



Brownlie's Principles of Public International Law (9th edn)

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CHAPTER

32 Third party settlement of international disputes

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Abstract

This chapter discusses the third party settlement of international disputes. It covers arbitration and the origins of international dispute settlement; the idea of judicial settlement of international disputes; the International Court of Justice, interstate arbitration, dispute settlement under UNCLOS, the WTO dispute settlement body, and international investment tribunals.

Keywords: [international law](#), [dispute settlement](#), [judicial settlement](#), [International Court of Justice](#), [WTO](#), [UNCLOS](#), [investment tribunals](#), [arbitration](#)

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1. Peaceful Settlement in General

The judicial settlement of international disputes is only one facet of the enormous problem of the maintenance of international peace and security. Under the UN Charter, the use of force by individual states to solve international disputes is impermissible, and in fact few disputes are finally resolved by such means. However, there is no obligation in general international law actually to settle disputes, and procedures for settlement by formal and legal procedures are consensual in character.

The context of judicial settlement in international relations is thus different to that of municipal courts, and this type of settlement is relatively exceptional in state relations (though less so than it was).¹ This chapter considers the problems of international legal process; that is, judicial process between states or otherwise at the international level and involving states.² Settlement by political means, including through organs of international organizations, is not covered.³ However, the two approaches to settlement are not completely

divorced. Political organs, like the General Assembly and Security Council, may concern themselves with factual disputes and legal issues, although the basis for action remains political.⁴ So also governments conducting negotiations with a view to settling disputes commonly take legal advice, and confidential legal advice may be weighty and reasonably objective.

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2. Development of International Dispute Settlement

(A) Arbitration and the origins of international dispute settlement

In both national and international legal history, the judicial process develops out of less formal administrative and political procedures. International practice has long included negotiation, good offices, and mediation as informal methods of settling disputes.⁵ Treaties establishing mechanisms for peaceful settlement frequently provide for these, as well as for conciliation. Conciliation is distinct from mediation and emerged from the commissions of inquiry provided for in the Hague Conventions for the Pacific Settlement of International Disputes of 1899⁶ and 1907⁷ and the commissions which figured in the series of arbitration treaties concluded by the US in 1913 and 1914 (the Bryan treaties).⁸ Conciliation has a semi-judicial aspect, since the commission has to elucidate the facts, will hear the parties, and make proposals for a settlement, which are normally non-binding.⁹

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Before formal modes of conciliation were established, interstate arbitration had long been practised, having the same political provenance. However, arbitration evolved as a sophisticated procedure similar to judicial settlement. The salience of arbitration increased considerably after the successful *Alabama Claims* arbitration of 1872 between the US and Great Britain.¹⁰ At this stage, arbitral tribunals were often invited by the parties to resort to 'principles of justice and equity' and to propose extra-legal compromises. However, by the end of the nineteenth century, arbitration was primarily if not exclusively associated with a process of decision-making according to law, supported by appropriate procedural standards. The contrasts with judicial settlement (as it developed post-1922) are principally these: the decision-maker in arbitration is called an 'arbitral tribunal' or 'court of arbitration';¹¹ the tribunal consists of an odd number, usually including national representatives with an independent chair (in older usage, an 'umpire');¹² the tribunal is usually created to deal with a particular dispute or class of disputes; and there is more flexibility than in a system of compulsory jurisdiction with a standing court.¹³ Due to this distinction, states came to see arbitration as a suitable mechanism for settling a certain class of dispute; of the cases referred to interstate arbitration, many have concerned territorial or quasi-territorial disputes.¹⁴

(B) The idea of judicial settlement of international disputes

In the modern period, there is no sharp line between arbitration and judicial settlement: the latter category is applicable to any international tribunal settling disputes involving states or other parties in accordance with international law. Moreover, the permanent institutions developed historically from arbitral experience. It is now common to see the development of integrated systems of dispute resolution which include international 'courts' of relatively formal jurisdiction and process, whilst reserving certain *sui generis* questions for arbitral tribunals convened under the procedures of the same system, for example in the procedures of United Nations Convention on the Law of the Sea (UNCLOS)¹⁵ and the World Trade Organization (WTO).¹⁶ But independent systems exist as expressed through the actions of many ad hoc arbitral tribunals,¹⁷ mixed commissions, and semi-permanent specialized tribunals.¹⁸

The international character of the tribunal derives from its organization and jurisdiction. A national court may apply international law,¹⁹ but even if this may be true, it does not act independently of the national system: it is

not settling issues between legal persons on the international plane, and its jurisdiction does not rest on international agreement.

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3. The International Court of Justice

(A) Historical overview: the permanent court of international justice

The 'World Court' is a label often applied to the Permanent Court of International Justice and the International Court of Justice, the latter a new creation in 1945 but substantially a continuation of the earlier body.²⁰ The Permanent Court began to function in 1922 but as a new standing body it developed from previous experience. Arbitral practice contributed to this development in two ways. Its positive influence shows in certain similarities between the Court and arbitral tribunals: the institution of national judges, the use of special jurisdictional agreements, the power to decide *ex aequo et bono*, and the application of some basic principles; for example, that, absent contrary agreement, an international tribunal may determine its own jurisdiction.²¹ The negative influence was more decisive, since criticism of the Permanent Court of Arbitration that it was not a standing court and could not develop a jurisprudence, led to a draft Convention Relative to the Creation of a Permanent Court of Arbitral Justice at the Second Hague Peace Conference in 1907.²² The draft Convention was not adopted because of disagreement on the number of judges, some representatives demanding as many judges as there were states members of the Court.²³

