panama did not pursue further (*M/V Norstar Case*, Judgment, paras 95–96). Second, Panama bore some responsibility for its misfortune, since it instituted the proceedings 17 years after the arrest of the M/V *Norstar* (*M/V Norstar Case*, Judgment, para 97).

24 When making document requests, the Tribunal refrains from adopting a binding act in this respect. Whether the parties have an obligation to comply with its requests is another issue. The ITLOS Statute and the ITLOS Rules contain no specific provision on the duties of the parties in relation to producing documents, not even one equivalent to Annex VII Article 6 United Nations Convention on the Law of the Sea, 1982 (‘UNCLOS’), which refers to ‘duties of parties to a dispute’. The wording of Article 77 ITLOS Rules suggests that these requests are not binding: the Tribunal may ‘call upon’ (in French, ‘inviter’). Yet the Tribunal’s power to request would be deprived of any *effet utile* if the parties had no correlative duty. Short of an obligation to comply, they have at least a duty to cooperate with the Tribunal to guarantee the good administration of justice (compare with Arts 34 and 38 European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, by which States undertook binding obligations to facilitate the individual right of access to the Court; → *Proof: European Court of Human Rights (ECtHR)*).

25 The consequences of a refusal to comply are unclear. Unlike Article 49 ICJ Statute, which provides that ‘[f]ormal note shall be taken of any refusal’ to produce documents, the ITLOS Statute and ITLOS Rules are silent on this point. A State may indeed have good reasons to withhold confidential information and the international judiciary is sensitive to security or confidentiality concerns (on the definition and treatment of confidential and restricted information by an UNCLOS Annex VII tribunal, see *Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v Russian Federation)*, Procedural Order No 2, 2018). Furthermore Article 302 UNCLOS protects the right of a party not ‘to supply information the disclosure of which is contrary to the essential interests of its security’. Arbitral tribunals have found ways to balance the competing interests at stake. In the *Kishenganga* arbitration, secret documents were shown only to the arbitral tribunal *in camera* (see *Indus Waters Kishenganga Arbitration*, 2012, para 3; → *Indus Waters Kishenganga Arbitration (Pakistan v India)*). The same procedure was chosen by the Annex VII tribunal in *Chagos (Chagos Marine Protected Area Arbitration)*, 2015, paras 35–49; → *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*). The *Guyana v*

Suriname Annex VII tribunal chose examination by an independent expert who reported back to the tribunal (*Guyana v Suriname*, 2005, operative paras 4–5).

26 It has been suggested that international courts might draw negative inferences from a party's unjustified refusal to disclose evidence. Yet, both the ICJ (Devaney, 2018, para 36) and ITLOS have not taken such radical action and have preferred to decide on an alternative legal and factual basis instead. The situation in inter-State litigation is indeed different from that before human rights courts, where there is a structural inequality between the parties. The ECtHR for instance found that an unjustified failure of a respondent Government to submit information may give rise to the drawing of inferences as to whether or not the allegations are well founded.

(b) Default of a Party

27 Article 28 ITLOS Statute, entitled 'Default', provides that in case of an absence of a party, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law. When default occurs in the context of provisional measures proceedings, where *prima facie* evidence is to be provided, reconciling the two elements might pose a particular challenge (*Arctic Sunrise Case*, Provisional Measures (Separate Opinion of Judge Paik), 2013). The modalities of default may however be different. Both in *Arctic Sunrise* and *Detention of Three Ukrainian Naval Vessels*, the ITLOS was confronted with Russia's absence at the stage of provisional measures introduced pursuant to Article 290 UNCLOS. However, while in *Arctic Sunrise*, Russia provided virtually no evidence at that stage, and simply sent a *note verbale* justifying its non-appearance by an alleged lack of jurisdiction of the arbitral tribunal (*Arctic Sunrise Case*, Institution of Proceedings, 2013), in *Detention of Three Ukrainian Naval Vessels*, Russia was a very active absentee: it submitted a Memorandum containing extensive factual information and, after the provisional measures order and in accordance with its *dispositif*, it filed a report on compliance (→ *Default: International Adjudication*; → *International Courts and Tribunals, Non-Appearance*).

