ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW

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SETTLEMENT OF DISPUTES

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SETTLEMENT OF DISPUTES

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PREFACE

This is the first instalment of an Encyclopedia of Public International Law which is scheduled to appear at regular intervals in 12 instalments during the years 1981 to 1984. The present instalment comprises 45 articles covering the main institutions and problems connected with the settlement of international disputes. Each of the 12 instalments will contain a considerable number of articles in alphabetical order dealing with various aspects of a certain area of public international law. The specific areas covered in the several instalments do not represent subdivisions of a preconceived system of public international law; they have been chosen because of practical considerations.

After the publication of all the instalments, the work will be printed again as a whole – with supplementary notes and new bibliographical references, where necessary – and will appear in four hardbound volumes; an additional volume will contain indexes, lists of authors and decisions, etc. The four volumes will bring all entries together into a continuous alphabetical order. The completed work, comprising about 1200 articles (a complete list of articles, updated where necessary, is included in each instalment), will provide reliable information and analysis on the problems and institutions of public international law; it will also summarize and evaluate a great number of important decisions of international courts and tribunals. A limited amount of overlapping of certain articles is not only unavoidable but is also necessary and useful in order to provide a more complete presentation of the different subjects, their relation to each other and the varying views of different experts.

In order to enable the reader to use the Encyclopedia to the fullest extent, arrow-marked cross-references in the texts of articles refer to other entries. When, for example, a specific topic might be expected to be dealt with under a certain heading but is discussed either under a different heading or only in a broader context, references to the relevant article will provide further guidance. Key-word arrow references are generally inserted at the first significant point in an article where another article deals with the subject mentioned.

Although the present Encyclopedia is a new and independent work, it owes much to the *Wörterbuch des Völkerrechts* edited between the two World Wars by Karl Strupp and published in a completely revised version by Hans-Jürgen Schlochauer during the years 1960 to 1962.

The manuscripts for this instalment were finalized in July 1980.

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LIST OF ENTRIES

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AFDI	Annuaire Français de Droit International
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
AnnIDI	Annuaire de l'Institut de Droit International
Australian YIL	Australian Yearbook of International Law
AVR	Archiv des Völkerrechts
BILC	British International Law Cases (C. Parry, ed.)
BYIL	British Year Book of International Law
CahDroitEur	Cahiers de Droit Européen
CanYIL	Canadian Yearbook of International Law
CJEC	Court of Justice of the European Communities
Clunet	Journal du Droit International
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
ColJTransL	Columbia Journal of Transnational Law
COMECON	Council for Mutual Economic Assistance
DeptStateBull	Department of State Bulletin
DirInt	Diritto Internazionale
EC	European Community *or* European Communities
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council of the United Nations
ECR	Reports of the Court of Justice of the European Communities (European Court Reports)
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Association
ESA	European Space Agency
ETS	European Treaty Series
EuR	Europa-Recht
Euratom	European Atomic Energy Community
Eurocontrol	European Organization for the Safety of Air Navigation
FAO	Food and Agriculture Organization of the United Nations
Fontes	Fontes Iuris Gentium
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
GYIL	German Yearbook of International Law
Harvard ILJ	Harvard International Law Journal
IAEA	International Atomic Energy Agency
IATA	International Air Transport Association
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association

IDI	Institut de Droit International
IFC	International Finance Corporation
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
Indian JIL	Indian Journal of International Law
IntLawyer	International Lawyer
IntRel	International Relations
ItalYIL	Italian Yearbook of International Law
JIR	Jahrbuch für internationales Recht
LNTS	League of Nations Treaty Series
LoN	League of Nations
Martens R	Martens Recueil de Traités
Martens R2	Martens Recueil de Traités, 2me éd.
Martens NR	Martens Nouveau Recueil de Traités
Martens NS	Martens Nouveau Supplément au Recueil de Traités
Martens NRG	Martens Nouveau Recueil Général de Traités
Martens NRG2	Martens Nouveau Recueil Général de Traités, 2me Série
Martens NRG3	Martens Nouveau Recueil Général de Traités, 3me Série
NATO	North Atlantic Treaty Organization
NedTIR	Nederlands Tijdschrift voor Internationaal Recht
NordTIR	Nordisk Tidsskrift for International Ret
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
PolishYIL	Polish Yearbook of International Law
ProcASIL	Proceedings of the American Society of International Law
RdC	Académie de Droit International, Recueil des Cours
Res.	Resolution
RevBelge	Revue Belge de Droit International
RevEgypt	Revue Egyptienne de Droit International
RevHellén	Revue Hellénique de Droit International
RGDIP	Revue Générale de Droit International Public
RIAA	Reports of International Arbitral Awards
RivDirInt	Rivista di Diritto Internazionale
SAYIL	South African Yearbook of International Law
SchweizJIR	Schweizerisches Jahrbuch für internationales Recht
SCOR	Security Council Official Records
SEATO	South-East Asia Treaty Organization
Strupp-Schlochauer, Wörterbuch	Strupp-Schlochauer, Wörterbuch des Völkerrechts (2nd ed., 1960/62)
Supp.	Supplement
Texas ILJ	Texas International Law Journal
UN	United Nations
UN Doc.	United Nations Document

UN GA	United Nations General Assembly
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UNITAR	United Nations Institute for Training and Research
UNTS	United Nations Treaty Series
UPU	Universal Postal Union
WEU	Western European Union
WHO	World Health Organization
WMO	World Meteorological Organization
YILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

ACCESS TO INTERNATIONAL COURTS *see* Standing before International Courts and Tribunals

ADJUDICATION OF INTERNATIONAL DISPUTES *see* International Courts and Tribunals.

ADMINISTRATIVE TRIBUNALS, BOARDS AND COMMISSIONS IN INTERNATIONAL ORGANIZATIONS

One of the attributes generally ascribed to international organizations as a result of their legal personality under international law is the right to jurisdictional immunity (→ International Organizations, Privileges and Immunities). Since municipal courts have no jurisdiction to settle disputes between international organizations and their personnel, an internal administrative law and specific institutions have been developed (→ International Organizations, Internal Law and Rules).

International administrative tribunals are bodies of a judicial character attached to international organizations. Their function is mainly to adjudicate on disputes between organizations and their servants (→ Civil Service, International). For this purpose they mainly apply the internal administrative law of the organization.

1. Historical Development

As long as international organizations remained under the primitive form of simple "unions", the legal claims of their personnel were settled by the courts of the State where the organization had its headquarters. This State, as a mandatary of the member-States, was generally entrusted with the function of organizing and supervising the administration of the union and of its bureau, in accordance with the constitutive charter (e.g., Switzerland with regard to the permanent bureau of the unions whose headquarters were located in Bern).

The emergence of true international organizations, independent of national tutelage, called for the establishment of a judicial procedure designed to settle disputes between the organization and its servants. The first international administrative tribunals were that of the International Agriculture Institute, whose seat was in Rome (and which was replaced by the FAO), and that common to the League of Nations and to the International Labour Office which was succeeded by the Administrative Tribunal of the ILO (→ International Labour Organisation, Administrative Tribunal). This latter tribunal is today the judicial organ of numerous organizations, including WHO, UNESCO, FAO, WMO, IAEA, GATT, Eurocontrol and UPU.

The → United Nations Administrative Tribunal was created by General Assembly Resolution 351 A (IV) of November 24, 1949, and started its work on January 1, 1950. It also acts as the judicial organ for other organizations, such as ICAO and IMCO.

In Europe, a distinction has to be made between the European Communities on the one hand, and international organizations with intensive European activities on the other. In the three → European Communities, the judicial power is entrusted to a single court (→ Court of Justice of the European Communities). In addition to the multiple and varied powers conferred upon it by the constitutive treaties, the Court has jurisdiction to decide all cases involving the Communities and their servants in accordance with the Court's Statute and with the special legal régime applicable to the Communities' officials. Other organizations have established specialized Appeal Boards to deal exclusively with disputes between the organizations and their servants (e.g., the Council of Europe, NATO, OECD, WEU, ESA).

2. General Characteristics

(a) Composition

It is difficult to generalize regarding the composition of international administrative tribunals. In certain of these tribunals the judges must have the highest judicial qualifications (e.g., Court of Justice of the European Communities). Others require their members to have had both administrative and judicial training (e.g., the UN Administrative Tribunal). Still other tribunals are composed of persons with experience in the civil service, while requiring that one member at least have a judicial qualification (e.g., ESA, OECD,

NATO). Age or sex requirements are not generally imposed.

The number of judges varies: three in the ILO Administrative Tribunal, seven in the UN Administrative Tribunal, nine at the Court of Justice of the European Communities and usually three in the different Appeal Boards of the other European organizations.

No nationality requirement is generally specified. However, the Statutes of the Administrative Tribunals of the ILO and of the UN stipulate that each member of the judicial organ should be of different nationality. Whereas this condition is not always provided for in other statutes or regulations, it may be noted that the Appeal Boards generally consist of persons of different nationalities. Furthermore, where the number of judges equals the number of the member-States of the organization, there is usually one judge from each of these States. Some texts provide for deputy judges (ILO Administrative Tribunal), some do not (UN Administrative Tribunal, Court of Justice of the European Communities).

Considerable differences exist with regard to the appointment procedures (by the governments of the member States, by the Council or Committee of Ministers or Permanent Representatives, by the General Assembly or by the General Conference of the organization), the conditions under which the members exercise their function and the terms of tenure (e.g., removability, resignation, dismissal, impeachment).

(*b*) *Procedure*

The administrative nature of these tribunals implies that the procedure is essentially a written one. The oral phase is provided for only to enable the parties to elaborate on certain arguments and to clarify positions taken in the written statements. Sometimes the decision on whether to initiate an oral phase is reserved to the tribunal itself, which may hold that the hearing of the parties is unnecessary (ILO Administrative Tribunal).

The proceedings start with the filing of an application; this must comply with admissibility requirements regarding the plaintiff (the notion of "servant" is broadly defined in the jurisprudence of international administrative tribunals) and regarding the challenged action, which must be an individual measure (or, in case of a general act, must be proved to have placed the applicant in a situation which individualizes him as if he were the addressee of the act), and must be final and harmful. In a number of organizations the judicial phase must be preceded by an administrative phase in which the applicant brings his claim before the appropriate administrative authority. Only after the latter has dismissed the claim, either by an explicit or an implicit decision, can the claim be brought before the judicial organ. When an administrative procedure is available, the applicant has sometimes the right to demand that, prior to the beginning of this phase, a special commission be set up before which he may make representations. Any opinion which may be arrived at by such a commission will be brought before the competent administrative authority called upon to make a decision. In addition, the application should satisfy a number of procedural requirements and must be submitted within a certain time limit. The claim is communicated to the respondent, who may file a written answer, to which the applicant may reply. Here the written phase normally ends. However, in certain cases, the respondents may be authorized to submit a rejoinder (Court of Justice of the European Communities).

Before the opening of the oral proceedings, the judges may decide whether there is a need for measures of inquiry (e.g., request for further information, expert's report, inspection of the place in question). The oral phase consists of the hearing of the parties. It may also include the summoning of witnesses. In general, the hearings are held in secret and the parties undertake not to disclose what has been said or what came to their knowledge during the hearings. The rules are different in the Court of Justice of the European Communities, the ILO Adminstrative Tribunal and the UN Administrative Tribunal, where most of the hearings are held in public, except cases heard *in camera*. The decision or judgment is given within a period of eight days to four months after the closure of the proceedings. The reasons on which the tribunal's decision is based must be stated. In the UN Administrative Tribunal dissenting opinions may be filed.

Judgments and decisions of international administrative tribunals are final and there is no appeal procedure available. The only further

action possible is for a party to appear before the same tribunal in order to ask for rectification of a substantive error or omission, for interpretation or for revision of the decision rendered. These are extra-ordinary proceedings which are subject to strict admissibility requirements.

It may be noted, however, that the decisions of the UN and ILO Administrative Tribunals may be reviewed by the → International Court of Justice which, in such instances, may give an advisory opinion (→ Judgment of UN Administrative Tribunal, Application for Review of (Advisory Opinion), → Judgments of ILO Administrative Tribunal (Advisory Opinion)). This is an exceptional procedure in a number of aspects. Application may only be filed by the Executive Council of the organization or by a special screening committee. This action resembles proceedings for review or application for cassation. The opinions given by the ICJ may be obligatory according to the relevant rules of the organization concerned although they are not binding under the UN Charter and the Statute of the Court. In the United Nations, the Secretary-General has the power either to implement the opinion immediately (where the ICJ confirms the Tribunal's decision) or to request the Tribunal to reconvene in order either to confirm its judgment or to amend it in accordance with the ruling of the ICJ.

The absence of an ordinary appeal procedure is highly unsatisfactory. The parties are deprived of a right which may be regarded by some as fundamental. The administration of justice itself suffers from a lack of coherence and of jurisprudential unity.

(c) *Activities*

International administrative tribunals have a limited authority to act. Their jurisdiction extends to litigation concerning recruitment, promotion, termination of employment and disciplinary actions. They do not have power to grant injunctions. They may only proceed to annul administrative decisions and to award damages to the injured party. Grounds for bringing an action include lack of competence, infringement of an essential procedural requirement, violation of a contractual term or a staff regulation or of → general principles of law (such as equal treatment and proportionality), and misuse of power. Where the action is directed against a decision taken on the basis of a discretionary power, judicial control is rather limited: the administrative judge may only verify whether the decision was taken by the competent authority in compliance with the ordinary procedure, whether it is based on erroneous factual considerations and whether it is vitiated by an error of law, manifest error of assessment or by a misuse of powers. Generally, international administrative tribunals act with extreme circumspection where the control of the exercise of a discretionary power is involved.

An action for damages often appears as complementary to an action for annulment. The success of the former often depends on the outcome of the latter, although it is generally acknowledged that an action for damages is an autonomous legal remedy. In the exercise of their power to accord damages, the judges have more extensive jurisdiction; they normally take into account the existence of wrongful behaviour on the part of the administrative authority, the direct and personal injury alleged to have been sustained by the plaintiff and the causal link between the administration's behaviour and the damage which is said to have resulted from it. Compensation may also be awarded for non-pecuniary loss.

It has to be emphasized that international administrative tribunals do not apply the same administrative law but rather the internal law of the respective organizations in which they have to perform the judicial function. The result is a mosaic of decisions whose lack of harmony sometimes appears to bring about contradictions. The explanation for this is to be found in the multitude of regulations and internal statutes governing the international civil service (→ Civil Service, International). When faced with problems of construction and of gaps in the law, the international administrative judges, and particularly those of the European Court of Justice, often use interpretative techniques (mainly general principles of law) to enable them to give full effect to the relevant and binding treaty provisions.

3. *A Special Tribunal*

In order to provide for a right of appeal in the international civil service, it has been suggested that an Administrative Tribunal of the European Communities be established to serve as tribunal at first instance in cases involving servants and

officials of the Communities. The Court of Justice would then act as a court of cassation, deciding on points of law and remitting the case to the Administrative Tribunal, which would then have to decide the case according to the Court's judgment, or as a court of appeal, making final judgments on cases brought before it. This proposal, inspired by the Court of Justice, which has to cope with an increasing number of cases, was made by the Commission of the European Communities. It has already received the approval of the Budget and the Legal Affairs Committees of the European Parliament (Working Document 37/79; April 6, 1979, Rapporteur M. Cointat). The establishment of such a tribunal would set an example for officials of other international organizations who are seeking better judicial protection.

At the time of writing, it appears however that the Commission's proposal has encountered some opposition from certain member-States and the prospects for such a tribunal are uncertain.

P. HUET, Les tribunaux administratifs des organisations internationales, Clunet, Vol. 77 (1950) 336–377.

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ADVISORY OPINIONS OF INTERNATIONAL COURTS

1. Nature

An advisory opinion is the judicial opinion of a standing international tribunal (→ International Courts and Tribunals) on a legal question whether or not related to an existing international dispute referred to the tribunal by an international entity. The opinion does not bind the requesting entity, nor any other body nor any State, to take any specific action; in general there may be at most an obligation on the requesting entity to regulate its conduct on the basis that the view of the legal situation expressed in the opinion is correct.

The possibility of an advisory opinion given by a tribunal other than a permanent one, i.e. an → arbitration body, is certainly conceivable, but unlikely in practice since the function of international arbitration is to obtain the binding settlement of inter-State disputes (but cf. the task conferred upon the ICJ in the → North Sea Continental Shelf Cases).

2. Jurisdiction to Give Advisory Opinions

It appears that the power of an international tribunal to give advisory opinions is not inherent in its judicial status, in the sense that a tribunal can not give an advisory opinion unless the power to do so is conferred on it by its constituent instrument. Requests for advisory opinions addressed to the → United Nations Administrative Tribunal by the → United Nations Secretary-General, and to the → International Labour Organisation Administrative Tribunal by the ILO Governing Body have been met in the one case with a refusal (UN Administrative Tribunal, Judgment No. 237, pp. 3–4) and in the other by the furnishing of an opinion given by the members of the tribunal in their private capacity as jurists (ILO, Governing Body Document G.B. 206/13/7 of 2/3 June 1978).

The system of advisory opinions given by a standing judicial body was conceived for the → Permanent Court of International Justice, on the basis of Art. 14 of the Covenant of the → League of Nations, and developed by the jurisprudence of that Court; similar power was conferred on the → International Court of Justice (→ United Nations Charter, Art. 96; Statute, Art. 65). Hudson (op. cit., pp. 107–108, 485–486) has shown that while certain municipal courts possessed advisory jurisdiction, this was not the inspiration for Art. 14 of the Covenant, which was derived more from the concept of the PCIJs' secondary role as legal advisor to the League.

Protocol No. 2 to the → European Convention on Human Rights (May 6, 1963; in force since September 21, 1970), confers power on the → European Court of Human Rights to give advisory opinions at the request of the Committee

of Ministers of the → Council of Europe on legal questions concerning the interpretation of the Convention and its Protocols. No advisory opinions have been delivered to date. Similarly, the American Convention on Human Rights confers a broad competence to give advisory opinions on the → Inter-American Court on Human Rights.

The → Court of Justice of the European Communities has power under several articles of the Community treaties to give advisory opinions, and, under one such article, power to give a "ruling". Under the → European Coal and Steel Community Treaty, Art. 95, the Court is to give advisory opinions on proposals for amendment of the power of the High Authority under the Treaty, in order to say whether the proposed amendments conflict with the fundamental aims of the Community or alter the relationship between the High Authority and the other institutions of the Community.

Under the → European Economic Community Treaty, an advisory opinion of the Court may be requested by the Council, the Commission, or any Member State, on the compatibility with the Treaty of any agreement proposed to be entered into by the Community with one or more non-Member States or with an international organization (EEC Treaty, Art. 228 (2)).

Under Arts. 103 and 104 of the → European Atomic Energy Community Treaty, agreements or contracts concerning matters within the purview of the Treaty may be challenged if they contain clauses which impede the application of the Treaty. A "ruling" (*déliberation*) from the Court may be obtained on the question; when application to the Court under the first of these provisions was made for the first time in 1978, the Court entitled its response a *prise de position* (official English translation: "decision") (see CJEC, November 14, 1978, Reports/Recueil 1978, p. 2151 at p. 2165).

It is interesting to note that the European Community Treaties have adopted the concept of the advisory "opinion" for judicial pronouncements which, while lacking any true binding or executory force, nevertheless entail practical consequences which the bodies concerned cannot ignore: thus, for example, an agreement which it is proposed the EEC shall enter into, if challenged before the Court of Justice and the subject of an adverse opinion, cannot come into force unless all Member States ratify it (EEC Treaty, Arts. 228 and 236).

The question has arisen whether possession of jurisdiction in general to give advisory opinions entails jurisdiction to respond positively to the specific request for an advisory opinion in every case, and whether, even if this is so, such jurisdiction must necessarily be exercised or whether there may not be cases in which it should not be exercised. Specifically, in view of the admitted principle that the contentious jurisdiction of an international tribunal derives from the consent of the parties, it has been argued that where a question submitted for advisory opinion is, or is closely related to, a question in dispute between certain States, the Court is entitled or bound to take into account the existence or lack of consent of those States for the exercise of its advisory jurisdiction.

The question first arose before the PCIJ in the → Eastern Carelia Case, where the subject of the request for an opinion was a matter in dispute between Finland and the Soviet Union and the latter State took no part in the proceedings before the Council of the League preceding the request nor those before the Court following it. The Court's refusal to give an opinion constituted a clear finding that the Court was not in every case obliged to exercise advisory jurisdiction if there were circumstances which in its discretion it considered militated against doing so. The Court's unwillingness to give an opinion has, however, also been interpreted as supporting the view that the absence of consent by a State party to the dispute is a bar to the exercise of advisory jurisdiction in respect of that dispute. The matter was re-examined by the ICJ in the cases concerning → Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinions), Legal Consequences for States of the Continued Presence of South Africa in Namibia (→ South West Africa/Namibia (Advisory Opinions and Judgments)) and → Western Sahara (Advisory Opinion); the last case in particular afforded the Court the opportunity of making it clear that "the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an

opinion", and that while "in certain circumstances, ... the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character" (ICJ Reports, 1975, p. 25), that was not always or necessarily so.

3. *Possible Subjects of Advisory Opinions*

The ICJ possesses a wide power to give an advisory opinion on "any legal question" (UN Charter, Art. 96; Statute, Art. 65); such a question will normally be one of international law (e.g. → Reparation for Injuries Suffered in the Service of UN (Advisory Opinion), → Genocide Convention (Advisory Opinion)), but may involve the legal appreciation of a historical situation (Western Sahara), or relate to the procedure of an international body (Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa (→ South West Africa/Namibia (Advisory Opinions and Judgments)) or to the proceedings of an administrative tribunal (→ Judgments of ILO Administrative Tribunal (Advisory Opinion); → Judgment of UN Administrative Tribunal, Application for Review of (Advisory Opinion)). There seems no reason why the Court should not be asked, in appropriate circumstances, for an opinion on a question purely of municipal law (cf. the Danzig Cases before the PCIJ; → Danzig Legislative Decrees (Advisory Opinion)).

Thus, although the Court's advisory jurisdiction in this respect is wide, there are limitations on the questions which may be put to it, depending on the identity of the questioner. While the → United Nations Security Council and → United Nations General Assembly may seek an opinion on "any legal question", other organs and agencies may be authorized by the General Assembly under Art. 96 of the Charter only to seek opinions on "legal questions arising within the scope of their activities". For the purpose of assessing *proprio motu* the applicability of this restriction, the Court will make its own appraisal of the nature of the "activities" of the requesting body (see ICJ Reports 1973 → Judgment of UN Administrative Tribunal, Application for Review of (Advisory Opinion), pp. 173–175, and the dissenting opinion of Judge Onyeama, ibid., pp. 228–229).

The expression of the Court's opinion on a legal question may also involve the consideration of the existence and relevance of certain facts. In the → Eastern Carelia Case the PCIJ laid down a sound approach in this respect:

> "The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are". (PCIJ B 5, p. 28).

4. *Procedure of the ICJ in Advisory Cases*

The original Statute of the PCIJ contained no provisions concerning the procedure to be followed in advisory proceedings, and in view of the total absence of experience in this domain, the Rules of Court prepared in 1922 contained only the barest outline. With the subsequent revisions of the Rules in 1926, 1931 and 1936, and the amendment of the Statute by the revision protocol of 1929, the opportunity was taken to incorporate provisions reflecting the growing experience of the Court in the matter (→ Procedure of International Courts and Tribunals). The Statute and Rules of the ICJ followed the Statute and Rules of the PCIJ without material change; however, the distinction in Art. 14 of the League of Nations Covenant between "disputes" and "questions" which might be referred to the Court for advisory opinion was not repeated in Art. 96 of the UN Charter, – a change which was not without significance to procedure (see below).

The general approach of the PCIJ from an early stage was to insist that, even when giving advisory opinions, it remained a court of justice, and therefore it adopted a procedure for its advisory work which broadly followed the established contentious procedure. This assimilation of advisory procedure to contentious procedure tended over the years to become stricter; a particularly significant step was the Court's decision in 1927 to allow the appointment of judges *ad hoc* in certain advisory proceedings. In this respect, the ICJ has, if anything, intensified the approach which views contentious proceedings as the norm, to which advisory proceedings should so far as possible be assimilated, taking account of the scope and nature of institutions of contentious procedure

when transposed to the advisory field. The 1978 revision of the ICJ Rules of Court has extended the section relating to advisory procedure, principally by codifying existing practice where previously the general provision of Art. 68 of the Statute effected the necessary assimilation from contentious procedure.

In general, therefore, advisory procedure is closely modelled on contentious procedure: it is divided into a written and an oral phase, though the Court has exercised the power to dispense with oral proceedings where it has seen fit to do so. There are no "parties", merely a category of States and international organizations regarded by the Court as likely to be able to furnish information on the question before the Court (Statute, Art. 66; → Standing before International Courts and Tribunals). Even where an existing dispute forms, to a greater or less extent, the background of the proceedings before the Court, no State concerned with the proceedings is regarded as having any particular status, except with regard to the question of the appointment of judges *ad hoc*. The decision of the Court on a request for an advisory opinion is produced by a deliberation process identical to that adopted for judgments, and in form closely resembles a judgment (a point emphasized by the addition in the 1978 Rules of Art. 107, defining the contents of an advisory opinion, which closely follows the wording of Art. 95 concerning the contents of a judgment).

The main procedural question which has given rise to difficulty is that of the appointment of judges *ad hoc*. After first declining to recognize the possibility of appointment of judges *ad hoc* in advisory proceedings, the PCIJ then reversed this approach, and judges *ad hoc* were regularly appointed in cases involving existing disputes between States. An attempt to obtain the appointment of a judge *ad hoc* on the ground of the general desirability of the Court having his assistance, in a case where there was no inter-State dispute, was unsuccessful, though the decision of the Court on the point (Danzig Legislative Decrees, PCIJ, A/B 65, pp. 69–71) has lent itself to differing interpretations.

The attitude of the ICJ has been influenced, firstly by the disappearance of the express distinction between "disputes" and "questions" formerly in Art. 14 of the Covenant; the concept of "dispute" has been replaced by that of a "legal question actually pending between two or more States", and this apparently wider formula has been narrowly interpreted. Secondly, the ICJ has developed a philosophy deriving from the fact that it is an organ of the United Nations, whereas the PCIJ was technically not an organ of the League. The ICJ has consistently laid stress on its duty to cooperate in the functioning of the United Nations, and to be guided by the objects and purposes of the Organization; similarly, it has tended to concentrate on the fact that the purpose of a request for an opinion by a United Nations body is to obtain guidance from the Court for that body, and therefore to play down the dispute element in cases in which a matter was at one and the same time one of concern to a United Nations organ, and arguably a "legal question actually pending between States". Thus in the Namibia Case, the Court's decision, subject to the powerful dissent of a minority of Members of the Court, was that South Africa could not appoint a judge *ad hoc* because the opinion had not been requested "upon a legal question actually pending between two or more States"; but in Western Sahara the Court was able to discern a difference in the position of two States closely concerned in the matter – Morocco and Mauritania – justifying the appointment of a judge *ad hoc* by one of them and not by the other.

A minor manifestation of the same approach in the procedural field, is the well-established practice of the ICJ whereby a representative of the Secretary-General of the United Nations is heard by the Court, not simply as supplying information, but also arguing as to what should, in the view of the Secretary-General, be the proper decision in the interests of the Organization (see in particular Namibia, Pleadings, Vol. 2, pp. 31 and 61–62; cf. Daillier, op. cit.).

The Court may invite an international organization other than the requesting organization to furnish information (Statute, Art. 66), but the Secretary-General's participation is not based upon any text.

5. *Special Features and Proposals for Development*

The disappearance of the reference to advisory opinions being given on "disputes" in the UN

Charter as compared to the League of Nations Covenant (see above) has been followed – though *post hoc* does not necessarily imply *propter hoc* – by a decline in the use of the procedure for indirect dispute settlement with the consent of those concerned. A number of international instruments negotiated in the immediate post-war years, however, contained provision for dispute settlement by advisory opinion accepted in advance by the parties as binding (e.g., the Convention on United Nations Privileges and Immunities of 1946, Article VIII, Section 30, → International Organizations, Privileges and Immunities). Up to the present time no dispute of this kind has been brought before the ICJ.

A further specialized use of the advisory opinion procedure which has been implemented, but which has not escaped criticism, is the procedure for review of judgments of the → International Labour Organisation Administrative Tribunal and → United Nations Administrative Tribunal. While originally instituted more in the interests of States, who ultimately have to foot the bill for compensation awarded to staff members of international organizations, than in the interests of the staff members themselves, the procedure on the face of it affords an ultimate judicial guarantee for the staff member (the relevant tests are Art. XI of the Statute of the UN Tribunal and Art. XII of the Statute of the ILO Tribunal). The procedure partakes more of a review by way of cassation than an appeal, since the role of the International Court is limited to examining the procedure and judgments of the Administrative Tribunals to ensure that they meet certain specified criteria. Apart from the difficulty, in the case of the UN Tribunal, on the point of whether the legal question put to the Court is one "arising within the scope of the activities" of the special body created to obtain advisory opinions (the Special Committee on Advisory Tribunal Judgments; see Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal), the provision in Art. 34 of the Statute of the Court that "only States may be parties in cases before the Court" has been read as debarring the Court from hearing entities other than States even in advisory proceedings. Some degree of participation of the staff member concerned in the procedure, generally regarded as necessary if justice is to be done, has therefore only been rendered possible by a certain amount of procedural gymnastics; for this reason, individual judges have cast some doubt on the propriety of the procedure, but the majority of the Court has accepted it (see Judgments of the ILO Tribunal on Complaints made against UNESCO, *supra*; Application for Review of Judgment No. 158 of the UN Administrative Tribunal, *supra*).

Proposals have from time to time been made for further specialized use or extension of the advisory competence of the International Court. In particular, in response to the invitation of the General Assembly in resolution 2723 (XXV) of December 15, 1970, for the "views and suggestions" of States "concerning the role of the Court", a number of governments put forward such suggestions (for summary see the report of the Secretary-General on the question, UN Doc. A/8382, a.i. 90, 26th sess. (1971) paras. 263–305). Some of the proposals would have involved amendment of the Statute and might therefore be regarded as politically unrealistic; but in fact even those proposals which, according to their authors, would not have required such amendment, did not result in specific action by the Assembly.

Among the ideas explored in this context was that of enabling regional organizations and individual States to seek advisory opinions from the Court, although there was division of views as to whether this would be desirable. It was also suggested that arbitral tribunals or permanent international tribunals established under treaties might be able to consult the Court by these means; or that national courts faced with a question of public international law should be enabled to use the advisory opinion procedure in order to obtain a ruling on a point arising in a current case, as is possible for the courts of EEC Member States with regard to the Court of the Communities. Even individuals might, it was suggested, have some degree of access to the Court in advisory procedure, to the limited extent necessary in order to ensure justice in cases coming from the UN and ILO Administrative Tribunals.

From a rather different viewpoint, it was, however, also suggested that the difficulties arising in cases where the request for an opinion was related to a pending dispute could be avoided if the Court were required to decline to give an

opinion unless the parties to the dispute agreed in advance to accept it as binding.

6. Conclusion

The determination of the PCIJ as well as the ICJ to preserve the character and procedures of a court in exercising the functions of legal adviser conferred by the Statute is entirely commendable; but the effect has been to forge a more unwieldy instrument than was probably foreseen in 1922. The sheer amount of time required for the judicial process may in itself to some extent account for the disappointing paucity of cases in which the procedure has been resorted to. Furthermore, the solemnity of the Court's decision in advisory cases, its close formal resemblance to a judgment, makes it difficult for an international body to contemplate seeking an opinion as a mere matter of routine in order to assist in the consideration of the legal aspect of a current problem. Just as a potential plaintiff State will not institute contentious proceedings unless it has considerable confidence of success, there is inevitably a tendency, on any question of real political significance, to put to the Court only questions on which the majority in the requesting body consider the reply of the Court to be predictable. If their prognostications are correct, there may be an uncomfortable feeling abroad that the Court is being used as a mere political instrument; if their expectations are disappointed, the authority of the Court is, regrettably, not sufficiently highly respected to silence criticism and prevent disappointment from affecting still further the popularity of the advisory opinion procedure.

For a list of their Advisory Opinions see → International Court of Justice and → Permanent Court of International Justice.

M.O. HUDSON, The Permanent Court of International Justice 1920–1942 (1943) esp. at pp. 483–524.

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See also Bibliography in → Permanent Court of International Justice and → International Court of Justice.

H.W.A. THIRLWAY

ARBITRAL COMMISSION ON PROPERTY, RIGHTS AND INTERESTS IN GERMANY

1. Introduction

The Convention on the Settlement of Matters Arising out of the War and the Occupation ("Settlement Convention"), a part of the → Bonn and Paris Agreements on Germany (1952 and 1954), provided for the setting up of the Arbitral Commission on Property, Rights and Interests in Germany and, in Chapters 5 and 10, specified the legal areas of its competence in disputes. Chapter 5, under the heading "External Restitution" (→ Restitution) (as opposed to the "Internal Restitution" of property to victims of Nazi oppression, which was dealt with in Chapter 3), dealt with the recovery and restitution of property which had been requisitioned (→ Requisitions) during the World War II occupation (→ Occupation, Belligerent) by the forces or authorities of Germany or her allies (→ Reparations after World War II). If the property to be restored, after identification in Germany, had been destroyed or otherwise disposed of, the rightful owner was entitled to compensation. Chapter 10 specified that the property (including shares in German companies) of "United Nations nationals" (for the meaning of "United Nations" in this context, see → Atlantic Charter) should be returned and their rights and interests restored, if their property had been the subject of discriminatory treatment (→ Aliens, Property); special provisions also dealt with the exemption of foreigners from the obligation to make payments under the Equalization of Burdens (*Lastenausgleich*) Law and clarified the position of their industrial, literary and artistic

property rights. Common to both Chapters was the provision that the Arbitral Commission was only competent as a final tribunal of appeal from decisions of German courts or administrative authorities; however, it was also competent if the German court or authority had not reached a final decision within one year following a submission to it (Chap. 10, Art. 12 para. 3 of the Settlement Convention). During the period of its existence, from 1956 to 1969, the Arbitral Commission heard 432 appeals; it rendered 162 decisions, while the remaining 270 cases were disposed of by other means. The decisions were published by the Commission in three languages in a ten-volume collection (Entscheidungen, op. cit., and cited in the following text as..., Vol.... No....). The Commission sat at Coblence Castle.

2. Composition and Organization

The rules regulating the composition, organization, jurisdiction and procedure of the Arbitral Commission were derived from several sources; the main body of rules was contained in the Commission's Charter, which was attached as an annex to the Settlement Convention. In accordance with Art. 14 (2) of the Charter, the Commission drew up Rules of Procedure (Bundesgesetzblatt 1957 II, 230; amendments in Bundesgesetzblatt 1958 II, 65). An Administrative Agreement of November 12, 1956 (Bundesanzeiger No. 225) between the signatory powers to the Settlement Convention contained certain additional rules of importance on the inviolability of the Commission's premises and archives, and on the duties of its members, registry and administrative board. The nine "permanent members" of the Commission (never referred to as judges) had to have the qualifications required in their respective countries for appointment to judicial office, or equivalent qualifications. The members were: President Hugo Wickström (Sweden); Vice-Presidents G. Sauser-Hall until 1967, then Python (Switzerland) and Gunnar Lagergren (Sweden); Albert I. Edelman until 1959 then Spencer Phenix until 1965 then Marc J. Robinson (United States of America); C.H.A. Bennett until 1968 then M.E. Bathurst (Great Britain and Northern Ireland); Jean Marion (France); J. Schwandt until 1966 then Frau H. Maier, Wilhelm Euler until 1968 then W.K. Geck, Karl Arndt (Germany). Italy, Greece, Belgium and the Netherlands took advantage of the opportunity open to all States to accede to the Charter (under Art. 17(2) of the Charter) and the accompanying right to appoint a member adjoint (under Art. 3(6) of the Charter); Denmark, Luxembourg and Norway simply acceded to the Charter. The Commission sat either in Chambers of three members or in plenary session with a quorum of five members, always under the chairmanship of one of the "neutral" presidents and with an equal number of German members and those appointed by the three signatory Allied Powers. A member adjoint could replace the member appointed by an Allied Power only in cases heard by Chambers (but not in plenary session). Orders (as opposed to decisions) could be issued by one member alone; it was possible to appeal against such orders to the plenary session or to one of the Chambers. A Chamber could at any time refer a case to the plenary session; in addition, if leave was sought within a certain period and granted by the Chamber or plenary session, a decision of a Chamber could be appealed against to the plenary session. Members of the Chamber hearing a case at first instance participated in the decision of the plenary session!

3. Jurisdiction

According to the wording of Art. 6 of the Charter, the "exclusive jurisdiction" of the Commission was subordinated to that of the Arbitration Tribunal named in the Convention on Relations between the three Powers and the Federal Republic of Germany (→ Bonn and Paris Agreements on Germany (1952 and 1954)), which was given the power, in Art. 9 of its Charter, to decide with binding effect on matters relating to the extent of the competence of the Arbitral Commission. The Arbitration Tribunal was, however, never actually formed.

In spite of the varying terminology used by the signatory States, there is no doubt that the Arbitral Commission was an international court (→ International Courts and Tribunals). The Commission was very concerned to observe the limits to its jurisdiction defined in the Settlement Convention. In its decision in Leupold-Praesent v. Federal Republic of Germany, Vol. II, No. 34, the Commission rejected the claim of a Swiss

national, although as a resident of the Federal Republic of Germany she was theoretically entitled, according to Art. 6 (4) of the Charter, to make an appeal, and a German-Swiss agreement had granted to Swiss nationals the same concessions as those granted to "United Nations nationals" under the Settlement Convention. The reasoning employed was that an extension of jurisdiction would have constituted a modification of the Convention and the Charter, which was not possible without the consent of all the signatory States. In an earlier decision it was stated, however, that the Commission, being a court, could take all the measures necessary to protect a party's rights, even without express provision, as only in this way could the Commission's jurisdiction and authority be made fully effective (Veerman v. Federal Republic of Germany, Vol. I, No. 1). And towards the end of its activities, the Commission, in plenary session, filled an alleged lacuna in the provisions governing its functions (IAK v. Federal Republic of Germany, Vol. X, No. 161) – with six (!) dissenting or separate opinions, some of which related to the decision itself and some to the reasoning employed.

The possibility of extending the jurisdiction of the Commission by agreement of the signatory States, as provided for in Art. 6 (3) of the Charter, was utilized only once. On June 16, 1966, the Federal Republic of Germany and France – with the consent of the British and American Governments – agreed to submit to the Commission a dispute which was not envisaged in the Settlement Convention. According to a German-French Agreement of October 23, 1954, the German Government was to allow France to arrange for the exhumation and return of the bodies of war and deportation victims, provided that the identification was "probable" and that there were no "reasons of extraordinary importance" to justify a refusal of consent. Among the thousands of bodies buried in mass and individual graves in the cemetery of Hohne in the vicinity of the concentration camp of Bergen-Belsen were those of many French nationals. Relying on the information contained in 185 personal information sheets listing special features of varying significance, France wished to attempt identification. The Federal Republic of Germany refused consent, mainly because of strong Jewish protests. The Commission decided in plenary session (French Republic v. Federal Republic of Germany, Vol. X, No. 162) that although a very small number of French bodies could probably be identified, there were reasons of extraordinary importance which justified the German refusal of consent. Apart from the great importance to be attached to the Jewish opposition, the alteration in the appearance of the cemetery and its monuments 24 years after the burials would, in view of their great symbolic significance, do violence to general human sensibilities.

4. Procedure

The procedure of the Arbitral Commission was regulated in detail in the Charter and the Rules of Procedure (RoP) which determined the procedure to be followed concerning written and oral proceedings, interventions by third parties, → interim measures of protection, settlement, default, appeals, the reopening of proceedings (termed "revision"), costs, legal aid, etc. (→ Procedure of International Courts and Tribunals). Any points of procedure which had not been regulated were decided upon as the need arose (RoP, Rule 77); as regards the intervention of third parties in the proceedings, the "generally recognized principle" of legitimate interest was adopted (Greece v. Federal Republic of Germany, Vol. I, No. 19). In Brincard v. Federal Republic of Germany (Vol. VIII, No. 143), the Commission rendered, on the application of one of the parties involved, a purely declaratory judgment although such a judgment was provided for in neither the Charter nor the RoP; it justified this approach by referring to international legal cases and literature.

Two examples of legal development are of particular interest:

(a) Unlike the Charters drawn up two years previously for the tribunals set up to apply the → London Agreement on German External Debts (→ London Agreement on German External Debts (1953), Arbitral Tribunal and Mixed Commission), the Commission's Charter provided in Art. 5 (5) that the deliberations of the Commission should remain secret. Nevertheless, the United States member attached a dissenting opinion to a decision rendered by a Chamber. This procedure was accepted by his two colleagues and later by the plenary session, after

which the order for publication was given (Western Machinery Co. v. Federal Republic of Germany, Vol. I, Nos. 5 and 21). The plenary session subsequently decided – without formally changing the RoP – that a dissenting opinion was permissible, at first only for the plenary session, but later also for Chambers (Vol. V, No. 112 footnote). However, it had to be objective and as brief as possible and was not to read as a criticism of the judgment; it also had to be approved by the majority. In practice, individual opinions were delivered in a third of the decisions; in two especially significant cases there were seven (Philips Patentverwaltung v. Federal Republic of Germany, Vol. VII, No. 132) and six (Italian Republic v. Federal Republic of Germany, Vol. VI, No. 123) separate or dissenting opinions (→ Judgments of International Courts and Tribunals). (b) Concerning the disqualification of members in the broader sense, the Charter contained only a brief mention of this in Art. 4 (2). Members could not engage in any activities which were incompatible with the proper exercise of their duties, or participate in any case with which they had previously been concerned or in which they had a direct interest. In one case, one of the parties challenged the participation of the German member Schwandt because he had previously been a senior official at the Federal Ministry of Finance and still had an office there close to the rooms of the Federal Republic's agents before the Commission; he was also the Ministry's representative on several boards of directors. The Chamber rejected the application for disqualification as unfounded, with Schwandt present but abstaining from the vote. The plenary session approved this procedure (Bengtson v. Federal Republic of Germany, Vol. II, No. 60) saying that in the absence of specific or general rules of international law, the Commission could determine its own procedure. Therefore each Chamber was entitled to decide on an application for disqualification made by the other members or one of the parties, but the challenged member could not participate in the decision of the plenary session. The majority of the plenary session considered that the list of grounds set out in Art. 4 (2) of the Charter was not exhaustive. On the other hand, in order to prevent a possible abuse which could impede the Commission's work, only exceptionally grave reasons for disqualification could be accepted. It was not accepted that there was a general rule of international law that the provisions concerning disqualification in the national laws of the signatory States or the States of the various members should be considered as applicable by analogy, as results contrary to justice and equity could ensue. Courts of a mixed character were in a special position in that it was not rare for a State to appoint as a judge someone who had previously had to deal with the dispute. In the case in question, the Commission found (without the oral proceedings which had been requested) that there was no proof of any genuine ground for disqualification.

5. Rules Applicable

The rules which were to be applied by the Commission were specified in Art. 8 of the Charter to be primarily the provisions of the Settlement Convention and the legislation referred to therein. When it became necessary to interpret or supplement these provisions, or in the absence of relevant provisions, the general principles of international law and of justice and equity were to be applied (→ Equity in International Law). As regards procedure, some examples of new or supplementary provisions are given in section 4 *supra*.

6. Contributions to International Law

Because of the very specific nature of the rules to be applied, recourse to general rules outside the scope of the Settlement Convention was relatively infrequent; this was because the provisions of the Settlement Convention were mostly the outcome of the previous practice during the occupation of Germany after World War II. Admittedly, some of the most important provisions of the Convention consequently remain obscure and ambiguous if not seen in relation to this historical background. It was not long before the problem of the *travaux préparatoires* arose, which was complicated in the case of acceding States which had not participated in the occupation or the drafting of the Convention. The leading case here is Italian Republic v. Federal Republic of Germany, Vol. III, No. 70 (the significance of which is not affected by the fact that the Chamber's judgment was set aside by the plenary session:

Vol. VI, No. 123). This case held that when interpreting an obscure treaty text (→ Interpretation in International Law), recourse to *travaux préparatoires* is both necessary and admissible, even if these had not been published. The validity of this principle was held to be unaltered in cases where a complainant only subsequently acceded to the multilateral treaty without being one of the original Contracting Parties. Whether the judge should take advantage of his powers to have recourse to such material must however depend on the special circumstances of the particular case. Thus, in this case it was obvious that acceding States could not have more extensive rights than the three victorious Powers which originally concluded the Convention with the Federal Republic of Germany.

Among other points of international law discussed or touched upon were the following: the admissibility in principle of controlling and blocking → enemy property (Heidsieck v. Federal Republic of Germany, Vol. I, No. 20), the → Berlin problem (Bour-About v. Federal Republic of Germany, Vol. VIII, No. 138, Brincard v. Federal Republic of Germany, Vol. VIII, No. 143, etc.), the status of Polish officer → prisoners of war (Krolitowski v. Federal Republic of Germany, Vol. III, No. 76), the meaning of the expression "floating territory" as applied to a vessel on the → high seas (Greece v. Federal Republic of Germany, Vol. IV, No. 80), the precedence of the Settlement Convention over any other rules of international law in spite of Art. 25 of the Basic Law of Germany (Gilis v. Federal Republic of Germany, Vol. V, No. 108; Holländisches Frachtenkontor v. Federal Republic of Germany, Vol. VII, No. 125), the conditions for the existence of a State of war (→ Peace and War; Philips Patentverwaltung v. Federal Republic of Germany, Vol. VII, No. 132), and the independent nature of a Government's claim even when it refers to the subject matter of a previous claim by a private party (Greece v. Federal Republic of Germany, Vol. III, No. 78).

7. Evaluation

It would be presumptuous for a former member to evaluate the work of the Arbitral Commission. There has, however, been a notable scarcity of criticism, the harshest coming from E.J. Cohn, (op. cit.). Most of the decisions were in fact in favour of the Federal Republic of Germany, which would seem to indicate the fairness of the previous decisions of the German courts. Some of the criticism may be partly influenced by a comparison with the – rightly – much more favourable treatment of victims of the Third Reich provided for both in the substantive and procedural rules. Moreover, insufficient regard has been paid to the fact that certain claims for compensation were deliberately excluded from the scope of the Settlement Convention (Chap. 10, Art. 1 (6)).

Convention on the Settlement of Matters Arising out of the War and the Occupation, UNTS, Vol. 322, pp. 219–386. (Text of the Charter of the Arbitral Commission on Property, Rights and Interests in Germany at pp. 316–331).

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KARL ARNDT

ARBITRATION

A. Bases of the Law of International Arbitration: 1. Concept and Nature of Arbitration. 2. Historical Development. 3. Forms of Arbitration. – B. Characteristics of International Arbitral Tribunals: 1. Organization. 2. Jurisdiction. 3. The Law Applicable. 4. Procedure and Award. – C. Importance and Future Prospects of International Arbitration.

A. Bases of the Law of International Arbitration

1. Concept and Nature of Arbitration

Arbitration is the process of resolving disputes between States by means of an arbitral tribunal appointed by the parties. The tribunal may be set up before or after differences arise between the parties. Art. 37 of the Hague Convention for the Pacific Settlement of International Disputes of 1907 (→ Hague Peace Conferences of 1899 and 1907) provides: "International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the award". Whereas there is only a limited number of international courts (→ International Courts and Tribunals) established by treaty, international arbitral tribunals are numerous. Although individual tribunals differ in origin, structure and competence, one can identify certain common characteristics of all international arbitral tribunals. Firstly, even in the case of institutionalized arbitration (see → Permanent Court of Arbitration), a tribunal is constituted to hear a particular case only, and its composition is determined, to some extent, by the parties (section B.1, *infra*). Secondly, an arbitral tribunal does not, as a matter of principle, determine its own jurisdiction but has to decide the dispute as submitted voluntarily or compulsorily by the parties (section B.2, *infra*). Thirdly, an arbitral tribunal makes its award in accordance with the rules adopted for that purpose by the parties or by rules otherwise binding the tribunal which are primarily the rules of international law (section B.3 *infra*). Fourthly, the parties – or, failing agreement, the tribunal – have control over the procedure to be followed, and the tribunal's award is, in principle, final, since the object is to settle the dispute (section B.4 *infra*).

These criteria distinguish international arbitration from other methods of → peaceful settlement of disputes in two ways: on the one hand, they distinguish it from proceedings before international courts, which presuppose an organized and permanent court of justice, staffed by judges whose appointment the parties to the dispute cannot influence, and which decide legal disputes between States in accordance with international law in force in order to uphold the international legal order. On the other hand, they distinguish it from non-diplomatic voluntary methods of dispute settlement, which either amount to no more than preliminary proceedings, as with the use of international commissions of inquiry (→ Fact-Finding and Inquiry) or are intended to bring about a settlement by → conciliation or mediation rather than a decision (→ Mixed Commissions). Examples of such preliminary proceedings are to be found in the permanent international commissions under the → Bryan Treaties (1913/1914) to which the parties were obliged to refer non-arbitral disputes for investigation before taking further action, in the conciliation commissions established under the → Locarno Treaties (1925) for political questions not suited to arbitration, and in the conciliation commissions set up by the → General Act for the Pacific Settlement of International Disputes (1928 and 1949) to deal with non-justiciable disputes prior to settlement by arbitration. However, commissions of this type have on occasion exercised arbitral functions, among them two mixed commissions established under the → Jay Treaty (1794) and the mixed commission under the German-Polish Upper Silesia Convention of 1922. Conciliation commissions can be empowered to deal with disputes both by way of proposals for settlement which are not binding on the parties and by way of arbitral awards, as in the case of the conciliation commissions set up under the → Peace Treaties after World War II between the Allied Powers and Bulgaria, Finland, Italy, Romania and Hungary, which have acted principally as arbitration tribunals, and the conciliation commission under the → Austrian State Treaty (1955). Occasionally arbitral functions are added to the judicial responsibilities of an international court; the Court of Justice of the European Communities can act as an arbitral tribunal, for example, when Member-States of the → European Coal and Steel Community enter into a special agreement to submit a dispute "which relates to the subject matter of this Treaty" (Art. 89(2) ECSC Treaty).

The concept of international arbitration does not include mixed arbitral tribunals. These deal with claims by private individuals or legal persons against foreign States. Generally, such claims are

pursued by the State of which the claimant is a national by way of → diplomatic protection. The institution of the mixed arbitral tribunal has its origin in the → Mixed Claims Commissions set up in the 19th century between the United States and South and Central American States, although the majority of these commissions did in fact satisfy the definition of international arbitral tribunals in view of the *de facto* limitation of their competence to disputes between States. Mixed arbitral tribunals were established in large numbers under the → peace treaties after World War I. As a result of the wide scope of the provisions dealing with the aftermath of the war, the number of cases decided by these mixed arbitral tribunals far exceeds the number of all international arbitral awards ever made. Mixed arbitral tribunals established in the period after World War II include in particular the two tribunals created under Art. 29 and Art. 32 of the → London Agreement on German External Debts (1953) (Annexes I and IV), the → Arbitral Commission on Property, Rights and Interests in Germany (1954) and the → Austro-German Property Treaty Arbitral Tribunal (1957) (established by Art. 108 of that Treaty).

International arbitration must be distinguished from the settlement of civil disputes by what is also known as arbitration, in particular by the Court of Arbitration of the → International Chamber of Commerce (Domke, op. cit.).

2. Historical Development

The settlement of disputes between city-states, and, at a later date, between other polities, by arbitrators can be shown to have occurred from pre-classical antiquity down to the late Middle Ages, with varying importance at different periods of history. However, this was not the origin of modern international arbitration, nor did the ancient practice have any influence on international arbitration as we know it.

This is particularly the case with the Hellenic system of arbitration in ancient Greece which many regard as the source of the modern practice. The Hellenic system is known from inscriptions, from a number of important actual decisions (for example the arbitration between Athens and Mytilene by Periander of Corinth concerning the possession of the strategically important fortress of Sigeion on the Hellespont, and that between Athens and Megara by a tribunal of Salamis (both around 600 B.C.)), and from events within the Amphiktyony (to which 18th century political philosophers attached an exaggerated significance). They were clearly regional religious organizations exercising a limited jurisdiction under sacral law (Lammasch, Die Lehre von der Schiedsgerichtsbarkeit, (1914) op. cit., 24). One could rather take non-hegemonial confederacies as the origin of arbitration in the modern sense, although as organs of political communities they only applied the rules of the relevant alliance. In the second half of the fifth century B.C., Athens and Sparta concluded treaties with some provision for settlement of disputes by arbitration but they were never applied, since no arbitrator was prepared to make a decision between the two powers, and the → hegemony of one subsequently prevented the use of these provisions. Arbitrations are also known to us in the period from the battle of Chaironeia (338 B.C.), which put an end to the independence of the Greek communities in foreign relations, to the beginning of Roman rule (168 B.C.). Some of these concerned territorial disputes on the edge of the Greek world (for example the estuary of the Danube, and the disputes between the cities of Crete and the Aegean island states, Lammasch, op. cit.). These arbitrations were, however, clearly based on the supremacy of Macedonian and, later, Roman tribunals. Similarly, in Roman times arbitral awards were, as a general rule, made either in exercise of the sovereignty of Rome over other political bodies or as hegemonial measures to maintain the Pax Romana; Rome itself never agreed to go to arbitration.

A thousand years later, the Middle Ages saw the rise of a form of arbitration which became widespread in the Later Middle Ages, but which again does not provide the origin of modern international arbitration. It occurred first between the city-states of Italy, between Italian princes and communities and between Swiss cantons, and was later used between smaller political communities. It was, on rare occasions, to be found between states which were resisting incorporation into the Holy Roman Empire or taking advantage of feudal divisions to deal with the subtle distinctions of power relationships and the com-

plications of feudal law. Medieval arbitration had the following characteristic features: it was either a substitute for decision by the courts, similar to trial by ordeal, or – as with the institution of trial by a jury of one's peers – in the nature of a feudal court to decide between parties of equal status, or a jurisdiction claimed by the Emperor (see Dante Alighieri in *De monarchia*, 1318) or by the Pope in virtue of his spiritual authority for himself or for his representative, which can be traced to the idea of a *Respublica Christiana*, and was only in a formal sense an arbitration. Popes Innocent III and Boniface VIII sought unsuccessfully to introduce a system of compulsory arbitration with the Pope as an independent arbitrator. In the kind of disputes which are typical of modern arbitration, such as frontier disputes, the exchange of prisoners of war and compensation for breaches of the peace by illegal acts of war, there was no clear dividing line between arbitration and diplomatic methods of settling the disputes. The position of the arbitrator was frequently that of a conciliator or *amiable compositeur*. No doubt the same was true of arbitrations by relatively independent collective bodies such as the law faculties at Bologna, Padua and Perugia. Awards were generally based on rules borrowed from canon law, modified in part by legal scholars, or on principles taken from Roman private law and applied to questions of public and international law. The confusion following the spread of war and the political and cultural changes which began in the course of the 15th century led to an increase in the non-observance of arbitral awards and brought about the decline of the medieval system of arbitration and its ultimate demise in the 16th century.

For these reasons scholars and statesmen began to consider plans for an international peace organization, in which the establishment of arbitral tribunals would play a decisive part. (The idea of such tribunals goes back at least to Pierre Dubois, in his De recuperatione terrae sanctae of 1306). Georg von Podebrad, for example, in his plan for a perpetual peace alliance (1462) recommended the creation of a Court for the Maintenance of Peace; the Duke of Sully suggested the settlement of disputes by arbitration within the framework of a world organization (Maximilien de Bethune, Mémoires, between 1617 and 1635); similarly Emeric Crucé (Le nouveau Cynée, 1623) and, at the time of the Peace of Utrecht, Abbé Saint Pierre proposed a permanent court of arbitration to decide all disputes between States (Projet pour rendre la paix perpétuelle en Europe, 1713). Among the early scholars of international law, Hugo Grotius and, later, Jeremy Bentham ("Plan for an universal and perpetual peace", in his Principles of International Law (1787)) considered arbitration and judicial settlement to be the most effective means for maintaining peace. The same idea inspired the Quakers, beginning with William Penn (Essay towards the Present and Future Peace of Europe, 1693), and they gave practical expression to the idea of arbitration in the New World through the foundation of numerous peace societies (→ Peace, Proposals for the Preservation of).

The conditions for the use of international arbitration were only created with the gradual breaking up of the medieval world from the 17th century onwards and the rise of nation-States in a society of independent, sovereign States. The idea of arbitration was promoted by the existence side by side of equal powers maintaining legal relations with one another, and also by the – admittedly slow – recognition of their → interdependence. A hundred years passed before disputes between States were submitted to impartial bodies deciding according to objective rules. The development of international arbitration began in Anglo-American international legal relations and on the American continent. Its origin can be traced to the conclusion of the Jay Treaty of 1794 between Great Britain and the United States. This was followed by numerous other similar treaties made by the United States with South American States in particular, characterized by the creation of mixed commissions having arbitral functions. Similar treaties (details in La Fontaine, op. cit.) were then concluded between Latin American States after their declarations of independence following the Congress of Panama (1826). Settlement by arbitration also gained a foothold in the multilateral treaties which became more common towards the end of the 19th century, such as the Congo Act of 1885, the Anti-Slavery Act of 1890 (→ Slavery) and treaties in the fields of international transport and economic law. The first provision for compulsory arbitration

was contained in the Convention setting up the → Universal Postal Union.

Treaty provisions providing for arbitration became more frequent as States which had hitherto not been involved in international arbitration began to see the advantages of settling disputes in this way. Particularly influential in this respect were the awards in the → *Alabama* Arbitration (United States-Great Britain, 1872), the → Delagoa Bay Arbitration (Great Britain-Portugal, 1875, which followed the decision of President Grant in the Bulama Arbitration in 1870), the first → Behring Sea Arbitration (United States-Great Britain, 1873) and the → Costa Rica Packet Arbitration (Great Britain-Netherlands, 1897). The settlement of the Alabama dispute, which had been unresolved since the American War of Independence, gave rise to parliamentary consideration of the adoption of → arbitration clauses in treaties. The Senate and House of Representatives of the United States voted in favour of their adoption in 1874, as did the legislatures of various European States (Great Britain 1873, Italy 1873, Netherlands 1874, Belgium 1875, followed by Denmark 1890, Spain 1890, Austria-Hungary 1896 and Norway 1897). The arbitration problem was also the subject of proposals by the members of the parliaments of nearly all European and of some American countries (C. Lange, L'Union Interparlementaire, Résolutions des Conférences (1911)). International jurists only began to consider the problem again in the last third of the 19th century, particularly in the work of learned societies. The Association for the Reform and Codification of the Law of Nations was founded in 1873 (in 1895 it became the → International Law Association) and saw the drafting of a code of international law as its first priority, such a code being regarded as an essential preliminary to the creation of a new system of arbitration (for later developments see Darby, op. cit. 588, 592; → Codification of International Law). At its founding conference in 1873 the → Institut de Droit International discussed the Washington Rules of 1871, which form the basis of the decision in the *Alabama* Arbitration, and later considered questions of procedure in international arbitral tribunals; a "Projet de règlement pour la procédure arbitrale internationale" was considered at the Hague Conference of 1875 (Ann IDI, Vol. 1 (1877) 126–133) and this had some influence on the negotiations at the First Hague Peace Conference.

The → Hague Peace Conferences of 1899 and 1907 produced a codification of the existing rules of international law on arbitration and attempted to develop them further. The 26 States who participated in the first conference and the 44 represented at the second adopted the Conventions for the Pacific Settlement of International Disputes of July 29, 1899, and October 18, 1907, by which, in the words of the almost identical Article 1 of the two conventions, "with a view to obviating, as far as possible, recourse to force in the relations between states, the [contracting] powers agree to use their best efforts to insure the pacific settlement of international differences". To this end both the first Convention and the revised and enlarged second Convention contain, in Title IV under the heading "On International Arbitration", provisions dealing with the composition, jurisdiction, awards and procedure of international arbitral tribunals. Efforts at the first conference to introduce compulsory arbitration for at least a limited class of legal disputes came to nothing, and, although the principle found recognition at the second conference, it was not adopted in the Convention. The 1899 Convention made provision for the → Permanent Court of Arbitration, but here again the original ideas were not developed further, apart from some insignificant amendments, and it remained merely an institution to facilitate resort to arbitration in international disputes. Similarly, the joint American-British-German compromise "Projet d'une Cour de Justice arbitrale", which was included in the Final Act of the 1907 Conference, was never adopted as such but later became significant as a precedent for the Statute of the → Permanent Court of International Justice. The Convention for the Pacific Settlement of International Disputes of 1907 came into force on November 27, 1909, between the eleven signatories which had ratified it up to that point. The 1899 Convention came into force on September 4, 1900, and continues to exist alongside the 1907 Convention. It is in force between those States which ratified it or which later acceded to it but have not ratified the 1907 Convention.

The idea of international arbitration was given further impetus after the first Hague Peace Con-

ference by the first awards of tribunals set up within the framework of the Permanent Court of Arbitration, for example, the → Pious Fund Arbitration, the → Preferential Claims against Venezuela Arbitration, the → Japanese House Tax Arbitration and the award in the → *Muscat Dhows* Case. Other favourable factors included a large number of arbitral awards between States parties to the 1899 Convention and third States (summary in Cory, op. cit. 235), and the increase in bilateral arbitration clauses and other arbitration agreements. An important development was the conclusion of numerous treaties modelled on the British-French Treaty of 1903 (Traités généraux d'arbitrage, op. cit., Series 1, p. 33). These treaties provide for legal disputes not affecting the → vital interests of the parties, particularly questions of the interpretation of treaties (→ Interpretation in International Law), to be taken to the Hague Court of Arbitration (collected in Cory, op. cit. 52 et seq.). Another important development was the use of arbitration clauses in treaties of commerce concluded by Germany with Belgium, Italy, Romania and Switzerland (1904) and with Bulgaria and Austria-Hungary (1905). The decision to hold the second Hague Peace Conference, taken on the initiative of United States President Theodore Roosevelt, was influenced by the failure of the proposed arbitration convention between States of the American continent to obtain ratification, although this convention had been considered at the first Pan-American Conference in Washington (1889/1890) and brought more into line with the Hague Convention at the second Pan-American Conference in Mexico City (1900/1901). Arbitration acquired a broader base after the second Hague Peace Conference through a number of well-known awards by tribunals operating within the framework of the Permanent Court of Arbitration, in particular the → Casablanca Arbitration, the → North Atlantic Coast Fisheries Arbitration and the → Savarkar Case. The extension of arbitration was also promoted by the → Bryan Treaties (1913/1914) which the United States concluded with several States after the failure of the → Taft Arbitration Treaties (1911).

After World War I, a number of important multilateral treaties provided for the reference of disputes to international arbitral tribunals as an alternative to settlement by diplomatic means or recourse to international courts. This occurred in the Covenant of the → League of Nations (Arts. 12, 13), in the → Geneva Protocol for the Pacific Settlement of International Disputes (1924), which never came into force, and in the → General Act for the Pacific Settlement of International Disputes (1928 and 1949). These general provisions were adopted by a wide circle of States and were supplemented by a network of bilateral arbitration and conciliation treaties. By 1939, some 250 such treaties were registered with the Secretariat of the League of Nations (analysis and texts of the treaties in United Nations Systematic Survey of Treaties, op. cit.). The more important among them were the German-Swiss Arbitration and Conciliation Treaty of 1921, the Danish-Swedish Treaty of 1924 and the Italian-Swiss Treaty of 1924, which all served as models for particular types of dispute settlement treaties. The German-Swiss Arbitration Treaty furnished the model for treaties made within the framework of the → Locarno Treaties of 1925 which were intended to close the gap in the League of Nations Covenant in place of the Geneva Protocol; these provided for questions of the interpretation of the peace treaties to be decided by arbitration. In the case of international organizations, renewed agreement was reached on the reference of differences concerning the interpretation and application of the treaties to arbitration, examples of such references appear in the Statutes on the International Regime for Railways (Art. 35; → Railway Transport, International Regulation) and in the Covenant on the International Regime for Maritime Ports (Art. 21; → Ports). There was a right of appeal to the → Permanent Court of International Justice against an award.

Developments in international arbitration since World War II have followed a similar pattern to those of 1919–1939. By Art. 1 (1) of the → United Nations Charter, the purposes of the → United Nations are: "To maintain international peace and security, and to that end: . . . to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". The Charter (Chapter VI) obliges member States which are parties to a dispute to make

use of diplomatic means, mediation, arbitration or judicial settlement. Most of the earlier bilateral arbitration treaties continue in force and, where necessary, were declared to be applicable again. The constitutions of most of the specialized agencies of the United Nations (→ United Nations, Specialized Agencies) provide for settlement of disputes by arbitration as an alternative to, or in default of, reference to the → International Court of Justice. Provision for arbitration exists also in treaties establishing the headquarters of international organizations (→ International Organizations, Headquarters) and in treaties between such organizations and the host States concerning the organizations' privileges and immunities (→ International Organizations, Privileges and Immunities).

Arbitration has gained in importance alongside the jurisdiction of the ICJ and settlement by conciliation through regional conventions. In this connection we may cite, in particular, the American Convention on the Peaceful Settlement of Disputes of 1948 (the → Bogotá Pact (1948)) conducted in order to implement the Bogotá Charter (see → Organization of American States). As far as Europe is concerned, the members of the Council of Europe are bound by the → European Convention for the Peaceful Settlement of Disputes (1957). Moreover, in the Final Act of the → Helsinki Conference on Security and Cooperation in Europe of 1975, the participating States declared their intention "to pursue the examination and elaboration of a generally acceptable method for the peaceful settlement of disputes aimed at complementing existing methods, and to continue to this end to work upon the 'Draft Convention on a European System for the Peaceful Settlement of Disputes' submitted by Switzerland" (ILM, Vol. 14 (1975) 1297; text of the Swiss Draft Convention in AVR, Vol. 17 (1976/78) 413–428). As part of the work on reform of the law of the sea, the third United Nations Conference on the Law of the Sea has produced a comprehensive system of rules on the compulsory settlement of disputes (→ Law of the Sea, Settlement of Disputes) for adoption in a new convention on the law of the sea. In so far as States do not wish to invoke the jurisdiction of the ICJ in questions of the law of the sea, arbitration has a decisive role to play in this area.

Although constitutional provisions such as Art. 24 (3) of the Basic Law of the Federal Republic of Germany which refers to "general, comprehensive and obligatory international arbitration" were rare in the past, they have become more common since World War II, especially in South American countries.

3. Forms of Arbitration

Arbitration may take place before an *ad hoc* or a permanent tribunal. These two traditional forms have been adopted by the Hague Conventions for the Pacific Settlement of International Disputes. Art. 17 of the 1899 Convention and Art. 39 of the 1907 Convention provide: "The arbitration convention is concluded for questions already existing or for questions which may arise eventually".

An *ad hoc* tribunal is one set up after a dispute has arisen by an arbitration agreement between the parties (→ *compromis*), in order to settle that particular dispute. The *compromis* outlines the subject-matter of the dispute and determines the composition of the tribunal, also sometimes its procedure and the law to be applied (for an example, see → *Alabama*, The).

Permanent arbitral tribunals are those provided for or established by treaty to decide disputes which may arise in future between the parties. Arbitration agreements of this kind can be found in arbitration treaties containing detailed provisions for the establishment of the tribunal, its competence and procedure (so-called "primary" arbitration agreements, such as the German-Swiss Arbitration and Conciliation Treaty of 1921 and the Bogotá Pact 1948). They can also be based on → arbitration clauses (so-called "secondary" arbitration agreements) which may be either special compromissory clauses, providing for the settlement of arbitration of all disputes which could threaten friendly relations between the contracting parties (for an example of this type, see → Treaties of Friendship, Commerce and Navigation). These and other secondary agreements to arbitrate frequently provide, in the alternative, for recourse to the ICJ. A chronological table of such agreements since 1933 is published in the ICJ Yearbooks.

In the case of a permanent tribunal, the parties may agree that it should have compulsory jurisdiction in certain kinds of disputes, with the result

that in such situations either party may invoke the tribunal's jurisdiction unilaterally; otherwise, the parties are obliged to implement the original agreement to arbitrate by concluding a special *compromis*, the purpose of which is to outline the subject-matter of the dispute and set out any agreement on the composition of the tribunal and its procedure, though the procedure is often left to be determined by the tribunal itself.

The structure of the → Permanent Court of Arbitration places it in certain respects somewhere between an *ad hoc* and a permanent tribunal, since the Court only exists to facilitate an immediate reference to arbitration in international disputes. After a dispute has arisen the parties must first conclude a *compromis* to set up an *ad hoc* tribunal within the framework of the Court under the provisions of the Hague Conventions discussed above.

The development of international arbitration has been characterized by a movement from *ad hoc* to permanent tribunals. The use of *ad hoc* tribunals was originally the rule, but, beginning with the → Jay Treaty (1794), the practice of creating permanent tribunals, first through the adoption of arbitration clauses in treaties, then, especially since the end of World War I, within a system of bilateral arbitration treaties and multilateral "primary" arbitration agreements, has become so widespread that *ad hoc* tribunals are now resorted to only in exceptional cases.

B. Characteristics of International Arbitral Tribunals

1. Organization

The composition of international arbitral tribunals is based on the principle that the arbitrators are chosen by the parties to the dispute, either by agreement between them or by a procedure laid down in the arbitration agreement. In the absence of such provisions concerning the appointment and functioning of the tribunal, the provisions of Title IV, Chapter 3 of the Hague Conventions for the Pacific Settlement of International Disputes are to be applied between States which have ratified the Conventions, and may be applied between other States even when they do not avail themselves of the facilities of the Permanent Court of Arbitration set up under the Conventions (Art. 51 of the 1907 Convention, Art. 30 of the 1899 Convention; in the following discussion the articles of the 1907 Convention are cited first, then those of the 1899 Convention in square brackets).

A tribunal can be composed of arbitrators chosen from the panel of the Permanent Court of Arbitration even when the parties do not otherwise make use of the Court's facilities. The tribunal may consist of a single arbitrator or of several arbitrators (Art. 55 (1) [32 (1)]). Although appointment of a single arbitrator was common at one time, it now occurs only in exceptional cases. As a rule, tribunals have three or five members. In the case of a three-member tribunal, one member is nearly always appointed by each party from among its own nationals; in a five-member tribunal, two members are nationals of the respective parties and each party can, but rarely does, appoint a second of its own nationals to be a member. The third, or fifth, member of the tribunal is always a neutral person, appointed by common agreement between the parties or chosen by the other members of the tribunal. He is the umpire and is *ex officio* President of the tribunal (Art. 57 [34]). Not merely for this reason, but also in particular because of the importance of his views in the event of a vote when the other members are nationals of the parties to the dispute, the authority of the umpire has often been decisive for a tribunal's success. If the parties are unable to reach agreement on the composition of the tribunal, each party appoints two arbitrators of whom only one may be its national. These arbitrators together choose the umpire, unless the parties have agreed on some other procedure (for example, nomination of the umpire by the President of the International Court of Justice). If the votes are equally divided, the umpire is chosen by a third power entrusted with this task by agreement between the parties; failing such agreement each party selects a different power and these two jointly decide on the umpire; if the two powers cannot agree, each puts forward the names of two members of the panel of the Permanent Court of Arbitration, and the umpire is chosen by lot from among them (Art. 55 (2), in conjunction with Art. 45 (3) to (6) [32 (2) to (5)]). Although the tribunal is an institution created by the parties to the dispute, it acts in its own name.

Arbitrators must meet certain conditions laid down in the Hague Conventions to qualify for nomination to the panel of the Permanent Court of Arbitration, and since they have to discharge their responsibilities with complete impartiality, they are independent and their appointment is irrevocable (by implication from Art. 59 [35]). They enjoy *de facto* the privileges accorded by the Hague Conventions to members of tribunals established within the framework of the Permanent Court of Arbitration even whilst acting as members of tribunals set up outside that framework. Unless otherwise provided in the arbitration agreement, arbitration tribunals sit at the Hague (Art. 60 [36]) and decide in each case the languages to be used in the proceedings (Art. 61 [38]).

2. *Jurisdiction*

(a) Only States may be parties to arbitrations (Art. 37(1) [15]); other subjects of international law may not, and of course individuals may not either. Claims by private persons arising from acts of the organs of another State which are contrary to international law (→ Responsibility of States: General Principles) can only be pursued by the State which is affected either directly or in the person of those for whom it can provide → diplomatic protection. Incidents of this kind have given rise to numerous international arbitrations. In view of the special character of arbitration proceedings, third States are not permitted to intervene in a pending arbitration on the ground that the outcome could affect their legal interests, by contrast with proceedings before an international court. Such States have the right to intervene only if the arbitration concerns the interpretation of a treaty to which they are parties. In this case the parties to the arbitration are under an obligation to inform all signatories of the treaty in good time (Art. 84 (2) [56 (2)]).

(b) The jurisdiction of arbitral tribunals extends to all matters submitted to them by the parties. The jurisdiction of *ad hoc* tribunals is defined by the *compromis*. The jurisdiction of permanent tribunals set up by arbitration treaties or arbitration clauses to deal with future disputes may be doubtful in some cases. All kinds of disputes between States are open to settlement by arbitration. As a rule, however, States generally impose limits on the types of disputes which they accept as arbitrable, and the Hague Conventions describe arbitration as the most effective means of peaceful settlement only for "legal" disputes, in particular for the interpretation of treaties (Art. 38 (1) [16]; see → Judicial Settlement of Disputes). Nevertheless, in the desire for → peaceful change, even disputes of a political nature have occasionally been submitted to arbitration (→ Behring Sea Arbitration and → North Atlantic Coast Fisheries Arbitration). Historically, the distinction between political and legal disputes was for long of considerable significance, but it lost its importance as many States came to submit to arbitration all disputes between them which could not be resolved by diplomatic means. In general, legal disputes were submitted to arbitration or judicial settlement and political disputes referred to conciliation. Until this practice became usual, States could refuse to enter into a *compromis* in relation to legal questions which in their view affected their vital interests or honour, or could plead their → domestic jurisdiction where an arbitration treaty was already in existence.