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In 1920, the Council of the League of Nations appointed an advisory committee of jurists to prepare a draft Statute for a Permanent Court of International Justice.²⁴ The draft Statute sprang from three sources: the draft Convention of 1907, a proposal of neutral states for compulsory jurisdiction, and the Root–Phillimore plan for the election of judges. The draft Statute provided for compulsory jurisdiction, but in the Council and the Assembly of the League the great powers and their supporters resisted this successfully. In the Assembly, however, a weak compromise was agreed in the form of the 'optional clause'. The Statute came into force in 1921.²⁵ It contained no amendment clause and all changes required unanimous approval, a slow procedure. After the Second World War, the Permanent Court could have been revived, but the San Francisco Conference decided to create a new court, two important considerations being the dislike of bodies related to the League of Nations expressed by the US and USSR, and the problem of amending the Statute if the old Court were to be related to the UN.²⁶

The new Court has a much closer relationship with the UN. The UN Charter provides (Art 92) that the International Court is 'the principal judicial organ of the United Nations'; all UN members are *ipso facto* parties to its Statute (Art 93). In other respects, the new Court is a continuation of the old: the Statute is virtually the same; jurisdiction under instruments referring to the old Court has been transferred to the new (Arts 36(5), 37); and there is continuity of jurisprudence.

(B) Organization of the court

A crucial issue for the creation of a standing international tribunal in which states may have confidence is judicial appointment.²⁷ The Statute emphasizes the independence of judges once appointed. No judge may exercise any political or administrative function, engage in any other professional occupation (Art 16(1)), act as agent or counsel in any case, or participate in the decision of a case with which he or she has previously been connected in another capacity (Art 17; see also Art 24). Dismissal of a judge requires the unanimous opinion of the other judges (Art 18(1)). When engaged on Court business, members have diplomatic privileges and immunities (Art 19). Salaries are fixed by the General Assembly, may not be decreased during the term of office, and are free of all taxation (Art 32).

The Court has 15 judges, five elected every three years for a nine-year term (with the possibility of re-election). Article 2 of the Statute provides that ‘the Court shall be composed of a body of independent judges, 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 recognized competence in international law’. This formula takes in professors, legal practitioners, national or international judges, and civil service appointees. Many judges have previously been advisers to national foreign ministries.²⁸ In other provisions of the Statute, the question of nationality acquires significance. No two members may be nationals of the same state (Art 3(1)), and Article 9 requires electors to bear in mind ‘that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured’.²⁹ The principle stated is unimpeachable but its practical application is difficult; the system of election ensures the composition of the Court reflects voting strength and political alliances in the Security Council and General Assembly. The Permanent Members of the Security Council have historically had judges of their own nationality on the Court.³⁰ But judges are elected as individuals and do not represent their states of origin.

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The electoral system involves independent, simultaneous voting by the Security Council and the General Assembly. Candidates must obtain an absolute majority simultaneously in both organs.³¹ In practice, political calculations feature prominently, and the attitude of judges in particular cases has occasionally affected the voting when they are considered for re-election. But it is difficult to see a way out: the Court’s existence is apparently conditioned on a political basis for elections.

Article 31 of the Statute provides that a party to a case has an effective right to representation by a national judge and, if there is no judge of its nationality, by a judge ad hoc, who may be of some other nationality. The judge ad hoc is appointed by the party concerned and commonly, though not invariably, supports its view of the case (or some variant of it).³²

(C) Jurisdiction in contentious cases

The Court has jurisdiction in contentious cases³³ only between states and only on the basis of consent.³⁴ The Court has often referred to the fact that its jurisdiction depends on the will of the parties.³⁵ This principle, reflected in Article 36 of the Statute, rests on international practice in dispute settlement and is a corollary of the sovereign equality of states, in the absence of any contrary provision.

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The competence to decide the merits of a claim may be challenged in various ways. Objections to jurisdiction strike at the power and authority to give rulings as to the admissibility of the claim or the merits. An objection to the admissibility of a claim, for example for non-exhaustion of local remedies, challenges the validity of a claim in a manner which is distinct from issues as to jurisdiction or merits.³⁶ In practice, the Court may join certain preliminary objections to the merits provided that ‘the objection does not possess, in the circumstances of the case, an exclusively preliminary character’ (Rules Art 79(9)).³⁷ It may also decline jurisdiction on grounds of judicial propriety.³⁸

States not parties to the Statute are not barred from the Court.³⁹ Article 35(2) provides that:

The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

In the *Legality of Use of Force* cases, the reference to ‘special provisions contained in treaties in force’ was interpreted to refer only to those treaties in force at the time the Statute was concluded.⁴⁰ Unlike the situation in 1921, there were in 1945 no such treaties.⁴¹

Thus, access to the Court by non-members is controlled under Article 35(2) by the Security Council. Security Council Resolution 9 provides that the Court is open to a state which deposits with the Registrar of the Court a declaration accepting the jurisdiction of the Court, undertakes to comply in good faith with any decision it may render, and accepts all the obligations of a UN Member under Charter Article 94.⁴² That said, neither Article 35(2) nor Security Council Resolution 9 exclude the possibility that the Security Council may authorize a state to appear ad hoc before the Court without lodging the required declaration.⁴³

p. 699 Parties to the Statute do not thereby submit to the jurisdiction of the Court: further consent is required. But they are bound to accept the jurisdiction of the Court to determine its own jurisdiction (Art 36(6)).⁴⁴ Further, they are subject to the Court's jurisdiction to indicate interim measures of protection (or 'provisional measures') to preserve the respective rights of the parties (Art 41).⁴⁵ Unless it is apparent that there is no consent to the jurisdiction, the Court will assume the power to indicate such measures, without prejudice to the question of its jurisdiction to deal with the merits of the case.⁴⁶ In *LaGrand*, the Court established that such interim measures are binding.⁴⁷ Lastly, under Article 62 the Court may permit third party intervention in cases in which the state seeking to intervene has a legal interest which may be affected by the decision in the case. Under Article 63, a state which is a party to a treaty under interpretation in a case may intervene in that case (and, though not a party to the case, is bound by the interpretation given).⁴⁸ There is no provision for intervention by private parties.