28 In the *Arctic Sunrise Case*, the Tribunal set out its case law on non-appearance, entirely aligned with that of the ICJ, whose jurisprudence was quoted *in extenso* (*Arctic Sunrise Case*, Provisional Measures, para 48; → *Arctic Sunrise Cases (Netherlands v Russia)*). According to the Tribunal, in a situation of non-appearance, the → *good administration of justice* implies that the procedural rights of both parties are safeguarded, which is the case if they are both given an 'opportunity of presenting their observations on the subject' (*Arctic Sunrise Case*, Provisional Measures, paras 48–49). At the same time, the Tribunal noted the obvious 'difficulty ... to evaluate the nature and scope of the respective rights of the Parties to be preserved by provisional measures' (*Arctic Sunrise Case*, Provisional Measures, para 55) when one of them does not assert them fully. In such a case, the Tribunal, like the ICJ, relies 'on the best available evidence' (*Arctic Sunrise Case*, Provisional Measures, para 57), a highly circumstantial concept, if not subjective.

29 In the case concerning the *Detention of Three Ukrainian Naval Vessels*, the Tribunal had the benefit of the information submitted by Russia in its Memorandum of 7 May 2019 and referred to it in its order. Yet, Russia deprived itself of the possibility to set out its views in detail on the relevance and weight of the material submitted, including the one which appeared to underscore the military nature of the operation (*Detention of Three Ukrainian Naval Vessels*, Provisional Measures (Dissenting Opinion of Judge Kolodkin), 2019).

30 Faced with a situation of—relative—default in provisional measures proceedings, ITLOS did not have to deploy its investigative powers widely, the standard of proof at this stage being lower (see paras 50–52 below). At the merits stage, the situation is different. The Annex VII arbitral tribunal in the *Arctic Sunrise* case relied *inter alia* on documents produced in the context of the administrative and criminal proceedings, video clips filmed from the Arctic, photographs, audio-recordings made on the Arctic Sunrise, and the logbook of the Arctic Sunrise (*Arctic Sunrise Arbitration*, 2015, para 71). The arbitral tribunal in the *South China Sea* case appealed to several experts: before the hearings, it appointed a hydrographer, chosen after consultation with Philippines; after the hearings on the merits, it decided that it would benefit from appointing several other experts: one on navigational safety issues and three on the environmental impact of Chinese operations (*South China Sea Arbitration*, 2016, paras 84, 95, and 99).

3. Admissibility of Evidence

31 According to the principle of the free production of evidence, at the written stage States may submit whatever documentation they consider apposite for their theses. During this phase, there are no specific procedural barriers to the admissibility of evidence as long as the presentation of the written pleadings conforms to the rules. Of course, general principles of law like the prohibition of deceitful, falsified documentation or fallacious testimonies already apply at this stage, but the documentation submitted is presumed veridic. Falsification of evidence in inter-State litigation has been extremely rare (see the example of evidence submitted by Qatar, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, 1994, paras 163–92; Reisman and Skinner, 2014; → *Fraudulent Evidence in Inter-State Adjudication*). In the *M/V Louisa Case*, ITLOS was confronted not with the problem of falsification, but of concealed documents (see para 15 above), which led Judge Cot to wonder whether the Tribunal was not faced with fraudulent conduct on the part of counsel of St Vincent and the Grenadines (*M/V Louisa Case*, Judgment (Separate Opinion of Judge Cot)). Other tribunals have been confronted with a situation in which the evidence is clearly authentic but was obtained through unorthodox means, such as leaks. Though it is unclear whether leaks are illicit under international law, the arbitral tribunal in the *Chagos* case did not ‘consider it appropriate to place weight on a record of such provenance’ (*Chagos Marine Protected Area Arbitration*, para 542).

32 Even if the documentation submitted enjoys a presumption of veracity, its reliability may sometimes be called into question. This is for instance the case when the origin, the author, or the circumstances of adoption of a document are unclear (*M/V Norstar Case*, Judgment (Declaration of Judge Gomez-Robledo)). In the *M/V Norstar Case*, the other party did not challenge its admissibility, but rather questioned its credibility and thus its evidentiary weight.

