once established may offer comments or advice with regard to negotiations between the parties in dispute, or any other appropriate dispute settlement process, and may engage in fact-finding and other conciliation functions. The Convention on Conciliation and Arbitration was signed in 1992 and came into force two years later. Under this Convention, a Court of Conciliation and Arbitration[134] has been established in Geneva. Conciliation may be undertaken by a Conciliation Commission constituted for each dispute and drawn from a list established under the Convention.[135] The Commission will draw up a report containing its proposals for the peaceful settlement of the dispute and the parties will then have a period of thirty days during which to examine the proposals. If the parties do not accept the proposed settlement, the report will be forwarded to the OSCE Council through the Senior Council (formerly the Committee of Senior Officials).[136] The Convention also provided for the establishment of Arbitral Tribunals, similarly constituted for each dispute and drawn from a list.[137] Such a tribunal would be set up by express agreement between the parties in dispute[138] or where the state brought to arbitration has agreed in advance to accept the jurisdiction of the Tribunal.[139] The award of the Tribunal would be final and binding as between the parties.[140]

In addition, the OSCE is able to send Missions to various participating states, with their consent, as part of its early warning, conflict prevention and crisis management responsibilities. Such Missions have been sent to Yugoslavia to promote dialogue between the populations of Kosovo, Sanjak and Vojvodina and the authorities of the state; to the Former Yugoslav Republic of Macedonia; to Georgia; Moldova; Tajikistan; Estonia; Ukraine and Chechnya. Additional Missions have operated in Albania and Kosovo,[141] Moldova and Georgia.[142] Under the General Framework

[134] This consists of the conciliators and arbitrators appointed under articles 3 and 4.

[135] See articles 1 and 2. Each state party is to appoint two conciliators, article 3.

[136] Article 25.

[137] Articles 2 and 4. Each state party is to appoint one arbitrator and one alternate.

[138] Either between two or more states parties to the Convention or between one or more states parties to the Convention and one or more OSCE participating states, article 26(1).

[139] Article 26.

[140] Article 31. See also UN Handbook, p. 87, and *OSCE Handbook 2000*, Vienna, p. 37 and see www.osce.org/publications/handbook/.

[141] See *OSCE Handbook 1996*, pp. 16 ff., and Annual Report for 2001. A series of Sanctions Assistance Missions, operating under the guidance of the OSCE/EU Sanctions Co-ordinator, was sent to various countries in order to assist them in maintaining sanctions imposed by the Security Council in the Yugoslav crisis, *ibid.*, p. 36.

[142] See Annual Report for 2007, pp. 54 and 60. Note also the Minsk Process established by the OSCE in 1995 in order to resolve the dispute between Armenia and Azerbaijan concerning Nagorno-Karabakh: see www.osce.org/item/21979.html.

Agreement for Peace in Bosnia and Herzegovina, initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995, the OSCE was made responsible for the supervision of elections,[143] for providing the framework for the conduct of discussions between the Bosnian parties on confidence and security-building measures and for measures of subregional arms control,[144] and for assisting in the creation of a Bosnian Commission on Human Rights.[145]

International organisations and facilities of limited competence[146]

The various specialised agencies[147] which encourage international co-operation in functional spheres have their own procedures for settling disputes between their members relating to the interpretation of their constitutional instruments. Such procedures vary from organisation to organisation, although the general pattern involves recourse to one of the main organs of the institution upon the failure of negotiations. If this fails to result in a settlement, the matter may be referred to the International Court of Justice or to arbitration unless otherwise agreed.[148] In such cases, recourse to the Court is by way of a request for an Advisory Opinion, although by virtue of constitutional provisions, the judgment of the Court would be accepted as binding and not as advisory.[149] In other cases, the

[143] See Annex 3 of the Agreement.

[144] Annex 1-B of the Agreement. The subregional arms control involves Yugoslavia, Croatia and Bosnia.

[145] Annex 6 of the Agreement. See also article 22 of the ASEAN Charter, 2007, which calls for the maintenance and establishment of dispute settlement mechanisms to resolve disputes between ASEAN members: see below, chapter 23, p. 1294.

[146] See generally C. A. Colliard, 'Le Règlement des Différends dans les Organisations Intergouvernementales de Caractère Non Politique' in *Mélanges Basdevant*, Paris, 1960, p. 152, and G. Malinverni, *Le Règlement des Différends dans les Organisations Internationales Économiques*, Leiden, 1974. It should also be noted that several international treaties expressly provide mechanisms and methods for the peaceful resolution of disputes arising therefrom: see e.g. with regard to the Convention on the Law of the Sea, above, chapter 11, p. 635, and with regard to the Convention on the Law of Treaties, above, chapter 16, p. 952.

[147] See Murty, 'Settlement', pp. 729–32. See further below, chapter 23, p. 1285.

[148] See article 37 of the International Labour Organisation Constitution; article 14(2) of the UNESCO Constitution; article 75 of the World Health Organisation Constitution; article 17 of the Constitution of the Food and Agriculture Organisation; article XVII of the International Atomic Energy Agency Statute and articles 50 and 82 of the Convention of the International Telecommunications Union.

[149] See C. F. Amerasinghe, *Principles of the Institutional Law of International Organisations*, 2nd edn, Cambridge, 2005, pp. 199 ff.

opinions to be given by the International Court or by an arbitral tribunal are to be non-binding.[150] A number of organisations provide for other mechanisms of inquiry and dispute settlement.[151]

There are a number of procedures and mechanisms which seek to resolve disputes in particular areas, usually economic and involving mixed disputes, that is between states and non-state entities. These processes are becoming of considerable significance and many of them are having a meaningful impact upon general international law. This section will briefly survey some of these.

The dispute settlement procedures established under the General Agreement on Tariffs and Trade[152] commenced with bilateral consultations under article XXII.[153] From this point, article XXIII provided for a party to refer a dispute for conciliation[154] where it was felt that 'any benefit accruing to it directly or indirectly' under GATT was being 'nullified or impaired'. A Panel, composed of experts chosen by the Director-General of GATT, then would seek to ascertain the relevant facts and reach a settlement.[155] The approach was pragmatic and focused on achieving a settlement between the parties. The report of the Panel would be sent to the GATT Council, which would usually adopt it by consensus. Where the disputing parties had not implemented the recommendations within a reasonable time, the complaining party was able to take retaliatory action with the authorisation of the Council. Such instances were in fact very rare.[156] In 1989, a series of improvements was adopted pending the conclusion of the Uruguay Round of negotiations. These

[150] See article 22(1) of the UN Industrial Development Organisation (UNIDO) Constitution and article 65 of the International Maritime Organisation Constitution.

[151] See the 1962 Special Protocol to the UNESCO Convention against Discrimination in Education which provides for a Conciliation and Good Offices Commission and the 1962 Special Protocol to the ILO Convention against Discrimination in Education which provides for a Conciliation and Good Offices Commission: see Murty, 'Settlement', pp. 729–30, and *Bowett's International Institutions*, chapter 3. See also the World Intellectual Property Organisation Mediation, Arbitration and Expedited Arbitration Rules 1994, 34 ILM, 1995, p. 559.

[152] See further below, chapter 23, p. 1286.

[153] See UN Handbook, pp. 136 ff.; J. H. Jackson, *The World Trading System*, 2nd edn, Cambridge, MA, 1997, chapter 4, and T. Flory, 'Les Accords du Tokyo Round du GATT et la Réforme des Procédures de Règlement des Différends dans la Système Commercial Interétatique', 86 RGDIP, 1982, p. 235.

[154] Before this stage, a party could seek the good offices of the Director-General of GATT to facilitate a confidential conciliation: see the 1982 GATT Ministerial Declaration.

[155] See in particular the 1979 Understanding on Dispute Settlement.

[156] See Henkin *et al.*, *International Law: Cases and Materials*, p. 1414.

improvements included the provision that the Council would normally accept the report of the Panel within fifteen months of the complaint and provisions relating to mediation, conciliation and arbitration were added.[157]

The GATT process was absorbed within the World Trade Organisation, which came into being on 1 January 1995. Annex 2 of the Marrakesh Agreement Establishing the World Trade Organisation, 1994 is entitled 'Understanding on Rules and Procedures Governing the Settlement of Disputes'.[158] Under the WTO scheme, disputes arising out of the agreements contained in the Final Act of the Uruguay Round are dealt with by the WTO General Council acting as the Dispute Settlement Body. Where a member state considers that a measure adopted by another member state has deprived it of a benefit accruing to it directly or indirectly under the GATT or other covered agreements, it may call for consultations with the other party and the latter must reply within ten days and enter into consultations within thirty days of receiving the request. If bilateral consultations have failed to resolve the dispute, the parties may agree to bring the dispute to the WTO Director-General, who may offer good offices, conciliation or mediation assistance. Where consultations fail to produce a settlement after sixty days, the complaining state may turn to the Dispute Settlement Body. This Body may establish a three-member panel, whose report should be produced within six months. Detailed procedures are laid down in the Understanding. The panel report is adopted by the

[157] See E. Canal-Forgues and R. Ostrihansky, 'New Developments in GATT Dispute Settlement Procedures', 24 *Journal of World Trade*, 1990, and J.-G. Castel, 'The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures', 38 ICLQ, 1989, p. 834.

[158] See e.g. A. F. Lowenfeld, *International Economic Law*, 2nd edn, Oxford, 2008, part III; J. H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge, 2006, chapter 5; *Dispute Settlement in the WTO* (eds. J. Cameron and K. Campbell), London, 1998; Collier and Lowe, *Settlement*, p. 99; R. Yerxa and B. Wilson, *Key Issues in WTO Dispute Settlement – The First Ten Years*, Cambridge, 2005; M. Matsushita, T. J. Schoenbaum and P. C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy*, 2nd edn, Oxford, 2006; T. Broude, *International Governance in the WTO: Judicial Boundaries and Political Capitulation*, London, 2004; D. Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System*, Oxford, 2005; *Bowett's International Institutions*, p. 379; A. H. Qureshi, *International Economic Law*, London, 1999, p. 287; J. Pauwelyn, 'Enforcement and Countermeasures in the WTO', 94 AJIL, 2000, p. 335, and J. Cameron and K. R. Gray, 'Principles of International Law in the WTO Dispute Settlement Body', 50 ICLQ, 2001, p. 248. See also WTO Secretariat, *The WTO Dispute Settlement Procedures*, 2nd edn, Cambridge, 2001 and www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

Dispute Settlement Body within sixty days, unless there is a consensus against adoption or one of the parties notifies an intention to appeal on grounds of law. The standing Appellate Body established by the Dispute Settlement Body consists of seven experts, three of whom may sit to hear appeals at any one time. Appeal proceedings generally are to last no more than sixty (or at most ninety) days. Unless there is a consensus against adoption within thirty days, the Dispute Settlement Body will accept the Appellate Body report.

Within thirty days of the adoption of the report, the parties must agree to comply with the recommendations and if this does not happen within a reasonable period, the party concerned must offer mutually acceptable compensation. If after twenty days, no satisfactory compensation is agreed, the complaining state may request authorisation from the Dispute Settlement Body to suspend concessions or obligations against the other party and this should be granted within thirty days of the end of the reasonable period. In any event, the Dispute Settlement Body will monitor the implementation of rulings or recommendations.[159]

There are two particular points to make. First, there have been a significant number of cases initiated before the Dispute Settlement Body[160] and, secondly, the establishment of an Appellate Body, composed of trade law experts, is having an important impact upon the development of international trade law.[161] As a reflection of the latter, a number of issues of general international law interest have been dealt with, ranging from consideration of the Vienna Convention on the Law of Treaties and treaty

[159] Rules of Conduct were adopted in December 1996: see WT/DSB/RC/1 and www.wto.org/english/tratop_e/dispu_e/rc_e.htm. See also the Working Procedures for Appellate Review, WT/AB/WP/4 and www.wto.org/english/tratop_e/dispu_e/ab_e.htm. The Doha Ministerial Declaration of November 2001 stated that negotiations on improvements and clarifications of the Dispute Settlement Understanding would take place with a view to agreement by May 2003. However, negotiations are continuing: see e.g. Hong Kong Ministerial Declaration of December 2005, WT/MIN(05)/DEC.

[160] Over 200 by mid-2000: see Cameron and Gray, 'WTO Dispute Settlement', p. 250, and 373 by early March 2008: see www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

[161] See e.g. D. M. McRae, 'The Emerging Appellate Jurisdiction in International Trade Law' in Campbell and Cameron, *Dispute Settlement*, p. 1, and Jackson, *Sovereignty, the WTO*, pp. 163 ff. There have been eighty-six notices of appeal as of the end of 2007: see Annual Report of the Appellate Body, 2007, Annex III. Lowenfeld, *International Economic Law*, p. 211, concludes that the WTO Dispute Settlement Mechanism 'is a great success – more so than any other arrangement for resolving international legal disputes at government level'.

interpretation[162] to questions relating to procedural issues such as burden of proof.[163]

A number of regional dispute mechanisms concerning economic questions have been established. The most developed is the European Union, which has a fully functioning judicial system with the Court of Justice in Luxembourg with wide-ranging jurisdiction.[164] Other relevant, but modest regional economic mechanisms include Mercosur (Argentina, Brazil, Paraguay and Uruguay),[165] Comesa[166] and ECOWAS.[167]

The North American Free Trade Agreement (NAFTA), 1992, linking the US, Mexico and Canada, aims at the free movement and liberalisation of goods, services, people and investment, and also contains dispute settlement provisions.[168] The principal mechanisms are contained in Chapters 11, 14, 19 and 20 of the Agreement. Under Chapter 11[169] investment disputes may be raised by individual investors of one state party against another state party and, if not resolved by negotiations, may be submitted to arbitration either under the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) or the ICSID Additional Facility or the rules of the United Nations Commission for International

[162] See e.g. the *Standards for Reformulated and Conventional Gasoline* case, 1996, WT/DS2/AB/R and the *Import Prohibition of Certain Shrimp and Shrimp Products* case, 1998, WT/DS58/AB/R. See also D. Palmeter and P. C. Mavroidis, 'The WTO Legal System: Sources of Law', 92 AJIL, 1998, p. 398, and Jackson, *Sovereignty, the WTO*, pp. 182 ff.

[163] See e.g. *Imports of Agricultural, Textile and Industrial Products*, 1999, WT/DS90/AB/R.

[164] As to which see e.g. D. Chalmers, C. Hadjiemmanuil, G. Monti and A. Tomkins, *European Union Law: Text and Materials*, Cambridge, 2006; S. Weatherill and P. Beaumont, *EU Law*, 3rd edn, London, 1999, and Weatherill, *Cases and Materials on EU Law*, 8th edn, Oxford, 2007; and A. Arnull, *The European Court of Justice*, 2nd edn, Oxford, 2006.

[165] See the Mercosur Treaty, 1991. The Protocol of Brasilia, 1991 (complemented by Decision 17 1998) establishes a rudimentary dispute settlement system for states parties based upon diplomatic negotiations with arbitration as a last resort. Arbitration was not used until 1999 and the first arbitral award was the *Siscomex* case: see D. Ventura, 'First Arbitration Award in Mercosur – A Community Law in Evolution?', 14 *Leiden Journal of International Law*, 2000, p. 447. See also www.mercosur.int/msweb/.

[166] See the Treaty Establishing the Common Market for Eastern and Southern Africa, 1993.

[167] The Economic Community of West African States: see the treaty of 1975 and revisions of 1993 and 2001 and Protocol 1 on the Community Court of Justice, 1999.

[168] See 32 ILM, 1993, pp. 682 ff. See also *Bowett's International Institutions*, p. 222; D. S. Huntington, 'Settling Disputes under the North American Free Trade Agreement', 34 *Harvard International Law Journal*, 1993, p. 407; Collier and Lowe, *Settlement*, p. 111; N. Kinnear, A. Bjorkland and J. Hannaford, *Investment Disputes under NAFTA*, The Hague, 2006, and *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (ed. T. Weiler), Ardsley, 2004. See also www.nafta-sec-alena.org/DefaultSite/index_e.aspx.

[169] Articles 1101–14 of the Agreement.