(c) The → Hague Peace Conferences (1899 and 1907) did not succeed in reaching agreement on compulsory arbitration. At the Second Conference, in addition to recommending recourse to the Permanent Court of Arbitration (Art. 48 (1) [27]), the Contracting Powers included the possibility of a declaration accepting the compulsory jurisdiction of the Court (Art. 48 (3) and (4)). The great majority of States welcomed the principle of compulsory jurisdiction. The 1907 Convention accordingly adopted the rule that it is open to States to agree on compulsory arbitration in general or to enter into particular agreements for all cases in which they consider this to be possible (Art. 40 [19]). Greater emphasis was placed on the principle of voluntary submission, however, by the inclusion of a new provision (Art. 38 (2)) in which recourse to arbitration even on legal questions was only described as desirable "in so far as circumstances permit". Provision has been made in the last few decades for compulsory jurisdiction of international arbitral tribunals both in special and general compromissory clauses as well as in bilateral and multilateral arbitration treaties. As a rule, however, compulsory jurisdiction has only been accepted by the parties for particular kinds

of legal disputes, and the parties have frequently limited the tribunal's jurisdiction by reservations. Such reservations have excluded from the tribunal's jurisdiction disputes affecting the independence, territorial integrity, honour or vital interests of the parties. Since the tribunal cannot go behind a declaration excluding matters within a party's domestic jurisdiction, this qualified compulsory jurisdiction was really optional (see deliberations of the Institut de Droit International on the topic of "Compétence obligatoire" and "L'extension de l'arbitrage obligatoire" AnnIDI, op. cit.). Unqualified submission of States to the jurisdiction of international tribunals has only occurred on the basis of treaties providing for compulsory arbitration as an alternative to other methods of peaceful settlement of disputes. In so far as parties have agreed on compulsory arbitration for certain legal disputes, a permanent arbitral tribunal can obtain jurisdiction without the need for a special agreement, through unilateral invocation by one party, or by the doctrine of *forum prorogatum*, by which is meant that the opposing party has expressly, or by implication, consented to a tribunal's jurisdiction, even though the subject-matter of the dispute does not in fact fall within the terms of the compulsory jurisdiction provisions.

(d) Only in special cases will an arbitral tribunal have to decide questions of the extent of its own jurisdiction. The tribunal's jurisdiction is defined by the terms of the submission of the dispute contained in the *compromis*, the principal function of which is to establish the subject-matter of the dispute, and the tribunal is not called upon to consider the matter (*extra compromissum arbiter nil facere potest*). On the other hand, where a dispute is submitted to an arbitral tribunal by reference in general terms to an arbitration treaty or to some other treaty, the tribunal can examine the question of its jurisdiction but only as a matter of interpretation of the relevant provisions of the treaty (Art. 73 [48]). The only cases in which a tribunal must decide for itself whether it has jurisdiction are where a compulsory arbitration agreement provides for unilateral invocation of the jurisdiction, or a reservation has been made to the acceptance of jurisdiction in the objective form so that the reservation can be relied upon only in matters that fall exclusively within the party's domestic jurisdiction "according to international law". A special agreement may also provide for the tribunal to decide questions of its jurisdiction (for example Art. 2(2) of the German-Swiss Arbitration and Conciliation Treaty).

3. The Law Applicable

The parties can determine the rules of law upon which the tribunal is to base its award. In the case of *ad hoc* tribunals these rules are frequently stated in the *compromis*, but are sometimes contained in a separate agreement; a classic example of the latter is provided by the Washington Rules of 1871, laid down for the → *Alabama* Arbitration. By contrast, arbitration clauses contain no provisions concerning the law to be applied. If the special agreement implementing the arbitration clause is also silent on this matter, the tribunal has to determine the principles upon which the award is to be based.

The Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 provide (in Art. 37(1) [15]) that arbitral awards must be based on "respect for law" ("sur la base du respect du droit"). Reports of the negotiations at the Hague Conferences shed no light on the meaning of this formula. It is to be noted that it does not say "sur la base du droit" or, as the Institut de Droit International had proposed, "selon les principes du droit international". Interpretation of the provision may, however, be assisted by reference to the Convention for the Creation of an International Prize Court signed at the Second Hague Peace Conference; by Art. 7 of the Convention, the → International Prize Court was to decide, in the absence of any provision in the treaty between the States concerned, according to the rules of international law, or, where such rules did not exist, according to general principles of justice and equity. Although international arbitral tribunals are less strictly bound by the applicable law, their awards must be made so as to conform as far as possible with existing international law. Unless expressly so authorized by the parties, tribunals are in principle permitted to decide on the basis of equity only to the extent that lacunae exist, either in the rules of law in force between the parties or in general inter-

national law, in relation to the subject-matter of the dispute.

Most of the more recent bilateral arbitration treaties between States on the European Continent provide that awards are to be based on those sources of international law which the PCIJ and ICJ are directed to apply (see the common Art. 38 (1) of the Statutes of the Courts). Frequently it is provided that, in the absence of established rules in treaties binding on the parties or in → customary international law, the tribunal is to decide according to general principles of law or, with the consent of both parties, *ex aequo et bono*. Indeed, the rendering of decisions *ex aequo et bono* constitutes an important characteristic of international arbitration since arbitral tribunals are supposed to resolve disputes in any case and, even in the absence of applicable rules of international law, should not resort to a *non liquet*. The tribunal's authority to decide *ex aequo et bono* attained considerable importance in the early history of arbitration (→ Behring Sea Arbitration, → North Atlantic Coast Fisheries Arbitration). In the words of the tribunal in the → Norwegian Shipowners' Claims Arbitration, equity is the application of "general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State" (AJIL, Vol. 17 (1923) 384). Because of the influence of the → Jay Treaty (1794) and certain provisions in the → Taft Arbitration Treaties (1911), the tradition of deciding according to equity is particularly strong in Anglo-American conceptions of international law. Under the Jay Treaty, decisions were to be made "according to the merits of the several cases and to justice, equity and the Laws of Nations". Many of the arbitration treaties concluded by the United States up to World War II specify rules of international law, equity and justice as the principles on which awards are to be based; although stated as alternatives, equity and justice are applicable only in default of rules of international law. The → General Act for the Peaceful Settlement of International Disputes (1928 and 1949), after referring to the sources of international law listed in Art. 38 (1) of the Statutes of the PCIJ and ICJ as the basis for arbitral awards, continues: "In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*" (Chapter III, Art. 28). Decisions *ex aequo et bono* are intended to fill gaps in the law but must be rendered *secundum legem*.

4. Procedure and Award

It is for the parties themselves in the first place to determine the procedure to be followed by the tribunal, and they can do this in the *compromis*, in the case of *ad hoc* tribunals, or, for permanent tribunals, in the arbitration treaty or in the special agreement concerning the submission of a particular dispute to the tribunal. In most cases provisions governing tribunal procedure are contained only in treaties setting up a permanent tribunal, and, in other kinds of arbitration, matters of procedure are left for the tribunal itself to decide. The procedural provisions of the Hague Conventions for the Pacific Settlement of International Disputes apply to signatories, in the absence of provisions in the agreement between the parties either specifying the procedure or leaving the tribunal the power to decide its own procedure (Art. 51 [30]). The importance of the procedural provisions of the Hague Conventions has been increased by their adoption by States in special arbitration agreements and in general arbitration treaties and by tribunals which have preferred them to a procedure of their own making.

Under the Hague Conventions, arbitration procedure is normally divided into two distinct phases, written pleadings and oral discussions (Art. 63 (1) [39 (1)]). The conduct of the case is determined by rules of procedure made by the tribunal (Art. 74 [49]). The parties are entitled to appoint counsel, and are represented by agents (Art. 62 [37]; on the rights and duties of counsel and agents, see Arts. 69 to 72 [44 to 47]). The written stage of the procedure begins with the submission of the *compromis* or, where the proceedings have been commenced unilaterally on the basis of compulsory jurisdiction, with the submission of the applicant's claim. It continues with the presentation of counter-cases and, if necessary, replies. All papers and documents relied on must be annexed to the pleadings (Art. 63 (2) [39 (2)]). The oral stage of the procedure is under the direction of the President (Umpire); it

is formally closed after the parties have submitted the evidence in support of their case and their final submission beyond which the tribunal may not refer. The oral discussions are recorded in minutes, which are the only authentic record. By contrast with proceedings before international courts, the hearing takes place in private unless the *compromis* otherwise provides or the tribunal directs, with the assent of the parties, that the proceedings should be in public (Arts. 63 (4) [39 (3)], 66 [41], 77 [50]). The oral stage is not an absolutely essential part of the proceedings; it does not take place if all the parties' representatives do not appear at the appointed time, though this has rarely happened. If the agent of only one party fails to appear, the proceedings are suspended, since there is no provision for default judgments by arbitral tribunals. There is no oral stage in the summary arbitral procedure provided for in the 1907 Convention (Arts. 86 to 90), and also in prior *compromis* agreements, for disputes of a technical nature or of limited importance. Decisions are taken by a majority (Art. 78 [51]) and the deliberations of the tribunal remain secret. It is not usual for a member who dissents from the award or from the reasoning on which it is based to give a separate opinion. The award must state the reasons on which it is based and is read out at a public sitting. By contrast with the rule for judgments of the PCIJ and ICJ, awards are only effective when notified to the parties' agents (Arts. 79 to 81 [52 to 54]). The usual practice is for a copy of the award to be handed to each of the agents immediately after the formal reading and for this to be recorded in the minutes as the entry into effect of the award. (See generally → Procedure of International Courts and Tribunals, → Judgments of International Courts and Tribunals).

The award is only binding on the parties to the proceedings. However, if the proceedings concern the interpretation of a convention to which powers other than the original parties are signatories, the interpretation contained in the award is also binding on any of those other States which exercise their right to intervene in the proceedings (Art. 84 [56]). Once it enters into effect, the award settles the dispute finally and without appeal; since recourse to the tribunal implies an undertaking to submit to the award (Art. 37 (2) [18]), it must be carried out in accordance with the requirements of good faith. The 1907 Convention contains the additional provision (Art. 82) that any dispute arising as to the interpretation and execution of the award shall be submitted to the decision of the tribunal which pronounced it, unless the parties otherwise agree. There is in principle no appeal against an award (Art. 81 [54]). However, the parties may in their arbitration agreement reserve the right to demand the revision of the award by the same tribunal. This can only be done on the ground of the discovery of some new fact which could have exercised a decisive influence upon the award and which, at the close of the proceedings, was unknown to the party demanding revision through no fault of its own (Art. 83 [55]). Apart from this case of new evidence, the Hague Conventions contain no provision for revision and are silent on the legal consequences of irregularity in the making of an award. The Institut de Droit International had proposed, in Art. 27 of its "Projet de règlement pour la procédure arbitrale internationale" of 1875, that in the following four cases the award should be null and void: invalidity of the *compromis*, bribery of a member of the tribunal, excess of jurisdiction by the tribunal, and material error of law in the award. Although the first two of these cases have been of theoretical interest only, the other two have occurred repeatedly in practice, at least at an earlier stage in the history of arbitration. In these cases, however, the awards were not treated as void, but were subjected to revision by agreement between the parties. The awards in the North Eastern Boundary Arbitration (→ American-Canadian Boundary Disputes and Cooperation) and in the Bolivian-Peruvian boundary dispute of 1909/1910 (→ Boundary Disputes in Latin America), which were objected to on the ground of excess of jurisdiction by the tribunals and because of the conduct of the judges as *amiables compositeurs*, were altered by agreement between the parties. In the → Orinoco Steamship Co. Arbitration the United States refused to recognize the award because of "essential errors of law and fact", and the award was revised by a newly constituted tribunal. In the dispute between Honduras and Nicaragua concerning the arbitration award of December 23, 1906 by the Spanish King (→ Honduras-

Nicaragua Boundary Arbitration) the ICJ decided, on November 18, 1960 (ICJ Reports (1960) p. 192), that an award can no longer be objected to if the parties have accepted it without protest for many years. This applies even though the objection is based on the invalidity of the appointment of the arbitrator, or on excess of jurisdiction by him, or on the fact that the award cannot be executed on account of omissions, contradictions and ambiguities contained in it. The provisions of Art. 1(2) of the Peace Treaty with Hungary and Art. 2 of the Peace Treaty with Romania (→ Peace Treaties) are an example of the rare case of a peace treaty annulling an arbitration award: they declared the Vienna Award of August 30, 1949, by the foreign ministers of the German Reich and Italy to be "null and void". (See generally → Judicial and Arbitral Decisions: Validity and Nullity).

C. Importance and Future Prospects of International Arbitration

As was declared at the Hague Peace Conferences of 1899 and 1907, arbitration has proved to be an effective means of settling disputes between States which cannot be resolved by diplomatic means. The Permanent Court of Arbitration performed a particularly useful service, with its Bureau acting as an impartial source of assistance and its panel of members facilitating the setting up of tribunals. After World War I, arbitration experienced a decline as a result of the creation of the PCIJ, although numerous arbitration treaties were concluded then. Since 1945 the frequency of resort to arbitration has once again, at least temporarily, increased, particularly in the context of peace settlements and the law of international organizations. The lesser authority enjoyed by the ICJ, by comparison with the repute of the PCIJ, is one of the factors producing a tendency for States to prefer the submission of disputes to a tribunal whose composition they control, instead of to the Court. Arbitration can also benefit from the fact that it has been placed on an equal footing with judicial settlement as a peaceful means of resolving disputes both in the → United Nations Charter (Art. 33) and in the → General Act for the Peaceful Settlement of International Disputes (1928 and 1949).

This tendency led the Secretary General of the Permanent Court of Arbitration, in his note of March 3, 1960, to all signatories to the Statute of the Court, to draw attention to certain advantages possessed by arbitration for States which hesitate to submit disputes arising between them for decision by the ICJ. These are that greater trust could be placed in a tribunal, the members of which are few in number and chosen by the parties themselves, than in the World Court; that arbitration offers the possibility of a decision *ex aequo et bono* for disputes with political implications; and that arbitration proceedings do not take as much time as proceedings before the ICJ. He prompted further States to accede to the 1907 Convention for the Pacific Settlement of International Disputes (AJIL, Vol. 54 (1960) 933–941).

When the → International Law Commission commenced its work in 1949, it included international arbitration procedure among the first topics suitable for codification and entrusted the writing of a report on the subject to Scelle, one of the members of the Commission. His Draft of a Code of Arbitral Procedure (UN Doc. A/CN 4/18) was adopted by the Commission in 1953, after much discussion, as a Draft Convention on Arbitral Procedure (UN Doc. A/CN 4/109 and 113; AJIL, Vol. 48 (1954) Supp. 1), and was laid before the members of the United Nations for final consideration. After minor revision in the light of the comments made, the text was adopted by the General Assembly by Resolution 1262 (XIII) of November 14, 1958, not in the form of a multilateral convention, but as Model Rules on Arbitral Procedure to serve as a precedent for the drafting of bilateral arbitration treaties. The Model Rules largely follow the provisions of the Hague Conventions for the Pacific Settlement of International Disputes, but notable innovations are the involvement of the ICJ and the incorporation of certain features of the Court's procedure. In the case of a dispute as to the arbitrability of the issues between the parties, the Model Rules provide for recourse to the ICJ to decide the question, and, in the case of failure to appoint a tribunal, for the President of the Court to make the appointment. If the *compromis* or special agreement does not lay down the principles upon which the tribunal is to base its award, the tribunal should resort to the sources of inter-

national law listed in Art. 38 of the Statute of the ICJ. The Model Rules also provide that an arbitral tribunal may order → interim measures of protection to preserve the rights of the parties, and may give interlocutory judgments and judgments in default of appearance at the oral proceedings. If proceedings for revision of an award by the tribunal which pronounced it cannot be brought under the conditions stipulated in the Hague Conventions, either party may appeal to the International Court of Justice under the Model Rules. In cases of bribery of an arbitrator, excess of jurisdiction by a tribunal and material error of law in the award, the Rules provide that either party may apply to the ICJ for a declaration of nullity in respect of the award, if the matter is not otherwise disposed of by agreement between the parties.

The International Law Commission deliberately omitted consideration of the question of compulsory arbitration when drafting the Model Rules; however, the Institut de Droit International, which had considered the problem earlier, particularly with regard to the legal position between the two World Wars (AnnIDI, Vol. 47 (1957) 34), has examined the issue again. Relying on a report by Wilfred Jenks on "Compétence obligatoire des instances judiciaires et arbitrales internationales" (AnnIDI, op. cit.), the Institut adopted a resolution at its conference in Neuchâtel in 1959 appealing to States to submit all legal disputes to arbitration or judicial settlement and to base reservations of matters of domestic jurisdiction upon objective criteria open to examination by a court or tribunal.

At its Hamburg Conference in 1960, the International Law Association proposed that arbitration should be extended to cover disputes arising from the invasion of private property rights. The Association's committee on the juridical aspects of nationalization and foreign property suggested (International Law Association, Report of the Forty-ninth Conference, Hamburg 1960, 175–244) that the provisions which already exist in many bilateral treaties for the mutual protection of the property rights of the parties' nationals should be unified and expanded in a multilateral convention on the settlement by arbitration of disputes concerning the invasion or destruction of the property rights of foreign nationals.

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ARBITRATION AND CONCILIATION TREATIES

1. Definition

Arbitration and conciliation treaties are international agreements concluded between subjects of international law in written form in order to serve the → peaceful settlement of disputes through the establishment of rules either for a binding third-party decision by judges of the parties' own choice (→ Arbitration; → Judicial Settlement of Disputes), or for a non-binding proposal of terms of settlement by an impartial commission or single conciliator not vested with political authority of their own (→ Conciliation and Mediation).

The notion of arbitration and conciliation treaties is sometimes limited by a narrow interpretation. For example, the use of the terms may be confined to agreements whereby the parties undertake to settle any present or future dispute by arbitration or conciliation. Thus, only those treaties which either stipulate compulsory settlement of future disputes or institute third party jurisdiction for a given case, would be included within the concept of arbitration and conciliation treaties. Such an interpretation would, by

definition, exclude such arbitration treaties as the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes (→ Hague Peace Conferences of 1899 and 1907) or the 1964 Protocol of the → Organization of African Unity on the Commission of Mediation, Conciliation and Arbitration, which contain no compulsion whatsoever. Another interpretation construes the term "treaty of arbitration" so as to exclude dispute settlement by an international court, such as the → Permanent Court of International Justice, and the → International Court of Justice. Indeed, in modern treaty practice, treaties of arbitration deal with arbitration *stricto sensu*, whereas treaties also providing for judicial settlement are identified as such by their title. Nevertheless, not only the original version of Arts. 12 to 15 of the Covenant of the League of Nations and the jurisprudence of the PCIJ (Ser. A/B 46, p. 47), but most recent State practice as well (cf. the 1965 Declaration of the Swiss Federal Council concerning the treaties of Conciliation, Judicial Settlement and Arbitration; Bundesblatt 1965 III 125) correctly use the terms "arbitration" and "arbitration treaties" in their broader sense, including the jurisdiction of any international court of justice.

Despite the fact that the term arbitration treaty is thus rather comprehensive, it does not apply to agreements submitting disputes to the decision of an international political body, e.g. the organ of an international organization, even though the word "arbitration", used in its broadest sense as characterized simply by the binding force of the decision to be taken upon recourse by the interested parties, might be understood to include such instances as well. (→ Interpretation of Treaty of Lausanne, PCIJ, B 12, p. 26).

The submission of any international dispute to international courts and tribunals or conciliation depends on the free will of the States in controversy. The indispensable consent to arbitrate or conciliate is established by international agreement, bilateral or multilateral. Such agreement may be confined to a single, already existing dispute (→ Compromis) instituting an "isolated" arbitration or conciliation. It may also cover future disputes ("institutionalized" arbitration or conciliation). In the latter case, it may be restricted to a certain class of disputes, e.g. all those related to the interpretation or application of a given treaty, and may either be incorporated in that treaty as a "compromissory clause" (→ Arbitration Clause in Treaties) or be appended as a separate instrument ("optional protocol"). The agreement may be a more general one, applicable to all future disputes; it may be included in a treaty of mutual security, of amity, of navigation and commerce, etc., thus taking the form of a "general arbitration/conciliation clause"; finally, it may become the exclusive subject of a treaty, thus taking the form of a "general arbitration/conciliation treaty". In institutionalized arbitration or conciliation, according to the terms of the original agreement, a "special agreement" may be necessary to determine the judge or conciliator and to actually establish his jurisdiction. A further category of treaties establishes subsidiary rules and organizational facilities which may be resorted to in any kind of arbitration commitment, isolated or institutionalized (→ Permanent Court of Arbitration; → Hague Peace Conferences of 1899 and 1907).

All these agreements are called arbitration and/or conciliation treaties, although a different use of the terms may be encountered limiting their usage to "general arbitration treaties" and excluding even "general arbitration clauses". Not included in any construction of the words are tacit agreements to arbitrate or conciliate (e.g. *forum prorogatum*). Not included, furthermore, are arbitration clauses or treaties between States and private individuals/corporations, even if the agreement is governed by international law, directly or by analogy (→ Treaties between States and Foreign Private Law Persons). The same applies to inter-State conventions providing for facilities for the settlement of disputes of the kind aforementioned, e.g. the 1965 World Bank Convention establishing the International Centre for the Settlement of Investment Disputes (→ Investment Disputes, Convention and International Centre for the Settlement of).

This article concentrates on general arbitration and/or conciliation treaties and on conventions containing general rules for the conduct of arbitration and conciliation. It disregards international arbitration where the private individual may have *locus standi* (→ Standing before International Courts and Tribunals; → Mixed Arbitra-

tion Tribunals; → Mixed Claims Commissions). It does not cover general and special compromissory clauses (→ Arbitration Clause in Treaties), special agreements or *compromis*.

2. Development

Even though some arbitration occurred in Greek antiquity and in the Middle Ages, the modern era of arbitration begins with the → Jay Treaty of 1794. Being itself a treaty on arbitration of already existing disputes, its success initiated to some extent the conclusion of a considerable number of general arbitration treaties between Latin American States in the 19th century, while European powers and the United States at that time preferred compromissory clauses or – even better for the control of their own affairs – *compromis* (if third-party intervention of some sort was viewed as inevitable). The Hague Peace Conferences of 1899 and 1907 mark another milestone. Assuming that acceptance in principle of mediation and voluntary arbitration on a universal basis as a means of settling disputes would prevent armed conflicts and serve as an incentive to limit excessive armament, the Hague Conferences succeeded in affirming that "in questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized . . . as the most effective and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle" (Art. 16 of the 1899 and Art. 38 of the 1907 Hague Conventions). No general agreement on any compulsory settlement procedure, however, was possible. In particular, the participants did not give their consent to the creation of a "Judicial Arbitration Court". Instead, the establishment of a permanent bureau and of a list of arbitrators (→ Permanent Court of Arbitration) was agreed upon, together with rules of procedure applicable to future arbitration.

Following the 1899 Conference, numerous general arbitration treaties were concluded, though of very limited material scope. Modelled after the Franco-British arbitration treaty of 1903, they nearly all included the honour and interest clause (→ Vital Interests) allowing either party to declare unilaterally a given dispute not to be arbitrable, thereby curtailing the *obligatorium* incurred. In the few cases in which unconditional arbitrability was agreed upon, the relevant treaties rarely contained provisions aimed at preventing an unwilling party from thwarting arbitration proceedings in a particular case. The execution of the arbitration agreement was, therefore, mostly left to the good will of the parties, the only significant exception being the Convention establishing the → Central American Court of Justice of 1907. The → Bryan Treaties of 1913/14 furnished a new element. As a supplement to earlier general arbitration treaties with honour and interest clauses, they themselves avoided the clause and, in consideration of the sensitivity of States, provided that the permanent commissions to be established could only render a non-binding decision. This marks the beginning of the evolution of conciliation as a separate means of peaceful settlement of disputes.

The experience of World War I regenerated interest in the idea that a new system of inter-State relations had to be established and that this system should be based along the lines of security, disarmament and arbitration. After the German-Swiss Arbitration Treaty of 1921, hundreds of bilateral general arbitration and conciliation treaties were concluded providing, *inter alia*, for (a) arbitration or adjudication of all legal disputes, often preceded by voluntary or compulsory conciliation, and failing conciliation, for arbitration of non-legal disputes, (b) compulsory binding settlement of legal disputes, or (c) compulsory conciliation only. Even the Soviet Union concluded a number of conciliation treaties. On the global scale, only one treaty provided for compulsory conciliation, adjudication and arbitration: the 1928 Geneva → General Act for the Pacific Settlement of International Disputes. This Act, however, had few ratifications. Regional treaties of some importance were concluded only in the Latin American hemisphere.

After World War II, the obvious impossibility of preventing wars by conciliation and arbitration demonstrated the need for a new approach. Binding dispute settlement nowadays is generally deemed appropriate only for minor conflicts and questions of a predominantly technical character. The systems of bilateral general arbitration and conciliation treaties, severely undermined by the war, have not been extended, with the sole important exception of the Swiss treaties (cf. Bun-

desblatt, *supra*), partly owing to the lack of homogeneity in the post-war society of States and to the revival of a very broad concept of sovereignty. Instead, many bilateral and some multilateral compromissory clauses have been negotiated. On the global scale, the 1949 Revised → General Act of Geneva did not receive the accessions necessary to lend it practical weight; and the number of States which have subjected themselves generally to the compulsory jurisdiction of the ICJ is very limited. In order to make compulsory settlement – at least of treaty disputes – more acceptable to States, a new type of compromissory clause for universal treaties was devised at the 1973 Convention on International Liability for Damage Caused by Space Objects (→ Space Activities, Liability for), providing for a claims commission which functions as a conciliation commission unless the parties to a concrete dispute agree in advance to accept its proposal as a binding arbitral award. In addition to the compromissory clauses agreed upon between States, there is an increasing number of such clauses concluded between international organizations and States. On the regional level, the 1948 → Bogotá Pact and the 1957 → European Convention for the Peaceful Settlement of Disputes are noteworthy, although neither has been ratified by a considerable number of the more important States in the respective regions. Both instruments provide in the last instance for compulsory adjudication of legal disputes and arbitration of non-legal disputes. The 1964 OAU Protocol, on the other hand, does not abandon the basic principle of voluntary dispute settlement. Finally, the Swiss Draft Convention on a European System for the Peaceful Settlement of Disputes (AVR, Vol. 17 (1976/78) 413), has revived the idea of preserving collective security through compulsory dispute settlement within the highly political framework of the Conference on Security and Cooperation in Europe, but seems to have remained, to date, in the project state (→ Helsinki Conference and Final Act on Security and Cooperation in Europe).

In contrast to the astoundingly high number of general arbitration and conciliation treaties concluded since the beginning of this century, the frequency of their application to actual disputes is just as astoundingly low. The period after World War II witnessed a decreasing total number of arbitrations, noteworthy among which were the → *Attilio Regolo*, the → Lac Lanoux, the → Argentina-Chile Frontier case and the → Beagle Channel case; following the Beagle Channel submission, however, the underlying arbitration treaty was terminated. With regard to disputes submitted under compromissory clauses, the picture is scarcely different. There is a better record with regard to disputes submitted to the World Court, if both general adjudication treaties and declarations under the optional clause are considered. All the afore-mentioned cases were legal in character; the only two non-legal disputes brought before an international judge in this century (→ Free Zones of Upper Savoy and Gex and → Gran Chaco cases) were not submitted on the basis of an already existing obligation to arbitrate. This does not actually substantiate a belief on the part of States that in concrete controversies arbitration might best serve to solve questions by elaborating new rules of international law between the parties. Besides those cases brought before courts and tribunals, 13 are known to have been submitted to conciliation commissions. Nearly all of them involved legal questions, the majority of which were submitted under a general undertaking to conciliate. Eight of these were settled on the basis of the recommendations of the commission. This success may be due to the fact that in all but one case, failing conciliation, compulsory arbitration had been provided for.

It is difficult to explain the divergence between the elaborated systems of arbitration treaties and their practical result. Presumably, some reasons are: (a) The smaller the probability of a dispute arising between two States, the more they were prepared to engage in arbitration; if a dispute already existed, it was often exempted from the agreement; (b) States often respected the other party's unwillingness to submit to arbitration a dispute which it considered important, in order not to risk a termination of the general arbitration commitment as a whole; (c) it is argued that States may be more inclined to settle a dispute by negotiation if it would otherwise be possible for one of the parties to submit it unilaterally to arbitration; (d) politically sensitive disputes are not submitted to arbitration due to their political importance while politically unimportant disputes

are not submitted either because they are too insignificant to pursue further or because they can easily be resolved even without the use of arbitrators.

3. Characteristics of Treaties

(a) Disputes subject to arbitration: justiciable and non-justiciable disputes. Before World War I, arbitration of all types of dispute was not general practice; such all-encompassing recourse to arbitration was mainly practised between Latin American or European States when separated by a considerable distance (for details, see Strupp, op. cit.). Later, such treaties became of greater, though limited, importance; the procedures to be applied mostly varied with the nature of the dispute, whether legal or not. The Geneva General Act belongs to this type of agreement, permitting, however, partial accession excluding non-legal disputes (for details see Habicht, op. cit.). After World War II this system was taken up by the Pact of Bogotá, the European Convention and, as outstanding bilateral examples, by the recent Swiss treaties.

Only legal disputes were declared arbitrable by the large majority of treaties before World War I, following the Franco-British example of 1903. In most cases this implied scarcely more than acceptance of arbitration in principle; in general, these treaties included the self-judging honour and interest clause, rendering impossible any real *obligatorium*, like the declarations under Art. 36 of the ICJ Statute with reservations of the Connally type (→ Connally Reservation). General treaties concluded since World War I are rarely limited to legal disputes.

In a few instances, only disputes as to treaty interpretation and application were declared arbitrable; noteworthy before the two Wars are some Belgian examples and between the Wars some Iranian ones. A similar clause proposed for the → Vienna Convention on the Law of Treaties proved unacceptable for many States.

(b) Definition of legal disputes. Early treaties of the Franco-British type generally used the formulation: "disputes of a legal nature" without further definition. Such a definition, however, was superfluous because, if those treaties did not contain the self-judging honour and interest clause, they generally required a special agreement instituting arbitration. Thus, the decision on arbitrability was left to the parties and not to the tribunal, the parties' special agreement being decisive.

After World War I, the great majority of arbitration treaties followed the enumeration method of Art. 13 (2) of the LoN Covenant. This system is used as well in Art. 36 (2) of the ICJ Statute, except that the four types enumerated are not described explicitly as "kinds of legal disputes", in order to avoid further discussion on the old problem of the exclusion of "political disputes" (cf. Lauterpacht, op. cit., 34–37).

A more subjective approach again was introduced by the Locarno formula (→ Locarno Treaties (1923)), incorporated as well in the Geneva General Act, which declares justiciable: "all disputes of any kind . . . in which the parties are in conflict as to their respective rights". The formula common to treaties concluded by the United States also required legal motivation of a claim; it reads: "All disputes relating to international matters in which the parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise and which are justiciable in their nature by reason of being susceptible of decision by application of the principles of law or equity, shall be submitted to . . .". This formula has the advantage over the former of preventing parties from either dressing up non-legal claims in legal guise or evading judicial settlement by simply basing the unwilling party's defence on non-legal grounds. Only once has the Locarno formula led to actual arbitration (Lac Lanoux); in that instance the parties concluded a special agreement explicitly referring to their different legal positions. Otherwise, the Locarno formula appears not to have reoccurred since World War II.

(c) Methods of dispute settlement. Between the World Wars, in particular, treaties introduced an impressive variety of systems either combining conciliation, arbitration and adjudication successively and alternatively, or providing for just one method, applicable to all disputes or only certain classes of them (cf. Systematic Survey, op. cit., p. 3). The above-mentioned Convention concerning Damages Caused by Space Objects

initiated the development of an interesting new concept combining arbitration and conciliation: a non-permanent conciliation commission which was to function as an arbitral tribunal if the parties to a dispute so agreed in advance.

(d) Extent of obligation. No *obligatorium* exists at all where the relevant instrument contains self-judging clauses such as the honour and interest formula embodied in most pre-war treaties and some concluded since 1919. On the other hand, a "watertight" *obligatorium* exists, at least as to the carrying out of proceedings, if a permanent deciding body may be resorted to upon unilateral application by either party – for instance, the Central American Court of Justice, the World Court, or some of the permanent conciliation commissions established by bilateral treaty (e.g. Switzerland). Yet, a permanent arbitral tribunal has never been instituted under a general arbitration treaty or clause.

Otherwise, there may be an *obligatorium de jure*, while *de facto* the *obligatorium* is accompanied by loopholes owing to an absence of watertight rules for third-party appointment of arbiters and umpires and for third-party settlement of the indispensable special agreement (Art. 53 of the 1907 Hague Convention; cf. the 1950 ICJ Advisory Opinion on the → Interpretation of Peace Treaties with Bulgaria, Hungary and Romania). Even where provision is made for third-party appointment (see Art. 23 of General Act of Geneva which does not prevent evasion in contrast to Art. 21 of the European Convention on the Peaceful Settlement of Disputes), if one party deliberately fails to cooperate, no legal remedy is available.

4. Reservations

(a) Multilateral general arbitration and conciliation treaties sometimes restrict the normally existing right of States to make their ratification or accession subject to reservations. In addition, some of them allow for accession to specified parts and procedures only. Noteworthy are the General Act of Geneva and the European Convention.

(b) Multilateral and bilateral treaties often contain clauses restricting justiciable matters or the third-party settlement commitment itself. The latter applies to the honour and interest clause if it is, as is most often the case, self-judging. A good example of the former may be found in Art. 39 (2) of the General Act of Geneva.

5. Composition of Tribunal or Commission and Procedural Law

(a) The composition of the bench in institutionalized arbitration presents some notable differences from isolated → arbitration. General treaties seldom provide for a head of State or other single arbitrator. Equally rare are mixed commissions composed of an equal number of arbiters appointed by each party with the possible addition of an umpire, failing agreement of the former. Concerning tribunals with an uneven number of members, general arbitration treaties often favour the five-man type, with three arbiters to be appointed jointly and one by each party in order to reduce direct party influence on the bench. Many treaties provide for third-party appointment of arbiters, but often no remedy is available in case of the resignation of an arbiter or his unilateral withdrawal. All treaties deal with questions of procedural law, at least concerning the institution of proceedings, making occasional reference to the Hague Conventions. In no case, however, is exhaustive regulation achieved, nor is such the intent. The law applicable is seldom precisely specified. It is interesting to note that, while several treaties follow the system of Art. 38 of the PCIJ Statute, very few consider the problem of lacunae in international law.

(b) General treaties of conciliation more often provide for third-party appointment of conciliators, if the problem is not avoided by the establishment of a permanent commission. Single conciliators are exceptional (cf. Bogotá Pact). With regard to procedural questions, a high degree of flexibility is generally preserved so as not to endanger adaptability to the needs of a concrete dispute settlement.

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HANS v. MANGOLDT

ARBITRATION CLAUSE IN TREATIES

1. Notion and Types

(a) Arbitration clauses ("compromissory clauses") serve to furnish a method for the settlement of disputes between State parties. Such clauses can be agreed upon and included in international → treaties of any kind. They provide for the settlement by an international arbitral tribunal or by another international institution that can decide with binding force of disputes which may arise between the parties to a treaty (→ Judicial Settlement of Disputes). The arbitration clause may refer the parties to an already established, permanent institution, such as a permanent arbitral tribunal, to an organ of an international organization (→ International Organizations, General Principles), or to the → International Court of Justice. Sometimes a provision of this kind is called a "jurisdictional clause". Alternatively, the parties may be obligated to set up an arbitral tribunal *ad hoc* for each dispute as it arises.

The institutional type of → arbitration (i.e. a type having some existing procedure for arbitration which will be activated once a dispute arises) must not be confused with the isolated or *ad hoc* type. In this latter variety, no obligation rests on the parties to make arrangements concerning an arbitral tribunal before a dispute arises; tribunals are agreed upon and established by the parties for each dispute by way of a → *compromis*.

(b) A further distinction should be made between "special" and "general" arbitration clauses. By a special arbitration clause is meant that all, or all of a certain class of disputes arising out of the treaty containing the clause are submitted to arbitration. General arbitration clauses, on the other hand (mostly occurring in the form of → Arbitration and Conciliation Treaties), relate usually either to all disputes arising between the

parties or to the interpretation or application of the treaties in force between the parties.

(c) Arbitration clauses must be distinguished from provisions in treaties setting forth other means for the peaceful settlement of disputes, such as consultations between the parties (→ Negotiation), → conciliation and mediation, and → fact-finding and inquiry. These methods share the common feature that their results – unlike an arbitral award – are not binding upon the parties to the dispute.

2. Historical Development and Current Tendencies

(a) Arbitration clauses can be found in the treaties entered into between the Greek city-States of antiquity and also in treaties concluded in the Middle Ages. But it was not until the 19th century that more frequent use was made of them in bilateral and multilateral agreements. A considerable increase in the use of arbitration clauses coincided with the fresh impetus that arbitration received following the → Hague Peace Conferences of 1899 and 1907; and another upsurge followed World War I, an era when bilateral arbitration treaties reached their high watermark. Apart from multilateral agreements concluded under the auspices of the → League of Nations, compromissory clauses can be found in many other treaties concerning special matters, such as → treaties of friendship, commerce, and navigation as well as other → commercial treaties, treaties on → diplomatic relations and → consular treaties.

(b) Whereas hardly any general arbitration treaties were concluded after World War II, (but see → General Act for the Pacific Settlement of International Disputes of 1949), a further increase in the use of arbitration clauses did take place. In addition to their traditional fields of application, these clauses are used most frequently in treaties dealing with the following matters: air traffic and transport (→ Air Transport Agreements), transfer of payments, economic cooperation (→ Economic Aid), protection of investment, social security, the common use of → international rivers or natural resources and boundary disputes.

(c) Strict arbitration clauses are to be found in an increasing number of agreements, mainly concluded by the → United Nations, their organs and specialized agencies (→ United Nations, Specialized Agencies). Besides treaties establishing the headquarters of an organization (→ International Organizations, Headquarters), this is especially the case in standard agreements on financial and administrative aid concluded by the → International Bank for Reconstruction and Development with → developing States.

(d) Finally, a number of multilateral conventions contain provisions for the settlement of disputes by arbitral tribunals, combined in part with other methods. With regard to the conventions concluded under the auspices of the United Nations codifying the law of the sea (1958) and the law of diplomatic and consular relations (1961 and 1963), the relevant provisions are contained in optional protocols. Arbitration clauses are also to be found in the main text of the → Vienna Convention on the Law of Treaties as well as in a number of multilateral agreements on various aspects of international communication, the use of space (→ Space and Space Laws) and the → protection and preservation of the marine environment.

3. Content

(a) In treaty clauses the parties are sometimes merely called on to settle their disputes by peaceful means without a neutral body being provided. The content of arbitration clauses may vary considerably. The combining of several methods for the peaceful settlement of disputes either cumulatively or alternatively, is a frequent feature. As a rule, in the latter case, recourse to an (arbitral) tribunal is only permitted after the exhaustion of the other means.

(b) As already mentioned, arbitration clauses can refer to different institutions and can contain differing degrees of obligations. Arbitral tribunals which are to be established *ad hoc* for each case can be said to be institutionalized to only a small degree. There are, however, considerable differences of opinion as to whether these procedures are really compulsory in the sense of existence of a real obligation to submit to arbitration. In this connection it is necessary to determine whether and to what extent the arbitral tribunal can be constituted and can function upon the application of one party alone or only by combined action (see → *pactum de contrahendo*); combined action is necessary where a clause sim-

ply states that a dispute "shall be referred to arbitration". Here the parties are only obliged to cooperate *bona fide* in order to draw up a *compromis* to constitute a particular arbitral tribunal.

More frequently it is agreed that "a dispute shall be submitted to an arbitral tribunal by either party". As a rule, this is followed by provisions concerning the composition of the tribunal, including a substitute procedure for the designation of an arbitrator if one of the parties fails to do so, and concerning the procedural rules. Generally, each party is given the right to appoint at least one arbitrator. These arbitrators, or the parties themselves, then jointly elect a neutral umpire; if there is no agreement on the selection of the umpire, it is frequently provided that he is to be appointed by a neutral body (in most cases today, the President of the International Court of Justice). An arbitration system is not completely compulsory, however, unless it is expressly stipulated in the treaty that a party may seise an arbitral tribunal on the strength of his unilateral application to the tribunal, rather than requiring a *compromis* to seise it (though this system is a rarity, an example can be found in the Austro-German Treaty of Finance and Compensation of November 27, 1961; see → Austro-German Arbitration Award under the Treaty of Finance and Compensation of 1961). In the absence of such provisions, a party will be able to prevent arbitral proceedings from taking place by simply not fulfilling its obligations.

(c) Clauses providing for the establishment of a permanent arbitral tribunal lead to a much more institutionalized system, but this is found far less frequently in State practice. Examples, however, are the Belgian-Netherlands treaty concerning the connection between the Rhine and the Scheldt, the German-French treaty on the settlement of the Saar question, the Convention on Relations between the Three Powers and the Federal Republic of Germany, the Convention on the Settlement of Matters Arising out of the War and Occupation and the → London Agreement on German External Debts (1953). The → mixed claims commissions and the → mixed arbitral tribunals established by the Peace Treaties after World War I and II also played a special role. Firstly, these bodies were concerned with already existing problems that had arisen out of the war and the occupation; and secondly, in numerous proceedings before them, private persons were granted the right to file claims, unlike the practice in traditional inter-State arbitration (→ Standing before International Courts and Tribunals). Finally, mention should be made of certain air transport agreements that permit the unilateral appeal to an organ of an international organization (the Council of the → International Civil Aviation Organization).

(d) Only a few clauses provide for the submission of a dispute directly to the ICJ without any other alternative means of dispute settlement. Instituting proceedings by the unilateral application is only permitted in rare cases. If there is no express agreement to this effect, the ICJ can only be seised by a joint *compromis* of the parties. Also, the statutes of international organization which do not have judicial organs of their own often refer disputes to the ICJ. Since international organizations cannot be parties before the ICJ, it is sometimes provided in treaties which they enter into that the parties are obliged to ask for an advisory opinion of the Court in the event of a dispute and that they agree to recognize it in advance as being binding on them.

(e) Besides these provisions concerning the jurisdiction of an arbitral tribunal, clauses may contain regulations for a number of other questions. Sometimes the parties determine more or less precisely which law is to be applied by the arbitral tribunal. If there is any reference at all to the law applicable, this is most often confined to a general stipulation for the tribunal to decide the case on the basis of international law. An arbitral tribunal is granted even greater discretion when it is to base its decision on "law and equity" (→ Equity in International Law). Recently, parties have sometimes limited the law applicable in their *compromis* to the extent that the decision is only to be made relating to the interpretation of a particular treaty.

(f) Furthermore, procedural questions may be regulated (including the important question of the majority necessary for a decision). More often, however, the arbitral tribunal is authorized to decide on such rules itself; alternatively, reference may be made to an already existing set of rules as, for example, the "arbitration rules" of the → International Law Commission.

(g) Finally, arbitration clauses may contain provisions on → interim measures of protection, reservations concerning exhaustion of local remedies (→ Local Remedies, Exhaustion of) and concerning disputes relating to internal affairs (→ Domestic Jurisdiction), costs and the revision of awards (→ Judicial and Arbitral Decisions: Validity and Nullity).

4. Evaluation

(a) The practice of concluding general arbitration treaties (especially after World War I) has evolved into the practice of frequently inserting arbitration clauses into treaties on particular subjects. These are mainly bilateral agreements. To the extent that arbitration clauses are contained in multilateral agreements (or protocols thereto), their compulsory character is partly limited by the fact that they may be optional or open to reservations. The Communist States have generally included such reservations, or have at least excluded the possibility of unilateral application to a court. These States have very rarely agreed to arbitration in their bilateral agreements, with the exception of a few treaties (mainly concluded by Yugoslavia) on air transport, transfrontier use of resources and social security.

(b) Compared to the large number of arbitration clauses in treaties, only very few disputes have actually been settled through arbitration procedures (leaving aside the special case of the tribunals set up for questions of war and occupation after the two World Wars). This does not, however, mean that such clauses are of no value. They can fulfil an important function by motivating parties, who wish to avoid their coming into effect, towards settling their disputes by other peaceful means. This view is borne out by the practice of States which continue to insert arbitration clauses in treaties while making little use of them.

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ARBITRATION, COMMERCIAL *see* Commercial Arbitration

AUSTRO-GERMAN PROPERTY TREATY (1957), ARBITRAL TRIBUNAL

1. Historical Background

In Art. 22 of the → Austrian State Treaty (1955), Austria recognized the right of the Allied Powers occupying Austria to dispose of all German assets in Austria for reparation purposes (→ Reparations after World War II) in accordance with the → Potsdam Agreements on Germany (1945). France, the United Kingdom and the United States thereupon transferred these assets to the Republic of Austria free of charge, the Soviet Union against a payment by Austria of $ 152 million and 6.5 million tons of oil. Except in the case of educational, cultural, charitable and religious property, Austria undertook not to return any of the former German assets to the ownership of German legal persons or, where the value of the assets exceeded 260,000 schillings, to the ownership of German natural persons. In Art.

23 of the State Treaty, Austria, on its own behalf and on behalf of Austrian nationals, waived all claims against Germany and German nationals which had arisen between March 13, 1938 and May 8, 1945, "without prejudice to the validity of settlements already reached". This waiver established a link with the → London Agreement on German External Debts, to which Austria adhered only after the coming into force of the Property Treaty.

In the Bonn Convention on the Settlement of Matters Arising out of the War and the Occupation (1954) (→ Bonn and Paris Agreements on Germany (1952 and 1954)), the Federal Republic of Germany had promised to abide by the provisions of the future Austrian State Treaty concerning German assets in Austria and to ensure the compensation of their former owners. The clause preventing Austria from retransferring most of these assets to their former owners was inserted into the Austrian State Treaty only after the Federal Republic of Germany had signed this "blank cheque". The Federal Republic of Germany had previously expected a large-scale retransfer of German property to German ownership by Austria. In view of the payments Austria had to make to obtain the transfer of the German assets held by the Soviet Union, Austria was unwilling to release even those German assets the retransfer of which was not prohibited by the State Treaty.

2. Austro-German Property Treaty

The ensuing tension was relieved by the Austro-German Property Treaty (1957). In this Treaty Austria agreed to retransfer to German natural persons their former property in Austria up to a maximum net value of 260,000 schillings in each case. The Republic of Austria retained the remainder of the German assets, but accepted the liability for any debts connected with particular items of such property. The Federal Republic of Germany paid to Austria DM 22.5 million and authorized Austrian creditors to proceed with their hitherto blocked claims against German private debtors which had arisen between 1938 and 1945.

3. Procedure for the Settlement of Disputes

The Treaty established a bilateral Permanent Commission to discuss problems arising in connection with the Treaty and to make recommendations to the two Governments regarding these problems.

Any claim based on the provisions of the Treaty was first submitted to the Conciliation Committee of the Permanent Commission, which consisted of two Austrian and two German members (→ Conciliation and Mediation). This Committee would then hear both parties. Only if the Committee failed to present a unanimous recommendation for an amicable settlement, or if such a recommendation was not complied with within two months, could a person then appeal to the domestic courts.

In the proceedings concerning such appeals the domestic court concerned was obliged to obtain, either on its own motion or at the request of either party, an interpretation of the relevant treaty rules by the Arbitral Tribunal set up under the Treaty. For this purpose the court would submit the files of the proceedings, including those of the proceedings before the Conciliation Committee, to the Arbitral Tribunal. The parties to the domestic proceedings and their representatives were given the right to plead their cases before the Arbitral Tribunal.

The Tribunal itself consisted of two judges from each country. All of its decisions were made unanimously, but in the case of a disagreement the two Governments would previously have had to have agreed upon a neutral chairman as fifth arbitrator. The interpretation of the Treaty given by the Tribunal in an Opinion (hereinafter: "Op.") then bound the domestic courts at all stages.

If the enforcement of the final decision of the domestic court reached after such proceedings would have caused undue hardship, the judgment debtor could appeal directly to the Arbitral Tribunal for an equitable reduction of his debt (→ Equity in International Law).

4. Summary of Decisions of the Arbitral Tribunal

The Arbitral Tribunal based its binding opinions on international law, principles of law common to both States and – under the hardship clause – on equitable considerations. The Tribunal granted equitable relief even to a party who had acted illegally under difficult post-war conditions (Op. 76). It also disregarded the plea that the rules of the Treaty were incompatible with obli-

gations resulting from other treaties, such as the → London Agreement on German External Debts (Op. 25). The Tribunal similarly disregarded pleas that certain claims based on the Treaty were incompatible with the constitutions of the two States (Ops. 25 and 67) (→ International Law in Municipal Law: Treaties). The Tribunal also held that the Federal Republic of Germany had reserved the benefits resulting from the Property Treaty only to German citizens whose interests were represented by the Federal Republic of Germany (Op. 96). The nationality of a corporation was held to depend exclusively on its domicile. Thus, a 100% German-owned Swiss corporation was entitled to the return of its Austrian assets in spite of the fact that the Occupying Power concerned, relying on the control test, had seized these assets as German property (Op. 1) (→ National Legal Persons in International Law).

The Arbitral Tribunal held that measures of nationalization or confiscation adopted in the German Democratic Republic could not transfer valid titles to assets in the Federal Republic of Germany (Ops. 28 and 50) or in Austria (Op. 84) (→ Expropriation). In assessing the value of claims, "official prices" fixed by the authorities under war or post-war emergency conditions were disregarded (Ops. 18 and 76), as were the valuations of services shown in the books of firms belonging to the same group (Op. 33). In Op. 37 the Tribunal determined the significance of the use of the word "karitativ" (charitable) in the Property Treaty by reference to the appearance of the same word in Art. 22 of the Austrian State Treaty and by a comparison of the significance of this notion in all the official languages of the State Treaty (→ Interpretation in International Law).

5. Significance of the Tribunal

Politically, the Property Treaty and the dispute settlement procedures provided therein put an end to the tension between the two countries.

The Property Treaty left in abeyance some further Austro-German financial problems, such as Austrian war-time claims against German public debtors. These matters were dealt with in the Treaty of Finance and Compensation of 1961. An Austrian attempt to challenge the definite character of this solution failed in the → Austro-German Arbitration Award under the Treaty of Finance and Compensation of 1961.

From a technical point of view, the settlement procedure proved a success. The system of the insertion of preliminary rulings by the Arbitral Tribunal into domestic proceedings was similar to that of Art. 177 of the EEC Treaty; and its operation was more or less identical to the latter. The obligation to obtain such rulings was occasionally disregarded, yet, when sought, the binding opinions were strictly complied with by all domestic tribunals. The insertion of binding opinions into the final judgments of domestic courts certainly speeded up the settlement of disputes and improved the compliance with the views held by international courts – as compared with the results obtained by "classical" arbitral tribunals (→ International Law and Municipal Law; → International Law in Municipal Law: Law and Decisions of International Organizations and Courts).

Of the roughly 1350 cases submitted to the Conciliation Committee, only 107 reached the Arbitral Tribunal, each being identified by consecutive numbers. Of these, 69 were the subjects of binding opinions, the others being disposed of through administrative decisions, mostly taking formal note of out-of-court settlements. The bulk of the cases was disposed of between 1961 and 1966, the last binding opinion being rendered in 1974. The organs established by the Treaty were dissolved by an Austrian-German Protocol of February 22, 1973, which became effective on June 7, 1976.

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IGNAZ SEIDL-HOHENVELDERN

BRYAN TREATIES (1913/1914)

The "Bryan Treaties" is the name given to the series of bilateral agreements negotiated by United States Secretary of State William Jennings Bryan and concluded between the United States and various other countries shortly before and at the outbreak of World War I to settle disputes that could not be adjusted by arbitration. The treaties were intended to extend, by the appointment of commissions of inquiry (→ Mixed Commissions; → Fact-Finding and Inquiry), the method for the → peaceful settlement of disputes worked out at the Hague Peace Conference of 1907 (→ Hague Peace Conferences of 1899 and 1907) after the experience of the → Dogger Bank incident. They were also intended to supplement existing bilateral agreements which concerned only arbitrable disputes (→ Arbitration and Conciliation Treaties). The Bryan Treaties introduced the practice of having situations which are threats to peace investigated by international commissions, thus providing at least a "cooling-off" period. In American treaty collections they are called "Treaties for the Advancement of Peace".

Bryan's scheme was first put forth as a proposal for supplementing the Model General Arbitration Agreement which, at the instigation of Richard Bartholdt (a member of the United States Congress and the Interparliamentary Council), was debated at the 13th session of the → Interparliamentary Union in Brussels in 1905. It first found formal expression in a draft for bilateral agreements which Bryan presented during the 14th session of the Interparliamentary Union in London in 1906. The United States' first attempt to provide procedures for the impartial settlement of non-arbitrable disputes is to be seen in the two arbitration treaties with France and Great Britain which were signed on June 3, 1911, but never ratified (→ Taft Arbitration Treaties). After Bryan became Secretary of State under President Woodrow Wilson (1913 to 1915), he presented his proposal to refer disputes which could not be settled by diplomacy or arbitration to international commissions for "investigation and report" in a memorandum dated April 1913 (the "Bryan Peace Plan"), which was delivered to all the diplomatic representatives accredited to the United States Government in Washington.

The first in the series of Bryan Treaties was the treaty between the United States and El Salvador concluded on August 7, 1913. This provided the model for all subsequent treaties. Between September 1913 and October 1914 similar treaties were signed by the United States and 27 other countries, but in only 22 cases were ratifications exchanged. Germany also expressed its interest in such an arrangement, but a treaty was never actually signed. Of the greatest political importance were the treaties with France, signed on September 15, 1914 (ratified on January 22, 1915: the so-called Jusserand Treaty), with Great Britain, signed on September 15, 1914 (ratified on November 10, 1914) and with Russia, signed on October 1, 1914 (ratified on March 22, 1915). In the years 1928 to 1930 the United States concluded similar agreements (known as Treaties of Conciliation) with several other countries. Whilst some of the earlier Bryan Treaties were no longer in force in 1930, 19 such bilateral treaties still existed at that time and most of them are still in force today.

The contents of the various Bryan Treaties are uniform in all major respects. They refer all disputes which cannot be settled by arbitration or diplomatic means for investigation by a previously established international commission. Only after the commission has submitted its – non-binding – report on the outcome of its investigations are the contracting parties then free to act independently and, if they so desire, to begin hostilities (but see the current rules on the → use of force). Art. 1 of the British-American treaty, for example, reads as follows: "The High Contracting Parties agree that all disputes between them, of every nature whatsoever, other than disputes the settlement of which is provided for and in fact

achieved under existing agreements between the High Contracting Parties, shall, when diplomatic methods of adjustment have failed, be referred for investigation and report to a permanent International Commission, to be constituted in the manner prescribed in the next succeeding article; and they agree not to declare war or begin hostilities during such investigation and before the report is submitted" (Martens, NRG3, Vol. 9, p. 110).

The commissions set up under the Bryan Treaties are institutions which were established as permanent joint organs of the contracting parties and consist of five members selected as follows: each party chooses two members (one from its own country and one from a third country) and the fifth is chosen by common agreement. A commission becomes operative when called upon by one of the parties, although according to some of the agreements it can also independently offer its services. As regards procedure, the commissions are guided by the provisions on commissions of inquiry contained in Arts. 9 to 36 of the Hague Convention on the Pacific Settlement of Disputes of October 18, 1907; the work of a tribunal should be completed within one year from the date on which it took jurisdiction.

The primary function of a commission is to investigate and report to the contracting parties, for which purpose the parties are required to furnish it with all the assistance necessary. In some cases, however, a commission may also indicate provisional measures to protect the rights of each party (→ Interim Measures of Protection). Whilst the treaty only speaks of a function to "report", it is generally accepted that a commission should not restrict itself merely to the determining of the facts in dispute, but should also advise on ways for the peaceful settlement of a dispute. The model for this approach is Art. 3 of the Taft Treaties, which empowered its commissions "to include in its report such recommendations and conclusions as may be appropriate".

The significance of the Bryan Treaties does not lie merely in their purpose – "to advance the cause of general peace" (preamble) – but also in the impetus they gave to the use of commissions of inquiry in situations where other methods of settling or deciding disputes had failed. This system was first instituted in the inter-American field in a treaty signed by Argentina, Brazil and Chile in 1915, and thereafter (though in a more limited form than in the Bryan Treaties) in a convention between the United States and the Central American Republics concluded in 1923, in the Gondra Treaty of 1923, in the General Convention of Inter-American Conciliation of 1929, in the General Treaty of Inter-American Arbitration of 1929, in the → Saavedra Lamas Treaty of 1933, and in the → Bogotá Pact of 1948. It is also referred to in the → General Act for the Pacific Settlement of International Disputes (1928 and 1949), in the Covenant of the League of Nations (Art. 15) and in the Charter of the United Nations (Arts. 33 and 36).

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BURDEN OF PROOF *see* Evidence before International Courts and Tribunals

CENTRAL AMERICAN COURT OF JUSTICE

1. Background

That the first permanent international tribunal should have been established in Central America is in part attributable to the fact that five Central

American republics – Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua – had attempted, on numerous occasions in their modern history, to form a confederation. (They had in fact been a single administrative unit while under Spanish rule). Moreover, their history has been characterized by a consistent record of revolution and internal strife; indeed, it was following hostilities between Guatemala, El Salvador and Honduras in 1906 that United States President T. Roosevelt and Mexican President Porfirio Diaz managed to bring about peace negotiations which culminated in the Washington Peace Conference of 1907. The deliberations there and the optimistic background against which they were set were probably also influenced to an extent by the Second Peace Conference at the Hague (→ Hague Peace Conferences of 1899 and 1907), which had met but a few weeks before the Washington Conference began. Nine international instruments were signed in Washington, on December 20, 1907, the basic political one being the General Treaty of Peace and Amity (Martens NRG 3, Vol. 3, p. 94). By Art. I the five republics agreed always to observe "the most complete harmony, and decide every difference or difficulty that may arise amongst them, of whatsoever nature it may be, by means of the Central American Court of Justice". One of the accompanying instruments was a Convention for the Establishment of a Central American Court of Justice (Martens NRG 3, Vol. 3, p. 105). This Convention was ratified in 1908, at which time the Court came into existence.

2. *Composition, Jurisdiction and Law Applicable*

The Court was intended to guarantee the rights of the various republics, to maintain peace and harmony in their relations, and to prevent recourse to the use of force. It had its seat in Costa Rica, first in Cartago and later in San José. The five judges, one from each republic, were elected by their respective legislative bodies (Art. VII) "from among the jurists who possess the qualifications which the laws of each country prescribe for the exercise of high judicial office, and who enjoy the highest consideration, both because of their moral character and their professional ability" (Art. VI). They were appointed for a term of five years (Art. VIII) and, once appointed, were to "take oath or make affirmation prescribed by law before the authority that may have appointed them" (Art. IX). When outside their own country, they were to enjoy the "privileges and immunities of Diplomatic Agents" and at home the "personal immunity which the respective laws grant to the magistrates of the Supreme Court of Justice" (Art. X). Their salaries were stipulated in the Convention and were to be paid by the Treasury of the Court from national contributions. Since the Court was to represent "the national conscience of Central America", there was no question of a judge being barred from hearing a case in which the republic which had appointed him was concerned (Art. XIII).

The jurisdiction of the Court was extremely broad and allowed States, individuals and domestic institutions to appear as parties. The republics bound themselves to submit to the Court all inter-State disputes "of whatsoever nature" which diplomatic procedures had left unsettled (Art. I). The Court could be seised of a case by unilateral application. Further, in what amounted to a revolutionary development as far as the judicial settlement of disputes was concerned, individuals (→ Individuals in International Law) could bring complaints against a Central American republic (other than their own) for "the violation of treaties or conventions and other cases of an international character"; the consent of the individual's own government to the bringing of the action was not necessary, but → local remedies had to have been exhausted or a → denial of justice be shown (Art. II). The Court had, in addition, a compromissory jurisdiction over disputes between one Central American State and a third State or individuals (Arts. III and IV), and by an annexed article, which only Costa Rica did not ratify, the Court was empowered to settle constitutional conflicts between the legislative, executive and judicial branches of government of a contracting State "when as a matter of fact the judicial decisions and resolutions of the National Congress are not respected". The Court was competent to determine its own jurisdiction (Art. XXII) and, once seised, to determine → interim measures of protection to preserve the *status quo* between the parties pending a final decision (Art. XVIII).

As far as the applicable law was concerned, on

questions of fact the Court was to be "governed by its free judgment" and on points of law "by the principles of International Law" (Art. XXI). The Court's decisions were to be final (Art. XV), and in Article XXV the republics bound themselves "to submit to said judgments" and agreed "to lend all moral support that may be necessary in order that they may be properly fulfilled".

3. Practice of the Court

The Court was in existence from 1908 until 1918, and of the ten cases which came before it during that period, five involved individuals though not one of these was successful. Of the others, the Court itself took the initiative on three occasions. It rendered an affirmative judgment in just two cases. A chronological summary of the ten cases follows (for sources see Hudson, op. cit.):

(a) Honduras v. Guatemala and El Salvador. The Court took the initiative in this case when events pointed to an invasion of Honduras. Honduras later lodged a complaint against Guatemala and El Salvador, claiming that they had violated Honduran sovereignty by protecting and encouraging a revolutionary movement there. The Court issued two interlocutory decrees aimed at maintaining the *status quo*. Although the final decision "acquitted" the two States, its legal validity in the light of Art. XXIV is questionable since it was signed by only three judges (Art. XXIV provides for signing by all the judges). The Court's intervention is credited in some quarters with having prevented a Central American war.

(b) Diaz v. Guatemala. The plaintiff, a Nicaraguan lawyer, alleged false arrest, imprisonment and expulsion and claimed an indemnity. The Court unanimously held the claim to be inadmissible for non-exhaustion of local remedies.

(c) The 1910 Revolution in Nicaragua. Again on its own initiative, the Court offered to mediate in the Estrada Revolution but all its proposals were declined. (No judicial proceeding was ever actually pending.)

(d) Cerda v. Costa Rica. Cerda, a Nicaraguan living in Costa Rica, alleged a denial of the equal rights guaranteed under the General Treaty of 1907 and under Costa Rica's constitution. The major issue, however, became the lawfulness of the Court's composition, with the plaintiff claiming that the appointment of the new Nicaraguan judge, Gutiérrez Navas, was improper. The Court held that only governments might "raise questions as to the legality of its organization" and quickly disposed of the plaintiff's complaint, finding that he had neither proved his Nicaraguan nationality nor the deprivation of rights which he alleged; nor had he shown that he had exhausted local remedies.

(e) The 1912 Revolution in Nicaragua. Although the rebels were in favour of the Court's mediation initiative, the Nicaraguan Government was not, and the Court's efforts failed. (No judicial proceeding was ever pending.)

(f) Molina Larios v. Honduras. The plaintiff, a Nicaraguan national, instituted a claim on the grounds of imprisonment and illegal search in, and expulsion from, Honduras. Although he alleged that he had been unable to re-enter Honduras and had thus been unable to exhaust local remedies, the Court held that his claim failed on this ground.

(g) Bermúdez y Núñez v. Costa Rica. In this case a national of Nicaragua alleged expulsion from Costa Rica and the Costa Rican Government waived the local remedies requirement. However, the Court found that the expulsion was lawful. Residents in a country were obliged to respect that country's neutrality and the plaintiff's claim itself showed that he had been involved in a revolution against the Nicaraguan Government.

(h) Election of Gonzáles Flores as President of Costa Rica. This was a protest by five individuals (one from each republic) asking the Court to declare the election of Gonzáles Flores by the Costa Rican Congress to the Presidency to be void. The Court unanimously held the protest to be inadmissible in that it sought an intervention in the internal affairs of Costa Rica. Indeed, Costa Rica had not even ratified the article annexed to the Convention establishing the Court which gave the Court jurisdiction over disputes between the various branches of government.

(i) → Costa Rica v. Nicaragua. Costa Rica claimed that the Bryan-Chamorro Treaty, concluded between Nicaragua and the United States and relating, *inter alia*, to a possible future interoceanic canal, violated Costa Rica's rights under the Cañas-Jerez Boundary Treaty of 1858 as in-

terpreted by President Cleveland's Award of 1888 and under Art. IX of the General Treaty of 1907. Costa Rica asked the Court to declare that Nicaragua lacked the capacity to enter into the Bryan-Chamorro Treaty which was therefore void (→ Treaties, Conflicts Between). In an interlocutory decree, the Court directed the parties to maintain the *status quo ante*, and in its final judgment the Court held that Nicaragua had indeed violated Costa Rica's rights under the above-mentioned instruments but refused to make a declaration on the validity of the Bryan-Chamorro Treaty.

(j) El Salvador v. Nicaragua. El Salvador alleged that the Bryan-Chamorro Treaty which, *inter alia*, provided for the establishment by the United States of a naval base in the Gulf of Fonseca would endanger her national security and would violate the rights of condominium in the Gulf which she enjoyed together with Honduras and Nicaragua; further, that the provision in the Treaty leasing two islands violated certain "primordial interests of El Salvador as a Central American State". In addition, El Salvador alleged that the Treaty was in breach of Arts. II and IX of the General Treaty of 1907. The Court directed the parties to maintain the *status quo ante* and, in its judgment, found for El Salvador, sustaining most of her claims and stating that the Government of Nicaragua was under an obligation – availing itself of all possible means provided by international law – to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Convention, but it refused to declare that Treaty void.

Nicaragua refused to accept the final two judgments of the Court, and gave notice of her intention to terminate the Convention establishing the Court. In fact, under Art. XXVII no such notice was required, since the Convention was due to expire ten years after the date of the last ratification, and this occurred on March 12, 1918. Efforts to revive the Court failed.

4. Conclusion

The Central American Court of Justice was certainly an innovative development in the field of the → judicial settlement of disputes. However, the method of election of judges, the oath they took, and the way in which they were paid were hardly conducive to the creation of an independent panel of judges. Furthermore, the privileges and immunities of the judges were never made sufficiently clear, and the Court's jurisdiction, particularly with regard to the annexed article, was inadvisably broad. Since not one of the claims involving individuals was successful, it was impossible for the Court to develop any real case-law in that area. In addition, the Court had no real sanctions mechanism to enforce its judgments, a problem which still confronts international courts today (→ International Courts and Tribunals). It may be that the Court was simply attempting too much; it seems to have been regarded as more than a mere judicial tribunal, a feeling perhaps reflected by the three instances when the Court itself took the initiative in what were difficult political situations. Some commentators have maintained that Central America was not ready for a court of this kind and that the international political climate was also not favourable. Furthermore, the United States, co-responsible for bringing the republics together in 1907 and co-signatory of the Bryan-Chamorro Treaty, cannot escape all responsibility for the Court's demise.

Nevertheless, one must also bear in mind that the Court was the first permanent international tribunal, predating the → Permanent Court of International Justice by some 14 years, and that it afforded individuals the possibility of bringing actions directly against foreign States – something which strikes one as novel even today. Although the life of the Court was only of ten years duration, those ten years mark an important step in the development of the international judicial settlement of disputes.

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COMMISSIONS *see* Adminstrative Tribunals, Boards and Commissions in International Organizations; Mixed Claims Commissions; Mixed Commissions

COMPROMIS

1. Notion

Compromis as a legal institution has been incorporated into international law from municipal law. It is an agreement between two or more States with a view to submitting an existing dispute to the jurisdiction of an arbitrator, an arbitral tribunal or an international court. In the absence of a general compulsory international jurisdiction and since so may States have failed to accept the jurisdiction of the → International Court of Justice, the settlement of international disputes still depends on the mutual consent of States. Thus, *compromis* is still of great importance today.

Compromis exists in two forms: on the one hand there is the "*ad hoc compromis*" (or "*compromis* proper" or "special agreement", which term is also used for an implementing *compromis*, *infra*), on the basis of which the parties submit a particular dispute which has arisen between them to an *ad hoc* or institutionalized arbitral tribunal or to an international court. On the other hand there is what is called the "general", "abstract" or "anticipated" *compromis* according to which States submit all or definite classes of disputes which may arise between them to an arbitral institution, a court or to an *ad hoc* arbitral body by concluding a general arbitration treaty or by including an arbitration clause in a treaty (→ Arbitration and Conciliation Treaties; → Arbitration Clause in Treaties; → Arbitration). In the event of an actual dispute a further agreement is then normally required between the parties concerning the details of the procedure to be adopted and the issues that the tribunal is to deal with. Thus, this type of agreement contains an obligation of the parties to negotiate in good faith and to try to conclude an agreement (*pactum de contrahendo, pactum de negotiando*). In this case the basic arbitration agreement is contained in the arbitration treaty or clause. In order to implement this agreement a further *compromis* is needed known as an "implementing *compromis*", a "special agreement" or a "protocol of submission". If one considers that it is only the *compromis* that forms the basis of the arbitration, an arbitration treaty or clause would be nothing more than a preliminary agreement or declaration of intention – a view which, indeed, has been advocated in the past. Only in the case of an agreement upon a general clause like the old "honour" or "interest" clause, which left it to the parties themselves to decide upon the arbitrability of a dispute, is it possible to question the obligatory effect of the arbitration treaty or clause. Such general clauses are no longer usual; States instead make specific reservations such as, for example, the exception of disputes concerning third States, the exception of disputes having arisen before the conclusion of the treaty and the reservation concerning → domestic jurisdiction. The last reservation may have the same effect as the old general clauses if adopted in the form of an "automatic" reservation, such as the → Connally Reservation.

2. Conclusion and Form of compromis

The "*ad hoc*" or "proper" *compromis* is a treaty, and as such is subject to the general law of → treaties, including the rules of nullity (→ Treaties, Validity; → Judicial and Arbitral Decisions: Validity and Nullity) so that, for example, the nullity of the *compromis* cannot be invoked after the award has been given. This type of *compromis* normally requires ratification, whereas the implementing *compromis* does not, because in the latter case, the obligation of the States has already been contracted in the arbitration treaty or clause as regards the necessary formalities. There are no special requirements as to the form of a *compromis* as is true for treaties in general, but normally they are in writing.

A special type of *compromis* may be constituted by the principle of *forum prorogatum*. Here the seising of a – necessarily institutional – tribunal is

accompanied by the invitation to the defendant party to submit to the jurisdiction of the tribunal concerned for the particular dispute itself and the defendant's acquiescence in this process (see Rule 38 (5) of the 1978 ICJ Rules of Court).

3. Contents

The necessary contents of a *compromis* are determined by its character as an *ad hoc* or an implementing *compromis* and by whether proceedings are to be held before an *ad hoc* or institutional tribunal. However, it is always essential that the *compromis* clearly define the subject of the dispute. The formulation of the issues in dispute is of utmost importance because it determines the extent of the tribunal's jurisdiction (*extra compromissum arbiter nihil facere potest*) and, further, it may already suggest an answer to the question.

The *ad hoc compromis* creating a tribunal must lay down the manner of appointing arbitrators. It is also desirable that it should contain rules concerning the applicable law, which may be defined precisely or indicated simply by a general reference to international law, or it may be agreed that the tribunal should decide the dispute *ex aequo et bono* (→ Equity in International Law). Further, there should be agreement as to where the tribunal will sit, its rules of procedure, the language to be used in the proceedings, its time-limits and financial provisions as well as all other points which appear important to the parties. It is necessary to deal specifically with these matters in this type of *compromis* because the *ad hoc compromis* provides the sole basis for the tribunal's form, jurisdiction and decision.

However, the freedom of the parties to set up rules for the proceedings is limited by the fact that those rules must not overstep the limits of what is compatible with the nature of arbitration or adjudication (→ Judicial Settlement of Disputes).

Instead of detailed rules, it is possible for the parties to confine themselves to referring to already existing rules of procedure or to model rules such as those contained in the Hague Conventions of 1899 and 1907 (→ Hague Peace Conferences of 1899 and 1907) or the Model Rules on Arbitration of 1958 as elaborated by the → International Law Commission. Model rules are intended to remedy or obviate the possibilites of delay or sabotage.

Where a dispute is to be settled by an institutional tribunal, there are fewer requirements concerning the procedural contents of the *compromis* and the parties' freedom in this respect is also narrower, since the statute and rules of the tribunal already exist. Decision is only required if there are lacunae in the existing texts or when there is a conflict with mandatory regulations of the statute or the rules of the tribunal. Since the tribunal cannot violate its own rules and must also respect the terms of the *compromis*, a conflict in these texts would force it to seek a change in the terms of the *compromis* or to refuse to give a decision.

The contents of an implementing *compromis* or protocol of submission depends on whether the arbitration treaty or clause refers to an institutional arbitral tribunal or court, or provides for the setting up of an *ad hoc* tribunal. Depending to what degree the arbitration treaty or clause regulates these essential questions, what has been said above concerning the *ad hoc compromis* applies equally to the implementing *compromis*.

4. Refusal to Enter into compromis

If a party, in disregard of its obligations, refuses to cooperate *bona fide* in the setting up of the tribunal or in establishing the implementing *compromis*, and if no remedies are provided for in such a situation, the judicial settlement of the dispute is itself "compromised". Although the parties are under an obligation to execute an *ad hoc compromis* or to give effect to an implementing *compromis* according to the principle of → *pacta sunt servanda*, it in fact depends on the good will to facilitate the judicial settlement of the dispute. Since the remedies for the breach of a treaty in international law are unsatisfactory (→ International Obligations, Means to Secure Performance), solutions have been sought to secure the implementation of a *compromis* independent of the cooperation of an unwilling party. The proposal that the tribunal itself shall write the *compromis* is only practicable where the arbitral agreement contemplates an institutional tribunal; on the other hand if a party refuses to set up an implementing *compromis*, it will surely refuse to cooperate in designating the arbitrators. There are serious problems connected with an increase of the tribunal's power at the expense of the parties', since this conflicts with the nature of

arbitration or adjudication based on *compromis*, the distinguishing feature of which is the parties' mutual consent to arbitrate. This is true even if the arbitration treaty or clause is sufficiently clear about the designation of the arbitrators, because the cooperation of the parties is rightly regarded as indispensable.

The situation is different when the parties have provided for the eventuality of difficulties arising in the implementation of the contracted obligations. They may do this in one of two ways. They may stipulate in the agreement that a third body, an international organization or institution shall make the necessary decisions instead of the parties. An example of the use of this method is found in Art. 43 of the → Bogotá Pact (1948), which provides that after the expiration of a certain time-limit the *compromis* shall be drawn up by the ICJ. Alternatively, they may permit a dispute to be unilaterally submitted to the ICJ or to an arbitral tribunal, once the relevant deadline has expired. Examples of this approach are provided in Art. 15 of the Locarno Pact, Annex C (→ Locarno Treaties (1925)) and Art. 19 of the → General Act for the Pacific Settlement of International Disputes (1928 and 1949) as well as in Art. 25 of the → European Convention for the Peaceful Settlement of Disputes. In both these cases it is rather difficult to speak any more of a "*compromis*" in the sense defined above, because the essential element, the consensual agreement of the parties, is lacking.

5. Significance

In spite of the manifest weakness inherent in a system of submitting disputes to an arbitral tribunal or to a court by means of a *compromis*, this means of access to a tribunal or court still has considerable significance. Eleven of the 29 cases dealt with by the PCIJ and six of the 30 cases which have so far come before the ICJ came to the Court by means of a *compromis*.

The attempt to overcome the dependance upon the agreement of the parties to the dispute by conferring the power to draft the *compromis* upon a third body or by providing for the unilateral seising of a tribunal after the expiration of a certain time-limit is similar to compulsory jurisdiction. For this reason parties may reject these alternatives.

In effect, the substitution of the parties' participation in the implementation of the *compromis* is only acceptable where the parties have expressed their prior agreement to such a procedure; in the absence of such an agreement, a weakening of the whole concept of arbitration would result (see → Commercial Arbitration).