33 At the hearings stage, the submission of new evidence is strictly scrutinized, since it may impair the good administration of justice and equality between the parties. In principle, new written material is not admissible unless the other party consents to its production. Should it object, the Tribunal may nonetheless authorize its production if it considers it necessary (see Art 71 ITLOS Rules; *M/V Virginia G Case*, Judgment, 2014, para 41). Sometimes, counsel tries to circumvent this prohibition by making the new material ‘readily available’, by its timely publication on a government website overnight. If the other party disputes it, the Tribunal will most likely ignore the elements submitted in such an unfair manner.

34 The rules of admissibility are less strict in urgent procedures such as provisional measures and prompt releases, where the written phase is summary (→ *Provisional Measures: International Tribunal for the Law of the Sea (ITLOS)*; → *Prompt Release of Vessels and Crews*). In exceptional circumstances the Tribunal may admit new written evidence at the hearings stage, and even after their closure, if the material reflects events subsequent to the closure of the written phase (*Tomimaru Case*, Judgment, 2007, para 68) or is of particular relevance for establishing the substantive truth (the case of the Tupet contract in the *Louisa* case). The higher the relevance of that piece of evidence the higher the likelihood that the Tribunal will admit it, even at such a late stage. *A contrario*, in the *Saiga* case, the belated introduction of a new → witness was rejected outright on grounds of the irrelevance of its knowledge of facts (*M/V SAIGA (No 1) Case*, Minutes of Public Hearings, 1997, at 22; → *Saiga Cases*).

C. Assessing the Probative Value: Guiding Considerations

35 Parties have the freedom to choose the means of proving their case: written documentation, expert evidence, reports, videos, photos, witness and expert interrogations etc. There is no *a priori* limitation as to the format, as there is no recipe for turning evidence into proof. The weight to be given to the different means of proof is not subject to any rigid general rule.

1. Affidavits

36 A few guidelines may be drawn from the case law on testimonies including *affidavits*, which are defined by as ‘a written statement made by someone who has officially promised to tell the truth, and which might be used in a court of law’ (The Cambridge Dictionary online). In *Delimitation of the Maritime Boundary between Bangladesh and Myanmar* (*Bangladesh v Myanmar*; → *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*), the Tribunal expressly endorsed the ICJ’s prudence and criteria, holding that

witness statements produced in the form of affidavits should be treated with caution. In assessing such affidavits the [Tribunal] must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events’ (*Bangladesh v Myanmar*, 2012, para 112, quoting *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, 2007, para 244).

Applying these criteria, ITLOS dismissed the relevance of the affidavits submitted by Bangladesh, either because they had been made by individuals—the fishermen—who could not have any relevant view over the boundary, or by naval officers, who were ‘officials who may have an interest in the outcome of the proceedings’ (*Bangladesh v Myanmar*, paras 113–14).

2. Witness and Expert Examination

37 To date, ITLOS has adopted a rather passive approach in relation to witness and expert examination, preferring the role of the trainer to the one of the referees who assesses the probative value of the testimonies and reports produced by the parties (see the more comprehensive entry in this Encyclopedia devoted to this controversial topic, → *Experts: International Tribunal for the Law of the Sea (ITLOS)*). In some cases, the Tribunal examined the experts and witnesses itself (see *Southern Bluefin Tuna Cases*, Minutes of

Public Hearings, 1999, 396-98; Gautier, 2018, 436) but that was the farthest it has gone in using its investigative powers.