Trade Law (UNCITRAL).[170] Tribunals established under NAFTA must apply both the NAFTA Treaty and applicable rules of international law.[171] Interim measures of protection may be ordered and the award of the tribunal is final and binding.[172] Questions relating to interpretation of the Treaty must be remitted to the Free Trade Commission,[173] whose interpretations are binding.[174] Chapter 19 provides for bi-national panel reviews of anti-dumping, countervailing duty and injury final determinations. These panels may also review amendments made by any of the state parties to their anti-dumping or countervailing duty law.[175]

The dispute settlement provisions of Chapter 20 are applicable primarily to inter-state disputes concerning the interpretation or application of the NAFTA, including disputes relating to the financial services provisions of Chapter 14. Should attempts to resolve the particular dispute by consultation within certain time limits, and good offices, mediation and conciliation by the Free Trade Commission within certain time limits fail, the parties may request that the Commission establish a five-person Arbitral Panel.[176]

A neutral chairperson is chosen within fifteen days by the parties in dispute (or by one of the parties chosen by lot if there is no agreement) and within a further fifteen days, two panellists of the nationality of the opposing party are chosen by each party.[177] The panel may obtain expert advice and a Scientific Review Board may be created to provide assistance on technical factual questions raised by the parties. The panel provides an Initial Report, within ninety days of the appointment of the last panellist, as to its findings and recommendations. Comments may then be received from the parties and the panel may reconsider its report. Within thirty days of the Initial Report, the panel will send its Final Report to the

[170] See below, p. 1043. [171] See article 1131. [172] Articles 1134 and 1136.

[173] Established under article 2001 of Chapter 20 and consisting of cabinet-level representation of the states parties with a general remit to supervise implementation of the agreement and to resolve disputes concerning its interpretation and application. The Commission also established and oversees the NAFTA secretariat comprising national sections, article 2002.

[174] See articles 1131 and 1132. See also e.g. with regard to the terms 'fair and equitable treatment' and 'full protection and security' under article 1105, *Mondev International Ltd* v. *USA* 6 ICSID Reports, 2002, p. 192, paras. 100 ff.; *United Parcel Service of America* v. *Canada* 7 ICSID Reports, 2002, p. 288, para. 97; *Loewen Group* v. *USA* 7 ICSID Reports, 2003, p. 442, paras. 124 ff. and *Methanex* v. *USA*, award of 3 August 2005, Part II, Chapter H, para. 23.

[175] See articles 1903–5. [176] See articles 2003–8. [177] See article 2011.

Commission.[178] The parties must then agree to a settlement of the dispute in the light of the panel's recommendations within thirty days.[179] If this does not happen, the complaining party may suspend the application to the party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.[180]

The World Bank (i.e. the International Bank for Reconstruction and Development and the International Development Association) established in 1993 an Inspection Panel system providing an independent forum for private citizens who believe that their interests have been or may be harmed by a project financed by the World Bank.[181] Upon receipt of a request by such private persons, the three-person Panel decides whether it is within its mandate and, if so, sends it to Bank Management who prepare a response for the Panel. A preliminary review is undertaken by the Panel that includes an independent assessment of the merits of Bank Management's response. A recommendation is then submitted to the Board of the Bank as to whether the claims should be investigated. If the Board approves a recommendation to investigate, the Panel proceeds with the investigation and its findings are then sent to the Board and to Bank Management. The management must then within six weeks submit its recommendations to the Board on what actions the Bank should take in response to the Panel's findings. The Board will then make a final decision as to future action based upon the Panel's findings and the recommendations of Bank Management.[182]

The International Centre for Settlement of Investment Disputes was established under the auspices of the World Bank by the Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States, 1965 and administers ad hoc arbitrations.[183] It constitutes

[178] See articles 2014–17. [179] Article 2018. [180] Article 2019.

[181] See e.g. I. Shihata, *The World Bank Inspection Panel*, Oxford, 1994; D. L. Clark, *A Citizen's Guide to the World Bank Inspection Panel*, 2nd edn, Washington, 1999; D. Clark, *Demanding Accountability: Civil Society and the World Bank Inspection Panel*, Lanham, 2003; G. Alfredsson, R. Ring and G. Melander, *The Inspection Panel of the World Bank: A Different Complaints Procedure*, The Hague, 2001; 'Conclusions of the Second Review of the World Bank Inspection Panel', 39 ILM, 2000, p. 243, and A. Gowlland Gualtieri, 'The Environmental Accountability of the World Bank to Non-State Actors', 72 BYIL, 2002, p. 213. See also the Inspection Panel's Annual Report, 2006/7.

[182] As of June 2007, forty-six requests had been sent to the Panel, of these thirty-five resulted in Board approval of the Panel's recommendations: see http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Summany_of_Inpection_Panel_Cases_%5updated%5D.pdf.

[183] See Lowenfeld, *International Economic Law*, pp. 536 ff.; R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford, 2008, pp. 222 ff.; C. Schreuer, *The ICSID*

a framework within which conciliation and arbitration takes place and provides an autonomous system free from municipal law in which states and non-state investors (from member states) may settle disputes. States parties to the Convention[184] undertake to recognise awards made by arbitration tribunals acting under the auspices of the Centre as final and binding in their territories and to enforce them as if they were final judgments of national courts.[185] The jurisdiction of the Centre extends to 'any legal dispute arising directly out of an investment, between a contracting state . . . and a national of another contracting state, which the parties to the dispute consent in writing to submit to the Centre'.[186] Accordingly, states must not only become parties to the Convention, but also agree in writing to the submission of the particular dispute to the settlement procedure, although this may be achieved in a concession agreement between the investor and the state concerned. In fact, bilateral investment treaties between states parties to the Convention frequently provide for recourse to arbitration under the auspices of the Centre in the event of an investment dispute.[187] Further, a number of multilateral treaties now provide for the submission to ICSID of disputes arising.[188] In 1978, the Centre introduced the ICSID Additional Facility which extends its jurisdiction to include disputes where only one of the parties is a contracting state or a national of a contracting state and disputes not arising directly out of an investment, provided the dispute relates to a transaction which has 'features that distinguish it from an ordinary commercial transaction' and further provides for fact-finding proceedings.

Convention: A Commentary, Cambridge, 2001; Broches, 'The Convention on the Settlement of Investment Disputes', 3 *Columbia Journal of Transnational Law*, 1966, p. 263, and Broches, 'The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States', 136 HR, 1972, p. 350; D. O'Keefe, 'The International Centre for the Settlement of Investment Disputes', 34 YBWA, 1980, p. 286; *The International Arbitral Process: Public and Private* (ed. J. G. Wetter), Dobbs Ferry, 1979, vol. II, p. 139; Collier and Lowe, *Settlement*, p. 59, and P. Muchlinski, *Multinational Enterprises and the Law*, Oxford, 1995, pp. 540 ff. See also www.worldbank.org/icsid/.

184 In becoming parties, states may expressly include or exclude certain kinds of disputes: see article 25(4). As of 2007, there were 144 contracting states (Bolivia denounced the convention in that year), Annual Report, 2007: see www.worldbank.org/icsid.

185 Wetter, *Arbitral Process*, vol. II, p. 139.

186 Article 25(1) of the Convention.

187 See I. Pogany, 'The Regulation of Foreign Investment in Hungary', 4 *ICSID Review – Foreign Investment Law Journal*, 1989, pp. 39, 51. See also the case of *Asian Agricultural Products* v. *Sri Lanka* 30 ILM, 1991, p. 577.

188 See e.g. article 1120 of the NAFTA Treaty, 1992 and *Metalclad Corporation* v. *United Mexican States* 119 ILR, p. 615. See also article 26(4) of the European Energy Charter, 1995.

The Convention requires individuals to be nationals of a state other than the one complained against and article 25(2) specifically excludes dual nationals. Nationality is determined according to the rules of the state of nationality claimed and must exist both at the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered. The same principles apply to companies, except that article 25(2)b includes also juridical persons which had the nationality of the contracting state party to the dispute on the date on which consent to submission of the dispute occurred and which 'because of foreign control, the parties agreed should be treated as a national of another contracting state for the purposes of this Convention'. This may be achieved in a bilateral investment treaty and may be implied in the circumstances.[189]

Disputes are referred to conciliation commissions or arbitral tribunals constituted under ICSID's auspices. Conciliation has been rare, but arbitration more frequent.[190] The Secretary-General may be asked to establish an Arbitral Tribunal by either party to a dispute that falls within the jurisdiction of ICSID. The parties nominate an uneven number of arbitrators with the chosen arbitrators deciding upon a neutral president of the tribunal. The applicable law is as agreed by the parties and otherwise the law of the contracting state party to the dispute together with such rules of international law as may be applicable.[191] Awards are binding and not subject to any appeal or other remedy other than those provided within the Convention system itself.[192] Each contracting state is obliged to recognise ICSID awards and enforce pecuniary obligations imposed as if they were final judgments in its own courts.[193] A number of significant awards have now been made.[194]

[189] See e.g. *AMCO* v. *Indonesia* 1 ICSID Reports, p. 377.

[190] As of May 2008, 139 cases had been concluded with 125 pending: see www.worldbank.org/icsid/cases/cases.htm.

[191] See Chapter IV of the Convention.

[192] Article 53.

[193] Article 54. However, this is subject to domestic legislation as regards sovereign immunity: see article 55.

[194] See P. Lalive, 'The First "World Bank" Arbitration (*Holiday Inns* v. *Morocco*) – Some Legal Problems', 51 BYIL, 1980, p. 123. See also *AGIP Spa* v. *Government of the Popular Republic of the Congo* 67 ILR, p. 318; *Benvenuti and Bonfant* v. *Government of the Popular Republic of the Congo, ibid.*, p. 345, dealing with questions of state responsibility and damages, and *LETCO* v. *Government of Liberia* 89 ILR, p. 313 and *Tradex Hellas SA* v. *Albania*, 1999, ARB/94/2 concerning expropriation. See also *Metalclad Corporation* v. *United Mexican States* 119 ILR, p. 615, concerning state responsibility, expropriation and compensation

Another procedure of growing importance is the Court of Arbitration of the International Chamber of Commerce.[195] A number of agreements provide for the settlement of disputes by arbitration under the Rules of the International Chamber of Commerce and several cases have been heard.[196] Also to be noted is the set of rules adopted by the UN Commission on International Trade Law (UNCITRAL) in 1966.[197]

An institution which constitutes a mixed model, combining elements of inter-state arbitration with elements of state–individual arbitration is the Iran–United States Claims Tribunal which was established in The Hague by the Claims Settlement Declaration in 1981.[198] The Tribunal is an international arbitral body set up to adjudicate claims of US nationals against Iran and of Iranian nationals against the United States arising out of alleged violations of property rights as a result of the circumstances surrounding the hostage crisis. The Tribunal also has jurisdiction to hear certain official claims between the US and Iran arising out of contractual arrangements for the purchase and sale of goods and services, and disputes relating to the interpretation and implementation of the Claims Settlement Agreement itself. As another indication of its mixed character, article V of the Claims Settlement Declaration provides that the Tribunal shall apply 'such choice of law rules and principles of commercial and

and *SGS Société de Surveillance SA* v. *Pakistan* 129 ILR, p. 360, concerning e.g. relations between domestic courts and ICSID tribunals and the definition of investment.

195 See Wetter, *Arbitral Process*, vol. II, p. 145. See also www.iccwbo.org/index_court.asp.

196 See *Dalmia Cement* v. *National Bank of Pakistan* 67 ILR, p. 611 and the *Westland Helicopters* case, 80 ILR, p. 595.

197 See e.g. I. Dore, *The UNCITRAL Framework for Arbitration in Contemporary Perspective*, London, 1993, and www.uncitral.org/en-index.htm.

198 See 1 Iran–US CTR, pp. 3–56; 20 ILM, 1981, pp. 223 ff. See also *The Jurisprudence of the Iran–United States Claims Tribunal* (ed. G. H. Aldrich), Oxford, 1996; Lowenfeld, *International Economic Law*, pp. 541 ff.; Stewart and Sherman, 'Development at the Iran–United States Claims Tribunal: 1981–1983', 24 Va. JIL, 1983, p. 1; D. Lloyd Jones, 'The Iran–United States Claims Tribunal: Private Rights and State Responsibility', 24 Va. JIL, 1984, p. 259; *The Iran–US Claims Tribunal 1981–83* (ed. R. Lillich), Charlottesville, 1984; *The Iran–United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (eds. R. Lillich and D. B. Magraw), New York, 1998; S. J. Toope, *Mixed International Arbitration*, Cambridge, 1990, chapter 9; D. D. Caron, 'The Nature of the Iran–United States Claims Tribunal and the Evolving Structure of International Dispute Resolution', 84 AJIL, 1990, p. 104; A. Avanessian, *Iran–United States Claims Tribunal in Action*, The Hague, 1993; R. Khan, *The Iran–United States Claims Tribunal*, Dordrecht, 1990; W. Mapp, *The Iran–United States Claims Tribunal: The First Ten Years 1981–1991*, Manchester, 1993, and the *Iran–United States Claims Tribunal Reports*, 1981 to date. See also www.iusct.org/index-english.html.

international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances'.

In order to ensure payment of awards to US nationals, a Security Account was established with one billion dollars capital from Iranian assets frozen in the US as a result of the hostages crisis. Once the sum falls below $500 million, Iran is under an obligation to replenish the Account.[199] Under the terms of the Agreement, all claims had to be filed by 19 January 1982.[200] The Tribunal has nine judges, three each chosen by Iran and the US and three by the remaining six. It sits in three chambers of three persons each and in important cases in plenary session. It operates under UNCITRAL Rules, save as modified by the parties or the Tribunal.[201] Awards are final and binding and enforceable in any foreign court in accordance with domestic law.[202]

A variety of important issues have been addressed by the Tribunal, including the treatment of dual nationality in claims[203] and in particular issues relating to expropriation.[204] Although claims of under $250,000 are to be represented by the government of the national concerned, claims in excess of this are presented by the individual claimants themselves, while the agents of the two states are present during the hearing with the right of audience.[205] Nevertheless, the Tribunal has emphasised on several occasions that the claim remains that of the individual and is not that of the state, as would be normal in classical state responsibility situations.[206]

Whether this model will be used in other similar situations is an open question, particularly since the trend in the post-war era has tended towards the lump-sum settlement of such disputes.[207] But the value of

[199] By early 1989, this had taken place on twenty-six occasions: see 83 AJIL, 1989, p. 915.

[200] Approximately 1,000 claims for amounts of $250,000 or more, and 2,800 claims for amounts of less than $250,000 were filed within the time limit, which does not apply to disputes between the two Governments concerning the interpretation of the Algiers Declarations. By the end of March 2008, there had been 600 awards and 83 interim and interlocutory awards filed and 133 decisions filed. Altogether 3,936 cases had been finalised by award, decision or order: see Communiqué of 25 April 2008.

[201] Article III of the Claims Settlement Declaration.

[202] Article IV of the Claims Settlement Declaration.

[203] See above, chapter 14, p. 815.

[204] See above, chapter 14, p. 827.

[205] See H. Fox, 'States and the Undertaking to Arbitrate', 37 ICLQ, 1988, pp. 1, 21.

[206] See *State Party Responsibility for Awards Rendered Against Its Nationals*, Case A/21, 14 Iran–US CTR, pp. 324, 330.

[207] See above, chapter 14, p. 840.

the Tribunal in general terms in resolving the large number of claims in question and in addressing significant issues of international law cannot be denied.

The establishment of the UN Compensation Commission constitutes an interesting and significant development.[208] It was created by Security Council resolution 692 (1991) to process claims for compensation for 'any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.[209] It constitutes a subsidiary organ of the Security Council and comprises a Governing Council (being the fifteen members at any given time of the Security Council), a secretariat and Commissioners appointed to review and resolve claims.[210] In resolution 705 (1991), the Security Council, acting under Chapter VII, decided that compensation to be paid by Iraq should not exceed 30 per cent of the annual value of the exports of petroleum and petroleum products from Iraq.[211] In resolution 706 (1991), the Council authorised states to import a certain amount of Iraqi petroleum and petroleum products in order to pay for essential food and humanitarian purchases by Iraq and provide payments for the UN Compensation Commission via the Compensation Fund.[212]

[208] See e.g. D. Campanelli, 'The United Nations Compensation Commission (UNCC): Reflections on its Judicial Character', 4 *The Law and Practice of International Courts and Tribunals*, 2005, p. 107; V. Heiskanen, 'The United Nations Compensation Commission', 296 HR, 2002, p. 314; Collier and Lowe, *Settlement*, p. 41; *The United Nations Compensation Commission: A Handbook* (eds. M. Frigessi di Ratalma and T. Treves), The Hague, 1999; A. Kolliopoulos, *La Commission d'Indemnisation des Nations Unies et le Droit de la Responsabilité Internationale*, Paris, 2001; A. Grattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations', 13 EJIL, 2002, p. 161; D. Caron and B. Morris, 'The United Nations Compensation Commission: Practical Justice, Not Retribution', 13 EJIL, 2002, p. 183, and M. B. Fox, 'Imposing Liability for Losses from Aggressive War: An Economic Analysis of the UN Compensation Commission', 13 EJIL, 2002, p. 201.