(i) Matters specially provided for in the Charter

p. 700 Article 36(1) of the Statute includes within the jurisdiction 'all matters specially provided for in the Charter of the United Nations'. This was inserted in the (ultimately frustrated) expectation that the Charter would provide for compulsory jurisdiction. In *Corfu Channel*, the UK argued that Article 36(1) of the Statute could refer to Article 36(1) and (3) of the Charter, which provide for reference of legal disputes to the Court on the recommendation of the Security Council, and that a recommendation involved a decision which was binding in accordance with Article 25 of the Charter. The Court did not consider the point, but in a joint separate opinion seven judges rejected the argument, inter alia on the ground that the term 'recommendation' was non-compulsory.⁴⁹

(ii) Transferred jurisdiction: Articles 36(5), 37

The Statute of the Permanent Court provided for jurisdiction on the basis of compromissory clauses in treaties or conventions. With respect to these, Article 37 of the ICJ Statute provides:

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Two limitations are prominent: the treaty or convention must be 'in force' between the litigating states, and all parties to the dispute must be parties to the Statute. In *Nicaragua*, the Court held that the Nicaraguan Declaration of 1929 constituted a valid acceptance of jurisdiction by virtue of Nicaragua's ratification of the Charter in 1945, despite the fact that the Declaration of 1929 had not previously acquired binding force.⁵⁰

(iii) Consent ad hoc: jurisdiction by special agreement

The consent of the parties may be given ad hoc to the Court's jurisdiction over a specific dispute. Normally, consent will take the form of a special agreement (*compromis*). But consent ad hoc may also arise where the plaintiff state has accepted the jurisdiction by a unilateral application followed by a separate act of consent by the other party.⁵¹ Voluntary jurisdiction is thus not restricted by formal requirements: Article 36(1) says simply that 'the jurisdiction of the Court comprises all cases which the parties refer to it'. Special agreement has been regularly used as a method of consenting to the Court's jurisdiction.

(iv) Advance consent: treaties and conventions

Article 36(1) refers also to 'all matters specially provided for ... in treaties and conventions in force'.⁵² A great many multilateral and bilateral treaties contain clauses granting jurisdiction in advance over disputes involving their interpretation or application.⁵³ Although the jurisdiction is likewise by consent of the parties, it can be described as 'compulsory' in the sense that binding agreement is given before any dispute has arisen. However, the label 'compulsory jurisdiction' is often used to describe jurisdiction arising under Article 36(2) of the Statute, the Optional Clause.

p. 701 (v) Advance consent: declarations under the optional clause

Article 36(2) of the Statute, commonly referred to as the optional clause, provides as follows:⁵⁴

The States parties to the present Statute may at any time declare that they recognize 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.

Jurisdiction is accepted via unilateral declarations deposited with the Secretary-General, the declarant being bound to accept jurisdiction vis-à-vis any other declarant to the extent the acceptances coincide. On the basis of reciprocity, the lowest common factor in the two declarations is the basis for jurisdiction, and thus a respondent state can take advantage of a reservation or condition in the declaration of the applicant state.⁵⁵ The independent declarations are binding in that withdrawal is possible only in accordance with principles analogous to the law of treaties,⁵⁶ and they operate contractually with a suspensive condition, viz, the filing of an application by a state with a coincident declaration.⁵⁷ This involves acceptance of jurisdiction in advance for categories of disputes which are usually at that time mere contingencies. The commitment in relation to any other state fulfilling the conditions of the Statute is usually described as compulsory jurisdiction, although, as with jurisdiction by treaty or convention, the basis is ultimately consensual.

p. 702 The origin of the optional clause lay in a compromise, achieved in 1920 and maintained in 1945, between a system of true compulsory jurisdiction based on unilateral applications by claimants, and independent, treaty-based jurisdiction. The expectation was that a general system of compulsory jurisdiction would be generated as declarations multiplied. The conception was sound enough, but the conditions in which the system has functioned have reduced its effectiveness. In 1934, there were 42 declarations in force, reducing to 32 by 1955 but increasing since then to 72 as of July 2018. This figure represents only one-third of all states (193

are parties to the Statute).⁵⁸ This is principally due to the lack of governmental confidence in international adjudication, the practice of making declarations subject to reservations and conditions, frequently arbitrary and ambiguous, and perceived tactical advantages of staying out of the system.

(vi) Consent *post hoc*: *forum prorogatum*

Lauterpacht wrote that ‘exercise of jurisdiction by virtue of the principle of *forum prorogatum* takes place whenever, after the initiation of proceedings by joint or unilateral application, jurisdiction is exercised with regard either to the entire dispute or to some aspects of it as the result of an agreement, express or implied’.⁵⁹ The Statute and Rules contain no mandatory rules as to the formal basis on which the applicant founds jurisdiction, nor as to the form of consent. Consent may take the form of an agreement on the basis of successive acts of the parties, and the institution of proceedings by unilateral application is not confined to cases of compulsory jurisdiction.⁶⁰ Thus, in *Corfu Channel*,⁶¹ Albania accepted jurisdiction in a communication to the Court. Informal agreement, agreement inferred from conduct, or formal agreement, in each case *after* the initiation of proceedings, may result in prorogated jurisdiction. More recent examples include two cases where France informed the Court that it consented to jurisdiction.⁶² However, the Court will not accept jurisdiction unless there is real, not merely apparent, consent.⁶³ Resort to technical constructions in order to promote jurisdiction in particular cases may discourage appearances before the Court.

(vii) Jurisdiction to decide *ex aequo et bono*

Article 38(2) of the Statute gives the Court power to decide a case *ex aequo et bono* if the parties agree.⁶⁴ This provision qualifies Article 38(1), which refers to the function of the Court as being to decide ‘in accordance with international law’ such disputes as ↵ are submitted to it. The power to decide *ex aequo et bono* has not yet been exercised, and cannot readily be reconciled with the judicial character of the Court.