38 The ITLOS Rules provide for common provisions for the examination of experts and witnesses (cf Arts 72-73, 78, 80, and 82), and this may lead to confusions as to their status. Yet, the relevance and probative value of their statements is different: 'an expert ... has specific knowledge on a particular matter; and a witness ... may give an account of facts' (Gautier, 2018, 433). The Tribunal has not excluded the possibility for the same person to wear the double-hat of a witness-expert, but this sheds doubt over impartiality of the expert (*M/V Virginia G Case*, Judgment, para 744; see also Procedure of International Courts and Tribunals: Final Report, 2020, at 51-52). In the same vein, in the *Norstar* case the Tribunal seemed to propose the same grid for evaluating the probative value of experts and witnesses:

The Tribunal will assess the relevance and probative value of [witness and expert] testimonies in this case by taking into account, *inter alia*: whether those testimonies concern the existence of facts or represent only personal opinions; whether they are based on first-hand knowledge; whether they are duly tested through cross-examination; whether they are corroborated by other evidence; and whether a witness or expert may have an interest in the outcome of the proceedings (*M/V Norstar Case*, Judgment, para 99; on the absence of rules on witness examination, see *M/V Louisa Case*, Judgment (Separate Opinion of Judge Cot), para 58).

39 Expert evidence has increasingly come under scrutiny, especially in cases involving complex scientific aspects (eg *Southern Bluefin Tuna Cases*, Provisional Measures, 1999; *MOX Plant*, Provisional Measures, 2001) or technical evaluation of damages (*M/V Norstar*, Judgment, paras 394-462; see also *Duzgit Integrity*, Award on Reparation, paras 37 ff). In a dispute involving scientific or technical matters, Article 289 UNCLOS affords to the Tribunal the power to choose experts to sit with it but without the right to vote. This provision has so far been unused. As President Paik noted, '[f]aced with scientific and technical disputes, the Tribunal often, instead of tackling them, asked the parties to the dispute to negotiate and reach an agreement on the disputed matter, or to cooperate with each other in order to determine the appropriate measures to be taken' (Paik, 2020, 18). ITLOS' exclusive reliance on the evidence submitted by the parties is criticized as an abdication of the judicial role. When the party-appointed experts reach contradictory conclusions, the judicial decision is ultimately based on perceptions of inconsistencies in the testimonies submitted and involve a certain degree of speculation. It remains to be seen whether or not the Tribunal will follow the ICJ's commitment to seek an independent expert opinion in such situations (*Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v Uganda*, Order of 8 September 2020, Decision to Obtain an Expert Opinion, paras 13-15; see also *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*, 2016; → *Court-Appointed Expert*).

3. Evidence of a Tacit Agreement over the Maritime Boundary

40 The tacit agreement is the factual argument *par excellence*, its purpose being to convince the judges that they may infer from the conduct of the parties a shared understanding of their respective rights and obligations. However, when the object of the agreement is a—maritime—boundary, the standard is raised from concordant inferences to clear and convincing evidence (see paras 46-47 below).

41 The argument of the tacit agreement was invoked in the two cases of maritime delimitation decided so far by the Tribunal and was rejected in both (*Bangladesh v Myanmar*, paras 117–18; *Ghana v Côte d’Ivoire*, para 212). Similar categories of evidence had been put forward in both cases and the Special Chamber in *Ghana v Côte d’Ivoire* found it appropriate to express general considerations over the probative value of the supporting material.

42 Ghana had put forward a variety of material in support of its contention: ‘concession agreements, presidential decrees, legislation, correspondence, maps, public statements, representations to international organizations and oil companies, and the cooperative practice of both States’ (*Ghana v Côte d’Ivoire*, Judgment, para 104). However, the thrust of its argument resided in its hydrocarbon concessions and activities, an argument often met in international case-law on maritime boundary delimitation (*Ghana v Côte d’Ivoire*, paras 451–52 and 468–77).

43 Although the Chamber agreed that the Parties had generally respected the line claimed by Ghana, as far as their oil activities were concerned (*Ghana v Côte d’Ivoire*, para 146) it nonetheless pointed out that ‘it [had] doubts as to whether the practice linked to the oil activities of the Parties might be sufficient to establish a single maritime boundary’ (*Ghana v Côte d’Ivoire*, para 149). It added that ‘evidence relating solely to the specific purpose of oil activities in the seabed and subsoil is of limited value in proving the existence of an all-purpose boundary which delimits not only the seabed and subsoil but also superjacent water columns’ (*Ghana v Côte d’Ivoire*, para 226). In the same vein, the Special Chamber rejected in general terms the probative value of ‘oil concession maps established by both private and public sources’ (*Ghana v Côte d’Ivoire*, para 148), as well as the probative force of national legislation, on account that, ‘as a unilateral act of a State, is of limited relevance to proving the existence of an agreed maritime boundary’ (*Ghana v Côte d’Ivoire*, para 163). By contrast, bilaterally agreed documents are likely to provide evidence of an agreement if their content effectively reflects the common understanding of the parties on the existence and the course of the boundary (*Ghana v Côte d’Ivoire*, para 191).