[209] Paragraph 16 of resolution 687 (1991) established that 'Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait' and paragraph 18 of the resolution established a fund to pay compensation for such claims together with a Commission to administer it.

[210] See Report of the Secretary-General of 2 May 1991, S/22559.

[211] See also Report of the Secretary-General, S/22661, May 1991.

[212] See also the Report of the Secretary-General, S/23006, 1991 and Security Council resolution 712 (1991).

Iraq at first refused to co-operate,[213] but in 1996, the 'oil for food' scheme put forward in resolution 986 (1995) began to function. This resolution provided also that 30 per cent of the proceeds of such oil sales were to be allocated to the Compensation Fund. This percentage was reduced to 25 per cent in resolution 1330 (2000). The Compensation Commission has received an overwhelming number of claims. Some 2.6 million claims from around 100 states were received.[214] The claims were divided into six categories.[215] The deadline of 1 January 1995 was set for the filing of category A to D claims; 1 January 1996 for the filing of category E and F claims and 1 February 1997 for category F environmental claims. Provisional Rules were adopted by the Commission in 1992.[216] Claims are subject to a preliminary assessment by the secretariat and then sent to panels of commissioners sitting in private. Recommendations are then sent to the Governing Council for decision from which there is no appeal. The first compensation awards were made in spring 1995.[217] By March 2003, 2,597,527 claims had been resolved and $16,708,302,236 compensation paid.[218] The Commission has awarded compensation with regard

[213] In resolution 778 (1992) the Council called upon states which held frozen assets representing the proceeds of sales of Iraqi petroleum to transfer these to a special escrow account, from which 30 per cent would be transferred to the Compensation Fund.

[214] See 35 ILM, 1996, p. 942, and Collier and Lowe, *Settlement*, p. 43 (the claims included those from some 1 million Egyptian workers). See also www.unog.ch/uncc/theclaims.htm. The claims amounted to over $300 billion.

[215] Category 'A' claims cover claims of individuals arising from their departure from Iraq or Kuwait between the date of Iraq's invasion of Kuwait on 2 August 1990 and the date of the ceasefire, 2 March 1991, with compensation for successful claims being set by the Governing Council at the fixed sum of US $2,500 for individual claimants and US $5,000 for families. Category 'B' claims cover individual claims for serious personal injury or death of spouse, children or parents, with compensation set at US $2,500 for individual claimants and up to US $10,000 for families. Category 'C' claims cover individual claims for damages up to $100,000. Category 'D' claims cover individual claims for damages above $100,000. Category 'E' claims cover claims of corporations, other private legal entities and public sector enterprises. Category 'F' claims cover claims made by governments and international organisations for various losses. See e.g. Decision 1, S/22885, annex II, paras. 14–16 and S/23765, annex. In Decision 11, it was decided that members of the Allied Coalition Forces were not eligible for compensation unless in accordance with the adopted criteria, the claimants were prisoners-of-war and the loss or injury arose from mistreatment in violation of international humanitarian law, S/24363, annex II, *ibid.* See also A/AC.26/1994/2, reproduced in 34 ILM, 1995, p. 307.

[216] See S/AC.26/1992/10 and 31 ILM, 1992, p. 1053.

[217] S/AC.26/1995/2–5. See also 35 ILM, 1996, p. 956. For examples of claims, see e.g. 109 ILR, p. 1 and the *Egyptian Workers' Claims* 117 ILR, p. 195.

[218] See www.unog.ch/uncc/status.htm.

to damage caused within Saudi Arabia, Israel, Jordan and Gulf states by Iraqi Scud missiles fired during the conflict.[219]

The Commission constitutes an interesting hybrid between a fact-finding political organ and a quasi-judicial mechanism.[220] It has been noted that panels are required, in the absence of specific guidance by the Security Council or the Governing Council, to apply international law.[221] It has had to deal with a remarkable number of claims with great success and has proceeded upon an expedited basis by relying upon computerised handling of smaller claims and without a judicial hearing stage.[222]

Binding methods of dispute settlement

As has been seen, there is a considerable variety of means, mechanisms and institutions established to resolve disputes in the field of international law. However, a special place is accorded to the creation of judicial bodies. Such courts and tribunals may be purely inter-state or permit individuals to appear as applicants or respondents.[223] They may be permanent or temporary, being established to resolve one particular dispute. In resolving disputes, a variety of techniques is likely to be used and references to judicial bodies should be seen as part of a larger process of peaceful settlement. As Jennings has written, 'the adjudicative process can serve, not only to resolve classical legal disputes, but it can also serve as an important tool of preventive diplomacy in more complex situations'.[224] The following section will deal with arbitration and the following chapter with the International Court of Justice.

[219] See the Report and Recommendations Concerning the Third Instalment of 'E2' Claims, S/AC.26/1999/R.40, para. 77.

[220] See the Report of the UN Secretary-General of 2 May 1991, S/22559. This Report in particular emphasised that the Compensation Commission was neither a Court nor an Arbitral Tribunal, but 'a political organ that performs an essentially fact-finding function of examining the claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims'. It was recognised, however, that 'some elements of due process should be built into the procedure', *ibid.*, para. 20: see Collier and Lowe, *Settlement*, p. 42, and Merrills, *International Dispute Settlement*, p. 61. See also the Guidelines adopted by the Governing Council on 2 August 1991, S/22885. Both documents are reproduced in 30 ILM, 1991, pp. 1703 ff. Note that Collier and Lowe refer to the UNCC as prominent amongst 'the most notable recent innovations', *Settlement*, p. 41.

[221] See article 31 of the Rules and the *Egyptian Workers' Claims* 117 ILR, pp. 195, 247.

[222] See Collier and Lowe, *Settlement*, p. 43.

[223] See above, note 2.

[224] R. Y. Jennings, 'Presentation' in *Increasing the Effectiveness of the International Court of Justice* (eds. C. Peck and R. S. Lee), The Hague, 1997, p. 79.

Arbitration[225]

In determining whether a body established by states to settle a dispute is of a judicial, administrative or political nature, the Tribunal in the *Laguna del Desierto* case emphasised that 'the practice of international law is to look at the nature of the procedure followed by those states before the body in question'.[226]

The procedure of arbitration grew to some extent out of the processes of diplomatic settlement and represented an advance towards a developed international legal system. In its modern form, it emerged with the Jay Treaty of 1794 between Britain and America, which provided for the establishment of mixed commissions to solve legal disputes between the parties.[227] The procedure was successfully used in the *Alabama Claims* arbitration[228] of 1872 between the two countries, which resulted in the UK having to pay compensation for the damage caused by a Confederate warship built in the UK. This success stimulated further arbitrations, for example the *Behring Sea*[229] and *British Guiana and Venezuela Boundary*[230] arbitrations at the close of the nineteenth century.[231]

The 1899 Hague Convention for the Pacific Settlement of Disputes included a number of provisions on international arbitration, the object of

[225] See e.g. Merrills, *International Dispute Settlement*, chapter 5; Wetter, *Arbitral Process*; L. Simpson and H. Fox, *International Arbitration*, London, 1959; L. Malintoppi, 'Methods of Dispute Resolution in Inter-State Litigation: When States Go To Arbitration Rather Than Adjudication', 5 *The Law and Practice of International Courts and Tribunals*, 2006, p. 133; L. Caflisch, 'L'Avenir de l'Arbitrage Interétatique', AFDI, 1979, p. 9; B. S. Murty, 'Settlement'. See also Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 866; Oellers-Frahm and Zimmermann, *Dispute Settlement*; Economides, 'L'Obligation de Règlement Pacifique'; S. Schwebel, *International Arbitration: Three Salient Problems*, Cambridge, 1987; A. M. Stuyt, *Survey of International Arbitrations (1794–1984)*, Dordrecht, 1990; V. Coussirat-Coustere and P. M. Eisemann, *Repertory of International Arbitral Jurisprudence*, Dordrecht, 4 vols., 1989–91; C. Gray and B. Kingsbury, 'Developments in Dispute Settlement: International Arbitration since 1945', 63 BYIL, 1992, p. 97; L. Sohn, 'International Arbitration Today', 108 HR, 1976, p. 1; *International Arbitration* (ed. F. Soons), Dordrecht, 1990, and H. Fox, 'States and the Undertaking to Arbitrate', 37 ICLQ, 1988, p. 1.

[226] 113 ILR, pp. 1, 42.

[227] See Simpson and Fox, *International Arbitration*, pp. 1–4, and R. C. Morris, *International Arbitration and Procedure*, New Haven, 1911. Note also the Treaty of Ghent, 1814, which incorporated the concept of a neutral element within the commission, *ibid.* See also G. Schwarzenberger, 'Present-Day Relevance of the Jay Treaty Arbitrations', 53 *Notre Dame Lawyer*, 1978, p. 715.

[228] J. B. Moore, *International Arbitrations*, Washington, DC, 1898, vol. I, p. 495.

[229] *Ibid.*, p. 755.

[230] 92 BFSP, p. 970.

[231] See also 'Projet de Règlement pour la Procédure Arbitrale Internationale', *Annuaire de l'Institut de Droit International*, 1877, p. 126.

which was deemed to be under article 15, 'the settlement of differences between states by judges of their own choice and on the basis of respect for law'. This became the accepted definition of arbitration in international law. It was repeated in article 37 of the 1907 Hague Conventions and adopted by the Permanent Court of International Justice in the case concerning the *Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne*[232] and by the International Court.[233]

International arbitration was held to be the most effective and equitable manner of dispute settlement, where diplomacy had failed. An agreement to arbitrate under article 18 implied the legal obligation to accept the terms of the award. In addition, a Permanent Court of Arbitration was established.[234] It is not really a court since it is not composed of a fixed body of judges. It consists of a panel of persons, nominated by the contracting states[235] (each one nominating a maximum of four), comprising individuals 'of known competency in questions of international law, of the highest moral reputation and disposed to accept the duties of an arbitrator'.[236] Where contracting states wish to go to arbitration, they are entitled to choose the members of the tribunal from the panel. Thus, it is in essence machinery facilitating the establishment of arbitral tribunals. The PCA also consists of an International Bureau, which acts as the registry of the Court and keeps its records, and a Permanent Administrative Council, exercising administrative control over the Bureau. Administrative support was provided in this context by the Bureau in the *Heathrow Airport User Charges* arbitration.[237] The PCA has been used in a variety of cases from an early date.[238]

[232] PCIJ, Series B, No. 12, p. 26.

[233] See *Qatar* v. *Bahrain*, ICJ Reports, 2001, para. 113. See also the *Dubai/Sharjah Border Arbitration* 91 ILR, pp. 543, 574 and 575.

[234] See Murty, 'Settlement', p. 685; M. Hudson, *The Permanent Court of International Justice 1920–1942*, New York, 1943, p. 11; *The Permanent Court of Arbitration: International Arbitration and Dispute Settlement* (eds. P. Hamilton, H. C. Requena, L. van Scheltinga and B. Shifman), The Hague, 1999; J. Allain, *A Century of International Adjudication: The Rule of Law and its Limits*, The Hague, 2000, chapter 1, and J. Jonkman, 'The Role of the Permanent Court of Arbitration in International Dispute Resolution', 279 HR, 1999, p. 9. See also www.pca-cpa.org/.

[235] There are currently 107.

[236] Article 44 of the Convention as revised in 1907.

[237] See 88 AJIL, 1994, p. 739, note 4.

[238] See e.g. the UK–France Agreement of 1903, providing for referral of differences of a legal nature to the Permanent Court of Arbitration, so long as the 'vital interests' of the parties were not involved, Cd 1837.

Between 1900 and 1932 some twenty disputes went through the PCA procedure, but from that point the numbers began to fall drastically. However, more recently the PCA has started to play an increasingly important role, so much so that an element of 'institutionalisation' of arbitration has been detected by some writers.[239] It has served as the registry in, for example, the two phases of the *Eritrea–Yemen* arbitration[240] and for the *Eritrea–Ethiopia* Boundary Commission[241] and Claims Commission[242] and in the *Larsen* v. *Hawaiian Kingdom* arbitration.[243] It also provided facilities in cases such as the *Mox* arbitration between the UK and Ireland[244] and *Saluka Investments* v. *Czech Republic*.[245] The PCA has also adopted, for example, Optional Rules for Arbitrating Disputes between Two States,[246] Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State,[247] Optional Rules of Arbitration Involving International Organisations and States,[248] and Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment in 2001.[249] The International Law Commission itself formulated a set of Model Rules on Arbitral Procedure, which was adopted by the General Assembly in 1958.[250]

Arbitration tribunals may be composed in different ways.[251] There may be a single arbitrator or a collegiate body. In the latter case, each party will appoint an equal number of arbitrators with the chairman or umpire

[239] See Malintoppi, 'Methods of Dispute Resolution', p. 135. See generally H. Von Mangoldt, 'Arbitration and Conciliation' in Wetter, *Arbitral Process*, vol. V, pp. 243 ff., and D. Johnson, 'International Arbitration Back in Favour?', 34 YBWA, 1980, p. 305.

[240] See 114 ILR, p. 1 (Phase One: Territorial Sovereignty) and 119 ILR, p. 417 (Phase Two: Maritime Delimitation).

[241] Decision of 13 April 2002: see 129 ILR, p. 1.

[242] See S/2001/608. As to some Eritrea–Ethiopia Claims Commission decisions, see above, chapter 13, p. 756, note 319.

[243] See 119 ILR, p. 566. [244] See 126 ILR, p. 310. [245] Partial Award of 17 March 2006.

[246] In 1992: see 32 ILM, 1993, p. 572. These are based upon the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules, adopted by the UN General Assembly on 15 December 1976 in resolution 31/98.

[247] With effect from 1993: see http://pca-cpa.org/ENGLISH/BD/1stateeng.htm.

[248] With effect from 1996: see http://pca-cpa.org/ENGLISH/BD/2igoenglish.htm.

[249] See www.pca-cpa.org/ENGLISH/EDR/ENRrules.htm.

[250] Resolution 1262 (XI). These are, however, merely optional. See also Report of the ILC, 1958, A/3859. Note also the 1928 General Act, the 1929 General Treaty of Inter-American Arbitration and the 1949 Revised General Act. See also *Yearbook of the ILC*, 1953, vol. II, p. 208.

[251] See e.g. Merrills, *International Dispute Settlement*, pp. 95 ff. It is, of course, an issue for the parties to decide.

being appointed by either the parties or the arbitrators already nominated. In many cases, a head of state will be suggested as a single arbitrator and he will then nominate an expert or experts in the field of international law or other relevant disciplines to act for him.[252] Under the PCA system, and in the absence of agreement to the contrary, each party selects two arbitrators from the panel, only one of whom may be a national of the state. These arbitrators then choose an umpire, but if they fail to do so, this task will be left to a third party, nominated by agreement. If this also fails to produce a result, a complicated process then ensues culminating in the drawing of lots.

States are not obliged to submit a dispute to the procedure of arbitration, in the absence of their consent.[253] This consent may be expressed in arbitration treaties, in which the contracting states agree to submit certain kinds of disputes that may arise between them to arbitration, or in specific provisions of general treaties, which provide for disputes with regard to the treaty itself to be submitted to arbitration,[254] although the number of treaties dealing primarily with the peaceful settlement of disputes has declined since 1945.[255] Consent to the reference of a dispute to arbitration with regard to matters that have already arisen is usually expressed by means of a *compromis*, or special agreement, and the terms in which it is couched are of extreme importance. This is because the jurisdiction of the tribunal is defined in relation to the provisions of the treaty or *compromis*, whichever happens to be the relevant document in the particular case. However, in general, the tribunal may determine its competence in interpreting the *compromis* and other documents concerned in the case.[256]

[252] E.g. the *Argentina–Chile* case, 38 ILR, p. 10 and the *Beagle Channel* case, HMSO, 1977; 52 ILR, p. 93. Note also the *Interpretation of Peace Treaties* case, ICJ Reports, 1950, p. 221; 17 ILR, p. 318.

[253] See e.g. the *Eastern Carelia* case, PCIJ, Series B, No. 5, 1923, p. 27; 2 AD, p. 394 and the *Ambatielos* case, ICJ Reports, 1953, p. 19; 20 ILR, p. 547.

[254] See *Arbitration and Security: The Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security Deposited with the League of Nations*, Geneva, 1927, and *Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928–1948*, New York, 1949.

[255] See L. Sohn, 'Report on the Changing Role of Arbitration in the Settlement of International Disputes', International Law Association, 1966, pp. 325, 334.