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COMPROMISSORY CLAUSES *see* Arbitration Clause in Treaties

CONCILIATION AND MEDIATION

1. Definition, General Aspects

No clear distinction can be drawn between the terms conciliation and mediation; they are often used interchangeably. Both describe the intervention of a third party in disputes between States with the aim of settling them or contributing to their settlement. The third party may be either a State or an international organization, or a private person. When third States intervene, this is an example of → good offices in the widest sense. For the purposes of this article the activities of States will be referred to as "mediation", those of private persons as "conciliation".

A third party's proposals may be limited to the procedure to be followed or they may suggest a

substantive solution to the conflict. The purpose of such activities is to narrow the gap between different points of view and find an acceptable compromise. Both concepts thus go beyond → fact-finding and inquiry, where the aim is simply the impartial clarification of a disputed set of facts.

In contrast to an arbitral award (→ Arbitration), the proposals do not bind the parties but require acceptance by them. They are thus in the nature of recommendations.

The proceedings can be either voluntary or compulsory. In the former case the acceptance of both parties is necessary. In the latter each party has the right unilaterally to appeal to a competent body and thus set its proceedings in motion; the other party is then under an obligation to accept such a move. A precondition to this procedure is that the two parties have previously agreed upon a specific permanent body. This is only possible on the basis of existing special or general treaty provisions.

The third party is not restricted to basing its proposals on existing law, but can also make proposals *ex aequo et bono* (→ Equity in International Law). This makes conciliation and mediation particularly suited to non-justiciable disputes and disputes which are of a delicate political nature (these may also be justiciable disputes). If treaties specify that the third party should be bound by existing law (cf. for example Art. 28 of the → General Act for the Pacific Settlement of International Disputes and Art. 26 of the → European Convention for the Peaceful Settlement of Disputes), the purpose of the system is defeated and the solution of the conflict may even be hindered.

2. Sources

While States can offer their → good offices unilaterally, the services of individuals can be resorted to only on the basis of a formal agreement. Such an agreement will either cover a specific case or be general and abstract so as to provide for an indefinite number of disputes that may arise in the future.

Both conciliation and mediation are referred to along with other means of settling disputes in:

The → United Nations Charter, Chapter VI (Arts. 33 to 38);

The → Bogotá Pact of April 30, 1948.

Only mediation (and inquiry and arbitration) is referred to in the Hague Convention for the Peaceful Settlement of International Disputes of October 18, 1907 (→ Hague Peace Conferences of 1899 and 1907).

References to conciliation (and arbitration and recourse to → international courts and tribunals) are to be found in:

The General Act for the Pacific Settlement of International Disputes of September 26, 1928, revised on April 28, 1949;

The European Convention for the Peaceful Settlement of Disputes of April 29, 1957.

In addition, there are several multilateral conventions on specific topics and a large number of bilateral treaties.

3. Mediation

One or more States, or an international organization within its sphere of competence, can either act on its own initiative or answer a request from one or both parties. The consent of the parties is not necessary initially but must be obtained before effective assistance can be rendered.

There are no rules of procedure in this area. The process consists of negotiations in the presence of and with the participation of the mediator, sometimes even under his direction.

Mediation has the great advantage that the mediator, in addition to proposing compromises, can offer other services, e.g. assistance in carrying out the compromise agreed upon, financial support and guaranteeing the execution and continued observance of the solution arrived at. One example is the mediation of the World Bank (→ International Bank for Reconstruction and Development) in the dispute between India and Pakistan between 1951 and 1961 on the division of the waters of the Indus basin (→ Indus Water Dispute); the dispute could not have been settled without the financial aid offered by the Bank. When States act as mediators, they can also bring their own influence and power to bear. This applies especially in the case of more powerful States. Finally, States have more and better technical facilities at their disposal than private persons. On the negative side, the mediator may be chiefly concerned with promoting its own interests

and may use its influence to the detriment of the other parties.

History offers various examples of mediation. Such actions were usually successful when the State intervening was a Great Power (→ Great Powers). Particular mention should be made of the role played by Germany at the Berlin Congress of 1878, by the Soviet Union in the Indo-Pakistan conflict of 1966 and by the United States in the peace talks between Egypt and Israel in 1978. On the other hand, the attempts of neutral States to mediate during the two World Wars met with failure, partly because they were not supported by the United States.

Experience has shown the difficulties of mediation. It has proved almost inevitable that one side is favoured and the other is detrimentally affected. The mediator puts his own relations with the parties at risk. This is particularly true in the case of armed conflicts; special risks are present in such a situation for neutral States. Moreover, the acceptance by one party of the mediator's proposals is often regarded by the other as a sign of weakness. This leads to a reluctance to become involved in such moves. Mediation has a chance of being successful particularly in stalemate situations or when an escalation of the conflicts is threatened (such as nuclear war). It is also worth considering this procedure in conflicts over relatively minor matters and for the settlement of local disputes. Finally, favourable conditions exist when the dispute has already in effect been decided (as with a military defeat) and all that remains to be done is to work out the necessary consequences. In the latter cases, mediation tends to assume more of the characteristics of technical good offices.

4. Conciliation

One party (in a compulsory system) or both parties can set these proceedings in motion. Third parties, however, have no right to take the initiative.

The persons who act as conciliators are designated either by reference to their office (Heads of State, the Pope, Secretaries-General of international organizations, etc.) or by name. Even those in the former category act in their individual capacity and not as functionaries of their State or organization. In general, each party nominates one or two of its own nationals, and the parties together select a certain number (one, three or five in order to guarantee a majority) of nationals of States not involved in the conflict. The parties are represented by agents before these bodies.

An ingredient for success is the independence and impartiality of the persons selected. Only in this way can objectivity and moderation be guaranteed. Independent persons bring a non-political element into the conflict and normally have more freedom of action than States. They are also less likely to be suspected of misusing their mandates. On the other hand, they lack the inherent weight of the mediator.

The conciliation body is either formed *ad hoc* for a specific case or established to deal with all or selected types of conflicts that may arise in the future. When treaties on a particular subject make provision for conciliation, they usually provide for the creation of the body at the time when the dispute arises. General treaties on the settlement of disputes normally provide for the appointment to be made in advance; in this case what is best described as a permanent body is set up (conciliation council or commission). Such an institution is then available at all times and the problems attendant to the formation of a conciliation body, especially formidable in times of stress, are thereby avoided. On the other hand, the parties no longer have a free choice.

Conciliation is particularly suitable for non-justiciable disputes, but it is also quite often provided for in justiciable disputes, either alone or as a preliminary to arbitration proceedings, sometimes on a compulsory and sometimes on a voluntary basis. In justiciable disputes the conciliation body acts initially as a sort of legal adviser to the parties. If agreement can be reached at this stage, arbitral or judicial proceedings with all their repercussions on the prestige of the parties can be avoided. On the negative side, compromises, which a conciliation body by its very nature tries to achieve, may have a weakening effect on the legal order. In spite of its popularity, conciliation would seem to be particularly inappropriate in the context of multilateral conventions, as their aim is to establish a uniform legal order.

The rules of procedure – more formal than those of mediation – are either specified in the

relevant treaties or left to the body's own discretion. They are normally patterned after those used in arbitration proceedings. The proceedings are adversarial and consist of a written and an oral stage. The conciliation body can negotiate with parties separately or jointly. It is supposed to establish the facts, take notice of the claims of both parties and take all other relevant factors into account; its decisions are not to be guided solely by considerations of equity (→ Equity in International Law), as the legal situation has to be taken into account as well. At the conclusion of its deliberations the conciliation body usually presents a report with recommendations for a solution, which must be accepted or rejected by the parties within a given period.

Under present political circumstances, conciliation enjoys a wider popularity than other more binding commitments. For this reason it has found acceptance in recent codification documents: the → Vienna Convention on the Law of Treaties of May 23, 1969, Art. 66 and annex; the → Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of March 14, 1975, Art. 85; the → Vienna Convention on Succession of States in Respect of Treaties of August 23, 1978, Art. 42 and annex; the Convention on International Liability for Damage caused by Space Objects of November 29, 1971, Art. XIX (→ Space Activities, Liability for). Arbitral or judicial proceedings are mentioned here only as an option when all parties are agreed in a particular case.

In spite of the numerous treaties providing for it, only a few conflicts have been submitted to conciliation. It has been primarily the European nations that have utilized this procedure; in the majority of cases it has been possible to reach a settlement in this way (for a list of the cases see von Mangoldt's article, op. cit.).

5. Evaluation

Mediation and conciliation have the advantage of introducing a "neutral", new element into a dispute. The two procedures are characterized by their flexibility. The third party can normally be freely chosen. The wishes and interests of the parties can, to a large extent, be taken into account during the proceedings, so that their autonomy remains largely intact. This makes it easier for States to resort to a procedure for peaceful settling disputes. The third party is not strictly bound by existing law and can take all the relevant circumstances into account. It can offer new, attractive alternatives which do not have to be directly connected with the subject of the dispute. Concessions on one point can be offset by reciprocal concessions on another point. Such a "package deal" can often pave the way to a solution of the conflict.

It is true that the body in question cannot make any binding decisions. However, the voluntary acceptance of a proposed settlement can strengthen its effectiveness and durability. Instead of a trial in which one party must lose, with a resulting loss of prestige, one has here a solution *à l'amiable* where no-one need lose face. As compared with direct negotiations (→ Negotiation), there is the advantage that it is easier to accept the proposals of a third party and make concessions to him than when a party deals directly with its opponent; also political and moral considerations may make it more difficult to reject a proposed compromise. In addition, the solution is less likely to be regarded as setting a precedent than would be the situation with an arbitral award or a court's decision; therefore the practical aspects of the case can more readily be taken into consideration without the fear of far-reaching consequences. It is not necessary for the third party to give reasons for its proposals or its report. The predominant importance given to factual data and specific rules of international law over general and more abstract concepts also speaks in favour of this means of settling disputes.

It is also possible to avoid all publicity and to conduct the proceedings in secret – numerous mediation attempts have failed because of indiscretions. The resort to public statements leads to a hardening of the parties' positions and restricts not only their freedom of action but also that of the mediator.

Turning to the negative aspects, it is more difficult to make it possible for one party to initiate the proceedings unilaterally. Conciliation and mediation are especially dependent on the consent and good will of the parties; these prerequisites are generally absent when → vital interests are at stake or when the opponent's capitulation is demanded. Reference has already

been made to the danger of fragmentation in the interpretation and application of international law. These proceedings contribute less to the development of law than do arbitral tribunals or international courts. The search for a compromise may also detract from the objectivity, legality and justice of the proposed solution.

Under present circumstances, the future prospects for conciliation and mediation are not very favourable. One should not be misled by the large number of treaties which include provisions on conciliation. Ideological considerations have come to be superimposed upon deepseated political antogonisms and tensions. Psychological elements and antipathies intensify conflicts between national interests. Homogeneity and the universal foundations of a legal order are lacking in the community of States. In place of a stable system, a revolutionary one has emerged. Moreover, the number of neutral nations has declined. In this connection the problem of impartiality becomes acute – the question is then posed whether impartial States or organizations, or even impartial persons, can really be said to exist.

Whether the chances for regional arrangements are more favourable is still an open question. On September 18, 1973, Switzerland submitted to the → Helsinki Conference on Security and Cooperation in Europe a draft of a comprehensive European system for the peaceful settlement of disputes which, in the case of non-justiciable conflicts, proposes a conciliation procedure with a permanent conciliation commission (Doc. CSCE/II/B/1). On the occasion of the Conference of Experts in Montreux in November 1978, the same country proposed that, in addition, provision should be made for obligatory consultations and mediation by States as provided for in the Hague Convention of 1907 (→ Hague Peace Conferences of 1899 and 1907).

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CONCILIATION COMMISSIONS ESTABLISHED PURSUANT TO ART. 83 OF PEACE TREATY WITH ITALY OF 1947

1. Historical Background

The Peace Treaty with Italy (→ Peace Treaties of 1947) provided for:

– the → restitution of property which was in Italy at that time and had been removed by force or duress by any of the Axis Powers from the territory of any of the "United Nations" (Art. 75) (for the notion of "United Nations", see → Atlantic Charter),

- the transfer without payment of Italian State or "para-statal" property within ceded territories (Annex XIV),
- the restoration of all legal rights and interests of "United Nations nationals" or persons treated as enemies and thus affected by Italian wartime measures (Art. 78 and Annexes XV, XVI and XVII B), and
- the compensation for losses caused by the war to "United Nations" property in Italy (at two-thirds of the repurchase value) or in territory ceded by Italy (Art. 78 (4) (a) and (7)) (→ Enemies and Enemy Subjects; → Enemy Property).

Under Art. 83 any disputes concerning these matters were to be referred to a Conciliation Commission.

2. *Composition*

Each Conciliation Commission consisted of one representative of the State concerned and one representative of Italy, each having equal status. If the Conciliation Commission was unable to reach an agreement within three months after the dispute had been referred to it, either Government could ask for a third member to be added to the Commission, that member to be selected by mutual agreement of the two Governments from the nationals of a third country. Only France, Greece, the Netherlands, the United Kingdom and the United States availed themselves of their right to establish such Commissions.

3. *Competence*

In spite of their name, the Commissions were given powers analogous to those of Arbitral Tribunals (→ Arbitration). Only a very few cases were decided by the Commissions "in a spirit of conciliation" and in these cases the questions of the legal basis of a certain claim and/or the rationale involved in the awarding of a higher or lower amount of compensation were left open. Some of these decisions were rendered by the Commissions in the absence of the third member and some with his support.

The competences of the Franco-Italian and Italian-United States Commissions were reduced by several exchanges of letters, providing other methods of settlement, *inter alia*, the restoration of industrial property rights and the allowance of certain restitution claims. The competence of the Franco-Italian Commission, however, was extended by further agreements authorizing the Commission to act as an arbitral college in connection with the liquidation of certain Italian assets in Tunisia and the solution – even by resorting to equitable principles (→ Equity in International Law) – of the problems concerning the property of local authorities affected by the modification of the Franco-Italian border. The Franco-Italian Commission refused to interpret liberally ("extensivement") the clause of the compromis regarding the competence of arbitrators (Montefiore Case (1955), RIAA, Vol. 13, p. 422, ILR, Vol. 22 (1955) 840).

4. *Procedure*

Each Conciliation Commission established its own Rules of Procedure (→ Procedure of International Courts and Tribunals). However, these rules conformed to a single pattern. While private parties involved in more or less similar litigation had direct access, for example, to the → Mixed Arbitral Tribunals established after World War I, only States had access to the Conciliation Commissions (→ Standing before International Courts and Tribunals). In fact, however, the State representatives acted in close co-operation with the interested parties. Where a case was settled with or without a proposal to do so by the Commission, such settlement was reached most often by an act of the person affected rather than by the representative of the Government claiming on his behalf. A waiver could not be assumed unless the intention of the claimants to waive their rights under the Treaty was quite unequivocal (Gassner Case (1954), (The M.Y. Gerry) (Anglo-Italian Conciliation Commission), ILR, Vol. 22 (1955) 972).

All claims were first heard by the two arbitrators appointed by Italy and the other party concerned. If these arbitrators failed to agree they issued a → *procès-verbal* of non-agreement. The case was thereupon decided under the chairmanship of the third member. Proceedings before the Commission of three members were limited to the points on which no agreement had been reached, leaving the other points, which had been agreed upon by the two members, as final and non-reviewable. A dissenting member had the right to

deposit a statement of the reason for his dissent.

The Commission was entitled to hear experts, but, of course, was not bound by the conclusions of such experts (Duc de Guise Case (1953), RIAA, Vol. 13, p. 162).

According to the provisions of the Peace Treaty, the decisions of the Commission were definitive and binding without appeal.

5. The Law Applicable

In general the awards rendered by the Commissions had to be supported by "reasons of law". Towards this end, the Commissions applied the Treaty within the framework of general international law, also having recourse to principles common to the domestic laws of the parties concerned (→ General Principles of Law). Where international law referred to municipal law, the questions were decided according to the national law concerned.

Where the same subject matter (such as the resumption of possession by French nationals of their sequestrated properties, which had been rented during their sequestration to third parties) was governed by an Italian law and by the Treaty, the Commission held the rights thereto to have ensued directly from the Treaty. These rights, therefore, could not be limited by the provisions of domestic Italian legislation (Guillemot-Jacquemin Case (1948), RIAA, Vol. 13, p. 64, ILR, Vol. 18 (1951) 403, and Ottoz Case (1950), RIAA, Vol. 13, p. 232, ILR, Vol. 18 (1951) 435).

6. Brief Survey of Cases

The most noteworthy cases are those connected with claims by persons with dual → nationality. Contrary to hitherto-accepted principles, the United States was held to be authorized to bring claims against Italy in favour of United States-Italian dual nationals – provided, however, that the persons concerned had closer links with the United States than with Italy, i.e. that United States citizenship was the dominant nationality (contrast Ruspoli-Droutzkoy Case (1957), RIAA, Vol. 14, p. 314, ILR, Vol. 24 (1957) 457 with the → Mergé Claim (1955)). Concerning dual nationality see also the → Flegenheimer Claim (1958).

The mere fact that a French national had made a request in 1942 to obtain German nationality did not deprive France of the right to bring a claim on his behalf (Bouquerot dit Voligny Case, Recueil op. cit., Vol. 4, p. 150).

The United States could not bring a claim on behalf of a German refugee naturalized in 1946, even though owing to her wartime residence in the United States, she had become an enemy alien under wartime Italian law. However, this abstract principle was held not to be sufficient in itself to constitute the treatment of a person as an enemy alien. This treatment could only become important in the event that it was the basis for any restrictive measure that may have been taken against the claimant or her property (Bacharach Case (1954), RIAA, Vol. 14, p. 187, ILR, Vol. 22 (1955) 646).

Monaco, not being one of the "United Nations", was not entitled to restitution of a ship taken in Monaco and owned by a company having its seat in Monaco and thus having the nationality of Monaco. France, however, could claim restitution of the ship, because the ship was registered in France and flying the French flag (The *Nymphe* Case (1950), RIAA, Vol. 13, p. 136) (→ Ships, Nationality and Status).

Where a French-owned Swiss company had been forced by Italy to cede shares of its Italian subsidiary to Italian nationals, France was held to be entitled to restitution (SOFIMELEC Case (1949), RIAA, Vol. 13, p. 88). France could similarly claim on behalf of Italian firms treated as enemies by Italy on account of their being subsidiaries of French firms (Dervillé e Soci Case, (1948, 1949 and 1950), RIAA, Vol. 13, p. 33) or because of the preponderance of French shareholders (Pertusola Case (1950, 1951 and 1952), RIAA, Vol. 13, p. 174, ILR, Vol. 18 (1951) 414) (→ National Legal Persons in International Law).

France could not bring a claim on behalf of the French parent company (Petits-Fils de C.J. Bonnet Case (1949) see: RIAA, Vol. 13, p. 76), whose Italian subsidiary Tessitura Serica Piemontese was treated as an enemy alien. France was, however, held to be entitled to bring such a claim on behalf of the subsidiary even after the end of the time-limits, as the rejected claim by the parent company had been brought within the time-limits (Tessitura Serica Piemontese Case, RIAA, Vol. 13, p. 78, ILR, Vol. 18 (1951) 427).

The Franco-Italian Commission held Italy liable

for acts done by the Region of Sicily (Duc de Guise Case, RIAA, Vol. 13, p. 154, ILR, Vol. 18 (1951) 423), organs of the Fascist Party (Mossé Case, RIAA, Vol. 13, p. 486, ILR, Vol. 20 (1953) 217) and organs of the so-called "Italian Social Republic" established by Mussolini in Salò in September 1943 (Mossé Case). Where, for example, an organ of the Italian Social Republic had seized the property of a French citizen by mistake intending to seize the property of a German Jew, such a mistake did not transform its act into an act done in a private capacity.

International law was held to permit the appointment of a custodian for enemy assets only for the purpose of preserving those assets, either in the interest of the owner thereof or of the appointing State, which might have a legitimate hope of obtaining certain rights over such assets after having won the war (I.V.E.M. Case (1952), RIAA, Vol. 13, p. 325, ILR, Vol. 22 (1955) 875; Filatures de Schappe Case (1954), RIAA, Vol. 13, p. 598, ILR, Vol. 21 (1954) 141).

However, the rules of the Treaty allowing France to seize and liquidate assets belonging to Italian settlers in Tunisia were interpreted in the most restrictive manner as they constituted an exception to the principle that assets belonging to private persons shall not be liquidated in order to satisfy claims against their home State (Rizzo Case (1952), RIAA, Vol. 13, p. 389, ILR, Vol. 19 (1952) 478; Canino Case, RIAA, Vol. 13, p. 448 and Recueil op. cit., Vol. 6, p. 273, and Vol. 7, p. 179; Antonucci Case, ibid., p. 121; di Menza Case, ibid., p. 141).

Treaties, in general, were to be interpreted according to the intentions of the parties, as shown by the words of the Treaty (→ Interpretation in International Law). Due regard was also paid to "travaux préparatoires". (Examples: United States-Italian Conciliation Commission: Shafer Case, RIAA, Vol. 14, p. 205, ILR, Vol. 22 (1955) 959, and Armstrong Cork Company Case, RIAA, Vol. 14, p. 159, ILR, Vol. 22 (1955) 945).

Whilst Ethiopia was not considered to be territory "ceded by Italy in virtue of the Treaty" (Compagnie du Chemin de Fer franco-éthiopien Case (1954 and 1956), RIAA, Vol. 13, p. 662), the former Italian colonies were deemed to be so ceded and Italy thus became responsible for wartime property losses in these territories (Société Dufay et Gigandet Case (1962), RIAA, Vol. 16, p. 197). Although the King of Italy was the Grand Master of the Order of St. Maurice and St. Lazare, the property of the Order in Italian territory ceded to France was not held to be Italian "para-statal" property (Case No. 312, Recueil, op. cit., Vol. 8, p. 37). Agreements reached by Italy with the United Kingdom and Greece on the definition of "para-statal" property were held not to be binding on France (Incis Case (1955 and 1957), RIAA, Vol. 13, p. 674).

7. Evaluation

Although the ICJ in its judgment in the → Barcelona Traction Case (ICJ Reports, 1970, at p. 40) did not accept the pronouncements of the Commissions as always expressing general international law, the work of the Commissions is of great and lasting importance. In the field of claims by dual nationals the Commissions were in the vanguard of the progressive development of international law and their decisions in this area have been approved by the → Institut de Droit International. However, these decisions did not establish generally-accepted precedents; and not all of the rules on interpretation applied by the Commissions found their way into the → Vienna Convention on the Law of Treaties. Nevertheless, the results reached appear to have been acceptable to the parties. This view is borne out by the fact that a very large proportion of the cases were decided without recourse to the services of the neutral third member. At least in the relations between France and Italy, however, the effective execution of the decisions reached appears to have been sometimes subject to excessive delay.

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CONNALLY RESERVATION

The United States of America has qualified her recognition of the compulsory jurisdiction of the → International Court of Justice by including the so-called Connally Reservation (named after Senator Tom Connally of Texas) in her Declaration of August 14, 1946. Under this Reservation the United States does not recognize the jurisdiction of the Court in "disputes with regard to matters essentially within the domestic jurisdiction of the United States *as determined by the United States of America*" [emphasis added]. "Self-judging" reservations (→ Treaties, Reservations) in this pattern have since been filed by other States as well (France 1947, terminated 1959; India 1956, terminated 1957; Liberia 1952; Malawi 1966; Mexico 1947; Pakistan 1948, terminated 1957; Philippines 1972; South Africa 1955, terminated 1967; Sudan 1958; see the Yearbooks of the ICJ).

The Reservation raises several legal issues which so far have not been resolved. As to its substantive interpretation, it is not entirely clear whether the United States possesses full freedom to invoke the Reservation under all circumstances, or whether the Reservation is addressed only to those issues which, under international law, are arguably within their domestic jurisdiction. The United States reversed her own position on this point during the proceedings before the ICJ in the case concerning the → Aerial Incident of 27 July 1955, United States of America v. Bulgaria (ICJ Pleadings, pp. 308, 322–325) and finally argued for the broad interpretation of the Reservation. The Court has not addressed itself to this issue, nor has it decided whether the interpretation of the Reservation lies unilaterally with the United States. The answer probably depends upon the legal character (whether contractual or not) of the unilateral acceptance of the jurisdiction of the Court and of the Reservation included therein, and upon the rules of interpretation applicable to such a reservation (→ Unilateral Acts in International Law).

A wide interpretation of the Reservation would raise doubts as to its validity. The ICJ considered this issue in the → Norwegian Loans Case, but has, to date, not ruled on its merits; in particular, Judges Lauterpacht (separate opinion, Norwegian Loans Case, ICJ Reports 1957, at p. 43 and dissenting opinion, → Interhandel Case, ICJ Reports 1959, at p. 104) and Spender (dissenting opinion, Interhandel Case, ICJ Reports 1959, at p. 56) maintain that the Reservation is void (see also the dissenting opinions of Guerrero, Norwegian Loans Case, p. 68; Basdevant, Norwegian Loans Case, p. 75; Klaestad, Interhandel Case, p. 76; Armand-Ugon, Interhandel Case, p. 92). It is in-

deed doubtful whether the Reservation constitutes an admissible acceptance under Art. 36(2) of the Statute and also whether a State may derogate from Art. 36(6) of the Statute whereby the ICJ is given the power to determine its own jurisdiction. Judges Lauterpacht and Spender have concluded that invalidity of the Reservation would make the Declaration void as a whole; this position seems indeed preferable to the view that the invalidity of the Reservation leaves the other parts of the Declaration unaffected.

The Connally Reservation has been subject to criticism because "the establishment of the Court's jurisdiction in any particular case will depend on the willingness of the State concerned to submit to jurisdiction after the case has arisen, and the professed acceptance of compulsory jurisdiction in the declaration is illusory" (Waldock, BYIL, Vol. 32, op. cit., at p. 273).

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DECLARATORY JUDGMENTS *see* Judgments of International Courts and Tribunals

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ENFORCEMENT OF INTERNATIONAL OBLIGATIONS *see* International Obligations, Means to Secure Performance

ENQUIRY *see* Fact-Finding and Inquiry

EUROPEAN CONVENTION FOR THE PEACEFUL SETTLEMENT OF DISPUTES

1. Background

The → peaceful settlement of disputes between States, although considered a cornerstone of the application of the rule of law, has not been specifically regulated by the Statute of the → Council of Europe, whereas the constituent instruments of some other international organizations have included such a procedure. The European Convention for the Peaceful Settlement of Disputes was opened at Strasbourg for signature and ratification by the member-States of the Council of Europe on April 29, 1957; it came into force on April 30, 1958, after ratification by two States. This followed discussion and expansion of its terms by the Council's Parliamentary Assembly since 1951, during which time two proposals of special interest were made. The first was for a regional European Court of Justice; the second for the recognition of a plea of → "vital interests" in cases involving non-legal disputes, a plea which would be decided upon by the Committee of Ministers of the Council of Europe. Both proposals were rejected. All innovative efforts having failed, in particular all attempts to create special organs for the settlement of disputes within the framework of the Council of Europe, the Par-

liamentary Assembly took further initiatives to insert innovative amendments in 1965 and 1974 – so far also without success (see Section 3 *infra*).

2. *Substantive Provisions*

The European Convention on the Peaceful Settlement of Disputes distinguishes between legal disputes and non-legal (political) disputes (→ Judicial Settlement of Disputes).

Art. 1 of Chapter I of the European Convention lays down that the types of international legal disputes set out in Art. 36 (2) of the Statute of the ICJ shall be submitted to the → International Court of Justice for judicial settlement. This obligation may not be excluded by reservation (Art. 34). These provisions are designed to strengthen the position of the ICJ. Bypassing the model of the → Locarno Treaties (1925), the provisions follow the examples set by the → Geneva Protocol for the Pacific Settlement of International Disputes (1924) and the → General Act for the Pacific Settlement of International Disputes (1928 and 1949).

According to Arts. 4 and 5 of Chapter II of the European Convention, disputes of a non-legal character are to be referred either to a permanent conciliation commission, previously set up by the parties, or to a special conciliation commission constituted by the parties *ad hoc*, unless the parties agree to have recourse to arbitration directly (→ Conciliation and Mediation). By Art. 15, the tasks of the conciliation commission consists of both → fact-finding and inquiry, and attempting "to bring the parties to an agreement"; the Commission may also "inform the parties of the terms of settlement which seem suitable to it". If no settlement is agreed upon by the parties, the conciliation procedure will be regarded as having failed, but this will not prejudice later arbitral proceedings. In the case of a mixed dispute involving both legal and non-legal questions, Art. 18 provides that any party to the dispute may refer the legal issues to judicial settlement before beginning the procedure of conciliation.

If conciliation fails or the parties have agreed to have direct recourse to → arbitration, Art. 19 provides that a non-legal dispute shall be referred to and decided upon by an arbitral tribunal to be set up by the parties. If nothing is laid down in a special agreement or if no special agreement (→ Compromis) has been made, Art. 26 provides that the arbitral tribunal "shall decide *ex aequo et bono*, having regard to the general principles of international law, while respecting the contractual obligations and the final decisions of international tribunals which are binding on the parties" (→ Equity in International Law).

The provisions on both conciliation and arbitration concerning non-legal disputes thus constitute an enlargement of the traditional bilateral options for the peaceful settlement of disputes (→ Hague Peace Conferences of 1899 and 1907), as envisaged also in numerous bilateral treaties (→ Arbitration and Conciliation Treaties, → Arbitration Clause in Treaties) already in force between member-States of the Council of Europe. The optional character of conciliation and/or arbitration within the system of the peaceful settlement of disputes in the European Convention is affirmed in Art. 34, which allows for the exclusion of either Chapter III (relating to arbitration) or Chapters II and III (relating to conciliation and arbitration).

3. *Evaluation*

The European Convention on the one hand goes beyond the General Act of Geneva, as it allows for the exclusion of non-legal disputes (i.e. those disputes intended to be dealt with by conciliation and arbitration) from the scope of the European Convention altogether and, on the other hand, it vests the arbitral tribunal with even broader powers for the settlement of non-legal disputes. The consequence of this has been that the member-States of the Council of Europe – those that have ratified the European Convention at all – have shown little inclination to submit to arbitration.

The European Convention on the Peaceful Settlement of Disputes has been ratified by twelve member-States, six of whom did not accept Chapter III on compulsory arbitration and one of whom (Italy) inserted a reservation excluding both conciliation and arbitration. Italy did, however, accept arbitration clauses referring to Chapter III of the European Convention in two treaties concluded at a later stage (see the treaties between Italy and Austria on customs clearance and the crossing of frontiers by railways of March 29, 1974).

Whereas the provisions on conciliation and arbitration have not yet become of practical importance, the provisions on judicial settlement contained in the European Convention have been invoked as a basis for the jurisdiction of the ICJ in the → North Sea Continental Shelf Case (1969). The European Convention also provided the basis for an agreement between Italy and Austria of July 17, 1971, establishing the jurisdiction of the ICJ with regard to any dispute concerning the status of the German-speaking minority in the → Southern Tyrol, an agreement which has not yet been ratified.

The European Convention for the Peaceful Settlement of Disputes has, on the whole, been of little practical relevance; this fact has led to two initiatives within the Parliamentary Assembly of the Council of Europe. In 1965, the Parliamentary Assembly recommended that the Committee of Ministers should in future play a more active role in the settlement of disputes among member-States and should set up an "Interim European Committee for the Settlement of Disputes" as a new facility for conciliation and mediation and → good offices (Council of Europe Recommendation No. 426 (1965)); this proposal was not followed up by the Committee of Ministers. In 1974 a Swiss initiative for the establishment of a European Court of Arbitration (Council of Europe Document No. 3502 (1974)) was not taken up by the Parliamentary Assembly, the latter again recommending that the Committee of Ministers play a more active role in the future, but generally re-affirming its support for the system for the peaceful settlement of disputes as laid down by the European Convention of 1957 (see Council of Europe Recommendation No. 878 (1979) of October 4, 1979).

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EVIDENCE BEFORE INTERNATIONAL COURTS AND TRIBUNALS

1. Introduction

No very substantial body of detailed rules of evidence has been developed common to the practice of → international courts and tribunals on any scale comparable to the scope of the subject in municipal legal systems. There are a number of reasons contributing to this result. First, the nature of international disputes submitted for settlement is not infrequently such that few or no disputed questions of fact, making it necessary to weigh evidence on each side, are involved, the controversy relating rather to the significance of facts which are broadly admitted, or the legal consequences to be deduced from them; secondly, the historical and social factors which have led to elaborate precautions in municipal law to prevent certain kinds of testimony, regarded as unreliable, from even being heard by those whose duty it is to decide, are generally absent at the international level; and thirdly, the lack of a common procedural background shared by judges and counsel in international proceedings tends to result in a certain lowest common denominator being adopted in this domain (see generally → Procedure of International Courts and Tribunals).

In this particular field of procedure, the general tendency in international proceedings, whereby the tribunal has liberty to adopt the course which appears most likely in the circumstances to ensure justice, operates in a particularly marked manner, with the result that international tribunals freely accept evidence *de bene esse*, as a common lawyer would put it, i.e. without prejudice to a later decision on its admissibility and weight. (See also → Maps.)

2. *Evidence of Fact and Evidence of Law*

The principle *jura novit curia* is generally held to be applicable in international judicial proceedings: i.e. while evidence must be adduced of all facts, the court is deemed to be fully informed as to the state of the law, and evidence therefore need not be called to prove it. As in private international law, an exception should be made for proof of "foreign law", that is to say proof of law other than general international law ("foreign law" thus includes all municipal law: cf. Barcelona Traction Case, ICJ Reports 1970, at p. 37). From dicta in the Asylum Case (ICJ Reports 1950, at pp. 276–277) it also appears that the maxim *jura novit curia* does not extend to an alleged rule of local customary law (→ Regional International Law); since local customs of this kind may apparently be valid although operative only between two States, it would seem inevitable to require the party relying on it to adduce evidence of its existence and content.

The distinction in this context between general and local customary law (→ Customary International Law) is, however, somewhat blurred by the fact that litigant States tend to adduce evidence of international practice regarded by them as constitutive or illustrative of general customary law. This is particularly likely, if not inevitable, in fields where general customary law is admittedly in a state of flux or development, e.g. the law of the sea (cf. the pleadings in the → North Sea Continental Shelf Cases and → Fisheries Jurisdiction Cases). Clearly the principle *jura novit curia* does not forbid them to do so: but the tribunal will not be limited, in making its assessment of the state of international customary law, to the material laid before it by the parties.

3. *Presumptions and Burden of Proof*

It is fairly common form in a special agreement (→ Compromis) for provisions concerning delivery of pleadings to declare expressly that the arrangements contemplated are without prejudice to the burden of proof. The operation of the simple principle that it is for the party asserting a fact to adduce proof of it will be affected by the operation of presumptions; but international practice does not appear to afford any examples of presumptions as to states of fact, as distinct from the conclusion of law to be drawn from facts. Thus, for example, the principle that a State is not to be presumed to have acted contrary to international law does not reverse any burden of proof, but rather increases the weight of that burden (cf. → Corfu Channel Case, ICJ Reports 1949, at p. 17).

It has, however, been argued, particularly by Sir Gerald Fitzmaurice (op.cit. at p. 12), that adoption of the – admittedly controversial – principle that sovereign States enjoy complete freedom of action except to the extent that → international law can be shown specifically to restrict their freedom (cf. the celebrated *Lotus* dictum, PCIJ, A 10, at p. 18), may result in the outcome of a case depending entirely on which State, by manoeuvring itself into the position of defendant, may rely on the presumption of legality of the acts complained of, if the area of the law in question is one in which there is some degree of uncertainty. The argument rests on the assumption that it is for a plaintiff State not merely to prove the facts on which it bases its case, but also to prove that international law imposes liability on the defendant State on the basis of such facts, an assumption which, at least theoretically, is not valid. An international tribunal has both the power and the duty to ascertain for itself the state of international law; and to reject a claim on the grounds that it has not been satisfied whether or not international law forbids the conduct complained of, is in effect to declare a *non liquet*, which most writers (including Fitzmaurice) agree is a course not open to such a tribunal.

The main area in which presumptions can and do play an important part in directing the reasoning of a tribunal is in the delicate operation of ascertainment of the intention of one or more States (→ Interpretation in International Law). This results from the fact that direct circumstantial evidence of an intention may be very hard to come by, or may in the nature of things not exist. The → Permanent Court of International Justice based its reasoning on presumptions of this kind in a number of cases; it appears, however, to have done so with reluctance, since it generally expressed its argument in favour of such

a presumption in the form of a rejection of an opposite presumption (e.g. Serbian Loans, PCIJ, A 20/21, at p. 42). Here also, however, the tactical advantage of the position of defendant probably goes no further than this: that an international tribunal will be reluctant to base a positive finding against a defendant State on an intention on the part of that State which has to be presumed, in the absence of firm evidence either way.

4. Time for Production of Evidence

In general, arbitral practice and the procedural rules of international tribunals favour the production of documentary evidence at the time of filing the pleading containing the contention in support of which it is adduced, rather than at the hearing. In Art. 63 of the 1907 Hague Convention this procedure is presented as part of the process of "l'instruction écrite". The common-law system of "discovery of documents" is generally unknown at the international level, although something similar was provided for in Art. IV, para. 3, of the → *Alabama* Claims Treaty between the United States and Great Britain.

The results of the system of "instruction" may be said to be moderately satisfactory, except insofar as they entail in some cases the production or offer of considerable quantities of evidence which prove in due course to be unnecessary, inasmuch as the facts to which they relate are ultimately not in issue. Little use seems to have been made, in arbitral and judicial practice, or in the drafting of arbitral agreements, of the devices developed in municipal legal systems to avoid this difficulty. The technique of the preliminary hearing for directions, derived from the common-law system, was, however, included in the rules of a number of → Mixed Arbitral Tribunals in 1921 (Recueil des Tribunaux des Arbitraux Mixtes, Vol. 1, pp. 622, 639, 655; cf. the Rules of the Franco-German Mixed Arbitral Tribunal of 1920, ibid. p. 44).

The procedure of the → Court of Justice of the European Communities provides for the Court to prescribe "measures of instruction", including oral testimony and a visit to the site (Rules of the CJEC, Art. 45), but this does not avoid the necessity for the parties to attach to their pleadings the documents relied on (Art. 37 (4)).

Theoretically the "instruction" process, particularly in cases involving more than one exchange of pleadings, should render it unnecessary for further written evidence to be filed after the close of the written proceedings or at the hearing. Inevitably, however, for a number of reasons, such evidence is put forward, and the → International Court of Justice in particular has developed rules to endeavour to control the practice. Art. 48 of the 1946 Rules of Court, taken over from the PCIJ Rules, provided for submission of further documents either with the consent of the other party or with the permission of the Court. In 1953 the Court drew attention to the need to comply with this Rule (see ICJ Yearbook 1953/1954, pp. 112–114), but protests by the opposing party at breaches, or apparent breaches, of it have not been infrequent. To some extent it was unclear whether a mere reference to a document at the hearing amounted to "submitting" it, so as to activate the operation of Art. 48. In 1972 the Rule was amended, *inter alia*, by specifically stating that "No reference may be made during the oral proceedings to the contents of any document which has not been produced in accordance with Art. 43 of the Statute [i.e. annexed to a pleading] or this Article . . .". It had always been understood that a document already in the public domain could be freely referred to; hence the Rule continues: "unless the document is part of a publication readily available" (1978 Rules, Art. 56 (4)). Subsequent practice suggests that the Court will, in the absence of specific protest from the other side, be ready to give this expression a fairly wide interpretation.

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EX AEQUO ET BONO *see* Equity in International Law; Judicial Settlement of Disputes

EXHAUSTION OF LOCAL REMEDIES *see* Local Remedies, Exhaustion of

FACT-FINDING AND INQUIRY

1. "Fact-finding" and "inquiry" are methods of ascertaining facts used in international relations for differing purposes. The three main purposes for the establishment of facts are:

(a) to create a basis for the → peaceful settlement of disputes between two or more States,

(b) to supervise the execution of international agreements (see, for example, the situation in → Antarctica),

(c) to supply information required for the making of decisions at an international level (Art. 34 → United Nations Charter).

This last function is an element of the decision-making process in international organizations and varies widely according to the structure and character of these processes. Function (b) plays an increasing role amongst other means to secure performance of → international obligations. The various forms of fact-finding as practised in organs of the → United Nations, the → United Nations Specialized Agencies, the → International Atomic Energy Agency and also other international bodies of a global or regional character have been the object of a detailed report of the Secretary-General "on methods of fact-finding" of April 22, 1966 (UN Doc. A/6228, GAOR (XXI), Annexes Vol. 2, Agenda item 87, pp. 1–21). In this article the role of fact-finding in the handling of international disputes, (i.e. function (a)) is of main interest.

2. In international disputes fact-finding and inquiry have their place after direct diplomatic → negotiations between the parties involved in the dispute (possibly with the cooperation of a third party offering its → good offices) have been exhausted, and before → conciliation and mediation in their proper sense begin. The phase of negotiations can easily be distinguished because different participants are involved. Negotiations involve the parties to the conflict, whereas fact-finding and inquiry are carried out by an impartial body usually appointed ad hoc but also, in exceptional cases, consisting of a standing panel placed at the disposal of the parties for a certain kind of dispute. However, a clear distinction between fact-finding or inquiry and the phase of conciliation or mediation is not possible, as the body entrusted with the establishment of facts may also be charged by the parties with the legal evaluation of these facts in connection with a request to make recommendations for the settlement of the dispute (for an example, see → Dogger Bank Incident).

3. The terms "fact-finding" and "inquiry" are synonymous and interchangeable. According to Art. 9 of the Hague Convention for the Pacific Settlement of International Disputes of 1907 (→ Hague Peace Conferences of 1899 and 1907), a commission of inquiry has the task to "facilitate a solution . . . by means of an impartial and conscientious investigation". Its report "is limited to a statement of facts and has in no way the character of an award . . ." (Art. 35). In recent instruments, however, "fact-finding commissions" have been established which are entrusted with a legal evaluation of facts and with making recommendations for the solution of conflicts (e.g. Art. 90 of Protocol I of December 12, 1977 Additional to the Geneva Conventions (→ Geneva Red Cross Conventions and Protocols); Art. 5 of Annex VII of the Informal Composite Negotiating Text (→ Law of the Sea, Settlement of Disputes)). Some authors therefore speak of "genuine commissions of inquiry with exclusive fact-finding powers" (Bar-Yaakov, op.cit., p. 197) in order to distinguish them from bodies with more far-reaching tasks. The thesis that the two terms are synonyms can also be based on Art. 33 of the UN Charter where the different steps of peaceful settlement are listed and only the word "inquiry" appears as a step between negotiation and mediation, without "fact-finding" being mentioned.

4. Since the Hague Conferences three problems have played a major role. The first problem is whether or not the process of fact-finding has to be strictly separated from conciliation. The Hague Conventions of 1899 and 1907 provided for such a separation as did the → Bryan Treaties. In many

practical cases (examples are quoted by W.I. Shore, op.cit., Chapter II and N. Bar-Yaakov, op. cit., pp. 89–197) a strict separation was not to be found. The view then prevailed that fact-finding should be combined with an attempt to settle the dispute. Only recently was it argued that a combination of fact-finding and conciliation could impair a settlement (see proposal of the Netherlands, UN Doc. A/6373 GAOR (XXI) Annexes, Vol. 2, Agenda Item 87, pp. 111–114). This position has been adopted by UN GA Res. 2329 (XXII) of December 18, 1967.

The second major problem has been whether a permanent commission of inquiry should be established. GA Resolution 2329 requested the Secretary-General to prepare a register of experts on fact-finding although the General Assembly did not accept the proposal (by the Netherlands) to establish a permanent commission of inquiry available for States and also for the organs of the UN and their Specialized Agencies which would have dispensed with a need for a special → *compromis* in each case. Considerations of State sovereignty prevented the adoption of this far-reaching proposal. Further, an obligation to proceed to fact-finding was not accepted. Thus, in every case there must be an agreement covering the establishment of a body, its terms of reference, its composition and procedure. The discussion on this subject in the UN organs lasted from 1962 to 1967. The Diplomatic Conference on Humanitarian Law (1974 to 1977) also raised this issue and produced a similar outcome. The proposal for the establishment of a mandatory permanent fact-finding commission competent to inquire into alleged grave breaches of obligations in times of armed conflict did not find the necessary support.

The third major problem has been the coexistence of special bodies for fact-finding with international organizations whose activities are directed towards preserving peace. This parallelism already had an impact on the use of fact-finding based on bilateral agreements during the times of the League of Nations. It has grown stronger since the creation of the UN. The fear has been expressed that the activities of these organizations, based on the collective responsibility of the international community, could be impaired by a further institutionalization of bilateral fact-finding. This explains why only modest results were achieved in strengthening the mechanism of bilateral fact-finding in order to prevent disputes or to settle them finally. The cases concluded with success after fact-finding are rare and mostly restricted to a rather limited field such as maritime incidents (→ Dogger Bank Incident and the → Red Crusader Incident). The theory that genuine inquiries (restricted to fact-finding) do not meet with the reluctance of States to allow interference with their sovereignty to the same extent as inquiries combined with elements of conciliation has not been confirmed by international practice during the last eighty years.

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GENERAL ACT FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES (1928 AND 1949)

In 1928 the → League of Nations attempted to assemble and complement the numerous existing bilateral treaties for → arbitration and conciliation by means of one extensive consolidating treaty. On September 26, 1928, during the ninth Session of the League of Nations Assembly, the text of a multilateral treaty for arbitration and conciliation was accepted, which came to be known as the "General Act of Geneva". On April 28, 1949, the → United Nations General Assembly approved a revised text of the General Act of Geneva which made no changes to the rules concerning organized mediation (→ Conciliation and Mediation).

In the absence of other arrangements between the parties to a dispute, the General Act of 1928 referred "legal" disputes to the → Permanent Court of International Justice, the 1949 revision to the → International Court of Justice (see also → Judicial Settlement of Disputes).

As far as "political disputes" are concerned, that is, conflicts where problems other than existing legal rules and rights are in question, the General Act furnishes a procedure for reconciliation that comprises two stages: the first involving a conciliation commission and the second an arbitral tribunal. For the first stage, the General Act of Geneva envisages the creation of permanent conciliation commissions between pairs of signatory States; thus, a large number of bilateral commissions were to be set up. Each signatory State is entitled to require the cooperation of another party to the General Act in the formation of such a commission within a period of six months. Also, the parties to a dispute are left in the legal position of being able to form a special *ad hoc* commission for the settlement of a particular dispute. While the signatory powers of the General Act of Geneva are bound to search for a settlement by conciliation of all non-justiciable political conflicts, legal disputes are admitted to the conciliation procedure only on the basis of common agreement. According to the General Act all signatory powers, and not only the contesting States, are obliged to abstain from any measures which may impair the efforts of a permanent or *ad hoc* conciliation commission or may prejudice the prospects for success of its proposals for a peaceful solution of the dispute. Every commission is bound to deliver its proposals or a final report within six months from the date when the case has been officially presented to it for consideration. This period is half of that provided by the → Bryan Treaties of 1913/1914; the necessity of a quick adjustment of the conflict has been given precedence over the idea of "cooling off" the dispute by means of the passage of time.

The procedure set out in the General Act of Geneva of 1928 and the revised text of 1949 must be considered as an attempt to revive the procedure of conciliation suggested in the Hague Convention for the Pacific Settlement of International Disputes of 1907 (→ Hague Peace Conferences of 1899 and 1907). The 1928 and 1949 Acts provide for the settlement of all political conflicts, which cannot be resolved by other means, by an arbitrator or arbitral tribunal. The General Act stipulates that, if no special agreement exists between the parties to a dispute, an arbitral tribunal consisting of five members shall be established by the appointment of one national representative by each of the disputing parties and three neutral representatives – among them the chairman – by agreement of the parties. Art. 23 provides that if agreement cannot be reached within three months, "a third Power, chosen by agreement between the parties, shall be requested to make the necessary appointments .... If no agreement is reached on this point, each party shall designate a different Power, and the appointments shall be made in concert by the Powers thus chosen". If even this turns out to be impossible, the necessary appointments should be made by the President, or if he is prevented from acting, by the Vice-President or the oldest member of (today) the International Court of Justice.

Art. 28 provides: "If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the dispute enumerated in Article 38 of the Statute of the International Court of Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*" (→ Equity in International Law).

If a State wishes an existing rule of public international law to be changed in its application to the parties, this aim can only be achieved at the first stage of the proceedings through a proposal made by a conciliation commission mentioned above and agreed to by both parties. Thus, only through the cooperation of all interested States can, according to the General Act, a revision of an existing rule of public international law be achieved in a particular case. The idea of a special independent international authority which is competent to change the rules of public international law actually in force solely in the interests of the administration of justice has apparently been clearly rejected by the authors of the General Act of Geneva.

This "conservative" approach has lost favour today. The formal decision of an arbitral tribunal

bound to respect the rules of international law will never be able to resolve what is essentially a conflict of political interests in which one party argues, in absence, for a change in a particular rule of international law.

On the other hand, the introduction in the General Act of an obligatory arbitral procedure as a means for the settlement of international disputes – in the case of a failure of a previous attempt at conciliation – can be considered to represent real progress towards international peace. Further merits of the General Act of Geneva are the limitation of possible reservations to certain cases enumerated in Art. 39 and the faculty given by the General Act to the arbitral tribunal and to the ICJ to issue provisional orders (→ Interim Measures of Protection).

States can accede to the General Act as a whole or to only a particular portion of the provisions, e.g. only those provisions which relate to the organized conciliation procedures and excluding the other rules contingent on the failure of conciliation. Also, the General Act specifies certain categories of disputes which the parties can exempt from the obligatory dispute settlement procedure provided for in the Act. Other reservations are not permitted.

By 1935 twenty-four States, mainly European States and the British Dominions, had signed and ratified the General Act of Geneva; however, Germany, the Soviet Union and the United States did not accede – the latter in consequence of its general abstention from the affairs of the League of Nations. In February 1939, France, Great Britain, India and New Zealand announced that they declined to recognize the application of the General Act if war was either imminent or had broken out or to conflicts essentially connected with a war (→ War, Effect on Treaties). On September 8, 1939, Australia joined in adopting this interpretation.

In spite of – or, perhaps, even because of – the most limited prospects of a successful application of the General Act of Geneva in situations in which all measures of conciliation have failed, the General Act outlived the League of Nations and did not become redundant after World War II. Some of the States which ratified the General Act of 1928 accepted it only in part, and some others have excluded its application to certain disputes by means of reservations or proviso clauses. The revised General Act of 1949 has been signed by only seven States to date, namely Belgium, Denmark, Luxembourg, the Netherlands, Norway, Sweden and Upper Volta.

It is disputed whether the 1928 text of the General Act of Geneva is still valid or not (→ Treaties, Validity). On May 16, 1973, before the International Court of Justice in the first → Nuclear Test Case (Australia v. France), France, as the defending party, declared the original General Act of Geneva to be obsolete for her part, because of its essential connection with the discarded League of Nations juridical system. On the other hand, Australia and – in the second Nuclear Test Case – New Zealand asserted that the General Act of Geneva in its original text was still in force, at least in an auxiliary role. The views of those judges who expressed dissenting opinions to the judgment differed on this question. On February 16, 1974, Great Britain stated that she was no longer bound by the General Act. On the other side, on March 23, 1974, Pakistan, in stark contrast to the legal opinion expressed by India, clearly stated her conviction that the General Act of Geneva of 1928 was still legally binding upon her by the fact of her being one of Great Britain's successor States (→ State Succession). In the following year, on March 15, 1975, Australia revoked her former reservations made in regard of the General Act of Geneva and confirmed the validity of the General Act of Geneva of 1928 as a whole so far as she is concerned.

In the → Aegean Sea Continental Shelf Case (Aegean Continental Shelf, Judgment, ICJ Reports 1978, p. 3) the question of the continuing validity of the General Act of 1928 and its relevance to Greece and Turkey played an important part in the pleadings submitted by the Greek Government to the ICJ. The Court side-stepped the question in holding that even if the General Act was still to be regarded as being valid (which the Court did not decide either way), the Greek reservation to it could be invoked by Turkey on the basis of the principle of → reciprocity; thus the Court's jurisdiction could not be founded on this ground (see pp. 16 and 17 of the Court's judgment, *supra*).

It is evident, therefore, that the question of the

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GENEVA PROTOCOL FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES (1924)

The Covenant of the → League of Nations, which entered into force on January 10, 1920, was an attempt to form a world-wide organization "in order to promote international cooperation and to achieve international peace and security by the acceptance of obligations not to resort to war", but the Covenant did not outlaw war in general. On the basis of the idea of a "cooling-off" policy, the Covenant established only a framework for the peaceful settlement of international conflicts (→ Peaceful Settlement of Disputes). It was left to nations themselves, cooperating within the League of Nations, to ensure that the framework was used and to continue the process which had been started with the Covenant. The first plan to extend the obligation not to resort to war, which had been proposed by Lord Robert Cecil, was based on the idea of establishing a close combination of both mutual international aid and multilateral arms restriction, but this plan was rejected by the British Government. After this failure, the Fifth Assembly of the League of Nations – on the basis of a joint report prepared by the Greek statesman Politis and the Czech Foreign Minister Beneš – recommended the adoption of a treaty, known as the Protocol of Geneva, which was opened for signature on October 2, 1924, and was intended to supplement the Covenant of the League of Nations. The central ideas of that Protocol were, first, the absolute prohibition of all wars of → aggression, secondly, the foundation of a system of → collective security with the obligation to jointly take warlike measures of collective defence (→ Collective Self-Defence) or collective → sanctions against an aggressor, thirdly, the introduction of an established mandatory procedure for the peaceful settlement of international disputes, and, fourthly, the general obligation to restrict armaments (→ Disarmament).

The Protocol prohibited all forms of armed aggression by a signatory power to the Protocol directed against another signatory power or against a non-signatory power which had accepted the obligations of the Protocol. In addition, acts of aggression were to be considered to be criminal acts and the authors thereof were to be prosecuted and tried for them (→ Crimes Against Peace). On the other hand, the Protocol was founded on the principle of → reciprocity: aggressive measures were not excluded against a non-signatory power which had refused to accept the obligations under the Protocol.

The Geneva Protocol produced many problems, the most crucial being that of the definition

of "aggression". According to Art. 10 of the Protocol, a State was to be regarded as an "aggressor" when it resorted to "war in violation of the obligations contained in the Covenant or the Protocol", or whose armed forces entered an internationally demilitarized zone (→ Demilitarization). In every case of hostilities (→ Armed Conflict) the Council of the League of Nations was to confirm, unanimously, which State was to be regarded as an aggressor. In the absence of unanimity, the Council of the League would be authorized to prescribe an → armistice directed at the parties of the conflict. The conditions of this armistice were to be imposed by the Council on the basis of a two-thirds majority vote and the Council would also supervise its observation. In certain situations set out in the Protocol, an "aggression" was to be presumed. In those situations, the Council of the League of Nations would be required to impose sanctions and the presumption of aggression could only be overturned by the unanimous decision of the Council. In other words, the veto of one member of the Council of the League not taking part in the conflict would generally have prevented a State from being considered an "aggressor"; but in the case of one of the enumerated circumstances in which aggression was presumed, the veto of one member of the Council would be sufficient to uphold that presumption.

A State was to be regarded as an aggressor when it refused to submit a dispute to the procedure as laid down in the Covenant of the League of Nations or the Geneva Protocol, or if it failed to recognize and execute the final decision of the organ competent under the Covenant or the Protocol to settle the conflict. A State would be regarded in the same way if it neglected one of the provisional measures taken by the Council of the League according to the terms of the Covenant or the Protocol, or violated an armistice ordered by the Council on the authority of the Protocol.

Whereas the Geneva Protocol regarded a war of aggression to be an international crime, the report of Politis and Beneš even put forward the view that it is the duty of a State which is attacked to wage a war of defence. They suggested that each State should be entitled to defend itself without prior consultation with the Council of the League of Nations. The Protocol itself differentiates between armed defence and armed sanctions. Armed sanctions are defined as military measures undertaken in conformity with the call of the Council or the Assembly of the League of Nations according to the rules of the Covenant or the Protocol. Thus the Protocol interpreted the Covenant in the sense of obliging all the member-States to take military measures against a State that violated the peace. The aggressor should then make → reparations for all the losses and costs arising from sanctions having been taken against it (Art. 15).

The prohibition of aggression is complemented by the rule in the Protocol for the peaceful settlement of disputes. The language of the Protocol prefers both judicial and arbitral procedures (→ Judicial Settlement of Disputes) to → conciliation. According to Art. 3, all legal disputes were to be decided by the → Permanent Court of International Justice: thus, all signatory States of the Protocol were to accept the optional jurisdiction clause of Article 36 of the Court's Statute within one month after the Protocol came into force. Non-legal – political – disputes were to be settled by an interesting combination of → arbitration and conciliation in which the Council of the League of Nations was intended to act as a kind of arbiter.

The Geneva Protocol itself never entered into force. One of the reasons for this was the pivotal combination of the provisions for the peaceful settlement of disputes and the plan for a general reduction of armaments. Ultimately, Great Britain's refusal to accept this system was decisive for its failure.

Nevertheless, the Geneva Protocol was doubtlessly very important for the evolution of international law between the two World Wars; in particular, its aims were pursued further in the → Kellogg-Briand Pact (1928).

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GOOD OFFICES

1. Notion

In its wider sense, "good offices" means the involvement of one or more States or an international organization in a dispute between other States with the aim of settling it or contributing to its settlement. A further aim of such involvement is the solution of specific problems which the States in question are unable or unwilling to solve themselves. Finally, the intention may simply be to establish or ease relations between certain States.

Good offices may be offered by a State or organization on its own initiative or they may be requested by one or both of the parties at variance. The consent of the parties is not necessary initially, but must be obtained before such assistance can in fact be rendered.

A distinction must be drawn between technical and political good offices, although the distinction between the two is not clear-cut. The two types may also be combined.

Technical good offices include inviting the parties to conferences, convening and organizing such conferences as host State, making the necessary facilities available, organizing transport and communication, providing security arrangements and possibly finances (→ Congresses and Conferences, International). Also falling within this category is the acceptance of the responsibilities of a protecting power. The intention here is to restore or preserve contact between conflicting parties when diplomatic relations have been broken off and to represent the interests of one of the parties in the country of the other; these purposes can be served in time of peace or war (→ Protecting Powers). Finally, mention should be made of trustee functions such as the representation of German interests in Switzerland after World War II.

Political good offices include, on the one hand, appeals for peace or an armistice and, on the other hand, calls for negotiations or the holding of a conference. Another category comprises the assuming of the mandates from other States for the solution of specific problems (e.g. returning persons to their native countries, controlling and supervising the execution of agreements). Lastly, the inquiry into disputed facts, conciliation, mediation and arbitration (→ Fact-Finding and Inquiry; → Conciliation and Mediation; → Arbitration; → Peaceful Settlement of Disputes) are other forms of political good offices. In contrast to technical good offices, States here intervene in the substance of the conflict in order to effect or facilitate a solution. This may consist of suggestions of a procedural and/or substantive nature for the settlement of the dispute. The State which tenders such offices takes an active part in the negotiations between the parties.

2. Sources

The right to offer good offices is based on customary international law and the sovereignty of States; the same applies to the right to reject such an offer. A line should be drawn to exclude those forms of involvement which are prohibited by international law, such as forcible → intervention or intervention in an internal dispute.

Provisions concerning good offices are also to be found in various multilateral and bilateral treaties. Of particular note are the following:
- The Hague Convention on the Pacific Settlement of International Disputes of October 18, 1907 (→ Hague Peace Conferences of 1899 and 1907). By Art. 2 the contracting powers agreed in the event of a dispute to have recourse to the

good offices or mediation of one or more friendly powers before resorting to arms. By Art. 3 the right to offer good offices was afforded to powers not involved in the dispute, even during the course of hostilities; the exercise of this right can never be regarded as an → unfriendly act.

– Chapter VI (Arts. 33–38) of the → United Nations Charter provides for the peaceful settlement of disputes likely to endanger international peace and security. In principle, this is the responsibility of the Security Council; normally it is the Secretary General or a special organ which is charged with the tendering of good offices.

– The American Treaty on Pacific Settlement, (→ Bogotà Pact (1948)) of April 30, 1948.

– Technical good offices in the sense of the protection of the interests of another State in time of peace are provided for in Arts. 45 and 46 of the → Vienna Convention on Diplomatic Relations of April 18, 1961, and in Art. 8 of the → Vienna Convention on Consular Relations of April 24, 1963. In the case of armed conflicts, the four Geneva Conventions of August 12, 1949, apply, in particular the common Arts. 8 and 11 of three of the Conventions (Arts. 9 and 12 in the fourth Convention). The Additional Protocol I of July 10, 1977, regulates the appointment of protecting powers in Art. 5 (→ Geneva Red Cross Conventions and Protocols).

3. Evaluation

History has known many examples of good offices, successful and unsuccessful. Among the more recent ones which should be mentioned are the many protecting power mandates accepted by Switzerland in times of both peace and war (at present 14, of which the most important is the representation of the United States in Cuba), the two Neutral Nations Commissions for supervising the armistice and for organizing the repatriation of prisoners of war in → Korea in 1953, and the peacekeeping operations of the United Nations (→ United Nations Peacekeeping System).

The advantages of good offices are to be seen in the breaking of a stalemate, the removal of psychological inhibitions and the introduction of new elements into negotiations.

Good offices can only be tendered by States which are not involved in the conflict or which are not closely allied to one of the parties. A precondition is confidence in the impartiality and reliability of the third party. The permanent neutrality of a State creates particularly favourable conditions for the exercise of good offices. (The reverse is also true, that the successful provision of good offices serves to strengthen the neutrality of a State; → Permanent Neutrality of States).

In the case of international organizations, it should be noted that in general they have no weight of their own; their authority rests solely in their member States. Another drawback is that they have to work in public. These disadvantages can be reduced by the formation of special bodies with a certain amount of freedom of action.

Good offices tendered by major powers have favourable chances of success as they can exert their own power. On the negative side, they generally pursue their own interests at the same time, to the detriment of one or both parties (→ Great Powers). Small States are less open to such a temptation, but their influence is proportionately smaller. Their services are therefore particularly useful when the good offices offered are of a technical nature.

Technical good offices have the most favourable chances of success because here political considerations recede into the background. Nevertheless, problems may still arise, as was shown when Switzerland was serving as a protecting power in the Indo-Pakistan conflict of 1971/72 concerning Bangladesh.

Calls for peace or an armistice have good prospects for success when they emanate from major powers in concert with one another; looked at in another way, the conflicts in question must be between smaller nations. When less powerful nations make appeals for peace or an armistice, they tend to go unheeded; when this tendency occurs repeatedly, it is liable to undermine the prestige of such States, particularly if they are neutrals.

When mandates to provide good offices are accepted for the solution of practical problems, the request should ideally have come from all the parties concerned (in the example of Korea this was not the case). The parties must agree on the substance and the extent of the mandate and must define it clearly and unambiguously. There must be no risk of the third party becoming involved in the hostilities or participating in coercive

measures. The task must also be practicable and the holders of the mandate must be allowed a free hand. Finally, it is advantageous for the mandate to be limited to a specific period of time.

A basic condition for the success of good offices is always the existence of a certain willingness of the parties to reach a solution of the conflict, regardless of the public stances they may have adopted, which might appear to be irreconcilable.

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INQUIRY *see* Fact-Finding and Inquiry

INTERIM MEASURES OF PROTECTION

1. Function

In international law, as in municipal law, the judicial settlement of disputes is directed towards a final judgment. Nevertheless, it is possible that one of the parties to a dispute may prejudice the final outcome of the process de facto by an arbitrary act before a judgment has been reached, rendering ineffective any judgment of the tribunal. It is the role of interim measures of protection to prevent such a result and to guarantee effective decision-making.

2. Sources

The concept of interim measures of protection appeared for the first time in the → Bryan Treaties of 1913/14, and provision was made for such measures in the Statute of the → Central American Court of Justice as well as in the Geneva → General Act for the Pacific Settlement of International Disputes (1928 and 1949), but most importantly in Art. 41 of the Statute of the → International Court of Justice and that of its predecessor, the → Permanent Court of International Justice. There are in existence an increasingly large number of tribunals, within the framework of specialized international or supranational organizations, which are empowered to indicate interim measures of protection; for example, the → European Court of Human Rights and the → Inter-American Court on Human Rights, the → Court of Justice of the European Communities, the European Nuclear Energy Tribunal (→ Organization for Economic Cooperation and Development, Nuclear Energy Agency), the Western European Union Tribunal (→ Western European Union), the International Tribunal and the German-French Mixed Court in the → Saar Territory and the Arbitral Tribunal of the → London Agreement on German External Debts. In addition, an important number of arbitral tribunals have been empowered to indicate interim measures, of which particular note should be given to the → Mixed Arbitral Tribunals after World War I.

In some cases special provisions expressly authorize international tribunals to grant interim protection. However, there is also a widely held view attributing such a power by implication to international tribunals and especially to arbitral tribunals, in the absence of such explicit provisions.

3. Procedure

Arts. 73 to 78 of the Rules of the ICJ adopted in 1978 contain provisions on the procedure for bringing a valid request for such measures as well as all other relevant information concerning, for example, the contents of the request, the possibility of revocation and of bringing a fresh request, and the procedural guarantees in the interim protection summary procedure, such as the requirement that the parties be given an opportunity to make their observations on the issue and the possibility to have a judge of their nationality on the bench. These rules also provide for the possibility of indicating interim measures without a request by either of the parties as well as the

possibility of an indication ultra petita; this latter procedure, however, does not exist, for example, in the Court of Justice of the European Communities (→ Procedure of International Courts and Tribunals).

4. Jurisdiction and Interim Measures of Protection

The fact that a finding on the question of jurisdiction often takes a considerable length of time leads in interim protection procedure to a conflict between the urgency of the matter and the fundamental rule that the jurisdiction of an international tribunal depends upon consent. Five tests have been proposed to determine to what extent, if at all, the Court must decide, at the interim measure stage, whether it has jurisdiction as to the merits of the case. (a) It has been argued that the Court's substantive jurisdiction must be clearly established before an order of interim protection can be considered (see diss. op. of Judge Forster in Nuclear Tests Case (Australia v. France), Order re Interim Measures, ICJ Reports 1973, p. 99 at p. 111 and sep. op. of Judge Morozov in Aegean Sea Continental Shelf Case, Order re Interim Measures, ICJ Reports 1976, p. 3 at p. 22). This test neglects the pre-preliminary character of interim protection and is not an acceptable one as the Court's consistent practice demonstrates. (b) At the other extreme of the range of possibilities is the standpoint that the question of substantive jurisdiction is irrelevant. This view has to be rejected as well, because it does not take account of the voluntary nature of the submission of States to international adjudication. (c) The third test is the "possibility test", which means that there must be an instrument emanating from the parties to the dispute conferring prima facie jurisdiction upon the Court and incorporating no reservation obviously excluding the jurisdiction (the so-called "Lauterpacht test", see sep. op. of Judge Lauterpacht in the Interhandel Case, Order re Interim Measures, ICJ Reports 1957, p. 105 at pp. 118–19). This is the approach which the Court has taken (→ Fisheries Jurisdiction Cases, → Nuclear Tests Cases); this also enables the States to evaluate their prospects more accurately when bringing a request for interim protection. (d) The fourth test is the "probability test", which apparently has never been adopted by the Court but has been propagated by several judges in their separate opinions in the → Anglo-Iranian Oil Co. Case, the → Fisheries Jurisdiction Cases, the → Nuclear Tests Cases, and the → Aegean Sea Continental Shelf Case. This test postulates that interim measures may only be granted if it is reasonably probable that the Court does have jurisdiction on the merits. This test, although providing for less than a complete investigation upon jurisdiction as to the merits, cannot avoid a prolonged examination of the question, making it difficult for the Court to make a different decision at the jurisdiction stage. Although this test would be an almost ideal one, the difficulties it encounters in practice make the above-mentioned "possibility test" the preferable one since it can be regarded as the appropriate accommodation of both sovereignty and international justice. (e) The fifth possibility was proposed by the then President of the Court Jiménez de Aréchaga in the → Aegean Sea Continental Shelf Case, based upon his opinion that the power to indicate interim measures is founded upon the Statute and not upon the instruments of submission of the States. Thus the question of jurisdiction would arise only as one of the "circumstances" requiring the indication of interim measures in the sense of Art. 41 of the Statute. This view cannot be accepted because, on the one hand, the balancing between the different circumstances and the question of jurisdiction is too hard a task for a Court under the pressure of time. On the other hand, jurisdiction has a special status distinguished from the circumstances referred to in Art. 41 and is therefore a precondition of any further consideration of the request. As the consent of States is crucial to the exercise of judicial power over States, the test of jurisdiction in the interim measures stage ought to be the same for all cases. In conclusion, it should be noted that even in the case of the non-appearance of one of the parties the jurisdiction test remains the same.

5. Article 41 of the Statute of the ICJ

Unanimity exists for the view that interim protection can only be awarded if irreparable damage is imminent. If, however, the damage could be repaired easily or if it is neither probable nor imminent, there is then no place for interim protection. (Denunciation of Treaty of 1865 between

China and Belgium, Order re Interim Measures, 1927, PCIJ A 8 at p. 7; Legal Status of the South-Eastern Territory of Greenland, Order re Interim Measures, 1932, PCIJ A/B 48, p. 277 at p. 284; Anglo-Iranian Oil Co. Case, Order re Interim Measures, ICJ Reports 1951, p. 89 at p. 93; Nuclear Tests Case (Australia v. France), Order re Interim Measures, ICJ Reports 1973, p. 99 at p. 103; Nuclear Tests Case (New Zealand v. France), Order re Interim Measures, ICJ Reports 1973, p. 135 at p. 139; Fisheries Jurisdiction Case (U.K. v. Iceland), Order re Interim Measures, ICJ Reports 1972, p. 12 at p. 16; Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), Order re Interim Measures, ICJ Reports 1972, p. 30 at p. 34). The requirement of urgency is closely linked to the preceding point: if no irreparable damage is imminent, there is no urgency (Trial of Pakistani Prisoners of War Case, Order re Interim Measures, ICJ Reports 1973, p. 328 at p. 330; Nuclear Tests Case (Australia v. France), Order re Interim Measures, ICJ Reports 1973, p. 99 at p. 104; Nuclear Tests Case (New Zealand v. France), Order re Interim Measures, ICJ Reports 1973, p. 135 at p. 140). The scope of interim protection is the preservation of the respective rights which are possibly to be adjudged on the merits. From this condition is derived the requirement that the rights for which protection is requested be connected to the rights to be adjudged on the merits, without a decision thereon prejudging the final decision. (See Factory at Chorzów, Order re Interim Measures, 1927, PCIJ A 12 at p. 10; Legal Status of the South-Eastern Territory of Greenland, Order re Interim Measures, 1932, PCIJ A/B 48, p. 277; Polish Agrarian Reform and German Minority, Order re Interim Measures, 1933, PCIJ A/B 58, p. 175). Even if all these prerequisites are satisfied, interim protection is not to be granted where the prospects of success on the merits are rather small. The limits of investigation here are comparable to those of the question of jurisdiction, but as this point will only arise once all the other "circumstances" have been investigated, it has scarcely been considered either by the Court or in legal writings (but see Haya de la Torre Case, ICJ Reports 1951, p. 71 at p. 82; Fisheries Jurisdiction Case (U.K. v. Iceland), Order re Interim Measures, ICJ Reports 1972, p. 12; Nuclear Tests Case (Australia v. France), Order re Interim Measures, ICJ Reports 1973, p. 99).

6. Binding Force and Enforceability

Whether interim measures of protection are binding upon the parties is as yet an unsettled question. There is a strongly held view as to the non-binding character of interim measures, which finds support not only in the very restrained language of Art. 41 of the Statute but also in the preparatory work to the Statute as well as in Rule 75 of the 1978 rules. The proponents of the binding force of interim measures rely on the general principle of law that States who are parties to an international dispute sub judice are under an obligation to abstain from any act that would nullify the result of the final judgment. The measures ordered by the Court are thus the practical application of this obligation. Although the wording of Art. 41 of the Statute does not support the argument that interim measures have a binding effect, the above general principle as well as the pronouncements of the PCIJ and the ICJ suggest that interim measures are binding. This view is supported by the new Rules 73 to 78 which employ the word "decision" in the context of interim measures and thus suggest the application of Art. 59 of the Statute. Also, the fact that there exists unanimity as to the obligation to make reparation for violation of an interim measure (→ Reparation for International Delicts) supports the recognition of its binding character, because in international law responsibility results only from the violation of an international obligation (→ Responsibility of States: General Principles).

A question to be separated from the binding effect problem is the enforceability of interim measures under Art. 94 of the UN Charter, a problem which was brought before the Security Council in the → Anglo-Iranian Oil Co. Case but not settled on that occasion. The view that an order indicating interim measures of protection is a "decision" in the sense of Art. 94 of the Charter may be easily accepted, especially in view of the new Rules 73 to 78. However, whether an order of interim protection can be regarded as a "judgment" in the sense of Art. 94 (2) of the Charter does not seem to follow automatically from Art. 41 (2) of the Statute, but nevertheless it appears to be acceptable in view of the character

of those measures. Even if this view is adopted, the effectiveness of the action of the Security Council under Art. 94 is of a doubtful character because of the right of → veto. Moreover, this view is also attended by all the difficulties connected with the enforcement of international judgments (→ Judgments of International Courts and Tribunals; → International Obligations, Means to Secure Performance).

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INTERNATIONAL COURT OF JUSTICE

A. Establishment, Legal Basis, Activities

1. Historical Background

In view of the importance of the role that the → Permanent Court of International Justice had come to play, the opponents of the "Axis Powers" were in agreement during the latter part of World War II that a system for the → peaceful settlement of disputes should be set up after the war. In accordance with the principles of the → Atlantic Charter, this system would have to include an international judicial institution. Thus a Court of Justice was included in the proposals for a world organization discussed at the → Dumbarton Oaks Conference (1944). As regards the statute of this court, it was decided either to adopt a modified version of the Statute of the PCIJ which was formally still in existence, or to draw up a fresh statute modelled upon that of the PCIJ.

At the → Yalta Conference (1945), it was agreed to convene a "United Nations Conference on International Organization" on April 25, 1945, in San Francisco. The United States of America convoked a Committee of Jurists in Washington on behalf of the powers represented at the Dumbarton Oaks Conference to discuss the establishment of an international court. The Committee, which consisted of representatives from 44 States, drafted the statute for a court of justice in April 1945. Most of the provisions were taken verbatim from the Statute of the PCIJ in its revised version of 1929, which came into force on February 1, 1936. At the subsequent San Francisco Conference, the draft of the statute was referred to a special commission which invited two members of the PCIJ, President Guerrero and Judge Hudson, to attend in a consultative capacity. The commission decided that a completely new court should be established, owing to the fact that 13 of the States represented at the San Francisco Conference were not signatories to the Statute of the PCIJ (including the Soviet Union and the United States), and that 16 signatories of that Statute were not participants at the Conference. The commission agreed, with only minor modifications, to the draft statute submitted by the Committee of Jurists.