(D) Jurisdictional exceptions and reservations

(i) Matters of domestic jurisdiction

A plea that the issue concerned is a matter of domestic jurisdiction may appear as a preliminary objection or as a plea on the merits: strictly speaking, the plea is available, apart from any reservation on the subject, in accordance with general principles of international law.

One form of this reservation has created particular controversy. In 1946, the US deposited a declaration with a reservation of ‘disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America’. Seven other states have adopted this ‘automatic’ reservation,⁶⁵ which seems incompatible with the Statute, contradicting the Court’s power to determine its own jurisdiction and not genuinely accepting jurisdiction *ante hoc*.⁶⁶

(ii) Time limits and reservations *ratione temporis*

Declarations may be for a term of years. Some are expressed to be terminable after a period of notice; some with immediate effect. While such a power of termination weakens the system of compulsory jurisdiction, it is not incompatible with the Statute.⁶⁷ The Court has held that, absent express provision, reasonable notice of termination must be given.⁶⁸ Once the Court is seized of a case on the basis of declarations in force at the date of application, however, subsequent expiry of a declaration or other basis of jurisdiction does not affect its jurisdiction in that case.⁶⁹

(iii) Reservation of past disputes

Reservation of past disputes is common, and the reservation may be extended, as in the ‘Belgian formula’, which refers to all disputes arising after a certain date ‘with regard to situations or facts subsequent to the said date’. Disputes often have a long history, and this formula is potentially sweeping. The Court has taken the view that ↪ the limitation takes in only situations or facts that are the source, the real cause, of the dispute.⁷⁰

(E) The advisory jurisdiction

Article 65(1) of the Statute provides that the Court ‘may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter ... to make such a request’.⁷¹ Charter Article 96 empowers the General Assembly and Security Council to request an opinion, and provides that the General Assembly may authorize other organs and specialized agencies to do so.⁷² The advisory jurisdiction allows for authoritative guidance to be given on legal questions arising from the function of organs and specialized agencies. Thus, some requests for opinions relate to specific disputes or situations, for example the various opinions relating to South West Africa (Namibia). Some relate to interstate disputes referred to the Court without the consent of all parties;⁷³ such requests utilize political organs as an indirect means of seizing the Court. Others, as in the *Reservations* case,⁷⁴ have involved general and abstract questions. The origin of many requests in actual disputes has given a contentious aspect to advisory proceedings, and Article 68 of the Statute provides that the provisions applicable in contentious cases shall guide the Court ‘to the extent to which it recognizes them to be applicable’.⁷⁵ In *Status of Eastern Carelia*,⁷⁶ the Council of the League of Nations sought an opinion on a dispute between Finland and the USSR. The USSR objected and the Court refused jurisdiction on the ground that the requesting organ was not competent to seek an opinion in the circumstances: no state can be compelled to submit disputes to a tribunal without its consent, and the USSR was not bound by the Covenant. In the *Namibia*,⁷⁷ *Western Sahara*,⁷⁸ and *Wall*⁷⁹ ↪ opinions, *Eastern Carelia* was distinguished on the basis that the situations involved did not constitute an interstate dispute, and the political organ making the request was concerned in the exercise of *its own* functions under the Charter, and not the settlement of a particular dispute.⁸⁰

There is no separate proceeding to deal with preliminary objections to advisory opinions, as there is in contentious proceedings, but objections arise frequently and relate both to jurisdiction as such and to questions of propriety. Objections might involve the incapacity of the requesting body⁸¹ or concern the subject matter of the request, as where a plea of domestic jurisdiction is made.⁸² The Court refused a request by the World Health Organization (WHO) for an opinion on the legality of nuclear weapons on the basis that the question was not ‘within the scope of the activities’ of the WHO,⁸³ and only provided an opinion addressing effectively the same issue when asked by the General Assembly.⁸⁴

In practice, objections have often challenged the Court’s capacity to deal with political questions. Article 65 of the Statute refers to ‘any legal question’, and the Court has taken the view that, however controversial and far-reaching in their implications, issues of treaty interpretation, arising in the context of the Charter, are legal questions.⁸⁵ As was said in the *Kosovo* opinion:

[T]he Court has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question ... Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have ...⁸⁶

The Court has jurisdiction notwithstanding that a request has political implications or motives: the issue is one of propriety. In the *Admissions*⁸⁷ and *Expenses*⁸⁸ opinions, the Court dealt with requests which had far-reaching political ramifications in the context of the Cold War. Significantly, the organs concerned were unable to act on these two opinions. In refusing to decline requests by virtue of its discretion over advisory jurisdiction, the Court has reiterated that a request for an advisory opinion should not, in principle, be refused.⁸⁹ In *Eastern Carelia*, the Permanent Court declined to answer a question which directly concerned a dispute between two states on the ground that jurisdiction could not be exercised without their consent, but the case concerned a non-party to the Covenant, and the decision has not been followed by the present Court.⁹⁰

(F) An evaluation of the court

In the period 1922–46, the Permanent Court dealt with 33 contentious cases and 28 advisory opinions.⁹¹ From 1946 to 31 July 2018, the International Court has dealt with some 69 judgments on the merits, 31 preliminary objections, eight judgments on jurisdiction and admissibility, and 37 requests for provisional measures, as well as 26 requests for advisory opinions. As of August 2018, there were 17 contentious cases and one request for an advisory opinion pending. The caseload of the Court has fluctuated since 1945. Several factors explain state reluctance to resort to the Court: the political fact that hauling another state before the Court is often regarded as unfriendly; the greater suitability of other tribunals and other methods of review for regional and technical matters; the general conditions of international relations; and a preference for the flexibility of arbitration versus judicial process. Given the conditions of its existence, the Court has made a reasonable contribution to the maintenance of civilized methods of settling disputes, but it has not been prominent in the business of keeping the peace; indeed, the provisions of the Charter on international peace and security do not emphasize the role of the Court. In certain respects, however, the Court has been influential—in the development of international law as a whole and in the giving of advisory opinions on the interpretation of the Charter⁹² and other aspects of the law of international organizations. Its decisions on land and maritime boundary disputes have found broad acceptance.