[256] In the absence of agreement to the contrary. See e.g. the *Nottebohm* case, ICJ Reports, 1953, pp. 111, 119; 20 ILR, pp. 567, 572. See also article 48 of the Hague Convention, 1899, and article 73 of the Hague Convention, 1907.

The law to be applied in arbitration proceedings is international law,[257] but the parties may agree upon certain principles to be taken into account by the tribunal and specify this in the *compromis*. In this case, the tribunal must apply the rules specified. For example, in the *British Guiana and Venezuela Boundary* dispute,[258] it was stated that occupation for fifty years should be accepted as constituting a prescriptive title to territory. And in the *Trail Smelter* case,[259] the law to be applied was declared to be US law and practice with regard to such questions as well as international law.[260]

Agreements sometimes specify that the decisions should be reached in accordance with 'law and equity' and this means that the general principles of justice common to legal systems should be taken into account as well as the provisions of international law. Such general principles may also be considered where there are no specific rules covering the situation under discussion.[261] The rules of procedure of the tribunal are often specified in the *compromis* and decided by the parties by agreement as the process commences. Hague Convention I of 1899 as revised in 1907 contains agreed procedure principles, which would apply in the absence of express stipulation. It is characteristic of arbitration that the tribunal is competent to determine its own jurisdiction and therefore interpret the relevant

[257] See e.g. the *Norwegian Shipowners' Claims* case, 1 RIAA, 1921, p. 309 and the *Dubai/Sharjah* case, 91 ILR, pp. 543, 585–8. Note that article 28 of the 1928 General Act for the Pacific Settlement of International Disputes, as revised in 1949, provides that where nothing is laid down in the arbitration agreement as to the law applicable to the merits of the case, the tribunal should apply the substantive rules as laid down in article 38 of the Statute of the International Court of Justice (i.e. international treaties, custom and general principles of law). See further above, chapter 3, p. 70.

[258] 92 BFSP, p. 970. [259] 3 RIAA, 1938, p. 1908; 9 AD, p. 315.

[260] Note that in international commercial arbitrations, the reference often incorporates municipal law: see e.g. the *BP* case, 53 ILR, p. 297, where the basic reference was to 'the principles of the Law of Libya common to the principles of international law'. See also the wide reference to the Iran–United States Claims Tribunal to decide all cases 'on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances', above, p. 1043. By way of contrast, the tribunal in the *OSPAR (Ireland* v. *UK)* case, operating on the basis of article 32 of the OSPAR Convention, held that the only applicable law was the Convention itself, 126 ILR, p. 334.

[261] See e.g. *Re Competence of the Conciliation Commission* 22 ILR, p. 867 and above, chapter 3, p. 98. See also article 28 of the 1928 General Act as revised in 1949, article 10 of the ILC Model Articles and articles 26 and 28 of the European Convention for the Peaceful Settlement of Disputes. Note in addition the *Rann of Kutch* case, 50 ILR, p. 520.

instruments determining that jurisdiction.[262] Once an arbitral award has been made, it is final and binding upon the parties,[263] but in certain circumstances the award itself may be regarded as a nullity.[264] There is disagreement amongst lawyers as to the grounds on which such a decision may be taken. It is, however, fairly generally accepted that where a tribunal exceeds its powers under the *compromis*, its award may be treated as a nullity, although this is not a common occurrence. Such excess of power (*excès de pouvoir*) may be involved where the tribunal decides a question not submitted to it, or applies rules it is not authorised to apply. The main example of the former is the *North-Eastern Boundary* case[265] between Canada and the United States, where the arbitrator, after being asked to decide which of two lines constituted the frontier, in fact chose a third line.

It is sometimes argued that invalidity of the *compromis* is a ground of nullity,[266] while the corruption of a member of the tribunal or a serious departure from a fundamental rule of procedure are further possibilities as grounds of nullity.[267] Article 35 of the Model Rules on Arbitral Procedure drawn up by the International Law Commission, for example, provides for a successful plea of nullity in three cases: excess of power, corruption of a tribunal member or serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.[268] 'Essential

[262] See the *Nottebohm* (*Preliminary Objections*) case, ICJ Reports, 1953, pp. 111, 119; 20 ILR, pp. 567, 571–3. See also Arbitration Commission on Yugoslavia, Interlocutory Decision of 4 July 1992, 92 ILR, pp. 194, 197.

[263] Articles 81 and 84, Hague Convention I, 1907. The principle of *res judicata* also applies to arbitration awards: see e.g. the *Trail Smelter* case, 3 RIAA, 1938, p. 1905; 9 AD, p. 324 and the *Orinoco Steamship Co.* case, 11 RIAA, 1910, p. 227.

[264] See e.g. W. M. Reisman, *Nullity and Revision*, New Haven, 1971; E. K. Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law*, Leiden, 1967, and O. Schachter, 'The Enforcement of International Judicial and Arbitral Decisions', 54 AJIL, 1960, p. 1.

[265] See C. C. Hyde, *International Law*, 2nd edn, Boston, 1945, vol. III, p. 1636. See also the *Pelletier* case, *ibid.*, p. 1640; the *Panama–Costa Rica Boundary* case, 11 RIAA, 1900, p. 519 and *US Foreign Relations*, 1914, p. 994; the *Chamizal* case, 11 RIAA, p. 309, and the *Cerruti* arbitrations, 6 AJIL, 1912, p. 965.

[266] See e.g. Murty, 'Settlement', pp. 693–4, and A. D. McNair, *The Law of Treaties*, Oxford, 1961, pp. 66–77.

[267] See Schachter, 'Enforcement', p. 3. See also, as regards corruption, Moore, *International Arbitrations*, vol. II, pp. 1660–4, and the *Buraimi* arbitration, Wetter, *Arbitral Process*, vol. III, p. 357 and 545 HC Deb., col. 199, 1955.

[268] See the *British Guiana and Venezuela Boundary* case, 92 BFSP, p. 160, and Wetter, *Arbitral Process*, vol. III, pp. 81 ff. See also the *Arbitral Award by the King of Spain* case, ICJ Reports, 1960, pp. 188, 216; 30 ILR, pp. 457, 476.

error' has also been suggested as a ground of nullity, but the definition of this is far from unambiguous.[269] It would appear not to cover the evaluation of documents and evidence,[270] but may cover manifest errors[271] such as not taking into account a relevant treaty or a clear mistake as to the appropriate municipal law.[272] Of course, once a party recognises the award as valid and binding, it will not be able to challenge the validity of the award at a later stage.[273] In certain circumstances, it may be open to a party to request a revision or re-opening of the award in order to provide for rectification of an error or consideration of a fact unknown at the time to the tribunal and the requesting party which is of such a nature as to have a decisive influence on the award.[274]

Arbitration as a method of settling disputes combines elements of both diplomatic and judicial procedures. It depends for its success on a certain amount of goodwill between the parties in drawing up the *compromis* and constituting the tribunal, as well as actually enforcing the award subsequently made. A large part depends upon negotiating processes. On the other hand, arbitration is an adjudicative technique in that the award is final and binding and the arbitrators are required to base their decision on law.[275] It will be seen in the following section just how close arbitration is to judicial settlement of disputes by the International Court of Justice, and it is no coincidence that the procedure of arbitration through the PCA began to decline with the establishment and consolidation of the Permanent Court of International Justice in the 1920s.

In recent years, there has been a rise in the number of inter-state arbitrations. The *Rann of Kutch* case,[276] the *Anglo-French Continental Shelf* case,[277] the *Beagle Channel* case[278] and the *Taba* case[279] were all the subject of

[269] See e.g. Murty, 'Settlement', p. 696, and Merrills, *International Dispute Settlement*, pp. 113 ff.

[270] *Arbitral Award by the King of Spain*, ICJ Reports, 1960, pp. 188, 215–16; 30 ILR, pp. 457, 475. See also, as regards the Argentinian claim of nullity of the *Beagle Channel* award, 17 ILM, 1978, p. 738; 52 ILR, pp. 267–85.

[271] See the *Trail Smelter* case, 3 RIAA, 1938, pp. 1905, 1957; 9 AD, p. 331.

[272] See e.g. the *Schreck* case, Moore, *International Arbitrations*, vol. II, p. 1357.

[273] *Arbitral Award by the King of Spain*, ICJ Reports, 1960, pp. 188, 213; 30 ILR, p. 473.

[274] See e.g. Wetter, *Arbitral Process*, vol. II, pp. 539 ff. See also article 29 of the ILC Model Rules.

[275] See the definition of arbitration in *Yearbook of the ILC*, 1953, vol. II, p. 202.

[276] 50 ILR, p. 2. See also J. G. Wetter, 'The Rann of Kutch Arbitration', 65 AJIL, 1971, p. 346.

[277] Cmnd 7438, 1978; 54 ILR, p. 6. See further above, chapter 11, p. 593.

[278] HMSO, 1977; 52 ILR, p. 93. See M. N. Shaw, 'The Beagle Channel Arbitration Award', 6 *International Relations*, 1978, p. 415.

[279] 80 ILR, p. 244. See also D. W. Bowett, 'The Taba Award of 29 September 1988', 23 *Israel Law Review*, 1989, p. 429; G. Lagergren, 'The Taba Tribunal 1986–89', 1 *African Journal*

arbitral awards, usually successfully.[280] More recent examples include the *Eritrea–Yemen* arbitration,[281] the *Eritrea–Ethiopia* boundary delimitation case[282] and the *Barbados* v. *Trinidad and Tobago* maritime delimitation case.[283] It may be that further such issues may be resolved in this fashion, although a lot depends on the evaluation of the parties as to the most satisfactory method of dispute settlement in the light of their own particular interests and requirements.

Arbitration is an extremely useful process where some technical expertise is required, or where greater flexibility and speed than is available before the International Court is desired.[284] The states themselves choose the arbitrators, lay down the applicable law and rules of procedure, as well as set the timetable. In addition, the states involved may wish for the proceedings to be confidential, something which is not achievable in the International Court with its public oral hearings and publication of written proceedings. However, the parties pay all the costs of the arbitration, including the fees due to the registrar and arbitrators, while in the International Court, the judges and members of the registry are paid by the UN.[285]

Arbitration may be the appropriate mechanism to utilise as between states and international institutions, since only states may appear before the ICJ in contentious proceedings. The establishment of arbitral tribunals

of International and Comparative Law, 1989, p. 525, and P. Weil, 'Some Observations on the Arbitral Award in the Taba Case', 23 *Israel Law Review*, 1989, p. 1.

[280] Argentina initially rejected the award in the *Beagle Channel* case, but later mediation and negotiations resolved the issue: see 17 ILM, 1978, p. 738 and 24 ILM, 1985, p. 1.

[281] 114 ILR, p. 1 and 119 ILR, p. 417.

[282] See 129 ILR, p. 1. See also M. N. Shaw, 'Title, Control and Closure? The Experience of the Eritrea–Ethiopia Boundary Commission', 56 ICLQ, 2007, p. 755.

[283] Award of 11 April 2006. See also the *Guyana* v. *Suriname* maritime delimitation case, award of 17 September 2007, see further on maritime delimitations, above, chapter 11, p. 590.

[284] For example in the *Argentina–Chile* case of 1966, the tribunal consisted of a lawyer and two geographical experts, 38 ILR, p. 10. See Malintoppi, 'Methods of Dispute Resolution', and R. Y. Jennings, 'The Differences Between Conducting a Case in the ICJ and in an *Ad Hoc* Tribunal – An Insider's View', *Liber Amicorum Judge Shigeru Oda* (eds. N. Ando, E. McWhinney and R. Wolfrum), The Hague, 2002, p. 893.

[285] Note that article 287 of the Convention on the Law of the Sea, 1982 provides that where a state has not chosen by a written declaration one of the dispute settlement methods laid down, it will be deemed to have opted for arbitration under Annex VII of the Convention. In the case of such arbitrations, the parties nominate one each of the five-member tribunal, with the remaining members being chosen by agreement. In the absence of such agreement, the President of the International Tribunal for the Law of the Sea will make the necessary appointments: see e.g. the *Barbados* v. *Trinidad and Tobago* arbitration of 11 April 2006 and the *Guyana* v. *Suriname* arbitration of 17 September 2007.

has often been undertaken in order to deal relatively quietly and cheaply with a series of problems within certain categories, for example, the mixed tribunals established after the First World War to settle territorial questions, or the Mexican Claims commissions which handled various claims against Mexico.[286] An attempt was made to tackle issues raised by the situation in the Former Yugoslavia by the establishment of an Arbitration Commission.[287] However, the Commission, while issuing a number of Opinions on issues concerning, for example, statehood, recognition, human rights and boundary matters, was not able to act as an arbitration tribunal as between the parties to the conflict.

Like arbitration, judicial settlement is a binding method of dispute settlement, but by means of an established and permanent body. There are a number of international and regional courts deciding disputes between subjects of international law, in accordance with the rules and principles of international law.[288] However, by far the most important, both by prestige and jurisdiction, is the International Court of Justice, and this is the subject of the following chapter.

Suggestions for further reading

J. Collier and V. Lowe, *The Settlement of Disputes in International Law*, Cambridge, 1999

J. G. Merrills, *International Dispute Settlement*, 4th edn, Cambridge, 2005

F. Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization*, Cambridge, 2004

United Nations, *Handbook on the Peaceful Settlement of Disputes Between States*, New York, 1992

[286] See e.g. A. H. Feller, *Mexican Claims Commissions 1923–1934*, New York, 1935.

[287] Established pursuant to the Declaration of 27 August 1991 of the European Community: see Bull. EC, 7/8 (1991). See generally, M. Craven, 'The EC Arbitration Commission on Yugoslavia', 66 BYIL, 1995, p. 333.

[288] See above, note 2.

19

The International Court of Justice[1]

The impetus to create a world court for the international community developed as a result of the atmosphere engendered by the Hague Conferences of 1897 and 1907. The establishment of the Permanent Court of Arbitration, although neither permanent nor, in fact, a court, marked

[1] See e.g. S. Rosenne, *The Law and Practice of the International Court, 1920–2005*, 4th edn, Leiden, 4 vols., 2006, and Rosenne, *The World Court*, 6th edn, Dordrecht, 2005; *The Statute of the International Court of Justice: A Commentary* (eds. A. Zimmermann, C. Tomuschat and K. Oellers-Frahm), Oxford, 2006; M. S. M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*, The Hague, 2003; G. Guillaume, *La Cour Internationale de Justice à l'Aube du XXIe Siècle: Le Regard d'un Juge*, Paris, 2003; *Fifty Years of the International Court of Justice* (eds. A. V. Lowe and M. Fitzmaurice), Cambridge, 1996; G. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge, 2 vols., 1986; H. Thirlway, 'The Law and Procedure of the International Court of Justice (1960–1989)' series of articles in the *British Year Book of International Law* from volume 60, 1989 to volume 70, 2003, and Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989, Supplement 2005: Parts One and Two', 76 BYIL, 2005, p. 1, and Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989, Supplement 2006: Part Three', 77 BYIL, 2006, p. 1; R. Y. Jennings, 'The International Court of Justice after Fifty Years', 89 AJIL, 1995, p. 493, and Jennings, 'The Role of the International Court of Justice', 68 BYIL, 1997, p. 1; G. Guyomar, *Commentaire du Règlement de la CIJ*, Paris, 1983; E. McWhinney, *The World Court and the Contemporary Law-Making Process*, Alphen aan den Rijn, 1979; T. O. Elias, *The International Court of Justice and Some Contemporary Problems*, Alphen aan den Rijn, 1983; J. G. Merrills, *International Dispute Settlement*, Cambridge, 4th edn, 2005, chapters 6 and 7; *The Future of the International Court of Justice* (ed. L. Gross), Dobbs Ferry, 2 vols., 1976; *The International Court of Justice at a Crossroads* (ed. L. Damrosch), Dobbs Ferry, 1987; E. Lauterpacht, *Aspects of the Administration of International Justice*, Cambridge, 1991; T. M. Franck, 'Fairness in the International Legal and Institutional System', 240 HR, 1993 III, pp. 13, 302; R. Higgins, *Problems and Process*, Oxford, 1994, chapter 11; *Increasing the Effectiveness of the International Court of Justice* (eds. C. Peck and R. S. Lee), The Hague, 1997; *The International Court of Justice: Its Future Role after Fifty Years* (eds. A. S. Muller, D. Raič and J. M. Thuránszky), The Hague, 1997; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 889; B. S. Murty, 'Settlement of Disputes' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, p. 673; K. H. Kaikobad, *The International Court of Justice and Judicial Review*, The Hague, 2000, and E. McWhinney, *Judicial Settlement of International Disputes*, Alphen aan den Rijn, 1991.

an important step forward in the consolidation of an international legal system.[2] However, no lasting concrete steps were taken until after the conclusion of the First World War. The Covenant of the League of Nations called for the formulation of proposals for the creation of a world court and in 1920 the Permanent Court of International Justice (PCIJ) was created. It stimulated efforts to develop international arbitral mechanisms. Together with arbitration, the Permanent Court was intended to provide a reasonably comprehensive system serving the international community. It was intended as a way to prevent outbreaks of violence by enabling easily accessible methods of dispute settlement in the context of a legal and organisational framework to be made available.[3]

The PCIJ was superseded after the Second World War by the International Court of Justice (ICJ), described in article 92 of the Charter as the 'principal judicial organ' of the United Nations. In essence, it is a continuation of the Permanent Court, with virtually the same statute and jurisdiction, and with a continuing line of cases, no distinction being made between those decided by the PCIJ and those by the ICJ.[4]

The organisation of the Court[5]

The ICJ is composed of fifteen members:

> elected regardless of their nationality, from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law.[6]

The procedure for the appointment of judges is interesting in that it combines both legal and political elements, while seeking to exclude as far as possible the influence of national states over them. The system established by the Root–Phillimore plan in 1920 is in essence followed. This plan played a large part in the actual creation of the PCIJ and

[2] See above, chapter 18, p. 1049.
[3] For an assessment of its work, see e.g. Rosenne, *Law and Practice*, vol. I, pp. 16 ff.
[4] See e.g. M. Shahabuddeen, *Precedent in the World Court*, Cambridge, 1996, pp. 22 ff.
[5] See e.g. Rosenne, *Law and Practice*, vol. I, chapter 6 and vol. III, chapter 17. See also H. Thirlway, 'Procedural Law and the International Court of Justice' in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, p. 389.
[6] Article 2, Statute of the ICJ.

succeeded in allaying many suspicions regarding the composition of the proposed Court.[7]

The members of the Court are elected by the General Assembly and Security Council (voting separately) from a list of qualified persons drawn up by the national groups of the Permanent Court of Arbitration, or by specially appointed national groups in the case of UN members that are not represented in the PCA.[8] This provision was inserted to restrict political pressures in the selection of judges. The elections are staggered and take place once every three years, with respect to five judges each time. In this way some element of continuity amongst the Court is maintained.