In the founding session of the → United Nations, the Statute for the new "World Court", the International Court of Justice, was adopted

together with the → United Nations Charter on June 26, 1945. Both the Statute and the Charter came into force on October 24, 1945.

2. Legal Basis

While the Charter (Chapter XIV) contains the legal basis for the establishment and legal status of the ICJ, the Statute of the Court contains provisions for its organization, jurisdiction and procedure, these being identical in many respects to those of the PCIJ.

The Statute of the Court forms an integral part of the Charter of the United Nations (Art. 92, Charter). Hence all members of the United Nations are automatically parties to the Statute. States which are not members of the United Nations may become parties to the Statute provided they satisfy certain conditions, determined in each case by the → United Nations General Assembly upon the recommendations of the → United Nations Security Council (Art. 93, Charter); so far, this has applied to Switzerland (1948), Liechtenstein (1950) and San Marino (1954). The position of the ICJ differs from that of the PCIJ in that the Covenant of the League of Nations merely provided guidelines for the setting up of a court. Thus the legal basis for the PCIJ was provided solely by its Statute, of which not all the signatories were members of the League, and furthermore, to which not all the members of the League were parties.

Amendments to the Statute of the present Court are governed by essentially the same procedure as amendments to the Charter of the United Nations (Art. 69, Statute; unspecified Article references hereinafter refer to the Statute). As a result of this provision, and of the integration of the Statute of the Court in the UN Charter, Art. 109 (3) of the Charter applies to the Statute as well. Here it was provided that a general conference for the purpose of reviewing the Charter was to be held ten years after the founding of the United Nations. In its 1955 Annual Session the UN General Assembly decided to hold such a conference; but in fact it never took place. Proposals for alterations to the Charter were to be submitted by the commencement of the 1961 Annual Session. Within the United Nations, the following possible alterations to the Statute were discussed, but were not actually pursued further: the question of moving the ICJ to New York; an increase in the number of judges; a reorganization of the institution of judges *ad hoc*; the question of granting access to the proceedings of the Court to international organizations; and an expansion of the Court's advisory jurisdiction. (For further discussions in the UN since 1970, see UN documents on "Review of the Role of the International Court of Justice": A/8238, A/8568, A/8967, A/9846 (Reports of the Sixth Committee); A/8382 with Addenda 1–4, A/8747 (Reports of the Secretary-General). The Court itself is empowered to propose such amendments to the Statute as it may deem necessary by means of a written communication to the → United Nations Secretary-General (Art. 70).

3. Legal Status

The fundamental purpose of the United Nations is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes" (Art. 1, Charter). The same objective is shared by the ICJ, it being "the principle judicial organ of the United Nations" (Art. 92, Charter). Furthermore, the Court is also guided by the basic principle, re-emphasized in the → Friendly Relations Resolution of 1970, that "every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice, are not endangered".

The Court is not the sole judicial organ of the United Nations; the → United Nations Administrative Tribunal operates as a subsidiary judicial organ, and other subsidiary organs may be created for special judicial tasks (Art. 7, Charter). The relationship between the United Nations Organization and the ICJ is manifest in the election of judges, in the Court's capacity to give advisory opinions for the Organization and in the regulation stating that the expenses of the Court are to be borne by the UN in the manner decided on by the General Assembly (Art. 33).

In spite of being an organ of the UN Organization, the ICJ occupies a special position in relation to the other five principal organs, into whose hierarchical structure it is not integrated. This position resembles the legal status of the PCIJ,

which was established outside the framework of the League of Nations. The ICJ is an independent court, deciding cases in its own name, rather than in the name of the UN; in this respect it differs from the Security Council, whose decisions, also directly binding on States, are made on the basis of an express delegation of power (Art. 24, Charter), and are thus those of the Organization as a whole. It would appear that the ICJ is a → subject of international law, whose capacity to act is limited to the fulfilment of its functions.

The ICJ is not the legal successor to the PCIJ. But in order to ensure the continuity of the two World Courts, matters referable to the PCIJ under treaties or conventions which are still in force between parties to the new Statute are now referred to the ICJ (Art. 37) despite institutional differences. The same holds true for declarations made under the optional clause of the PCIJ Statute (Art. 36 (5) ICJ Statute; see section C.4 *infra*).

4. Opening of the Court and its Activities

Its judges having been elected on February 6, 1946, by the United Nations assembled in London, the ICJ was able to convene its constitutive session at its seat in the Hague on April 4, 1946. The inaugural meeting of the Court was held on April 18, 1946. Since then, except during judicial vacations, it has remained permanently in session (Art. 23). The PCIJ was dissolved on the day of the ICJ's inauguration.

The first dispute between States to be brought before the new Court was the → Corfu Channel Case on May 22, 1947. By December 31, 1980, the Court had given judgment in 26 disputes (see section G.1, *infra*) brought before it. By order of the Court, proceedings were discontinued in several cases because the applications were withdrawn (French Nationals in Egypt, 1950; → Electricité de Beyrouth Company Case, 1954; → Aerial Incident of 27 July 1955 Cases; Compagnie du Port de Beyrouth Case, 1960; → Trial of Pakistani Prisoners of War Case, 1973, and in further cases because the parties against whom the claims were brought failed to submit to the jurisdiction of the Court (→ Antarctica Cases, 1956; → Aerial Incident Cases (U.S. v. Hungary; U.S. v. U.S.S.R.; U.S. v. Czechoslovakia; see section E.1 b, *infra*). Since the first advisory opinion concerning the → Admission of a State to Membership in United Nations (1948), the Court has given 16 advisory opinions (see section G.2, *infra*). One further request was received in 1980 (Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt). A list of all advisory opinions is found in section G, *infra*; they are also dealt with in separate articles.

B. Organization

1. Composition of the Court and Election of Judges

The ICJ is composed of 15 judges, elected irrespective of their nationality. They must be of high moral character, and must possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurisconsults of recognized competence in international law. No more than one national of any State may be a member of the Court. Together, the judges should represent the main forms of civilization and the principal legal systems of the world (Arts. 2, 3, 9). A relatively large number of the judges in the PCIJ (an average of ten) came from West European States; this has changed in the election of the judges of the ICJ. In the last years, the practice has been to have four judges from West European States, one from the United States, two from South American States (previously four), two from East European States and six from African and Asian States (previously three); Commonwealth States are no longer represented as such.

The judges are elected by the General Assembly and by the Security Council of the United Nations. The Secretary-General invites nominations from the national groups in the → Permanent Court of Arbitration, each of which may nominate up to four persons (not more than two of whom may be of their own nationality), and prepares a list of candidates thus nominated. Members of the United Nations which are not represented in the Permanent Court of Arbitration have a similar right of nomination. The General Assembly and the Security Council elect the members of the Court independently of one another; the vote in the Security Council is taken without distinction between permanent and non-permanent members – thus obviating the possibility of a veto by a State with a permanent seat

on the Security Council. States which are parties to the Statute but not members of the United Nations may participate in the elections under the conditions laid down by the General Assembly, upon recommendation by the Security Council (e.g. Switzerland). Those candidates who obtain an absolute majority of votes in both the General Assembly and the Security Council are considered elected. If, after the third ballot, seats remain vacant, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed for the purpose of proposing candidates; should this procedure prove unsuccessful, those judges who have already been elected must fill the vacant seats, by selection from among those candidates who obtained votes in the previous ballots (Arts. 1 to 12).

The judges are elected for nine years and may be re-elected. In the interests of continuity in the interpretation and development of international law, however, the bench is not re-elected in its entirety every nine years, but rather a third of the bench is re-elected every three years. In order to commence this electoral cycle, only five judges were appointed for the full nine-year term at the first election in 1946, while the terms of five judges expired at the end of three years and those of five more at the end of six years, the choice of individuals being decided by lot. By-elections are provided for in the case of seats becoming vacant; it is, however, not essential that such seats be filled, provided that the number of judges remaining in office is sufficient to fulfil the quorum requirements of plenary sessions of the Court. A member of the Court appointed in a by-election holds office only for the remainder of his predecessor's term (Arts. 13 to 15).

2. Status of the Judges

The members of the ICJ are independent. No member can be dismissed unless, "in the unanimous opinion of the other Members, he has ceased to fulfil the required conditions" (Art. 18). Their independence is secured by their freedom from instruction, especially in relation to their home States, and by their being granted diplomatic privileges and immunities during their term of office. The salaries of the judges and the conditions under which they may be given retirement pensions are fixed by the United Nations General Assembly.

The judges are to fulfil their functions impartially and conscientiously. They may not "exercise any political or administrative function or engage in any other occupation of a professional nature" (Art. 16). No judge may participate in a case brought before the Court in which he has previously been involved as agent or counsel for one of the parties, as a member of a commission of inquiry, or as a member of a national or international court of justice or arbitration. Furthermore, a member of the Court may declare that he should not take part in the decision of a particular case (Art. 24). Art. 24 further provides that: "If the President considers that for some special reason one of the Members of the Court should not sit in a particular case, he shall give him notice accordingly". In the case of disagreement between the judge concerned and the President, the matter is to be settled by decision of the Court.

3. Structure of the Court

The Court comprises the President, the Vice-President, the full Court, the Chambers, the Registrar and the Registry.

The President and the Vice-President are elected by the Court for periods of three years and may be re-elected. The President – or if he is unable, the Vice-President – represents the Court in its external dealings, and exercises the numerous powers assigned to him in the Rules as well as extra-judicial competences conferred on him in the international sphere.

The full Court is the organ by means of which the Court normally exercises its functions. Nine judges constitute a quorum. The composition of the Court varies with each particular case.

The Court may form chambers of three or more judges – which, so far, it has not done – for particular categories of disputes, for example, for labour cases and cases relating to transport and communication. Furthermore, the parties to a particular dispute may request that such a chamber be formed. As provided for in the Statute, there exists a special chamber of five judges, which, in the interests of a rapid dispatch of business, is to decide cases by summary procedure, should the parties so request. Judgments

given by the chambers are considered as judgments of the Court.

The Registrar is appointed by the Court for a period of seven years, and is the head official in the Registry set up by the Court. The Registry, apart from having to fulfil its functions as a secretariat, is charged with the publication of the voluminous documents of the Court. Its functions are governed by the Rules of Court, by its own regulations of service and by a special set of instructions for the Registry.

4. Judges ad hoc

Judges who are of the same nationality as one of the parties in a particular case retain both their seats and their votes on the bench, and may not be replaced on grounds of partiality (Art. 31). In order to preserve equality in the status of the parties, the Statute provides that where a judge of the nationality of one of the parties is sitting on the bench, the opposing party may choose an additional judge. A judge so chosen must possess the same qualifications as members of the Court, and should preferably be selected from among those persons who have been nominated for election to the Court. He need not be a "national" judge, but may be a national of a State which is not represented on the bench. Each of the parties may, furthermore, choose such a judge if neither of them has a national sitting on the bench. These opportunities introduce a further variant into the composition of the bench in each particular case. The same regulations apply to cases brought before the chambers, provided that there are no members of the Court of the nationality in question who could be substituted for the ordinary members of the chambers. Judges chosen by the parties have the same rights and duties as the members of the Court, for the duration of the proceedings.

The institution of judges *ad hoc*, both national and non-national, has been made use of in over half of the cases decided by the ICJ to date. The objection has been raised by some States and in the literature, that this procedure runs counter to the principle of allowing the composition of the Court to remain free from the influence of the parties, and that it introduces principles of international → arbitration into the sphere of international adjudication. In the course of discussions concerning possible alterations to the Statute, the → Institut de Droit International suggested either dispensing with the institution entirely, or having judges *ad hoc* elected by the members of the national groups in the Permanent Court of Arbitration, rather than having them chosen by the parties (AnnIDI Vol. 45 II (1954) 291).

5. Rules of Court

The Court adopted the Rules provided for by the Statute on May 6, 1946. These Rules corresponded substantially to those of the PCIJ in their revised version of 1936. The Rules are primarily of relevance when questions of procedure arise that are not covered by the Statute.

On May 10, 1972, the Rules were partially revised on the basis of experience in procedural practice, and as a result of discussions held by the Court in 1968. Eighteen of the articles underwent alteration, the text was reworded in a number of places, and the total number of articles was increased to 91. In particular, the revision concerned provisions relating to the chambers of the Court, to the expedition of the proceedings of the Court, and to the reorganization of the system of preliminary objections. A comprehensive revision followed on April 14, 1978. It affected nearly all of the chapters, and brought the total number of articles up to 109. For the most part, the changes were limited to rewording previous articles, defining various provisions, and incorporating articles of the Statute into the Rules. Only a few alterations were of a substantive nature. A regrouping of the articles also necessitated their renumbering (see Oellers-Frahm, op. cit.). The revised Rules came into force on July 1, 1978 (ICJ Acts and Documents, No. 4 (1978) 92–161).

In accordance with a Court resolution of 1946, the internal judicial practice of the Court was to be governed provisionally by the regulations adopted by the PCIJ in 1931, as amended in 1936. On July 5, 1968, the Court introduced its own regulations for internal procedure. The regulations now in force are those contained in the Resolution concerning the Internal Judicial Practice of the Court adopted by the Court on April 12, 1976. (ICJ Acts and Documents, No. 4, *supra*, pp. 165–173.) Art. 19 of the Rules of 1968 referred to this resolution as a supplement to the Rules.

C. Jurisdiction

1. Categories of Jurisdiction

(a) The general jurisdiction of the ICJ covers "all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force" (Art. 36(1); Chronological List: ICJ Yearbooks, Chapter IV, Section III). The Court exercises this jurisdiction by giving judgments in contentious proceedings, and by giving advisory opinions on questions of law. There are various ways in which the parties can confer jurisdiction on the Court to adjudicate disputes. Jurisdiction can be accepted *ante hoc*; *ad hoc* or *post hoc*. The Court's jurisdiction *ante hoc*, in other words before a matter is brought before it, can only arise through the recognition of its compulsory jurisdiction or when a treaty expressly so provides (see sections C.4, E. 1(b), *infra*). Jurisdiction *ad hoc* arises when the parties agree, without any former commitment, to seek the judicial settlement of a dispute which has already arisen, or on the basis of a provision contained in the Charter of the United Nations or in other conventions in force or arbitration agreements. Such jurisdiction does not necessarily arise automatically, but must be invoked in each individual case by means of a special agreement between the parties (see section E.1(a), *infra*). The Court may have jurisdiction *post hoc*, in other words after a matter has been brought before it, if a counter-claim is filed (see section E.1(b), *infra*), by the operation of the principle of *forum prorogatum* (see section E.1(c), *infra*), through participation by third States (see section E.2, *infra*) or through the application for interpretation or revision by a party which is bound by the decision (see section C.1(d), *infra*). The Court may give advisory opinions (see section F., *infra*) on questions of law brought before it by organs so entitled under the Charter of the United Nations, or by other related agencies specially authorized to do so.

(b) The provision mentioned earlier whereby the ICJ, while not the legal successor to the PCIJ, nonetheless inherits the latter's jurisdiction where conferred by treaty (see section A.3, *supra*, and also section C.4, *infra*), applies to the original members of the United Nations, to States which subsequently became parties to the Charter of the United Nations and *ipso facto* to the Statute, and to States which are parties to the Statute alone. The ICJ will also have jurisdiction where a State becomes a party to the Statute only after a particular dispute has arisen (as was the case with Spain after the interim judgment in the → Barcelona Traction Case, 1964). The earlier treaty in question must still be in force at the time legal proceedings are instituted. This requirement has led to difficulties in evaluating the applicability of a certain treaty cited (→ Ambatielos Case, 1953), and the significance of the changes in the legal status of a State involved in a dispute (see the Namibia Advisory Opinion of 1971, → South West Africa/Namibia (Advisory Opinions and Judgments)).

(c) The jurisdiction of the ICJ is relatively often concurrent with that of international arbitral tribunals and other institutions concerned with the peaceful settlement of disputes. This is due to the fact that there are often various arrangements between two States as to how disputes between them should be resolved, and that under many bilateral and multilateral agreements, parties may choose from among a number of methods of settling disputes. The jurisdiction of the ICJ does not enjoy universal priority (Art. 95, Charter). Where there is no express regulation on the problem of concurrent jurisdiction, a bilateral agreement takes precedence over a multilateral agreement, regardless of the dates of their conclusion. Furthermore, within such agreements, a specific regulation to commit disputes to adjudication or arbitration will take precedence over a regulation which refers only in general terms to the settlement of disputes. Notwithstanding these principles, a collective agreement or a convention containing stronger legal commitments – for instance, compulsory as opposed to optional jurisdiction – will take precedence over a bilateral treaty or a specific dispute settlement treaty. Under the rules for UN members, provisions of the Charter have priority in the event of conflicts with other obligations of the member-States (Art. 103 Charter).

(d) Since the ICJ ranks alongside international arbitral tribunals rather than above them, jurisdiction as a court of appeal or as an instance of evocation may only be conferred on it in certain cases; in such cases it decides as a "second court of first instance" (Guggenheim). The ICJ derives this

type of jurisdiction from certain treaties concluded prior to its establishment (cf. → Permanent Court of International Justice, see section C.1(d), *infra*). Furthermore, such jurisdiction has again been attributed to the Court in the law of international organizations (→ Jurisdiction of the ICAO Council Case, 1972). An appellate function accrues to the ICJ's advisory opinions concerning judgments given by the → International Labour Organisation, Administrative Tribunal, in that these pronouncements are of binding effect.

(e) The competence to make extra-judicial decisions, which is attributed to the ICJ or its President, is derived from a number of treaties concluded either before or after the establishment of the Court. In the majority of cases, this task entails the appointment of arbitrators or members of international commissions. Usually the President, rather than the Court, is authorized to appoint an arbitrator or an umpire of a court composed of several arbitrators. This power of appointment may either be immediate and direct, or it may be conditional upon the failure of the creating authorities to reach agreement. If the President is so authorized, but happens to be of the same nationality as one of the parties to the dispute, the Vice-President becomes competent to exercise this jurisdiction.

By virtue of various agreements concluded by member-States and specialized agencies of the United Nations, the President of the ICJ has been authorized to appoint a chief official or a chairman of the judicial organ of such agencies.

2. Access to the Court

(a) The Statute of the ICJ provides that access to the Court (see → Standing before International Courts and Tribunals) is limited to States (Art. 34(1)). The same applies to cases of intervention and other forms of participation in the proceedings (Arts. 62, 63). Subjects or objects of international law other than States – organizations with international legal personality and individuals – are not entitled to appear as parties before the Court, although they may be called upon by the Court to give information; organizations may provide such information on their own initiative. If in a dispute between States the constitutive instrument of such an organization, or a treaty based on the same requires interpretation, the Court must notify the organization concerned, and communicate to it copies of the records of the written proceedings, in order to give it an opportunity to express an opinion on the matter (Art. 34). This does not, however, apply to non-governmental organizations. An exception to the principle that only States may have access to the ICJ is the right conferred on the UN Security Council and General Assembly, and on organs and specialized agencies so authorized by the latter, to apply to the Court for advisory opinions (Art. 96, Charter; Art. 65).

(b) That States which are parties to the Statute have access to the Court is universally recognized (Art. 35(1)). Since the Statute forms an integral part of the Charter (Arts. 92, 93, Charter), the member-States of the United Nations automatically have this capacity. States which are not members of the United Nations may become parties to the Statute under the conditions determined by the General Assembly upon recommendation by the Security Council (Art. 93(2) Charter; Liechtenstein, San Marino and Switzerland have become parties to the Statute under this provision).

(c) The Security Council may decide whether or not and under what conditions States which are neither members of the United Nations nor parties to the Statute, and which thus lack access to the Court, may be admitted to the proceedings; the conditions thus determined must not, however, result in any inequality in the status of the parties before the Court (Art. 35(2)). In the application of this regulation, the Security Council, in a resolution passed on October 15, 1946, (ICJ Yearbook 1978/9, pp. 42–43) granted access to the ICJ to every State which, in a declaration to the Registrar, agrees to submit, in accordance with the Charter, the Statute and the Rules, to the jurisdiction and the judgment of the Court and to the measures provided for in Art. 94 of the Charter for the enforcement of decisions of the Court. Such a declaration to the Registrar may be in respect of a particular dispute which has already arisen (as was the case with the declaration made by Albania in the → Corfu Channel Case, 1949, and by Italy in the → Monetary Gold Case, 1954 before these States became parties to the Statute), or it may be in respect of all pending or future disputes or of certain categories of disputes. Here, a declaration concerning future dis-

putes is held to be an acceptance of compulsory jurisdiction.

3. Justiciable Disputes

Although by virtue of the principle of voluntary submission there are technically no limitations on the subject-matter of cases submitted to the ICJ, only legal disputes are considered "justiciable", i.e. admissible to judgment by the Court (→ Judicial Settlement of Disputes).

Even "legal" disputes can have political elements which so strongly affect the → vital interests or the reputation of a State that it is reluctant to refer the matter to an international court. This reluctance is of particular significance where a State, while accepting the Court's compulsory jurisdiction, reserves the right to exclude matters relating to honour, vital interests or → domestic jurisdiction (see section C.4 *infra*). It is necessary to distinguish between legal disputes and political disputes (conflicts of interest), in which it is not differences of opinion as to questions of international law that are at issue, but rather demands to have particular legal situations or legal relationship altered or to have political claims recognized. Political disputes are not justiciable, and can therefore only be settled by diplomatic means or by non-judicial methods for the → peaceful settlement of disputes. They may be subject to arbitration, in which case they can be submitted for equitable settlement within the framework of international arbitration.

4. Compulsory Jurisdiction

Adopting the corresponding regulation from the Statute of the PCIJ, the Statute of the ICJ provides that States which are parties to it may issue declarations, with regard to all other States accepting the same obligation, that they recognize the jurisdiction of the Court in all legal disputes as compulsory (Art. 36(2)). Legal disputes within the meaning of the Charter may concern the following: the interpretation of a treaty; any question of international law; the existence of a fact which, if established, would constitute a breach of an international obligation; and the nature or extent of the reparation to be made for the breach of an international obligation.

Since such a declaration is left to the States' own discretion, this provision is called an "optional clause". From the moment of the submission of its declaration to the Secretary-General of the United Nations (who must then communicate a copy of it to the Registrar of the Court), the State accepting jurisdiction under the optional clause is bound for the future by the compulsory jurisdiction of the Court. Any State which is not a party to the Statute may also make such a declaration. Declarations made in accordance with Art. 36 of the Statute of the PCIJ are deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the ICJ for the period which they still have to run (Art. 36(5)). The Court has construed this regulation as applying only to the original signatories of the Charter. Where States subsequently become parties to either the Charter or the Statute, or, without becoming parties to the Statute, make declarations under the optional clause, the compulsory jurisdiction of the PCIJ does not accrue to the ICJ under Art. 36(5) (see the → Aerial Incident of 27 July Case, Israel v. Bulgaria, 1959).

The compulsory jurisdiction of the Court may be accepted unconditionally, or on condition that several or certain States undertake the same obligation, or for a limited period of time. Normally, time limits are set, but the condition that a group of States should submit to the *obligatorium* is rare. In every case, the principle of reciprocity automatically governs the extent to which a declaration is binding on one State as against the other. Many declarations contain reservations regarding domestic jurisdiction; in this way, States may exclude from the compulsory jurisdiction of the Court legal disputes which affect their vital interests. Such reservations are formulated in various ways. As a rule, they exclude disputes which fall "essentially" or "exclusively" within the State's domestic jurisdiction.

Reservations referring specifically to disputes which "under international law fall exclusively within the domestic jurisdiction", are consistent with the conditions contained in Art. 36, in particular with the right of the Court to resolve disputes as to its own jurisdiction. On the other side, there is much debate as to whether the so-called "automatic reservation", reserving to the State the right to determine unilaterally the scope of its jurisdiction, is consistent with the Statute (see Judges Guerrero's

and Basdevant's Dissenting Opinions in the → Norwegian Loans Case, 1957, and Judge Lauterpacht's Separate Opinion in the → Interhandel Case, 1959).

By December 31, 1978, declarations under the optional clause had been made by 43 of the member-States of the United Nations (including eleven West European and five South American States), as well as by Liechtenstein and Switzerland (see ICJ Yearbook 1978/79, pp. 56–86). Communist-orientated States have always up to now rejected compulsory jurisdiction.

Of the declarations made to date under the optional clause, about half have been unqualified; the rest were made with reservations of varying content. The United States, for example, formulated its declaration of August 26, 1946, so as to exclude the jurisdiction of the ICJ for "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America" (→ Connally Reservation).

5. *Determination of Jurisdiction*

In the event of a dispute between the parties as to jurisdiction, the Court decides the matter itself (Art. 36(6)). This provision does not apply only to the interpretation of the matters mentioned in Art. 36(2), as is sometimes assumed, but rather to whatever differences of opinion may arise as to the jurisdiction of the Court (→ Nottebohm Case, 1955). The Court is also competent to determine its own jurisdiction *ex officio* with regard to *res judicata*, to *lis pendens*, to *jus standi* (→ Standing before International Courts and Tribunals) and to its competence to give substantive judgments (→ Northern Cameroons Case, 1963). This right is of particular significance if the parties have accepted compulsory jurisdiction with reservations regarding domestic jurisdiction. If the reservation excludes matters from the *obligatorium* which under international law fall exclusively within domestic jurisdiction, the Court must examine whether this is in fact the case.

D. The Law Applicable

1. *Judgments based on International Law*

The ICJ decides matters brought before it in accordance with international law. In so doing, under Art. 38(1) of its Statute it is to apply, both in contentious and advisory proceedings, "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Art. 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

The designation of the → sources of international law upon which the Court may draw also determines the hierarchical order of the law applicable. At the top of the list comes international treaty law and, should this prove unproductive, international customary law. Universally recognized basic principles of law (→ General Principles of Law) provide a subsidiary source of law. Only in order to facilitate the interpretation of legal norms in these spheres may precedents and the writings of esteemed scholars of international law be drawn upon.

As far as the activity of the Court in giving advisory opinions is concerned, the provision in Art. 38(1a) relating to contentious proceedings is to be construed along the lines of Art. 68. Thus construed, it obliges the Court to apply not only agreements concluded among States, but also agreements concluded between States and international organizations, or amongst international organizations where such agreements contain principles which are relevant to the determination of the law.

Not only those principles which have become established as a result of the continuing general acceptance and application by States are applicable as norms of customary international law, as could be inferred from the wording of Art. 38(1b), but also norms of → regional international law.

In speaking of "general principles of law recognized by civilized nations", the Charter is referring not to norms in the international sphere, which – provided the necessary conditions are fulfilled – are only applicable as customary international law, but to general legal principles embodied in municipal laws or reflected in the basic concepts behind the legal orders of States whose legal systems are considered to be those of "civilized nations". Such norms may be used in a particular case to fill gaps in

international law, as long as international treaty law and international customary law contain no applicable rules.

The Court may only draw upon judicial decisions and writings of eminent scholars of international law to aid it in interpreting applicable primary sources of international law and general legal principles, or to clarify ambiguities in their content. Here, judicial decisions comprise not only the judgments of the Court itself and of its precursor, the PCIJ, but also decisions of other international courts and arbitral tribunals. Although Anglo-American influence prevailed in the committees which deliberated on the Statute of the ICJ, the provision of the PCIJ Statute was retained, by which, following continental European legal thought, judgments may not be based directly on precedents in international law, precedents may only be used as a means of clarifying ambiguities in the law which is to be applied. In order to establish clearly this principle for the Court's own decisions, Art. 38(1d) qualifies this reference to former decisions by referring to Art. 59 which states that a judgment of the Court is binding only on the disputing parties and only in respect of the particular case in question.

2. Judgments ex aequo et bono

The possibility of deciding cases *ex aequo et bono* (→ Equity in International Law) is suitable to international arbitration, but is inadequate where compulsory jurisdiction arises over questions of law and is hardly compatible with the nature of international adjudication, the primary purpose of which is to apply existing international law. Nevertheless, Art. 38(2) of the Statute provides that the power of the Court to decide cases *ex aequo et bono*, should the parties expressly so agree, is not prejudiced by the principle laid down in Art. 38(1) by which disputes are to be decided in accordance with international law. To date, no judgments *ex aequo et bono* have been given by either of the World Courts.

However, States have introduced the power of the Court to decide cases *ex aequo et bono* into various compromissory clauses and arbitration agreements. On the other hand, this power has been expressly excluded in numerous agreements regarding the judicial settlement of disputes and in numerous declarations of acceptance of the compulsory jurisdiction of the Court.

E. Procedure (see also → Procedure of International Courts and Tribunals)

1. Institution of Proceedings

(a) The filing of a special agreement between the parties is the normal method of bringing a claim before the ICJ (Art. 40(1)). Such a special agreement may either be concluded *ad hoc* after the dispute has arisen, or it may be reached on the basis of provisions relating to the settlement of disputes in existing international treaties between the parties which include the referral of disputes to the ICJ (Art. 36(1)). Through its designation of the parties and of the subject of the dispute, the agreement forms the basis for the Court's activity. The Registrar is charged with notifying the members of the United Nations, through the Secretary-General, and those non-member-States which are parties to the Statute, of the claims thus brought as well as of proceedings initiated by other means (Art. 40(3)).

(b) If an application is filed by only one party, the matter becomes pending only if both parties to the dispute have accepted the compulsory jurisdiction of the Court. In accordance with the principle of reciprocity, both parties must have undertaken the same obligations; this condition is not fulfilled if their respective declarations of acceptance of compulsory jurisdiction contain discrepant reservations; in this case, only the common content of both declarations forms the basis for the Court's jurisdiction (→ Norwegian Loans Case; → Aegean Sea Continental Shelf Case). The application must name the party against whom the claim is being brought, describe the subject-matter of the dispute in detail and state all the facts and grounds on which the claim is based. The Registrar must notify the State against whom the claim is being brought, and all others concerned.

Although the opposing parties had not accepted the compulsory jurisdiction of the Court, applications were filed unilaterally by Great Britain against Argentina and Chile (→ Antarctica Cases, 1956/57), as well as by Israel against Bulgaria in the → Aerial Incident of 27 July 1955 Cases, Israel v. Bulgaria, 1959, in a further six → Aerial Incident Cases brought against Hungary, the Soviet Union, and Czechoslovakia. This was intended to induce

the defendant to take part in the proceedings (which did not in fact occur), also to demonstrate that these States were avoiding the peaceful settlement of disputes, in violation of Art. 33 of the UN Charter. As a further means of making a unilateral application, the Rules which supplement the Statute provide an opportunity for the defendant State to answer the application with a counter-claim (Art. 80, 1978 Rules); such a claim must be directly connected with the subject-matter of the dispute, and must come within the jurisdiction of the Court. See in this connection the → Haya de la Torre Cases.

(c) The Court's competence and the subject of the dispute are established on the basis of *forum prorogatum* when a party which has not yet accepted the jurisdiction of the Court consents, expressly or implicitly, to the deciding of a claim initiated unilaterally by the other party. A defendant may also join an issue by means of a subsequent declaration or, if the proceedings have already been instituted, by refraining from raising an objection to the Court's jurisdiction, or by implication (tacit consent). Furthermore, the jurisdiction of the Court may arise out of an earlier declaration of consent to proceedings before the Court made by the defendant State either to the opposing party, or to the Secretary-General of the United Nations (consent by → estoppel). Neither the Rules nor the Statute contain regulations pertaining to these forms of joining an issue. The institution of *forum prorogatum* has, however, been recognized, if not without contradictions, in the practice of both World Courts; see the PCIJ in the → Minorities in Upper Silesia Case (Minority Schools) (1928), and the ICJ in the → Corfu Channel Case (1949), and the → Haya de la Torre Case (1951).

2. *Intervention by Third States*

Third States may participate in cases pending before the Court under two sets of circumstances. If a State considers that its own legal interests might be affected by the decision in a case, it may make a request to be admitted to the proceedings as an intervenor, upon which the Court then decides (Art. 62). If the construction of a multilateral treaty or convention is at issue in contentious proceedings, the Registrar must inform all States which are parties to the treaty in addition to those which are directly concerned in the case in question: they have the right to intervene in the proceedings without special permission; if they exercise this right, the construction contained in the judgment will be equally binding on them (Art. 63). In the practice of both World Courts to date, only two requests have been made, as provided for by Arts. 62 and 63 (→ Haya de la Torre Case and the → Nuclear Test Cases).

3. *Structure and Phases of Proceedings*

(a) Although the procedural principles laid down in the Statute refer to proceedings before the full Court, they have, as a general rule, also to be applied to proceedings before the chambers.

The official languages of the Court are English and French, with equal authority; the parties may agree to have the proceedings conducted in only one of these two languages; at the request of any party, the Court may authorize that party to use another language. In bilingual or multilingual proceedings, the judgment must be delivered in both French and English; the Court determines which text is to be considered authoritative. In unilingual proceedings, the judgment is delivered in the language used; the text in the other language is considered as a (non-authoritative) translation (Art. 39).

The procedure of the Court is governed by Part III Section C of the Rules of 1978 and the Resolution concerning the Internal Judicial Practice of the Court of 1976 (see section B.5, *supra*). The Court determines the course of the proceedings by means of procedural orders. The most important phases in the proceedings are the decisions on → preliminary objections, the ordering of → interim measures of protection, the written proceedings, the oral hearings and the deliberations on and pronouncement of the judgment (see section E.4, *infra*).

(b) The procedural orders serve primarily to determine the forms and time-limits within which the parties have to submit their briefs and file their final pleas, as well as the arrangements connected with the taking of evidence (Art. 48). Such orders are also the means by which cases are removed from the Registry's list when this becomes necessary because the action is withdrawn or because a party which has been summoned under a unilateral application, but is not bound by the *obligatorium*, fails to accept jurisdiction (see section E.1b, *infra*).

(c) The decisions on preliminary objections are

governed not by the Statute, but by Art. 79 of the Rules. Preliminary objections are frequent in the practice of the ICJ; of peremptory effect are, above all, objections to the capacity to be a party or to the Court's jurisdiction to make a substantive decision (see the first judgment in the → Ambatielos Case, 1952), or objections on the basis of *res judicata* or *lis pendens*. Further peremptory objections are constituted by the assertion of domestic jurisdiction or the invocation of a reservation in a declaration of acceptance of the compulsory jurisdiction of the Court. In principle, dilatory objections may only be raised by the defendant, and then only in instances of a unilateral application to the Court; they refer to the non-compliance with conditions which must be met prior to the commencement of proceedings. Among other things, such objections might refer to the fact that efforts to achieve an amicable settlement by diplomatic means, mediation proceedings or obligatory conciliation proceedings – required to precede adjudication by many provisions relating to the settlement of disputes – have either not been made, or have not yet proved unsuccessful. In cases which States have brought before the Court pursuant to an infringement of the rights of their nationals, the objection may be raised that local remedies have not yet been exhausted (→ Interhandel Case, 1959; → Local Remedies, Exhaustion of). The decision upon such procedural objections is given in the form of a judgment, which may be an interim judgment.

(d) The ICJ may indicate that provisional measures (→ interim measures of protection) should be taken if it considers them necessary for the protection of the rights of one of the parties (Art. 41). These measures are intended to preserve the *status quo*; in particular they impose an obligation upon a party to refrain from undertaking, while the matter is before the Court, any actions which, to the detriment of the other party, would bring about an irredeemable situation. This institution dates back to the → Bryan Treaties (1913/1914) and is also familiar from the Statute of the → Central American Court of Justice which made use of it in three cases, and from the → General Act for the Pacific Settlement of Disputes (1928 and 1949).

The Court may order provisional measures without prejudicing the decision as to its jurisdiction in the case. Once the matter has been brought before it, the Court may indicate measures not only at the request of one of the parties – as has, in fact, always been the case to date – but also on its own initiative. The Court must give notice of the measures indicated to the parties concerned and to the → United Nations Security Council (Art. 41). The Court may indicate measures other than those applied for by a party (as in the → Anglo-Iranian Oil Company Case, 1952), or it may reject the application *in toto* (as in the → Interhandel Case and the → Aegean Sea Continental Shelf Case). The Court indicates such measures by way of an order. Such an order does not, as is sometimes assumed, have the character of a recommendation, but rather has a binding effect, even if the parties have not voluntarily agreed, either in the special agreement or by unilateral declarations, to accept the obligation to preserve the *status quo*. Because orders for interim measures of protection are not "judgments" within the meaning of Art. 94 of the Charter, the Security Council cannot be called upon to enforce them; however, a party which has failed to comply with an order is under an obligation to compensate the other party.

(e) In the written part of the proceedings, the parties must submit the memorial and counter-memorial in the form specified in the special agreement; in cases of unilateral applications to the Court, the memorial must also be communicated to the opposing party. In response to the memorial comes the counter-memorial, and where necessary, a reply and, in cases of unilateral applications, a rejoinder of the accused party (Art. 43(2) in conjunction with Arts. 44–46, Rules). Time-limits and other details are regulated by procedural orders. In the written proceedings, the parties must produce all documents relevant to the case and tender their evidence. In the event of a refusal by one of the parties, the Court is obliged to take a formal note of such refusal (Art. 49). The Court is not confined to the evidence submitted by the parties, but may obtain further information, and may at its own discretion entrust individuals or institutions with the task of holding an inquiry or giving an expert opinion (Art. 50).

(f) The oral proceedings begin with the hearing of the parties, which takes place after the formal closure of the written proceedings. The parties are represented by agents who may call upon the assistance of counsel or advocates, who also have the right to plead before the Court (Art. 42). The

proceedings, of which an authoritative verbatim record is made, are public. The Court may, however, acting *proprio motu* or on the request of both parties, exclude the public from the hearings (Arts. 43, 45 to 47).

In the course of the oral proceedings, witnesses and experts who were named in the written proceedings are heard, and documents previously submitted are discussed; further evidence may only be adduced with the consent of the other party (Arts. 51, 52). The evidence submitted by the parties is subject to independent assessment by the Court. In contradistinction to arbitration proceedings, if a party fails to appear before the Court in the oral proceedings or fails to defend its case, the opposing party may request a decision in favour of its final claims. The Court must then examine the factual and legal foundations of the claim (Art. 53).

4. Judgments

(a) The judgment (→ Judgments of International Courts and Tribunals) is drawn up on the basis of private and secret deliberations held by the Court subsequent to the closure of the oral proceedings (Art. 54). The Court decides by a majority of the votes of the judges present; in the event of equality of the votes for and against, the President, or the judge acting in his place, has a casting vote (Art. 55). In its judgment, the Court may not go beyond the scope of the claims made by the parties or the *petitum* of a unilateral application to the Court (the *ne ultra petita* rule; see here, particularly, the → Corfu Channel Case, 1948, and the → Haya de la Torre Case, 1951). The judgment must state the reasons on which it is based, and must comply with certain formalities (Art. 95 Rules). It may regulate the question of costs; otherwise each party bears its own costs (Art. 64). If one party fails to appear, a judgment in default may be given (Art. 59; → Fisheries Jurisdiction Cases (U.K. v. Iceland; Federal Republic of Germany v. Iceland), 1974; → United States Diplomatic and Consular Staff in Tehran Case, 1980). The judgment is signed by the President and the Registrar, and is read in open court; at this point it becomes binding on the parties (Art. 58).

The Court may give declaratory judgments or judgments requiring performance. The former include decisions on questions of the Court's jurisdiction and other objections, on the interpretation of international treaties, on the existence or non-existence of a legal principle or relationship and on questions of whether there has been an infringement of a right, provided judgment on a wrong resulting from such infringement is not what is actually being sought in the particular case. In its judgment, the Court may declare that it does not have competence (see e.g. → Aegean Sea Continental Shelf Case, 1978), or it may decline to give a decision because the dispute has already been resolved as a result of the conduct of the defendant (→ Nuclear Test Cases, 1974). In some cases, the Court has not made a final decision on the substance of the dispute, but rather has imposed an obligation upon the parties to seek a settlement corresponding to the special circumstances by means of negotiation. It has laid down basic principles for this, which the parties must respect in good faith (→ North Sea Continental Shelf Cases and → Fisheries Jurisdiction Cases – Federal Republic of Germany v. Iceland; United Kingdom v. Iceland, 1974). Judgments requiring performance primarily determine the compensation or reparation (→ **Reparation for Internationally Wrongful Acts**) owed by the State against whom judgment is entered to the wronged subject of international law, or they may impose an obligation to undertake or refrain from undertaking a particular action.

(b) A judge whose views on the matter differ either in whole or in part from those of the majority may deliver an individual opinion along with the judgment. This institution can be traced back to the connection between the person of the judge and the substantive decision characteristic of common law legal systems, and to the desire to preserve the esteem of the judges of the World Courts, appointed by special selection procedures, and at the same time to take into consideration their national origins. Individual opinions have been delivered in isolated cases in the sphere of international arbitration, but these have not always been published along with the judgment (→ *Alabama* Case, 1872; → North Atlantic Coast Fisheries Arbitration, 1910). The possibility provided for in Art. 52 of the Hague Convention for the Pacific Settlement of Disputes of 1899 for outvoted judges to declare their dissent at the signing of the judgment was not retained in the 1907 revision (→ Hague Peace Conferences of 1899 and 1907). The view that the publication of individual opinions constitutes an

infringement of the regulation in Art. 54, under which the deliberations of the Court are secret and must remain so, contains an apparent contradiction to that principle, inasmuch as the result appears in the judgment itself.

In the practice of the World Courts, two types of individual opinions have been developed through the interpretation of Art. 57: the separate opinion expresses different views as to the reasons on which a judgment is based by a judge who agrees with the result of the decision; and the dissenting opinion expresses disagreement with the holding in the judgment. In individual opinions to judgments of the PCIJ which are, to a certain extent, of universal relevance (see → Permanent Court of International Justice, section E.4b), the desire to express an opinion about controversial questions with a view to further clarifying them stood well to the fore. In contrast to this, a large number of the individual opinions, delivered with greater frequency, in the ICJ contain criticisms of the judgments, which are to a certain extent unsubstantiated and do not serve to enhance the value of the Court's judgment. On the other hand, the weakness of some of the individual opinions may even serve to strengthen the majority's decision. A certain number of individual opinions hardly contain discourses on questions of law, but seem to be of an unmistakably political character.

(c) The judgment has binding force on points of both procedural and substantive law. The decision is binding only on the parties to and in respect of the particular case (Art. 59). Third States which participate in proceedings in which the interpretation of a convention or a multilateral treaty is at issue are also bound by the judgment. It follows from this that judgments of the ICJ may not be used as binding precedents. The formal legal force of the judgment manifests itself in the fact that the judgment is final at the moment of delivery, and may not be appealed against (Art. 60, sentence 1). This provision does not apply in the circumstance, which has so far remained a theoretical one, of a judgment being null and void due to gross deficiency (→ Judicial Decisions, Validity and Nullity). If the judgment is deficient in some way, the Court may correct it by revision proceedings. The party against whom judgment has been given must comply with the decision, but the parties may reach by common accord an alternative settlement amongst themselves. In State practice, there are only isolated instances of non-compliance or delayed compliance with the obligation to carry out the Court's judgment (but see, for example, Albania in the → Corfu Channel Case, 1949, Columbia in the → Haya de la Torre Case, 1951, and Iran in the → United States Diplomatic and Consular Staff in Tehran Case (1979)).

(d) For the enforcement of the judgments of the ICJ, the law of the United Nations has provided a regulation which reaches well beyond the previous stage of development. In accordance with the principle laid down in Art. 2(2) of the Charter, Art. 94(1) of the same imposes an obligation upon the members of the United Nations to comply with the decision of the Court in every case to which they are parties. The regulation in Art. 94(2) of the Charter concerning the implementation of judgments applies not only to members of the United Nations, but also to non-members which are parties to the Statute, or which have been granted access to the proceedings which always requires submission to this provision. If a party does not fulfil the obligations imposed upon it by a judgment, the other party may have recourse to the Security Council. The Security Council may, at its own discretion, make recommendations or decide what measures shall be taken to give effect to the judgment. The possibilities of enforcing the judgment against the party in default are, however, limited, because the only measures which may be employed are those concerned with the settlement of disputes under Chapter VI of the Charter, and not the harsher measures, particularly sanctions, provided for in Chapter VII, which require an immediate threat to the peace before they may be resorted to. Furthermore, decisions in the Security Council, except where they relate to procedural matters, are subject to the → veto power of the permanent members.

(e) The interpretation of a judgment may be applied for on the basis of special agreement between the parties, or merely by unilateral application, if either before or during the execution of the judgment disputes arise between the States concerned as to its meaning and scope (Art. 60, sentence 2). The interpretation is given in the form of a judgment, which must not go beyond the scope of the original decision. With regard to

this, the PCIJ made the following comments on the two decisions in the → German Interests in Polish Upper Silesia Case (1927): "The interpretation adds nothing to the decision, which has acquired the force of *res judicata*, and can only have binding force within the limit of what was decided in the judgment construed" (PCIJ A 13, p. 21). The ICJ refused, in its judgment of November 27, 1950 (ICJ Reports 1950, p. 395), to interpret the first judgment in the → Haya de la Torre Case, because Columbia had not in fact applied for interpretation, but instead had applied for a decision upon a question which had not been put, and which had, for this reason, not been dealt with in the previous proceedings.

(f) If a party discovers a new fact which is capable of having a decisive influence on the substance of the judgment already handed down, and of which both it and the Court were ignorant at the time the judgment was given, it may, provided its ignorance was not due to negligence, submit an application requesting that the proceedings be reopened (Art. 61). The application may not be made later than six months after the discovery of the fact, and must be made within ten years of the delivery of the judgment. If the results of the Court's examination of the matter are positive, it must, in the form of a judgment, record the existence of the new fact, recognize that it is of such a character as to justify reopening the proceedings, and declare the application admissible; otherwise it must reject the application. The Court may make the revision proceedings conditional upon previous compliance with the terms of the judgment. The proceedings in revision are the same in all phases as the ordinary proceedings.

F. Advisory Opinions

The Court may also give advisory opinions on legal questions upon request by the organs of the United Nations and specialized agencies so authorized. The Court fulfils this function as the principal judicial organ of the United Nations. This function is similar to that of the PCIJ as regards giving advisory opinions for the Assembly and the Council of the League of Nations. In discussions concerning the revision of the Charter of the United Nations and the Statute of the ICJ, it was suggested by legal practitioners and scholars that the Court's activity in giving advisory opinions within the framework of the United Nations be extended.

Only the General Assembly and the Security Council of the United Nations have a primary right to request the Court to give an advisory opinion. By virtue of authorization by the General Assembly (Art. 96, Charter; Art. 65, Statute), its Interim Committee, the Economic and Social Council, the Trusteeship Council and the Committee on Applications for Review of Administrative Tribunal Judgments are also entitled to request advisory opinions. General Assembly resolutions, supplemented by agreements between the United Nations and the respective institutions, have granted all the specialized agencies of the United Nations, with the exception of the Universal Postal Union, the right to request advisory opinions. Of the 16 advisory opinions given by the ICJ to date, 13 were requested by the General Assembly through the Secretary-General, and one each by the Security Council, UNESCO, IMCO and the UN Committee on Applications for Review of Administrative Tribunal Judgments; in addition, the WHO made a request for an advisory opinion in 1980.

The subject of a request for an advisory opinion (Art. 65) by the General Assembly and the Security Council may be "any legal question" (as opposed to "any dispute or question" under Art. 14 of the Covenant of the League of Nations). Requests for advisory opinions made by other organs of the United Nations and specialized agencies so authorized by the General Assembly may only concern legal questions arising within their respective spheres of activity (Art. 96, Charter). The General Assembly and the Security Council may seek advisory opinions about the construction of a provision in the Charter of the United Nations (as was the case with the two requests for interpretation of the admissions regulations in Art. 4 of the Charter; → Admission of a State to Membership in United Nations, Advisory Opinions). Requests for advisory opinions should concern only abstract questions of law, and not legal disputes actually pending between States. Otherwise, the Court could prejudice a substantive decision without the consent of the States concerned. The PCIJ rejected the request

for an advisory opinion in the → Eastern Carelia Case (1928) on this basis.

In principle the ICJ is obliged to give advisory opinions, despite the fact that Art. 65 (1) is formulated so as to make this an optional function. However, the Court is authorized to determine its jurisdiction in advisory proceedings as well. The Court stated, concerning reservations in the → Genocide Convention (Advisory Opinion) that: "The Court has the power to decide whether the circumstances of a particular case are such as to lead the Court to decline in reply to the request for an Opinion" (ICJ Reports 1950, p. 19). The Court would also have to decline to give an opinion if the answer to the question at issue could not be found in international law already in force.

The advisory opinions of the ICJ have an appellate function within the framework of some international organizations (see section C.1(d), *supra*), in that they are binding where they are concerned with the legality of decisions of the → International Labour Organisation's Administrative Tribunal (see Advisory Opinion→ Judgments of ILO Administrative Tribunal, 1956). The ICJ can also interpret an advisory opinion it has given; in this respect see the several interpretations of the advisory opinion of July 11, 1950 on the International Status of South West Africa (→ South West Africa/Namibia (Advisory Opinions and Judgments)).

In exercising its advisory functions, the Court is to be guided by the provisions which apply to contentious proceedings (Art. 68), as supplemented by the provisions in Part III of the Rules. In accordance with these provisions, the Registrar must notify all States entitled to appear before the Court and all international organizations that are able to furnish information on the question at issue of the request for and advisory opinion. If a State which is not entitled to appear before the Court expresses the wish to be heard on the matter, the Court decides on the request. Advisory Proceedings are also divided into written and oral sections. The States and international organizations which actively participate must be informed of any other statements presented in the written and oral sections (Art. 66).

Advisory proceedings are conducted before the full Court, which may be supplemented by judges *ad hoc*, in accordance with the principle in Art. 31, for advisory opinions concerning questions which are disputed by two or more States. Advisory opinions are delivered at public sittings of the Court, to which members of the United Nations and the States and international organizations immediately concerned must be invited (Art. 67). In advisory opinions as well, the results of the voting in the concluding deliberations must be specified, and individual opinions are admissible.

As befits their nature, advisory opinions of the ICJ have no binding effect. In isolated cases, exceptions have been made to this principle in the law of international organizations, as these do not have access to contentious proceedings. As regards the binding effect of advisory opinions in connection with decisions of the ILO's Administrative Tribunal, see above (see also → United Nations Administrative Tribunal).

The advisory activities of the ICJ have not been as intensive as were those of the PCIJ (which, in the period from 1922 to 1935, gave 26 advisory opinions, whereas the ICJ in the period from 1948 to 1975, gave only 16), and are of less general significance. The advisory opinions of the PCIJ were regarded as legally authoritative by the parties concerned and even by States which were not immediately concerned. In general, such an authority has not accrued to advisory opinions of the ICJ. This is due, on the one hand, to the diminished authority of the ICJ as compared with that of the PCIJ, but above all to the fact that many States which have been admitted to the United Nations, particularly those which have been admitted in the past two decades, avoid the judicial settlement of international disputes.

G. Activities to Date

1. Judgments

→ Corfu Channel Case	25. 3.1948
	9. 4.1949
	15.12.1949
→ Haya de la Torre Cases	26.11.1950
	27.11.1950
	13. 6.1951
→ Fisheries Case (U.K. v. Norway)	18.12.1951

→ Ambatielos Case	1. 7.1952 19. 5.1953
→ Anglo-Iranian Oil Company Case	22. 7.1952
→ United States' Nationals in Morocco Case	27. 8.1952
→ Minquiers and Ecrehos Case	17.11.1953
→ Nottebohm Case	18.11.1953 6. 4.1955
→ Monetary Gold Case	15. 6.1954
→ Norwegian Loans Case	6. 7.1957
→ Right of Passage over Indian Territory Case	26.11.1957 12. 4.1960
→ Guardianship of Infants Convention Case	28.11.1958
→ Interhandel Case	21. 3.1959
→ Aerial Incident of 27 July 1955 Cases	26. 5.1959
→ Sovereignty over Certain Frontier Land Case (Belgium/Netherlands)	20. 6.1959
→ Arbitral Award of 1906 Case (Honduras v. Nicaragua)	18.11.1960
→ Temple of Preah Vihear Case	26. 5.1961 15. 6.1962
→ South West Africa Cases (Judgments)	21.12.1962 18. 7.1966
→ Northern Cameroons Case	2.12.1963
→ Barcelona Traction Case	29. 7.1964 5. 2.1970
→ North Sea Continental Shelf Cases	20. 2.1969
→ Jurisdiction of the ICAO Council Case	18. 8.1972
→ Fisheries Jurisdiction Cases (U.K. v. Iceland, Federal Republic of Germany v. Iceland)	2. 2.1973 26. 7.1974
→ Nuclear Tests Cases (Australia v. France; New Zealand v. France)	20.12.1974
→ Aegean Sea Continental Shelf Case	19.12.1978
→ United States Diplomatic and Consular Staff in Tehran Case	24. 5.1980

2. Advisory Opinions

→ Admission of a State to Membership in United Nations	28. 5.1948 3. 3.1950
→ Reparation for Injuries Suffered in Service of UN	11. 4.1949
→ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania	30. 3.1950 18. 7.1950
International Status of South West Africa (→ South West Africa/Namibia Cases)	11. 7.1950
→ Genocide Convention	28. 5.1951
→ Awards of Compensation Made by U.N. Administrative Tribunal	13. 7.1954
Voting Procedure on Questions relating to Reports and Petitions concerning South West Africa (→ South West Africa/Namibia Cases)	7. 6.1955
Admissibility of Hearings of Petitioners (→ South West Africa/Namibia Cases)	1. 6.1956
→ Judgments of ILO Administrative Tribunal	23.10.1956
→ IMCO Maritime Safety Committee, Constitution of	8. 6.1960

→ Certain Expenses of the United Nations	20. 7.1962
Legal Consequences for States of the Continued Presence of South Africa in Namibia (→ South West Africa/Namibia Cases)	21. 6.1971
→ Judgment of UN Administrative Tribunal (Application for Review of)	12. 7.1973
→ Western Sahara	16.10.1975

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HANS-JÜRGEN SCHLOCHAUER

INTERNATIONAL COURTS AND TRIBUNALS

I. Definition and Essence: A. General. B. Criteria of Definition. – II. Historical Development. – III. Present International Courts and Tribunals: A. International Courts and Tribunals at the Global Level: 1. International Courts and Tribunals with General Jurisdiction. 2. International Courts and Tribunals with Specialized Jurisdiction. B. International Courts and Tribunals at the Regional Level: 1. Europe. 2. The Americas. 3. Africa. C. Emerging New Types of International Courts and Tribunals. – IV. Main Functions: A. Binding Decisions. B. Preliminary Rulings. C. Advisory Opinions. D. Interim Measures of Protection. – V. Special Features of Organization and Procedure: A. Institutional Problems: 1. Jurisdiction. 2. Access. 3. Composition. 4. Procedure. 5. The Law Applicable. 6. Pronouncements on Legal Principles. 7. Individual Opinions. 8. Execution of Decisions. B. Political Problems. – VI. Significance.

I. DEFINITION AND ESSENCE

A. General

International courts and tribunals (ICTs) are permanent judicial bodies, composed of independent judges, whose tasks are to adjudicate international disputes on the basis of international law (→ Judicial Settlement of Disputes) ac-

cording to a pre-determined set of rules of procedure, and to render decisions which are binding upon the parties. ICTs as they exist at present have nearly all been established on the basis of multilateral international treaties.

B. Criteria of Definition

In contradistinction to arbitral tribunals (→ Arbitration), the composition of ICTs is not modelled on a pattern of parity between the parties to a specific dispute, with each one choosing its own judges. The basic idea underlying the creation of ICTs is for them to function as permanent bodies, less subject to considerations connected with the issue at stake, and capable of ensuring a certain degree of continuity of legal reasoning. Thus, irrespective of the nature of the dispute to be ruled upon, the composition of ICTs remains essentially the same, the legitimate interests of the parties finding their protection through the generally balanced structure of ICTs and through strict rules on the independence of judges.

International disputes, which are the subject-matter of the adjudicatory functions of ICTs, are not always confined to inter-State controversies. In accordance with present-day trends in international law, international organizations as well as individuals also qualify as parties to international disputes, inasmuch as access to ICTs has been granted to them with a view to the protection of their international status.

Only courts and tribunals that apply international law qualify as ICTs. As a rule, their basic instruments contain specific instructions as to the precise scope of the rules of international law to be resorted to. ICTs with general jurisdiction differ widely on this point from ICTs discharging solely limited functions within a specialized context.

In contradistinction to the principles valid for arbitral tribunals, ICTs operate within the framework of procedural rules which are, in principle, not established by the parties to a specific dispute and cannot be changed by them. This feature is again attributable to a deliberate choice designed to subject the parties to a certain kind of procedural discipline thought to promote the proper exercise of the judicial function.

Whereas ICTs are sometimes vested with advisory functions, their main task is always to give binding decisions on the disputes brought before them. Bodies altogether deprived of the power to render binding decisions do not qualify as ICTs; on the other hand, a combination of adjudicatory and advisory jurisdiction does not impede the classification of a body as being a judicial one.

Almost all ICTs show certain features which do not fit into the picture described above. Nonetheless, the definition is useful as a general guide-line for orientation.

II. HISTORICAL DEVELOPMENT

The question of creating, on a world-wide scale, a court for the settlement of international disputes was discussed at the Second → Hague Peace Conference of 1907. The Conference, however, produced only the skeleton draft for a Court of Arbitral Justice. At the same time, the Conference resolved to create an → International Prize Court by adopting a draft convention which, however, received not a single ratification.

Influenced by these initiatives, the five Central American Republics decided in the same year to set up a → Central American Court of Justice which began functioning in May 1908, and carried on its activity for ten years. The jurisdiction of the Court extended not only to inter-State disputes, but also covered complaints brought by individuals against the Government of any of the Contracting States for alleged breaches of rules of international law.

The → Permanent Court of International Justice (PCIJ) was created on the basis of a general understanding which had emerged at the close of World War I, that a more intensive use of judicial methods of dispute settlement would help stabilize peaceful conditions in the world. Based on Art. 14 of the Covenant of the → League of Nations, the Statute of the PCIJ was prepared in 1920; the Court, which took up its functions in January 1922, operated effectively until 1940. It was dissolved after World War II in April 1946.

The International Military Tribunal at Nuremberg (as well as the International Military Tribunal for the Far East) does not come within the purview of ICTs since it must be viewed primarily as an agency for the joint exercise of domestic penal jurisdiction as held individually by each one of the four Applied Powers. Even if one considers that the International Military Tribunal exercised

penal jurisdiction directly derived from international law, it does not fit into the normal pattern of ICTs, since no judge of German nationality was allowed to sit on the bench.

III. PRESENT INTERNATIONAL COURTS AND TRIBUNALS

A. International Courts and Tribunals at the Global Level

1. International Courts and Tribunals with General Jurisdiction

The only international court or tribunal with general jurisdiction with regard to inter-State disputes is the → International Court of Justice (ICJ) as provided for in Arts. 92–96 of the UN Charter. According to Art. 92, the ICJ constitutes the "principal judicial organ" of the UN.

2. International Courts and Tribunals with Specialized Jurisdiction

(a) Strictly speaking, the Administrative Tribunals both of the ILO (→ International Labour Organisation, Administrative Tribunal) and of the UN (→ United Nations, Administrative Tribunal) meet all of the requirements of an international court or tribunal, inasmuch as they are endowed with the task of settling disputes between the respective organizations and their staff members. The legal régime under which staff members are employed, being derived from the basic charter of an international organization, also pertains to the field of international law (→ International Organizations, Internal Law and Rules). However, disputes concerning the rights and duties of an international civil servant very largely resemble similar disputes between national agencies and their employees. Furthermore, the above Administrative Tribunals have been shaped according to the model of judicial protection at the national level, so that they occupy a special position within the wide range of ICTs (→ Administrative Tribunals, Boards and Commissions in International Organizations).

(b) Numerous proposals have been made for the establishment of specialized ICTs at the global level. Attempts to create an → International Criminal Court along the lines of the International Military Tribunal at Nuremberg were suspended by the UN General Assembly in 1957. Suggestions for the establishment of an international Human Rights Court have been frequently voiced in recent years, but have never been fully explored. It would indeed be unrealistic to assume that the States of all the world's regions would be prepared, at the present stage of international relations, to accept the jurisdiction of such a Court. It is certain, however, that the forthcoming Law of the Sea Convention will provide for a Law of the Sea Tribunal including a specific Sea-Bed Disputes Chamber (→ Law of the Sea, Settlement of Disputes).

B. International Courts and Tribunals at the Regional Level

1. Europe

(a) The oldest among the ICTs functioning in Western Europe is the → Court of Justice of the European Communities (CJEC) which began its functions in 1952 as the Court of Justice of the European Coal and Steel Community.

(b) The → European Court of Human Rights, established under the → European Convention on Human Rights, is empowered to rule on allegations that a State is in breach of its commitments under the Convention.

(c) The Court of Justice of the Benelux Economic Union, established in 1974, is mainly entrusted with the uniform interpretation of rules of law which are common to the three State parties (→ Benelux Economic Union, Arbitral College and Court of Justice).

(d) Despite its name, the Benelux Arbitral College can be characterized as an international court or tribunal since its composition does not rely on the principle of parity between the respective parties to a dispute. Although each party appoints one arbitrator, the president of the arbitration panel need not be a neutral person but is chosen according to a strict rotation plan from among the presidents of the highest courts of the three countries.

(e) A more limited scope of jurisdiction has been assigned to the European Nuclear Energy Tribunal, which is to provide judicial protection to State parties as well as to affected enterprises in respect of acts of the European Nuclear Energy Agency (→ Organisation for Economic Cooperation and Development, Nuclear Energy Agency).

(f) A Convention providing for the establish-

ment of a Western European Union Tribunal (→ Western European Union) for the protection of private interests against measures for the control of armaments, which hence would be a judicial body accessible to individuals, has not yet come into force. The same is true with regard to the → European Convention on State Immunity which aims at creating a tribunal to consider questions involving State immunity.

(g) Neither the Benelux Arbitral College nor the European Nuclear Energy Tribunal have ever sat to decide a case to date.

2. The Americas

(a) In July 1978, the → American Convention on Human Rights of 1969, which makes provision for the establishment of an → Inter-American Commission on Human Rights and an → Inter-American Court of Human Rights, came into force. Both institutions follow quite closely the example of the corresponding European institutions.

(b) The Arbitration Tribunal of the Central American Common Market (→ Central American Common Market, Arbitration Tribunal), an *ad hoc* institution to be established with regard to a given dispute, bears some resemblance to a proper international court or tribunal in that each one of the five contracting States has the right to name an arbitrator, the quorum being three persons, so that the tribunal can function even if boycotted by one of the parties to the dispute. It appears, however, that the tribunal has never met. In addition, the present tensions between the Central American States have reduced the prospects for judicial settlement of disputes arising between them.

(c) Recently, the countries of the Andean Pact have decided to create a tribunal for the settlement of disputes resulting from the application of the Pact (→ Andean Common Market, Court of Justice).

3. Africa

Within the context of the East African Common Market established by Kenya, Tanzania and Uganda, a Common Market tribunal was projected which actually took up its functions in 1972. To a large extent, the structure and jurisdiction of the Tribunal were influenced by the example of the CJEC. Due to the tensions and hostilities between the three countries, the Tribunal seems to have collapsed, together with the Common Market which it was intended to secure (→ East African Community).

C. Emerging New Types of International Courts and Tribunals

Within the regional systems for the protection of human rights, a duality of institutions has evolved in Europe as well as in America whereby a Commission is responsible for screening complaints, a Court intervening only at a second stage. Although neither the → European Commission of, nor the → Inter-American Commission on, Human Rights have been officially designated to act as tribunals, their function, which is to apply the law to the cases pending before them, bears all the features of judicial activity. Since members enjoy, furthermore, an independent status, they meet all of the substantive requirements of an international court or tribunal. This characterization holds true in spite of the fact that both Commissions are primarily required to seek a friendly settlement after a petition has been found to be admissible, and also that the European Commission of Human Rights is prevented from determining definitively that a complaint is well-founded.

IV. MAIN FUNCTIONS

A. Binding Decisions

As in the national sphere, the primary function of ICTs is to settle disputes by rendering binding decisions which the parties are obligated to comply with. Such decisions may take a wide variety of forms according to the basis on which the jurisdiction of the international court or tribunal concerned rests. Although ICTs are in many cases called upon to pronounce on the compatibility of national measures with rules of international law, they are normally confined to making a declaratory finding, without being empowered to annul national acts at variance with international law (→ Judgments of International Courts and Tribunals).

B. Preliminary Rulings

Preliminary rulings constitute a particular category of binding decisions. The procedure under Art. 177 of the EEC Treaty, according to which national tribunals may – or are obligated to –

request the CJEC to interpret the Treaty itself or any act of Community legislation, or to rule on the legality of such acts, has proved highly successful within the EEC. Through this mechanism, in a manner which affects to the least possible extent the exercise of national judicial powers, the CJEC may determine the orientation of the entire system of Community law. It is this obvious success which has prompted the creation of the Benelux Court of Justice whose main task is to give preliminary rulings. Proposals also to entrust the ICJ and the European Court of Human Rights with similar jurisdiction have not materialized to date.

C. Advisory Opinions

Jurisdiction for giving advisory opinions (→ Advisory Opinions of International Courts) is traditional for the World Court. Whereas relatively wide use has been made of the right to consult the ICJ, the corresponding provisions which entrust the Committee of Ministers of the Council of Europe with the faculty to consult the European Court of Human Rights on institutional questions have up to now remained a dead letter; similarly, in no case has the Benelux Committee of Ministers made use of the right to request the Benelux Court of Justice to give an interpretation of a common rule of law. Nor have the advisory mechanisms of the American Convention on Human Rights, due to their very recent entry into force, received any practical application to date. Finally, advisory functions will also be granted to the Sea-Bed Disputes Chamber of the Law of the Sea Tribunal. Within the European Community, the official terminology differs from generally accepted connotations. "Opinions" – which the CJEC may give on the conformity with the EEC Treaty of an envisaged international agreement – are binding since a formal treaty amendment will be required as a prerequisite to the conclusion of the agreement if the CJEC finds an inconsistency (Art. 228 (1) EEC Treaty).

D. Interim Measures of Protection

As a rule, ICTs are empowered to adopt → interim measures of protection designed to secure the rights and interests in issue whilst the matter is still pending for an examination of the merits.

V. SPECIAL FEATURES OF ORGANIZATION AND PROCEDURE

A. Institutional Problems

1. Jurisdiction

According to the traditional structure of the international society, jurisdiction of ICTs depends on the consent of the State parties concerned.

The most highly developed form of jurisdiction is represented by those bodies where an aggrieved party may unilaterally seise an international court or tribunal without having to obtain the specific consent of the defendant party. Within the European Community, jurisdiction of the CJEC is generally compulsory. By acceding to the Community, Member States automatically subject themselves to the jurisdiction of the CJEC for all kinds of disputes connected with the application and interpretation of the Community treaties. Jurisdiction of the Sea-Bed Disputes Chamber of the Law of the Sea Tribunal may also be compulsory with regard to sea-bed controversies for all States parties to the future Law of the Sea Convention. No such commitment derives from admission to the UN with regard to the ICJ. States may, however, accept the jurisdiction of the ICJ by virtue of agreements which, either generally with a view to fostering the judicial settlement of disputes or with regard to specific disputes resulting from the instrument concerned, provide for the right of any party unilaterally to institute judicial proceedings. Such unilateral recourse to the ICJ is also possible if a State party has made a declaration under the so-called optional clause (Art. 36 (2) of the Statute of the ICJ) whereby it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the ICJ in all legal disputes. The requirement of a specific acceptance of jurisdiction is also characteristic of the European and the Inter-American Courts of Human Rights.

2. Access

According to traditional thinking, the only parties which may appear before ICTs are States. In fact, the Statute of the ICJ (Art. 34 (1)) still provides that in contentious proceedings no other legal person has standing to sue or to be sued (→

Standing before International Courts and Tribunals). International organizations are only admitted in advisory proceedings. Outside the ICJ, however, international organizations have been granted access to ICTs to a considerably large extent. Thus, before the CJEC, Community organs may file actions against Member States, and, vice versa, Member States are entitled to challence any act of the organs which they deem to be inconsistent with Community law. Even the individual has been vested with the right to challenge before the CJEC acts which directly affect his rights. As far as the regional systems for the protection of human rights are concerned, the individual may submit petitions to the two Commissions, but he is still denied the right to bring his case before the respective Courts, access to which is restricted to the State parties and to the competent Commissions. It is to be expected that the individual will also to a certain extent be granted standing before the Sea-Bed Disputes Chamber of the Law of the Sea Tribunal (→ Individuals in International Law).

3. Composition

(a) For the composition of ICTs, two basic alternatives exist. Either every State party to the statute of an international court or tribunal is attributed a seat on the bench, or a selection procedure is provided which operates according to a general principle of just representation. The former formula can be resorted to only if the community supporting the international court or tribunal concerned does not exceed a certain functional threshold. An international court or tribunal of the size of a parliamentary body would be unworkable. At the regional level in Western Europe, all of the ICTs which have been mentioned grant one seat on the bench to each State party, whereas the Inter-American Court of Human Rights, due to the large and still growing number of States of the American hemisphere, consists only of seven judges. Likewise, the Inter-American Commission on Human Rights counts no more than seven members. At the global level, a selection has to take place by necessity. Departing slightly from the general principle of equitable regional distribution, Art. 9 of the Statute of the ICJ provides that in the Court "as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured".

(b) Generally, election procedures have been devised which are designed to strike a delicate balance between the need for a judge to enjoy the confidence of his national government and the necessity to enlist support from all other governments which have accepted the jurisdiction of the court. Procedures range from appointment based on a common accord between governments (e.g. the CJEC) to election mechanisms which involve several political bodies (e.g. the ICJ, European Court of Human Rights).

(b) Occasionally, the strictness of the rule that the composition of the bench should not depend on the litigant parties' wishes is mitigated in that chambers may be established upon the request of the parties. Whereas, however, according to the rules of the ICJ, the judges who are to form a chamber are elected by the Court in plenary session, the composition of chambers of the projected Law of the Sea Tribunal will be determined by the Tribunal with the approval of the parties. Consequently, such chambers bear a close resemblance to an arbitral body.

(d) If there is not a judge on an international court or tribunal from each one of the States parties to a dispute, such States are generally allowed to nominate a judge *ad hoc*. The only exception in that respect is the CJEC.

4. Procedure (→ Procedure of International Courts and Tribunals)

(a) As a general feature, rules of procedure are included not only in the basic statute of the international court or tribunal concerned, but are supplemented by rules which the international court or tribunal itself is empowered to promulgate. The function of such rules is to concretize procedural principles of a more abstract character and to fill in such gaps as are normally left by the provisions of the relevant statute.

(b) Proceedings before an international court or tribunal are normally divided into a written and an oral phase. Oral hearings are generally held in public, unless it is otherwise decided under specific circumstances. A significant departure from this pattern can be found in proceedings before the two regional Human Rights Com-

missions which do not sit in public when cases are being argued.

5. The Law Applicable

Specific instructions as to the applicable law are always contained in the relevant basic instruments. Art. 38 of the Statute of the ICJ has gained such a degree of acceptance that it has become the cornerstone of the doctrine on sources of international law. Even in the case of ICTs set up for the purpose of ensuring the observance of a specific treaty, it may be necessary to refer additionally to rules of general international law. Although Art. 38 (2) of the Statute of the ICJ reserves the power of the ICJ to rule upon a case *ex aequo et bono* if the parties so agree, this provision has never been applied.

6. Pronouncements on Legal Principles

In recent years, a trend has emerged to entrust the ICJ not with the rendering of a definitive decision on a dispute, but rather with the determination of the guiding principles to be followed in dealing with that dispute (→ North Sea Continental Shelf Cases, → Tunesia-Libya Continental Shelf Case). Such findings are distinguishable from an advisory opinion in that they are binding upon the parties.

7. Individual Opinions

Individual opinions are widely permitted in ICTs. It is even one of the major problems of the ICJ that its decisions are sometimes nearly submerged by such opinions. The relevant rules of the CJEC do not allow judges to express their concurring or separate opinions. No change of this state of affairs is envisaged due to the desire to retain the homogeneity of the CJEC.

8. Execution of Decisions

As long as the international society retains its present non-centralized structure characterized by mutual coordination, the execution of the decisions of ICTs will rest to a large extent on the willingness of the losing party itself to take the requisite measures for redressing the situation. Whereas for the PCIJ not a single instance of disregard of a decision or even of an advisory opinion was reported, lack of respect for the decisions of the ICJ has almost become the rule in recent years in those proceedings which have not been instituted by way of mutual agreement. The UN Security Council, with respect to judgments in contentious proceedings, has never availed itself of the powers granted by Art. 94 (2) of the UN Charter to ensure the execution of judgments of the ICJ. Lack of respect for its decisions was one of the decisive factors for the ultimate failure of the Central American Court of Justice. On the other hand, the record for the ICTs functioning in Western Europe is almost perfect to date.

B. Political Problems

Among the political factors which affect the effectiveness especially of the ICJ, the most prominent ones are doubts concerning the impartiality of the bench, fears connected with the lack of clarity of international law and finally a growing tendency to demonstrate overt disregard for the pronouncements of the Court. There are judges on the ICJ from groups of countries which, as a matter of principle, reject judicial procedures as a suitable method for settling international disputes. Judges from the Third World represent a cultural background which tends to favour a drastic change in the substance of traditional rules to bring them into line with present-day needs of less-developed countries. Therefore, countries which uphold the more legalistic approach feel hesitant about bringing a dispute before the Court, all the more so since, in fact, international law is presently undergoing a continuous process of politically motivated transformation, making it difficult for any lawyer to predict the outcome of a controversy submitted to international adjudication. The ICJ suffered an additional blow when in recent years a number of States from all regions deliberately boycotted its proceedings (→ Fisheries Jurisdiction Cases: Iceland; → Nuclear Tests Cases: France; → Trial of Pakistani Prisoners of War Case: India; → Aegean Sea Continental Shelf Case: Turkey; → United States Diplomatic and Consular Staff in Tehran Case: Iran) and disregarded its decisions (Iceland, France, Iran).

VI. SIGNIFICANCE

Among the vast array of ICTs described in section III., not including the Administrative Tribunals of the UN and of ILO, only two can be said to be flourishing institutions today: the CJEC and the European Court of Human Rights (together with its Commission). In Western Europe, where much credit is given to the judicial

method of settling disputes in the domestic sphere, this general attitude is also reflected in relations with other nations in the same region. Broad consensus on basic societal values of individual rights and freedoms and on the rule of law facilitates the operation of the institutions for the protection of human rights. On the other hand, the acute awareness that a common market would not be workable without a strong judicial organ constitutes the basis of the success of the CJEC. Both courts are not so much a forum for inter-State disputes, but instead give a prominent role as applicants to international institutions and to the individual. In such a way, a certain amount of depoliticization of disputes can be obtained which seems generally to favour the actual recourse to judicial procedures for the settlement of international disputes. Even under such conditions ICTs with too narrow a scope of jurisdiction do not seem, however, to be viable institutions.