D. Standard of Proof

44 Proof may follow from undisputed facts but also from the existence of sufficiently strong, clear, and concordant inferences, or from similar unrebutted presumptions of fact. The level of persuasion necessary for reaching a particular conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made, and the legal rights at stake.

45 Obviously there is no codified standard of proof before ITLOS, but the Tribunal is anxious to define the standard of proof applied in its judgments (*M/V Norstar*, Judgment, paras 87–99; *Ghana v Côte d’Ivoire*, paras 198–210). The judges participate in this effort in their opinions (*M/V Norstar Case*, Judgment (Separate Opinion of Judge Ndiaye), 41–48; *M/V Norstar Case*, Judgment (Separate Opinion of Judge Lucky), 74–89; *Bangladesh v Myanmar* (Dissenting Opinion of Judge Lucky) 242–43 and 262–63). However, this pedagogical effort does not translate into a generally agreed terminology and the various standards of proof are identified below by analogy with those retained in domestic legal systems.

1. Clear and Convincing Evidence

46 When the legal rights at stake are of considerable value, the standard of proof is also more stringent and tends to be that of clear and convincing evidence. This is especially the case for proving a tacit agreement over a maritime boundary. Quoting the judgment of the ICJ in *Nicaragua v Honduras*, the Special Chamber of the ITLOS in *Ghana v Côte d'Ivoire* held that: 'Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed' (*Ghana v Côte d'Ivoire*, para 212). By the same token, the Chamber rejected the standard of → *preponderance of evidence*:

The Special Chamber acknowledges that the practice has been consistent and mutual over a long period of time, although it is not free of controversy or doubt. (...) In any event, as far as the Parties' oil practice is concerned, whether or not its character is unequivocal is not the main consideration of the Special Chamber (*Ghana v Côte d'Ivoire*, para 213).

47 If facts are undisputed between the parties, the Tribunal appears to apply the standard of clear and convincing evidence (eg the existence of a continental shelf in *Bangladesh v Myanmar*, paras 439–49). One may also consider that the Tribunal relies on presumptions of fact based on consensual views by the parties over their entitlements.

2. Preponderance of Evidence

48 Preponderance of evidence is a standard according to which 'the evidence adduced by one party on the basis of reasonable probability weighs heavier than the evidence produced by the other side' (Wolfrum, 2007, 354). In international litigation this is the most common standard, which is logical in a system relying mostly on the evidence submitted by the parties, in which the role of the tribunal is that of a referee. This standard was applied for instance in *Norstar*, to assess the damage suffered by the ship and the amount of compensation due by Italy to Panama. The Tribunal examined the evidence submitted by the Applicant and declared it to be convincing on some points (for example, on the seaworthiness of ship at the time of arrest: *M/V Norstar Case*, Judgment, para 410) and unconvincing on other (for instance, on the loss of profits: see *M/V Norstar Case*, Judgment, para 448).