In practice, there is close co-ordination between the Assembly and Security Council in electing judges and political factors do obtrude, especially in view of the requirement contained in article 9 of the Statute that the

> electors should bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilisation and of the principal legal systems of the world should be assured.

This process has attracted much criticism on the grounds of attendant politicisation but in the circumstances it is difficult to see a way to avoid this completely.[9] The opinions of individual judges can be crucial, particularly in sensitive cases, and the alteration in the stance adopted by the Court with regard to the *Namibia* case between 1966[10] and 1971[11] can be attributed in large measure to changes in the composition of the Court that took place in the intervening period. Candidates must obtain an absolute majority of votes in both the Assembly and the Council,[12] and no two successful applicants may be of the same nationality.[13]

The members of the Court are elected for nine years and may be re-elected.[14] They enjoy diplomatic privileges and immunities when on

[7] See e.g. Murty, 'Settlement', p. 700. See also L. Lloyd, *Peace Through Law*, London, 1997.

[8] Articles 4 and 5 of the ICJ Statute. In practice, governments exercise a major influence upon the nominations process of the national groups: see Merrills, *International Dispute Settlement*, pp. 147 ff.

[9] See e.g. Rosenne, *Law and Practice*, vol. I, pp. 382 ff., and Rosenne, 'The Composition of the Court' in Gross, *Future of the International Court of Justice*, vol. I, pp. 377, 381–6. See also G. Abi-Saab, 'The International Court as a World Court' in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, p. 3.

[10] ICJ Reports, 1966, p. 6; 37 ILR, p. 243.

[11] ICJ Reports, 1971, p. 16; 49 ILR, p. 2.

[12] Article 10, Statute of the ICJ.

[13] Article 3, Statute of the ICJ.

[14] Article 13, Statute of the ICJ.

official business,[15] and a judge cannot be dismissed unless it is the unanimous opinion of the other members of the Court that he or she has ceased to fulfil the required conditions.[16] These include the requirement that no member may exercise any political or administrative function or engage in any other professional occupation. No member may act as agent, advocate, or counsel in any case and no member may participate in the decision of any case in which he has previously taken part as agent, advocate or counsel for one of the parties, or as a member of a national or international court, or of a commission of inquiry, or in any other capacity.[17] The Court elects a president and vice-president for a three-year term which can be renewed,[18] and it is situated at The Hague.[19]

Since the aim of the election procedures relating to the composition of the Court is to produce a judicial body of independent members rather than state representatives, the Statute provides in article 31 that judges of the nationality of each of the parties in a case before the Court shall retain their right to sit in that case. However, the effect of this is somewhat reduced by the provision in that article that the parties to a dispute before the ICJ are entitled to choose a person to sit as judge for the duration of that case, where they do not have a judge of their nationality there

[15] Article 19, Statute of the ICJ. [16] Article 18, Statute of the ICJ.

[17] Articles 16 and 17, Statute of the ICJ. Note the problem raised particularly in the *Namibia* case, ICJ Reports, 1971, pp. 3, 6 and 9, of judges who had previously been involved in the dispute albeit in another capacity. The Court did not accept the need to remove the judges in question. Practice, however, has been variable and, for example, Judges Fleischhauer (former UN Legal Counsel) and Higgins (former member of the Human Rights Committee) felt unable to take part in the *Application of the Genocide Convention* case: see CR 96/5, 29 April 1996, p. 6. In the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 142; 129 ILR, pp. 37, 58–9, and the Court's Order of 30 January 2004, objections made to the participation of Judge Elaraby for playing a 'leading role in recent years in the very Emergency Special Session from which the advisory opinion request has now emerged' and other diplomatic and political involvement in the Middle East question prior to election to the Court were dismissed by the Court, citing the *Namibia* opinion. See also Rosenne, 'Composition', pp. 388–90, and *Law and Practice*, vol. I, pp. 400 ff. and vol. III, pp. 1056 ff.; P. Couvreur, 'Article 17' in Zimmermann *et al.*, *Statute of the International Court*, p. 337; H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989', 72 BYIL, 2001, p. 38, and M. N. Shaw, 'The International Court of Justice: A Practical Perspective', 46 ICLQ, 1997, pp. 831, 845–6.

[18] Article 21, Statute of the ICJ.

[19] Article 22, Statute of the ICJ. Note that article 31(5) of the Statute provides that where there are several parties 'in the same interest' they shall be treated *inter alia* for the purposes of appointing ad hoc judges as one party only: see Rosenne, *Law and Practice*, vol. III, p. 1093, and *Serbia and Montenegro* v. *Belgium*, ICJ Reports, 2004, pp. 279, 287.

already.[20] This procedure of appointing ad hoc judges may be criticised as possibly adversely affecting the character of the Court as an independent organ of legal experts.[21] The reason for the establishment and maintenance of the provision may be found within the realm of international politics and the need for political legitimacy and can only be understood as such.[22] Nevertheless, it may be argued that the procedure increases the judicial resources available to the Court in enabling the appointing state's arguments to be fully appreciated.[23] Judge ad hoc Lauterpacht in the *Application of the Genocide* (*Provisional Measures*) case in a discussion of the nature of the ad hoc judge, declared that together with the duty of impartiality, the ad hoc judge has the special obligation to ensure that so far as is reasonable, every relevant argument in favour of the party appointing him has been fully appreciated in the course of collegial reflection.[24] In practice the institution has not resulted in any disruption of the functioning of the ICJ.[25] While it is overwhelmingly the case that ad hoc judges

[20] It is possible for states in this position not to appoint ad hoc judges: see e.g. the *Temple of Preah Vihear* case, ICJ Reports, 1962, p. 6; 33 ILR, p. 48. Note that in *Djibouti* v. *France*, ICJ Reports, 2008, para. 6, an ad hoc judge was appointed for France as the French judge on the Court recused himself.

[21] See e.g. H. Lauterpacht, *The Function of Law in the International Community*, Oxford, 1933, pp. 215 ff. This provision should be distinguished from article 27(2) of the European Convention on Human Rights, which similarly provides for the appointment of an ad hoc judge to the Court. In this case, the Court deals with the provisions of municipal law of the member states of the Council of Europe and measures their conformity with the Convention. It is thus necessary to retain some expertise as to the domestic system in the case in question. Note that it is possible for an ad hoc judge to be of the same nationality as that of one of the permanent judges: see e.g. *Liechtenstein* v. *Germany*, ICJ Reports, 2005, p. 6, and Rosenne, *Law and Practice*, vol. III, p. 1092, note 68.

[22] See e.g. S. Schwebel, 'National Judges and Judges Ad Hoc of the International Court of Justice', 48 ICLQ, 1998, p. 889; N. Valticos, 'L'Évolution de la Notion de Judge *Ad Hoc*', 50 *Revue Hellénique de Droit International*, 1997, pp. 11–12; H. Thierry, 'Au Sujet du Juge *Ad Hoc*', in *Liber Amicorum Judge Ruda* (eds. C. A. Armas Barea *et al.*), The Hague, 2000, p. 285; P. Kooijmans, 'Article 31' in Zimmermann *et al.*, *Statute of the International Court*, p. 495; Rosenne, *Law and Practice*, vol. III, pp. 1085 ff., and L. V. Prott, *The Latent Power of Culture and the International Judge*, Abingdon, 1979.

[23] See Franck, 'Fairness', p. 312. See also N. Singh, *The Role and Record of the International Court of Justice*, Dordrecht, 1989, pp. 193–4.

[24] ICJ Reports, 1993, pp. 325, 408–9; 95 ILR, pp. 43, 126–7, and see also at the Counter-Claims Order phase of the case, ICJ Reports, 1997, pp. 243, 278; 115 ILR, p. 206. Judge Lauterpacht's views were cited with approval by Judge ad hoc Franck in his Dissenting Opinion in *Indonesia/Malaysia*, ICJ Reports, 2002, pp. 625, 693.

[25] Note that Practice Direction VII of the Court now requires that 'parties, when choosing a judge *ad hoc* pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding

support the state that has so nominated them, this is not invariably so.[26] The Court has also permitted the use of ad hoc judges in advisory proceedings, although only where it has found that an opinion is requested 'upon a legal question' actually pending between two or more states.[27]

Article 29 of the Statute of the ICJ provides for the establishment of a Chamber of Summary Procedure for the speedy dispatch of business by five judges. It has not as yet been called upon. More controversially, a seven-member Chamber for Environmental Matters was established in July 1993.[28] Article 26 permits the creation of Chambers composed of three or more members as the Court may determine for dealing with particular categories of cases[29] or to deal with a particular case. This procedure was revised in the 1978 Rules of Court[30] and used for the first time in the *Gulf of Maine* case.[31] The question of the composition of the Chamber is decided by the Court after the parties have been consulted, and in such cases the identity of the judges to comprise the Chamber is clearly of critical value. In the *Gulf of Maine* case it was alleged that Canada and the US threatened to withdraw the case if their wishes as to composition were not carried out.[32] Judge Oda has underlined that 'in practical terms, therefore, it is inevitable, if a chamber is to be viable, that its composition must result from a consensus between the parties and the Court', although the

the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge *ad hoc* in another case before the Court.' Practice Direction VIII provides in addition that 'parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court'.

[26] See e.g. the *Application for Revision and Interpretation of the Judgment* made in the *Tunisia/Libya* case, ICJ Reports, 1985, p. 192; 81 ILR, p. 419, and the *Great Belt* (*Finland* v. *Denmark*) case, ICJ Reports, 1991, p. 12; 94 ILR, p. 446.

[27] See article 102(3) of the Rules of Court 1978. See the *Western Sahara* case, ICJ Reports, 1975, p. 12; 59 ILR, p. 30. Cf. the *Namibia* case, ICJ Reports, 1971, p. 16; 49 ILR, p. 2. See also L. Gross, 'The International Court of Justice: Consideration of Requirements for Enhancing its Roles in the International Legal Order' in Gross, *Future of the International Court of Justice*, vol. I, p. 61.

[28] See International Court of Justice, *Yearbook 1993–1994*, The Hague, 1994, p. 18. It has not yet been called upon, no doubt partly because whether or not an issue is an environmental one may indeed be very much in dispute between the parties: see R. Higgins, 'Respecting Sovereign States and Running a Tight Ship', 50 ICLQ, 2001, pp. 121, 122.

[29] Labour cases and cases relating to transit and communications are specifically mentioned.

[30] See articles 15–18 and 90–3 of the Rules of Court.

[31] ICJ Reports, 1982, p. 3 and *ibid.*, 1984, p. 246; 71 ILR, p. 58. The Chamber consisted of Judge Ago (President) and Judges Gros, Mosler and Schwebel and Judge ad hoc Cohen.

[32] See e.g. Merrills, *International Dispute Settlement*, p. 150, and Brauer, 'International Conflict Resolution: The ICJ Chambers and the Gulf of Maine Dispute', 23 Va. JIL, 1982–3, p. 463. See also Singh, *Role and Record*, p. 110.

Chamber is a component of the Court and 'the process of election whereby it comes into being should be as judicially impartial as its subsequent functioning'.[33]

Recourse to a Chamber provides the parties with flexibility in the choice of judges to hear the case and to that extent parallels arbitration.[34] Of the first two matters before Chambers of the Court, perhaps the more interesting from the perspective of the future development of the ICJ was the *Burkina Faso–Mali* case,[35] since African states had hitherto been most reluctant in permitting third-party binding settlement of their disputes. Chambers of the Court have also been utilised in the *Elettronica Sicula* case,[36] the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras (Nicaragua intervening),[37] the *Application for Revision of the Judgment in El Salvador/Honduras (Nicaragua intervening)*[38] and *Benin/Niger*.[39]

The Rules of the Court, which govern its procedure and operations, were adopted in 1946 and revised in 1972 and 1978.[40] Articles 79 and 80 of the 1978 Rules were amended in 2000 and 2005.[41] The internal judicial practice of the Court has been the source of discussion in recent years[42] and some changes have taken place.[43] The Court, for example,

[33] ICJ Reports, 1987, pp. 10, 13; 97 ILR, pp. 139, 142.

[34] Although concern was expressed about the unity of the jurisprudence of the Court by frequent use of ad hoc Chambers: see H. Mosler, 'The *Ad Hoc* Chambers of the International Court of Justice' in *International Law at a Time of Perplexity* (ed. Y. Dinstein), Dordrecht, 1989, p. 449. See also S. Schwebel, 'Chambers of the International Court of Justice formed for Particular Cases', *ibid.*, p. 739; E. Valencia-Ospina, 'The Use of Chambers of the International Court of Justice' in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, p. 503; Rosenne, *Law and Practice*, vol. III, pp. 1068 ff.; P. Palchetti, 'Article 26' in Zimmermann *et al.*, *Statute of the International Court*, p. 439, and Franck, 'Fairness', pp. 314 ff. As to the precedential value of decisions of Chambers, see Shahabuddeen, *Precedent*, pp. 171 ff. See also Thirlway, 'Law and Procedure', 2001, pp. 38, 46.

[35] See 22 ILM, 1983, p. 1252 and Communiqué of the ICJ No. 85/8, 1 May 1985. The Chamber consisted of Judge Bedjaoui (President) and Judges Lachs and Ruda, with Judges ad hoc Luchaire and Abi-Saab: see ICJ Reports, 1986, p. 554; 80 ILR, p. 441.

[36] ICJ Reports, 1989, p. 15; 84 ILR, p. 311.

[37] See ICJ Reports, 1987, p. 10; 97 ILR, pp. 112 and 139 and ICJ Reports, 1992, p. 351.

[38] ICJ Reports, 2003, p. 392; 129 ILR, p. 1 [39] ICJ Reports, 2005, p. 90.

[40] See Rosenne, *Law and Practice*, vol. III, p. 1074. [41] See below, pp. 1074 and 1096.

[42] See e.g. D. Bowett *et al.*, *The International Court of Justice: Process, Practice and Procedures*, London, 1997. See also e.g. Jennings, 'Role', pp. 8 ff.; M. Bedjaoui, 'La "Fabrication" des Arrêts de la Cour Internationale de Justice' in *Mélanges Virally*, Paris, 1991, p. 87, and S. Oda, 'The International Court of Justice Viewed from the Bench', 244 HR, 1993 VII, p. 13. See also Shaw, 'International Court', pp. 862 ff.