The work of the Court in the last quarter of a century has been characterized by a variety of elements. In the first place, the number of contentious cases before the Court has significantly increased, despite a number of disputes being referred to ad hoc arbitral tribunals. Many of the new cases have been based on special agreements. In recent years, the Court has had a full calendar of cases, a pattern which seems likely to continue.

4. Other International Courts and Tribunals

(A) Interstate arbitration

(i) The Permanent Court of Arbitration

The precursor of ‘modern’ international tribunals is an institution, the Permanent Court of Arbitration (PCA), which is not a court and does not, itself, arbitrate.⁹³ It was established under the Hague Convention for the Pacific Settlement of International Disputes of 1899⁹⁴ as an arbitration secretariat and mechanism. Until 1920, the PCA was the major organization for housing arbitrations, but it was then largely replaced by the PCIJ. The basis of the PCA is a panel to which parties may nominate four persons. When parties to the Convention agree to submit a dispute to the PCA, each appoints two arbitrators from the panel, and the four arbitrators select an umpire. Thus, a tribunal is constituted only to hear a particular case.

Between 1900 and 1932, 20 cases were heard, but there followed almost seven decades of hibernation. In the 1990s, however, the PCA reinvented itself, adopting a series of new arbitral rules and hosting a significant

number of arbitrations, interstate and other.⁹⁵ It has shown flexibility as to parties, for example hosting arbitrations between a state and a liberation movement.⁹⁶

(ii) International claims and compensation bodies

p. 708 Periodically, ad hoc dispute-resolution bodies⁹⁷ have been created to assess claims and compensation between states.⁹⁸ Such bodies first became common with the ‘mixed commissions’ of the late eighteenth and early nineteenth centuries. Although typically composed of four commissioners, it became practice to have such disputes adjudicated by an umpire from a neutral state. The first such body was established between the US and UK under the Jay Treaty of 1794 to resolve certain boundary disputes.⁹⁹

Unlike those tribunals convened to address a specific question,¹⁰⁰ claim and compensation bodies are usually convened to address a general situation and claims arising therefrom. An example is the Iran–United States Claims Tribunal,¹⁰¹ created following the Iranian Revolution of 1979. The majority of cases concerned nationalization of US-owned assets in Iran during the Revolution. Over the life of the Tribunal, some 3,900 claims were filed. All but a few interstate cases have been concluded.

A different form of compensation commission is the United Nations Compensation Commission (UNCC).¹⁰² It was created as a subsidiary organ of the Security Council¹⁰³ to deal with claims arising out of Iraq’s invasion and occupation of Kuwait in 1990–1. The claims were resolved by panels made up of three independent Security Council-appointed commissioners who were experts in different fields including law, accountancy, loss adjustment, insurance, and engineering. The UNCC was a fact-finding body charged with verifying a claim and assessing compensation. All 2.7 million claims submitted were determined: the total compensation awarded was \$52.4 billion to approximately 1.5 million successful claimants.

(B) Dispute settlement under UNCLOS

p. 709 Article 287(1) of UNCLOS provides that a state party may choose from four options to determine disputes concerning the interpretation or application of UNCLOS:¹⁰⁴ these are: (1) the International Tribunal for the Law of the Sea (ITLOS), (2) the ICJ, (3) an Annex VII arbitral tribunal, or (4) an Annex VIII special arbitral tribunal with respect to disputes falling within its ambit. A party which has made no declaration is deemed to have accepted Annex VII arbitration, which is also the default mechanism in the absence of a common choice.¹⁰⁵ The ICJ’s optional clause jurisdiction, however, prevails over the other options.¹⁰⁶

(i) The International Tribunal for the Law of the Sea

ITLOS¹⁰⁷ dealt with its first case in 1997,¹⁰⁸ and since then has heard some 25 cases. It consists of 21 judges elected by the states parties to UNCLOS from among persons ‘enjoying the highest reputation of fairness and integrity and with recognized competence in the field of the law of the sea’.¹⁰⁹ ITLOS judges are elected for a term of nine years, with one-third retiring every three years.¹¹⁰ Except for the President, they are currently part-time.

(ii) UNCLOS Annex VII arbitration

UNCLOS Annex VII provides for the creation of ad hoc arbitral tribunals to hear interstate disputes, and also for disputes involving international organizations.¹¹¹ Annex VII arbitration may be preferable to ITLOS for the usual reasons that arbitration is preferred to litigation; efficiency, flexibility, confidentiality, and greater influence over the composition of the tribunal.¹¹² Under Article 5, absent agreement by the parties, a tribunal may develop its own procedure.

(iii) Extent of subject matter jurisdiction

UNCLOS Article 288(1) gives the tribunal jurisdiction (pending referral) over disputes concerning the application or interpretation of UNCLOS. Additionally, Article 288(2) provides for jurisdiction over disputes concerning the interpretation or application of an international agreement related to the purposes of UNCLOS. A number of such agreements have been concluded, notably the Straddling Stocks Agreement.¹¹³ Article 30(2) applies even where the parties to the dispute are not parties to UNCLOS, extending the jurisdiction of Part XV tribunals on a *sui generis* basis,¹¹⁴ including to the US, which is a party to the Straddling Stocks Agreement and many regional fisheries agreements.