49 A hybrid standard—between preponderance of evidence and *prima facie* evidence—is applied to determine the nationality of ships. The Tribunal held that, from the point of view of international law, 'nationality ... is a question of fact to be determined, like other facts in dispute before it, on the basis of the evidence adduced by the Parties' (*Grand Prince Case*, Judgment, 2001, para 81). One would expect the proof of nationality to be straightforward: after all, this is a domestic status which does not suffer nuances, easy to establish through an individual act delivered by national authorities—a passport for individuals, a certificate of registration for ships etc. Yet international courts tend to be satisfied with an appearance of nationality, stemming from the subjective views of the parties (with respect to an individual, see also *Jadhav Case (India v Pakistan)*, Judgment, Merits, para 56). Regarding ships, a loose approach to the proof of their nationality is facilitated by the fact that there are no harmonized rules on documents of nationality. Accordingly, the Tribunal accepted → *circumstantial evidence*, such as: a provisional patent of navigation, a *note verbale* of the Ministry of Foreign Affairs, a communication from a domestic agency (*Grand Prince Case*, Judgment, para 92 and Separate Opinion of Judge Laing, para 81); the inscription on the stern of the vessel of the port of registry, the documents on board and the ship's seal, and the then charter-party which recorded the flag of the vessel as 'Saint Vincent and the Grenadines' (*M/V SAIGA (No 2) Case*, 1999, paras 67–70; → *Flag of Ships*). In the latter case the Tribunal considered that the Applicant had discharged the initial burden of

establishing that the ship had Vincentian nationality at the time of its arrest, even though its provisional certificate of registration had already expired. Accordingly, the burden of proof was reversed, and it was Guinea who had to prove ‘that the *Saiga* was not registered in or did not have the [Vincentian] nationality’ (*M/V SAIGA (No 2) Case*, para 72).

3. Plausibility (or *Prima Facie* Evidence) at the Provisional Measures Stage

50 At the stage of provisional measures, the standard of *prima facie* evidence (or balance of probabilities) is generally used. ‘This standard means that the adjudicative body decides provisionally on the basis of evidence submitted by one party, mostly the applicant. In fact, the assessment establishes whether the application meets a plausibility test on the basis of the evidence submitted in its support’ (Wolfrum, 2007, 355). This lowering of the bar is acceptable in light of the fact that the tribunal having jurisdiction to decide on the merits may overturn the conclusions reached at the provisional measures stage.

51 The test is thus one of the ‘likelihood’ (the term is used for instance in *Detention of Three Ukrainian Naval Vessels*, Provisional Measures, para 70) that some events took place or might take place in the future. Indeed, to show the risk of irreparable harm, the parties are required to substantiate the likelihood or unlikelihood of a future event. In *San Padre Pio*, in order to assess the risk whether the ship might in the future be attacked by pirates if held in a Nigerian port, the Tribunal relied on a previous attack and a generic report on piracy risks made by an NGO (*M/T San Padre Pio Case*, Provisional Measures, 2019, para 129). At the same time, the Tribunal disregarded the specific evidence submitted by Nigeria to show that security was strengthened (see the criticism by Judges Kolodkin and Murphy in their respective opinions).

52 Lastly, an even lower standard of proof is applied when the Tribunal relies on—irrefragable—presumptions of irreparable harm. This is what it did in the two cases of warships arrested by the defendant, when it held that ‘any action affecting the immunity of warships [was] capable of causing serious harm to the dignity and sovereignty of a State and [had] the potential to undermine its national security’ (*Detention of Three Ukrainian Naval Vessels*, Provisional Measures, para 110; *ARA Libertad Case*, 2012, paras 97–98).

E. Conclusions

53 Overall, the Tribunal seems to yield to a pedagogical impetus to explain its reasoning and to clarify the rules concerning the probative value of evidence and the standard of proof applied (see for instance, the headings on ‘Rules of evidence’ in the *M/V Norstar Case*, Judgment, para 87–89; ‘Standard of proof’ in *Ghana v Côte d’Ivoire*, paras 198–210). This is a felicitous exercise of transparency, apt to foster the acceptance of the decision by the parties and its comprehension by the public. It should not however be viewed as an all-purpose codification of the rules of evidence. On the contrary, the variety of cases submitted to the Tribunal and of situations concerning access to evidence calls for flexibility in this respect. Naturally, there are still some areas in which the treatment of evidence by the Tribunal has not fully met the expectations of those coming before it: the use of its—soft—investigative powers prior to the hearings, the assessment of complex expert issues or the standard of evidence in urgency procedures are among the recurrent causes of concern. These are some of the areas in which jurisprudence may evolve in the future.

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