[43] See the 1976 Resolution on Practice, International Court of Justice, *Acts and Documents Concerning the Organisation of the Court*, The Hague, 1989, p. 165. See also Higgins, 'Respecting Sovereign States'.

now adopts Practice Directions.[44] The Court has the power to regulate its own procedure.[45] Written pleadings are governed by articles 44 to 53 of the Rules of Court, which in fact allow the parties considerable latitude. While it is for the Court itself to determine the number, order and timing of filings of pleadings, this is done in consultation with the parties and the Court is ready to allow parties to extend time limits or determine whether, for example, there should be further rounds of pleadings.[46]

The jurisdiction of the Court[47]

General

The International Court is a judicial institution that decides cases on the basis of international law as it exists at the date of the decision. It cannot formally create law as it is not a legislative organ.[48] The Court has emphasised that, 'it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily

[44] There are currently twelve, the majority seeking essentially to ensure that the parties keep strictly to the Rules concerning pleadings and to restrict the tendency to produce large numbers of annexes. Practice Direction XII provides that written statements and documents submitted by international non-governmental organisations in advisory proceedings shall not be considered as part of the case file, but rather as publications in the public domain and available for consultation.

[45] See e.g. Judge Weeramantry's Dissenting Opinion in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Nuclear Tests Case*, ICJ Reports, 1995, pp. 288, 320; 106 ILR, pp. 1, 42, where he noted that this power enabled it to devise a procedure *sui generis*.

[46] The memorial is to contain a statement of relevant facts, a statement of law and the submissions. The counter-memorial is to contain an admission or denial of the facts stated in the memorial, any additional facts if necessary, observations upon the statement of law in the memorial and a statement of law in answer thereto and the submissions: see articles 49(1) and (2) of the Rules. The reply and rejoinder, if authorised by the Court, are to be directed at bringing out the issues still dividing the parties, article 49(3).

[47] See e.g. Rosenne, *Law and Practice*, vol. II, and C. Tomuschat, 'Article 36' in Zimmermann *et al.*, *Statute of the International Court*, p. 589. See also M. N. Shaw, 'The Security Council and the International Court of Justice: Judicial Drift and Judicial Function' in Muller *et al.*, *International Court of Justice: Future Role*, p. 219; W. M. Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication', 258 HR, 1996, p. 9, and S. A. Alexander, 'Accepting the Compulsory Jurisdiction of the International Court of Justice with Reservations', 14 *Leiden Journal of International Law*, 2001, p. 89. See also the series of articles by Thirlway on 'The Law and Procedure of the International Court of Justice' in the *British Year Book of International Law* from 1989 to date.

[48] See the *Fisheries Jurisdiction* case, ICJ Reports, 1974, pp. 3, 19; 55 ILR, pp. 238, 254.

has to specify its scope and sometimes note its general trend.'[49] Its views as to what the law is are of the highest authority. However, the matters that come before it are invariably intertwined with political factors. On occasions, such matters are also the subject of consideration before the political organs of the UN or other international organisations or indeed the subject of bilateral negotiations between the parties. This raises issues as to the proper function and role of the Court. The International Court of Justice is by virtue of article 92 of the Charter the 'principal judicial organ of the United Nations'. It is also, as Judge Lachs put it, 'the guardian of legality for the international community as a whole, both within and without the United Nations'.[50] It has been emphasised that the 'function of the Court is to state the law'[51] and it can only decide on the basis of law.[52] The issue of judicial function was examined in an important joint declaration by seven judges in *Serbia and Montenegro* v. *UK*,[53] one of the cases brought by what was originally the Federal Republic of Yugoslavia against NATO countries arising out of the Kosovo conflict in 1999. It was noted that when choosing between various grounds upon which to accept or reject jurisdiction, there were three criteria to guide the Court. These were, first, consistency with previous case-law in order to provide predictability as 'consistency is the essence of judicial reasoning'; secondly, certitude, whereby the Court should choose the ground most secure in law, and, thirdly, as the principal judicial organ of the United Nations, the Court should be 'mindful of the possible implications and consequences for the other pending cases'.[54]

Nevertheless, political factors cannot but be entwined with questions of law. The Court has noted that while political aspects may be present in any legal dispute brought before it, the Court was only concerned to establish that the dispute in question was a legal dispute 'in the sense of a dispute capable of being settled by the application of principles and rules of international law'.[55] The fact that other elements are present cannot detract

[49] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 237.

[50] The *Lockerbie* case, ICJ Reports, 1992, pp. 3, 26; 94 ILR, pp. 478, 509.

[51] The *Northern Cameroons* case, ICJ Reports, 1963, pp. 15, 33; 35 ILR, pp. 353, 369.

[52] See the *Haya de la Torre* case, ICJ Reports, 1951, pp. 71, 79; 18 ILR, p. 349. See also Judge Weeramantry's Dissenting Opinion in the *Lockerbie* case, ICJ Reports, 1992, pp. 3, 56; 94 ILR, pp. 478, 539.

[53] ICJ Reports, 2004, p. 1307. [54] *Ibid.*, pp. 1353–4.

[55] The *Armed Actions* (*Nicaragua* v. *Honduras*) case, ICJ Reports, 1988, pp. 16, 91; 84 ILR, pp. 218, 246. See also the *Certain Expenses of the United Nations* case, ICJ Reports, 1962, pp. 151, 155; 34 ILR, pp. 281, 285, and the *Tadić* case before the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, IT-94-1-AR72, p. 11. See also

from the characterisation of a dispute as a legal dispute.[56] The Court has also referred to the assessment of the legality of the possible conduct of states with regard to international legal obligations as an 'essentially judicial task'.[57] Accordingly, 'the task of the Court must be to respond, on the basis of international law, to the particular legal dispute brought before it. As it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that.'[58]

The fact that the same general political situation may come before different organs of the UN has raised the problem of concurrent jurisdiction. The Court, however, has been consistently clear that the fact that the issue before the Court is also the subject of active negotiations between the parties,[59] or the subject of good offices activity by the UN Secretary-General[60] or the subject of consideration by the Security Council[61] or regional organisations,[62] will not detract from the competence of the Court or the exercise of its judicial function. The Court has noted that the Security Council has functions of a political nature, while the Court itself has functions of a legal nature, and that therefore both organs could perform their separate but complementary functions with respect to the same events.[63] The Court may also indicate provisional measures of protection at the same time as the UN Secretary-General is organising a fact-finding mission to investigate the same events.[64] The Court's

R. Higgins, 'Policy Considerations and the International Judicial Process', 17 ICLQ, 1968, pp. 58, 74.

[56] ICJ Reports, 1988, p. 92; 84 ILR, p. 247. See also the *Iranian Hostages* case, ICJ Reports, 1980, pp. 7, 19–20; 61 ILR, pp. 530, 545–6 and *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 234; 110 ILR, pp. 163, 184. See, for the view that rather than concentrate upon definitions of legal and political questions, one should focus upon the distinctions between political and legal methods of dispute settlement, R. Y. Jennings, 'Gerald Gray Fitzmaurice', 55 BYIL, 1984, pp. 1, 18, and R. Higgins, 'Policy Considerations', p. 74.

[57] See the Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports, 1996, pp. 66, 73; 110 ILR pp. 1, 13. See also e.g. the *Certain Expenses* case, ICJ Reports, 1962, pp. 151, 155; 34 ILR, pp. 281, 284–5.

[58] *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 190. See also the Separate Opinion of Judge Simma, *ibid.*, p. 335.

[59] See the *Aegean Sea Continental Shelf* case, ICJ Reports, 1976, pp. 3, 12; 60 ILR, pp. 562, 571.

[60] See the *Iranian Hostages* case, ICJ Reports, 1980, pp. 7, 21–2; 61 ILR, pp. 530, 547–8.

[61] See the *Nicaragua* case, ICJ Reports, 1984, pp. 392, 431–4; 76 ILR, pp. 104, 142–5.

[62] ICJ Reports, 1984, p. 440 and *Cameroon* v. *Nigeria* (*Preliminary Objections*), ICJ Reports, 1998, pp. 275, 307.

[63] ICJ Reports, 1984, p. 435; 76 ILR, p. 146.

[64] *Cameroon* v. *Nigeria* (*Provisional Measures*), ICJ Reports, 1996, pp. 13, 22.

essential function is to resolve in accordance with international law disputes placed before it[65] and to refrain from deciding points not included in the final submissions of the parties.[66] The provision as to international law relates to the sources of law available for application by the Court and is considered subsequently.[67] The obligation to decide was referred to by the Court in the *Libya/Malta* (*Application for Permission to Intervene*) case,[68] where it was noted that it was the duty of the Court 'to give the fullest decision it may in the circumstances of each case'.[69] However, this obligation is subject, for example, to jurisdictional limitations (for example, with regard to the rights of third states)[70] and questions related to judicial propriety.[71]

The nature of a legal dispute

Article 36(2) of the Statute of the Court requires that a matter brought before it should be a legal dispute.[72] Although it is not possible to point to a specific definition, the approach adopted by the Permanent Court in the *Mavrommatis Palestine Concessions* (*Jurisdiction*) case[73] constitutes

[65] See e.g. *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 190. See also Judge Weeramantry's Dissenting Opinion in the *Lockerbie* case, ICJ Reports, 1992, pp. 3, 56; 94 ILR, pp. 478, 539.

[66] This rule (known as the *non ultra petita* rule) has been termed by Judge Buergenthal in his Separate Opinion in the *Oil Platforms (Iran* v. *USA)* case, ICJ Reports, 2003, pp. 161, 271; 130 ILR, pp. 323, 426, 'a cardinal rule which does not allow the Court to deal with a subject in the *dispositif* [operative paragraphs] of its judgment that the parties to the case have not, in their final submissions, asked it to adjudicate'. See the *Request for the Interpretation of the Judgment in the Asylum Case*, ICJ Reports, 1950, pp. 395, 402; the *Qatar* v. *Bahrain* case, ICJ Reports, 2001, pp. 40, 96–7 and the *Democratic Republic of the Congo* v. *Belgium* case, ICJ Reports, 2002, pp. 3, 18–19; 128 ILR, pp. 60, 73–5. See also Rosenne, *Law and Practice*, vol. II, p. 576.

[67] See below, p. 1086.

[68] ICJ Reports, 1984, pp. 3, 25; 70 ILR, pp. 527, 554.

[69] See also Judge Weeramantry's Dissenting Opinion in the *East Timor* case, ICJ Reports, 1995, pp. 90, 158; 105 ILR, pp. 226, 299. See also generally M. Bedjaoui, 'Expediency in the Decisions of the International Court of Justice', 71 BYIL, 2000, p. 1.

[70] See e.g. the *Monetary Gold* case, ICJ Reports, 1954, p. 32; 21 ILR, p. 399, and the *East Timor* case, ICJ Reports, 1995, pp. 90, 105; 105 ILR, pp. 226, 246.

[71] See further below, p. 1086.

[72] The Court noted in the *Nuclear Tests* case, ICJ Reports, 1974, pp. 253, 270–1; 57 ILR, pp. 398, 415–16, that 'the existence of a dispute is the primary condition for the Court to exercise its judicial function'. It is also a question which is 'essentially preliminary', ICJ Reports, 1974, p. 260; 57 ILR, p. 405.

[73] PCIJ, Series A, No. 2, 1924, p. 11. See also the *South-West Africa* cases, ICJ Reports, 1962, pp. 319, 328; 37 ILR, pp. 3, 10; the *Nuclear Tests* case, ICJ Reports, 1974, p. 253; 57 ILR, p. 398; *Liechtenstein* v. *Germany*, ICJ Reports, 2005, pp. 6, 18 and *Democratic Republic of the Congo* v. *Rwanda*, ICJ Reports, 2006, pp. 6, 40.

the appropriate starting point. The Court declared that a dispute could be regarded as 'a disagreement over a point of law or fact, a conflict of legal views or of interests between two persons'. It is to be distinguished from a situation which might lead to international friction or give rise to a dispute. This is a subtle but important difference since, for the process of settlement to operate successfully, there has to be a specific issue or issues readily identifiable to be resolved.

In the *Interpretation of Peace Treaties* case[74] the Court noted that 'whether there exists an international dispute is a matter for objective determination' and pointed out that in the instant case 'the two sides hold clearly opposite views concerning the question of the performance or the non-performance of certain treaty obligations' so that 'international disputes have arisen'. A mere assertion is not sufficient; it must be shown that the claim of one party is positively opposed by the other.[75] This approach was reaffirmed in the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* case,[76] where the Court in an advisory opinion noted that the consistent challenge by the UN Secretary-General to the decisions contemplated and then taken by the US Congress and Administration with regard to the closing of the PLO offices in the US (which of necessity included the PLO Mission to the United Nations in New York) demonstrated the existence of a dispute between the US and the UN relating to the Headquarters Agreement. In the *East Timor* case[77] the Court again reaffirmed its earlier case-law and went on to note that 'Portugal has rightly or wrongly, formulated complaints of fact and law against Australia, which the latter has denied. By virtue of this denial, there is a legal dispute.' This acceptance of a relatively low threshold was underlined in the *Application of the Genocide Convention (Bosnia*

[74] ICJ Reports, 1950, pp. 65, 74; 17 ILR, pp. 331, 336.

[75] *South-West Africa* cases, ICJ Reports, 1962, pp. 319, 328; 37 ILR, pp. 3, 10 and the *Nicaragua* case, ICJ Reports, 1984, pp. 392, 429–41; 76 ILR, pp. 104, 140. See also *Larsen* v. *Hawaiian Kingdom* 119 ILR, pp. 566, 587. Note also that Kelsen wrote that 'a dispute is a legal dispute if it is to be settled by the application of legal norms, that is to say, by the application of existing law', *Principles of International Law* (ed. R. W. Tucker), 2nd edn, New York, 1966, p. 526. See also Rosenne, *Law and Practice*, vol. II, pp. 517 ff. Higgins has made the point that generally the Court has taken a robust attitude as to what is a 'legal' matter, *Problems and Process*, p. 195. See also V. Gowland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case', 88 AJIL, 1994, p. 643.

[76] ICJ Reports, 1988, pp. 12, 30; 82 ILR, pp. 225, 248.

[77] ICJ Reports, 1995, pp. 90, 99–100.

and Herzegovina v. *Yugoslavia)* case,[78] where the Court stated that 'by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia-Herzegovina, "there is a legal dispute" between them'. Such denial of the allegations made against Yugoslavia had occurred 'whether at the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the present proceedings relating to those objections'.[79] In other words, in order for a matter to constitute a legal dispute, it is sufficient for the respondent to an application before the Court merely to deny the allegations made even if the jurisdiction of the Court is challenged.[80]

While it is for the parties to put forward their views, and particularly for the applicant, in its application, to present to the Court the dispute with which it wishes to seize the Court,[81] it is for the Court itself to determine the subject-matter of the dispute before it.[82] This will be done by taking into account not only the submission but the application as a whole, the arguments of the applicant before the Court and other documents referred to, including the public statements of the applicant.[83] Should the Court conclude that the dispute in question has disappeared by the time the Court makes its decision, because, for example, the object of the claim has been achieved by other means, then the 'necessary consequences' will be drawn and no decision may be given.[84] In all events, the determination on an objective basis of the existence of a dispute is for the Court itself.[85]

[78] ICJ Reports, 1996, pp. 595, 615. See also *Liechtenstein* v. *Germany*, ICJ Reports, 2005, pp. 6, 19.

[79] ICJ Reports, 1996, pp. 595, 614.

[80] See also *El Salvador/Honduras*, ICJ Reports, 1992, pp. 351, 555; 97 ILR, p. 112.

[81] Note that article 40(1) of the Statute requires that the application indicate the subject of the dispute and that article 38(2) of the Rules requires that the 'precise nature of the claim' be specified in the application.

[82] See e.g. *Spain* v. *Canada*, ICJ Reports, 1998, pp. 432, 449; 123 ILR, pp. 189, 209–10 and *Nicaragua* v. *Colombia*, ICJ Reports, 2007, para. 38.

[83] The *Nuclear Tests* case, ICJ Reports, 1974, pp. 253, 263; 57 ILR, pp. 398, 408. Note that new claims formulated during the course of proceedings will be declared inadmissible where such claims would, if admitted, transform the subject of the dispute originally brought before the Court in the application: see e.g. *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 108.

[84] The *Nuclear Tests* case, ICJ Reports, 1974, pp. 253, 271; 57 ILR, p. 416. See also the *Northern Cameroons* case, ICJ Reports, 1963, pp. 15, 38; 35 ILR, p. 353 and *Democratic Republic of the Congo* v. *Belgium*, ICJ Reports, 2002, pp. 3, 14–15; 128 ILR, pp. 60, 69–71.

[85] *Spain* v. *Canada*, ICJ Reports, 1998, pp. 432, 448; 123 ILR, pp. 189, 208–9.