ITLOS also has compulsory residual jurisdiction under Article 292 over matters involving the prompt release of detained vessels and crews. It possesses similar jurisdiction with respect to provisional measures under Article 290(5). Most of the cases so far brought before ITLOS have involved prompt release or provisional measures. ITLOS may also give an advisory opinion on a legal question if so provided by 'an international agreement related to the purposes' of UNCLOS.¹¹⁵

(iv) The Seabed Disputes Chamber

The Seabed Disputes Chamber is a specialized division of ITLOS, established by UNCLOS Part XI, Section 5 and ITLOS Statute Article 14. It comprises 11 of the sitting judges of ITLOS,¹¹⁶ and has exclusive jurisdiction over disputes arising out of the exploration and exploitation of the Area,¹¹⁷ including disputes between states parties and the Seabed Authority. It also has advisory jurisdiction at the request of the Seabed Authority Assembly or Council with respect to legal questions arising from the scope of their activities.¹¹⁸

(C) The WTO dispute settlement body

(i) The origins of WTO dispute settlement: the GATT

In the 1994 Agreement Establishing the World Trade Organization,¹¹⁹ significant changes were made in the dispute-settlement procedure for world trade disputes,¹²⁰ with the inclusion of the Dispute Settlement Understanding (DSU).¹²¹ The DSU replaced and largely reinforced the system of the General Agreement on Tariffs and Trade (GATT).¹²²

Notwithstanding its trade-diplomatic origins, the GATT system developed to provide structured adjudication. Disputes were referred to 'panels'; ad hoc groupings of experts to make recommendations to the GATT Council. The GATT system was relatively successful, with the results of an adverse panel report accepted by the losing party in over 90 per cent of cases, but it was procedurally defective. GATT Article XXIII required consensus between the contracting parties for panels to be established and their recommendations adopted. A recalcitrant party could avoid the adverse consequences arising from a panel report by simply withholding consent, a practice which appeared to increase during the 1980s. The emerging impasse led the contracting parties to develop the so-called Montreal Rules,¹²³ the eventual basis for the DSU.

(ii) Dispute settlement under the DSU

The Dispute Settlement Body (DSB)¹²⁴ has as its purpose the prompt settlement of disputes between WTO Members¹²⁵ arising out of their obligations under the WTO covered agreements. DSU Article 3.2 states that:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the

rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with the customary rules of public international law.¹²⁶

The DSB's jurisdiction is compulsory and exclusive with respect to the covered agreements.¹²⁷ Consisting of all WTO Members, it oversees the adjudication of trade disputes and the implementation of any recommendations. It operates via reverse consensus, with the blocking of a recommendation only possible if every member of the DSB objects.¹²⁸

A panel is responsible for initially hearing a dispute and assessing the conformity of a Member's challenged measure or policy with the covered agreements.¹²⁹ Panels are ordinarily composed of three experts (not necessarily lawyers) selected ad hoc by the DSB.¹³⁰

A party dissatisfied with a panel decision may resort to the Appellate Body. This comprises seven members appointed for a four-year term, renewable once.¹³¹ Any three will convoke to hear an appeal, which must be determined within 90 days.¹³² It has the power to uphold, modify, or reverse any of the legal conclusions reached by the panel, though not determinations of fact.¹³³ Some 80 per cent of panel decisions are modified or reversed on appeal, a much higher rate than other international appeal or review structures. So far almost 70 per cent of panel reports have been appealed.¹³⁴

(iii) Remedies and implementation

The sole final remedy is withdrawal of the violating measure.¹³⁵ Where a party fails to comply with a recommendation within a reasonable time, the complaining Member may seek compensation (e.g. additional market access privileges),¹³⁶ or take countermeasures, consisting of increased tariffs on products of export interest to the implementing party,¹³⁷ ordinarily in the same sector, but exceptionally in different trade sectors ('cross-retaliation').¹³⁸ When considering retaliation, the complaining party must apply to the DSB within 30 days of the expiry of the reasonable period. If the implementing party seeks to challenge the retaliation, an arbitral tribunal will be convened to hear the dispute.

(iv) International law and the DSB

The extent to which the DSB interacts with other elements of international law is uncertain. The covered agreements are not the only source of applicable law for panels; they may also draw on other DSB reports (especially those of the Appellate Body),¹³⁹ acts of the WTO bodies, agreements within the WTO context, customary international law,¹⁴⁰ general principles of international law,¹⁴¹ other international agreements, the subsequent practice of WTO Members, and the negotiating history of the GATT and WTO.¹⁴² As noted by the Appellate Body in *US—Gasoline*, the covered agreements cannot be interpreted 'in clinical isolation' from public international law.¹⁴³ Similarly, the panel in *Korea—Procurement* noted that '[c]ustomary international law applies generally to the economic relations between the WTO Members ... [s]uch international law applies to the extent that the WTO treaty agreements do not "contract out" from it.'¹⁴⁴

p. 713 (v) The DSB and Regional Trading Agreements

The WTO shares its regulatory space with the organizations created through Regional Trade Agreements (RTAs).¹⁴⁵ These agreements create regional trading associations with internalized privileges between Members and in many cases their own rules-based dispute-resolution bodies. Prominent bodies include the European Union, MERCOSUR, ASEAN, CARICOM, and the Andean Community of Nations. All WTO Members are presently a party to at least one RTA.

(D) International investment tribunals

(i) International investment arbitration

International investment arbitration is conducted between a foreign investor and the ‘host’ state in which its investment is located, usually pursuant to a dispute-resolution clause in a bilateral¹⁴⁶ or multilateral¹⁴⁷ investment treaty concluded between the host state and the ‘home’ state of the investor.¹⁴⁸ It has been described as ‘arbitration without privity’,¹⁴⁹ because there is no prior contractual arbitration agreement. Consent to arbitration is given by the host state in the treaty, by the claimant through the very act of commencing the arbitration. In this, the claimant acts autonomously: investment arbitration does not require the intervention of the home state by way of diplomatic protection, nor (unlike diplomatic protection) does it tend to require exhaustion of local remedies. It is thus a privileged form of access to international arbitration.¹⁵⁰

An additional element is provided by the International Convention for the Settlement of Investment Disputes (ICSID), established under the Washington Convention of 1965.¹⁵¹ Most investment treaties give the investor the option of arbitration through ICSID or an ad hoc tribunal, commonly under the UNCITRAL arbitration rules.¹⁵² Despite the conclusion of the ICSID Convention, arbitration pursuant to investment treaties is a recent phenomenon: only in 1990 was the first arbitration award based on a bilateral investment treaty (BIT) handed down.¹⁵³