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INTERNATIONAL CRIMINAL COURT

1. Historical Background

The concept of an international criminal court could not take root until → international criminal law was born. Since the times of the Phoenicians and the Vikings, → piracy has been condemned as a → crime against the law of nations. Pirates, as ***hostes humani generis*** (the enemies of all mankind), could be tried by any country. With the development of rules for humanitarianism in warfare, (→ Humanitarian Law and Armed Conflict), as reflected in the 1863 Code of Dr. Francis Lieber, the 1874 Brussels Declaration, the creation of the → Red Cross in Geneva, and the Hague Conventions of 1899 and 1907 (→ Hague Peace Conferences of 1899 and 1907), many States recognized that violations of the customs of war should be treated as → war crimes. During World War I, new weapons were employed that violated the then-existing rules of combat. Planes and dirigibles bombarded non-combatants (→ Air Warfare), tanks wantonly destroyed villages, submarines torpedoed passenger ships (→ Submarine Warfare, → Lusitania, The), and poison gas was used (→ Chemical Warfare). The massacre of Armenians in Turkey was denounced as a → crime against humanity. In 1916, the Englishman, Hugh Bellot, called for the trial of war criminals before an international criminal court.

The → League of Nations described → aggression as an international crime. An Allied Commission on Responsibility of the Authors of the War concluded that aggression had never been a punishable offence but that violators of the laws of war could be put on trial (→ War, Laws of; → War, Laws of, History). → The Versailles Peace Treaty required Germany to surrender the Kaiser for trial before a special Allied tribunal on charges of "a supreme offence against international morality and the sanctity of treaties" (Art. 227). Those who had breached the rules of war were to be tried by Allied military tribunals. When Germany repudiated the treaty as a *Diktat*, it was agreed that sample trials would be held before the German Supreme Court at Leipzig, where a few defendants were finally convicted. Thereafter, the → Interparliamentary Union, the International Association of Penal Law, and the → International Law Association, supported by many scholars including Professors V.V. Pella of Romania, Donnedieu de Vabres of France, Q. Saldaña of Spain, N. Politis of Greece and Elihu Root of the USA, urged that an international criminal court be established.

The assassination of King Alexander of

Yugoslavia in 1934 aroused demands for a code and court to suppress → terrorism. The ensuing conventions of November 16, 1937, (Convention of the Prevention and Punishment of Terrorism and Convention for an International Court) embraced the principle *aut dedere aut punire*, requiring offenders to be punished or surrendered for trial. No asylum could be granted to assassins. But no State was willing to relinquish its sovereignty in criminal matters, and the Convention for an International criminal court was never ratified.

Following World War II, the first international criminal court, composed of the four victorious Allied Powers, was established for the → Nuremberg Trial. The jurisdiction of the International Military Tribunal was based on a Charter drawn up in London in 1945 by France, the United Kingdom, the United States and the Soviet Union. According to the principles contained therein, Heads of State could be tried, and a plea of superior orders could only be considered in mitigation. → Crimes against peace (aggression), → war crimes and → crimes against humanity were declared to be punishable under existing international law. Twenty-four leaders of the Third Reich were indicted. The argument that they should not be subjected to *ex post facto* law was countered by the contention that the atrocities were of such magnitude that the accused must have known their deeds were criminal, and justice demanded prosecution even if the law had to take a step forward. American judges, pursuant to Control Council Law No. 10, applied the same legal reasoning in a dozen subsequent proceedings at Nuremberg. An International Military Tribunal for the Far East tried Japanese defendants before a similar court of the victors (→ Tokyo Trials). These *ad hoc* international criminal tribunals went out of existence when the trials were completed.

The → United Nations unanimously affirmed the principles of the Nuremberg Charter and Judgment in 1946, and the → International Law Commission was asked to formulate those principles in an international criminal code. Experts argued that the crime of → genocide should be punishable by an international court, but the Genocide Convention of 1948 left the procedure undefined. The majority of the ILC agreed that an international criminal court was desirable and possible but the time was not yet ripe. In 1951 and 1953, the United Natiόns appointed special Committees on International Criminal Jurisdiction to draft statutes for an international criminal court, but work was postponed pending preparation of a Code of Offences against the Peace and Security of Mankind. The draft international criminal code was, in turn, postponed until States could agree upon a definition of the crime of aggression. Progress toward an international criminal court was thus delayed until aggression was defined by consensus of the United Nations in 1974. The Draft Code of Offences is scheduled for debate at the UN in 1980. Until the text of such a Code is agreed upon it is not anticipated that any action will be taken toward the creation of an international criminal court.

2. Characteristics of Proposed Court

Many proposals have been made containing specific descriptions for an international criminal court. These include statutes drawn up by the ILA in 1926, those submitted by legal experts in connection with the 1937 Terrorism Convention, those of the London International Assembly in 1943 and the related UN War Crimes Commission in 1944, the Charters for the Tribunals at Nuremberg and Tokyo, a 1949 UN Secretariat draft, proposals considered by the ILC and statutes drafted by the Special Committees on International Criminal Jurisdiction.

The court could be created by an amendment to the United Nations Charter, by a resolution of the → United Nations General Assembly, or by an international Convention adopted by the contracting States. The Statute of the → International Court of Justice that provides jurisdiction only over consenting States, could be amended in the same manner as the UN Charter to create an international criminal chamber. It has been suggested that cases could be remanded to the court by vote of the Security Council or by joint action of the offender's State and the State where the crime was committed.

All of the proposed statutes contain procedures for the selection of judges, who must be highly qualified and take an oath of impartiality. Judges could be selected by the contracting parties, or by the United Nations, from lists of experts. The

number of judges and their terms in office vary with different proposals, but nine or fifteen judges are frequently suggested, with a lesser number sitting in special chambers or divisions. The statutes also define the jurisdiction of the court as well as the law to be applied, and the ICJ Rules of Court serve as a model. In the absence of any specific international criminal code, general principles of international criminal law would be applicable. Several proposals provide for a "committing authority" or a pre-trial screening procedure to determine who should stand trial. Most drafts provide for a separate staff of prosecutors. All statutes contain guarantees for fair trial, including provisions for review and appeal. According to the proposals, the sentences could be administered by the State of which the accused is a citizen or by the State that brought the charges, by an independent constabulary or as directed by the court.

3. Current Significance

Recent years have witnessed the emergence of new norms of international behaviour and new institutions to cope with violations. Nations are beginning to consider codes defining new economic rights and duties of States, a law of the sea, restraints on multinational corporations and measures to preserve the environment for mankind (see generally → Codification of International Law). International courts, such as the → Court of Justice of the European Communities, help to enforce the emerging standards. The → European Court of Human Rights in Strasbourg, and the similar → Inter-American Court on Human Rights, offer protection to individuals whose rights are violated by governmental action. War crimes, aggression, and crimes against humanity have been punished by international criminal tribunals, and more recently, genocide, → apartheid, → aerial piracy, offences against diplomats (→ Diplomatic Agents and Missions), the taking of → hostages, and other acts of terrorism or → torture have been added to the list of international crimes.

There seems to be general agreement that the creation of an international criminal court would be desirable, but those who doubt the practicability of such an agency point to the continuing reluctance of many States to submit themselves or their nationals to the compulsory jurisdiction of any international tribunal. Those who support the idea of an international criminal court argue that the deterrence aspect of punishment for international crimes would serve to maintain tranquility among nations, just as domestic criminal law serves to maintain tranquility within nations. Without an international criminal court there is no way to determine judicially whether the international code has been violated, and thus, the punishment of offenders is left to the whim of avenging or protective States. An international criminal court is seen as the eventual and inevitable outgrowth of a slow evolutionary movement toward a rational world order and as an important instrument in helping to maintain world peace.

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INTERNATIONAL OBLIGATIONS, MEANS TO SECURE PERFORMANCE

1. Factors Determining Compliance with International Law

Performance of international (legal and non-legal) obligations is determined by a complex system of variables. The present state of our knowledge does not permit a complete account. Much of international law is observed as a matter of routine by the relevant actors. This may be explained by the fact that international law is a decentralized legal system, that the law is created by the potential violators, that there is thus a high probability of coincidence between the actor's interests and the law. It is mainly in cases of a change in the perceived interests of States (which may be due to an internal upheaval or to a fundamental change in international relations) that the problem of deliberate non-compliance becomes acute. Especially in the case of fundamental changes, the primary disadvantage of the decentralized legal system becomes evident:

the decentralized lawmaking process is rather slow. Thus, the accommodation of changing needs through changing the law is often impossible, and these new needs come into conflict with existing law.

Both for routine compliance and for observance of the law in critical situations, it is important that the relevant actors know the law, that they have a positive attitude towards the law, and that they adhere to legal and moral values. Thus, promotion of the knowledge of the law is an important means to secure compliance with it (see section 2(a) *infra*).

A decision to comply or not to comply with the law may be taken for a great variety of reasons, rational or irrational. If the decision is taken on a rational basis, it may be the result of a type of a cost-benefit analysis. Such an analysis may take into account on the benefit side the possibility to create *faits accomplis* by fast and successful aggressive acts and on the cost side the possible negative reactions of other actors, inside or outside the State, governmental or non-governmental.

Where no reaction is to be feared because the violation could pass unnoticed, the decision not to comply is easy. Control of observance is thus an essential means to secure compliance with international obligations (see section 2(b) *infra*). It serves in itself as a deterrent against non-compliance.

Where another actor asserts that a certain State's act or omission is a violation, the State will often deny it. States rarely admit to violating their obligations; they generally try to justify their actions by legal arguments. A violation might thus appear the less "costly", the better it can be justified. The risk of non-compliance also increases if a norm is not well defined and legal loopholes remain. Compliance is furthered by the possibility of obtaining a clear determination of the content of a norm in relation to a given case. This is the reason why international adjudication and other means of arriving at a determination of a breach are important as means to secure performance of international obligations (see section 2(c) *infra*) and why the difficulty of arriving at such a determination constitutes one of the major weaknesses of the international legal system.

The reactions of other actors to what they perceive as a breach may vary greatly between the use of formal procedures provided by law and very informal methods, between recourse to international institutions and measures of → self-help (see section 2(d) *infra*). The weight as a deterrent factor which these potential reactions have in a cost-benefit analysis largely depends on power relationships, *inter alia* on the physical possibility of the reacting entity to cause some disadvantage to the actor and on the vulnerability of the latter. Therefore, the risk of retaliation is an important element in this cost-benefit analysis (→ Reprisals; → Retorsion). The law may also be obeyed because the same attitude is expected from other actors (→ Reciprocity). In the absence of such mutuality of expectations (e.g. asymetrical conflicts), compliance with the law is in danger.

There is also a time element involved in this analysis. Short-term benefits may be weighed against long-term costs. A long-term disadvantage would be, for instance, the upsetting of the functioning of the international system as a whole; a violation may set a precedent which others could invoke to the disadvantage of the first violator. But where the actor in fact wants to alter the system, especially in response to a change in the perception of State interest, the violation becomes attractive, precisely because it sets a new precedent which can be used to change the law. Such a development can be observed, for instance, in the current trend in the → law of the sea in relation to the extension of State jurisdiction over the sea area adjacent to their coasts.

2. Means to Secure Compliance

(a) The acceptance of international obligations by the relevant actors in their legal thinking as well as in their actual practice is mainly brought about by information, instruction and publicity. Publicity has played a definite role in the field of → human rights. It has been a matter of public interest promoted by the media. But also the publicity provisions of the → Helsinki Conference and Final Act on Security and Cooperation in Europe have played an important role. Instruction in international law has so far been mainly in the hands of national educational systems. Regrettably only few measures have been taken on the international level to promote it; but the work of the → United Nations Educational,

Scientific and Cultural Organization and the → United Nations Institute for Training and Research is notable in this connection. In the field of humanitarian law, the → Geneva Red Cross Conventions and Protocols additional thereto, as well as the Hague Convention on Cultural Property (→ Cultural Property, Protection in Armed Conflict) contain specific provisions on dissemination and instruction by the parties in their countries; also the → International Committee of the Red Cross has developed its activities in this field considerably.

(b) Control of the observance of international obligations may be effected through the State's municipal system. In so far as international law is part of the municipal law of a State (→ International Law and Municipal Law), existing controls of the legality of governmental actions (judicial review, parliamentary control, ombudsman) may be used also to monitor observance of international law. More generally speaking, existing political controls (opposition, critical press) are also relevant in this respect. Some recent treaties in the field of → arms control specifically refer to some kind of self control.

Observation of the conduct of other States is the task of a number of government agencies, e.g. diplomatic missions, also secret services. → Verification of compliance is particularly important in the field of disarmament and → arms control. The → Strategic Arms Limitation Talks Treaty, for instance, specifically provides for the observation of the activities of one party by the other through "national technical means of verification". Observation of compliance may be institutionalized on a bilateral level through → mixed commissions, e.g. armistice commissions. In the field of the laws of war (→ War, Laws of), monitoring compliance is one of the functions of the → protecting power.

There are also a number of multilateral institutional devices to monitor compliance with international obligations (legal and non-legal, see → International Controls). An important monitoring device is the so-called reporting system which has become a widespread feature since its invention by the → International Labour Organisation in the 1920s (→ Reporting Obligations in International Relations). As provided in international treaties (e.g. UN → Human Rights Covenants) and resolutions, reports are to be provided on request or at certain intervals on matters relating to the implementation of a particular instrument (→ Human Rights, Activities of Universal Organizations). The effectiveness of this system in each case depends upon how it is carried out in practice in terms of the frequency and prescribed content of reports, on the composition of the scrutinizing body, and the publicity given to it.

International monitoring on the spot may also be performed by international organizations or other international bodies on the basis of *ad hoc* arrangements with the State(s) concerned. Examples are to be found in the activities of international armistice commissions or observer groups established by the United Nations or regional organizations, and → International Atomic Energy Agency safeguards.

In the field of the laws of war, the → International Committee of the Red Cross also serves the important function of monitoring compliance. There are a number of non-governmental "watchdogs" concerned with the observance of other specific fields of the law, e.g. → Amnesty International in relation to human rights.

Some of these controls are performed in secrecy (secret services, verification in arms limitation). More important are the publicity given to State behaviour and the international flow of communications. The service of the mass media to compliance with international obligations has become an important feature in international relations.

(c) The described methods of scrutinizing implementation of and compliance with international obligations will as a rule lead to some kind of review and appraisal by various actors, and in certain cases, result in claims that a breach of an international obligation has occurred. Only in rare cases do these methods lead to a binding determination that such a breach has occurred. Even the institutionalized monitoring devices often do not lead to the determination of a breach, in still fewer cases to a binding determination of one. Both the facts and the law often remain controversial. Since international law is a decentralized legal order, it is difficult to reach a binding determination of a breach. The claim of a breach leads to a dispute, but the only obligation

existing under general international law with respect to the settlement of disputes may be a duty to negotiate (→ Negotiation). Third party settlement, be it in the form of → good offices, → conciliation or mediation, be it in the form of adjudication (→ Judicial Settlement of Disputes) or the decision of international bodies (e.g. the case of determination of a breach of membership obligations in international organizations) is compulsory only if accepted *ad hoc* or in advance in a treaty. States are generally loath to accept such an obligation to submit to third party settlement, especially to international adjudication. The explanation does not so much lie in a lack of trust in the relevant institutions, but in a lack of confidence in the existing law itself which is due to the heterogeneous character of today's international society.

Third party determination of breaches works well at present only within the framework of more homogeneous subgroups of the international community (e.g. Western European States under the → European Convention on Human Rights).

Even a binding decision that a breach has occurred does not necessarily mean that a dispute is settled. There have been a number of cases where decisions were not accepted by the losing party, although it was legally bound to do so. In such a situation claims are often advanced that the decision is rendered void by some kind of legal defect, e.g. lack of jurisdiction (→ Judicial and Arbitral Decisions: Validity and Nullity). The execution of binding decisions concerning a breach against a party which is unwilling to comply remains a difficult question (→ Judgments of International Courts and Tribunals). Present global international society being as heterogeneous as it is, negotiation remains the most adequate means of settling disputes. This may in most cases not lead to a determination of a breach, but some kind of solution may be achieved. Even in international organizations, which have as a rule the power to determine a breach of membership obligations as a condition for sanctions (see section 2(d) *infra*), such determinations are rather rare. A binding determination under Art. 39 of the Charter by the → United Nations Security Council may be expected only in exceptional circumstances, because of the → veto power of the permanent members.

(d) If and as long as there is no agreed or accepted solution to a dispute arising out of a claimed breach, the question of the reaction of other actors arises. An aggrieved party, not necessarily a State, will in certain cases seek and obtain redress through the municipal legal system of the non-complying State.

Regarding the reaction of the victim in the international sphere, international law provides for certain possibilities of → self-help consisting in a "value deprivation", the infliction of some harm on the violator: → sanctions, → retorsion or → reprisal. The right to resort to reprisals is limited by the general prohibition of the → use of force. In case of an armed attack, use of force in → self-defence is permissible. These possible reactions to a violation depend on the power relationship between the parties and are highly problematic in the absence of an authoritative determination of a breach. Experience shows that the party at fault often claims not to be at fault, and that it may even denounce the reaction of the victim as being illegal and resort to countermeasures. Evidently, measures of self-help involve a serious risk of escalation. This is the reason why reprisals have fallen into disrepute. Imposing criminal liability on an enemy person responsible for a violation of the laws of war or for crimes against peace, if effected during the conflict, involves the same risk of escalation.

As to the possible reactions of third parties, international law provides only a few rules. In principle, self-help, to the extent that it would otherwise constitute an unlawful act, is only permissible as a reaction by the victim. Thus, retorsion by a non-victim State is permissible, but not a reprisal. There are cases, however, where a violation legally concerns not only the State which is primarily affected, but the international community as a whole, or the community constituted by a multilateral treaty. Thus, the operation of a multilateral treaty may, at least in certain cases, be suspended by all the parties thereto in relation to a defaulting State. In case of an armed attack, → collective self-defence is permissible. Acquisition of territory in violation of the prohibition of the use of force must not be recognized by any State (→ Stimson Doctrine). There are also other cases where it is at least arguable that a certain act done in violation of international law is not

legally valid and may be regarded as void by third States (→ Acts of State; → Chilean Copper Cases). These possible reactions of third parties, however, in view of the absence of a binding determination of a breach, present problems similar to those encountered regarding self-help by the victim.

Sanctions on the basis of binding decisions of international organizations may be divided into three categories: measures taken by States (essentially value depriviations like those just described) on the basis of a binding decision (→ Collective Measures; → Peacekeeping), military measures undertaken by the organization itself, and deprivation of certain advantages of membership. The last category ranges from a denial of access to funds or credits (→ International Monetary Fund) or concessions (→ General Agreement on Tariffs and Trade) to the loss of the right to vote (Art. 19, UN Charter), the complete suspension of membership rights and forced withdrawal or expulsion (→ International Organizations, Membership).

As these sanctions are based on binding decisions, they should, in theory, not have the same drawbacks as those decided upon by States for themselves. They have, however, not escaped some of the disadvantages of a decentralized legal system. The possibility still exists to challenge the validity of a decision of an international organization by claiming that the decision is itself illegal (→ International Organizations, Legal Remedies Against Acts of Organs). So far, it has not been possible for any global organization, or regional organization, to impose its will unilaterally by military force. The effectiveness of economic sanctions (Ethiopia, Rhodesia) has also been negligible (→ Boycott; → Embargo), mainly because it was not possible to ensure the necessary universal participation. Once there is a loophole in a system of economic sanctions, they tend to be ineffective and other States are also tempted not to participate in order not to allow a competitive advantage to non-complying States. The possibility of expulsion or suspension of members, or the withholding of membership advantages also presents a number of difficulties. There have been uses of this option which have been of dubious legality (e.g. expulsion or forced withdrawal of Portugal and South Africa from some specialized agencies). Expulsion ultimately means release from obligations and may thus be counter-productive, especially where there exists a strong interest in universal participation in the work of an organization. For these and similar reasons, States have been reluctant to use such sanctions (e.g. withdrawal of financial contributions to UN peacekeeping activities, → Certain Expenses of the United Nations (Advisory Opinion)). There are, however, instances where the threat of such sanctions produced a salutary effect.

Sanctions provided by law are by no means the only reaction which a violator has to take into account. There are other and sometimes more effective "value deprivations", the fear of which may induce compliance with international law. A general chilling of the political climate, political isolation (South Africa), a loss of prestige and credibility may rank much higher in the calculation of costs of a violation than formal sanctions. This is the reason why the critical forums of international organizations, especially the UN General Assembly, which have only the "power" of discussion, may induce compliance with what their majority thinks the law is or should be. It is also the reason for the practical importance of non-governmental actors denouncing violations (e.g. Amnesty International). States have a definite interest in prestige and are therefore highly sensitive to public opinion abroad or (when it cannot be manipulated) at home. Violations of international law may cause considerable loss of prestige. Here is another point where the mass media may exercise a significant effect upon compliance with international law.

Public pressure, however, is not the only form of inducing compliance, and it is not necessarily more effective than more discrete forms of influence. The ICRC relies instead on a non-public approach to bring about compliance with international law and the dictates of humanity, thus allowing a State to change an unlawful attitude or practice without losing face.

The reaction of international entities to acts or omissions of States (and other subjects of international law) as a means to induce compliance with international law, however, is not always free from a fundamental ambivalence, as the same procedures may also be used to deter a State from

exercising its rights – and they have been so used. The different responses may be used to enforce not only legal obligations, but also obligations of a political or moral character. Where public opinion serves to induce compliance, what counts is not the law as seen by a detached legal expert, but the law as made plausible by a legal salesman.

3. Evaluation

An account of measures to secure compliance with international obligations has to be a tale of imperfections. Yet, it is safe to state that international law is observed to a great extent in spite of these imperfections. Empirical research has been done on a number of international crises in order to replace speculation and vague estimates by safer knowledge on the effective usefulness of means to secure compliance. But much more research is needed before a general evaluation can be given with a satisfactory degree of exactness and certainty.

If compliance with international law were to be explained by the deterrent effect of possible reactions of other actors alone, it could probably not be explained at all. The coincidence of State interest with the law is probably more important. Thus, procedure designed to smooth the law-making process in order to enable it to cope with rapidly changing needs is perhaps as important a means to promote compliance with international law as an improvement in international adjudication or a strengthening of the sanctioning capabilities of international organizations. The positive attitude of the relevant actors towards international law, internalization and the ensuing importance of legal education must also be stressed.

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INTERNATIONAL ORGANIZATIONS, ADMINISTRATIVE TRIBUNALS, BOARDS AND COMMISSIONS IN *see* Administrative Tribunals, Boards and Commissions in International Organizations

INTERNATIONAL PRIZE COURT

1. History

The Convention on an International Prize Court, drawn up by the Second Peace Conference at the Hague (→ Hague Peace Conferences of 1899 and 1907), never came into force. Its lasting importance lies in the fact that it was the first international agreement which was intended to create a permanent international tribunal for the resolution of legal differences between States. Since late medieval times, States had set up prize courts for the adjudication of the legality of the capture of ships and goods by their navies or by commissioned privateers. From these beginnings of judicial control of maritime economic warfare evolved the principle that vessels or goods taken

by a belligerent could only become a lawful prize by the adjudication of a prize court (→ Prize Law). The prize courts were national institutions, and although they took into consideration the international rules of → maritime warfare, they gave primacy to the legal rules emanating from the authorities of their own countries (see e.g. The *Zamora* (1916) 2 A.C.77). During the 17th and 18th centuries recognized rules of maritime warfare had been developed, but belligerent action against neutral trade nevertheless continued to be an area of international dispute. Neutral complaints became strongly articulated during the 18th century and found political expression in the "Armed Neutralities" of neutral powers for the protection of their trade, concluded in 1780 and 1800 (Martens R, Vol. 3, 180) (→ Neutrality in Maritime Warfare). It was in this period that the idea of an international tribunal supervising the decisions of national prize courts was first introduced by Dane M. Hübner and other authors. The proposal was revived in the 19th century after the → Paris Declaration (1856) which strengthened the neutral position. At the Heidelberg session (1887) of the Institut de Droit International, Bulmerincq suggested the establishment of an international tribunal of appeal against the judgments of national prize courts, composed of judges from the belligerent and neutral countries. At that moment the proposal remained without effect, but it received new force through the rising international interest in arbitration between States. The Second Hague Peace Conference (1907) codified some areas of law relating to maritime warfare, but its main concern was the creation of a system of obligatory arbitration between nations. The Conference failed in this regard owing to the resistance generated against such a general arbitral commitment by the German delegation. However, Germany and Great Britain made a concession in that direction by submitting proposals to the Conference for the establishment of an international prize court. These proposals were subsequently amalgamated and accepted as the Hague Convention XII of October 18, 1907.

2. The Convention of 1907 and its Fate

The Convention dealt with some of the fundamental problems which had to be resolved later on concerning the constitution of international courts (→ International Courts and Tribunals). Its permanent institution and obligatory competence made the Court a true international judicial tribunal, as distinct from a mere arbitral forum (→ Arbitration), even if some authors at that time called it only a world arbitral tribunal. Of the 15 judges seven were appointed by the governments of the leading maritime powers, and the remaining places were filled by the other signatories in accordance with a scheme of rotation involving six groups. Nomination was for six years, and as is true today in the Statute of the → International Court of Justice, the Convention demanded of the judges expert knowledge and the highest moral standards. If during a war a State became a party to a case but was not represented on the Court, one of the rotating seats was to be made free – by lot – for a judge from the country concerned. In this system one can recognize the root of the institution of the judge *ad hoc*. The Prize Court was to have served as a court of appeal against the decisions of national prize courts, which could themselves have two levels. According to Art. 3 of the Convention, the Court was to have had the competence to hear cases regarding: neutral property of a neutral power or of its nationals; enemy property taken from a neutral ship; enemy property seized from an enemy ship in neutral territorial waters without diplomatic action having been taken by the neutral country; or enemy property allegedly seized in violation of the mutual contractual obligations of the belligerents or of the rules established by the captor State. Individuals of neutral or enemy status also had access to the Court with regard to actions involving their property (→ Neutral Nationals, → Enemies and Enemy Subjects). Thus, for the first time the Convention opened the way for claims by individuals, even if contemporary doctrine tended to contemplate individuals as being only representatives of their States (→ Individuals in International Law). The Prize Court was to have decided upon the validity of the seizure of ships or goods, taking into consideration the law of the captor and the rules of international law. At this point, by referring to international law, the Convention encountered a serious problem. The law of maritime warfare was codified on some points, but the rules of → economic warfare were omit-

ted from the codification. The Convention therefore empowered the Court to adopt a type of creative law-giving approach in indicating, as a source of the legal foundations of its judgments, the principles of justice and equity (→ Equity in International Law), if international rules were not yet in existence. It was this bold trust in judicial capacity to supplement rules that met with lively criticism. Also the Court could have struck down a national decision conflicting with international law and could have ordered, if necessary, indemnities. As the Senate of the United States had raised doubts as to whether the capacity of the Court to alter national judgments would infringe upon constitutional limitations, a supplementary protocol was signed on September 19, 1910, allowing a signatory to limit the competence of the Court to decisions of indemnification, excluding a direct effect upon national decisions (→ International Law in Municipal Law: Law and Decisions of International Organizations and Courts).

The Hague Convention XII has never been ratified by any State. Its fate became intimately linked to the Declaration of London of February 26, 1909 (AJIL, Vol. 3 Supp. (1909)179) (→ London Naval Conference of 1908/1909). The London Declaration tried to codify the rules of maritime economic warfare. However, from the start it met strong opposition in England, and finally (on December 15, 1911) the House of Lords threw out the Naval Prize Bill (1 & 2 Geo V) which carried approbation of the London Declaration. This action also sealed the fate of the Convention on the International Prize Court. The idea of such an international tribunal has never been revived. After World War II, the Allied Powers, in some of the peace treaties, claimed the right to reexamine the decisions of the prize courts of their enemies (→ Peace Treaties of 1947, → Peace Treaty with Japan (1951)).

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INTERVENTION OF PARTIES IN JUDICIAL PROCEEDINGS *see* Procedure of International Courts and Tribunals; Judgments of International Courts and Tribunals

JAY TREATY (1794)

The "Jay Treaty" is the name given to the Treaty of Amity, Commerce and Navigation between Great Britain and the United States signed on November 19, 1794 (ratifications exchanged on October 28, 1795).

The initiative for the negotiations which led to the conclusion of the Treaty was taken by George Washington, President of the United States from 1789 to 1797, who was anxious to resolve the differences which still existed between the former colonies and the mother country after the end of the American War of Independence and to improve Anglo-American relations, which had become more strained when Britain entered (in January 1783) into the War of the French Revolution (1792–1797). As the situation further deteriorated in 1794 and threatened to lead to war between Great Britain and the United States, President Washington, with the approval of the Senate, sent Chief Justice John Jay (a former Secretary for Foreign Affairs) as Envoy Extraordinary to London in order to settle the differences between the two countries. The differences concerned, firstly, the northeastern boundary with Canada which, in spite of the provisions of the Paris Peace Treaty of September 3, 1783, was still disputed, and the timing of the withdrawal of British troops and garrisons from frontier posts within American territory; secondly, the compensation of British subjects for losses suffered as a result of legal obstacles erected by certain American States to the repayment of debts to British creditors; thirdly, the military service of foreign nationals (→ Aliens, Military Service); fourthly, the opening of West Indian trade to the United States and the abolition of the Rule of the War of 1756, established in the

Anglo-French War of 1755–1763, according to which neutrals were excluded during wartime from trade not open to them in times of peace (→ Neutrality in Maritime Warfare). The United States also sought recognition of the principle "free ships, free goods", a topic which had become acute during Great Britain's war with France (→ Prize Law), the indemnification of American nationals for losses resulting from illegal British → privateering, the acceptance of a reduced list of → contraband and equal status for France and Great Britain in their rights as belligerents.

Jay and the British Secretary of State for Foreign Affairs, Lord Grenville, entered into negotiations on these matters at the end of July 1794 and signed the Jay Treaty in London on November 19, 1794. After the acceptance by Great Britain of an Additional Article proposed by the United States Senate concerning the West Indian trade, ratifications were exchanged on October 28, 1795. An Explanatory Article relating to Art. 3 was signed on May 4, 1796 (ratifications exchanged on October 10, 1796) and another relating to Art. 5 was signed on March 15, 1798 (ratifications exchanged on June 9, 1798).

The Treaty, with its 28 articles, only partially resolved the outstanding questions. The results achieved were weighted strongly in Great Britain's favour so that the reaction in the United States was one of disappointment. Moreover, the signing of the Treaty led to a rupture in the relations between France and the United States. According to the Treaty provisions, British troops would continue to occupy American territory until June 1796 (Art. 2), commerce with the West Indies remained the prerogative of British ships (Art. 12 with Additional Article) and French goods found on American ships were open to seizure. The list of contraband was reduced in some respects, but the original list was extended to include shipbuilding materials (Art. 18). The Treaty also contained several important innovations, some of which later became standard formulations in commercial, settlement and navigation agreements (→ Treaties of Friendship, Commerce and Navigation, → Commercial Treaties) and others contributed to the development of the basic principles of → maritime law.

Of special interest are those provisions concerning the setting up of three → mixed commissions: the first to settle the boundary dispute arising from the 1783 peace treaty (Art. 5); the second to examine the claims of British creditors who, owing to the legislation of certain American States, had been unable to obtain satisfaction (Art. 6); and the third to consider the complaints of American citizens who had sustained losses by reason of the illegal capture of their vessels during the maritime war between Great Britain and France (Art. 7). The boundary commission was to consist of three members; Great Britain and the United States were to nominate one member each, the third to be chosen by agreement between the original two or, in the absence of agreement, by lot. The other two commissions were to consist of five members each, two of whom were to be named by Great Britain, two by the United States and the fifth selected in the same manner as the third member of the boundary commission. The requirement commonly found in Continental and later in Anglo-American practice (→ Bryan Treaties of 1913/1914) that at least the one member of a mixed commission or arbitration court not named by the States involved must be neutral does not yet appear in the Jay Treaty; instead the signatories adopted the principle of national commissioners. The Jay Treaty commissions were thus joint organs of the signatory States. The commissioners were sworn "impartially to examine" the matters brought before them and, in the case of the second and third commissions, to decide the complaints "according to Justice and Equity and the Laws of Nations" (→ Equity in International Law). Whereas the boundary commission was comparable with a commission of inquiry (→ Fact-Finding and Inquiry) empowered to reach a final and binding decision, the other two commissions, being entrusted with the settlement of claims arising from loss and damage suffered in times of the recent war and the revolution, with their awards being directly binding on the Treaty signatories, bore all the features of international arbitral tribunals (→ Arbitration).

The first commission started its work in Halifax in the autumn of 1796 and after detailed investigations issued a declaration on October 25, 1798, which stated that the river truly intended in the Paris Peace Treaty of September 3, 1783,

under the name of the River Saint Croix was the River Schoodiac together with its northern tributary. This settled the question of the disputed boundary between the United States and Great Britain's North American possessions (Moore, International Adjudications, Vols. 1–2; de La Pradelle-Politis, op. cit., 5–12). Although the two parties accepted the commission's decision, further disputes concerning the northeastern boundary arose later on which could be resolved neither by one of the mixed commissions set up under the Treaty of Ghent of December 24, 1814, nor by an arbitral award of the King of the Netherlands dated January 10, 1831. Finally, the Webster-Ashburton Treaty of August 9, 1842, attempted to resolve these differences (→ American-Canadian Boundary Disputes and Cooperation).

The second commission first met in Philadelphia in May 1797 and at first had no difficulty in deciding upon a large number of claims from British subjects for compensation for losses which they had suffered because, according to the legislation of various States, debtors resident in those States could pay their debts due to British subjects into the State treasuries in full discharge of their obligations (the so-called "confiscated debts"; → Expropriation). Thanks to a majority of British members, the commission gave a very broad interpretation to the term "confiscated debts" in their decisions in the cases of Strachan-Mackenzie (July 1798) and Cunningham (August 1798), an interpretation which "in effect made the United States the debtor for all the outstanding debts due to British subjects and contracted before the treaty of peace" (Secretary of State Pickering to the Minister of the United States in London, February 5, 1799; see Moore, International Adjudications, Vol. 3, 170). Serious differences of opinion among the commissioners arose during the hearings in the case of Bishop Inglis (February 1799), and a clear division occurred during the hearings in the case of Allen (July 1799). As a result, Secretary of State Pickering announced the dissolution of the commission on September 4, 1799. After long negotiations, the question of compensation was settled by a convention dated January 8, 1802, by which Art. 6 of the Jay Treaty was annulled and the United States undertook to pay the sum of £600,000 in three annual instalments to cover the "confiscated debts" (Moore, International Adjudications, Vol. 3; de La Pradelle-Politis, op. cit. 12–28).

The third commission, which first assembled in October 1796, was prevented from proceeding to business as the American commissioners, who were in the majority, claimed that the commission also had jurisdiction in cases which had already been decided by the British courts. After this question had been resolved, a fresh obstacle arose with the expiry of the eighteen-month term for the bringing of claims under Art. 7 of the Jay Treaty, namely, a difference of opinion as to the treatment of claims which were still pending before the ordinary courts. This obstacle was removed in August 1798, but the British commissioners suspended the proceedings in July 1799 until a decision could be reached in the dispute among the commissioners appointed under Art. 6 of the Jay Treaty. Once this question had been settled by the signing of the convention of January 8, 1802, proceedings continued smoothly until they were terminated on February 2, 1804. The commission made 553 awards on the claims of United States citizens who had been affected by the British confiscation of contraband, most of which arose from the seizure of American ships laden with grain consigned to French ports. Twelve awards were made in favour of British claimants, compensating them for damage inflicted by French privateers which had been fitted out in the United States in violation of its neutrality. The commission thus contributed to the development of principles governing neutral rights and obligations in maritime warfare. In all, the British Government paid to the United States the sum of £2,330,000 and the United States Government to Great Britain $ 143,428 (Moore, International Adjudications, Vol. 4; de La Pradelle-Politis, op. cit. 28–217).

The Jay Treaty has been described as "dans l'histoire de l'arbitrage un acte capital qui sépare nettement les anciens errements des pratiques modernes" (de La Pradelle, op. cit. xxix). A pattern similar to that of the Jay Treaty appears in a number of treaties concluded between Great Britain and the United States in the years that followed. This is particularly evident in the Treaty of Ghent of December 24, 1814, which set up in Arts. 4 to 7 four mixed commissions to decide upon boundary questions concerning the Bay of Fundy (settled in 1817), the River St. Lawrence

(settled in 1822), the northeastern boundary (the work of this commission followed upon the St. Croix River decision of the first Jay commission, but ended in failure in 1821), and the boundary running from Lake Huron to the Lake of the Woods (this commission's work ended in failure in 1827). Other States also set up similar institutions before rules for international arbitration were codified at the → Hague Peace Conference of 1899.

At the Commemoration Sitting of the International Court of Justice in 1972, Sir Muhammad Zafrulla Khan, then president of the Court, described the Jay Treaty as "the historical landmark from which the trend which was to lead to the establishment of a true international judicial system is usually dated" (ICJ Yearbook (1971–1972) 130).

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HANS-JÜRGEN SCHLOCHAUER

JUDGMENTS OF INTERNATIONAL COURTS AND TRIBUNALS

A. General Remarks

Judgments of international judicial bodies are the final decisions of international legal disputes, binding on the parties to the case. → International courts and tribunals pronounce, by way of judgment, on the merits of the dispute and, as the case may be, on preliminary matters of jurisdiction and admissibility. The same applies to arbitral tribunals (→ Arbitration) which offer the same essential guarantees of judicial settlement. The terms "court" and "tribunal" do not relate to different types of international judicial institutions; the terms are interchangeable. An arbitral judicial body established *ad hoc* may be properly called a court (e.g. → Continental Shelf Arbitration, France/United Kingdom); similarly, a permanent institution though usually called a court, may be called a tribunal (e.g. Law of the Sea Tribunal → Law of the Sea, Settlement of Disputes).

The term "court" as used in this article, is meant to cover all international institutions endowed with the essential features of a judicial body.

1. Characteristics of Judicial Bodies

The following elements represent the essential characteristics of an international court: (a) Establishment on the basis of an international convention (multilateral, as the Statute of the → International Court of Justice; regional or plurilateral, as the → European Convention on Human Rights; bilateral, as the treaties constituting → Mixed Claims Commissions); (b) Independence of the judiciary, guaranteeing an impartial decision; (c) Objective rules derived from general international law and treaty law effective between the parties, to guide the judges in determining the law applicable; (d) The equality of the parties in the application of the law and in

the proceedings before the court. This last principle applies without exception to inter-State disputes. To the extent to which international courts possess jurisdiction on applications made by private persons, groups and juridical persons, the applicants are not in all cases admitted to appear before the court; this right is reserved to an international commission which gives its views from an objective standpoint and acts on an equal footing with the defendant government (→ European Court of Human Rights and → Inter-American Court on Human Rights). The further essential characteristics of an international court are: (e) A procedure, the rules for which are established before hand and which are appropriate for the subject-matter of the disputes submitted to the court's jurisdiction; (f) The binding effect of the judgment.

2. *Judicial Bodies Rendering Judgments*

Judgments are given by various types of international courts, the most important of which are permanent judicial bodies whose composition is constituted according to rules established by their basic conventions without regard to cases which may be brought before them (with the qualification that a party may appoint a judge *ad hoc* if the bench does not include a judge of its own nationality). For a survey of courts of this type, see → International Courts and Tribunals, section III). A good deal of the judicial practice of the international judicature is found in what may be called "semi-permanent" tribunals, established in the framework of peace settlements and treaties establishing normal relations between the former belligerent countries after the two World Wars: Under the peace treaties after World War I, mixed arbitral tribunals and mixed claims commissions were set up between many of the Allied and Associated Powers on the one side, and Germany and her Allied Powers on the other. → Mixed claims commissions existed mainly between the United States and some European States on the one side, and certain Latin American States on the other. After World War II, "conciliation commissions" were established between victorious and defeated States under the Paris Peace Treaties of February 10, 1947, which were in fact arbitral tribunals whose decisions were to be accepted as definitive and binding. (→ Conciliation Commissions Established pursuant to Art. 83 of Peace Treaty with Italy of 1947; → Property Commissions Established pursuant to Art. 15 (a) of Peace Treaty with Japan of 1951). Arbitral tribunals were created by the → Bonn and Paris Agreements and by the → London Agreement on German External Debts. Tribunals of this kind disappear when the task which gave rise to their establishment has been accomplished.

Arbitral tribunals are, as a rule, composed of an equal number of members appointed by each party but independent of any instructions from the appointing party, and one or an odd number of "neutral" members. The term "arbitral tribunals" encompasses both bodies constituted *ad hoc* in case of a particular dispute and bodies established on the basis of a general arbitration treaty or of a compromissory clause providing for procedural mechanisms for the setting up of such a tribunal in the event that a future dispute should occur. The judgment of an arbitral tribunal has the same legal value as that of courts and tribunals in the narrower sense.

3. *Parties to International Judicial Proceedings*

Judgments are binding on the parties to a dispute. The *jus standi in judicio* (→ Standing before International Courts and Tribunals) depends on the contractual instrument constituting the court. If the court has contentious jurisdiction restricted to inter-State cases, only States are entitled to seise the court and to appear before it. This is the traditional and still prevailing type (e.g. the → International Court of Justice and most arbitral tribunals). The appearance of parties other than States (international organizations and individuals, groups and juridical persons constituted under a national legal order) is a new phenomenon, first admitted to a large extent by the mixed arbitral tribunals and commissions mentioned above, the interested persons themselves appearing as parties. Other judicial bodies dealing primarily with private interests follow a similar pattern. The most important court competent to receive complaints of individuals is the → Court of Justice of the European Communites. In the area of the protection of → human rights, States and commissions defending the interests of the public (→ European Convention on Human Rights. → American Convention on Human

Rights) are entitled to appear before the two Human Rights Courts in Strasbourg and San José, Costa Rica (→ European Court of Human Rights, → Inter-American Court on Human Rights). The commission is not a party in the proper sense but has the same procedural rights; only the State party is affected by the obligations following from the judgment.

Courts or – as they are normally called – "tribunals" established within the framework of international organizations in order to deal with internal administrative matters, particularly staff regulations (for a detailed description, see → Administrative Tribunals, Boards and Commissions in International Organizations) and disputes between the various organs of the organization and between the organization and a member-State (this competence has been attributed, *inter alia*, to the → Court of Justice of the European Communities), can be compared with national administrative and constitutional tribunals. They are not international judicial bodies in the proper sense, i.e. courts dealing with international disputes; their judgments concern only the interested subjects of the internal law of the organization.

B. Content of Judgments

1. Form

Elements of a judgment in the usual form are: the names of the participating judges; the names of the parties and of their agents, counsel and advocates; a summary of the proceedings; the submissions of the parties; the grounds for the decision, wherein those matters of fact and law which form the basis for the operative part are set forth in detail and the arguments of the parties are given consideration; the operative provisions; the date on which the judgment was read or, if it was not publicly pronounced, the date on which it was adopted; in cases where the statute or rules of the court provide for more than one official language, a statement as to which text of the judgment is authoritative; and the signatures of the president and the registrar.

2. Individual Opinions of Judges

Judges of international courts may, if they so desire, attach their individual opinion to the judgment. The opinion must be completed in written form at the time that the judgment is pronounced or adopted; it is not read in public. A dissenting opinion states the reasons why a judge disagrees – on one or more points of the operative provisions – with the court's decision and has in consequence given a negative vote. A separate opinion is written by a judge who concurs in the decision but disagrees with all or part of the court's reasoning. Rules of court usually also permit declarations of judges who desire to give a brief indication of concurrence or dissent without stating the reasons. In cases where not all dissenting judges make a declaration or file an individual opinion, the names of the judges constituting the majority do not appear. However, according to the 1978 Rules of Court of the ICJ, not only the number but also the names of the judges forming the majority must be indicated in the judgment.

3. Judgments on Preliminary Matters and on the Merits

Questions relating to the competence of the court to give a judgment on the merits of the dispute are dealt with in a procedural phase of the case terminated by a judgment limited to the decision on this question only (→ Preliminary Objections). Lack of jurisdiction or inadmissibility of the claim may present obstacles to a decision on the merits. These two impediments are sometimes interrelated and not always easily distinguishable. The objection is normally raised by the defendant party. If that party refuses to appear before the court, as has happened several times before the ICJ, the court must satisfy itself, *ex officio*, that there are no obstacles against the exercise of its jurisdiction and the admissibility of the proceedings. The reason is that international courts are normally competent and obliged to decide on their own jurisdiction (see e.g. Art. 36 (6) and Art. 53 (2), ICJ Statute).

4. Operative Part and Reasoning

The decision of the court is not confined to the operative provisions, but includes the essential reasoning (*ratio decidendi*), and recourse may be had to the reasoning to elucidate the meaning of the operative part. Difficulties of interpretation may arise, particularly if separate opinions of the judges concurring in the operative provisions do

not make clear the essential grounds on which the holding is based.

C. Operative Provisions

International judgments may, like national judicial decisions, be classified according to the differing purposes of their operative pronouncement. Proceedings before any court, national or international, may be directed to obtaining a decision which creates a new legal situation, or one which gives an order to perform an act, or one which states, in a declaratory form, how the law disputed between the parties is to be applied. The effect of judgments is dependent on the category of decision which is in question.

1. Assignment of Territorial or Personal Jurisdiction

To this category belong, first of all, decisions determining a title to territory (e.g. the → Minquiers and Ecrehos Case; → Sovereignty over Certain Frontier Land Case). Judgments of this type relate to boundaries, to jurisdictional rights of the parties in international waterways, to the delimitation of fisheries zones, or to the baselines of territorial waters and the delimitation of the continental shelf as between the parties. As far as jurisdiction over persons in foreign territory is concerned, the judgments of the ICJ in the → United States' Nationals in Morocco Case offers an example of a decision on the extent of consular protection.

2. Judgments Calling for the Performance of a Specific Act by the Parties

Judgments of this type may order the payment of a certain sum by one party to the other (the → *Wimbledon* Case before the PCIJ and the → Corfu Channel Case before the ICJ). Judgments of the → European Court of Human Rights may order the defendant State to pay a certain sum of money to the applicant as a "just satisfaction". The act of performance may also consist in acts other than payment.

3. Declaratory Judgments

Declaratory judgments, as defined by the PCIJ, are decisions "the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties, so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" (→ German Interests in Polish Upper Silesia Cases, PCIJ A 13, at p. 20). The declaration can have various objects: it can consist, for example, in an interpretation of a treaty provision binding on the parties, or in the statement that certain acts of a national organ – including acts of the legislature or decisions of the judiciary – are inconsistent with the obligations of a party to the dispute derived from a treaty or from general international law. For example, the finding against a defendant State by the European Court of Human Rights is expressed, in the operative clause, by the statement that the State concerned has violated one or more provisions of the European Convention. If the parties agree not to submit the dispute between them to the court – concerning, for example, their land or sea boundaries – in its entirety, but to settle it on the basis of the rules and principles of law applicable between them, they may ask the court to give a declaratory judgment on those principles and rules but retain the liberty to settle their controversy by agreement (→ North Sea Continental Shelf Cases). The rule found in the municipal law of some countries, according to which a declaratory judgment is inadmissible if the case is appropriate for a judgment on performance of specific acts, does not exist in international law.

4. Dismissal of Action

If an application is rejected, the operative part consists only of the declaration of dismissal. It does not order or state anything; its wording is purely negative. Its meaning can only be deduced from the reasoning in the judgment.

5. Preliminary Rulings

In order to guarantee the uniform application of a law-making treaty, and in order to strengthen the supra-national character of international judicial decisions, it has often been suggested that national courts should be obliged to suspend the proceedings in a given case until an international court has given a preliminary ruling on a question essential to the decision in the pending case. At present the most well-known and important realization of that idea is the treaty establishing the →

European Economic Community, according to which the CJEC is competent to make a preliminary decision concerning the interpretation of the treaty, the validity and interpretation of acts of the institutions of the Community, and the interpretation of the statutes of any bodies set up by an act of the Council of the Communities, where such statutes so provide. The submission of such legal questions to the CJEC is mandatory for municipal courts of last resort; it is optional for lower courts (Art. 177 EEC Treaty) (see also → Benelux Economic Union, Arbitral College and Court of Justice).

D. Process of Reaching a Decision

The rules governing the procedure after the termination of the oral proceedings (or, if no hearing is held, from the end of the written proceedings) are fixed by the court. Permanent courts normally lay down such rules in a "Resolution concerning the Internal Judicial Practice". The rules are modelled after the following general pattern but may vary according to certain peculiarities of each court: after the end of the public hearings (or, as the case may be, the written proceedings) the President establishes a list of the issues that in his opinion require decision; members of the court may, in the first deliberation, comment thereon and make suggestions for amendments. The same meeting may be continued – as is the practice of the → European Court of Human Rights – by deliberation on the merits following the order of issues established in the list, until a solution is reached and the future majority view becomes discernible. A formal vote is not taken and views expressed by judges need not be final. In the ICJ, however, the first meeting ends after a brief exchange of the preliminary views of the judges. Members of the Court then have to prepare, within a fixed period determined by the Court, a written note giving their tentative views on all relevant questions. After members of the Court have had the opportunity to read the notes of their colleagues, the deliberations are resumed and continued until the future majority view becomes discernible. At the end of this deliberation, a drafting committee is constituted, normally consisting of the President and some members of the court whose views most closely reflect the opinion of the apparent majority. If the President belongs to the minority, his place is taken by the Vice-President or, if necessary, by another judge, either according to seniority or by election. The drafting committee prepares a preliminary draft judgment which is circulated to the judges who may make suggestions for amendments. The committee considers whether or not to accept these suggestions and submits an amended draft to the court for the first reading. Changes or amendments adopted during this deliberation are considered by the committee, and the draft is considered by the court in a second reading. A final vote is taken, in inverse order of seniority of the judges, on the operative provisions of the judgment, i.e. on the answers to be given to the points raised by the parties in their submissions. Abstentions are not permitted. The decision is taken by an absolute majority of the judges present.

E. Legal Effects

Treaties instituting judicial organs usually define the effects of the judgments of that organ. Normally, they prescribe that the decision of the court is final, that it has no binding force except between the parties, and that it imposes obligations on them only in respect of the particular case (e.g. Art. 59, ICJ Statute). Treaties may, however, provide for a stronger effect of judgments, and attribute to them a direct effect within their national domain (e.g. the provisions relating to Central Commission for → Rhine Navigation, the Committee of Appeal for the → Moselle; → Investment Disputes, Convention and International Centre for the Settlement of). Such an effect has only been accorded to judgments of international courts where individuals or other legal persons of municipal law are admitted as parties. There are exceptions from the usual limitation on the parties of the legal force of judgments, namely certain effects on States intervening in the proceedings and the *erga omnes* effect of territorial adjudication (see *infra*).

1. Effect on Parties to inter-State Disputes

(a) State parties are bound in their capacity as subjects of international law. The States concerned are not bound to open their internal sphere of jurisdiction to judgments of international courts. If some action of national authorities (including

the courts) is needed in order to comply with the consequences resulting from an international judgment, the State is responsible in international law to see that such action be carried out. But judgments of international courts have no direct effect on municipal law and on national authorities unless the municipal law itself prescribes to or permits national authorities to apply international judgments or to draw the consequences resulting from them. Efforts have been made – in treaty provisions and in the national legal orders of a number of countries – that are intended to facilitate the application of international law and international obligations, including those flowing from judgments. This development is an appropriate means of circumventing the undesirable consequences of the theory of dualism by technical legal devices tinged with monism (→ International Law in Municipal Law: Law and Decisions of International Organizations and Courts).

The State concerned is under an obligation to comply with all the consequences of the judgment: If a title to jurisdiction is recognized or denied, the State is bound to assure that all national State organs exercise their competence within the limits of this title. If the judgment directs the performance of an act, the government is obliged to perform it, either through its executive branch or through any other organ which can contribute to this effect. If the judgment contains declaratory provisions, the State has the choice of the means of bringing about the effect called for by the judgment – if necessary, by abolishing or enacting legislation (e.g. Marckx Case before the → European Court of Human Rights).

(b) The judgment has the effect of *res judicata* between the parties. Applications for revision or interpretation are, however, admissible under certain conditions (see *infra*).

(c) Although the strict idea of *res judicata* is confined to the operative provisions, it is generally admitted that all parts of a judgment concerning the points in dispute are to be taken into account in order to determine the scope of the operative part. The reasons given for the operative part of the judgment provide the party concerned with guidance on the action to be taken to comply with it.

(d) No principle of *stare decisis* exists in the international judicature. Courts are bound neither by their own precedents nor by those of the ICJ. However, the ICJ often refers to statements of law contained in its own jurisprudence and that of the PCIJ. Other permanent courts act accordingly. International courts of any kind frequently refer to the jurisprudence of the ICJ and the PCIJ.

2. *Effect and Relevance erga tertios*

(a) Intervention of States not parties to a dispute goes back, as a concept of international procedural law, to the → Hague Peace Conferences of 1899 and 1907. The example of the Hague Conventions on the Pacific Settlement of International Disputes has been followed by such judicial instruments of a universal character as the Statutes of the PCIJ and the ICJ and the → General Act for the Pacific Settlement of International Disputes of 1928. Two kinds of intervention exist: the first presupposes an interest of a legal nature which could be affected by the decisions in the pending case; the second is operable when the construction of a convention is in question to which States other than those participating in the case are parties. The legal consequence of the second form is that the construction given to the judgment is equally binding on the intervening State. The consequences of the first form of intervention are not explicitly defined; it may be concluded that the intervening State is bound to the same extent as the original parties to the dispute, namely, only in that particular case and *inter partes*.

(b) Although not legally binding on them, a judgment may be relevant to States not parties to the dispute because a declaratory statement or the essential reasons of a judgment relate to the construction of a multilateral or plurilateral treaty in which those other States participate. Since it is to be expected that the court will apply the same construction in similar cases concerning other contracting parties, all these States may consider implementing, in their own sphere, the consequences resulting from the judgment. The most striking examples demonstrating this problem are offered in the European Convention on Human Rights, where no article exists providing for intervention. The judgments of the court have, in practice, the effect of precedents for all contrac-

ting parties which have recognized the right of individual complaint, as they may themselves become a defendant in a similar case in the future.

(c) A judgment adjudicating or recognizing a title to territorial jurisdiction has to be respected by all other States, unless a third State has a claim to the subject of the litigation.

(d) For deficiencies of judgments, see → Judicial and Arbitral Decisions: Validity and Nullity.

F. Interpretation and Revision

Judgments of international courts are final and without appeal. A second degree of jurisdiction does not exist. Requests for judgments on interpretation and revision are, however, admitted.

1. Interpretation

In the event of a dispute as to the meaning or scope of a judgment, any party may make a request for its interpretation. The court gives an interpretation in the form of a judgment (e.g. → Continental Shelf Arbitration, France/United Kingdom). The interpretation may concern either the operative provisions or the essential grounds constituting the *ratio decidendi*.

2. Revision

An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was unknown to the court and also to the party claiming revision when the judgment was given, provided that such ignorance was not due to negligence. The decision is given in the form of a judgment.

G. Execution

If the treaty establishing an international court does not contain a provision on the execution of its judgments, the State on which an obligation is imposed by the operative part of a judgment is responsible for its implementation. It is bound to ensure compliance with the judgment through the domestic organs competent under its municipal law. Treaties establishing courts in the framework of an international organization normally assign to an organ of that organization the responsibility for the execution of judgments. If the party concerned fails to perform the obligations imposed upon it under a judgment of the ICJ, the other party may have recourse to the → United Nations Security Council, which may, if it seems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment (Art. 94, UN Charter). Judgments of the European Court of Human Rights are transmitted to the Committee of Ministers of the → Council of Europe which has the duty of supervising their execution. According to the → American Convention on Human Rights, that part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State.

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HERMANN MOSLER

JUDICIAL AND ARBITRAL DECISIONS: VALIDITY AND NULLITY

The problems concerning the principles governing the nullity and validity of judicial decisions and arbitral awards have been discussed primarily with regard to arbitral awards, but they also exist with respect to judicial decisions. After three centuries of discussion, the problems still remain unsettled. Important considerations at the heart of international adjudication and arbitration are in conflict here: on the one hand, the rule that international judicial and arbitral awards are final and unappealable (Art. 54 of the 1899 Hague Convention for the Pacific Settlement of International Disputes, Art. 81 of the 1907 Convention [→ Hague Peace Conferences of 1899 and 1907] and Art. 59 of the Statute of the → International Court of Justice) as well as the rule that the decision should definitively settle the dispute, and on the other, the fact that international decisions are sometimes deficient and that the upholding of deficient awards can damage the authority of international adjudication. Moreover, the need for stability and predictability in international law should not absolutely prevail over substantive justice.

A limited number of grounds for the nullity of international awards have been adopted which are derived from municipal law, such as the principle of Roman law: *arbiter nihil extra compromissum facere potest.* Out of the great number of grounds of nullity advanced in the course of time the following have crystallized as being generally accepted and covering most of the grounds formerly advanced. (The customary term "nullity" is used in this article to denote any circumstance pertaining to an award whereby that award may be avoided or set aside).

1. Excess of Power

The most important ground of nullity is undoubtedly that of "excess of power", which is not clearly distinguishable from lack of jurisdiction. In theory it is possible to define lack of jurisdiction as being related to the content and interpretation of a → *compromis* or arbitration treaty and excess of power to the use of powers by a judge manifestly outside his judicial functions, but, in practice, both grounds are interchangeably employed (→ Hungarian-Romanian Land Reform Dispute). In fact, both grounds can be treated together and their ingredients may be classified into the following categories: a decision outside the *compromis* (e.g. North-Eastern Boundary Case of 1831 between Canada and the United States; → Argentina-Chile Frontier Case; the Chamizal Tract Case between the United States and Mexico of 1910; → Honduras-Nicaragua Boundary Arbitrations); error relating to jurisdiction; error in the comprehension or application of the law which the tribunal is directed to apply (→ Orinoco Steamship Co. Arbitration), as well as serious departure from fundamental rules of procedure (→ Buraimi Oasis Dispute).

2. Essential or Manifest Error

Nullity can hardly result from an error of fact, which may give rise only to revision where provided for, or to rectification, unless the error was induced by fraud (→ Judgments of International Courts and Tribunals). An error of law is difficult to establish in view of the broad scope for interpretation inherent in a tribunal's jurisdiction and the nature of the task of the arbitrator to seek an adequate solution to the dispute under examination which inevitably carries with it a certain amount of discretion. Theoretically, there may be cases where an essential error of law may be found, but in practice this ground of nullity has never been invoked.

3. Corruption of an Arbitrator

This affects the award as a whole and constitutes a ground for nullity. This ground may be

defined as being any action which impairs or is likely to impair the impartiality of an arbitrator and may take forms other than a payment of money (see → Buraimi Oasis Dispute and the United States-Venezuela Claims Commission at Caracas 1866). Fraud, consisting in deceit in the presentation of a case to the tribunal, may also be treated as the discovery of a 'new fact' and lead to revision.

4. Invalidity of the Compromis (see also → Treaties, Validity)

This no longer seems to be acceptable as a ground for nullity, for if it is advanced by a party and accepted by the tribunal before the beginning of the tribunal's proceedings, there will be no award, and if it is advanced after the proceedings have taken place and the award has been given, the *compromis* will be regarded as being binding on both parties.

The grounds for nullity set out above were adopted by the → Institut de Droit International as early as 1874 in Rule 27 of the *règlement* governing arbitral procedure. But the consequences of the existence of one of those grounds for nullity were not specified. Is the award then void or merely voidable? Both views are advocated by different writers, but it seems that the concept of voidability is more consistent with the nature of international adjudication. Considering that it is not desirable that the defeated party may assert the voidness *ab initio* of the award and that there should be a different treatment of the various grounds for nullity, some of them leading to voidability, others to voidness, the difference would appear to be only important in theory. In practice, both conceptions require a body to decide upon the alleged ground for nullity and to determine whether the decision is null as a whole or only in part (→ Cerruti Arbitrations).

There are five possibilities as to who shall determine the nullity: a) The least desirable one is doubtless that the party alleging nullity should be the judge in his own cause. Besides other self-evident inconveniences implicit in this solution, unilateral action is inconsistent with the whole concept of international arbitration and adjudication. The recognition of the possibility of unilateral determination as to the validity of any award would mean that an award is nothing more than a proposal of a mediator or a conciliation commission which becomes binding only by the subsequent consent of the parties. b) Another possibility is to empower the tribunal which rendered the award to determine the charges of nullity. This solution presents two difficulties: firstly, it does not seem proper to charge the tribunal with the examination of its own faults, and secondly, in the case of international arbitration, the tribunal concerned can only act under a special agreement of the parties; consent to such an agreement can hardly be expected from the winning party, who is not likely to want to risk its position in a new suit (cf. the Orinoco Steamship Company Case, the Cerruti Case, the Case of the Hungarian-Romanian Land Reform of 1927). c) A third solution provides for an agreement in order to seise another tribunal to decide the issue; this approach seems highly desirable and is consistent with the nature of international arbitration. d) A fourth possibility consists in vesting a reviewing tribunal with compulsory jurisdiction. It was the absence of such a tribunal which had led to the complete rejection of binding rules on nullity at the 1899 → Hague Peace Conference. The creation of the → Permanent Court of International Justice and the rather perplexing action of the Council of the League of Nations in the Hungarian-Romanian Land Reform Case of 1927 led to the Finnish proposal to the Council of the League to empower the PCIJ as a court of review for claims of nullity. This Court was regarded as a "higher authority" indispensable for the review of nullity claims; it guaranteed the most impartial decisions as well as greater stability and predictability in law. This proposal, however, had no immediate success, although indirect success can be observed in subsequent bilateral agreements to the same effect. Nevertheless the → International Law Commission took up the proposal again with regard to the ICJ, because the lack of a procedure for the review of nullity claims, except in the case of express agreement by the parties, was not acceptable. Because of sharp criticism, this proposal was modified to the extent that the compulsory jurisdiction of the ICJ would only apply in cases where the parties failed to agree upon another tribunal within three months; furthermore, a time-limit was fixed for challenging a decision on nullity grounds (→ Arbitral Award of 1906 Case

(Honduras v. Nicaragua)). Yet even this proposal met with little success in practice. Compulsory jurisdiction would be the most effective legal solution to the problem, but it conflicts with the basic principle of international adjudication, i.e. that the system is based on the consent of States. e) As it does not seem that States are ready to accept the last solution, only political means are left in this field (e.g. Orinoco Steamship Arbitration, Cerruti Arbitrations). This solution may appear to be a dubious one to lawyers brought up in national judicial habits of thought, but in the international arena legal obligations are not infrequently enforced by resorting to political means (→ International Obligations, Means to Secure Performance), as demonstrated by the possibility to enforce judgments of the ICJ by resorting to the application of Art. 94(2) of the → United Nations Charter.

Thus it can be stated that the problem of the nullity of international and arbitral decisions remains unsolved, and, since the days of the First Hague Peace Conference, no essentially new solutions have been advanced. The unsatisfactory situation persists that there are recognized grounds for nullity but no authority to test them; moreover, unless a new arbitration agreement is concluded or an optional submission to the ICJ is made, the party alleging nullity may declare himself to be entitled to be a judge in his own case (→ Beagle Channel Arbitration).

The roots of this situation go beyond the concept of nullity. Even new proposals cannot solve the problem but only seek the best possible compromise acceptable to States, for where there is a claim of nullity, the problem of review depends exclusively upon the fundamental attitude of States towards international law, and their commitment to settle disputes by peaceful means. If this commitment is lacking at whatever phase of the proceedings, only a political solution remains available. Although this is not an altogether satisfying state of affairs, it should be borne in mind that in practice most international decisions have been implemented by the parties. Nevertheless, it is important that international law should maintain the requirement that charges of nullity should be settled by subsequent consent to a new arbitration or by seising the ICJ, thus relinquishing the idea derived from municipal law that the revision tribunal should be a superior one.

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JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES

A. Definition and Terminology. – B. Historical Development. – C. Basic Features and Problems: 1. Basic Types of Obligations and of Institutions for Judicial Settlement. 2. Justiciability of Disputes. 3. Jurisdiction. 4. Basic Types of Procedures. 5. The Law Appli[illegible]

Significance and Possible Functions of Judicial Settlement.

A. Definition and Terminology

By judicial settlement is understood the employment of the judicial functions of international courts and arbitral tribunals for the purpose of settling actual disputes between subjects of international law concerning their international relations. It is one of the means to promote the → peaceful settlement of international disputes as mentioned, for example, in Art. 33(1) → United Nations Charter.

Settlement by → arbitration, which may be characterized by the binding nature of the decision of a third body chosen by the disputants, falls within the province of judicial settlement if it qualifies as judicial arbitration, i.e. if according to a judicial procedure the decision is rendered on the basis of law and legal standards by an independent arbitral body. This concept of judicial arbitration is expressed, for example, in Art. 37 of the Hague Convention on the Peaceful Settlement of International Disputes (1907) (→ Hague Peace Conferences of 1899 and 1907), Arts. 21 to 28 of the Geneva → General Act for the Pacific Settlement of Disputes of 1928, Art. 38 of the → Bogotá Pact of 1948, and Arts. 19 to 26 of the → European Convention on the Peaceful Settlement of International Disputes of 1957.

A distinction between international courts and arbitral tribunals can reasonably be drawn by typological criteria and not by clear-cut definitions; international practice exhibits several interactions between the two forms. In principle, the notion of an international court implies the establishment, usually by treaty, of a permanent institution which is composed of persons whose independence and impartiality are requirements stipulated in the relevant constitutive instrument or other governing rules. The notion further implies the competance of the court to render binding decisions on the basis of law which are arrived at in accordance with procedural rules that guarantee, at minimum, the procedural equality of the parties and a full and fair hearing. Normally, international courts are not established by conflicting parties themselves but by multilateral instruments. The classical example of judicial arbitration is the *ad hoc* arbitral tribunal established according to a special agreement (→ *compromis*) between the conflicting parties in order to decide an existing dispute on the basis of procedural and substantive legal rules which are indicated in the agreement, the arbitrator or the composition of the tribunal being selected or chosen by the disputant parties. Between the two basic types of courts and arbitral tribunals a wide range of organizational varieties can be met in international practice stretching from courts which expressly grant permission to potential parties to influence the number as well as, possibly, the persons comprising *ad hoc* chambers during consultation procedures (→ International Court of Justice (Art. 26 (2) ICJ Statute, Art. 17, Rules of Court) to permanent arbitral tribunals which in principle exclude all influence of the parties on the composition of the tribunal (Art. 28 of the → London Agreement on German External Debts, with the exception there of the appointment of *ad hoc* judges).

Within the framework of international organizations there are institutions which, although not qualifying as courts or arbitral tribunals in the above sense, may at least partly employ quasi-judicial procedures or perform quasi-judicial functions with the purpose of contributing to the settlement of disputes, e.g. the Human Rights Committee established under Part IV of the UN Covenant on Civil and Political Rights (→ Human Rights Covenants) and the Optional Protocol thereto (Art. 5), the UN Committee on the Elimination of Racial Discrimination (→ Discrimination against Individuals and Groups), the European Commission on Human Rights established under Art. 19 of the → European Convention on Human Rights, the Commissions of Enquiry (→ Fact-Finding and Inquiry) according to Arts. 26 to 34 of the Statute of the → International Labour Organization, or the Council of the → International Civil Aviation Organization under Art. 84 of the Convention of 1944.

B. Historical Development

In its present form, judicial settlement of international disputes is a product of 19th and 20th century developments. There is knowledge of disputes arbitrated between the ancient Greek city-states (→ Arbitration); in medieval Europe arbitration was held in high regard and practiced in numerous cases. It faded away during the

growth of territorial → sovereignty and the period of absolutism. Modern development started with the → Jay Treaty (1794) between the United States and Great Britain, which established three arbitral tribunals.

Conspicuously successful arbitrations, e.g. in the → *Alabama* Case (1872), lent support to the idea that judicial settlement might become an instrument for diminishing the danger of and even replace the resort to arms. The Hague Peace Conferences of 1899 and 1907, facing a political climate of mounting tensions due to the competing expansionist economic and political ambitions of the time, with the inherent risks of war, were the first multilateral attempts to place judicial settlement within the context of → collective security and → disarmament and to make it operational. The Hague Conventions of 1899/1907 set forth procedures for → good offices, mediation (→ Conciliation and Mediation) and commissions of inquiry, and created a permanent administrative and procedural institution, the → Permanent Court of Arbitration, to establish *ad hoc* arbitral tribunals for settlement of disputes submitted by the disputants. Between 1902 and 1914, 17 disputes were referred to tribunals established under the Conventions. Attempts at the 1907 Peace Conference to create a permanent Court of Arbitral Justice and, in particular, to institute, at least for a limited number of matters compulsory jurisdiction, failed as did the proposal for an → International Prize Court. The Treaty of October 14, 1903, between France and Great Britain (Martens, NRG2, Vol. 32, p. 479) provided for institutional judicial arbitration for the first time in Europe; its scope was to comprise "differences of a legal nature or relating to the interpretation of treaties". By 1914, about 100 bilateral treaties of this kind had been concluded, which, in practice, remained almost dead letters. As a rule, the reservations to the treaties included a clause that parties were not to be obliged to submit to arbitration if, in the opinion of a contracting party, the dispute concerned its → vital interests, honour, independence, or the interests of third States. From 1908 to 1918, the → Central American Court of Justice was in existence; it heard ten cases, five of them concerning international disputes.

Under Art. 12 of the → League of Nations Covenant, member States had agreed to submit disputes which might lead to a breach between them to arbitration, adjudication, or, alternatively, to the Council of the League for settlement. Art. 13 provided that disputes concerning the interpretation of a treaty or any question of international law were generally to be considered as appropriate for arbitration or adjudication. On February 15, 1922, the → Permanent Court of International Justice was established as a separate institution. Although attempts to make the jurisdiction of the Court compulsory *ipso facto* by accession to its statute had failed, the option provided for in Art. 36 (2) of the Statute was considered to be a decisive achievement. This optional clause provided that parties could recognize by a declaration the jurisdiction of the Court in all legal disputes as compulsory *ipso facto* and without the need for a special agreement. Such disputes comprised, in particular, the interpretation of a treaty or any question of international law. In the years to follow more than two thirds of the members of the League recognized the compulsory jurisdiction of the Court. This trend towards compulsory jurisdiction was the principal feature distinguishing the post-World War I period from the Hague system based on voluntary submission. Moreover, the "vital interests and honour" clause, not mentioned in the League instruments, came into disuse, while the reservation of "domestic affairs" (→ Domestic Jurisdiction) gained ground. The PCIJ had to decide itself whether it had jurisdiction in a particular case. In the spirit of the League system, judicial settlement was considered an indispensable element of an integrated system of collective security, disarmament and renunciation of war. The same spirit promoted the → Locarno Treaties of October 16, 1925. They provided for the submission of legal disputes to judicial arbitration or to the PCIJ. The Geneva → General Act for the Pacific Settlement of International Disputes of September 26, 1928, accepted by 23 States (although in most cases with considerable reservations), provided in Chapter II for judicial settlement of legal disputes, and in Chapter III for arbitration of other disputes. The Act represents the high watermark of the idea of pacific and, in particular, of judicial settlement. On January 5, 1929, the General Treaty of Inter-American

Arbitration was concluded (LNTS, Vol. 130, p. 135), followed by a series of Inter-American multi- and bilateral instruments. Between the wars, numerous bilateral treaties for peaceful settlement, often including non-judicial means, were concluded. Switzerland and Germany led the way with their arbitration and conciliation treaty of December 3, 1921 (LNTS, Vol. 12, p. 272).

In contrast to this imposing contractual network, international practice was rather modest, if not discouraging. The General Act remained a dead letter as well as many bilateral treaties and compromissory clauses. The PCIJ, on the other hand, became the leading institution of judicial settlement. It was seised in 65 contentious cases, rendered 20 judgments on the merits, 9 on preliminary objections, and received 27 requests for advisory opinions. Several decisions and opinions were of great importance for the restatement and development of general international law. In contrast, comprehensive arbitral activity developed only in very limited fields, in particular, before the → Mixed Arbitral Tribunals established under the → peace treaties after World War I. They had mainly to deal with claims for compensation resulting from extraordinary war measures in tens of thousands of cases. Their contribution to the development of international procedural law has been remarkable. One of their special features was that private individuals could be parties to the proceedings. This was also true with regard to the arbitral tribunal for Upper Silesia (→ German Interests in Polish Upper Silesia Cases) established under the German-Polish Convention of May 15, 1922, according to which private individuals could even institute proceedings against their own State. Another unique feature was the possibility of calling upon the arbitral tribunal for an interlocutory decision on questions of interpretation of the Convention which could be initiated by national courts, administrative authorities and even private parties if a case was pending before a national court of one of the contracting parties. The various claims commissions (→ Mixed Claims Commissions), i.e. arbitral tribunals established bilaterally between Latin American countries on the one side, the United States and European States respectively on the other side, were also quite active. They had to decide mainly on claims for compensation resulting from internal turmoil akin to civil wars. One interesting feature was that exhaustion of → local remedies was not required for a claim to be admissible, e.g. before the Mexican Claims Commissions.

The decay of international relations after the economic crisis of 1929 and, finally, the outbreak of World War II demonstrated that the idea of judicial settlement as a workable surrogate to the resort to arms had failed; it had been refuted in practice by power politics and its underlying ideologies.

Expectations were high again, at least among the smaller States, when the ICJ was instituted as the principal judicial organ of the UN. Efforts at San Francisco in 1945 failed to provide for obligatory recognition of compulsory jurisdiction by mere adherence to the → United Nations Charter or to the ICJ Statute, in order to balance the hegemonical structure of the → United Nations Security Council; optional recognition, as had been the case also with the PCIJ, was retained. In contrast to the League period, less than one third of the member-States have made declarations under Art. 36 (2) of the Statute since 1946. The situation has deteriorated even further because several States have phrased their declarations in such a way that they are largely at liberty, should an actual dispute be submitted by unilateral application, to accept or decline the Court's jurisdiction (→ Connally Reservation). Other circumstances also indicate a retrogressive tendency on the universal level to resort to judicial settlement. The General Act of 1928, although restored to life by the → United Nations General Assembly, has not become a vital force in present-day disputes. Every element of compulsory jurisdiction in the 1953 Draft on Arbitral Procedure of the → International Law Commission was taken out again by the General Assembly. Although a large number of bilateral and multilateral instruments have embodied various types of clauses providing for reference of disputes to the ICJ (see ICJ Year Books), a retrogressive trend has appeared in a series of important codification conventions: the provisions for possible reference of disputes to the ICJ, in order not to endanger the adoption of these conventions, had to be placed in optional protocols, the adoption of which was not made dependent upon adherence to these conventions.