It is also clear that the exhaustion of diplomatic negotiations is not a prerequisite to going to the Court.[86]

Contentious jurisdiction[87]

The jurisdiction of the International Court falls into two distinct parts: its capacity to decide disputes between states, and its capacity to give advisory opinions when requested so to do by particular qualified entities. The latter will be noted in the following section.

The Court has underlined that the question as to the establishment of jurisdiction is a matter for the Court itself. Although a party seeking to assert a fact must prove it, the issue of jurisdiction is a question of law to be resolved by the Court in the light of the relevant facts.[88] Further, jurisdiction must be determined at the time that the act instituting proceedings was filed, so that if the Court had jurisdiction at that date, it will continue to have jurisdiction irrespective of subsequent events.[89] Subsequent events may lead to a finding that an application has become moot, but cannot deprive the Court of jurisdiction.[90] It should also be noted that in dealing with issues of jurisdiction, the Court will not attach as much importance to matters of form as would be the case in domestic law.[91] The Court possesses an inherent jurisdiction to take such action as may be required in order to ensure that the exercise of its jurisdiction over

[86] *Cameroon* v. *Nigeria* (*Preliminary Objections*), ICJ Reports, 1998, pp. 275, 303. The question of non-exhaustion of domestic remedies is an admissibility issue: see below, p. 1071.

[87] See e.g. Rosenne, *Law and Practice*, vol. II, and R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, 1993.

[88] See the *Fisheries Jurisdiction* (*Spain* v. *Canada*) case, ICJ Reports, 1998, pp. 432, 450; 123 ILR, pp. 189, 210–11. See also the *Armed Actions* (*Nicaragua* v. *Honduras*) case, ICJ Reports, 1988, p. 76; 84 ILR, p. 231 and *Serbia and Montenegro* v. *UK*, ICJ Reports, 2004, pp. 1307, 1322.

[89] See e.g. *Democratic Republic of the Congo* v. *Rwanda*, ICJ Reports, 2006, pp. 6, 29. However, the Court has held that it would not penalise a defect in procedure which the applicant could easily remedy, *ibid.*

[90] *Democratic Republic of the Congo* v. *Belgium*, ICJ Reports, 2002, pp. 3, 12–13; 128 ILR, pp. 60, 67–8.

[91] See the *Application of the Genocide Convention* (*Preliminary Objections*) case, ICJ Reports, 1996, pp. 595, 613; 115 ILR, pp. 10, 26. See also the *Mavrommatis Palestine Concessions* case, PCIJ, Series A, No. 2, p. 34; 2 AD, p. 27, and the *Northern Cameroons* case, ICJ Reports, 1963, pp. 15, 28; 35 ILR, pp. 353, 363. The Court in *Cameroon* v. *Nigeria* (*Provisional Measures*), ICJ Reports, 1994, p. 105; 106 ILR, p. 144, in fixing relevant time limits for the parties, noted that Cameroon had submitted an additional application after its original application, by which it sought to extend the object of the dispute. It was intended as an amendment to the first application. There is no provision in the Statute and Rules of the

the merits, once established, is not frustrated, and to ensure the orderly settlement of all matters in dispute, to ensure the 'inherent limitations on the exercise of the judicial function' of the Court and to 'maintain its judicial character'.[92] The Court has also held that where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required in order to consider the question of remedies.[93]

It has been emphasised that the function of a decision on jurisdiction is solely to determine whether the case on the merits may proceed 'and not to engage in a clarification of a controverted issue of a general nature', while a case will not be declined simply on the basis of the alleged motives of one of the parties or because the judgment may have implications in another case.[94] The Court has freedom to select the ground upon which it will base its judgment and when its jurisdiction is challenged on diverse grounds, it is free to base its decision on one or more grounds of its own choosing, in particular 'the ground which in its judgment is more direct and conclusive'.[95] Once the Court has reached a decision on jurisdiction, that decision assumes the character of *res judicata*,[96] that is it becomes final and binding upon the parties. Subject only to the possibility of revision under article 61 of the Statute,[97] the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events.[98]

As well as the question of the jurisdiction of the Court, which essentially concerns issues as to the consent of the parties, it is necessary that the application be admissible.[99] Admissibility refers to the application of relevant general rules of international law, such as exhaustion of local remedies in cases concerning diplomatic protection.[100] Objections to

Court for amendment of applications as such, although in this case Nigeria consented to the request and the Court accepted it.

92 The *Nuclear Tests* case, ICJ Reports, 1974, pp. 253, 259; 57 ILR, pp. 398, 404, citing the *Northern Cameroons* case, ICJ Reports, 1963, pp. 15, 29; 35 ILR, pp. 353, 365. See also below, p. 1074.

93 The *LaGrand* case, ICJ Reports, 2001, pp. 466, 485; 134 ILR, pp. 1, 24.

94 *Serbia and Montenegro* v. UK, ICJ Reports, 2004, pp. 1307, 1323.

95 *Ibid.*, p. 1325.

96 See the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, paras. 117 ff. See further as to *res judicata*, above, chapter 3, p. 101.

97 See below, p. 1105.

98 The *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, para. 120.

99 See e.g. *Serbia and Montenegro* v. *UK*, ICJ Reports, 2004, pp. 1307, 1322.

100 See e.g. *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 276 and the *Diallo (Guinea* v. *Democratic Republic of the Congo)* case, ICJ Reports, 2007, paras.

admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant state are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.[101] Together they form the necessary prerequisite to the Court proceeding to address the merits of a case. Also of relevance in the pre-merits consideration of an application to the Court is the question of standing or jurisdiction *ratione personae*, a matter which logically arises before a consideration of jurisdiction and admissibility. It refers to the question of the receivability of the request, sometimes termed the process of seisin, which constitutes 'a procedural step independent of the basis of jurisdiction invoked', although the question as to whether the Court has been validly seized is a question of jurisdiction.[102]

Article 34 of the Statute of the Court declares that only states may be parties in cases before the Court. This is of far-reaching importance since it prohibits recourse to the Court by private persons and international organisations, save in so far as some of the latter may be able to obtain advisory opinions. The Court is open to all states that are parties to the Statute. Article 93 of the UN Charter provides that all UN members are *ipso facto* parties to the Statute of the ICJ, and that non-members of the UN may become a party to the Statute on conditions determined by the General Assembly upon the recommendation of the Security Council. In the case of Switzerland, for example, the Assembly and Security Council declared that it could become a party to the Statute of the ICJ provided it accepted the provisions of that Statute, accepted all the obligations of a UN member under Article 94 of the Charter (i.e. undertaking to comply with the decision of the Court), and agreed to pay a certain amount towards the expenses of the Court.[103] The Security Council has in fact resolved that access to the ICJ for a state not party to the Statute is possible provided that such state has previously deposited with the registrar of the Court a declaration (either general or particular) accepting the jurisdiction of the Court and undertaking to comply in good faith with the decision or decisions of

33 ff. See also Rosenne, *Law and Practice*, vol. II, pp. 817 ff.; Tomuschat, 'Article 36', p. 646 and article 79 of the Rules of Court.

[101] See the *Oil Platforms (Iran* v. *USA)* case, ICJ Reports, 2003, pp. 161, 177; 130 ILR, pp. 323, 337.

[102] *Qatar/Bahrain*, ICJ Reports, 1995, pp. 6, 23–4: 102 ILR, pp. 1, 64–5.

[103] General Assembly resolution 91 (I). Switzerland became a member of the UN in September 2002. See also Rosenne, *Law and Practice*, vol. II, p. 598. Japan, Liechtenstein, Nauru and San Marino were also in the same position until 1956, 1990, 1999 and 1992 respectively.

the Court.[104] West Germany filed a general declaration with the ICJ on this basis before it joined the UN,[105] while Albania[106] and Italy[107] filed particular declarations with respect to cases with which they were involved.

Article 35(2) of the Statute further provides that the conditions under which the Court shall be open to states other than those parties to the Statute shall be laid down by the Security Council[108] 'subject to the special provisions contained in treaties in force'. The Court has rather restrictively interpreted this condition to refer to treaties in force as at the date of the entry into force of the Statute and providing for the jurisdiction of what was then the new Court.[109] Although only states may be parties before the Court, the Court may request information relevant to cases before it from public international organisations and may receive information presented by these organisations on their own initiative.[110]

The question as to whether a party has the right to appear before the Court under the Statute is not dependent upon consent and is an issue which the Court itself must enquire into and determine prior to considering any objections to jurisdiction and admissibility.[111] Article 35(1) of the Statute provides that the Court shall be open to the states parties to the Statute, or as the Court itself has stated, 'The Court can exercise its judicial function only in respect of those states which have access to it under article 35.' Only states which have access to the Court, therefore, are in a position to confer jurisdiction upon it.[112] In *Serbia and Montenegro* v. UK,[113] the Court concluded that Serbia and Montenegro

[104] Security Council resolution 9 (1946).

[105] The *North Sea Continental Shelf* case, ICJ Reports, Pleadings, vol. I, pp. 6, 8.

[106] The *Corfu Channel* case, ICJ Reports, 1949, p. 4; 16 AD, p. 155.

[107] The *Monetary Gold* case, ICJ Reports, 1954, p. 19; 21 ILR, p. 399.

[108] Such conditions were laid down in Security Council resolution 9 (1946).

[109] ICJ Reports, 2004, pp. 1307, 1350. The Court accepted that no such prior treaties referring to the jurisdiction of the Court had been brought to its attention, *ibid.*

[110] Article 34(2), Statute of the ICJ. See also Rosenne, *Law and Practice*, vol. II, pp. 620 ff. Individuals, groups and corporations have no right of access to the Court: see here also H. Lauterpacht, *International Law and Human Rights*, London, 1950, p. 48. Note that Judge Higgins has written that, 'There is some flexibility I think for possible *amicus* briefs by NGOs in advisory opinion cases, and I think that a useful possibility for the Court to explore', 'Respecting Sovereign States', p. 123. See now Practice Direction XII with regard to the provision of written information by international non-governmental organisations in advisory proceedings.

[111] *Serbia and Montenegro* v. *UK*, ICJ Reports, 2004, pp. 1307, 1322 and 1326.

[112] *Ibid.*, p. 1326.

[113] ICJ Reports, 2004, p. 1307. This was one of a series of cases brought by the Federal Republic of Yugoslavia (the precursor to Serbia and Montenegro) against NATO countries in 1999, so that the point in question applied to other respondent states.

could not be regarded as a party to the Statute at the time of the application.[114]

The Court has certain inherent powers flowing from its role as a judicial organ.[115] These would include in certain circumstances the right of its own motion to put an end to proceedings in a case.[116] However, this would appear to be restricted to two circumstances: first, in cases before the adoption of article 38(5) of the Rules, where an application is made without a basis of jurisdiction in the hope that the other state would accept it,[117] and, secondly, where the Court accedes to the request of respondent states to remove cases from the list on the grounds of being manifestly lacking in jurisdiction.[118] This approach by the Court in the *Serbia and Montenegro* v. *UK* case was criticised by Judge Kooijmans[119] and by Judge Higgins, who noted that there was nothing in the case-law to suggest that the exercise of the Court's inherent powers in the absence of discontinuance was limited to the two circumstances referred to by the Court.[120] Judge Higgins emphasised that, 'The Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the Rules.' The 'very occasional need' to exercise such inherent powers might arise at any stage, from summary dismissal of a case to jurisdictional questions to merits issues.[121]

Under article 79(9) of the Rules, there are three ways in which the Court may dispose of a preliminary objection to jurisdiction. It may uphold the challenge, reject the challenge or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character, in which case the matter will be dealt with together with a

[114] *Ibid.*, pp. 1336–7. As to the relevant details of the case, see above, chapter 17, p. 963.

[115] See e.g. C. Brown, 'The Inherent Powers of International Courts and Tribunals', 76 BYIL, 2005, p. 195.

[116] *Serbia and Montenegro* v. *UK*, ICJ Reports, 2004, pp. 1307, 1321. The Rules do not provide for such a procedure.

[117] See below, p. 1076, note 131.

[118] See e.g. *Yugoslavia* v. *Spain*, ICJ Reports, 1999, pp. 761, 773–4 and *Yugoslavia* v. *USA*, ICJ Reports, 1999, pp. 916, 925–6.

[119] ICJ Reports, 2004, pp. 1307, 1370 ff. [120] *Ibid.*, p. 1361.

[121] *Ibid.*, pp. 1361–2. The question, therefore, that Judge Higgins believed that the Court should have addressed was whether it was possible to say that in the case, 'the circumstances are such that it is reasonable, necessary and appropriate for the Court to strike the case off the List as an exercise of inherent power to protect the integrity of the judicial process', *ibid.*, p. 1362.

consideration of the merits.[122] The Court has stated that in principle, a party raising preliminary objections to its jurisdiction is entitled to have those objections answered in the preliminary stage of the proceedings, unless the Court does not have before it all facts necessary to decide the question raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits.[123]

Article 36(1)

The Court has jurisdiction under article 36(1) of its Statute in all cases referred to it by parties, and regarding all matters specially provided for in the UN Charter or in treaties or conventions in force.[124] As in the case of arbitration, parties may refer a particular dispute to the ICJ by means of a special agreement, or *compromis*, which will specify the terms of the dispute and the framework within which the Court is to operate.[125] This method was used in the *Minquiers and Ecrehos* case,[126] and in a number of others.[127]

The jurisdiction of the Court is founded upon the consent of the parties,[128] which need not be in any particular form and in certain

[122] See e.g. *Nicaragua* v. *Colombia,* ICJ Reports, 2007, para. 48. See also the preliminary objections judgment in *Cameroon* v. *Nigeria*, ICJ Reports, 1998, p. 275.

[123] *Nicaragua* v. *Columbia*, ICJ Reports, 2007, para. 51. It is possible, however, for the determination by the Court of its jurisdiction to 'touch upon certain aspects of the merits of the case', *ibid.*

[124] See also article 40 of the ICJ Statute and article 39 of the Rules of Court.

[125] See e.g. L. C. Marion, 'La Saisine de la CIJ par Voie de Compromis', 99 RGDIP, 1995, p. 258.

[126] ICJ Reports, 1953, p. 47; 20 ILR, p. 94.

[127] See e.g. the *Belgium/Netherlands Frontier Land* case, ICJ Reports, 1959, p. 209; 27 ILR, p. 62, the *Tunisia/Libya Continental Shelf* case, ICJ Reports, 1982, p. 18; 67 ILR, p. 4 and the *Libya/Chad* case, ICJ Reports, 1974, p. 6; 100 ILR, p. 1.

[128] See the *Nicaragua* case, ICJ Reports, 1986, pp. 3, 32; 76 ILR, pp. 349, 366. The Court noted in the *Application for the Interpretation and Revision of the Judgment in the Tunisia/Libya Case*, ICJ Reports, 1985, pp. 192, 216; 81 ILR, pp. 419, 449, that it was 'a fundamental principle' that 'the consent of states parties to a dispute, is the basis of the Court's jurisdiction in contentious cases', citing here the *Interpretation of Peace Treaties* case, ICJ Reports, 1950, p. 71; 17 ILR, pp. 331, 335. See also *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 421 and *Democratic Republic of the Congo* v. Rwanda, ICJ Reports, 2006, pp. 6, 18. The Court further noted that, 'its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them' and that 'the conditions to which such consent is subject must be regarded as constituting the limits thereon . . . The examination of such conditions relates to its jurisdiction and not to the admissibility of the application', *ibid.*, p. 39. See also *Djibouti* v. *France*, ICL Reports, 2008, para. 48.

circumstances the Court will infer it from the conduct of the parties. In the *Corfu Channel (Preliminary Objections)* case,[129] the Court inferred consent from the unilateral application of the plaintiff state (the United Kingdom) coupled with subsequent letters from the other party involved (Albania) intimating acceptance of the Court's jurisdiction. The idea whereby the consent of a state to the Court's jurisdiction may be established by means of acts subsequent to the initiation of proceedings is referred to as the doctrine of *forum prorogatum*.[130] It will usually arise where one party files an application with the Court unilaterally inviting another state to accept jurisdiction with regard to the particular dispute where jurisdiction would not otherwise exist with regard to the matter at issue. If the other state accedes to this, then the Court will have jurisdiction.[131]

The doctrine has been carefully interpreted to avoid giving the impression of a creeping extension by the Court of its own jurisdiction by means of fictions. Consent has to be clearly present, if sometimes inferred, and not merely a technical creation.[132] The Court has emphasised that such consent has to be 'voluntary and indisputable'.[133] In the

[129] ICJ Reports, 1948, p. 15; 15 AD, p. 349.