(ii) Structure and features of investment treaties

Aside from the dispute-resolution clause, investment treaties offer substantive protections to investors, which are discussed in chapter 28.¹⁵⁴ Ordinarily, only a breach of these standards will provide a basis of claim; the breach of an investment agreement as such will not. The situation may be different where the investment treaty includes a so-called ‘umbrella clause’, which guarantees the observation of obligations assumed by the host state with respect to the investor.¹⁵⁵ Whether this equates the breach of an investment agreement to a breach of an investment standard—and the scope of the obligation if it does—are controversial.¹⁵⁶

(iii) Jurisdiction of tribunals

Investment treaties ordinarily include several jurisdictional gateways through which the investor must pass in order to bring the dispute before any tribunal. Additional requirements may be imposed if the arbitration is under the ICSID Convention.¹⁵⁷ To provide jurisdiction, the claim must concern (1) an investment within the meaning of the investment treaty and the ICSID Convention (if applicable), (2) made by an investor or national within the meaning of the investment treaty, and (3) within the temporal and other limits set down by the treaty.¹⁵⁸

(iv) Challenge and annulment

As a general principle, the awards of investment arbitration tribunals are not subject to appeal. Only under limited circumstances is the review of an award possible.¹⁵⁹ If the claimant opts for ad hoc arbitration, the award will be subject to the rules for enforcement and challenge provided in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹⁶⁰ in the same way as any private international arbitration. This will ordinarily be done through the courts of the country where the tribunal had its seat, or in the courts of any country in which enforcement is sought. Article V of the New York Convention lists several narrow grounds on which the recognition and enforcement of an arbitral award may be challenged.¹⁶¹

By contrast, an ICSID award is not subject to review by national courts; the Convention provides its own self-contained system for review of final awards by way of annulment.¹⁶² Annulment is distinct from appeal, and is

concerned only with the process by which the award was rendered, not its substantive correctness. This much is seen by the grounds for annulment provided in Article 52(1) of the ICSID Convention:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

In the event of annulment, the ad hoc Committee cannot replace the original decision of the tribunal with its own; it can only invalidate it, with the claim then able to be referred to a new tribunal for rehearing.

More recently, the EU has favoured the creation of a multilateral investment court, including provision for appeal. The Comprehensive Economic and Trade Agreement with Canada (CETA), signed in October 2016, is the first to envisage such a body.¹⁶³ How it would fit within the existing systems for arbitral review is one of many open questions.¹⁶⁴

(v) Remedies and enforcement

The standard remedy for breach of an investment standard in an investment treaty is financial compensation for the loss suffered. Under both the New York¹⁶⁵ and ICSID¹⁶⁶ Conventions, a valid arbitral award must be recognized and enforced within any state party, subject to the grounds for challenge outlined earlier.

5. Conclusion

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During the 1980s and 1990s, reluctance to resort to international adjudication appeared to decline while the production of international rules increased.¹⁶⁷ The result was the growth of specialized, often compulsory, dispute-resolution systems and more frequent recourse to adjudication.¹⁶⁸

But these developments were not univocal and there are counter-trends. The earlier practice of non-appearance has recurred: in *Arctic Sunrise* and *South China Sea*, Russia and China respectively refused to appear before Annex VII tribunals; Russia also failed to participate in related proceedings before ITLOS.¹⁶⁹ Although non-appearance does not formally stay the proceedings or affect the bindingness of the decisions, including with regard to jurisdiction, nevertheless it creates difficulties for the tribunal and implies eventual non-compliance and disrespect for the treaty commitment of peaceful settlement.¹⁷⁰

Non-appearance is not the only symptom of a backlash against international adjudication. In response to unfavourable rulings or potential claims, some states have denounced the instruments in which they consented to third party dispute settlement, notably treaties on investment¹⁷¹ and human rights protection.¹⁷² The permissibility and temporal effects of such withdrawal may be limited.¹⁷³ States have also sought to dismantle or diminish the capacity of courts, as certain responses to decisions of sub-regional African integration communities' courts demonstrate.¹⁷⁴ Allegations of partiality have also resulted in attempted withdrawal of consent and non-appearance by the allegedly prejudiced state.¹⁷⁵

The prospects for international adjudication are thus currently clouded. But the value of impartial context-sensitive adjudication of international disputes remains.