This device was employed, for example, in the 1958 Convention on the Law of the Sea, the → Vienna Convention on Diplomatic Relations (1961) and the → Vienna Convention on Consular Relations (1963). The → Vienna Convention on the Law of Treaties of May 22, 1969, does not generally provide for compulsory adjudication; only in the limited field of disputes relating to → *jus cogens* (Arts. 53, 64) does submission to the ICJ by any one of the parties to the dispute form one alternative settlement procedure (Art. 66, Annex). Other conventions, including the Antarctic Treaty of December 1, 1959 (→ Antarctica) and the UN Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights of December 16, 1966 (→ Human Right Covenants), do not provide for reference of disputes to the ICJ at all; nor does the Declaration on Principles of International Law of October 24, 1970 (UN GA Res. 2625 [XXV]) mention the possibility of any direct reference to the Court. Above all, the UN Security Council, unlike the League Council, and, to a lesser degree, the General Assembly and the authorized bodies of → United Nations Specialized Agencies, showed great reluctance to request advisory opinions from the Court. As of July 1, 1980, the ICJ has had a total of 64 cases (including requests for advisory opinions) to deal with, and it has given 39 judgments and 16 advisory opinions (see → International Court of Justice). The ICJ's jurisprudence has, on the whole, proved to be of great importance for the restatement and development of international law as well as for the peaceful settlement of most disputes submitted to it; in other cases (e.g., → United States Diplomatic and Consular Staff in Tehran Case, 1980) the Court's decisions or advisory opinions were flatly disregarded by one side or the other, UN organs not excepted. In the greater number of its decisions the majority opinions struck skilful balances between lasting values and new requirements of international law in an international society undergoing profound changes. The main reason for the fact that its role in the peaceful settlement of disputes has, nevertheless, remained quite modest does not result from any deficiencies of the Court itself but from the unwillingness of States to make use of its services for this purpose.

The prospects for judicial settlement with respect to limited subject areas and, to an extent, on a regional basis has been somewhat brighter than on the universal level. Judicial or quasi-judicial settlement of international disputes proved workable, in particular, within the framework of international organizations with limited, mostly technical, competences, such as the → International Civil Aviation Organization or the → Universal Postal Union. On a regional basis the most important instruments are: (1) America: The American Treaty on Pacific Settlement of April 30, 1948 (→ Bogotá Pact), implementing Art. 23 of the charter of the → Organization of American States. Besides non-judicial means it also provides for settlement of disputes by arbitration. If conciliation as well as the conclusion of a special agreement have failed, disputes of the nature described in Art. 36 (2) of the ICJ Statute may be referred to the ICJ by way of unilateral application. It contains devices to prevent a party from unilaterally withdrawing from a proceeding. Apart from the Bogotá Pact a whole network of multilateral and bilateral treaties mutually connect most States of the Western hemisphere. In 1979 the → Inter-American Court on Human Rights was established under Chapter VIII of the → American Convention on Human Rights of November 22, 1969. (2) Africa: Art. 19 of the Charter of the → Organization of African Unity of May 25, 1963, together with the Protocol of July 21, 1964, provide, *inter alia*, for the establishment of an arbitration commission consisting – similarly to the Hague Permanent Court of Arbitration – of a list of arbitrators. Arbitral settlement of a dispute requires a special agreement. Arts. 32 to 42 of the Treaty of East African Co-operation of June 6, 1967 (ILM, Vol. 6, p. 932) provided for the establishment of the East African Common Market Tribunal (see → East African Community). A rather weak possibility for arbitration has been embodied in Art. 5 of the Pact of the Arab League of March 22, 1945 (→ Arab States, League of). (3) Europe: After 1945, Western Europe achieved a breakthrough in judicial settlement. In 1953 the Court of Justice of the → European Coal and Steel Community came into existence. This court was later followed by the Court of Justice of the European Communities with jurisdiction in mat-

ters regarding the ECSC, the → European Economic Community and the → European Atomic Community. Yet, the supranational structure of the Community has placed this Court somewhat beyond the sphere of purely international disputes between member-States; its jurisdiction, while obligatory in matters arising from primary or secondary law of the Community within the new legal order, is not compulsory with respect to other disputes which lie purely on the international plane (see Arts. 182 EEC, 42 ECSC, 154 Euratom Treaties) but requires jurisdiction to be conferred upon it by special agreement. Aside from member-States and the principal institutions of the Community, private individuals and entities may be parties before the Court in proceedings against the organs of the Community. Interlocutory procedures (e.g. Art. 177 EEC Treaty) from courts of the member-States to the Court have proved to be a most effective device to secure the uniform application of Community law inside the member-States. The Court has developed its activities extensively and produced an imposing body of jurisprudence.

In the field of human rights, the establishment of the → European Commission on Human Rights and the → European Court of Human Rights under the Convention of 1950 were a great step forward. Both institutions have shown considerable vitality and proved to be real forces in the field of protection of human rights. Their example inspired undertakings in the same directions in the Americas and in the United Nations. While the jurisdiction of the above-mentioned institutions as well as that of the Arbitral College of the Benelux Economic Union, (→ Benelux Economic Union Arbitral College and Court of Justice), cover limited, though in practice very important, subjects, the → European Convention for the Peaceful Settlement of Disputes of 1957 provides for reference of all legal disputes – defined in the same way as in Art. 36 (2) of the ICJ Statute – to the ICJ, while all other types of disputes, failing conciliation, are to be submitted to arbitration.

In addition to these principal multilateral instruments on a regional basis, numerous arbitral bodies for limited subject areas have been provided for in multilateral or bilateral instruments, on universal or regional bases; the scope of subject matters has covered mainly technical questions and matters connected with the settlement of special problems resulting from World War II. Only a few prominent examples can be mentioned here: (1) the international conventions on railway traffic (→ Railway Transport, International Regulation); the ICAO Conventions of December 7, 1944; the European → Nuclear Energy Tribunal (Convention of December 20, 1957) (→ Organization for European Economic Cooperation and Development, Nuclear Energy Agency); (2) the defunct UN Tribunals in Libya (UN GA Res. 388 A [v]) and in Eritrea (UN GA Res. 530 [VI]); the Arbitration Tribunal established under the → London Agreement on German External Debts (1953), Arbitral Tribunal and Mixed Commission; the → Arbitral Commission on Property, Rights and Interests in Germany; the Arbitral Tribunal established under Art. 108 of the → Austro-German Property Treaty (1957). In addition, a large number of multilateral and bilateral treaties concluded since 1945 contain compromissory clauses, covering mainly technical subjects, such as air transport, communications, economic problems, trade, settlement, navigation, social security, protection of foreign investments, protection of the environment, use of natural resources, border waters etc. Rigid arbitration clauses are contained in a number of agreements between international organizations and developing countries.

With the exception of disputes related to World War II (in regard to which the respective arbitral bodies developed a comprehensive and routine activity similar to that of the period after World War I and to that of the → mixed claims commissions), and excepting various technical fields, like aviation or postal communications, resort to arbitration in general since the Hague period has steadily declined, and after World War II has reached an all-time low. This trend was not, as at times during the League period, balanced by a more frequent use made of the ICJ. Leaving aside the special case of the → European Communities, real progress in judicial settlement can be found only in the limited field of the protection of human rights, restricted moreover, at least until now, to Western Europe. In general, prospects for adjudication after 1945 in other fields have been shown to have become rather dim.

C. Basic Features and Problems

1. Basic Types of Obligations and of Institutions for Judicial Settlement

Under present general customary international law, States are under no obligation to submit disputes to judicial settlement (→ Eastern Carelia Case, PCIJ B 5, at p. 27 [1923]), nor does such an obligation result from Arts. 2 (3) and 33 of the UN Charter. Only by express consent do disputants assume an obligation to submit or acquire a right to refer disputes to judicial settlement. Such assent may be expressed in various forms. State practice exhibits four basic types of numerous varieties *in concreto*:

(a) The special agreement between the disputants (see → *Compromis*). It defines the actual dispute, determines the arbitrator and, as a rule, the procedure for the establishment and composition of the arbitral body, the law to be applied, often including the competence to render a decision *ex aequo et bono* (→ Equity in International Law) and the basic rules of procedure. The related type of institution is the isolated *ad hoc* arbitral tribunal (board, commission) (→ Arbitration). Until the Hague period, State practice exclusively relied on this basic type although with numerous variations.

(b) The compromissory clause (→ Arbitration Clause in Treaties), forming part of a bilateral or multilateral contractual instrument, provides for referring to judicial settlement such disputes which arise under a particular contractual relation. Various types of clauses can be met in State practice. In its weakest form the clauses provide that before judicial procedure may be actually entered upon an (additional) special agreement between the disputants is required to refer the dispute to the procedure or institution provided for. Although such a clause must be executed *bona fide*, it is no more than a → *pactum de contrahendo*, in reality leaving open various escape devices to an unwilling opponent, ranging from refusal to conclude the required special agreement to disagreement on the framing of the questions to be submitted or on the establishment of the arbitral body, the selection of the judges, the law to be applied or the procedure to be followed. Such avenues of escape may be closed by compromissory clauses conferring on third persons or bodies competence in advance to fill any gaps arising out of the lack of *bona fide* cooperation of an opponent (e.g. appointing an arbitrator). More stringent, at least in their wording, appear to be compromissory clauses which provide for unilateral reference of an actual dispute by either party to a pre-established arbitral procedure and institution. In practice, however, States even then are extremely reluctant to resort to instituting arbitration unilaterally.

(c) Treaties on the peaceful settlement of disputes, including means for judicial settlement. They may be concluded bilaterally or multilaterally, on a global basis (like the Hague Conventions of 1899/1907), or on a regional basis (like the European Convention of 1957 or the Bogotá Pact of 1948). Aside from non-judicial means of settlement, they usually provide for reference of disputes, as defined by the treaty, to *ad hoc* arbitration or to permanent judicial or arbitral bodies established under the treaty itself or under other international instruments. The European Convention, for instance, provides (in Art. 1) that "all international legal disputes" shall be referred to the ICJ, while all others, failing conciliation, shall be submitted to arbitration (Chapter III). Again, the treaty may provide that before a dispute can actually be submitted to judicial procedure a disputant may request the conclusion of a special agreement to that effect (e.g. Art. 52 Hague Convention of 1907); or it may provide for unilateral submission (e.g. Art. 31, Pact of Bogotá).

(d) Treaties instituting permanent international courts or arbitral tribunals on a global or regional basis.

Their competence may extend to disputes and other matters, as defined by the relevant instruments, or be limited to specific subject areas. The only international courts established on a global basis with general competence have been the PCIJ and, since 1946, the ICJ. A regional court with general competence was the Central American Court of Justice, which existed from 1908 to 1918. Courts on a regional basis with limited competence are, e.g. the → Court of Justice of the European Communities, the Arbitral College of the Benelux Economic Union, the European Court of Human Rights, the Inter-American Court on Human Rights, and the East African

Common Market Tribunal. Several projects to establish other regional courts, in particular in Latin America, have not been realized to date.

2. *Justiciability of Disputes*

As indicated above, under general international law States are under no obligation to submit disputes to judicial settlement. States that have not assented to any special obligation may or may not consider an actual dispute or certain future issues appropriate for judicial settlement. The following are some of the factors determining this consideration: the political climate existing between the disputants – the interdependence with other fields of relations or frictions – factors of timing – prospects of settlement by non-judicial means (→ negotiations, good offices, mediation, conciliation, fact-finding and inquiry, peace-maintaining devices) bilaterally or multilaterally employed, e.g. within the framework of an international organization – the applicability of legal rules – the certainty of the law to be applied and the predictability of a possible decision – the remaining freedom of action and the chances to arrive at a final solution by diplomatic means after the judicial decision has been rendered – the effect of a decision on the settlement of the dispute in part or in its entirety – the reaction of internal and international public opinion to further conduct – the prospects for and the means of enforcement of the decision. At this level, justiciability or non-justiciability is a political question, with the answer left to the discretion of a disputant.

It becomes a legal question if a State is bound by an obligation to accept judicial settlement. Problems of justiciability may then arise within different contexts including the following:

(a) How does the relevant instrument define the categories of matters submissible to the court or tribunal? This definition becomes important, in particular, where a general instrument, such as the Covenant of the League of Nations (Arts. 12, 13), the Geneva General Act, the → Locarno Treaties or the respective European and Inter-American Conventions, provides for different settlement procedures, assigning certain kinds of disputes primarily or exclusively to judicial procedures. It may be doubtful whether an issue constitutes a dispute at all, or if so, whether it is covered *in concreto* by a category of disputes submissible to *judicial* settlement procedures under the terms of the governing instrument. Treaty practice exhibits several methods of substantive definition: The Hague Convention of 1907 employs in Art. 38 a rather broad approach by speaking of *les questions d'ordre juridique* and primarily, questions of interpretation or application of treaties. Art. 13 of the League of Nations Covenant enumerates rather broadly the kinds of disputes considered to be justiciable; this enumeration was adopted in Art. 36 (2) of the Statutes of the PCIJ and the ICJ as well as in many multilateral and bilateral instruments. The definition in the Locarno Treaties took into consideration the subjective element in defining legal disputes as those in which the parties mutually contest a right, while Art. 1 of the European Convention of 1957 simply refers to "all international legal disputes", which must be understood to mean all disputes that may be judged on the basis of international law. A dispute in which a party does not question existing rights but requests a change of the legal norms governing the relations with its opponent would not qualify, as a rule, as a dispute in this sense. If an actual dispute qualifies as submissible under the governing instrument, and if jurisdiction is properly conferred upon the court, e.g. by unilateral application (see *infra*), the court may not decline jurisdiction or declare the application inadmissible on the grounds that the dispute concerns a highly sensitive political matter or encroaches upon the vital interests or honour of the opponent; nor may the opponent upon these grounds object to the proceedings. The fact that a legal dispute (in the sense of the governing instrument) is at the same time a political dispute does not preclude a court from taking cognizance of and deciding upon it. This also holds true if, at the same time, attempts are made to settle a dispute within a political institution such as the UN Security Council (see, e.g. Case concerning United States Diplomatic and Consular Staff in Tehran, ICJ Reports, 1980, at p. 19 *et seq*). While the dispute may not be settled politically by the decision, it can and, in the absence of provisions to the contrary, must be adjudged by the competent court on the basis of the applicable law.

(b) Intimately related to the question of the

substantial definition of disputes justiciable according to the governing instrument is the question of who is competent to decide whether or not a dispute falls within the definition. This question goes to the scope of a court's competence *ratione materiae* in an actual case. In the absence of provisions to the contrary, a court or tribunal must be deemed competent to decide whether the requirements for its own competence in an actual dispute have been met.

(c) A dispute submitted may not be justiciable, in part or in its entirety, if, for instance, the court or tribunal finds that the law to be applied according to the *compromis* of the parties is not applicable to the facts submitted. A different question though is whether the law applicable to the facts of the dispute recognizes an element of discretionary conduct, precluding to that extent judicial control. This would be a question of the merits of the case, not of competence, jurisdiction or admissibility.

3. Jurisdiction

Jurisdiction is the legal power, established by the governing instrument, of courts or tribunals within their scope of competence to take cognizance of and to deal with matters actually brought before them. It is exercised via certain procedures provided for in their statutes and rules of procedure. Although it is an indivisible concept, several dimensions of jurisdiction may be distinguished, including jurisdiction *ratione materiae, personae, temporis, territorii.*

Adherence to a treaty or a statute establishing a permanent court or arbitral tribunal does not necessarily mean that a contracting party has subjected itself *ipso facto* to the jurisdiction of the court or tribunal; it may depend on an additional act by the contracting party as provided for in the governing instrument. If an additional act of recognition is not required, jurisdiction is obligatory *strictu senso*; if it is required, jurisdiction is optional. The jurisdiction of the CJEC (with the exception of Art. 182 EEC, 42 ECSC, 154 Euratom Treaties), and of several permanent arbitral courts with limited competence *ratione materiae*, e.g. of the Arbitral Tribunal for the Agreement of German External Debts (Art. 28), is obligatory *strictu senso*. Yet, the recognition of the jurisdiction of most other international courts, e.g. of the ICJ (Art. 36 Statute) as well as that of the European Court of Human Rights (Arts. 46 and 48 of the Convention, in contrast to Art. 24 concerning the European Commission of Human Rights) is optional.

Recognition of jurisdiction may take various forms and be limited by reservations *ratione materiae, temporis, personae,* or *territorii,* if the governing instruments permit such limitations.

(a) Recognition may be expressed by way of a *compromis* conferring jurisdiction upon the court in a particular dispute and actually submitting it to the court. It may also be conferred by conclusive conduct, e.g., by mutually referring a dispute to the court, or by responding to a unilateral application (*forum prorogatum*). These ways of establishing jurisdiction are envisaged in Art. 36 (1) of the ICJ Statute.

(b) Compromissory clauses providing for agreed or unilateral reference of a dispute to a court constitute a basis for conferring jurisdiction. Even if they do not expressly state that either party may bring a dispute before the court by unilateral application, this may be what the clause was intended for (see Case concerning United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980, at p. 27).

(c) The instruments governing jurisdiction may provide that parties may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other party accepting the same obligation, the jurisdiction of the court or tribunal in all disputes as defined in these instruments. It may be provided, moreover, that such declarations may be made unconditionally or on condition of → reciprocity on the part of several or certain States, or for a specified period. This is called the optional clause for compulsory jurisdiction. Its prototype is Art. 36 (2) of the Statutes of the PCIJ and ICJ. Similar optional clauses are contained in Art. 46 of the ECHR and Art. 62 of the ACHR with regard to the compulsory jurisdiction of their respective courts. This type of optional clause providing for compulsory jurisdiction in the proper sense is to be distinguished from other clauses, such as those embodied in Art. I of the Optional Protocols to the Vienna Conventions on Diplomatic and on Consular Relations, or in Art.

31 of the Bogotá Pact, which provide that disputes arising out of the interpretation or application of the respective treaty shall lie within the compulsory jurisdiction of the ICJ, and may, accordingly, be brought before the Court by unilateral application made by a party to the dispute if both of the parties concerned are also parties to the instrument containing that clause. Clauses of this type confer a special kind of compulsory jurisdiction upon the ICJ based not on Art. 36 (2) but on Art. 36 (1) of the Statute.

The practice concerning *ad hoc* arbitration does not pose any serious problems as to the competence and jurisdiction of the tribunal by its very nature, although it may raise questions as to its scope *ratione materiae* or *temporis*. Institutionalized judicial settlement, on the other hand, involves potential risks, so that States are wary of assuming comprehensive obligations to submit disputes to arbitration and adjudication on a permanent basis. States often employ one or some of several devices to insure against these risks: limiting the subject areas as well as the duration of their obligations, or limiting the competence of the court or tribunal. One device has been to subject their obligations and, in particular, their declarations to recognize compulsory jurisdiction to limitations. Under the Hague system of arbitration this was effected by clauses embodied in treaties on judicial settlement expressly retaining the right of either party unilaterally to bar the settlement procedure if, in its opinion, the dispute concerned its vital interests, honour, independence, or the interests of third States. This position was further safeguarded by the requirement of a *compromis* prior to resorting to arbitration. Besides the vital interests and honour clause, other clauses made reservations with respect to disputes concerning independence, sovereignty, → territorial integrity, constitutional principles, the relations of → British Commonwealth members *inter se*, and even, in United States treaties, the → Monroe Doctrine. Since the League period, the reservation as to matters essentially within the → domestic jurisdiction of a party has become of overriding importance. It stems from the provision of Art. 15 (8) of the League of Nations Covenant and has passed into many bilateral and multilateral instruments. Since 1946 it has become the primary device to undermine declarations made under Art. 36 (2) of the ICJ Statute. Its prototype is the United States declaration of August 14, 1946 (→ Connally Reservation) which excepts from its recognition of compulsory jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction . . . as determined by the United States . . ." Extremely restrictive effects may also result from clauses making recognition of compulsory jurisdiction terminable upon mere notice. The impact of all these escape devices, moreover, is multiplies by their reciprocal effects (see → Norwegian Loans Case). The ICJ has confirmed the wide operational scope of reciprocity. As a result, jurisdiction under optional clauses of this kind is conferred upon courts only to the extent to which declarations coincide (→ Anglo-Iranian Oil Company Case). They are capable of limiting recognition of compulsory jurisdiction to a minimum of actual commitment (see Waldock, op. cit.).

4. *Basic Types of Procedures*

The governing instruments usually provide that courts or permanent arbitral tribunals shall exercise their jurisdiction according to specified procedures depending on the kind of subject matter to be dealt with. The requirements as to who is capable of participating in the respective procedure (States, other international subjects, organs of international organizations, private individuals), as to → standing, intervention of third parties, burden of proof, the kinds of possible decisions, depend as a rule on the type of procedure applicable. While arbitral tribunals with competence limited to specific subject areas usually deal with disputes according to a basic type of procedure in contentious cases, the Court of Justice of the European Communities employs several types of procedures comparabie to the varieties found in domestic procedural law. Two basic types of procedure have to be distinguished: that for contentious proceedings and that for advisory proceedings, the procedure for → interim measures of protection being incidental to contentious proceedings.

A basic admissibility requirement for contentious proceedings has been that the matter brought before the court must constitute a dispute, a "case or controversy". There must exist at

the time of the adjudication an actual controversy involving conflicting legal interests of the parties (→ Northern Cameroons Case); a mere difference of opinion over a moot point or abstract question does not meet this requirement. It may be difficult to define positively what constitutes an actual controversy; it is easier to ask – in the negative – whether a decision on the submitted question, even if accepted *bona fide*, would have no practical consequences for the parties. On the other hand, in regard to a contested relation or situation, it is admissible merely to request the court to expound or outline the legal rules or principles applicable to it so as to give the disputants guidance in reaching a final settlement out of court (→ North Sea Continental Shelf Cases). In this case the court's decision is binding upon the parties but leaves them a wide range of diplomatic possibilities for and control over the final settlement. Proceedings instituted by *compromis* or joint application may pose problems as to the burden of proof. In this situation it would be highly inadequate to make the burden of proof dependent on formal "adversary" positions as applicant or respondent (→ Procedure of International Courts and Tribunals).

The court may be competent to give → advisory opinions on certain kinds of, or on "any legal question" (Art. 65 ICJ Statute) upon request by the proper bodies authorized by the governing instrument. Advisory procedures may accomplish a useful purpose within the framework of international organizations by clarifying their constitutional problems. Beyond the scope of this facility, they involve the risk of bringing before the court disputed matters which otherwise might not be submissible without the consent of others concerned, thereby circumventing a basic principle of present-day international law. Notification and quasi-intervention devices (see, e.g. Arts. 66, 68 ICJ Statute) do not offer sufficient protection against these risks. The PCIJ, recognizing these dangers, was very cautious to remain strictly within its judicial function under advisory procedures (→ Eastern Carelia Case). Grounds for judicial self-restraint appear to be less demanding where the third States concerned were members of the legal framework under which the substantive issue as well as the formal request were raised (→ Southwest Africa/Namibia (Advisory Opinions and Judgments), ICJ Reports 1971, at p. 16; → Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinions)).

5. The Law Applicable

In *ad hoc* arbitration and in compromissory clauses requiring a *compromis*, disputants are generally at liberty to determine and thereby delimit the legal rules to be applied by the court or tribunal in deciding the dispute; they may also exclude the application of other rules. The court or tribunal is bound by such determination and delimitation, provided that the relevant rules are indeed applicable at all to the submitted facts. If they are not applicable, the dispute is non-justiciable under the governing rules; unless the disputants correct this deficiency, the court cannot decide on the merits. Recently, a certain trend may be discerned in special agreements to strictly delimit the law to be applied. Delimitations of this kind, on the other hand, only mean that the decision must not be based on any other than the indicated rules; unless there are provisions to the contrary, the agreements do not, however, preclude the court or tribunal from judging questions pertinent to the *ratio decidendi* according to other legal norms, e.g. by applying the rules on the interpretation of treaties as codified in the Vienna Convention on the Law of Treaties to the indicated norms themselves, or to interpret them in the light of *jus cogens* or of general principles of law. The law to be applied as indicated must not necessarily be international in origin. It may, at least in part, be embodied in a national legal system. Art. 4 of the special agreement in the → Trail Smelter Arbitration, for instance, provided that the tribunal was to apply the law and practice followed in dealing with cognate questions in the United States as well as international law and practice (compare also Art. 2 (2) of the special agreement in the → Gut Dam dispute).

A considerable number of special agreements, compromissory clauses and treaties for judicial settlement do not contain any indication of the law to be applied. It is well established in arbitral practice that in this situation international law is to govern the decision. The same is true with clauses or treaties which simply provide, as the Hague Conventions of 1899/1907 do, for the arbitral tribunal to decide *sur la base du respect du*

droit. Compromissory clauses often provide that the dispute shall be decided on the basis of the respective treaty, customary international law and the general principles of law recognized by civilized nations. The German-Swiss Arbitration and Conciliation Treaty of 1921 even referred to "legal principles which, in the opinion of the arbitral tribunal, *should* form part of the rules of international law" [emphasis added]. Provisions of this type obviously envisage gaps in the applicable law and consent to the court or tribunal filling them by way of judicial reasoning. Art. 38 (1) of the Statutes of the PCIJ and ICJ states that it is the function of the Court to decide "in accordance with international law" and goes on to enumerate primary → sources of international law and subsidiary means for the determination of rules of law to be applied by the Court. This enumeration, referred to by numerous other instruments, does not constitute a *numerus clausus* of primary sources of and subsidiary means to determine international law; it would not exclude application of, for instance, decisions of international organizations if they qualify as international law (→ International Organizations, Resolutions).

Governing instruments sometimes refer to "law and equity" as the basis for the decision. In this case the term "equity" can have different meanings (see generally → Equity in International Law). In many national legal systems the concept of equity forms part of the legal order; rules of equity are considered to be capable of judicial cognizance and reasoning, and of providing a possible basis for the *ratio decidendi*. On the level of international law, rules of equity mean general principles of justice as distinguished from any particular system of municipal law or of jurisprudence (see arbitral award in the → Norwegian Shipowners' Claims Arbitration). Such principles are at least legal standards forming part of law.

The term is used, on the other hand, in a different sense for decisions *ex aequo et bono*. In numerous governing instruments, e.g. in Art. 38 (2) ICJ Statute, courts or tribunals are empowered to render decisions *ex aequo et bono* if the disputants agree. By this is meant a decision not based on legal rules or principles but on standards *extra legem*. Equity is rather seldom relied upon in arbitral practice; decisions rendered solely on this basis fall outside the judicial function *sensu stricto* of the respective court or tribunal. They may form the grounds for the settling of a dispute by a means judicial in form but not in substance. The risks involved for the parties consist in the non-predictability of the decision. The court or tribunal, on the other hand, may – in close contact with the parties – try to ascertain the range of possible solutions considered not to be absolutely unacceptable to them. The court's function may come close to conciliation and include, with the consent of the parties, elements of give and take outside the scope of the dispute which otherwise might not be available to a court; in the end it may render no decision in the proper sense but formulate a conciliatory instrument binding upon the parties and including contractual undertakings.

D. Significance and Possible Functions of Judicial Settlement

The hope that the judicial settlement of international disputes might play a more important role in the context of disarmament, collective security and maintenance of peace, replacing resort to arms, has been cherished by many since the time of the Hague Peace Conferences. Yet the idea has proved to be an overestimation of the capabilities of judicial institutions in today's international society. Undoubtedly, the PCIJ as well as the ICJ have made significant contributions to the settlement of even highly political issues. The same is true of *ad hoc* arbitrations (e.g., the → Casablanca Arbitration, → Gran Chaco Conflict, or → Rann of Kutch Arbitration). When held against the expectations, the practical results have nevertheless been very modest. Indeed, judicial bodies have made very limited contributions in the field of the maintenance of international peace and security. Although the legal questions involved might be adjudicated upon, this will quite often not settle the dispute, as the overriding non-legal issues will remain. It is remarkable that neither the ICJ nor any other judicial body to date has played a noticeable part in the actual operation of the collective security system of the UN. While devices like the → Uniting for Peace Resolution, the increased role of the Secretary General and the instruments of the → United Nations Peacekeeping System have taken over to some – rather modest – extent, at least in a few practical instances, surrogatory functions

of a veto-stricken Security Council, the ICJ was not included in this process.

The prospects for judicial settlement are undoubtedly suffering from the fundamentally differing ideological concepts of law and international society of today as well as from the new States' distrust of the "old", "western", "European" international law. At the same time, it should not be overlooked that "old" States have not resorted to the ICJ much more frequently than "new" States. Indeed, even before the ideological and economic rifts of the present time, judicial settlement of disputes did not play too important a role between the "old" States.

The chances for judicial settlement are improved where the disputants for political reasons are resolved to deescalate or even depoliticize a dispute; this is also true with respect to certain subject areas where legal regulations have reached a stage where they cover areas in great detail and precision, for instance, within the framework of international organizations. → Codification of parts of the international law may also diminish the distrust, in particular of new States, of the "old" international law and its application by judicial institutions. Judicial means, on the other hand, will always compete with other means of settlement. The considerations involved in this choice will be very complex in the actual case and will usually depend on the political significance of the dispute and of its possible settlement. Non-judicial means may offer considerable advantages such as greater autonomy of the disputants, wider flexibility with respect to engaging third bodies, their composition and specialized expertise, more simple and expedient procedures, the possibilities of a wide range of *do ut des* normally outside the reach of courts (package deals), and avoidance of victory and defeat (face-saving devices).

In comparison with *ad hoc* (judicial) arbitration, permanent institutions for judicial settlement better ensure, in particular to smaller States, a solution along the paths of law, not of power. Also ensured is the development of continuing case law and better predictability of the law. Furthermore, permanent institutions tend to diminish the possibilities of escape and even sabotaging devices, and lead to binding decisions.

Once the disputants are willing to depoliticize the issue, there is no real contradiction between non-judicial and judicial means; the latter, as a rule, will be resorted to only after exhaustion of the former. *Ad hoc* arbitration, in particular, offers the advantage that the parties have confidence in the persons composing the tribunal. By framing the issues submitted as well as the law to be applied, parties narrow down the inevitable range of uncalculable risks. Possibilities for compromise might even overcome the more or less deep-seated distrust between disputants adhering to fundamentally differing concepts of law and international society, or between old and new States. With permanent courts and tribunals, reluctance of potential parties to resort to them might be lessened to some extent if a greater flexibility is shown in the composition of the Court (e.g. by a better use of chambers; see → International Court of Justice) and if the parties are left a measure of liberty after the decision has been rendered. The North Sea Continental Shelf cases as well as the revised Rules of Court of the ICJ point in this direction.

While its contributions in the field of settling disputes with political implications will always depend on the willingness of the parties involved, the main significance of judicial settlement has been and, if used at all, will remain in the restatement, clarification and development of international law. Contributions, in particular, by the PCIJ and the ICJ as well as by arbitral bodies have been and will continue to be very important. In the fields of human rights, even if it be on a regional basis only, hope may be cherished for the future of the existing courts and commissions. In this indirect way and in spite of all failures, judicial settlement will contribute at least to maintain the ideal of international peace under law and justice.

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JURISDICTION OF INTERNATIONAL COURTS *see* International Courts and Tribunals; Preliminary Objections

LAW OF THE SEA, SETTLEMENT OF DISPUTES

A. General Remarks

The settlement of disputes in cases and controversies where questions of the law of the sea are involved has not been regarded in the past as a special problem to be dealt with apart from the general rules and considerations for dispute settlement in international law (→ Peaceful Settlement of Disputes). Many controversies of this kind have been submitted to well-known procedures such as → negotiations, → fact-finding and inquiry, → good offices, → conciliation and mediation, → arbitration and the → judicial settlement of disputes. Arbitral tribunals as well as the → Permanent Court of International Justice and the → International Court of Justice have

decided many cases in which the law of the sea was in dispute. See, *inter alia*, the → *Alabama*; → Behring Sea Arbitration; the → *Lotus*; → Corfu Channel Case; → Fisheries Case (U.K. v. Norway); → North Sea Continental Shelf Cases; → Fisheries Jurisdiction Cases (U.K. v. Iceland; Federal Republic of Germany v. Iceland); → Continental Shelf Arbitration (France/United Kingdom). These cases illustrate that the traditional methods for dispute settlement are still applicable today for law of the sea disputes.

For the specific problem of capture of foreign vessels at sea by belligerents (→ Prize Law), an → International Prize Court was strongly advocated at the beginning of this century, but the project failed. An Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes by the ICJ was added to the 1958 Law of the Sea Conventions (→ Conferences on the Law of the Sea), and the third of these Conventions, the Convention on Fishing and Conservation of the Living Resources of the High Seas, provided for the settlement of disputes by special commissions. None of these texts has come to be of practical importance.

In conventions dealing with certain problems of → maritime law, special institutions and procedures for the settlement of disputes might be provided for in the future. See, for instance, the proposals contained in a resolution adopted on October 12, 1978, at the Third Consultative Meeting of the parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, ILM (1979) 516 (→ Environment, International Protection). The proposals envisage arbitration tribunals and a list of qualified persons from which the arbitrators can be selected.

The rapid development and change of maritime law in the last decade has brought about several proposals for the creation of courts or arbitral tribunals specialized in the law of the sea and competent to decide all or certain disputes in this field. In the course of the Third UN Conference on the Law of the Sea, all aspects of the traditional law of the sea were reconsidered and, in this connection, a complex system of institutions for the settlement of disputes was elaborated. The central provisions are contained in Part XV ("Settlement of Disputes") and Annexes V–VIII of the "Informal Composite Negotiating Text/Revision 2" (ICNT) of April 11, 1980 (UN Doc. A/CONF. 62/WP. 10/Rev. 2). It can be expected that these proposals will find – possibly with some changes – the final approval of the Third UN Conference on the Law of the Sea – if there is agreement at all on the final text of a convention. It is important to note that the institutions and rules described hereinafter are at present only proposals and not yet existing institutions and valid rules. But these proposals contain the most sophisticated and detailed system for dispute settlement ever drafted.

B. Proposals of the Third UN Conference on the Law of the Sea

1. Institutions

(a) The ICNT (Annex V) provides that a list of conciliators shall be drawn up and maintained by the Secretary-General of the UN, and that conciliation commissions – normally composed of five members "to be chosen preferably from the list" – should be constituted. Their task is to facilitate an amicable settlement: Neither the conciliation procedure nor the report of a duly constituted commission is binding; only in cases where disputes are excepted from the system of binding judicial settlement may the parties be obliged to take part in a conciliation procedure (see Arts. 296 and 298).

(b) The text further provides for a Law of the Sea Tribunal (Art. 287 ICNT and Annex VI). It shall be composed of 21 independent members "of recognized competence in matters relating to the law of the sea". A quorum of eleven members shall be required to constitute the Tribunal in a given case.

(c) A Sea-Bed Dispute Chamber (Part XI Sect. 6 and Annex VI), composed of eleven members of the Law of the Sea Tribunal selected by a special procedure, shall have jurisdiction in matters pertaining to deep sea mining activities. A quorum of seven members shall be required to constitute the Chamber.

(d) Arbitral tribunals and proceedings are provided for in Annex VII ICNT. A list of arbitrators shall be drawn up and maintained by the Secretary-General of the UN. In a dispute each party shall appoint one of the five members of the

tribunal, and the three neutral members have to be appointed by agreement of the parties or, failing agreement, by the President of the Law of the Sea Tribunal.

(e) Annex VIII ICNT provides that special arbitral tribunals may be constituted for "the interpretation or application of the articles of this Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research and (4) navigation . . .".

(f) The International Court of Justice is also competent for law of the sea disputes if the parties agree (Art. 287 ICNT).

2. *Competence and Procedure*

During the several sessions of the Conference it has been widely accepted that a procedure for dispute settlement with binding decisions should be incorporated in the convention. But it was not possible to reach an agreement on the principle that only one court or tribunal should decide in all disputes concerning the interpretation or application of the convention. Instead, a choice of procedure is granted to the parties. Each State can unilaterally declare which of the alternatives mentioned above should apply. If two States have chosen the same procedure, only this procedure applies unless the parties otherwise agree. Failing agreement between the parties, an arbitral tribunal as mentioned above under 1 (d) has to be instituted and decides the issue with binding force. It should be noted that whenever the parties to a dispute have agreed or agree *ad hoc* that a dispute settlement procedure outside the system of the convention should take place, this alternative procedure takes precedence.

The ICNT provides that all disputes can in principle be submitted to and decided by a court or tribunal. However, this basic rule is modified by far-reaching exceptions and qualifications. They are contained in Arts. 296 to 298 ICNT. In some disputes, mainly concerning the rights of coastal States, no binding dispute settlement procedure takes place. For certain other categories of disputes, the States can unilaterally declare "optional exceptions" from the rules for dispute settlement. It is feared that arguments concerning State sovereignty will bring about even more exceptions to the rule of binding dispute settlement in the final deliberations of the Conference. One central controversy is the question whether and to what extent the delimitation of sea areas between contending States can or should be decided upon by a court or tribunal.

The ICNT contains some provisions for the procedure of the institutions described above. These provisions are more or less similar to the general rules valid for the → procedure of international courts and tribunals. A novelty is contained in Art. 297, insofar as preliminary proceedings may take place in order to determine "whether the claim constitutes an abuse of legal process or whether it is established *prima facie* to be well founded".

3. *The Sea-Bed Disputes Chamber*

Part XI ICNT provides for an international régime for parts of the sea-bed referred to as "the Area". An international authority with several organs is to be responsible for deep sea activities in which probably not only an international "Enterprise" takes part but also "natural or juridical persons which possess the nationality of States Parties" (see Art. 153 and Annex III ICNT). Disputes concerning the Area can be expected not only between the States parties to the convention but also in connection with the acts and activities of the international authority, the international enterprise and the nationals just mentioned. It is for the resolution of disputes of this kind that the Sea-Bed Disputes Chamber is to be established; for details see Section 6 of Part XI. It is important to note that these provisions allow not only States but also, under certain conditions, international institutions and nationals of the States parties to apply to the Chamber (→ Standing before International Courts and Tribunals; → Individuals in International Law).

4. *Evaluation*

The dispute settlement described above evokes both hopes and fears. If it actually comes into force, it may lead to more stability and security in the future law of the sea through the binding decisions of impartial institutions. Yet it is also possible that the exceptions to the rule that all disputes can be submitted to a court or tribunal, on the one hand, and the great number of different institutions, on the other, may have the opposite result, namely contradictory decisions

and practices. Everything depends upon the use that the States as well as other participants may make of the dispute settlement system.

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LEGAL AND POLITICAL DISPUTES *see* Judicial Settlement of International Disputes

LOCAL REMEDIES, EXHAUSTION OF

1. General Scope of the Rule

Undisputed and long-standing international legal practice confirms the principle that the exercise of active → diplomatic protection is precluded as long as all the remedies available under domestic law have not been exhausted by the private party involved.

The subtleties of the rule, its preconditions and its scope of application have nevertheless undergone some alterations during its historical development. The legal basis of the rule may be found in → customary international law as well as in treaty practice, and it cannot clearly be said whether the customary law is created by treaty practice or whether the treaty provisions followed principles already contained in customary law. The international judiciary, in particular the → Permanent Court of International Justice and the

→ International Court of Justice, has applied the rule consistently and in a large number of cases (e.g. → Interhandel Case); the same is true for arbitral tribunals and commissions. The rule is also well known to domestic law, at least in cases where the national legal system makes provision for a review procedure before constitutional courts against the acts of State authorities. The → Institut de Droit International added its support to the rule by a resolution in 1956. The rule was also inserted in, for example, the → European Convention on Human Rights (Art. 26) and in the United Nations Covenant on Civil and Political Rights (Art. 41 (1c) (→ Human Rights Covenants)).

The local remedies rule, according to current legal understanding, makes the exercise of diplomatic protection subsidiary to the prior exercise of municipal procedural rights by the individual concerned in the State where the violation is alleged to have occurred. Where the individual himself can apply directly to an international agency, this right can only be exercised once local remedies have been exhausted.

2. Rationale for the Rule

Many reasons are given for the fact that this rule has been continuously applied and developed and for the fact that up to now the principle has been unanimously observed. It has been said that the rule expresses the respect for the sovereignty of States; that it offers protection against the abusive exercise of diplomatic protection; that it is evidence for the voluntary subordination of the foreigner to the law of the State of residence, corresponding to a generaliy accepted principle of international law; that it serves to prevent a premature exercise of diplomatic protection, thus offering States the opportunity to rectify the behaviour of their organs within their own legal systems; and lastly, it expresses a certain equality of status among nationals and aliens. An additional argument in favour of the rule may be found in the opinion that legal protection through national courts may in many cases be more effective than that administered through international judicial machinery. These grounds are given varying weight; a general evaluation can state only that the most important ground which is put forward is that of respect for the sovereignty of the State against which the complaint is brought.

3. Notion of Remedy

Since the rule states that local remedies must be exhausted before diplomatic protection can be exercised, the notion of remedy requires definition. In particular, the question arises as to whether a remedy in this sense only consists of judicial protection or whether governmental, administrative or even legislative protection can or must also be invoked by the injured person. If the rule is limited to judicial protection only, it would not seem to apply to States which offer no judicial protection against acts of their public authorities. Furthermore, it should not be overlooked that international law leaves the institution of courts and the organization of the judiciary, as well as the system and even the existence of legal remedies, to municipal law. In conformity with overwhelming opinion, a remedy in this sense is not meant to be restricted to judicial protection alone. And the rule would therefore appear to require the exhaustion of all legal possibilities before protection on the international plane can be invoked. Even if only one of the available possibilities is not used by the injured party, the protecting State would be legally prevented from exercising active diplomatic protection. Thus, it becomes necessary for the injured party to file a complaint before the administrative authorities if those authorities have been given competence by domestic law and if judicial protection is not available. On the other hand, the possibility of merely obtaining an act of grace is not to be taken into account. It has also been said that the requirement to exhaust available remedies is not fulfilled if the possibility existed to use a remedy against the legislature and if that remedy was not pursued (cf. → Norwegian Loans Case). This opinion, nevertheless, seems to be of dubious authority, especially relating to legal systems which do not even allow the courts to correct or to review acts of the legislature.

It seems to be uncontested that certain types of conduct in proceedings on the part of the plaintiff may deprive him of any further protection, e.g. if time-limits provided by procedural rules are not observed. On the other hand, if the individual is prevented from pursuing a legal remedy owing to

force majeur, it cannot be argued that local remedies have not been exhausted (see → Ambatielos Case). The conditions for the exhaustion of remedies may be modified or altered by treaty. Such treaty may even express the complete waiver of any observance of the rule (see → Calvo Clause).

4. Particular Aspects of the Application and Consequences of the Rule

The rule must always be observed when a State complains of the violation of the private rights of its own nationals by another State, i.e. in the typical case calling for diplomatic protection. The conditions for the application of the rule, however, are not always so obvious. Its invocation is not appropriate if the dispute among States relates to the exercise of sovereign rights, in other words, if a State is protecting its own sovereign rights and not the rights of its nationals (e.g. → Aerial Incident of 27 July 1955 Cases (Israel v. Bulgaria)). In such direct disputes between States observance of the rule is not required. Otherwise a State would be forced to defend its rights before the municipal court of the other State, thereby waiving its immunity. Difficulties may of course arise when an action of a State is not exercised *jure imperii* but rather *jure gestionis*. Where that is the case, the requirement for the observance of the local remedies rule may be invoked by States whose legal systems do not recognize the absolute immunity of foreign States, with the result that the claiming State possesses no immunity. The same is true if an official public organization or a sub-division of the claiming State acted *jure gestionis*.

The local remedies rule is not applicable if the alleged violation of international law has been committed outside the territory or jurisdiction of the State that is alleged to have committed the violation. If the actions of the State do not violate international law but only municipal law, the rule is also not applicable. Nevertheless, it may be that in such a case the → denial of justice itself can be regarded as constituting a breach of the → minimum standard of international law, on the basis of the absence of court protection. If, indeed, the violation of international law consists in that lack of full court protection, the local remedies rule must be observed only to the extent that all other available remedies – e.g. administrative or legislative – have to be exhausted.

All coercive measures on the part of the injured national's State, i.e. reprisals and other measures to enforce rights, are prohibited as long as local remedies have not been exhausted. It is not, however, unlawful to initiate attempts for negotiations, to lodge a protest, or to make use of the services of other States through diplomatic means. These possibilities are more of a preventive character and therefore permissible whereas repressive or corrective measures are not.

5. Limits of the Rule

The strict observance of the rule is not always required; under certain circumstances, the impropriety of requiring observance of the rule is evident. No State, of course, can demand adherence to the rule barring immediate diplomatic protection if its own legal system does not provide appropriate remedies, i.e. if no adequte system of judicial protection exists and no other remedies are made available. Against such a system, the reproach of denial of justice is justified.

Further, the observance of the rule cannot be expected if it seems clear that the claiming individual would not be allowed to present his grievance before courts or public authorities on personal grounds; again this would constitute a denial of justice. The same holds true if the decision as to the remedy were improperly postponed, or if other obstructions and hindrances were posed, or if it were clearly established that no chance for obtaining a remedy really existed. In particular, such could be the case if the judicial practice of the municipal courts has consistently and clearly declined to decide in favour of those claims. In cases when the municipal courts and administrative authorities are not competent under municipal law to give international law priority over domestic law, it may be doubtful whether the observance of the rule can be required. One additional situation should be mentioned under which the observance of the rule cannot be required: there are certain types of violations the reparation of which is not possible because of a special set of facts which would imply that an irreparable harm would occur if the rule were rigidly observed; e.g. where the carrying out of an order for capital punishment, in viola-

tion of international law, is imminent, it appears that direct diplomatic protection without recourse to the local remedies rule is justified. In additional and similar situations, requiring the exhaustion of remedies would be unjustifiable.

6. Rule of Procedure or Rule of Substantive Law?

As long as the local remedies rule exists, controversy will remain as to the question of its conceptual nature, i.e. the question of whether the rule forms a part of procedural law or whether it operates as a part of substantive law. It has been argued that the violation of international law through an organ of the State has to be seen as an unlawful act in itself, so that a subsequent court decision under municipal law would only rectify the alleged violation. The opposite view is that it is not the initial act or omission of the State organ which creates the violation of international law, but that such violation exists only if a subsequent court decision upholds the disputed act or omission.

For many reasons it is essential to fix the exact date of the alleged wrongful act. That necessity becomes apparent if the → nationality rule has to be observed, i.e. the rule under which diplomatic protection through a State is only admitted if the injured individual possesses the nationality of the protecting State at the date of the violation as well as at the date of raising the claim. The ascertainment of the exact date of the violation may also be of importance if the time-limits for bringing the claim are in question. In such a case, of course, a later date would operate in favour of the individual. On the other hand, the view which holds that the wrongful act of the State concerned occurs solely with the final court decision may be based on a doctrine originating in common law systems, which tends to regard only the final judgment of a court as the decisive declaration on the existence of a right or wrong.

One might judge this controversy to be of a purely academic nature. The deciding point consists in the fact that the rule precludes immediate recourse to direct diplomatic protection; hence, the effect of the rule basically is of a procedural character. Therefore one should maintain the position that the initial action of a State organ already represents the unlawfulness, and that therefore the rule does not form part of substantive law. Thus, it can hardly be conceded that in a case where human rights are obviously violated, the initial infringement of those fundamental rights should not yet be characterized as unlawful; an obvious example would be the killing of an individual. These considerations taken into account, the local remedies rule has an influence on procedural questions and cannot be used to demonstrate the postulate that only the last action of the State, for instance the decision of a municipal court, crystallizes the wrong although it should not be overlooked that the opposite view disposes of important arguments.

7. The Importance of the Local Remedies Rule for the Legal Concept of Diplomatic Protection

Considering a more classical doctrine and the wording of some decisions of international courts (see → Mavrommatis Concessions Cases), a State, in exercising diplomatic protection in favour of its national, invokes its own rights and not the rights of its protected national. This traditional view has come to be doubtful in theory and is disputed in modern times. In particular, the strengthening of human rights favoured a new concept; the perhaps already prevailing opinion shows the tendency to characterize the factual violation of an individual's rights not only to be a violation against his State but also a direct infringement of the rights of the individual. Indeed, it would be hard to agree that e.g. the maltreatment of an alien would not represent in itself an international infringement of that person. A more modern concept therefore consists in the proposition that the exercise of diplomatic protection by a State involves claims for the reparation of two violations, the one relating to the misconduct against the foreign State (immaterial damage) and the other relating to the violation of individual rights (material damage). The protecting State exercises its right to protect the individual and in addition protects its own rights by the same action. From a procedural point of view, State protection of the individual consists in a kind of representation of the individual through the State because the individual himself cannot, as a general rule, be a party before international courts (see e.g. Art. 34, Statute of the International Court of Justice but cf. discussion in → Standing before International Courts and Tribunals). This modern view is strongly backed by

the basic principle of the local remedies rule that the State is entitled to exercise protection only if its national has exhausted all local remedies. That system demonstrates that the injured individual is even in a position to prevent his own State from exercising protection merely through the non-exhaustion of his remedies. That possibility proves that, in a certain sense, the individual is in the position himself to decide whether to pursue his right to claim reparation and thereby to bind the State itself in its role concerning the claim; hence the individual must be seen to be the true holder of the right. It seems that this view has not been sufficiently taken in account.

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LONDON AGREEMENT ON GERMAN EXTERNAL DEBTS (1953), ARBITRAL TRIBUNAL AND MIXED COMMISSION

1. Historical Background

The → London Agreement on German External Debts (1953) contains provisions concerning the Federal Republic of Germany's liability for Germany's pre-World War II external debts (→ Dawes Plan; → Young Plan) and for debts originating in the economic aid given after World War II as well as recommendations (so-called "rules") for the settlement of private external debts. The Agreement provides for a total of six different arbitral bodies (→ Arbitration; → Mixed Arbitral Tribunals; → Mixed Claims Commissions). Four of these are arbitral bodies whose members are nominated by the interested private parties (debtors and creditors). The remaining two

are the Arbitral Tribunal under Art. 28 of the Agreement and the Mixed Commission under Art. 31 in conjunction with Annex IV; the members of these bodies are appointed by the governments concerned and their jurisdiction relates to inter-governmental disputes. The statutes of the Arbitral Tribunal and the Mixed Commission are contained in Annexes IX and X to the Agreement.

2. Composition

(a) The Arbitral Tribunal consists of eight permanent members, three of whom are appointed by the Government of the Federal Republic of Germany and three by the French, British and United States Governments respectively. The President and Vice-President are appointed jointly by the four governments, unless they cannot agree, in which case the President of the → International Court of Justice makes the selection. A government party to a dispute which does not have a permanent member on the bench may appoint a judge *ad hoc*. In this case, the Federal Republic of Germany has the corresponding right to appoint a judge *ad hoc*.

(b) The Mixed Commission for questions respecting Annex IV is composed of the eight permanent members of the Arbitral Tribunal. It is an independent body, distinct from the Tribunal, but the provisions governing the Arbitral Tribunal apply to it as well. Additional members may be appointed when a creditor country other than one of the Three Powers is a party to the proceedings.

3. Jurisdiction

(a) The Tribunal has exclusive jurisdiction in all disputes regarding the interpretation or application of the Agreement and its Annexes (Art. 28 (2)). An exception is made with respect to the provision on consultation (Art. 34); the Tribunal has no competence with regard to this clause. Moreover, the Tribunal has no jurisdiction with respect to matters concerning an Annex to the Agreement where an arbitral body is established specifically for the interpretation of such an Annex (Art. 28 (5)). A special scheme of jurisdiction between the Tribunal and the Mixed Commission is established for Annex IV (dealing mainly with claims arising out of goods and services transactions and certain capital transactions); the Tribunal is competent in this area only where a party deems the dispute to be "of fundamental importance" for the interpretation of Annex IV (Art. 28 (3)). Beyond its function in areas where it has exclusive jurisdiction, the Tribunal also serves as an appellate court for cases decided by the Mixed Commission (Arts. 28 (4); 31 (7)); the appellant must, however, assert that his case is of "general or fundamental importance".

The decisions of the Tribunal are final and binding upon the parties concerned (Art. 28 (8)); they must also be followed by other arbitral bodies established under the Agreement. It is of importance that the parties may also request the Tribunal to render an advisory opinion regarding any questions concerning the interpretation or application of the Agreement, again with the exception of Art. 34; such advisory opinions have no binding effect (Art. 28 (11)).

(b) The Mixed Commission has jurisdiction only within the scope of Annex IV to the Agreement (Art. 31); in Article 16 of Annex IV it is recommended that the Commission shall only be competent to decide "questions of fundamental importance". Any party to the Agreement which is concerned in the subject matter of a proceeding between a creditor and a debtor may become a party to the proceeding on the ground that the case is of "fundamental importance" to the interpretation of Annex IV (Art. 31 (1) (b); Annex IV, Arts. 11, 16, 17).

There are three ways of instituting proceedings before the Commission: the private parties may jointly refer a difference as to the interpretation of Annex IV to the Mixed Commission; an individual creditor or debtor can also take this action unilaterally, provided that his government states that in its opinion the question at issue is "of general importance for the interpretation" of the Annex; finally a case pending before the Court of Arbitration established pursuant to Art. 32 may be referred to the Mixed Commission either by a State party to the Agreement or by that Court itself.

4. Procedure and Law Applicable

The procedure for both organs is laid down in the uniform rules of May 17, 1955 (op. cit.). There are written and oral proceedings and the decision

is rendered in the form of a judgment. The Arbitral Tribunal and Mixed Commission apply the generally recognized rules of international law.

5. Practice

Both the Arbitral Tribunal and the Mixed Commission have dealt with a limited number of cases, the decisions of which are published. The latest award of the Arbitral Tribunal was rendered on May 16, 1980, settling a dispute concerning the currency protection clause in the London Agreement (→ Young Plan Loans Arbitration).

6. Evaluation

The granting to private parties of direct access to the Mixed Commission has meant a further strengthening of the individual's position in international law (→ Individuals in International Law). This follows a general tendency in international law which started with the → Mixed Arbitral Tribunals after World War I. Another interesting development concerns the relation between international and national courts (→ International Law and Municipal Law). Under the provisions of Art. 31 (2) (b) in conjunction with Arts. 11 and 16 of Annex IV, a decision of a national court can be appealed against to a special court of arbitration and can subsequently be referred to the Mixed Commission. The limited use that has been made of all of the arbitral bodies established by the London Agreement shows that the detailed provisions of the Agreement itself have fulfilled their purposes, that is, to avoid disputes between parties over its provisions and to offer acceptable solutions for the questions that are raised.

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MEDIATION *see* Conciliation and Mediation

MIXED ARBITRAL TRIBUNALS

1. Definition and History

(a) Mixed arbitral tribunals constitute a specific form of → arbitration. So far their most significant use has occurred pursuant to the terms of the → Peace Treaties after World War I, which empowered them to settle disputes in connection with the rights and claims of private individuals who were affected by the war. Individuals were permitted to present their cases before the mixed arbitral tribunals themselves (→ Standing before International Courts and Tribunals; → Individuals in International Law).

The basic idea of such institutions dates back to the → mixed claims commissions which the United States in particular had created with a number of Central and South American States in the 19th century. These mixed claims commissions were given the competence to decide on claims for damage caused to citizens of the United States by war or revolution. The claims, however, fell within a limited number of categories; moreover individuals were not allowed to present their cases themselves – their claims had to be assumed by the United States and pursued by her as claims of the State (→ Diplomatic Protection).

The mixed arbitral tribunals, on the other hand, dealt not only with claims of individuals against foreign States, but also with claims of individuals

against each other. The Hague Convention XII of October 18, 1907 (which did not enter into force) provided for the creation of an → International Prize Court which inspired the adoption of this system. The mixed arbitral tribunals were directly modelled upon the German-Russian Mixed Arbitral Tribunal provided for by the German-Russian treaty of August 27, 1918, which was an additional treaty to the → Brest-Litowsk Peace Treaty of March 3, 1918. This tribunal was to have dealt with claims of private persons, but it never came into existence. The tribunal would have been composed of one national member each, together with a neutral chairman and would have decided on the claims of individuals which had been blocked due to the outbreak of the war.

(b) The following peace treaties provided for the establishment of mixed arbitral tribunals between each of the Allied and Associated Powers, on the one side, and each of the Central Powers, on the other: the → Versailles Peace Treaty (1919), the → Saint Germain Peace Treaty (1919), the → Neuilly Peace Treaty (1919), the → Trianon Peace Treaty (1920) and the → Lausanne Peace Treaty (1923).

Not all of these tribunals were, in fact, set up. The following table shows which tribunals were actually established:

	Austria	Bulgaria	Germany	Hungary	Turkey
Belgium	+	+	+	+	+
Czechoslovakia			+		
France	+	+	+	+	+
Greece	+	+	+		+
Italy	+	+	+	+	+
Japan	+		+		
Poland			+		
Romania	+		+	+	+
Siam			+		
United Kingdom	+	+	+	+	+
Yugoslavia	+		+	+	

In addition, a German-American Mixed Claims Commission and a Tripartite Claims Commission (United States, Austria and Hungary) were established separately, because the United States had not ratified any of the above peace treaties. There was also a German-Mexican Mixed Claims Commission. These commissions functioned in a way similar to the mixed arbitral tribunals, but dealt also with reparation cases. Individuals did not have direct access to these commissions.

(c) After World War II the institution of mixed arbitral tribunals has only been taken up in modified forms (→ Arbitration). In the → Peace Treaties of 1947 between the Allied Powers and Bulgaria, Finland, Italy, Romania, and Hungary and the → Peace Treaty with Japan (1951), "Conciliation Commissions" were provided for (see e.g. → Conciliation Commissions Established Pursuant to Art. 83 (g) of Peace Treaty with Italy of 1947; → Property Commissions Established Pursuant to Art. 15 (a) of Peace Treaty with Japan of 1951). They had the same composition as the mixed arbitral tribunals, but a far narrower jurisdiction. Also, individuals were not granted the right to appear before them and to present their claims themselves.

2. Composition and Procedure

Each mixed arbitral tribunal was composed of three members. One national member was named by each of the States involved, and a neutral chairman was chosen by mutual agreement. If the two States involved failed to reach agreement, the chairman was then named by the Council of the → League of Nations. The latter method of selection was applied in the case of the Franco-German tribunal during the Ruhr dispute (→ Rhineland Occupation after World War I).

Individuals had direct access to the mixed arbitral tribunals: they could be parties to cases and take part themselves. However, in order to represent their governments' interests, State agents were also always present during the proceedings and supervised the individuals' conduct of cases at the same time.

The tribunals decided upon their own rules of procedure (for the texts of these see: Recueil des décisions des Tribunaux Arbitraux Mixtes, op. cit.). These provided, *inter alia*, for written and oral proceedings. In most of the cases before the tribunals, the language used during the proceedings was the language of the Allied Power involved; in cases with the so-called "new States",

the use of German was sometimes permitted

3. Jurisdiction

The jurisdiction of the mixed arbitral tribunals was more extensive than the jurisdiction of any prior international arbitral tribunal. The most important types of cases falling within their competence were: claims between individuals originating from their pre-war relations, claims for damages against the German Empire and the other Central Powers arising out of war measures, and claims against the "new States" for their post-war measures (→ Expropriation).

(a) Claims between individuals blocked by the war: The majority of these claims consisted of pre-war pecuniary obligations between nationals of the States which had been at war (see Art. 296 Versailles Peace Treaty). A clearing procedure through a system of national offices was provided for to process these claims; the clearing offices had to examine the obligations, settle up the respective accounts and pay over the balance. If the two national clearing offices concerned in a claim did not reach an agreement disposing of the claim, the creditor could bring an action before the relevant mixed arbitral tribunal. The work of the clearing offices, and especially their endeavours to bring the parties to an agreement, produced the result that only a relatively small number of the tens of thousands of notifications of claims to be cleared actually came before the tribunals.

The arbitral tribunals acted as courts of appellate jurisdiction in cases where national courts had violated the provisions of the peace treaties (see Art. 305 Versailles Peace Treaty). They could be appealed to directly regarding pre-war claims which did not fall within the scope of the clearing procedure. They could also be appealed to in the case of pre-war contracts that – as could be demanded by the Allies – had been maintained and not liquidated pursuant to the general rule in Art. 296 of the Versailles Peace Treaty.

(b) Claims for damages against the German Empire and the other Central Powers for war measures: According to Art. 297 (e) of the Versailles Peace Treaty, the mixed arbitral tribunals were to determine compensation for damage or injury inflicted upon nationals of Allied and Associated Powers as a result of the application of "exceptional war measures" by the Central Powers; these measures consisted mainly of compulsory confiscation and requisitioning of material without payment (→ Requisitions). In practice, the determination of compensation in accordance with Art. 297 (e) of the Versailles Peace Treaty accounted for the largest part of the workload of the tribunals.

Nationals of the Central Powers claiming compensation for similar types of measures applied by the Allied Powers were obliged to seek it from their own States. Damages caused by acts of war during the existence of a state of war between the two States did not fall within this regulation either; they were to be pursued separately by the Allied Powers as → reparations (for a different treatment of damages caused during a state of neutrality, see → *Lusitania* and → German External Debts Arbitration). This exclusion of war damages caused much confusion and many double claims.

(c) Claims against the "new States" for their post-war measures: In contrast to almost all of the other areas of jurisdiction, this one was established in favour of the nationals of the Central Powers. According to the peace treaties the right of the "new States" to confiscated German property was restricted by the provision that the requirements for each confiscation as well as the level of compensation itself had to be equitable; in particular, no measures differing from the general laws of the "new States" were permitted (Art. 297 (h) Versailles Peace Treaty; Art. 249 (i) Saint Germain Peace Treaty; Art. 232 (i) Trianon Peace Treaty; Art. 177 (i) Neuilly Peace Treaty). An owner to whose property damage had been inflicted in violation of these requirements could seek adequate compensation before the mixed arbitral tribunals.

4. The Law Applicable and the Enforcement of Judgments

(a) The law which the mixed arbitral tribunals were directed to apply was partly laid down in the peace treaties themselves. This was notably so in the case of compensation for exceptional war measures of the Central Powers. In most other cases the applicable law was to be derived from the domestic laws between which the arbitral tribunal had to choose according to the rules of

private international law. This latter approach governed disputes arising out of claims in the clearing procedure and pre-war contracts.

(b) The modes of execution varied according to the different types of judgments. The creditor could secure a judgment ordering an individual to pay his debt according to the ordinary procedure of execution in the debtor's country. As regards judgments against the States themselves, three different means of execution were provided for. Compensation awarded by judgments within the scope of the clearing procedure was credited to the relevant clearing office, with the office then forwarding the balance on a monthly basis. Compensation for exceptional war measures was paid in cash. Compensation for lost current accounts was credited to the relevant clearing office and then set off against the proceeds of confiscated German property.

Money judgments were enforceable in the States involved, and in theory there were several possible ways of securing enforcement. In practice, however, due to currency problems, judgments were usually executed by adding together the sums from all the awards on the claims which had been decided upon and then paying off all the individuals creditors out of the proceeds derived from the confiscation of the property of the Central Powers.

5. The Practice of the Mixed Arbitral Tribunals

As far as the number of judgments is concerned, the mixed arbitral tribunals hold the record for having delivered more judgments than any other international tribunal to date. The Franco-German Arbitral Tribunal alone dealt with more than 20,000 cases, the Anglo-German and German-Italian with about 10,000 each.

However, the history of the tribunals was not a smooth one. Soon after having taken up their work, the tribunals met with difficulties. This was especially true for the Franco-German Arbitral Tribunal, the activity of which was greatly hindered by the continued occupation of the Rhineland by the French. This tribunal did not start to function again until after the neutral judges, whom the League of Nations had appointed in place of the German judges who had been withdrawn in protest, were replaced by German judges in 1925. Apart from these problems it appeared that the arbitral tribunals were not able to handle the large number of cases by themselves. Efforts were made to reduce their workload by, *inter alia*, *inter partes* settlements, special agreements on very small claims, and priority treatment for cases of fundamental importance.

With respect to the processing of private claims through the clearing system, further problems arose because the envisaged mechanism had become distorted, especially by the decline of the German currency. Finally, the "new States" offered bitter political resistance to the claims brought against them. In the → Hungarian-Romanian Land Reform Dispute, Romania even withdrew her arbitrator, protesting that the arbitral tribunal had overstepped its competence; only after several years was the League of Nations able to settle this dispute. Meanwhile, it had come to be generally accepted that all the problems arising out of the peace treaties had to be covered in a comprehensive and final solution which would ensure uniformity. To this end, the → Dawes Plan and the → Young Plan were developed. The arbitral tribunals were included within these schemes. The real importance of their decisions actually focused upon the question of the extent to which the proceeds from the confiscation of German property had been consumed through the payment of the awards made by the arbitral tribunal, and what should be done with the remainder of such proceeds.

In a comprehensive settlement contained in the Hague Convention of January 20, 1930 (LNTS, Vol. 104, pp. 243–393), it was decided to end the work of the mixed arbitral tribunals that had been established with the Allied Powers. The same type of agreement was entered into with the "new States". As regards the Central Powers, a similar development took place. Thus, by the beginning of the 1930s, the work of these tribunals had come to an end.

6. Evaluation

The early criticism which was directed at the mixed arbitral tribunals, especially from the German side, was in reality aimed at the relevant provisions of the peace treaties themselves. The tribunals, however, did contribute to clarifying and developing rules of international law and

produced elaborate procedural rules. For the development of international courts and tribunals the most important contribution rendered by the mixed arbitral tribunals was the granting to individuals of direct access to the tribunals.

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MIXED CLAIMS COMMISSIONS

1. Notion

Mixed claims commissions are bodies founded *ad hoc* on the basis of international agreements, consisting of a majority of nationals of the States parties to the agreement, and established with the purpose to settle, in formal and final proceedings, claims which have arisen between citizens of different States, between citizens of one State and the other State, or between the States themselves. Such Commissions played a most prominent role in the settlement of disputes in the 19th century. Typically, the task assigned to these Commissions in the past was to decide a multitude of claims which had arisen after internal disturbances or wars during which foreigners had suffered damages.

From the perspective of the historical development of dispute settlement, mixed claims commissions in part replaced → arbitration by single persons (mostly Heads of State), and were forerunners of the → mixed arbitral tribunals which came into use in the 20th century. Although the judicial element is usually stronger in the proceedings of mixed arbitral tribunals, no qualitative difference between mixed claims commissions and mixed arbitral tribunals can be found as long as the impartiality of the members of the claims commissions is assumed. Correspondingly, the designation of bodies as "mixed arbitral tribunals" or "mixed claims commissions" has varied in practice. More recently, a tendency has developed to limit the term → mixed commissions to such bodies to which individual claimants have direct access (→ Arbitral Commission on Property, Rights and Interests in Germany, → London Agreement on German External Debts (1953), Arbitral Tribunal and Mixed Commission); this is true even though after World War I the proceedings before mixed claims commissions were much more under the control of the governments than were those before arbitral tribunals.

Mixed claims commissions have their legal basis in treaties between the States involved and thus are to be distinguished from commissions set up by → international organizations. They also differ from organs established by one State on the basis of an international agreement: mixed claims commissions have not acted as organs of one State, but have decided the claims on the basis of the legal rules designated in the constitutive agreement. Nevertheless, their use has sometimes been considered as a form of dispute settlement which lies between diplomatic activities and judicial settlement. In spite of the influence of the litigating States upon the composition of the commissions, it appears more accurate to view them as a particular form of judicial settlement. The legal framework which they must observe does not allow State organs to give strict instructions for their activities, and also precludes efforts to decide the cases on an individual *ad hoc* basis, as is more typical for diplomatic forms of dispute settlement; this holds true even though the constitutive agreements have sometimes instructed the mixed claims commissions to decide

their cases on the basis of equitable principles (→ Equity in International Law).

2. *History*

The historical role of mixed claims commissions began with the → Jay Treaty (1794): two of three commissions established under this treaty had to deal with claims of citizens of Great Britain and the United States. In the 19th century, States often resorted to such Commissions; Stuyt (op. cit.) lists about 80 which were established during this period. The emphasis on this international form of dispute settlement was also maintained between 1900 and 1918 (about 30 commissions). Again after 1918, several commissions were established to regulate damages which occurred during World War I. Up to 1939, claims against Mexico were dealt with by nine mixed claims commissions, but otherwise the number of such commissions decreased during this period. After World War II, the use of mixed claims commissions has been even more limited, although some aspects of the damages that occurred in World War II have been settled by commissions of this type, now called commissions or arbitral tribunals (→ Conciliation Commissions Established Pursuant to Art. 83 of Peace Treaty with Italy of 1947, → Property Commissions Established Pursuant to Art. 15 (a) of Peace Treaty with Japan of 1951).

Particularly extensive use of mixed claims commissions was made in the settlement of claims against France after the Napoleonic Wars, in the settlement of United States claims against Mexico after 1838 and 1868, in the settlement of claims of various nations against Chile after 1882 and after Chile's war with Peru and Bolivia (arbitration agreements between 1883 and 1886), in the settlement of claims of various countries against Venezuela after a civil war (agreement of 1903), in the claims of neighbour States of Peru after an internal disturbance (settled by a commission established in 1904), in settlements involving Germany after World War I, and again in claims of United States citizens against Mexico (Conventions of 1923 and 1924). In general, the largest number of agreements establishing mixed claims commissions have been concluded between European States and the United States on the one side and Latin American States on the other, but such agreements have also been concluded among European States; it is remarkable that Asian and African States have so far shown little, if any, inclination to submit claims to mixed claims commissions.

3. *Status and Composition*

The formal independence of the commissioners from their appointing governments has been laid down in most treaties establishing the commissions. Frequently an oath sworn by the members required them explicitly to decide "carefully and impartially"; in some treaties, it was provided that the commissioners were required to decide "without fear, favor or affection to their country".

The composition of mixed commissions has varied. The general development shows a gradual strengthening of the independence and impartiality of the commission. Up to 1870, it was not uncommon for commissions to consist only of two members, one each appointed by the litigating governments. Starting around 1840, more and more commissions had the duty to appoint, sometimes by lot, an "umpire" in case the (two or four) members appointed by the governments disagreed on a case. According to many agreements, the umpire could not be a national of a litigating State; the Jay Treaty had not yet included this requirement for the claims commissions. In the later part of the 19th century, some commissions were set up in such a way that the governments themselves appointed a third presiding commissioner who participated in all cases from the beginning. In order to strengthen the judicial element in claims proceedings, this collegiate structure was preferred to the umpire version in nearly all commissions after World War I. The collegiate type was also used after World War II in the settlement of claims against Italy, Japan and Germany; nevertheless, the designation of mixed commissions was kept.

4. *Legal Rules Applicable*

As to the legal rules to be applied by the commissions, most treaties included specific stipulations. No standard formula was used. Sometimes the "law of nations" and the applicable treaty provisions were referred to; in a con-

siderable number of cases "justice" and "equity" was the standard; and in rare instances "equity" alone or the "conscience" of the arbitrators was referred to. The Convention reached between Great Britain and Venezuela in 1869 did not specify the applicable law; the commissioners subsequently agreed to decide on the basis of "justice and equity". After 1870 a formula frequently used was "international law, justice and equity". A convention between Great Britain and Venezuela concluded in 1903 set a standard of "absolute equity, without regard to objections of a technical nature". The Agreement concluded in 1922 between the United States and Germany referred only to the terms of the → Versailles Peace Treaty; the commission set up pursuant thereto subsequently spelled out in an "Administrative Decision" the sources relevant in the absence of an applicable provision in the Treaty.

5. Status of Individuals before Commissions

Although in most instances the claims dealt with had arisen out of claims of individuals, only States were, in accordance with the traditional rules on the status of → individuals in international law, enabled to file claims with the commissions in the 19th century; it was even rare for individuals to be allowed to be represented by counsel, to present memorials to the commission, to participate in oral proceedings, or to appear as witnesses. This practice changed after World War I, when individuals were granted direct access to commissions under some agreements. No uniform practice developed; under the terms of the Agreement between the United States and Mexico of 1923, for instance, a valid claim had to be signed by the affected individual, but otherwise the proceedings were conducted by agents of the States concerned.

6. Evaluation

The broad use made of mixed claims commissions for longer than a century confirms that they have in the past proved to be most useful in the settlement of claims. The appointment to the commissions of nationals of the litigating States by their governments provided for a framework where the familiarity of the deciding body with the particular circumstances of the case was ensured; potential problems concerning the independence of these members were not given particular weight. Where a large number of cases had to be decided, an institutionalized independent body familiar with the general circumstances of the cases was considered to facilitate an adequate and efficient settlement. In the absence of permanent international courts, mixed claims commissions thus contributed greatly to the evolution of international rules determining the status of → aliens and the responsibility of States (→ Responsibility of States, General Principles). It cannot be overlooked, though, that the desire to compromise may occasionally have been an important element in the decision-making process of mixed claims commissions.

In a certain number of cases, the commissions did not always fulfil all expectations of the parties. The decline of the use of mixed claims commissions may, in part, be indeed related to effectivity problems and to the expenses which these commissions necessarily incurred on the part of the litigating States. The high number of → lump sum agreements concluded after World War II obviated the necessity of extensive recourse to mixed claims commissions. In comparison with the mixed claims commissions, lump sum agreements have had the effect of broadening the diplomatic options of the States concerned during the negotiations. Lump sum agreements relieve the party making the payment from the burden of participating in the process of deciding individual cases, and, sometimes expand the discretion of the State receiving the lump sum to distribute the sums; at times the recipient States distributed the sums by means of claims commissions organized on the municipal level.

It remains to be seen whether the widespread contemporary reluctance of States to submit claims to permanent international tribunals will in the future lead again to forms of settlement where members of the litigating States play a dominant role in the deciding body.

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MIXED COMMISSIONS

A variety of international organs entrusted with diplomatic, administrative or dispute settlement functions, have been termed "mixed commissions" either by their founders or by international law writers. Therefore, it does not seem possible to give an all-encompassing definition which would at the same time serve to uphold established distinctions between quite a number of different types of international bodies, such as arbitral tribunals, conciliation commissions, commissions of inquiry, inter-State administrative agencies or (subsidiary) organs of an international organization. There does not seem to exist any clear and coherent practice to establish a particular kind of international organ as a "mixed commission". In addition, international practice uses an impressive variety of different terms to designate bodies which have also been called mixed commissions: e.g. joint/special/central commission/committee, intergovernmental commission, joint board, council, permanent (expert) commission. Consequently, the mere fact of establishing an international organ as a "mixed commission" does not allow any legal consequences whatsoever to be drawn.

Despite the impossibility of defining mixed commissions as a standard-type institution of international cooperation, a number of peculiarities may be indicated.