[130] See e.g. Rosenne, *Law and Practice*, vol. II, pp. 672 ff., and S. Yee, 'Forum Prorogatum in the International Court', 42 German YIL, 1999, p. 147.

[131] See article 38(5) of the Rules. The Republic of the Congo filed an application against France on 9 December 2002 with regard to which the former gave its consent on 11 April 2003: see ICJ Press Release 2003/14 and the Court's Order of 17 June 2003, while France consented to jurisdiction with regard to an application dated 9 January 2006 brought by Djibouti: see the Court's judgment of 4 June 2008, noting that, 'For the Court to exercise jurisdiction on the basis of *forum prorogatum*, the element of consent must be either explicit or clearly to be deduced from the relevant conduct of a State' (para. 62) and that the extent of consent (and thus the jurisdiction of the Court) depended upon the matching of the application made with the expression by the other party of its consent, para. 65. It was emphasised that, 'Where jurisdiction is based on *forum prorogatum*, great care must be taken regarding the scope of the consent as circumscribed by the respondent State', para. 87. On 18 April 2007, Rwanda filed an application against France, but as of the date of writing, France has not given its consent to jurisdiction: see ICJ Press Release 2007/11.

[132] See e.g. the *Monetary Gold* case, ICJ Reports, 1954, pp. 19, 31; 21 ILR, pp. 399, 406. But cf. the *Treatment in Hungary of Aircraft of the USA* case, ICJ Reports, 1964, pp. 99, 103; the *Aerial Incident (USA* v. *USSR)* case, ICJ Reports, 1956, pp. 6, 9, 12, 15 and the two *Antarctic* cases, ICJ Reports, 1958, p. 158 and *ibid.*, 1959, p. 276. Note that article 38(2) of the 1978 Rules of the Court stipulates that the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based. See also *Djibouti* v. *France*, ICJ Reports, 2008, para. 163.

[133] *Corfu Channel* (*Preliminary Objection*), ICJ Reports, 1948, p. 27. See also *Application of the Genocide Convention*, ICJ Reports, 1996, pp. 595, 621.

Corfu Channel case the UK sought to found the Court's jurisdiction *inter alia* on the recommendation of the Security Council that the dispute be referred to the Court, which it was agreed was a 'decision' binding upon member states of the UN in accordance with article 25 of the Charter.[134] Accordingly it was maintained by the UK that Albania was obliged to accept the Court's jurisdiction irrespective of its consent. The ICJ did not deal with this point, since it actually inferred consent, but in a joint separate opinion, seven judges of the Court rejected the argument, which was regarded as an attempt to introduce a new meaning of compulsory jurisdiction.[135] A particularly difficult case with regard to the question as to whether relevant events demonstrated an agreement between the parties to submit a case to the Court is that of *Qatar* v. *Bahrain*.[136] The issue centred upon minutes of a meeting signed by the Foreign Ministers of both states (the Doha Minutes) in December 1990. The status of such Minutes was controverted,[137] but the Court held that they constituted an agreement under international law.[138] There was also disagreement over the substance of the Minutes and thus the subject matter of the dispute to be placed before the Court. Bahrain defined the issue as including the question of 'sovereignty' over Zubarah, while Qatar merely accepted that that was how Bahrain characterised the issue.[139] The Court concluded that this was sufficient to lay the whole dispute, including this element, before it.[140] Questions do therefore remain with regard to the extent of the consensual principle after this decision.[141]

[134] Although not a member of the UN, Albania had agreed to assume the obligations of a member with regard to the dispute. This application was on the basis of that part of article 36(1) which specifies that the Court's jurisdiction also comprised 'all matters specifically provided for in the Charter' of the UN.

[135] ICJ Reports, 1948, pp. 15, 31–2; 15 AD, pp. 349, 354.

[136] ICJ Reports, 1994, p. 112 and ICJ Reports, 1995, p. 6; 102 ILR, pp. 1 and 47. See M. Evans, 'Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (*Qatar* v. *Bahrain*), Jurisdiction and Admissibility', 44 ICLQ, 1995, p. 691.

[137] The argument revolving around whether any application to the Court had to be by both parties or whether unilateral application was provided for.

[138] ICJ Reports, 1994, p. 121; 102 ILR, p. 18.

[139] ICJ Reports, 1995, pp. 9–11; 102 ILR, pp. 50–2.

[140] ICJ Reports, 1995, pp. 17 and 25; 102 ILR, pp. 58 and 66. This was disputed by four of the five dissenting judges, who argued that the Zubarah sovereignty issue had not been properly laid before it, ICJ Reports, 1995, pp. 49, 55 ff., 72 and 74–5; 102 ILR, pp. 90, 96 ff., 113 and 115–16.

[141] See also E. Lauterpacht, '"Partial" Judgements and the Inherent Jurisdiction of the International Court of Justice' in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, p. 465.

It is a well-established principle that the Court will only exercise jurisdiction over a state with its consent[142] and it 'cannot therefore decide upon legal rights of third states not parties to the proceedings'.[143] As a consequence of this principle, the Court will not entertain actions between states that in reality implead a third state without its consent. This rule was underlined in the *Monetary Gold* case,[144] where it was noted that where the legal interests of the third party 'would form the very subject-matter of the decision', the Court could not entertain proceedings in the absence of that state. In the *Nicaragua* case, the Court noted that the circumstances of the *Monetary Gold* case 'probably represent the limit of the power of the Court to refuse to exercise its jurisdiction'.[145] This approach was underlined in the *Nauru* case, where the Court emphasised that the absence of a request from a third party to intervene 'in no way precludes the Court from adjudicating upon claims submitted to it, provided that the legal interests of the third state which may possibly be affected do not form the very subject-matter of the decision that is applied for'.[146] The test referred to was whether the determination of the third state's responsibility was a pre-requisite for the claims raised before the Court by one party against the other.[147] In the *East Timor* case,[148] the Court held that it could not rule on the lawfulness of the conduct of another state which was not a party to the case, whatever the nature of the obligations in question (i.e. even if they were *erga omnes* obligations as was the case with regard to the right to self-determination).[149] It was felt that in view of the situation, the Court would have to rule on the lawfulness of Indonesia's conduct with regard to East Timor as a pre-requisite for deciding upon Portugal's claims against Australia[150] and that such a determination would constitute

[142] See e.g. the *Libya/Malta* case, ICJ Reports, 1984, pp. 3, 24; 70 ILR, pp. 527, 553, the *Nicaragua* case, ICJ Reports, 1984, pp. 392, 431; 76 ILR, pp. 104, 142, the *El Salvador/Honduras* case, ICJ Reports, 1990, pp. 92, 114–16; 97 ILR, pp. 214, 235–7, and the *Nauru* case, ICJ Reports, 1992, pp. 240, 259–62; 97 ILR, pp. 1, 26–9.

[143] *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 421.

[144] ICJ Reports, 1954, pp. 19, 54; 21 ILR, pp. 399, 406. In this case, Italy asked that the governments of the UK, US and France should deliver to it any share of the monetary gold that might be due to Albania under Part III of the Paris Act of 14 January 1946, as satisfaction for alleged damage to Italy by Albania. Albania chose not to intervene in the case.

[145] ICJ Reports, 1984, pp. 392, 431; 76 ILR, pp. 104, 142.

[146] ICJ Reports, 1992, pp. 240, 261; 97 ILR, p. 28.

[147] *Ibid*. See also *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 237–8.

[148] ICJ Reports, 1995, pp. 90, 101 ff. [149] *Ibid.*, p. 102. [150] *Ibid.*, p. 104.

the very subject matter of the judgment requested and thus infringe the *Monetary Gold* principle.[151]

Apart from those instances where states specifically refer a dispute to it, the Court may also be granted jurisdiction over disputes arising from international treaties where such treaties contain a 'compromissory clause' providing for this.[152] In fact, quite a large number of international treaties, both bilateral and multilateral, do include a clause awarding the ICJ jurisdiction with respect to questions that might arise from the interpretation and application of the agreements.[153] Examples of the more important of such conventions include the 1948 Genocide Convention, 1965 Convention on Investment Disputes, the 1965 International Convention on the Elimination of all Forms of Racial Discrimination and the 1970 Hague Convention on Hijacking. In the *Application of the Genocide Convention (Bosnia* v. *Yugoslavia)* case,[154] the Court founded its jurisdiction upon article IX of the Genocide Convention. In the *US Diplomatic and Consular Staff in Tehran* case (the *Iranian Hostages* case),[155] the Court founded jurisdiction upon article 1 of the Optional Protocols concerning the Compulsory Settlement of Disputes (to which both Iran and the US were parties), which accompany both the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963. Common article 1 of the Protocol provides that disputes arising out of the interpretation or application of the Conventions lie within the compulsory jurisdiction of the International Court of Justice. The Court also founded jurisdiction in the *Nicaragua*[156] case *inter alia* upon a treaty provision, article XXIV(2) of the 1956 US–Nicaragua Treaty of Friendship, Commerce and Navigation providing for submission of disputes over the interpretation or application of the treaty to the ICJ unless the parties agree to settlement by some other specific means.

[151] *Ibid.*, p. 105. See also *Larsen* v. *Hawaiian Kingdom* 119 ILR, pp. 566, 588–92.

[152] See also article 40 of the ICJ Statute and article 38 of the Court's Rules.

[153] See Rosenne, *Law and Practice*, vol. II, chapter 11. There are almost 300 such treaties, bilateral and multilateral, currently listed on the Court's website: see www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasictreatiesandotherdocs.htm. To these need to be added treaties giving such jurisdiction to the Permanent Court of International Justice: see article 37 of the Court's Statute. See also J. Charney, 'Compromisory Clauses and the Jurisdiction of the International Court of Justice', 81 AJIL, 1989, p. 85.

[154] ICJ Reports, 1996, pp. 595, 615–17 on preliminary objections. See also ICJ Reports, 1993, pp. 3 and 325; 95 ILR, pp. 18 and 43 (the two Orders on Provisional Measures).

[155] ICJ Reports, 1980, pp. 3, 24; 61 ILR, pp. 530, 550.

[156] ICJ Reports, 1984, pp. 392, 426–9; 76 ILR, pp. 104, 137. See Briggs, '*Nicaragua* v. *United States*: Jurisdiction and Admissibility', 79 AJIL, 1985, p. 373.

In its judgment on jurisdiction and admissibility in the *Case Concerning Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*,[157] the International Court emphasised that the existence of jurisdiction was a question of law and dependent upon the intention of the parties. The issue of jurisdiction in the case centred, in the view of the Court, upon article 31 of the Pact of Bogotá, 1948, which declared that the parties '[i]n conformity with article 36(2) of the Statute of the International Court of Justice . . . recognise, in relation to any other American state, the jurisdiction of the Court as compulsory *ipso facto* . . . in all disputes of a juridical nature that arise among them' concerning the interpretation of a treaty, any question of international law, the existence of a fact which if established would constitute the breach of an international obligation or the nature or extent of the reparation to be made for the breach of an international obligation. Objections to jurisdiction put forward by Honduras on the grounds that article 31 was not intended to have independent force, and was merely an encouragement to the parties to deposit unilateral declarations of acceptance of the Court's compulsory jurisdiction, and that article 31 would only operate after the exhaustion of conciliation procedures referred to in article 32, were rejected on the basis of interpretation.[158]

Article 31 nowhere envisaged that the undertaking contained therein might be amended subsequently by unilateral declaration and the reference to article 36(2) of the Statute was insufficient to have that effect,[159] while the reference in article 32 of the Pact to a right of recourse to the International Court upon the failure of conciliation provided a second basis for the jurisdiction of the Court and not a limitation upon the first.[160] In other words, the commitment contained in article 31 of the Pact was sufficient to enable the Court to exercise jurisdiction.[161]

Where a treaty in force provides for reference of a matter to the PCIJ or to a tribunal established by the League of Nations, article 37 of the Statute declares that such matter shall be referred to the ICJ, provided the parties

[157] ICJ Reports, 1988, pp. 69, 76; 84 ILR, pp. 218, 231.

[158] ICJ Reports, 1988, pp. 78–90. The decision to affirm jurisdiction and admissibility was unanimous.

[159] *Ibid.*, pp. 85–8. [160] *Ibid.*, pp. 88–90.

[161] By article 6 of the Pact, article 31 would not apply to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the Pact. See *Nicaragua* v. *Colombia*, ICJ Reports, 2007, paras. 53 ff. and 120, where the Court rejected Colombia's objection to jurisdiction on the basis of article 31.

to the dispute are parties to the Statute. It is basically a bridging provision and provides some measure of continuity between the old Permanent Court and the new International Court.[162] Under article 36(6) of the Statute, the Court has the competence to decide its own jurisdiction in the event of a dispute.[163]

Article 36(2)[164]

This article has been of great importance in extending the jurisdiction of the International Court. Article 36(2), the so-called 'optional clause', stipulates that:

> The states parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> (a) the interpretation of a treaty;
> (b) any question of international law;
> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
> (d) the nature or extent of the reparation to be made for the breach of an international obligation.

This provision was intended to operate as a method of increasing the Court's jurisdiction, by the gradual increase in its acceptance by more and more states. By the end of 1984, forty-seven declarations were in force and

[162] See e.g. the *Ambatielos* case (Preliminary Objections), ICJ Reports, 1952, p. 28; 19 ILR, p. 416 and the *Barcelona Traction* case (Preliminary Objections), ICJ Reports, 1964, p. 6; 46 ILR, p. 18. Cf. the *Aerial Incident* case, ICJ Reports, 1959, p. 127; 27 ILR, p. 557.

[163] See I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction*, The Hague, 1965. This is a characteristic of the judicial function generally: see e.g. the *Effect of Awards* case, ICJ Reports, 1954, pp. 47, 51–2; 21 ILR, pp. 310, 312, and the *Nottebohm* case, ICJ Reports, 1953, pp. 111, 119; 20 ILR, pp. 567, 572. See also the *Tadić* case before the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, IT-94-1-AR72, pp. 7–9.

[164] See e.g. Rosenne, *Law and Practice*, vol. II, chapter 12. See also J. G. Merrills, 'The Optional Clause Today', 50 BYIL, 1979, p. 87, and Merrills, 'The Optional Clause Revisited', 64 BYIL, 1993, p. 197; L. Gross, 'Compulsory Jurisdiction under the Optional Protocol: History and Practice' in Damrosch, *International Court of Justice at a Crossroads*, p. 19; E. Gordon, '"Legal Disputes" Under Article 36(2) of the Statute', *ibid.*, p. 183; M. Vogiatzi, 'The Historical Evolution of the Optional Clause', 2 *Non-State Actors and International Law*, 2002, p. 41, and M. Fitzmaurice, 'The Optional Clause System and the Law of Treaties', 20 Australian YIL, 2000, p. 127.

deposited with the UN Secretary-General, comprising less than one-third of the parties to the ICJ Statute. By 15 May 2008, this number had risen to sixty-five.[165]

The Court discussed the nature of such declarations in the *Cameroon* v. *Nigeria* (*Preliminary Objections*) case and stated that,

> Any state party to the Statute, in adhering to the jurisdiction of the Court in accordance with article 36, paragraph 2, accepts jurisdiction in its relations with states previously having adhered to that clause. At the same time, it makes a standing offer to the other states parties to the Statute which have not yet deposited a declaration of acceptance. The day one of those states accepts that offer by depositing in its turn its declaration of acceptance, the consensual bond is established and no further condition needs to be met.[166]

Declarations pursuant to article 36(2) are in the majority of cases conditional and, as noted, are dependent upon reciprocity for operation. This means that the Court will only have jurisdiction under article 36(2) to the extent that both the declarations of the two parties in dispute cover the same issue or issues. The doctrine of the lowest common denominator thus operates since the acceptance, by means of the optional clause, by one state of the jurisdiction of the Court is in relation to any other state accepting the same obligation. It is not that declarations in identical terms from the parties are necessary, but both declarations must grant jurisdiction to the Court regarding the dispute in question.

In practice, this can lead to the situation where one party may rely on a condition, or reservation, expressed in the declaration of the other party. This occurred in the *Norwegian Loans* case,[167] between France and Norway. The Court noted that:

> since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the declarations coincide in conferring it. A comparison between the two declarations shows that the French declaration accepts the Court's jurisdiction within narrower limits than the Norwegian declaration; consequently, the common will of the parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation.[168]

[165] See www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm.
[166] ICJ Reports, 1998, pp. 275, 291. [167] ICJ Reports, 1957, p. 9; 24 ILR, p. 782.
[168] ICJ Reports, 1957, p. 23; 24 ILR, p. 786. But note Judge Lauterpacht's individual opinion, ICJ Reports, 1957, p. 34; 24 ILR, p. 793. See also the *Right of Passage* case, ICJ Reports,