1. Characteristics

Mixed commissions are collegiate organs, generally created by two or more States, each of which appoints an equal number of members. Additionally, a third-party element may be present in the commission, comprising a member (or an uneven number of members) holding a third State's nationality and/or serving an international organization in an official capacity. A mixed commission may, as well, be established with the direct participation of an international organization; e.g. the "Mixed Armistice Commissions" instituted by the Arab-Israeli General Armistice Agreements of 1949 (cf. Art. IX of the Egypt-Israeli Agreement of February 24, 1949, UNTS, Vol. 42, p. 251) and composed of three representatives from each of the parties under the chairmanship of the UN Chief of Staff of the Truce Supervision Organization who, himself, was subjected to directives of the UN Security Council (cf. F.Y. Chai, Consultation and Consensus in the Security Council, in K.V. Raman (ed.), Dispute Settlement through the UN (1977) 541). Furthermore, mixed commissions may be created by States and an international organization (cf. the "Transport Commission" of the Agreement of July 26, 1957, between Austria on the one hand and the ECSC and its member States on the other, UNTS, Vol. 386, p. 3; the "Association Council" of the EEC-Greek Association Agreement of July 9, 1961, Journal officiel des Communautés européennes, Vol. 6 (1963) 293, Art. 67) or by two or more international organizations, or by only one of them, in order to coordinate the functioning of its (subsidiary) organs (cf. the "Temporary Mixed Commission" established by decision of the LoN Council in February 1921; J. Ray, Commentaire du Pacte de la Société des Nations (1930) 325). Yet, a more common form of cooperation between international organizations is based on the agreements concluded in pursuance of Art. 57 of the UN Charter which provide for consultative participation of representatives of either organization in the work of organs of the other (→ Administrative Tribunals, Boards and Commissions in International Organizations).

Mixed commissions are generally set up on the basis of an international treaty, mostly in written form. The only exception arises in the case of mixed commissions established as subsidiary organs of an international organization; there, a resolution or decision of the competent organ serves as the constitutive instrument. The treaty

or resolution defines the tasks and functions assigned to the commission, its composition and the mode of appointment or replacement of commissioners and the qualifications required; often, provision is made for questions of status and procedure. Commissioners may be declared free from binding instructions of their appointing State or organization, or may be subject to directives. In many cases, decisions or advisory reports must be adopted unanimously; in others, the majority rule is declared applicable. The commissions may be established as permanent bodies but they may discharge temporary functions as well.

Inter-State mixed commissions and the commissions established with the participation of an international organization do not possess the status of a separate subject of international law, but remain a single joint organ of the subjects of international law which created them. They represent less integrated agencies of international cooperation and organization than the various international organizations. Yet, the institution of a mixed commission may lead to the creation of an international organization, the former inter-State mixed commission – unchanged in either composition or name – becoming the principal organ of the new organization (cf. the "Central Commission" for the Rhine, Art. 43 et seq. of the Convention of Mannheim of October 17, 1868 with later amendments). Generally, however, mixed commissions may be distinguished from organs of an international organization, now and then named "commission" or "committee of ministers" (cf. the → European Economic Community); the latter belong to the organization itself as its (normally principal) organs established by its basic constitutional instrument, while the former must be attributed to those subjects of international law which created them by common accord.

Mixed commissions created by international organizations as subsidiary organs or as commissions of interorganizational cooperation, on the other hand, differ from the other organs of the organization entitled "commission" in that the latter's composition is generally characterized by equal representation of member States or, at least, groups of member States (cf. the "International Law Commission" or the "Human Rights Commission"), while the former, through their composition, are intended to reconcile inconsistent positions of organs or organizations which have to or may cooperate in a given matter according to their competence.

Their creation by means of treaty or resolution distinguishes the mixed commissions from non-governmental international organizations. Some writers argue that the same criterion may serve to differentiate the former from international conferences and congresses. Conferences and congresses, however, may be convened on a treaty basis as well. On the other hand, mixed commissions exceptionally have been understood also as conferences; Art. 43 of the 1868 Convention of Mannheim reads: "Chacun des Etats contractants délègue de un à quatre commissaires pour prendre part à des conférences communes sur les affaires de la navigation du Rhin. Ces commissions forment la Commission Centrale . . .". Due to the institution of mixed commissions by treaty or resolution, however, the initiative and final decision as to their creation is left to the subjects of international law directly interested. Therefore, commissions of mediation, now and then established on the initiative of and by agreement between third States (cf. the practice of States members of the OAU) in order to intervene in an inter-State dispute, belong to another type (→ Conciliation and Mediation).

Even so, a mixed commission need not be established by all parties directly interested in a given matter of international concern. It may be that some of them have been entrusted with special jurisdiction to settle the matter and may decide to create a mixed commission in order to discharge their function, e.g. the "Tripartite Commission for the Restitution of the Monetary Gold" (for details see RIAA, Vol. 12, p. 20).

The responsibilities and functions conferred on mixed commissions are manifold. The matter brought to them for deliberation and solution through the means of an advisory report or a mandatory decision may be of a highly political or purely technical character, or both. It is, therefore, impossible to precisely circumscribe the scope of their jurisdiction and the questions covered.

2. Functions

(a) Arbitral bodies. Quite a number of treatises on international law refer to mixed commissions

only as arbitral tribunals (→ Arbitration), → mixed claims commissions or → mixed arbitral tribunals. Already at the inception of the modern era of arbitration, the → Jay Treaty of 1794 provided for mixed commissions to arbitrate unresolved disputes; this denotation was chosen although the commission's composition was similar in every aspect to what later became the normal form of the bench of an arbitral tribunal, composed of a national commissioner representing each party and an umpire. (For a more recent example see the Latvian-Lithuanian Arbitration Convention of September 28, 1920, LNTS, Vol. 2, p. 233). In later years and in other instances the third-party element even increased without any change in the designation of the organ, either by conferring far-reaching jurisdiction on the president of a commission alone (e.g. the "Mixed Commission for Upper Silesia"), or by composing the commission of more neutral members than arbiters appointed by either party (the influence of the commissioners of the parties is extremely diminished in the "Special Commission" of Art. 9 of the 1958 Geneva Fishery Convention). Even recently, arbitral tribunals including neutral members have been named mixed commissions (cf. the → London Agreement on German External Debts).

An important exception to mixed commissions containing a neutral element and functioning as arbitral tribunals are those composed of an equal number of representatives of both parties to a dispute, in some instances denominated as arbitral tribunals (some Iranian treaties following 1929, see Systematic Survey, op. cit.; see also → Austro-German Arbitration Award under the Treaty of Finance and Compensation of 1961), in others as mixed commissions (e.g. the → *I'm Alone* case, a Finno-Soviet Agreement on frontier water problems of April 24, 1964, UNTS, Vol. 537, p. 231; see also the Franco-Togo Convention on financial questions of July 10, 1963, Art. 18, UNTS, Vol. 722, p. 147). If, in case of disagreement between the national commissioners, an umpire has to be appointed or if the majority opinion shall prevail over that of dissenting commissioners, such commissions are likely to function as ordinary arbitral tribunals, with the same intrinsic tendencies, transactional or judicial, as those typifying the self-understanding of arbiters. If, however, unanimity is required, either because of an explicit provision or because a majority decision is impossible (the commission being composed of two members only), such commissions will be much more inclined to a diplomatic rather than a judicial approach.

(b) Conciliation and diplomatic dispute settlement bodies. Frequently, mixed commissions have been established to discharge advisory functions, for inquiry (→ Fact-Finding and Inquiry) or → conciliation purposes (e.g. the international joint commission of Art. IX of the United States-British [Canadian] Convention on boundary questions of January 11, 1909, AJIL, Vol. 4 Supp. (1910) 239; German-Belgian Treaty of May 10, 1935, Martens NRG 3, Vol. 32, p. 348; some Soviet treaties between the Wars are likewise often mentioned in this connection, cf. Systematic Survey, op.cit.). International theory on third-party dispute settlement (→ Peaceful Settlement of Disputes), in defining commissions of inquiry and conciliation commissions, generally does not expressly require any third-party element to be represented in the commission. Accordingly, mixed commissions composed of party commissioners only are often considered to be conciliation commissions or commissions of inquiry; the reverse, however, is not the case. Nevertheless, the above-mentioned differences between commissions subject to the unanimity rule and those which are not, and the question of whether commissioners depend on instructions or not, cannot be set aside if there is any use in distinguishing diplomatic means of settlement from those involving a neutral (third-party) element. Additional criteria allow for conclusions as to a commission's settlement approach, whether conciliatory or diplomatic or intermediate: If a mixed commission, in case of its failure, is to be followed by arbitration (e.g. Canadian-United States Treaty concerning the Columbia River Basin of January 17, 1961, Art. 16, UNTS, Vol. 542, p. 244; Netherlands-Senegal Treaty of Economic and Technical Cooperation of June 6, 1965, Art. 6, UNTS, Vol. 602, p. 231), it is likely to function as a conciliation commission; if, instead, diplomatic negotiations are to follow the commission's failure before the matter may be submitted to arbitration (Austro-Czechoslovakian Treaty on natural resources of January 23, 1960, Art. 8, UNTS, Vol. 495, p. 125; Yugoslav-Romanian Treaty of November 30, 1963, Art. 19,

UNTS, Vol. 513, p. 166), the approach will tend to become diplomatic; it will have even stronger diplomatic overtones if the dispute, failing settlement on the expert level, is to be submitted to a mixed commission followed, where necessary, by resolution through diplomatic channels (Finno-Soviet Treaty on the Saimaa Canal of September 27, 1962, Art. 16, UNTS, Vol. 479, p. 99). Finally, mixed commissions may take the place of ordinary diplomatic settlement (→ Negotiation) on a deconcentrated level, if they have to report on disputes referred to them in lieu of their being dealt with through diplomatic channels, and if the commissioners depend on instructions of their respective governments and, as regards their report, upon a unanimous vote (as in most Soviet Union instances, e.g. Somali-Soviet Treaty on Commerce of June 2, 1961, UNTS, Vol. 493, p. 173).

(c) Supervisory, administrative, quasi-legislative and dispute-preventing bodies. These are the core of mixed commissions, with little risk of being confused with international organs serving different purposes, as, for example, dispute settlement proper. Their field of activity is comprehensive, ranging from the elaboration of draft conventions (United States-British [Canadian] Commission of the afore-mentioned Convention of 1909), the submission of proposals for the adaptation of treaties to changing circumstances (such as in many treaties of commerce, veterinary conventions and treaties on foreign workers) and the administration and supervision of the execution of an international régime established by treaty (e.g. river commissions in so far as they are not transformed into international organizations; reparations/armistice commissions; the Mixed Commission for the Exchange of Greek and Turkish Populations, see PCIJ B 16; the already-mentioned Tripartite Commission for the Restitution of the Monetary Gold), to responsibilities for developing proposals for the enhancement of mutual relations or for specific cooperation in order to avoid future dispute or conflict between the parties (as in some treaties of commerce and treaties relating to boundary questions).

(d) In many instances, mixed commissions, particularly the permanent ones, are not confined to merely one of the functions mentioned above; administrative commissions may also be entrusted with dispute settlement responsibilities, to mention but one example.

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NEGOTIATION

1. Negotiation as a Means of International Communication

Negotiation serves the purpose of achieving agreed solutions and is thus more than mere deliberation between States or governments (→ Consultation). It is the normal means of transacting business between sovereign States (→ States, Sovereign Equality) as well as between → subjects of international law in general. According to the number of participating subjects of international law, negotiation is either bilateral or multilateral. Multilateral negotiations often take place in the form of international → congresses and conferences. The entering into negotiations is generally agreed upon through diplomatic channels and they can be conducted in oral as well as in written form. In practice a mixture of both oral and written proceedings is the most current form of negotiations. Negotiations are conducted by persons entitled to speak for the State or other subject of international law which they represent. Each State or other subject of international law is free to determine who may conduct negotiations on its behalf. → Full powers may be required both in bilateral and in multilateral negotiations; such full powers, which are not identical with the power to sign an agreement or other instrument drawn up during negotiations, are in practice more frequently

required in multilateral than in bilateral negotiations. In conferences held under the auspices of the → United Nations, the requirement of full powers is general practice. There is no general rule as to the precise form of the full powers (e.g., credentials, letter of introduction). They must emanate, however, from persons who are considered to represent the State or other subject of international law without having to produce full powers (cf. Art. 7 (2) of the → Vienna Convention on the Law of Treaties).

Normally each party to a negotiation keeps its own records, but frequently formal statements are made in the course of a negotiation expressly for the record of the other side. The exchange of written texts which are intended to become part of the history of a negotiation is also common practice. In the case of multilateral conferences of a general character, such as codification conferences held under the auspices of the United Nations (→ Codification of International Law), it is frequent practice to publish the oral proceedings and the proposals and amendments tabled in written form. The history of the negotiations leading up to an international treaty may be of importance for its interpretation (→ Interpretation in International Law): according to Art. 32 of the → Vienna Convention on the Law of Treaties, recourse may be had to the preparatory work of a treaty and the circumstances of its conclusion if interpretation according to the general rule set forth in Art. 31 leaves the meaning of the text ambiguous or obscure or leads to manifestly absurd or unreasonable results. The purely unilateral records of each side have no authority of their own in international law. It is, however, important for the preparation of a later recourse to the history of the negotiations.

In the case of treaty negotiations the negotiating phase may be terminated by the initialling of the draft texts. Governments may, however, decide to continue to negotiate even after the draft treaty has been initialled. At the latest, treaty negotiations are terminated when the treaty is signed (→ Treaties, Conclusion and Coming into Effect). Otherwise the end of negotiations is determined in form and time by each participating State or other subject of international law as freely as the entering into of negotiations.

While States and other subjects of international law normally enter into negotiations according to their own free will and decision, there are cases in which there is a duty to negotiate. Such an obligation is normally not to be presumed. It can, however, follow from a treaty (→ Pactum de contrahendo, Pactum de negotiando) or be related to a specific legal position. It can also arise as an obligation of → good faith out of the conduct of a particular State or other subject of international law.

2. Negotiation as a Form of → Peaceful Settlement of Disputes

Negotiations have traditionally been used for the settlement of international disputes, and Art. 33 of the → United Nations Charter cites negotiation as one of the principal forms of peaceful settlement. In contrast to other forms of peaceful settlement such as → conciliation and mediation, → arbitration or → judicial settlement of disputes, negotiation is distinguished by the absence of a neutral third party which could suggest or even impose a solution. The absence of the third party element constitutes a certain weakness of negotiation as a means of securing the peaceful settlement of disputes. Therefore, in many cases, dispute settlement clauses in international treaties (→ Arbitration Clause in Treaties) provide for negotiation only as the first phase of dispute settlement procedure and permit the submission of the dispute to other forms of peaceful settlement such as conciliation, arbitration or judicial proceedings if the attempt to solve the dispute by negotiation has failed within a given time. Even in the absence of such specific clauses, a duty to first negotiate may easily be deduced from the general duty of States to settle their disputes peacefully as set forth in Art. 2 (3) of the UN Charter and from the additional duty to choose such "means as may be appropriate to the circumstances and the nature of the dispute" (→ Friendly Relations Resolution). The duty to negotiate entails for the parties to the dispute an "obligation so to conduct themselves that the negotiations are meaningful" (ICJ in the → North Sea Continental Shelf Cases; ICJ Reports 1969, at p. 47). The duty to seek a negotiated settlement could in practice, however, be undermined by the denial of the existence of a dispute or by the assertion on behalf of a State involved in a dispute of a right to demand that

certain preconditions be met before negotiations are actually entered into. Technically, the conduct of negotiations for the purpose of the peaceful settlement of disputes is not different from the conduct of any other negotiations.

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NULLITY OF JUDICIAL DECISIONS *see* Judicial and Arbitral Decisions: Validity and Nullity

OPTIONAL CLAUSE *see* International Court of Justice

PEACEFUL SETTLEMENT OF DISPUTES

The Charter of the United Nations contains, in Art. 2 (3) and (4), two parallel obligations, requiring all Members: to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"; and to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (→ United Nations Charter).

In the past, many international conflicts were resolved by economic pressure or military action, the will of the stronger country being imposed upon the weaker one. The Charter of the United Nations, going beyond the obligations previously contained in the Covenant of the League of Nations and the → Kellogg-Briand Pact (1928), proscribed the use of armed force for the settlement of international disputes. This enhanced the importance of providing adequate means for the settlement of international disputes; one of the basic purposes of the United Nations is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (Art. 1 (1)). A whole chapter of the Charter (Chapter VI) is devoted to the fulfilment of this purpose.

The obligations under Chapter VI are limited to disputes "the continuance of which is likely to endanger the maintenance of international peace and security" (Art. 33 (1)). It is only with respect to such disputes that the parties to a dispute have a duty to seek, first of all, a solution "by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". All these means are, of course, open to the parties to a dispute even if their dispute is not likely to endanger peace, and long before the creation of the United Nations these various means were employed by States, whenever conflicts arose.

The United Nations can deal with a dispute only when its continuance is likely to endanger peace; its organs have also the preliminary competence to investigate any dispute brought to their attention in order to determine whether its continuance "is likely to endanger the maintenance of international peace and security" (Art. 34). If an organ of the United Nations to which a dispute has been submitted should determine that its continuance is not likely to endanger peace, it would have to declare itself no longer competent to deal with the case.

In a dispute which falls properly within the jurisdiction of the United Nations, the competent organ is not supposed to deal with the merits of the dispute, but should determine instead which procedure or method of settlement is best suited for that dispute. Its first duty is to call upon the parties to settle their dispute by one of the seven means enumerated in Art. 33 or by any "other peaceful means of their own choice". If such a general call does not lead to a settlement, the competent organ of the United Nations may recommend, in a more specific manner, "appropriate procedures or methods of adjustment", taking into consideration "any procedures for the settlement of the dispute which have already been adopted by the parties" (Art. 36 (1) and (2)). Should the parties fail to settle the dispute by the means thus recommended, the dispute would have to be referred again to the United Nations. The competent organ of the United Nations would then have a choice of recommending an-

other method of settlement not yet tried by the parties, or of proceeding to the merits of the dispute and recommending "such terms of settlement as it may consider appropriate" (Art. 37 (2)). All these elaborate procedures may, however, be bypassed, "if all the parties to any dispute so request", and the United Nations would then be able to proceed directly to "recommendations to the parties with a view to a pacific settlement of the dispute" (Art. 38). This power would seem to extend to "any dispute", even if it is not likely to endanger peace.

While most of Chapter VI refers only to the Security Council, the Charter confers parallel jurisdiction on the General Assembly, and allows a State to bring a dispute before it (Arts. 11 (2) and 35). To avoid duplication, the General Assembly is not authorized to make any recommendations with regard to a dispute which is being dealt with by the Security Council, unless the Council itself so requests (Art. 12).

The principles of the Charter with respect to the settlement of international disputes have been further elaborated in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (UN GA Res. 2625 (XXV), Oct. 24, 1970; → Friendly Relations Resolution). It made clear, for instance, that the parties to a dispute have a duty to "refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace". It pointed out also that international disputes "shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means".

The seven means enumerated in Art. 33 of the United Nations Charter are the most common ones. Each of them has a long tradition preceding the United Nations, and there are several international instruments which have codified these procedures to some extent.

The Hague Convention for the Pacific Settlement of International Disputes of July 29, 1899, contains provisions on → good offices, mediation (→ Conciliation and Mediation), international commissions of inquiry (→ Fact-Finding and Inquiry) and → arbitration; it is still in force for more than 60 States. It was revised at the Second Hague Peace Conference, and in particular there were some changes with respect to the commissions of inquiry and the arbitration procedure; the revised Convention of October 18, 1907, replaced the 1899 one as between the parties to the new one, but it is in force for only some 50 States (several of which were not parties to the 1899 Convention) (→ Hague Peace Conferences of 1899 and 1907). The → General Act for the Pacific Settlement of International Disputes, concluded under the auspices of the League of Nations on September 26, 1928, contains provisions on conciliation and → judicial settlement of disputes, including arbitration; it has been acceded to by 23 States (the Act was denounced by Spain in 1939, by France and the United Kingdom in 1974, and by Turkey in 1978; India announced in 1974 that it was not bound by it). A slightly revised text of the Act was approved by the General Assembly of the United Nations (Res. 268A (III), April 28, 1949); only seven States have acceded to it.

Apart from these global instruments, there are several regional ones: the American Treaty on Pacific Settlement of April 30, 1948 (→ Bogotá Pact); the → European Convention for the Peaceful Settlement of Disputes of April 29, 1957; and the Protocol of the Commission of Mediation, Conciliation and Arbitration of the → Organization of African Unity of July 1964 (L.B. Sohn, Basic Documents of African Regional Organizations, Vol. 1 (1971) 69; ILM, Vol. 3 (1964) 1116).

Apart from their general obligations under the Charter of the United Nations, and their more specific obligations under other global or regional treaties, States are frequently bound to resort to specific means for dispute settlement under bilateral treaties for the settlement of international disputes (→ Arbitration and Conciliation Treaties, → Bryan Treaties). Finally, many bilateral and multilateral treaties contain special provisions (so-called compromissory clauses) for the settlement of disputes relating to the interpretation or application of these treaties (→ Arbitration Clause in Treaties; → *Compromis*).

The most common and most ancient method for settling international disputes is through diplomatic negotiations (→ Negotiation). Patient negotiations between foreign offices can ordinarily solve all but the most intractable disputes, and in

more complicated cases they can help to narrow the issues to more manageable proportions. Accordingly, most treaties for the settlement of international disputes are limited to those disputes which it has not been possible to settle by diplomacy or direct negotiations. But when a deadlock is reached in the negotiations or there is no reasonable probability that further negotiations will lead to a settlement, then other means may be invoked by a party to the dispute. (See South West Africa Cases, ICJ Reports 1962, p. 319, at pp. 327, 344–46).

Good offices, mediation and conciliation have two common characteristics: the participation of third parties in the settlement of the dispute, and the non-binding nature of the third party's contribution.

When the parties accept an offer of good offices by a third party, or accept a recommendation to that effect by the United Nations, the third State (or, frequently, an eminent individual) tries "to bring the parties together, so as to make it possible for them to reach an adequate solution between themselves" (Bogotá Pact, Art. 9). Thus the third State (or person) acts here as a "go-between", passing messages and suggestions back and forth, until the parties agree to resume direct negotiations.

A mediator is more active in helping the parties to reach a settlement; his main function is to elicit substantive proposals from the parties and to find a way for reconciling them. He is supposed to do it "in the simplest and most direct manner, avoiding formalities", and ensuring complete confidentiality (Bogotá Pact, Art. 12). Sometimes good offices and mediation are in fact combined.

Commissions of inquiry, investigation and/or conciliation usually combine two functions: elucidating the facts "by means of an impartial and conscientious investigation" (Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, Art. 9) and (as in mediation) bringing the parties to an agreement. A commission can also communicate to the parties in the form of a report the terms of settlement which seem suitable to it (General Act for the Pacific Settlement of International Disputes (1928 and 1949) Art. 15).

If these non-binding recommendations do not lead to a settlement, some treaties provide for arbitration and/or other means of judicial settlement (see also → International Courts and Tribunals). Both arbitration and judicial settlement by international courts and tribunals result in a binding decision. Arbitration is often less formal, permits sometimes a more expeditious procedure, and – most important – gives the parties a greater freedom to select the members of the tribunal and the applicable law. Judicial settlement by international courts and tribunals, on the other hand, allows the parties to submit their dispute to a standing tribunal (without any delay concerning the selection of the tribunal), such a tribunal being already equipped with rules of procedure known in advance to the parties, and able to render a decision which, because of the court's prestige, is more likely to be implemented.

The principal court of the international community is the → International Court of Justice (successor to the → Permanent Court of International Justice). There are also regional and specialized courts, some of which are open not only to States but also to individuals and corporations (→ Standing before International Courts and Tribunals). To this group belong the → Court of Justice of the European Communities, the → European Court of Human Rights, the → Inter-American Court on Human Rights, and the proposed Law of the Sea Tribunal (→ Law of the Sea, Settlement of Disputes).

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PERMANENT COURT OF ARBITRATION

1. Legal Basis and Structure

The Permanent Court of Arbitration has its legal basis in the two Conventions for the Pacific Settlement of International Disputes of July 29, 1899, and October 18, 1907 – both still in force (→ Arbitration) – which were concluded at the → Hague Peace Conferences of 1899 and 1907. Under Art. 20 of the 1899 Convention, the signatory powers undertook to establish a Permanent Court of Arbitration, accessible to States at all times, "with the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy". In Art. 41 of the 1907 Convention, the contracting powers declared their intention "to maintain the Permanent Court of Arbitration, as established by the First Peace Conference" (in the following text, reference will always be made first to the 1907 Convention and then [in square brackets] to the 1899 Convention).

In order to "insure the pacific settlement of international differences" (Art. 1 of both Conventions) the Conventions include in Part IV (international arbitration) a chapter defining the Permanent Court of Arbitration in ten almost identical articles (Arts. 41–50 [20–29]). This institution has remained imperfect but it has made a fruitful contribution to the development of international arbitration. Proposed changes in the form given to the Court in the 1899 Convention failed to gain acceptance at the 1907 Peace Conference because of the lack of agreement on the appointment of judges, and especially because of the opposition of the smaller nations which, in contrast to the major powers, would not have been permanently represented by national judges but only periodically on a rotation basis. An American-British-German proposal for a Court of Arbitral Justice (→ Permanent Court of International Justice) was similarly unsuccessful as was also the plan for the → International Prize Court.

The Court of Arbitration is not, as its name suggests, a "permanent" court capable of direct action, but merely an institution to facilitate recourse to arbitration in cases of international dispute. This purpose is served by an International Bureau under the control of a Permanent Administrative Council and by a list of potential arbitrators from which an arbitral tribunal can be formed as the need arises. The permanent "Court" means the institution as a whole as opposed to the "tribunal" which sits only when called upon. In its composition, the Hague Court of Arbitration stands part way between a permanent institution and isolated arbitral bodies, as it is not itself an arbitral tribunal, nor does it have an independent jurisdiction; it simply renders possible the formation of individual arbitral tribunals according to certain principles within the framework of the Court.

2. Establishment and Activities

Following a resolution of the Administrative Council of December 9, 1900, the International Bureau referred to in Art. 22, para. 1 of the 1899 Hague Convention was set up in April 1901. Since August 1913 the Permanent Court of Arbitration has been housed in the Hague Peace Palace (built with funds donated by the → Carnegie Endowment for International Peace and inaugurated on August 28, 1913), which also provided premises for the → Académie de Droit International and later became the seat of the → Permanent Court of International Justice and its successor, the → International Court of Justice.

The first case to come before the Court of Arbitration was the → Pious Fund Arbitration which led to an arbitral award rendered on October 14, 1902. In all, 25 cases have been heard by arbitral tribunals set up within the framework of the Permanent Court of Arbitration and 24 awards have been given. Of these, 14 were given before World War I, the first four cases (the Pious Fund Arbitration, the → Preferential Claims against Venezuela Arbitration, the → Japanese House Tax Arbitration and the → *Muscat Dhows* Case) being heard before the Second Peace Conference of 1907. Ten awards were given in the years between 1920 and 1970 subsequent to which no further cases have come before the Court. The one case withdrawn was the *Tavignano* Case, which was to have been heard by the arbitral tribunal set up by a Franco-Italian compromis of November 8, 1912, to arbitrate in the → *Carthage* and → *Manouba* Cases. The *Tavignano* Case was settled by agreement between the parties; the Court

thereafter relinquished its jurisdiction on May 3, 1913. (Rapport du Conseil administratif, op. cit. (1914) 13).

The Permanent Court of Arbitration was utilized most in the years between the Second Hague Peace Conference and the outbreak of World War I. During this period a number of important awards were given, notably those in the → Casablanca Arbitration, the → North Atlantic Coast Fisheries Arbitration and the → Savarkar Case. Its significance declined between the two World Wars and has become minimal since the end of World War II. The reason for this is to be seen not only in the establishment of further → international courts and tribunals, especially the Permanent Court of International Justice and its successor, the International Court of Justice, but also in the growing reluctance of States to have recourse to arbitration or to the → judicial settlement of disputes.

In view of this development, the Permanent Administrative Council of the Court, in a resolution dated December 2, 1959, expressed the wish that "the High Contracting Parties to the Conventions... of 1899 or 1907 should resort to the services of the Court should the need arise and much more extensively than at present". It charged the International Bureau "to examine... the question in which way the Permanent Court of Arbitration might play a more active role in the pacific settlement of disputes". In a circular note dated March 3, 1960 (English text: AJIL, Vol. 54 (1960) 933–941), the Secretary-General stated that the Permanent Court of Arbitration was not, and did not intend to be, in competition with the ICJ; arbitration within the framework of the Court offered advantages to States which hesitated to submit their difference to the ICJ, in that a more restricted tribunal consisting of arbitrators selected by the parties themselves might more fully enjoy the confidence of those parties than a court of 15 judges representing judicial systems from all over the world; arbitration offered the possibility of settling disputes *ex aequo et bono* (→ Equity in International Law) especially in cases of a political nature; moreover, a procedure before the Permanent Court of Arbitration was always less spectacular and less lengthy than one before the ICJ. In conclusion, it was suggested that the attention of the parties to the Hague Conventions should be drawn to these advantages and that an attempt should be made to increase the number of High Contracting Parties to the Convention for the Pacific Settlement of International Disputes of October 18, 1907.

3. Structure

(a) The organs of the Permanent Court of Arbitration are the International Bureau and the Administrative Council. The Bureau consists of the Secretary-General and a small staff, who in practice have always been of Dutch nationality. The position of Secretary-General (with the rank of minister-resident) was not provided for in the Hague Conventions but was created by the Administrative Council. According to Art. 21, para. 3 of the Statute of the PCIJ, the Registrar of that Court could undertake the duties of Secretary-General. The expenses of the Bureau are borne by the States parties to the Conventions in the proportion fixed for the International Bureau of the → Universal Postal Union (Art. 50 [29]). The Bureau, which is not empowered to act on its own initiative, conducts the administration of the Court, channels communications relative to the meetings of tribunals, and acts as the registry for these tribunals, for the special boards of arbitration referred to in Art. 47, para. 1 [26, para. 1] and for the international commissions of inquiry referred to in Art. 15 (the last of which was established for the → *Red Crusader* Incident, Denmark v. United Kingdom, 1962). It is also entrusted with the Court's archives (Art. 43, para. 2 [22, para. 1–3]). The offices and staff of the Bureau are at the disposal of the contracting powers for the use of any special board of arbitration (Art. 47 [26]). In 1935 this provision was entended by the Administrative Council so as to make the premises available for arbitration proceedings between a State and a commercial undertaking. In 1937 it was further extended to apply to the meetings of commissions of arbitration and conciliation set up according to → arbitration and conciliation treaties between individual contracting powers. This facility was last used in the Irrégularités douanières Case (France v. Switzerland, 1955) and the Roula Case (Greece v. Italy, 1956). In keeping with the 1935 decision and proposals made at conferences on inter-

national commercial arbitration in 1953 and 1958, the Administrative Council commissioned the drafting of "Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of which only one is a State." (AJIL, Vol. 57 (1963) 500–512). It was to apply to the contracting parties to the Hague Conventions and was intended to facilitate the settlement of disputes which showed a mixture of public and private international legal aspects and which were not important enough for a government to extend → diplomatic protection to a commercial undertaking and to transform thereby the dispute into one between States.

The Permanent Administrative Council is composed of the diplomatic representatives of the contracting powers at the Hague (74 in 1979) with the Netherlands Minister for Foreign Affairs acting as President. The Council, which at its first session on September 19, 1900, adopted a *règlement d'ordre*, meets as the occasion arises, but at least once a year. Pursuant to Art. 28 of the 1899 Convention, the Council established the International Bureau and on December 8, 1900, supplied it with a *règlement* (texts: British and Foreign State Papers Vol. 94, pp. 722, 724). According to Art. 49 of the 1907 Convention, the Council is charged with the direction and control of the Bureau. It appoints the officials of the Bureau and fixes their conditions of employment. It also furnishes the contracting powers with an annual report on the activities of the Court and on its expenditures.

(b) The list of arbitrators contains the names of the persons, selected by each contracting power, who are prepared to accept the duties of arbitrator (Art. 44 [23]). Each State can name up to four persons, either of its own or of foreign nationality, or it may agree with other powers upon the selection of common members, the same person can thus be selected by different powers. The persons nominated are appointed for a term of six years and the appointments are renewable. Should a vacancy occur, the same procedure is to be followed, the new appointment being made for a fresh term of six years. It is the duty of the Bureau to provide the contracting powers with the list of arbitrators and to inform them of any alterations. The persons selected must be "of known competency in questions of international law" and "of the highest moral reputation"; the other qualifications required of the judges of the PCIJ and ICJ (Art. 2 of their Statutes), namely that they should "possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law" are not mentioned in the two Hague Conventions, but the persons selected normally fulfil these requirements. The list of candidates from which the judges of the ICJ (and previously those of the PCIJ) are elected is based on the Permanent Court of Arbitration's list (Art. 4 of their Statutes). The nominated persons are called "members of the Court", but in actual fact are only potential arbitrators without function and without any special legal status. They acquire the latter only when they are appointed to an arbitral tribunal. Members of an arbitral tribunal enjoy diplomatic privileges and immunities but, as a result of an ill-founded analogy with diplomatic practice, only when they are outside their own country (Art. 46 para. 4 [24, para. 8]; → Diplomatic Agents and Missions, Privileges and Immunities). There is no general rule that a member of the court may not act as agent, counsel or advocate before an international arbitral tribunal. The persons listed as potential arbitrators do not form a "corps" *stricto sensu* but merely a "panel" (M.O. Hudson, AJIL, Vol. 27 (1933) 443).

(c) An arbitral tribunal for the settlement of differences between the contracting powers is formed by the appointment of arbitrators from the general list of members of the Court (Art. 45, para. 1 [24, para. 1]). Following the general principles governing international arbitration, the parties must enter into a → *compromis* whenever they wish to use the Court's facilities. This must define the manner of appointing arbitrators, the subject of the dispute and any other special conditions (Art. 52 [31]). Failing agreement of the parties on the composition of the tribunal or on a special method of selection (e.g. the appointment by Czar Nicholas II of three arbitrators in the Preferential Claims against Venezuela Arbitration), the Hague Conventions define the selection procedure to be followed (Art. 45, paras. 2 to 6 [24, para. 2–6]). According to the 1907 Convention, the parties can, if necessary, agree to

have the *compromis* settled by the "Permanent Court", i.e. by a commission of five members selected in the same manner as that specified in Art. 45 (Art. 53, para. 1; Art. 54; alternative *compromis* cf. section 4 *infra*). On a parallel with general arbitration practice, the duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators (Art. 55, para. 1 [32, para. 1]); in a tribunal consisting of several arbitrators, however, each party may not choose more than one of its own nationals (Art. 45, para. 3). In some cases, the tribunals set up within the framework of the Hague Court consisted of only one arbitrator (as in the → Timor Island Arbitration and the → Palmas Island Arbitration) or of five members (as in the → Casablanca Arbitration and the → *Carthage* Case), but as a rule they consisted of three arbitrators. As soon as the members of the tribunal have been appointed, the parties forward to the International Bureau the text of their *compromis*, the names of the arbitrators and notice of their determination to have recourse to the Court (Art. 46 [24, para. 6]). The Bureau thereafter communicates to each arbitrator the contents of the *compromis* and the names of the other arbitrators. The tribunal assembles on the date fixed by the parties; unless some other place is selected by the parties, it sits at the Hague (Art. 60 [25]), where the Court staff and premises are at its disposal. The same facilities are available for the use of the "special boards of arbitration". The Hague Conventions (Art. 47 [26]) use the term "special" on the one hand for tribunals for the settlement of disputes between non-contracting powers, or between contracting and non-contracting powers (cf. section 4 *infra*) and on the other hand for tribunals which are partially or exclusively composed of arbitrators who are not members of the Permanent Court of Arbitration (as in the → Grisbadarna Case, → the Russian Indemnity Arbitration and the → Norwegian Shipowners' Claims Arbitration). The term "special tribunal" is also used in the practice of the Court (see the annual publication: Rapport du Conseil administratif, op. cit., since 1933) for tribunals whose members, although members of the Permanent Court of Arbitration, have not been appointed in this capacity by the parties (as in the → Pious Funds Arbitration and the → Chevreau Claim Arbitration); this has led to various misunderstandings in legal literature. In the publications of the Permanent Court of Arbitration, the United States-Russian dispute arising from the confiscation of American ships in the Behring Sea (→ Behring Sea Arbitration) and settled by the award of a single arbitrator, T.M.C. Asser, on November 29, 1902, is not included in the list of arbitrations before the Court, although it took place on the Court's premises and with the use of its facilities, because the *compromis* had been settled before the Court was officially established; various writers on the subject disagree with this view and list the award in question as the first of the decisions delivered within the framework of the Hague Court.

4. Jurisdiction

The institution of the Permanent Court of International Arbitration is intended primarily to facilitate the proceedings of general or special arbitral tribunals formed by the contracting powers to the Hague Conventions (Art. 45, para. 1 [24, para. 1]; 47, para. 1 [26, para. 1]). However, under certain conditions it is also available for the settlement of disputes between contracting powers and non-contracting powers (Art. 47, para. 2 [26, para. 2]). Theoretically, only disputes between States can be settled within the framework of the Court (Art. 37, para. 1 [15]). This rule, which corresponds to the basic principles of international arbitration, has not prevented the Administrative Council from offering, on request, the technical facilities of the Court for the arbitral settlement of differences between two parties of which only one is a State. The award of such a tribunal (e.g. the award of the three arbitrators in the → China v. Radio Corporation of America Arbitration; Arbitration of Cirdi in Société Guadaloupe Gas Products v. Gouvernement militaire fédéral du Nigéria, 1979) is not, however, considered an award of the Court.

All types of disputes can be settled within the framework of the Court. The parties to a dispute can freely choose whether they wish to submit it to arbitration. The chapter in the Hague Conventions on the Permanent Court of Arbitration begins with the statement that the Court is competent for all arbitration cases, but immediately qualifies this by mentioning alternatives (Art. 42 [21]). As arbitration practice developed, States

showed a growing tendency to prefer the alternatives.

Attempts at the Second Hague Conference to make recourse to the Court compulsory were unsuccessful. However, by means of → arbitration clauses in treaties or by → arbitration and conciliation treaties the contracting powers can agree to submit to compulsory arbitration by the Court as long as no other court of arbitration has been named. The Hague Conventions also provide that if a serious dispute threatens to break out between contracting powers, the other powers should, when offering their → good offices, remind them that the services of the Permanent Court of Arbitration are open to them (Art. 48, paras. 1 and 2 [27]). In addition, according to a provision inserted in the 1907 Convention (Art. 48, paras. 3 and 4), a disputing party may notify the International Bureau of its willingness to submit to arbitration. This possibility has not been utilized to date.

An arbitration tribunal set up within the framework of the Permanent Court cannot decide on its own competence, but instead can only interpret the *compromis* and any other papers and documents which may be invoked (Art. 73 [48]), when there are differences of opinion or when one of the parties raises questions not covered by the *compromis*. Where the parties have excluded the application of this article, the tribunal cannot function if one of the parties challenges its jurisdiction.

A special competence – not yet used in practice – lies in the authority given to the Court to settle an alternative or compulsory *compromis*. This competence is assigned to the "Permanent Court", but is in fact to be exercised by a commission of five members selected in the same way as the members of an arbitral tribunal when the parties fail to agree on its composition (Arts. 54, 45 paras. 3 to 6). Such a commission is competent to settle the *compromis* when both parties agree to have recourse to it (Art. 53, para. 1: alternative *compromis*) and also when, after attempts to reach an understanding have failed, the request is made by only one of the parties (Art. 53, para. 2: compulsory *compromis*). The latter competence exists only when the opposing party refuses to settle the *compromis* provided for in a treaty of arbitration concluded after the 1907 Convention or when the dispute in question concerns contractual debts claimed against one power by another as due to its nationals and settlement by means of arbitration has already been accepted. The effectiveness of these provisions is reduced by the fact that the commission which is to settle the *compromis* can only be formed by cooperation between the parties. Failing an agreement to the contrary, the commission itself will form the arbitral tribunal which is to settle the actual dispute (Art. 58).

5. Procedure and Awards

The procedure to be followed by an arbitral tribunal set up within the framework of the Permanent Court of Arbitration can be specified by the parties in the *compromis* (this has not happened so far). Failing such an agreement, the rules set out in the chapters of the Hague Conventions relating to arbitration procedure come into operation (Art. 51 [30]). The arbitral tribunals can merely supplement these rules; they may not make their own rules. The procedure in general comprises two distinct phases: written pleadings and oral hearings (Arts. 63 [39], 66 [41]). The hearings are held in public only if so decided by the tribunal and with the assent of the parties. Sometimes written pleadings alone are sufficient; the hearings can be dispensed with if the parties do not appear before the tribunal or do not appoint agents (as in the → Canevaro Claim Arbitration). Provision was also made in the 1907 Convention (Arts. 86 to 90) for arbitration by summary procedure – comparable with the summary procedure before chambers of the PCIJ and the ICJ – in the case of disputes admitting of such a procedure, i.e. disputes of a technical nature or of limited significance. The rules for summary procedure were applied in the → French-Peruvian Claims Arbitration, although Peru had not ratified the 1907 Convention. In his circular note of March 3, 1960, the Secretary-General came to the conclusion that the rules of procedure set out in the Hague Conventions had proved their worth and needed no modifications; he merely suggested that in cases in which the languages to be used had not been agreed upon in the *compromis* (Arts. 52, 61 [38]), other languages should be considered on the same footing as French.

The principles governing the awards to be made by arbitral tribunals are referred to only in Art. 37, para. 1 [15], which states that international arbitration has for its object the settlement of differences "on the basis of respect for law". This provision allows the arbitrators to base their decisions not only on the principles of international law but also, without special agreement between the parties, upon other legal principles and on equity (*ex aequo et bono*). This reflects the conciliatory nature of arbitration proceedings, which are not concerned with the application of international law to the same extent as international courts of justice, but seek primarily to persuade the parties to settle their differences.

The tribunal considers its decisions in private and decides all questions by a majority vote. The award, giving the reasons on which it is based, is read out in public session (Arts. 78 to 80 [51 to 53]). The award is issued in the name of the tribunal, or – to be more exact – in the name of its members. The award is binding only on the parties in dispute (Art. 84 [56]). Once pronounced, it settles the dispute definitively and without appeal (Art. 81 (54]). However, the parties can reserve in the *compromis* the right to demand the revision of the award (Art. 83 [55]). The 1907 Convention provides that any dispute arising between the parties as to the interpretation and execution of the award shall, as a rule, be submitted to the tribunal which pronounced it (Art. 82). Recourse to a tribunal set up within the framework of the Permanent Court implies the engagement to submit in good faith to the award (Art. 37, para. 2 [18]).

6. *Arbitrations before the Court*

→ Pious Funds Arbitration	14.10.1902
→ Preferential Claims against Venezuela	22. 2.1904
→ Japanese House Tax Arbitration	22. 5.1905
→ *Muscat Dhows*, The	8. 8.1905
→ Casablanca Arbitration	22. 5.1909
→ Grisbardana Case	23.10.1909
→ North Atlantic Coast Fisheries Arbitration	7. 9.1910
→ Orinoco Steamship Co. Arbitration	25.10.1910
→ Savarkar Case	24. 2.1911
→ Canevaro Claim Arbitration	3. 5.1912
→ Russian Indemnity Arbitration	11.11.1912
→ *Carthage*, The	6. 5.1913
→ *Manouba*, The	6. 5.1913
Tavignano, The	no award
→ Timor Island Arbitration	25. 6.1914
→ Expropriated Religious Properties Arbitration	4. 9.1920
→ French-Peruvian Claims Arbitration	1.10.1921
→ Norwegian Shipowners' Claims Arbitration	13.10.1922
→ Palmas Island Arbitration	4. 4.1928
→ Chevreau Claim Arbitration	9. 6.1931
→ *Kronprins Gustaf Adolf* and *Pacific* Arbitration	18. 7.1932
→ China v. Radio Corporation of America Case	13. 4.1935
→ Radio Orient Arbitration	2. 4.1940
→ Lighthouses Case	24. 7.1956
Sudan-Turriff Construction Case	23. 4.1970 (not published)

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HANS-JÜRGEN SCHLOCHAUER

PERMANENT COURT OF INTERNATIONAL JUSTICE

A. From Establishment to Dissolution: 1. Historical Background. 2. Legal Bases. 3. Revision of the Statute. 4. Activities. – B. Organization: 1. Composition of the Court and Election of Judges. 2. Status of the Judges. 3. Structure of the Court. 4. Judges *ad hoc*. 5. Rules of Court. – C. Jurisdiction: 1. Categories of Jurisdiction. 2. Access to the Court. 3. Justiciable Disputes. 4. Compulsory Jurisdiction. 5. Determination of Jurisdiction. – D. The Law Applicable. – E. Procedure: 1. Institution of Proceedings. 2. Intervention by Third Parties. 3. Structure and Phases of Proceedings. 4. Judgments. – F. Advisory Opinions. – G. Activities of the Court 1922–1939.

A. From Establishment to Dissolution

1. Historical Background

The idea of furthering the → peaceful settlement of disputes and supplementing already existing institutions for international → arbitration by setting up a body with international jurisdiction to settle justiciable disputes was first raised at the → Hague Peace Conferences of 1899 and 1907. At the Second Conference the American delegates proposed that, in addition to the → Permanent Court of Arbitration which had been established by the First Conference, a permanent court of justice should be set up. It should be composed of salaried judges, impartial to the particular disputes to be resolved, and appointed for a fixed number of years. The proposal met with British and German approval and resulted in an American-British-German draft for the establishment of an international court. It was not adopted by the Conference because of differences of opinion concerning the court's jurisdiction and the election of judges. However, it was attached as an annex to the Final Act of the 1907 Conference under the title "Projet d'une Convention relative à l'établissement d'une Cour de Justice arbitrale". In spite of the use of the term "arbitral", chosen to respect the wishes of certain States, the body whose organization and functions were described in 35 articles, would not have been a court of arbitration but an international court of justice. It was to have been formed in conjunction with an → International Prize Court, which was provided for in a Convention signed at the same time but

never ratified, and would possibly have been composed of the same judges.

After the failure of efforts at the → London Naval Conference of 1908/1909 to bring the Prize Court into being, the plan to vest this Court initially with the competence to deal with cases within the jurisdiction of the proposed Court of Arbitral Justice had to be abandoned. The United States, Great Britain, France and Germany agreed to ratify the Prize Court Convention and to create a basis for the Court of Arbitral Justice by concluding among themselves an agreement to which other States could accede. The four Powers, however, ratified neither this agreement of March 1910, supplemented by an additional protocol dated September 19, 1910, nor the Prize Court Convention. At its Christiania session, the → Institut de Droit International passed a unanimous resolution recommending the establishment of the Court of Arbitral Justice (AnnIDI, Vol. 25 (1912) 603–610). Thereafter, the United States again took the initiative; in a circular note of July 1913, United States Secretary of State Knox proposed to the nations participating in the London Law of the Sea Conference that these States should adopt the 1907 draft on the occasion of the inauguration of the → Académie de Droit International, which was at that time in the planning stage. The Court of Arbitral Justice was initially to comprise nine judges and nine deputy judges (one member from each of the participating countries: Austria, France, Germany, Great Britain, Italy, Japan, Netherlands, Russia, United States). Because of the international tensions prevailing, the proposal found favour only with the Netherlands but, together with the 1907 draft, formed the basis for the preparatory work on the Statute of the PCIJ.

During World War I various proposals were made for an international court to be set up after the war, sometimes in conjunction with plans for a world organization, but mostly on the independent initiative of academic bodies – notably the → Interparliamentary Union, the British Fabian Society and the American Society for the Judicial Settlement of Disputes. Several neutral States (Denmark, Norway, Sweden, Switzerland) presented draft conventions. An international court was mentioned neither in President Wilson's Fourteen Points nor in the three American drafts for a Covenant of the League of Nations. It was mentioned by Wilson only in Point 4 of his Mount Vernon speech of July 4, 1918.

At the Paris Peace Conference it was decided that the details concerning an international court, which the participants all agreed was desirable, would not be discussed at the conference but worked out by an independent international Committee of Jurists and established with the support of the Council of the League of Nations. The proposals made by Lord Robert Cecil for a permanent court and the Hurst-Miller draft conceived on similar lines (Sir Cecil Hurst was adviser to the British, Hunter Miller to the American Government) were not discussed. According to the Covenant of the → League of Nations, which formed the opening section of the various → Peace Treaties after World War I, members of the League undertook to settle disputes by peaceful means (Art. 12) and agreed to submit all arbitrable or justiciable disputes to arbitration or judicial settlement (Art. 13). The final text of the Covenant contained a provision not included in the first draft, namely, that the Council of the League should formulate plans for the establishment of a Permanent Court of International Justice (Art. 14). The plans were to be adopted not by the Assembly, the representative body of the League of Nations, but by the individual member-States.

In accordance with Art. 14 of the Covenant, the Council of the League discussed the plan for an international court at its meeting on February 2, 1920, and on February 13, 1920, announced the formation of a Committee of Jurists to draft a statute for the court. The Committee members had all previously worked for the establishment of an international court, some even at the Hague Conference of 1907; seven members of the Committee were later appointed judges of the PCIJ.

The Committee of Jurists began its work on June 16, 1920, in the Peace Palace at the Hague. As the basis for its discussions it took the 1907 Hague draft Convention for a Court of Arbitral Justice and the Statute of the → Central American Court of Justice. It also took into account the drafts prepared during the war by academic societies and the governmental committees of neutral States, including the plan adopted at a conference held at the Hague in 1920 by the Netherlands, the three Scandinavian countries

and Switzerland – varying in part from the earlier individual drafts. It further relied on a proposal from the German Government, based on a report dated January 1, 1919, of the German Society for International Law, a draft submitted by the Italian Government, and suggestions offered by the Austrian peace delegation in Paris (drawn up by Lammasch). After 35 sessions the Committee adopted a draft scheme for the Statute of the Permanent Court of International Justice on July 20, 1920.

On the basis of this draft scheme, accompanied by a report from de La Pradelle, the Council of the League again considered the question of the Court's Statute on August 5, 1920. The draft scheme was discussed by the Council in several sessions. Apart from a few minor amendments, the only major criticism concerned the provisions for compulsory jurisdiction, which were felt to be incompatible with Art. 13 of the League's Covenant. The draft scheme was submitted to the Assembly of the League, which referred it to its Third Committee. This Committee set up a sub-committee of ten members, five of whom were members of the Committee of Jurists. In 11 meetings at the end of 1920, the sub-committee discussed the subject, taking into account the proposals offered by the governments of various member-States of the League. It suggested only minor amendments and additions, which on the whole the Third Committee approved. On December 13, 1920, this version was adopted unanimously by the Plenary Session of the Assembly of the League of Nations, although during the foregoing discussions a number of States, mainly South American, tried in vain to have the compulsory provisions re-introduced. (For a detailed account of the origins of each article, see Hudson, The Permanent Court, op.cit., 142–215). The United States did not take part in the debate in the League of Nations, as the Senate, returning to the traditional → Monroe Doctrine and the policy of isolationism, had refused to approve the Paris Peace Treaties.

2. Legal Bases

The legal bases for the composition and functions of the PCIJ are to be found in Art. 14 of the Covenant of the League of Nations and in the Court's Statute. Although the Court did not function as an organ of the League of Nations, unlike the → International Court of Justice which is closely linked to the → United Nations, it was regarded as the League's judicial body. At the Court's inauguration ceremony, President Loder described it as "un des principaux organes" of the League of Nations and said that it took "une place analogue à celle du pouvoir judiciaire dans beaucoup d'Etats" (Société des Nations, Journal officiel (1922) 312). The principal link with the League of Nations consisted in the fact that members of the League were primarily envisaged to be parties in cases before the Court, and only the Council or the Assembly of the League could refer to it requests for advisory opinions. Its expenses were borne by the League of Nations as part of its budget. The judges were elected by the Assembly and the Council.

The Court's jurisdiction in matters of dispute was predetermined by Art. 14, sentence 2, of the Covenant of the League of Nations, which was signed on June 28, 1919, together with the → Versailles Peace Treaty and became effective when that Treaty came into force on January 10, 1920. According to a principle of treaty law, this provision applied only to members of the League; through the recommendations concerning the peaceful settlement of disputes contained in Arts. 12 and 13, they were referred to the facilities offered by the Court. Until the introduction of a new Chapter IV in the 1936 revision of the Statute (never actually applied), Art. 14, sentence 3, was the only legal basis for the Court's advisory activities.

The Statute of the PCIJ, wjocj om accprdamce with Art. 14, sentence 1, of the League's Covenant was formulated by the Council and approved by the Assembly, was an independent document and only indirectly linked with the Covenant. In a Protocol of Signature dated December 16, 1920 (PCIJ D 1 (4th ed. 1940) 7), 41 members of the League accepted the Statute subject to ratification. According to an Assembiy resolution, the Statute was to come into force when it had been ratified by the majority of the members of the League (not the majority of signatories). As the number of members at the time of the resolution was the basis for calculation, the Statute came into force on September 2, 1921, when the 22nd ratification was received.

In the years 1921 to 1939, the Protocol of 1920 was signed by 18 more States as they gained admission to the League of Nations according to

Art. 1 (2) of its Covenant and by the United States after it had campaigned for a revision of the Statute in 1929. Nine of the States which originally or subsequently signed the Protocol failed to ratify (including the United States). In all, 50 States accepted the Statute; this figure is a maximum, since the number of participating States dropped as some of them withdrew. A denunciation was not provided for in the Statute but was considered permissible. In the period 1921 to 1942, 13 States withdrew their participation; in the same period, 19 States left the League of Nations, but not all of them withdrew from the Court.

3. Revision of the Statute

After the Court had been functioning for several years, it became evident that the Statute could be improved by certain amendments and additions, as circumstances arose which had not been foreseen at the time of drafting. As the Statute, in contrast to the Covenant of the League of Nations, made no provision for amendments, revision was possible only with the consent of all the participating States. The possibility of revising the Statute was discussed in the League of Nations, although not all of its members had acceded to the Protocol of Signature. In accordance with a resolution adopted by the Assembly, the Council set up a new Committee of Jurists on December 12, 1928. Included among the eleven members of the Committee was the American, Elihu Root, because one of the topics to be discussed was the conditions stipulated by the United States for its acceptance of the Statute.

The Committee of Jurists met in Geneva in March 1929 and decided on the inclusion of four new articles on advisory opinions (Arts. 65 to 68) and on the amendment of 19 existing articles. Apart from a few purely textual improvements (in Arts. 35, 38 to 40), the amendments concerned the following points: The institution of deputy-judges was to be abolished (Art. 3; corresponding changes had to be made to Arts. 8, 13, 14 to 17, 25 to 27, 29, 31, 32); participation in the election of judges was to be extended to non-members of the League of Nations (Art. 4); and, because of the pressure of work, the Court was to remain in permanent session rather than meeting only once a year (Art. 23).

After its approval by the Council of the League, the draft amendments were the subject of a Conference held in Geneva at the beginning of September 1929 and attended by the signatory States, including some which had signed but not yet ratified the Protocol of 1920. Subject to a few minor amendments, the Conference adopted the draft and referred it to the Assembly of the League. The revised text of the Statute was adopted by the Assembly on September 14, 1929 (PCIJ D 1, *supra*, 8), and presented for ratification, along with a Protocol drafted by the Conference of Signatories, to those States which had ratified the first Protocol, and to the United States. The amendments were to come into force on September 1, 1930, as long as all the States had either ratified the Protocol or had raised no objection to the coming into force of the new text. These conditions were not fulfilled; of the 45 States which had ratified the Protocol of 1920, only 32 ratified the new Protocol, while eight further States notified their consent to the coming into force of the amendments.

The accession of the United States, which was to have been made possible by the revision, was still in the balance. On January 27, 1926, the United States Senate had given its consent for accession to the Protocol of 1920 on five conditions. At a Conference of Signatories held in Geneva in 1926, the signatory States had already accepted the requirements of the United States that participation would not involve, even indirectly, any obligations arising from the Covenant of the League of Nations, that it was entitled at any time to withdraw its acceptance of the Statute, that it would share to only a limited extent in the expenses of the Court and that it could participate in the election of judges. They did not accept the United States' requirement that no request for an advisory opinion should be entertained by the Court whenever it concerned a question in which the United States had a direct or even an indirect interest, one reason being that the Court's rejection of a request for an advisory opinion in the → Eastern Carelia Case had led to ill feelings. Although the question of advisory opinions was still unresolved, the United States signed the Protocols of 1920 and 1929 on December 9, 1929. Ratification did not however follow, as the Senate refused its consent in January 1935.

By the beginning of 1936 the Revision Protocol had been ratified by all those signatories of the Protocol of 1920 which were also members of the League of Nations, with the exception of Brazil, Panama and Peru. The United States had already informed the Secretary-General of the League on June 25, 1930, that it would raise no objections to the coming into force of the amendments to the Statute between those nations which had ratified them. As Brazil, Panama and Peru had made similar declarations and indicated that ratification would shortly follow, the Assembly resolved that the revised text of the Statute should become effective on February 1, 1936 (Text: PCIJ D 1, *supra*, 13–28).

The revised Statute came into force shortly before the new Rules of Court (see section B.5 *infra*). Although both instruments were destined to be applied for only a short time, they acquired considerable significance as models for the Statute and the Rules of Court of the ICJ, in which the provisions of the 1936 Statute and Rules were adopted almost word for word. The following discussion of the organization, jurisdiction, applicable law and procedure of the PCIJ can therefore be limited to highlighting the divergences from the provisions applying to the ICJ.

4. Activities

The panel of judges, which was elected by the Assembly and Council of the League immediately after the Statute had become effective, met for the first time on January 30, 1922. The public inaugural meeting of the Court at its headquarters at the Hague took place on February 15, 1922. This was followed by a preliminary session which ended with the adoption of the Rules of Court. The first official session began on June 15, 1922.

At the beginning, the PCIJ acted mainly in its advisory capacity. The first requests for advisory opinions came from the Council of the League in May and June 1922, and these were followed in 1923 by five more. The first decision in a dispute came on August 17, 1923, when the Court gave its judgment in the → *Wimbledon* Case. Just as the arbitral award in the → *Alabama* Case is regarded as a milestone in the history of international arbitration, so is this case considered of major significance for the future work of the new international judicial body. In all, the Court delivered judgments in 21 contentious cases (see section G.I *infra*). Seven cases were ordered to be removed from the Court's list. The last case to be submitted to the Court, on June 17, 1939, was the Gerliczy dispute between Liechtenstein and Hungary. However, this remained unsettled as no written submissions were presented in response to an Order of October 18, 1939, fixing the time limits, and the inquiry addressed by the Court to the Government of Liechtenstein on November 3, 1945, remained unanswered. The Court gave 26 advisory opinions (see section G.2 *infra*). The request for an advisory opinion in the → Eastern Carelia Case in 1928 was rejected. In 11 judgments and 18 advisory opinions, the subject matter related to the provisions of the Paris Peace Treaties and other post-war settlements. In this respect the activities of the PCIJ differed considerably from those of its successor. The significance of the pronouncements of the PCIJ may be seen in the further development of rules of procedure, in its contributions in the field of treaty interpretation and in the establishment of recognized sources of international law; it also contributed indirectly towards the general development of international law. On account of the impartiality of its judgments and advisory opinions, the PCIJ acquired an authority which has so far not been matched by the ICJ. The reason for this is partly the equivocal content of some of the latter's decisions and partly the reluctance of States to acknowledge the binding effect of its pronouncements.

The last official function undertaken by the Court was the ordering, on February 26, 1940, of interim measures of protection in the → Electricity Company of Sofia Case; the oral proceedings could not take place on May 16, 1940, as fixed, as German troops had already invaded the Netherlands. In October 1945 the Court met again to settle administrative matters. The judges announced their resignation on January 30, 1946. The Permanent Court of International Justice was dissolved on April 18, 1946, by a resolution adopted by the Assembly of the League of Nations, which had met to wind up its own business. On the same day, the International Court of Justice was inaugurated. Although this was not the legal successor of the PCIJ, it inherited the jurisdiction of the latter and continued its work along the same legal lines.

B. Organization

1. Composition of the Court and Election of Judges

After the 1936 revision of its Statute, the PCIJ consisted of 15 judges (previously 11 judges and 4 deputy-judges), elected without regard to nationality, the sole limitation being that no more than one national of a State could sit on the bench. These provisions are repeated in the Statute of the ICJ (Arts. 2, 3, 6, 9). Ten seats on the bench were alloted to European countries, two each to Asiatic and South American countries and one to the United States, although this country had acceded neither to the Covenant of the League of Nations nor to the Statute of the Court. In 1930 the South American countries received a third seat, taken from those previously alloted to European nations. The judges were elected by the Assembly and the Council of the League of Nations in separate proceedings, in each case an absolute majority being necessary (Arts. 4, 5, 7, 8, 10, 11, 12). Art. 4 (3) of the Revised Statute extended the number of countries eligible to vote, mainly in order to include the United States, which previously had only been able to nominate candidates.

The judges were elected for nine years and could be re-elected. Vacancies occurring during a term of appointment were to be filled only for the remainder of that term (Arts. 13 to 15). The election of a third of the bench every three years, as adopted in the ICJ Statute in order to ensure continuity, had not yet been introduced. At the end of each nine-year period of office, new elections were held for all the seats of the PCIJ.

The first election of judges was in September 1921, and this was followed by a second general election on September 25, 1930. In the meantime there had been four special elections to fill vacancies. Although the Revised Statute was not yet in force, 15 full judges were elected in 1930; in accordance with Art. 3 of the still valid original version of the Statute, the Assembly and Council of the League also elected four deputy-judges, on the understanding that if the Revised Statute came into force they would cease to exercise their functions; this happened on February 1, 1936. Preparations were made for the general election due in 1939, but, because of the international situation, the Assembly decided to postpone it. In accordance with Art. 13 (3), it was decided that the present judges should continue to discharge their duties until a new election could be held. No such election ever took place.

2. Status of the Judges

The members of the Court were independent and, in principle, could not be dismissed; a judge could only be dismissed if, in the unanimous opinion of the other judges he had ceased to fulfill the required conditions (Art. 18). The judges enjoyed diplomatic privileges during their period of office (Art. 19). Concerning the declaration of impartiality and conscientiousness required of judges, and the list of functions and activities considered incompatible (only partially applicable to deputy-judges), similar provisions applied as those adopted in the Statute of the ICJ (Arts. 16, 17, 20, 24).

3. Structure of the Court

The various organs of the Court were its President and Vice-President, the full Court, Chambers, and the Registrar whose responsibility it was to supervise the Registry and fulfil those duties alloted to him in the Rules (Arts. 21, 25 to 29). The President – or in his absence the Vice-President – represented the Court in its external dealings and fulfilled those functions assigned to him in the Rules, as well as certain extra-judicial functions where provided for in international agreements. The full Court, which was responsible for delivering judgments and advisory opinions, was to consist of 11 judges, but a quorum of nine sufficed. Apart from judges *ad hoc*, the Court normally consisted of 11 or 12 judges and deputy-judges. In the second term of office, during which the revised version of Art. 3 was applied throughout (although at the beginning it had not yet been adopted), only full judges sat on the bench.

The intention was for special Chambers of five judges to be set up to deal with labour cases referred to in Part XIII of the Treaty of Versailles and the corresponding portions of the other peace treaties, and to handle cases concerning the law of transit and communications and other matters referred to in Part XII of the Treaty of Versailles and the relevant sections of the other peace trea-

ties, should the parties so demand. Four technical assessors were to be attached in an advisory capacity to each of these Chambers. In actual fact neither was set up. However, a Chamber of five (originally three) judges which had also been provided for was established which, at the request of the parties, could reach a speedy decision by summary procedure. This procedure was resorted to in only one case (the → Neuilly Treaty Case), both in the original judgment and the later interpretative judgment.

4. Judges ad hoc

In cases in which a judge of the nationality of only one of the parties belonged to the bench, the opposing party was entitled to nominate an additional judge (Art. 31). If neither of the parties had a judge of its nationality on the bench, both parties could appoint judges. This practice introduced an element of international arbitration into the quite differently constructed system of international adjudication.

The institution of the judge *ad hoc* was originally intended only for contentious cases but was later also adopted for advisory opinions concerning legal questions disputes by two or more countries. This was first provided for when the Statute was revised in 1929 by the inclusion of Art. 68 in Chapter IV. A corresponding provision was inserted in the Rules when they were amplified in 1926 and appeared as Art. 83 in the Rules of 1936. This specified that, when answering the request for an advisory opinion, the Court should observe the provisions for contentious proceedings which it considered applicable.

The States which were entitled to appoint judges *ad hoc* could select not only their own nationals but also persons of foreign nationality. The selection should theoretically have been made from among the persons with the qualifications necessary for a regular seat on the bench, but in practice little regard was paid to this limitation. During the activities of the PCIJ, one or two judges *ad hoc* participated in 19 of the 21 judgments and in seven advisory opinions. In the very first contentious case, the → Wimbledon, Schücking was appointed as a national judge (before his election to the bench as an ordinary judge). As regards advisory proceedings, judges *ad hoc* were first appointed in the case relating to the → Jurisdiction of the Courts of Danzig (1928).

5. Rules of Court

The drafting of the Rules of Court to supplement the Statute was left to the Court's own discretion. The original Rules were adopted on March 24, 1922. After a revision of 32 of the 75 articles, new Rules were promulgated on July 31, 1926. An addition was made on September 7, 1927, and on February 21, 1931, 18 articles of the 1926 version were amended. On May 12, 1931, the Court decided to undertake a general revision (including renumbering the articles) in order to adapt the Rules to the 1929 draft of the Revised Statute. This work took almost five years and resulted in the rewording of numerous provisions and the insertion of 11 new articles. The final version of the Rules was promulgated on March 11, 1936 – shortly after the entry into force of the Revised Statute (PCIJ D 1, *supra*, 31–61).

C. Jurisdiction

1. Categories of Jurisdiction

(a) In accordance with Art. 14, sentence 2, of the League of Nations Covenant, the general jurisdiction of the PCIJ extended to "all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force" (Art. 36, para. 1, of the Statute). Numerous such treaty provisions were contained in the → peace treaties after World War I and in the minorities treaties and the → mandates drawn up in conjunction with them. In the period between 1920 and 1945, a total of about 550 international agreements specified the jurisdiction of the Court (see the annual reports of the PCIJ, Series E). As there was no provision for universal compulsory jurisdiction, the Court's jurisdiction to settle a particular dispute could only be founded on a treaty provision, on an acceptance under the so-called optional clause by both parties or on a special agreement (→ *Compromis*). A special agreement was necessary even when an international agreement providing for judicial or arbitral settlement already existed. When an application was filed unilaterally, the Court could assume jurisdiction on the basis of a counterclaim, implicit consent (*forum prorogatum*) or upon the intervention of third States. It also had juris-

diction when one of the parties requested the interpretation or revision of a judgment. The Court was to give advisory opinions on "any dispute or question referred to it by the Council or by the Assembly" (Art. 14, sentence 3 of the Covenant of the League of Nations).

(b) According to several treaties signed before the entry into force of the Statute, especially Arts. 336 and 386 of the → Versailles Peace Treaty (1919), jurisdiction was to be conferred on an international tribunal to be instituted by the League of Nations. Art. 37 of the Statute clearly provided for the Court's jurisdiction in such cases. This provision proved to be significant as early as the → ***Wimbledon*** Case and was later extended to cover treaty provisions which merely specified that disputes should be "settled as provided by the League of Nations" (e.g. Art. 376 of the Versailles Treaty).

(c) The concurrent jurisdiction of the PCIJ with that of international arbitration tribunals or other institutions for the peaceful settlement of disputes was relatively frequent. This can be explained by the fact that, for the signatory States, the provisions of the League of Nations Covenant and the Court's Statute had in principle no precedence over other agreements on the peaceful settlement of disputes.

(d) Appellate jurisdiction was discussed only briefly by the 1929 Committee of Jurists, but on September 25, 1929, it was made the subject of a request submitted by the Assembly to the Council of the League of Nations. The Council was to consider whether the PCIJ could assume "the functions of a tribunal of appeal from international tribunals in all cases where it is contended that the arbitral tribunal was without jurisdiction or exceeded its jurisdiction". A special committee set up by the Council came to the conclusion that the Assembly could recommend its members to insert a provision to this effect in arbitration treaties or in bilateral or multilateral special agreements; it could also draw up a protocol which would be open to the members for signature. The Assembly delayed consideration of this proposal as the time was not yet ripe for its discussion. However, in the second and third of the four Agreements, signed on April 28, 1930, concerning the settlement of questions arising from the → Trianon Peace Treaty (1920), Czechoslovakia, Yugoslavia, Romania and Hungary agreed to accept the jurisdiction of the PCIJ as a court of appeal from judgments of the → Mixed Arbitral Tribunals. On the basis of this provision, Czechoslovakia appealed in 1932 and 1933 against several judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal. The appeals against three of the judgments were subsequently withdrawn, and in the fourth case the Court rejected the claim (→ Appeals from Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Cases)). In 1935 the Court declined to consider a Hungarian appeal from a decision of the Mixed Arbitral Tribunal in favour of Yugoslavia in the → Pajzs, Csáky, Esterházy Case, as the conditions for appealing under Art. X of Agreement III of 1930 were not fulfilled. As early as December 9, 1923, when the Statutes on the International Régime of Railways and the International Régime of Maritime Ports were adopted, Art. 36 of the former and Art. 22 of the latter referred to the PCIJ any legal questions raised in cases, mainly of a technical nature, being heard before international arbitral tribunals. In view of these developments and the possibility of establishing the jurisdiction of the PCIJ *ad hoc* as an appeal court, provision for the treatment of "appeals to the Court" was included in the Rules of 1936 (Art. 67).

(e) The jurisdiction to make extra-judicial decisions was often, by mutual agreement between States, bestowed on the Court or its President and included in the provisions of international agreements concluded after the establishment of the Court. The extra-judicial activities related in most cases to the nomination of arbitrators or umpires in international tribunals or the members of mixed commissions (see the annual reports of the PCIJ, Series E).

2. Access to the Court

(a) Unlike the Statute of the ICJ, the PCIJ's Statute did not clearly limit access to the Court to States. According to Art. 34, "only States or members of the League of Nations" could be parties before the Court. In view of Art. 1 (2) of the League of Nations Covenant, according to which self-governing dominions and colonies could also become members of the League, it is conceivable that non-State communities could

have appeared before the Court. The dominions (→ British Commonwealth) which were members from the beginning were, as signatories of the → Peace Treaties after World War I, treated as States and thus as subjects of international law. Access to the Court was therefore, in practice, also limited to States as far as "Members of the League of Nations" were concerned. Art. 34 had a limiting effect in that it excluded private persons from being parties before the Court. The consultative role of international organizations – later introduced into Art. 34 (2, 3) of the Statute of the ICJ – was not provided for in the PCIJ's Statute. Only for advisory activities was there a deviation from the principle that States alone could be parties before the Court. According to Art. 14 of the Covenant of the League, the Council and the Assembly could submit requests for advisory opinions. This right was not extended to individual States, even when they were members of the League of Nations.

(b) According to Art. 35, para. 1, the Court was open to the members of the League and also to States mentioned in the Annex to the Covenant. Members of the League could therefore be parties regardless of whether they had signed the Protocol of 1920. The States listed in the Annex to the Covenant had access to the Court irrespective of whether or not they were League members. The United States could also appear before the Court although it was neither a member of the League nor had it ratified the Protocol of 1920.

(c) The conditions under which States other than the countries referred to in Art. 35, para. 1, could be admitted were to be determined by the Council of the League (Art. 35, para. 2; the corresponding article of the Statute of the ICJ gives this authority to the → United Nations Security Council). Such a State could not, however, become a party to the Statute; it therefore had fewer rights than a non-member of the United Nations now has, which according to Art. 93 of the Charter can become a party to the Statute of the ICJ if the General Assembly, upon the recommendation of the Security Council, so decides. The Council of the League of Nations fulfilled its obligation to determine "the conditions under which the Court shall be open to other States" by its Resolution of May 17, 1922. According to this ruling, a State had to have previously deposited with the Registrar of the Court a declaration by which it accepted the jurisdiction of the Court in accordance with the Covenant of the League of Nations and the Statute of the Court; it had to undertake to carry out "in full good faith" the decisions of the Court. The declaration could relate to a particular dispute (for example, the declaration made by Turkey in the → *Lotus* case before it became a member of the League) or to all or certain types of disputes which might arise in the future. The declaration could also include acceptance of the Court's compulsory jurisdiction. The Court determined the amount which such States should contribute to its expenses. No special admission procedure was necessary if provisions of treaties in force specified the jurisdiction of the Court with effect on other States. Thus, on the basis of Art. 386 of the Treaty of Versailles, Germany was admitted as a party in the → *Wimbledon* Case and had its application accepted in the → German Interests in Upper Silesia case before becoming a member of the League, although it had made no declaration according to the Council Resolution of May 17, 1922.

3. Justiciable Disputes

The broader terminology of Art. 36, para. 1, of the Statute ("cases") as compared with Art. 14, sentence 2, of the League Covenant ("disputes") enabled States to refer all questions of an international nature to the Court. States could decide themselves whether they considered a matter justiciable or whether they preferred, because of its political content, a decision based on reasons of equity within the framework of international arbitration.

4. Compulsory Jurisdiction

As no agreement regarding universal compulsory jurisdiction could be reached within the League of Nations, it was provided in the Statute that the participating States and the other States to which the Court was open could, in relation to any other States accepting the same obligation, declare that they recognized the jurisdiction of the Court as compulsory for all or certain classes of disputes (Art. 36, para. 2 the optional clause). According to Art. 36, para. 3, such declarations could be made "unconditionally or on condition

of reciprocity, on the part of several or certain Members or States, or for a certain time". In practice, other conditions were also made. In some cases the declarations still consitute a recognition of the compulsory jurisdiction of the ICJ (under Art. 36 (5), ICJ Statute). All of the States which adhered to the Statute signed the optional clause at some time or other, but some never ratified. Some States submitted unconditionally to the compulsory jurisdiction of the Court, some with reservations (see annual reports of the PCIJ, Series E).

5. Determination of Jurisdiction

Whereas arbitral tribunals are bound by the *compromis* settled by the parties or the terms of an arbitration agreement, and cannot refuse to settle a dispute, if necessary according to equity, the PCIJ had to examine its own jurisdiction *ex officio*. It had, for instance, to investigate the party's right of access to the Court, as well as the question of *res judicata* and of *lis pendens*. The application had to be rejected if the Court lacked jurisdiction.

D. The Law Applicable

The PCIJ was bound to apply rules derived from the same sources of international law as those which still govern the decisions of the ICJ (Art. 38 (1) of both Statutes). As the legal questions arising from the application of these rules have been treated in a similar fashion in the practice of both World Courts and in writings on the subject, the corresponding section of the article on the → International Court of Justice should be consulted. The decisions of the PCIJ were governed by the principle that disputes submitted to it could be settled by the application of international law.

E. Procedure (see also → Procedure of International Courts and Tribunals)

1. Institution of Proceedings

(a) Proceedings were instituted by the filing of a "special agreement", except when special circumstances allowed for a unilateral application. The Registrar had the duty to communicate the content of the special agreement or the unilateral application to all concerned, and to notify, through the Secretary-General, the members of the League of Nations and any other States entitled to appear before the Court.

(b) In the case of a unilateral application, the dispute only became *sub judice* if the other party had accepted the same obligation to recognize the Court's compulsory jurisdiction. It also became pending if the other party filed a counter-claim on the subject of the dispute, or gave its consent explicity, implicity, or on the basis of an earlier commitment. Proceedings based on unilateral applications occurred more frequently in the practice of the PCIJ than they have in that of the ICJ to date.

2. Intervention by Third Parties

Other States were entitled to intervene in the proceedings if their own legal interests were affected (Art. 62), or if the dispute concerned the interpretation of a convention to which they were also parties (Art. 63). In the latter case, the intervening party required no special permission, but in the former the Court had to decide on the request to intervene. In the cases considered by the Court no State intervened under Art. 62, and the only occasion on which advantage was taken of the second possibility was when Poland intervened in the → *Wimbledon* Case as a joint signatory of the Treaty of Versailles.

3. Structure and Phases of Proceedings

(a) The basic rules of procedure were laid out in Chapter III of the Statute and, according to Art. 30, were to be supplemented by detailed rules drawn up by the Court itself. These appeared as Chapter II of the 1922 Rules. In order to meet the requirements which arose in practice, they were amended and added to on several occasions, and in the last general revision were rearranged in a new systematic order (see section B.5 *supra*). The provisions relating to proceedings in plenary session and in chambers and those concerning the interpretation or revision of judgments could be modified in individual cases by the Court's decision following joint proposals by the parties. This was only possible if the remaining provisions of the Statute were observed (→ Free Zones of Upper Savoy and Gex Case). The rules concerning the official languages were taken over unchanged by the ICJ. The conduct of

individual cases was determined by the Court by means of orders. Proceedings consisted of a written and an oral phase (Art. 43, para. 1), which were preceded by any decisions on preliminary objections or interim measures of protection.

(b) Procedural orders fixed the form of the submissions and the time allowed to the parties for submitting their written arguments and final claims, and all the arrangements connected with the taking of evidence (Art. 48). It was also by means of orders that cases were struck from the list when applications were withdrawn.

(c) Decisions concerning objections aimed at preventing or postponing proceedings (→ Preliminary Objections) were, by contrast, delivered as judgments, or the objections were joined to the merits.

(d) By means of an order indicating → interim measures of protection (provisional measures), the Court could protect the rights of parties for the duration of the proceedings, either at the request of one of the parties or on its own initiative (Art. 41). These measures were of less practical significance than they have proved to be in the practice of the ICJ. The PCIJ complied with only one of the six requests received for the indication of interim measures. In an order dated January 8, 1927, it complied with a request from Belgium in the case concerning the denunciation of the Sino-Belgian Treaty of 1865, a case which was later struck from the list when the claims were withdrawn.

(e) In the written phase of the proceedings, the documents to be presented were – whether the proceedings had been instituted by special agreement or by unilateral application – a memorial, a counter-memorial and, if necessary, a reply. In the case of unilateral applications, these were followed by a rejoinder from the respondent. (Art. 43 of the Statute in conjunction with Art. 41 of the 1936 Rules.) If documents were not submitted or explanations were not supplied, the Court had to take formal note of the refusal (Art. 49); it could then consider any assertion which had not been refuted by the other party as proved. The Court was not limited to a consideration of the evidence presented by the parties, but could also, at any time, entrust any individual, commission or international agency of its own choice "with the task of carrying out an enquiry or giving an expert opinion" (Art. 50). The parties were represented by agents; communications intended for the parties were addressed to the agents, while notices served on other persons were sent to the government of the State upon whose territory the notice was to be served (Arts. 42, 44).

(f) The oral proceedings consisted of the arguments brought by the parties, the hearing of witnesses and experts, and the examination of the evidence. The presentation of a party's case was basically the responsibility of the agent, but his arguments could be supplemented by his government or by counsel or advocates appointed to appear with him. The oral proceedings, the minutes of which had to be signed by the Registrar, were public, unless the Court decided otherwise or both parties demanded that the public should not be admitted (Arts. 42, para. 2, 43, para. 5, 45 to 47, 51, 52). The Court was free to estimate the value of the evidence. If one of the parties failed to appear, or did not defend his case, the other party could – in contrast to arbitration proceedings – request the Court to decide in favour of his claim. The Court had then to examine the factual and legal accuracy of the claim and deliver a judgment in default (Art. 53).

4. Judgments

(a) When all the relevant material had been presented and the hearing declared closed, the Court met in secret session to consider and formulate its judgment (→ Judgments of International Courts and Tribunals). Decisions were reached by a majority vote; if there was a parity of votes, the President had a casting vote. The practice which the Court developed in its early years was embodied in a resolution adopted by the Court on February 20, 1931; on the basis of later experience, it was revised on March 17, 1936 (Resolution regarding the Court's Judicial Practice; text: PCIJ D 1, *supra*, 62–63). In order to retain flexibility, reference to questions concerning the Court's judicial practice was not included in the Rules of 1936. In the form specified in the 1936 Resolution it continues to be followed, with some amendments, by the ICJ. According to this Resolution, preliminary discussions under the direction of the President were followed by the written formulation, without commitment, of the

views of the individual judges. These notes were distributed among all the judges and evaluated by the President in a plan of discussion before the next phase of deliberations when each point was discussed and put to the vote. A drafting committee consisting of the President and two other judges then had to prepare a summary of the findings. After the judges had been given the opportunity to propose amendments, a draft decision was submitted and, after two readings, adopted at a final session. The judgment had to state the reasons on which it was based, contain the names of the participating judges, and fulfill certain other requirements. Unless otherwise decided, each party had to bear its own costs (Art. 64). The judgment was signed by the President and the Registrar and read in open Court (Art. 58); it took effect on that day rather than on the date of its delivery to the parties. The Registrar had the duty of sending original versions of the judgment text to the agents of each party and copies to members of the League of Nations and States entitled to appear before the Court.

(b) Provision was made for one or more individual opinions of dissenting judges in the event that the judgment did not wholly or in part represent the unanimous opinion of the Court (Art. 57). This institution was further refined by the Court in that differences of opinion as to the reasoning could be presented in a "separate opinion" whereas disagreement with the holding in the judgment was expressed in a "dissenting opinion". Within these two categories, joint opinions, although originally considered to be incompatible with the Statute, were accepted. Because of their learned content, many of the individual opinions have been accorded special respect. This applies particularly to the dissenting views of Anzilotti/Huber and Schücking in the → *Wimbledon* Case and those of the six judges in the → *Lotus* Case, on which occasion the President had to cast the deciding vote.

(c) The binding force of the judgment was limited to the disputing parties (except when third parties intervened) and related only to that particular case (Art. 60, sentence 1). Under certain circumstances revision could be requested.

(d) The execution of a judgment did not fall within the Court's competence. The Court's Statute – like that of the ICJ – contained no provisions on the basis of which it could supervise compliance with its decisions or take measures should one of the parties fail to fulfil the obligations imposed by the judgment within the time allotted. Apart from the few which were superseded by events, the judgments of the PCIJ were all respected by the parties concerned. In some cases this did not happen within the time appointed (for example, Germany's payment of damages in the → *Wimbledon* Case was delayed for reasons beyond its control), or the awards were modified by agreement between the parties (for example, to achieve an economically more appropriate solution in the → Free Zones of Upper Savoy and Gex Case). An assurance that the Court's decisions would be complied with was contained in Art. 13 (4) of the Covenant of the League of Nations, according to which the members of the League undertook to carry out any judicial decision "in full good faith". The same legal situation applied for the other States with access to the Court by reason of their declarations deposited with the Registrar in accordance with the Council's Resolution of May 17, 1922. Whereas the League's power to intervene was only vaguely defined, and in view of the wording of Art. 16 of the Covenant somewhat disputable, other international instruments provided more definite provisions for sanctions. For example, according to Art. 419 of the → Versailles Peace Treaty (1919), a member of the → International Labour Organisation could take economic measures against another member who had failed to execute a judicial decision in the field of international labour law. Such measures had to be declared appropriate by the PCIJ, which was in this way made indirectly responsible for the execution of its judgments.

(e) Requests for the interpretation of a judgment could be made by either party unilaterally or by a special agreement in the event of a dispute as to its meaning or scope (Art. 60, sentence 2, in conjunction with Art. 79 of the 1936 Rules). The Court did not consider itself bound by the wording of the request, but free to use its own discretion (as it did in the → German Interests in Polish Upper Silesia Cases). The interpretation, which was delivered in the form of a judgment, could not go beyond the limits of the original judgment (see the comments in the above-men-

tioned decision). In addition to its interpretation of the two judgments concerning German Interests in Polish Upper Silesia, the Court delivered an interpretation judgment by summary procedure in the Neuilly Treaty Case.

(f) The revision of a judgment (Art. 61) was allowed only if a decisively important fact were discovered which was unknown when the judgment was given, and provided that the party requesting revision had not been guilty of negligence. The application for revision had to be filed no later than six months after the discovery of the new fact and within ten years from the date of the original judgment. After a formal examination of the admissibility of the application, the Court was to deliver a judgment. In practice, the Court was never called upon to deal with any requests for revision of its own judgments.

F. Advisory Opinions

Although the PCIJ – unlike the ICJ within the framework of the United Nations – was not an organ of the League of Nations, it was empowered under Art. 14, sentence 3 of the League's Covenant to give advisory opinions upon questions referred to it by the Council or the Assembly.

In the revised version of the Court's Statute which came into force in 1936, Chapter IV contained, for the first time, special provisions for advisory proceedings. These provisions came into force only after the last advisory opinion had been given. They provided that a request for an advisory opinion could be brought before the Court by the President of the Council of the League or by the Secretary-General of the League under instruction from the Assembly or the Council. In practice, all the requests were based on Council resolutions and were transmitted to the Court through the Secretary-General on behalf of the President of the Council. The initiative for requesting an advisory opinion was sometimes taken by the Council of the League itself, but in the majority of cases it resulted from an approach made to the Council by a member of the League not represented in the Council or by an international organization; sometimes the Council decided against passing on the request to the Court. One question which was never clarified (and a decisive one as regards the United States' accession to the Court's Statute) was whether a resolution calling for the request of an advisory opinion had to be adopted unanimously or whether – in view of the fact that advisory opinions had no binding force – it was to be considered as a matter of procedure and thus falling within the scope of Art. 5 of the Covenant, according to which acceptance by a majority of the members present was sufficient. Apart from a few exceptions, the Council resolutions were adopted unanimously. After long discussions, the solution of this problem was entrusted, by means of a Council resolution dated January 26, 1937, to a special committee set up by the Assembly to study the application of the principles of the Covenant. The committee, however, did not discuss the problem (PCIJ E 16, pp. 63–64).

According to Art. 14, sentence 3, of the Covenant, a request for an advisory opinion could concern "any dispute or question". A different formulation ("any legal question") is used in Art. 96 of the Charter of the United Nations and in Art. 65 of the Statute of the ICJ. A further condition was that the matter should come within the competence of both the League organ requesting the advisory opinion and the PCIJ. In accordance with the rules established for the Court's competence in contentious cases, it therefore had to be a question which could be decided according to international law. Whether it had to be of practical significance and have led to an actual dispute, or whether it could relate to a purely hypothetical point of international law, remained an unresolved question. All the requests made for advisory opinions concerned disputed legal questions the answer to which were of immediate practical importance. It was not considered admissible for the Court to give an advisory opinion concerning a specific dispute which could be settled with the consent of the parties in contentious proceedings. This principle was established when an advisory opinion was requested in the → Eastern Carelia Case. The rejection of this request answered affirmatively the disputed question as to whether the Court was empowered to decide its own competence to give advisory opinions.

In the exercise of its advisory function, the Court was to be guided by the corresponding provisions to be applied in contentious cases (Art.

68 of the Revised Statute). Art. 66 specified that the Registrar should give notice of the request for an advisory opinion to the members of the League of Nations, through the Secretary-General of the League, and to other States entitled to appear before the Court. He was also responsible for inviting these States and international organizations to furnish information relevant to the subject matter of the advisory opinion. In practice, advantage was frequently taken of this opportunity, and written statements were supplemented by oral statements made at the hearings which, as in contentious cases, formed part of the proceedings. Unlike the procedure followed in contentious cases, advisory procedure allowed only for hearings before the full Court. As in contentious proceedings, judges *ad hoc* could be appointed as the need arose, and dissenting and separate opinions were admitted. The advisory opinions were delivered in open Court in a session to which those States and international organizations which were immediately concerned were invited.

Apart from the 26 advisory opinions delivered between July 1922 and December 1935, two further requests for advisory opinions were submitted: the request in the Eastern Carelia case was rejected; the request dated March 28, 1925, for an opinion in the matter of the Greco-Turkish dispute concerning the expulsion of the Ecumenical Patriarch was withdrawn by the Council through a resolution dated June 12, 1925.

The advisory activities of the PCIJ are significant for their contribution to the application of international law and the development of international judicial procedure. Even though subsequent political developments deprived a number of opinions of their practical value their reasoning is still accorded respect in current international law.

G. Activities of the Court 1922–1939

1. Judgments

	Judgment of	Publication No.
→ The *Wimbledon*	28. 6.1923	A 1
	17. 8.1923	A 1
→ Mavrommatis Concessions Cases	30. 8.1924	A 2
	26. 3.1925	A 5
	10.10.1927	A 11
→ Neuilly, Treaty of, Case	12. 9.1924	A 3
	26. 3.1925	A 4
→ German Interests in Polish Upper Silesia Cases	25. 8.1925	A 6
	25. 5.1926	A 7
	26. 7.1927	A 9
	16.12.1927	A 13
	13. 9.1928	A 17
→ The *Lotus*	7. 9.1927	A 10
→ Minorities in Upper Silesia Case	26. 4.1928	A 15
→ Serbia Loans Case	12. 7.1929	A 20
→ Brazilian Loans Case	12. 7.1929	A 21
→ Jurisdiction of the International Commission of the Oder Case	10. 9.1929	A 23
→ Free Zones of Upper Savoy and Gex Case	7. 6.1932	A/B 46
→ Interpretation of Memel Territory Statute Case	24. 6.1932	A/B 47
	11. 8.1932	A/B 49
→ Eastern Greenland Case	5. 4.1933	A/B 53
→ Appeals from Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal – Peter Pázmány University Case	11.12.1933	A/B 61
→ Lighthouses Cases (France v. Greece)	17. 3.1934	A/B 62
	8.10.1937	A/B 71
→ Chinn Case	12.12.1934	A/B 63
→ Pajzs, Csáky, Esterházy Case	16.12.1936	A/B 68
→ Meuse, Diversion of Water, Case	28. 6.1937	A/B 70
→ Borchgrave Case	6.11.1937	A/B 72
→ Phosphates in Morocco Case	14. 6.1938	A/B 74
→ Panevezys-Saldutiskis Railway Case	23. 9.1939	A/B 75
→ Electricity Company of Sofia Case	4. 4.1939	A/B 77
→ Société Commerciale de Belgique Case	15. 6.1939	A/B 78

2. Advisory Opinions

	Opinion of	Publication No.
→ Designation of Worker's Delegate at ILO Conference	31. 7.1922	B 1
→ Competence of ILO concerning Persons Employed in Agriculture	12. 8.1922	B 2

	Opinion of	Publication No.
→ Competence of ILO concerning Methods of Agricultural Production	12. 8.1922	B 3
→ Nationality Decrees in Tunis and Morocco	7. 2.1923	B 4
→ Eastern Carelia Case	23. 7.1923	B 5
→ German Settlers in Poland	10. 9.1923	B 6
→ Acquisition of Polish Nationality	15. 9.1923	B 7
→ Jaworzina	6.12.1923	B 8
→ Monastery of Saint-Naoum	4. 9.1924	B 9
→ Exchange of Greek and Turkish Populations	21. 2.1925	B 10
→ Polish Postal Service in Danzig	16. 5.1925	B 11
→ Interpretation of Treaty of Lausanne	21.11.1925	B 12
→ Competence of ILO concerning Personal Work of the Employer	23. 7.1926	B 13
→ Jurisdiction of the European Commission of the Danube	8.12.1927	B 14
→ Jurisdiction of the Courts of Danzig	3. 3.1928	B 15
→ Interpretation of Greco-Turkish Agreement of 1926	28. 8.1928	B 16
→ Greco-Bulgarian "Communities"	31. 7.1930	B 17
→ Danzig and ILO	26. 8.1930	B 18
→ German Minority Schools in Upper Silesia	15. 5.1931	A/B 40
→ Customs Régime between Germany and Austria	5. 9.1931	A/B 41
→ Railway Traffic between Lithuania and Poland	15.10.1931	A/B 42
→ Polish War Vessels in the Port of Danzig	11.12.1931	A/B 43
→ Polish Nationals in Danzig	4. 2.1932	A/B 44
→ Interpretation of Greco-Bulgarian Agreement of 1927	8. 3.1932	A/B 45
→ Interpretation of Convention concerning Employment of Women during the Night	15.11.1932	A/B 50
→ Minority Schools in Albania	6. 4.1935	A/B 64
→ Danzig Legislative Decrees	4.12.1935	A/B 65

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PRELIMINARY OBJECTIONS

1. Nature

The preliminary objection is a procedural device developed in the practice of international ligitation which owes its form to the particular nature of international judicial settlement, and does not therefore correspond precisely to any parallel in municipal legal systems (cf. → German Interests in Polish Upper Silesia Cases, PCIJ A 6, p. 9). Developed essentially in the practice of the PCIJ and ICJ, it also exists in the procedure of the → Court of Justice of the European Communities (Rules, Arts. 91 and 92), the → European Court of Human Rights (Rule 46) and some standing arbitration bodies; its use in *ad hoc* arbitrations is less appropriate, but not unknown. The ingenuity of pleaders has caused it to take a number of very different forms, so that it is difficult to define it other than by its effects: the PCIJ referred in the → Panevezys-Saldutiskis Railway Case to "any objection of which the effect will be, if the objection is upheld, to interrupt further proceedings in the case, and which it will therefore be appropriate for the Court to deal with before enquiring into the merits" (PCIJ A/B 76, p. 16). The term "preliminary objections" has not only been used in the literature to describe issues relating to proceedings before international courts but also to characterize certain questions on the jurisdiction of the political organs of the United Nations (cf. D. Ciobanu, Preliminary Objections related to the Jurisdiction of the United Nations Political Organs (1975)). This article is confined to the more common usage, i.e. preliminary objections before international courts and tribunals.

Essentially, a preliminary objection consists in the contention by a State party to international proceedings (normally in the position of defendant) that a certain preliminary question, distinct from the merits of the claim, should be examined and resolved by the tribunal first of all, inasmuch as a decision upholding the preliminary objection would make it impossible, or unnecessary, to deal with the merits of the claim. As the ICJ observed in the → Barcelona Traction Case, "the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits" (ICJ Reports 1964, p. 44).

For this reason, the characteristic example of a

preliminary objection is an objection to jurisdiction: a jurisdictional issue must be dealt with as a preliminary point since a State is entitled to decline to permit its conduct to be scrutinized by a tribunal unless it has conferred jurisdiction on that tribunal. Preliminary objections are however not limited to jurisdictional questions (see the Panevezys-Saldutiskis Railway Case, *supra*): the 1978 Rules of the ICJ refer, under the heading "Preliminary Objections", to "any objection by the respondent to the jurisdiction of the Court or to the admissibility of the Application, or other objection the decision upon which is requested before any further proceedings on the merits". In the view of Judge Morelli, a question can be raised by way of preliminary objection "only if a decision on that question is logically necessary before proceeding with the consideration of other questions" (ICJ Reports 1964, p. 98), but it is suggested that this may be too narrow a criterion.

It is for the State concerned to decide whether to raise a question of jurisdiction or admissibility by way of preliminary objection; such a question may, however, simply be raised in the course of a pleading and will not normally be treated as a preliminary issue unless the party raising it specifically so requests.

2. *History*

The earliest use of the expression "preliminary objection" seems to have been by the British Government in the Mavrommatis Jerusalem Concessions Case (PCIJ C5, Vol. 1, p. 478). At this time, the Rules of Court contained no provision for objections though the question had been discussed in the abstract at the time that the Rules were drafted. The procedure adopted in the Mavrommatis Case set the pattern for subsequent treatment of preliminary objections: a written reply to the objection was called for from the applicant government, and the Court then held oral proceedings limited to the objection, deliberated and gave judgment on that issue. The jurisdictional objection having been dismissed, the proceedings on the merits were then resumed. A similar procedure was followed in the German Interests in Polish Upper Silesia Case.

In 1926, in the course of revision of its Rules, the Permanent Court added an article to make provision for the procedure to be followed in the filing of a preliminary objection (cf. 1926 Rules, Art. 38; 1936 Rules, Art. 62). It subsequently had to devise a procedure to deal with preliminary objections which it was not in a position either to uphold or wholly to reject. In the → Pajzs, Csáky, Esterházy Case the Court found itself unable to decide on the objections without going into the merits, the proceedings on which would "place the Court in a better position to adjudicate with the full knowledge of the facts upon the . . . objection". The decision of the Court was thus to join the objections to the merits, the effect being, as the Court specifically stated, that "the Court will give its decision upon them and, if need be, upon the merits in one and the same judgment". Express provision for the Court's adopting this course was made in the 1936 revised Rules (Art. 62 (5)). In the → Electricity Company of Sofia Case, the court found that an objection, though possibly well-founded, was not "preliminary in character", and therefore rejected it with the proviso that "the Parties remain free to take it up again in support of their case on the merits" (PCIJ A/B 77, p. 83).

When the Rules of the ICJ were prepared in 1946, the 1936 provisions on the subject of preliminary objections were taken over without substantial change, and thus, until the 1972 Rules revision, the courses open to the Court remained the same: acceptance of the objection; rejection of the objection; joinder to the merits; or dismissal of the objection as an objection, without prejudice to a defence on the merits on the same ground, a course not provided for in the Rules. Art. 67 of the 1972 Rules, re-enacted without change as Art. 79 of the 1978 Rules, however, provides that the Court, by its judgment on the preliminary objection, "shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". The alternative of joinder to the merits has therefore apparently been abolished in favour of the option of declaring that the objection does not possess an exclusively preliminary character; it has however been suggested that such abolition is purely formal, in that the latter option will in fact prove to be a joinder to the merits in all but name. The Court has not yet found it necessary to exercise this option, and the circumstances in which it will

do so, and the precise effect of such a declaration cannot therefore at present be ascertained.

3. *Classification*

Despite the variety of preliminary objections, some general categories may be identified. A basic distinction, which however is of less practical importance than might appear, is that between objections to jurisdiction and objections to admissibility; in some cases, the allocation of an objection to the one category or the other may depend less on the nature of the objection itself than on the terms of the instrument conferring jurisdiction, and a single objection may in fact partake of both natures. It is an unsettled question whether a court faced in a given case with objections to its jurisdiction and to the admissibility of the claim is obliged to deal with one category in priority, and if so, which.

A further distinction may be made between objections which, if upheld, terminate the proceedings without possibility of revival, and those which relate to procedural defects which may be cured by some action of the plaintiff State. An objection as to non-exhaustion of local remedies may sometimes fall into this latter class (cf. also the US objection as to the identity of the applicant in the → United States Nationals in Morocco Case).

By way of examples of objections in practice, the following types may be noted (all have been raised before the ICJ, though not always as preliminary objections (cf. below, section 5), and on some no decision was given by the Court in the case mentioned):

Objections to jurisdiction have been taken on the ground that the instrument conferring jurisdiction is no longer in force (→ Temple of Preah Vihear Case; → Nottebohm Case; → Fisheries Jurisdiction Cases; → Nuclear Tests Cases), or that it does not apply *ratione temporis* to the dispute before the Court (→ Norwegian Loans Case; Aerial Incident of 10 March 1953 Case (→ Aerial Incident Cases); → Right of Passage over Indian Territory Case; → Barcelona Traction Case), or that the dispute is excluded from its ambit by virtue of a reservation thereto (Nuclear Tests Cases; → Aegean Sea Continental Shelf Case), particularly a reservation as to matters of domestic jurisdiction (→ Interhandel Case; Norwegian Loans Case; → Connally Reservation). A special category of jurisdictional objections is that connected with the substitution of the ICJ for the PCIJ (Aerial Incident of 10 March 1953 Case; Barcelona Traction Case).

Generally regarded as objections to admissibility are those relating to nationality of claims (Nottebohm Case; Barcelona Traction Case; Aerial Incident of 10 March 1953 Case; cf. the question of *jus standi*, raised in the South West Africa Cases (→ South-West Africa/Namibia (Advisory Opinions and Judgments)), and see → Standing before International Courts and Tribunals), and those relating to non-exhaustion of → local remedies (Aerial Incident of 10 March 1953 Case; Interhandel Case; Norwegian Loans Case; Barcelona Traction Case). Also in this category probably is an objection that the proper defendant is some other, non-State, entity; see Norwegian Loans Case.

An objection which may be an objection to jurisdiction or admissibility is that based on the assertion that there is no "dispute", by reason of the absence of negotiation between the parties or otherwise (Right of Passage over Indian Territory Case; → Northern Cameroons Case; cf. also Nuclear Tests Cases).

It will be apparent from the frequency with which certain case-titles appear in the enumeration above that there is a marked tendency for a State which files one objection to couple it with as many others as it can find.

4. *Special Cases*

From the nature of the preliminary objection procedure it follows that the right to file an objection is normally exercised by a State in the position of respondent, and also that objections to jurisdiction at least are normally filed only in cases begun by unilateral application. Nevertheless, exceptional cases of preliminary objections filed by the applicant party and preliminary objections filed in cases begun by special agreement have both occurred in practice.

In the → Borchgrave Case before the PCIJ, which was instituted by special agreement, the respondent party, Spain, disputed the jurisdiction of the Court in respect of some of the submissions contained in the Memorial, and filed a preliminary objection to that effect. In the Monetary

Gold Case in 1954 the State which had filed the application seising the Court, namely Italy, submitted a document entitled "Preliminary Question" in which it challenged the Court's jurisdiction to deal with the merits of the claim. (For the reason for this apparently inconsistent attitude, see → Monetary Gold Case.) In both these cases, the Court found that the procedure was regular and not in breach of the Statute or Rules. The current Rules (1978 revision) specifically provide for the possibility of an objection being made by "a party other than the respondent".

5. Present Situation

Current trends in the behaviour of parties before the Court and in the Court's own conduct of its proceedings suggest that the preliminary objection procedure may in practice be falling into desuetude. In virtually all contentious cases since 1973, the party named as respondent has disputed the jurisdiction of the Court, and sometimes also the admissibility of the application; but instead of filing a preliminary objection it has chosen to adopt an attitude of non-participation in the proceedings, while making sure that its contentions were made known to the Court by way of informal communication. Faced with this reaction, it would have been open to the Court to proceed as it did in the → Nottebohm Case, namely to treat such communication from the respondent State as a preliminary objection presented in an irregular form, and to deal with it accordingly.

The Court has, however, devised a novel procedure to deal with this situation, one which has not been provided for in the Rules of Court despite the opportunity afforded by the 1978 revision. On receipt of such an informal objection, the Court has suspended the proceedings on the merits and invited the parties to argue the preliminary issue, but it has done so as though it were raising a jurisdictional question *proprio motu*; and the subject of the interlocutory proceedings has been defined only in very broad terms (which caused the applicants some difficulty in the → Nuclear Tests Cases: see ICJ Pleadings, Vol. 1, pp. 472 and 514). The relevant order of the Court normally recites the attitude of the recalcitrant party and states further that in the circumstances "it is necessary to resolve first of all the question of the Court's jurisdiction". Although initially criticized by members of the Court (see dissenting opinions of Judges Benzon and Jiménez de Aréchaga in → Fisheries Jurisdiction Cases, ICJ Reports 1972, pp. 184 and 191), this practice seems to have become regularly established (but not followed in → United States Diplomatic and Consular Staff in Tehran Case).

Such a procedure is, however, not without its difficulties. It is clearly easier for the applicant party to argue in answer to a specific objection to jurisdiction than to argue the question of jurisdiction at large; and since there is no *petitum* before the Court emanating from the respondent party, there might be doubt as to the exact extent of the effect as *res judicata* of the Court's decision as to its jurisdiction, given in such proceedings. In the → Aegean Sea Continental Shelf Case a more specialized difficulty presented itself: namely, in a situation where a multilateral treaty constituted the basis for jurisdiction and provided that a reservation made by the party in the position of applicant might be "enforced" by any other party to the treaty, whether a party which was not appearing before the Court and had not filed any formal pleading raising the point, could be regarded as having "enforced" the reservation.

It would not, however, be correct to suppose that the tendency of respondent States to boycott the Court implies that the preliminary objection procedure has been tried and found wanting, on the legal level at least, whatever may be the political considerations relevant in a particular case. There is undoubtedly an impression current that to take any part in proceedings before the ICJ is to recognize its jurisdiction; but the instances of preliminary objections which have been upheld in the past clearly indicate that the only jurisdiction submitted to by a party which files a jurisdictional objection is the *compétence de la compétence* – and this, for a party to the Statute of the Court, is inescapable. The filing of a preliminary objection does constitute an express recognition that the decisions of the Court thereon (and, where appropriate, on the merits) will be binding; and instances are not lacking in international affairs where it is convenient to avoid actual recognition of an uncomfortable, but inescapable, fact. The preliminary objection will continue to be a useful instrument for those par-

ties who, while disputing jurisdiction, are content to remain within the judicial field of reference.

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PRESUMPTIONS *see* Evidence before International Courts and Tribunals

PROCEDURE OF INTERNATIONAL COURTS AND TRIBUNALS

1. Introduction

The procedure followed by both standing international tribunals and (insofar as published material enables it to be ascertained) that of *ad hoc* arbitration bodies formed for the settlement of international disputes presents a considerable degree of homogeneity, despite the fact that there is no single governing text common to these various bodies, and despite the absence of any accepted doctrine of → sources of international law in the field of procedure. This similarity may be accounted for, first by the way in which international judicial and arbitral bodies have developed over the last century, and secondly by the nature of the subject matter.

The question of the formal sources of international procedural law has not received much doctrinal attention. It is doubtful whether anything in the nature of a binding custom, as distinct from the borrowing of tried and efficient practices, can be said to exist. Provisions in special agreements, and in statutes of permanent international tribunals, clearly have the status of treaty law, but while this confers their authority, it does not explain the regular choice of particular provisions for inclusion in such texts.

Although it has been powerfully argued by Sereni (Principi generali, op. cit.) that a comparative examination of procedural systems in municipal law disproves the existence of any general principles of law in the field of procedure, if one looks beyond procedures shaped by particular modes of trial or by the natures of the communities in which they developed, the nature of the judicial task itself – the establishment of legal rights and duties on the basis of admitted or ascertained facts – itself dictates to some extent the procedures to be followed, in that certain methods are demonstrably efficient and unarguably just.

A tentative conclusion on this point may be that since very little, if any, of the discernible law of procedure may be regarded as → *jus cogens*, and since most procedural questions are regulated in advance in treaties and rules of court, there is only a very limited field in which a residual general procedural law could operate. Insofar as it does so, it is by the guidance which precedents and practices afford to the judge called upon to resolve an unforseen point of procedure.

Historically the development of international judicial procedure may be traced from arbitration practice, focusing on the provisions for the procedure of the → Permanent Court of Arbitration laid down in the 1899 and 1907 Hague Conventions (→ Hague Peace Conferences of 1899 and 1907), which in turn provided a foundation for the 1922 Statute of the → Permanent Court of International Justice. While this Statute subsequently proved to contain imperfections, only some of which were remedied by the revision of 1929 or by the preparation of the new Statute of the → International Court of Justice in 1946, it is

remarkable to what extent it has served as a foundation both for the statutes of other standing tribunals and for the procedure of other bodies.

For this reason, while → international courts and tribunals may be regarded as comprehending any tribunal which either is not subject to a local or national procedural system, and/or one to whose proceedings one or more bodies of international status are parties, the following discussion will concentrate on the procedure of the PCIJ and ICJ. The procedure of the two international courts may very broadly be regarded as a norm from which the procedure of other tribunals departs to a limited extent and for particular reasons. (In particular, the procedure of the → Court of Justice of the European Communities is influenced by the "supranational" character of the Communities themselves; and the procedure of the European Court of Human Rights has special features as a result of the role played by the Human Rights Commission.) The procedure of an international tribunal may conveniently be analysed in four phases:

(a) The institution of proceedings
(b) The written phase
(c) The oral phase
(d) Deliberation and decision

2. *Outline of Typical Procedure*

(*a*) *The institution of proceedings*

It is only in this phase that a marked distinction has to be drawn between a standing tribunal and an *ad hoc* arbitration body. In the case of an arbitral body, the appearance of the dispute will make it necessary first to bring the tribunal into existence, either by agreement or by the setting in motion of established machinery, e.g., a compromissory clause in a treaty (→ Arbitration Clause in Treaties). If the parties agree to create a tribunal *ex nihilo* to resolve their dispute, questions as to its composition and jurisdiction will normally present no difficulty, being regulated by the agreement. If, however, one party invokes a pre-existing arbitration clause, and calls for the establishment of the arbitral tribunal contemplated in general terms by that clause, questions may arise as to the applicability of the arbitration clause to the circumstances. The proposal of G. Scelle, as Rapporteur of the International Law Commission, (see the Yearbooks of the ILC for 1950 and 1951), that such questions be regulated by the ICJ, has remained only a suggestion, and the position therefore appears to be that such questions are to be settled by the arbitral tribunal itself, assuming that it is at least possible to constitute it for the purpose (see the Interpretation of Peace Treaties case; cf. Zafrullah Khan, op. cit.). In the case of a pre-existing international tribunal, questions of the applicability of the title of jurisdiction relied upon are indistinguishable from other jurisdictional questions, and are clearly subject to the decision of the tribunal under the principle of *la compétence de la compétence.*

(*b*) *The written phase*

This phase of the proceedings consists of the exchange of written memorials setting out the contentions of the parties. Depending on the procedure agreed upon by the parties, or regulated by the rules of the court, these memorials may be filed simultaneously by both sides or alternately, each party replying to the other. In the latter case, questions may arise as to which party is in the position of plaintiff and should hence be called upon to file first; apart from the implication that the other party will have the last word, this question may be thought to have implications as to the burden of proof (→ Evidence before International Courts and Tribunals), and may therefore be controverted between the parties.

Unlike the pleadings in Anglo-American practice, written pleadings submitted to international tribunals normally contain a very full statement both of the facts considered relevant by the party and of its arguments as to the law. Documentary evidence is normally annexed; Art. 50 of the Rules of the ICJ requires production as annexes of "any relevant documents adduced in support of the contentions contained in the pleading" (→ Evidence before International Courts and Tribunals).

Until 1972, the regular practice of the ICJ was for two written pleadings to be filed on each side (Memorial, Counter-Memorial, Reply, Rejoinder), subject to agreement to the contrary by the parties (1946 Rules, Arts. 37 and 41). In the 1972 Rules revision, however, the normal pleadings

were reduced to two (Memorial, Counter-Memorial), with provision for there to be a Reply and a Rejoinder "if the parties are so agreed, or if the Court decides *proprio motu* or at the request of one of the parties, that these pleadings are necessary" (1978 Rules, Art. 45).

(c) *The oral phase*

In principle oral proceedings before the ICJ are held in public (Statute, Art. 46) "unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted". The oral proceedings in arbitration cases are almost invariably conducted in private, though there seems to be no reason why they should not be public if the parties so wish, (cf. the 1977 → Beagle Channel Arbitration, Argentina/Chile, where the tribunal held a public inaugural session before commencing its hearings in private). In view of the fullness of the written pleadings, it might be expected that the oral arguments could be limited in scope. In fact experience has proved otherwise: apart from the comparatively few cases in which it has been found necessary to hear the oral evidence of witnesses, there is a tendency, probably irresistible, on the part of litigant States to try to make sure that their every point is driven home before the tribunal by repeating, and embellishing orally, arguments already set out in the pleadings. The International Court of Justice has tried to set its face against this practice; Art. 60 of the 1978 Rules provides that:

> "The oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing. Accordingly, they shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain".

While valuable as a directive, it is doubtful whether this provision can ever be strictly enforced.

(d) *Deliberation and decision*

Art. 54 (3) of the ICJ Statute, which provides that "the deliberations of the Court shall take place in private and remain secret", represents a practice of such widespread application as to be arguably a general principle of law. At the same time, however, the provision for separate opinions of individual judges in Art. 57 of the Statute shows that the secrecy of the deliberations does not extend so far as to debar an individual judge from making his views known. From 1922 to 1978 it was, however, consistently the practice of the two international courts that no judge was required to make known how he had voted on a decision; only the numbers of votes cast in each sense were recorded, and the identity of the judges on each side was only made known insofar as individual judges chose to do so. Art. 95 of 1978 Rules of Court, however, now provides that a judgment shall contain "the number *and names* of the judges constituting the majority" [emphasis added].

The decisions of the International Court are read in public and published in the Court's Pleadings series; the awards of arbitral bodies are sometimes made public – but not always, and not necessarily immediately on delivery – and may be published either officially or unofficially (e.g., ILM, ILR). Arbitral awards which remain entirely unpublished at the wish of the parties are simply retained in the government archives of the parties concerned, there being no centralized authority with which the text may formally be deposited (though some have been deposited with the Secretariat of the Permanent Court of Arbitration at The Hague).

3. *Particular Procedural Problems*

(a) *Parties*

The question of who may be a party to international judicial proceedings depends upon the nature of the proceedings and of the dispute; to some extent it is a mere matter of terminology depending on what proceedings are classified as "international" judicial proceedings. Private arbitrations are frequently held between a State on one side and a commercial corporation incorporated under the laws of the same or another State on the other, as well as arbitrations between governments or government agencies of two different States. In cases before the International Court, however, "only states may be parties" (Art. 34 of the Statute); this provision therefore debars international organizations from appearing

as parties (although they may furnish information to the Court under Art. 34 (2) of the Statute and have a certain *locus standi* in advisory proceedings: → Advisory Opinions of International Courts), as well as private individuals and corporations. Disputes to which international organizations are parties therefore have to be settled by other means, for example, by arbitration (e.g., Ariana Site Agreement of 1946 between the UN and Switzerland, Art. 13), or even by an administrative tribunal (a number of agreements concluded by the → International Labour Organisation provide for disputes to be settled by the → International Labour Organization Administrative Tribunal, cf. Art. II (4) of the Tribunal's Statute; on the jurisdiction of administrative tribunals of international organizations generally, → Administrative Tribunals, Boards and Commissions in International Organizations).

The definition of a "party" ceases to be a matter of semantics when regard is had to the binding effect of the tribunal's decision as *res judicata*. Art. 59 of the ICJ Statute, in providing that: "The decision of the Court has no binding force except between the parties and in respect of that particular case", does no more than give expression to the general principle that *res inter alios acta tertiis nec nocet nec prodest*; but for its application it is essential to be clear as to who or what is or is not a party.

In recent years, the tendency for respondent States to decline to appear to defend their cases before the ICJ (and before arbitrators also: cf. the recent award in the → Libya-Oil Companies Arbitration) has led to some confusion between the concept of a party to a case in the sense of a respondent properly sued in accordance with a valid jurisdictional clause, and a party in the sense of one participating in proceedings. It has been suggested that a State which declines to appear is not a "party" to the case (or perhaps to the proceedings); for the most marked judicial statement of this position, see the separate opinion of Judge Gros, Nuclear Tests Case, ICJ Reports 1974 at p. 290.) (In that case, the situation was confused by the presence of a number of unresolved issues of jurisdiction and admissibility; but the principle of *la compétence de la compétence* entails the acquisition, voluntarily or involuntarily, of the status of party to the proceedings on jurisdiction by the State denying the existence of jurisdiction.) The danger of this argument is that logically it leads to the conclusion that non-participation in the proceedings has the effect of preventing the decision of the tribunal from being binding on the non-participant State, which would deprive the whole system of advance acceptance of jurisdiction in compromissory clauses of its value.

(*b*) *Intervention*

The development contemplated by the 1899 and the 1907 Hague Conventions whereby international arbitration would become institutionalized and thereby made into an instrument for serving the collective interests of the community, rather than remaining a purely private means of settling differences between two States, led to it being contemplated that a dispute being settled by arbitration between two States might involve the interests of others. Provision was therefore made in the procedure of the Permanent Court of Arbitration for intervention by third States which were parties to a convention, the interpretation of which was in question in the proceedings. In 1922, in the Statute of the PCIJ, the right of intervention was enlarged to permit a State which considers "that it has an interest of a legal nature which may be affected by the decision in the case" to ask the Court for permission to intervene. Very little use has been made of these provisions (intervention of Poland in the → *Wimbledon* Case; of Cuba in the → Haya de la Torre Cases; application by Fiji to intervene in the → Nuclear Tests Cases (Australia v. France; New Zealand v. France)), and it is doubtful whether the more precise procedural provisions on the subject which the Court has included in its recent (1978) revision of its Rules will in fact be needed in practice.

(*c*) *Costs*

When an arbitral tribunal is constituted by agreement, it is usual for the expense thereof to be borne equally by the parties (cf. 1907 Hague Convention, Art. 85). Recourse to the International Court of Justice has the advantage, which is perhaps not as widely appreciated as it might be, that the expense of functioning of the Court is

borne out of the budget of the United Nations, so that parties only have to incur the costs of the presentation of their claim (counsel's fees, printing costs, travel expenses, etc.).

A number of arbitral tribunals have had the power, which also appertains to the PCIJ and ICJ, to order payment of costs by one or the other party, but this power has never in fact been exercised by the International Court.

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PROPERTY COMMISSIONS ESTABLISHED PURSUANT TO ART. 15 (a) OF PEACE TREATY WITH JAPAN (1951)

1. Treatment of Allied Powers' Property

During the period of the Allied occupation prior to the conclusion of the Peace Treaty, the property of the Allied Powers and their nationals that had been administered and expropriated in Japan as → enemy property during World War II was returned, or compensation was paid, in accordance with the memorandum of the Supreme Commander for the Allied Powers (→ Expropriation).

Art. 15 (a) of the → Peace Treaty with Japan of 1951 stipulated as follows: "Upon application made within nine months of the coming into force of the present Treaty . . . Japan will, within six months of the date of such application, return the property, tangible and intangible, and all rights or interests of any kind in Japan of each Allied Power and its nationals which was within Japan at any time between December 7, 1941, and September 2, 1945, unless the owner has freely disposed thereof without duress or fraud . . . . In cases where such property . . . cannot be returned or has suffered injury or damage as a result of the war, compensation will be made . . .".

An agreement for the Settlement of Disputes Arising under Art. 15 (a) of the Treaty of Peace with Japan, concerning the interpretation and execution of this article, was signed at Washington on June 12, 1952. This Agreement provided in Art. 1 that, when an application for the return of an Allied Power's property was made, the Japanese Government was obliged to inform the government of the Allied Power concerned of the action being taken over the application within six months (18 months for claims for compensation). An Allied Power which was not satisfied with the action that had been indicated was entitled to refer an application (or claim) within six months to a property commission for final determination.

In Art. 2 the procedure for setting up a property commission was laid down as follows: "A commission for the purpose of this Agreement shall be appointed upon request to the Japanese Government made in writing by the Government of an Allied Power and shall be composed of three members; one, appointed by the Government of the Allied Power, one, appointed by the Japanese Government, and the third, appointed by mutual agreement of the two Governments". These commissions were known by the name of the Allied Power concerned and Japan (e.g., the American-Japanese Property Commission).

2. The Property Commissions

Twenty-six nations signed the above-mentioned agreement, but only five commissions were established, namely the American-Japanese, Anglo-Japanese, Dutch-Japanese, Franco-Japanese and Canadian-Japanese Property Commissions. Only the first three commissions actually came into operation.

(a) The American-Japanese Property Commission

The members of the Commission were: L.M. Summers (United States), K. Nishimura (Japan) and T. Salèn (Sweden).

This Commission was established on February 17, 1959, and handled 18 cases. All the cases involved claims for compensation. Three of them were amicably settled and two American claims were dismissed. As to the remaining 13 cases, the Japanese Government was held liable and ordered to pay a total of $16,295,000,000 in compensation.

(b) The Anglo-Japanese Property Commission

The members of the Commission were: Sir Michael Hogan (United Kingdom), K. Nishimura (Japan) and Å. Holmbäck (Sweden).

This Commissions was set up on October 31, 1958, and dealt with ten cases. Nine of them were in connection with claims for compensation. Of these, one case ended in a compromise and one British claim was rejected. With regard to the other seven cases, the Japanese Government was held responsible and ordered to pay 563,000,000 yen compensation.

The remaining case was in respect of an application for the return of the site of Kobe All Saints Church which concerned an area of 13,200 square metres. During the war, H.E. Panett, the honorary director in charge of financial affairs of the Church, invested Miss Leonora Lea with executive authority by virtue of which, after the destruction of the church building by fire, she leased the land to thirty households. The British Government demanded that the land be cleared of existing buildings and residents and returned in its former condition (→Restitution). On November 15, 1960, the Commission granted the British application on the grounds that Panett was not entitled to give the authority to Miss Lea because, although he was a trustee, it was not certain that he was a "financial director"; and that the property in question could not be considered to have been "freely disposed of". On the advice of the Commission, however, exemption from the obligations to return the land in its original condition was agreed upon; compensation was accorded in the sum of 24,000,000 yen.

(c) The Dutch-Japanese Property Commission

The members of the Commission were: J.H. Verzijl (Holland), K. Nishimura (Japan) and Å. Holmbäck (Sweden).

This Commission was formed on December 6, 1960, and dealt with only one case concerning the return of the "*Opten Noort*", a Dutch hospital ship. The ship was expropriated by the Japanese Navy in the Java Sea in 1942. It had its name changed to the "*Ten-Oh-Maru*" and was used by the Japanese Navy until it was sunk outside Maizuru Port on August 19, 1945. The Dutch Government demanded that the vessel be salvaged and returned. On January 16, 1961, however, the Commission refused the dutch application for the reason that the vessel was not "in Japan" since it was sunk 3.9 nautical miles off the Japanese coast, that is, 0.9 nautical miles outside Japanese territorial waters.

(d) The Franco-Japanese Property Commission and the Canadian-Japanese Property Commission

R. Kapitan (France) was selected as a member of the Franco-Japanese Property Commission, and Sir Michael Hogan (United Kingdom) as a member of the Canadian-Japanese Property Commission. Nishimura and Holmbäck were also appointed as members of these commissions, but all the disputes were settled between the parties concerned before the Commissions became operative.

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PROVISIONAL MEASURES *see* Interim Measures of Protection

REMEDIES *see* Responsibility of States: General Principles; Reparation for International Delicts

RES JUDICATA *see* Judgments of International Courts and Tribunals

SAAVEDRA LAMAS TREATY (1933)

The Anti-War Treaty of Non-Aggression and Conciliation (Tratado antibélico de no-agresión y de conciliación) was signed on October 10, 1933, in Rio de Janeiro. It is commonly known as the Saavedra Lamas Treaty after its author Carlos Saavedra Lamas (1878–1959), the Argentinian statesman and authority on international law. In 1932 Argentina had first proposed the conclusion of an anti-war treaty with other South American States as a contribution towards the solution of the → Gran Chaco Conflict. Unlike the original draft, the final text provided in Art. 16 for participation on a global rather than on a purely regional basis. The original signatory States were Argentina, Brazil, Chile, Mexico, Paraguay and Uruguay, all of which deposited ratifications. All the other Latin American republics existing at the time (with the exception of Bolivia and Costa Rica), as well as Bulgaria, Czechoslovakia, Finland, Romania, Spain, the United States and Yugoslavia deposited instruments of adhesion to the Treaty. Although Bolivia, Costa Rica, Greece, Italy, Norway, Portugal and Turkey expressed their intention to accede, they failed to do so. Many of the signatory States added extensive reservations (→ Treaties, Reservations). The Treaty has been in force since November 13, 1935.

While the Saavedra Lamas Treaty continues a series of inter-American treaties for the settlement of disputes (the Gondra Treaty of 1923, the Inter-American Conciliation Convention of 1929, the Inter-American Arbitration Treaty of 1929 (→ Arbitration and Conciliation Treaties)), it was also intended to supplement and strengthen the → Kellogg-Briand Pact (1928) and to extend the anti-war precept to those Latin American members of the League of Nations that were not adherents to the Kellogg-Briand Pact (Argentina, Bolivia, El Salvador, Uruguay). Whereas effective → sanctions and rules of procedure for the → peaceful settlement of disputes are lacking in the Kellogg-Briand Pact, the Saavedra Lamas Treaty provides both for collective measures to be taken against an aggressor (Art. 3) and for the compulsory settlement of disputes by means of a detailed conciliation procedure (Arts. 4 to 14).

In Art. 1 the contracting parties condemn wars of → aggression in their mutual relations or in those with other States. Saavedra Lamas himself considered that an outright condemnation of wars of aggression would be more effective than the disputed formulation of Art. 1 of the Kellogg-Briand Pact (condemnation of war as a means for solving international controversies and renunciation of it as an instrument of national policy). The fact that Art. 1 of the Saavedra Lamas Treaty does not exactly define the elements constituting aggression would not nowadays be considered a deficiency, but it caused Colombia to add a reservation concerning interpretation.

Art. 2 contains a renunciation of the → use of force for the settlement of territorial questions as between the contracting parties, and an obligation not to recognize any territorial arrangement (→ Conquest) which has been obtained by non-peaceful means, or the validity of the occupation or acquisition of territory (→ Territory, Acquisition) that has been brought about by force of arms. In this way, the principle defined in the → Stimson Doctrine of January 7, 1932, which also governed the resolution of August 3, 1932, of the 19 American States not involved in the Gran Chaco Conflict, became fully incorporated into treaty law. In terms of pan-American history, this principle goes back to a resolution of the First Inter-American Conference of 1889/1890 on the right of conquest, which confirmed that there were no longer areas on the American continent which could be regarded as *res nullius* and as such open to occupation (→ Occupation, Pacific).

Art. 3 has met with considerable criticism. This provision states that "in case of non-compliance by any State engaged in a dispute with the obligations contained in the foregoing articles, the contracting States undertake to make every effort for the maintenance of peace. To that end they will adopt in their character as neutrals a common and solidary attitude; they will exercise the political, juridical, or economic means authorized by international law; they will bring the influence of public opinion to bear, but will in no case resort to intervention, either diplomatic or armed. . . ." As compared with the Kellogg-Briand Pact, this provision represents a step forward, as it links the prohibition of the use of force (→ Peace, Proposals for the Preservation of; → Peace Move-

ments) with the obligation of the parties not involved in the conflict to introduce sanctions. However, it still falls short of the → League of Nations Covenant and the Charter of the → United Nations as it excludes military and even diplomatic measures against the aggressor. Moreover, the obligation undertaken by the contracting States not involved in the conflict to adopt a neutral attitude is rather problematic when considered from the point of view of → collective security, as this should entail taking common cause on behalf of the victim of aggression. However, in its closing words, Art. 3 clearly states that precedence must be given to more specific obligations undertaken by the contracting States by virtue of other collective treaties to which they are parties.

Art. 5 enables the contracting parties to make reservations excluding certain classes of dispute from the conciliation procedure. Bulgaria, Chile, Ecuador, El Salvador, Finland, Honduras, Romania and Yugoslavia took advantage of this opportunity. Among the matters which can be excluded are controversies affecting constitutional precepts ("preceptos constitucionales") of the parties (Art. 5 (d)). In case of doubt, the supreme court of the party concerned, if it has the power under domestic law, must decide the matter (the so-called Argentinian clause). This arrangement is not very satisfactory, since it leaves to a national judicial body a decision on a matter which can hardly be described as falling within the limits of → domestic jurisdiction.

The procedural rules for conciliation (Arts. 6 to 14) correspond on the whole to those in the Inter-American Conciliation Convention of 1929. This is an example of the tendency, characteristic of inter-American peace preservation treaties, to reiterate existing rules with only minor amendments, a tendency which is not conducive to a consolidation of the system (→ Organization of American States).

Art. 7 provides that the task of conciliation in inter-State disputes may also be entrusted to national tribunals or supreme courts, which, in accordance with the domestic legislation of the State concerned, may be considered competent to interpret in the last instance the constitution, treaties or general principles of international law. The national court may function as a *plenum* or may designate some of its members to act alone or to constitute a → mixed commission in conjunction with members of a similar court of the other country involved in the dispute. This provision, which if applied would be contrary in most of the contracting States to the constitutional rules governing the competence of judicial bodies, is a unique feature of the Saavedra Lamas Treaty. It is not to be found in later dispute settlement agreements. It is hardly conceivable that one of the parties to a dispute would subject itself to conciliation measures dictated by the supreme court of the opposing party; nor would the conferring of the task of conciliation to a mixed commission formed from the supreme courts of two separate States be compatible with the functions of national judicial bodies.

The Saavedra Lamas Treaty, which was concluded for an indefinite period but may be denounced upon one year's notice, has proved to be without practical significance. It belongs to those inter-American agreements which according to Art. 58 of the → Bogotá Pact of 1948 ceased to be in force with respect to the parties to that treaty. The Bogotá Pact has so far been adhered to by 13 Latin American States. Therefore, the Saavedra Lamas Treaty remains in force for the other Latin American States, for the United States, and for those European States which became parties to that instrument.

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SPECIAL AGREEMENT *see* Arbitration; Compromis

STANDING BEFORE INTERNATIONAL COURTS AND TRIBUNALS

I. The Concept of Standing

There is no uniform concept of standing in international law. This is due to the absence of an international court with general jurisdiction and to the lack of a generally accepted theory governing legal procedure before international courts. Even the terminology on this topic varies considerably. The following is a list of the most used terms: *standing, jus standi, locus standi in judicio, jus legitimae personae standi in judicio, capacity, quality, qualification, access to court, entitled to bring a claim, entitled to appear before the court, entitled to be a party before the court, the court shall be open to, jurisdiction or competence ratione personae.* All of these expressions are used to refer to partly identical, partly different, but mostly overlapping procedural categories. Even elements of substantive law relating to the basis of the claim are occasionally covered.

In a very broad sense, standing may be defined as any right to appear as a party before an international court or arbitral tribunal (→ International Courts and Tribunals). Guided by general procedural considerations, this article categorizes the various aspects of standing as follows:

(a) Standing in the "narrow sense" (capacity to be a party). This is the right to appear in court in one's own name and on the basis of an independent status and to make binding statements before the court. Not essential is the status as plaintiff or respondent; standing is the prerequisite for participating in every legally binding proceeding (as plaintiff, defendant, intervenor or third party).

(b) Procedural capacity. Subjects of international law with limited capacity to act on the international plane – and accordingly with limited procedural capacity – are represented before international courts by the State that conducts their external relations. This was applicable with respect to → protectorates, → mandates and → trust territories as to which the protecting State appeared before the → Permanent Court of International Justice and the → International Court of Justice in its own name. Similarly, claims were not only raised against the protected State but also against the protecting State itself, for instance in the case of Greece against Great Britain in the latter's capacity as mandatory State for Palestine (→ Mavrommatis Concessions Cases); Italy against France as protector for Morocco (→ Phosphates in Morocco Case); in other instances claims were raised in the protector's name and in the name of the protected State, e.g., France as protector for Morocco against the United States (→ United States Nationals in Morocco Case).

The practice before international arbitral tribunals permitted dependent States to represent themselves, for instance the States under French and British mandate in the → Ottoman Debt Arbitration and in the → Radio-Orient Case.

As is true for every legal person, the State must also be represented by the competent organ (→ Representatives of States in International Relations). The question becomes relevant when there is dispute as to which government is the legitimate government of a particular State. The advisory opinion on → Reparation for Injuries Suffered in Service of UN (ICJ Reports 1949, p. 174 at p. 187) shows that this may be a *de jure* or a *de facto* government.

(c) Representation on the basis of an agreement. States which contractually delegate partly or wholly the conduct of their external relations to another State are not limited in their

capacity to act on the international plane and accordingly not in their procedural capacity. Thus they can represent themselves before a Court, e.g., → Liechtenstein (see especially → Nottebohm Case). Of course, it is conceivable that they would also entrust with the representation in Court that State which usually conducts their foreign relations, provided that this State possesses standing before the relevant international court.

(d) *Jus postulandi.* Provisions are often included in the statutes of international courts whereby States have to be represented by agents, as for example before the ICJ (Art. 42 (1) Statute), before the → European Court of Human Rights (Art. 28 of its Rules of Court) or before the → Court of Justice of the European Communities (also applicable to the institutions of the Community: Art. 17 of the Protocol on the Statute of the Court of Justice of the EEC, hereinafter CJEC-EEC Statute), whom they must appoint, through whom they submit their written and oral declarations and to whom the Court shall address all communications concerning the case (Arts. 40, 52, 60 (2), 81 (2), 82 (2) ICJ Rules of Court). This type of regulation is a procedural one and does not refer to the abstract right of a party to appear, merely as to how it does so.

(e) Access to court. Pursuant to Art. 34 of the ICJ Statute only States may be parties in cases before the Court. Art. 35 goes on to specify which States have this right and in what ways States acquire this right. The addition of a separate category concerning "access to court" for institutionalized international courts and arbitral tribunals (PCIJ, ICJ, Permanent Court of Arbitration) is explained by the fact that the jurisdiction of the court is not compulsory *per se* on all States.

(f) Jurisdiction *ratione personae.* The provisions of Art. 36 of the ICJ Statute, Arts. 46 and 48 of the European Convention on Human Rights, Art. 62 of the American Convention on Human Rights, Arts. 181 and 182 of the EEC Treaty refer to the jurisdiction *ratione personae* of the respective courts. To the extent that States recognize the jurisdiction of a court only with respect to particular States or exclude jurisdiction with respect to other States, this is also covered by the concept of jurisdiction *ratione personae.*

(g) Legitimation based on the subject matter. The State which calls upon an international court on behalf of its citizens or legal persons exercises its own right (→ Diplomatic Protection). Absence of "nationality of claim" is a deficiency that does not arise out of the legal personality of the plaintiff (standing in the narrow sense), nor out of failure to belong to a category of States recognizing the jurisdiction of the Court ("access to court"), nor out of the court's lacking competence to decide (lack of jurisdiction *ratione personae*), but exclusively out of the non-existence of the claimed right. It makes no difference whether the claimed right does not exist as such or is simply not available against the respondent State (→ Reparation for Injuries Suffered in Service of UN (Advisory Opinion)).

(h) Legal interest. It is difficult to classify precisely the requirement of a legal interest – which together with the right of action – may also play a role in international jurisdiction. Similarly, it is uncertain whether the requirement of an existing legal interest should be seen as being procedurally necessary to establish the jurisdiction of the court or whether it should be treated as an element of the substantive claim. One encounters various factual situations and different views in judicial decisions. A sufficient legal interest may be lacking from the outset when, for instance, an eventual decision by the court would have no consequences whatsoever (→ Northern Cameroons Case), or it may be eliminated by the occurrence of new events which would render a decision on the claim academic or moot (→ Nuclear Tests Cases, ICJ Reports 1974, pp. 271, 272, 477, 478). In the South West Africa decisions of the ICJ of 1962 and 1966 (→ South West Africa/Namibia Cases) the question was also raised as to whether a State can only represent its own material rights and interests or whether it may also act as the trustee of the international community in calling upon the court, for instance, to defend the interests of the population of former mandate territories. The question does not lend itself to a general answer, since it depends on how far the relevant provisions may extend the right to file a claim. This is shown especially in recent developments in the field of the international protection of → human rights. Legal interest is also required of any natural or legal person instituting proceedings according to Arts. 173 para. 2 and 175 para. 3 of the EEC Treaty.

II. Specific Topics of Standing

A. States

1. Standing before the ICJ

According to Art. 34 of the ICJ Statute only States may appear as parties. The component units of a federal State therefore have no standing (anomalously, however, Byelorussia and the Ukraine are members of the UN and as such parties to the Statute, Art. 35 (1)).

According to Art. 35 (1) of the Statute, read together with Art. 93 of the UN Charter, the following categories of States may appear before the ICJ as parties:

(a) Members of the UN. These are *ipso facto* parties to the Statute.

(b) Non-members of the UN, which have become parties to the Statute upon the recommendation of the Security Council and subject to any conditions imposed by the General Assembly. At present this category comprises Switzerland, San Marino and Liechtenstein.

(c) Non-members of the UN, which are not parties to the Statute but which, "subject to the special provisions contained in treaties in force" (Art. 35 (2) ICJ Statute), submit to the Registrar of the Court a statement requesting admission according to such conditions determined by the Security Council. The Security Council's conditions were formulated in Resolution No. 9 (1946) of October 15, 1946. Such declaration may either be particular (in respect only of a particular dispute or disputes which have already arisen) or general (in respect of all disputes or of a particular class or classes of disputes which have already arisen or which may arise in the future).

(d) The → Corfu Channel Case shows, however, that the method foreseen in Resolution 9 (1946) of the Security Council is not the only method of acquiring standing before the Court: Albania, which at the time was neither a member of the UN nor a party to the Statute, appeared before the Court in its dispute with Great Britain pursuant to a special Resolution of the Security Council dated April 9, 1947.

The requirements set forth in Arts. 34 and 35 of the Statute also apply for the intervention of a State in the proceedings as provided in Art. 62 of the Statute. For intervention in cases of construction of a convention (Art. 63) the qualifications set forth in Art. 35 are not required.

Pursuant to Art. 65 (1) of the Statute in conjunction with Art. 96 of the UN Charter, States are not entitled to request the Court to give advisory opinions. They may, however, participate in advisory opinion proceedings as provided for in Art. 66, which also envisages the fulfillment of the qualifications mentioned in Arts. 34 and 35, even though formally there are no parties in advisory opinion proceedings.

2. Standing before the European and American Courts of Human Rights

All States parties have the right to submit cases to the → European Court of Human Rights (Art. 44 ECHR), provided that the requirements of Arts. 46 and 48 are fulfilled. For the → Inter-American Court on Human Rights see Art. 61 (1) American Convention on Human Rights (hereinafter ACHR). The same principle applies to the respective Commissions, without prejudice to their competence *ratione personae*, which is determined differently (Art. 24 ECHR, Art. 45 ACHR).

3. Standing before the CJEC

Member-States of the European Community may appear as parties or as intervenors before the CJEC according to its competence *ratione personae et materiae* as defined in the relevant texts (cf. Arts. 169 para. 2, 170, 173 para. 1, 175 para. 1 of the EEC Treaty, Art. 37 para. 1, Arts. 38 to 41 CJEC-EEC Statute). Federal States within a member-State (conceivably third States too) may appear before the CJEC as well as other legal persons (see section II/C/3, *infra*) to the extent that they are the addressees of community regulations or of decisions of a Community organ.

4. Standing before other International Courts and Arbitral Tribunals

The question of standing before other international courts and arbitral tribunals depends on the particular statute or on the arbitration agreement. Pursuant to Arts. 41, 45, 47 para. 1 of the Convention for the Pacific Settlement of International Disputes of 1907 (→ Hague Peace Conferences of 1899 and 1907) only the contracting powers have access to the Permanent Court of Arbitration; yet, under Art. 47 para. 2 the

jurisdiction of the Permanent Court may, within the conditions laid down in its regulations, be extended to disputes between non-contracting powers or between contracting powers and non-contracting powers. Especially in isolated cases of non-institutionalized international arbitration, the question of "standing" is inseparable from that of competence *ratione personae*.

B. International Organizations

1. Arts. 34 and 35 (1) of the ICJ Statute do not confer upon international organizations the status of parties in contentious cases before the Court. In the Reparation for Injuries Suffered in the Service of UN Advisory Opinion (ICJ Reports 1949, p. 177 at p. 187), the Court mentioned the possibility of such participation, without, however, specifying the preconditions and implications.

In advisory opinion proceedings pursuant to Art. 65 of the Statute in conjunction with Art. 96 (1) of the UN Charter both the General Assembly and the Security Council may be applicants. According to Art. 96 (2) other organs of the United Nations and → United Nations specialized agencies, which may be so authorized by the General Assembly, may also request advisory opinions of the Court. (For the list of these organs and agencies see the Yearbooks of the ICJ.)

Under special conditions an international organization so authorized may request an advisory opinion which is binding and has very similar effects as a decision in a contentious case. In this way, the ICJ has actually functioned as a kind of court of appeal with respect to decisions of the → International Labour Organisation Administrative Tribunal (cf. → Judgments of ILO Administrative Tribunal (Advisory Opinion)). This category of advisory opinions of the Court has properly been termed "hybrid". In fact, it represents an evasion of the strict rules and a deviation from the essentially advisory function of the ICJ in this area.

2. International organizations – with the exception of their respective commissions (Arts. 44 and 48 ECHR; Art. 61 ACHR) – do not have the status of parties before the European Court of Human Rights or before the Inter-American Court on Human Rights.

Pursuant to the Second Protocol to the European Convention on Human Rights (1963), the Committee of Ministers can request the European Court of Human Rights for advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto. According to Art. 64 of the ACHR only the member-States of the → Organization of American States may consult the Inter-American Court, but the scope of consultation is much broader.

3. The Council, the Commission and other institutions of the EEC may appear as parties or intervenors before the CJEC pursuant to its very broad competence *ratione personae et materiae* (cf. Arts. 169 para. 2, 173 para. 1, 175 para. 1 EEC Treaty; Art. 20 para. 2, Art. 37 Para. 1, Arts. 39 and 40 CJEC-EEC Statute). According to Art. 228 (2) of the EEC Treaty, the Council and the Commission may also obtain from the Court an opinion as to whether an envisaged agreement between the Community and any other international entity is compatible with the provisions of the Treaty. See also Art. 95 ECSC Treaty.

C. Natural Persons and → National Legal Persons

1. In keeping with the accepted international legal concept of the United Nations as an organization of States, individuals have no standing before the Court.

2. Before the European Court of Human Rights (Art. 44 ECHR) and before the Inter-American Court on Human Rights (Art. 61 para. 1 ACHR), individuals have no standing as such. At present, the question is being discussed whether individuals should be granted the status of parties before the European Court of Human Rights; an amendment to the Convention would be necessary to enable this to be done. Yet, thanks to a very liberal application of the procedural rules of the Court and the cooperation of the Commission, individuals have come to acquire practically the same procedural possibilities that State parties have.

According to Art. 25 ECHR "any person, non-governmental organizations or group of individuals" may appear before the Commission, provided that the State concerned has made a declaration under this article. The petitioner at this level enjoys party status on an equal footing with the respondent State. The comprehensive term "any . . . non-governmental organization or group of individuals" comprises public and

private legal persons as well as associations which according to the law of their home States lack legal personality. On the other hand, according to Art. 44 of the ACHR only such legal persons and associations may appear before the Commission that are legally recognized in one or more member-States of the Organization of American States.

3. In the law pertaining to the European Court of Justice provision is made for the appearance of natural as well as public and private legal persons as parties or as intervenors in cases before the Court (cf. Arts. 173 para. 2, 175 para. 3, EEC Treaty; Art. 37 para. 2, Arts. 39 and 40, CJEC-EECS). The term "legal person" refers in the first place to such entities that have legal personality in their home States; it also includes associations and societies that do not possess this status but are the addressees of Community regulations or of decisions of Community institutions. In the European Coal and Steel Community "associations" as defined in Art. 48 and "undertakings" as defined in Art. 80 of the ECSC Treaty have the equivalent status to that of public or private legal persons under the EEC Treaty.

4. The question as to what extent other international courts and arbitral tribunals confer party status upon individuals is answered in the statutes of the respective tribunals. Before the → Central American Court of Justice, which functioned from 1908 to 1918, individuals were granted the status of parties in proceedings between citizens of one Central American State-party (as plaintiff) and another State-party to the treaty.

Individuals also had the status of parties in proceedings before the → Mixed Arbitral Tribunals set up pursuant to the → Peace Treaties After World War I (e.g., according to Arts. 304 and 305 of the → Versailles Peace Treaty). Individuals may also appear as parties in proceedings before the administrative tribunals of international organizations (Art. 2 Statute → United Nations Administrative Tribunal, Art. II Statute → International Labour Organisation Administrative Tribunal) or before the CJEC in certain employment disputes as provided for in the relevant civil service statutes.

The Administrative Council of the → Permanent Court of Arbitration on occasion made available the technical apparatus of the Court for the settlement of disputes between States and private (legal) persons (cf. → China v. Radio Corporation of America). The arbitration proceedings carried out in this context are not, however, considered as being those of the Permanent Court itself. See also → Investment Disputes, Convention and International Centre for the Settlement of.

III. Procedural Matters

Standing may be termed as an absolute precondition for all legal actions since its existence is officially tested at the commencement of every proceeding. Needless to say, the standing of a party may be challenged by the other party to the proceeding. And since it is a condition that must be considered *proprio motu* by the Court, the failure of a party to raise an objection does not preclude a later examination. A lack of standing may, however, be corrected by subsequent qualification as a party. (See → Corfu Channel Case, ICJ Reports 1947, p. 4 at p. 5.)

The denial of standing results in the dismissal of a complaint as inadmissible without examination of the merits.

In the words of the ICJ: "It is a universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between, on the one hand, the right to activate a court and the right of the court to examine the merits of the claim, – and, on the other, the plaintiff party's legal right in respect of the subject-matter of that which it claims . . .". However, this view has not always come out clearly in the decisions of the Court. The reason may be that according to the former practice any question could be raised as a → "preliminary objection". If the objection involved a basic question relating to the claim, the PCIJ and ICJ simply joined the examination of this question to that of the merits. Art. 79 of the ICJ Rules of Court corresponds to this conception. Thus, in the → Nottebohm Case the "nationality of claim" requirement, which as an aspect of active legitimation directly relates to the basis of the claim, was seen as condition of admissibility and Liechtenstein's complaint was dismissed as inadmissible because of the failure to meet this condition.

Later decisions have shown a trend toward a more sensible practice from the procedural point

of view: see → South West Africa Judgment, ICJ Reports 1966, at p. 51, n. 100, and → Barcelona Traction Case, ICJ Reports 1970, at p. 51, n. 103, where the decision that the applicant State was devoid of active legitimation resulted in the dismissal of the claims on the merits. See Morelli's separate opinions in ICJ Reports 1962, p. 573, ICJ Reports 1966, pp. 59, ICJ Reports 1964, p. 84, especially p. 110 and ICJ Reports 1970, p. 226.

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TAFT ARBITRATION TREATIES (1911)

The Taft Arbitration Treaties were the two arbitration treaties between the United States and France and between the United States and Great Britain which were signed on August 3, 1911, but not subsequently ratified.

After the failure of the 1910 British-American-German proposal to set up a Court of Arbitral Justice (cf. → Permanent Court of International Justice), the initiative for the conclusion of bilateral agreements was taken by William Howard Taft (President of the United States from 1909 to 1913). His aim was to secure the refinement of the rules for international arbitration formulated at the → Hague Peace Conferences of 1899 and 1907, initially through bilateral arbitral agreements. This idea was strongly supported by

Secretary of State Philander C. Knox, who was responsible for the signing of these treaties – sometimes also known as the Knox Treaties – on behalf of the United States. The proposal also met with British approval expressed by British Foreign Minister Sir Edward Grey and Ambassador James Bryce; this was followed soon afterwards by the approval of the French Government.

The treaties were intended to extend the use of arbitral procedures to all disputes between the parties which could not be settled by diplomacy, and to supersede the arbitration treaties of February 10, 1908 (United States and France) and April 4, 1908 (United States and Great Britain), which had contained certain qualifications. In five articles which are worded almost identically in the two treaties, the parties undertook to refer all their differences to obligatory arbitration after investigation by a joint high commission of inquiry (→ Mixed Commissions; → Fact-Finding and Inquiry).

Art. 1 provided that all differences "in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity" were to be submitted to the → Permanent Court of Arbitration or to "some other arbitral tribunal as may be decided in each case by special agreement" (→ *Compromis*). For this purpose the provisions relating to international arbitration contained in Part IV of the Hague Convention on the Pacific Settlement of Disputes of 1907 were to be applicable, including the provisions relating to the Permanent Court of Arbitration, but with the exception of Arts. 53 and 54 thereof concerning the settlement of the *compromis* by the Court.

For individual controversies a joint high commission of inquiry could be formed as the occasion arose, at the request of either party with each party designating three of its nationals as members. The organization and procedure of such a commission were to be determined by the analogous application of the provisions of Part III of the Hague Convention of 1907, so long as Arts. 4 and 5 of the treaties did not apply and the parties themselves had not agreed upon special arrangements in a particular case (Art. 2). According to the type of controversy, the commission had three different tasks: 1. to investigate the facts of a dispute so as to facilitate the subsequent work of an arbitral tribunal (Art. 2 (1)); 2. to decide upon the competence of the arbitral tribunal where the parties disagreed as to whether a dispute was subject to arbitration under Art. 1 of the treaties (Art. 3 (3)); 3. to act as a commission of inquiry (similar to those which had been set up under the → Jay Treaty (1794) and subsequent instruments, and which had taken on a particular significance in the → Dogger Bank Incident (1904)) for clarifying contradictory views in a non-arbitrable dispute and reporting to the parties with non-binding recommendations for the settlement of the dispute (Art. 3 (1) and (2)). In the first two situations the Commission could postpone the proceedings until after the expiry of one year from the date of the initial request "in order to afford an opportunity for diplomatic discussion and adjustment".

The main reason why the treaties never came into force was that the United States Senate objected to the most important provisions. Some Senators felt that the general obligation to submit disputes to arbitration would be a threat to the → Monroe Doctrine and an undesirable deviation from the traditional practice of accepting the jurisdiction of international courts or arbitral tribunals only with the exception of cases in which vital interests were at stake. Because of the obligation to refer all disputes to arbitration, the German Government was not even prepared to start negotiating an arbitration agreement similar to these two treaties, as suggested by Secretary of State Knox following the joint proposal for a Court of Arbitral Justice. President Taft held the view that – as a result of the proposed Senate amendment to the treaties deleting Art. 3 (3) and listing types of disputes that could not be submitted to arbitration – the purpose intended at the signing of the treaties could no longer be achieved, namely, the extension of the process of arbitration to matters not comprised by the 1908 treaties with France and Great Britain. He therefore decided against making any further efforts in this matter.

The importance of the Taft Treaties was acknowledged at the Lake Mohonk Conference of

1911 by members of the American peace movement as a valuable contribution to the preservation of peace (→ Peace Movements; → Peace, Proposals for the Preservation of). Contemporary authors envisaged that the treaties would become a basis for extending the apparatus for the → peaceful settlement of disputes. The Taft Treaties have indeed influenced the use of dispute settlement procedures in that, in addition to referring arbitrable disputes to arbitration, they provided for the setting up of international commissions of inquiry as an aid to the peaceful settlement of political disputes. The draft treaties served above all as a model for the → Bryan Treaties (1913/1914).

The interpretation given to the provisions of Art. 1 of the 1911 treaties, which is found in literature and shown in State practice, has made an important contribution to the clarification of the term "equity" in arbitration cases (cf. → Norwegian Shipowners' Claim Arbitration; see also → Equity in International Law).

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VALIDITY OF JUDICIAL DECISIONS *see* Judicial and Arbitral Decisions: Validity and Nullity

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