Notes

- 1 For an overview: Kingsbury in Crawford & Koskeniemi (eds), *Cambridge Companion to International Law* (2012) 203. Also: Pellet, 'Judicial Settlement of International Disputes' (2013) *MPEPIL*; O'Connell & VanderZee in Romano, Alter, & Shany (eds), *The Oxford Handbook of International Adjudication* (2013) 40; Alter, *ibid*, 63.
- 2 The qualification is necessary because some international courts and tribunals now have jurisdiction in 'mixed' cases, i.e. cases involving states and non-states including individuals and corporations. The PCIJ, created at a time when only states were considered international persons, was not one of these, nor is the ICJ which was modelled on it: ICJ Statute, Art 34. Not even the EU has standing before the ICJ, despite its exercising state functions within the ICJ's area of subject matter competence. For international human rights courts and committees: chapter 29.
- 3 UN Charter, Chs VI–VII; Goodrich, Hambro, & Simons, *Charter of the United Nations* (3rd edn, 1969); Simma et al (eds), 1–2 *The Charter of the United Nations* (3rd edn, 2012) 1069–428; Conforti & Focarelli, *The Law and Practice of the United Nations* (5th edn, 2016).
- 4 Higgins, *Development* (1963) 1–11; Peck, *The United Nations as a Dispute Settlement System* (1996); Merrills, *International Dispute Settlement* (6th edn, 2017) ch 10.
- 5 Pellet, 'Peaceful Settlement of International Disputes' (2013) *MPEPIL*; Merrills (6th edn, 2017) chs 1–6. On commission of inquiry: Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry* (1974) 85; Jachec-Neale, 'Fact-Finding' (2011) *MPEPIL*. Also: Lapidoth, 'Good Offices' (2006) *MPEPIL*; Brower II, 'Arbitration' (2007) *MPEPIL*; Vicuña, 'Mediation' (2010) *MPEPIL*; Hakapää, 'Negotiation' (2013) *MPEPIL*, Section C. For hybrid forms: *Re Letelier and Moffitt* (1992) 88 ILR 727; *Rainbow Warrior* (1986) 74 ILR 241; *Beagle Channel* (1977) 52 ILR 93.
- 6 29 July 1899, 187 CTS 410.
- 7 18 October 1907, 205 CTS 233.
- 8 E.g. France–United States, Treaty for the Advancement of Peace, 15 September 1914, 10 *AJIL Supp* 278. Further: Finch (1916) 10 *AJIL* 882; Scott, *Treaties for the Advancement of Peace between the United States and Other Powers* (1920); Schlochauer, 'Bryan Treaties (1913–14)' (2007) *MPEPIL*.
- 9 For the first compulsory conciliation under UNCLOS, Part XV, see *Timor-Leste v Australia*, PCA, Decision on Australia's Objections to Competence, 19 September 2016. The process was successful: see the Treaty between Australia and the Democratic Republic of Timor-Leste establishing their Maritime Boundaries in the Timor Sea, 6 March 2018.
- 10 Moore, 1 *Digest* 653. Further: Cook, *The 'Alabama' Claims* (1975); Bingham (2005) 54 *ICLQ* 1.
- 11 There is no fixed terminology; judicial functions are carried out by agencies labelled 'mixed claims commissions', or even 'conciliation commissions' (as in the case of the Conciliation Commissions set up to hear claims arising under Art 83 of the Treaty of Peace with Italy, 15 September 1947, 42 UNTS 3).
- 12 Interstate tribunals normally consist of five members, including two party-appointed and three chosen by an 'appointing authority'. See e.g. UNCLOS, Annex VII, Art 3.
- 13 Collier & Lowe, *The Settlement of Disputes in International Law* (1999) 31–5; Merrills (6th edn, 2017) ch 5.
- 14 E.g. *Argentina–Chile Frontier (La Palena)* (1966) 38 ILR 10; *Rann of Kutch* (1968) 50 ILR 2; *Beagle Channel* (1977) 52 ILR 93; *Delimitation of the Continental Shelf (UK v France)* (1977) 54 ILR 6; *Delimitation of the Continental Shelf (UK v France)* (1978) 54 ILR 139; *Guinea–Guinea-Bissau* (1985) 77 ILR 635; *Taba* (1988) 80 ILR 224; *St Pierre and Miquelon* (1992) 95 ILR 645; *Red Sea Islands (Eritrea v Yemen)* (1998) 114 ILR 1; *Barbados v Trinidad and Tobago* (2006) 139 ILR 449; *Guyana v Suriname* (2007) 139 ILR 566; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)* (2014) 167 ILR 1; *South China Sea (Philippines v China)* (2016) 170 ILR 1.
- 15 10 December 1982, 1833 UNTS 3.
- 16 15 April 1994, 1867 UNTS 410.
- 17 For modern arbitrations not involving boundary delimitation, see e.g. *Lake Lanoux* (1957) 24 ILR 101; *Air Service Agreement of 27 March 1946* (1978) 54 ILR 304; *Belgium, France, Switzerland, UK and USA v Germany (Young Loan Arbitration)* (1980) 59 ILR 494; *Indus Waters Kishenganga Arbitration (Pakistan v India)* (2013) 157 ILR 362; *Railway Land Arbitration (Malaysia v Singapore)* (2014) 162 ILR 588.
- 18 Generally: Charney (1998) 271 *Hague Recueil* 101; Simma (2009) 20 *EJIL* 265, 278ff; Caminos in Boschiero et al (eds), *International Courts and the Development of International Law* (2013) 55; Dupuy & Viñuales in Romano, Alter, & Shany (2013) 135.
- 19 Crawford, *Chance, Order, Change* (2014) 212–17.
- 20 Generally: Lowe & Fitzmaurice (eds), *Jennings Essays* (1996); Eyffinger, *The International Court of Justice 1946–1996* (1996); Zimmermann et al (eds), *The Statute of the International Court of Justice* (2nd edn, 2012); Thirlway, *The Law and Procedure of the International Court of Justice* (2013); Kolb, *The International Court of Justice* (2013); Shany, *Assessing the Effectiveness of International Courts* (2014) 161–88; Quintana, *Litigation at the International Court of Justice* (2015); Shaw,

- Rosenne's *Law and Procedure of the International Court 1920–2015* (5th edn, 2016); Thirlway, *The International Court of Justice* (2016); Merrills (6th edn, 2017) chs 6–7.
- 21 *Nottebohm (Liechtenstein v Guatemala)*, Preliminary Objection, ICJ Reports 1953 p 111, 119.
- 22 Scott, *The Project Relative to a Court of Arbitral Justice (No 34)* (1920) 89–98.
- 23 Scott (1908) 2 *AJIL* 772; Hudson, *The Permanent Court of International Justice 1920–1942* (1943) 80–4. Further on the PCIJ: Spiermann, *International Legal Argument in the Permanent Court of International Justice* (2005); Tams & Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (2013).
- 24 Covenant of the League of Nations, Art 14.
- 25 Protocol of Signature to the Statute of the Permanent Court of International Justice, 16 December 1920, 6 LNTS 379.
- 26 Hudson (1957) 51 *AJIL* 569; 1 Shaw-Rosenne (5th edn, 2016) 67–71.
- 27 Generally: Lauterpacht, *Function of Law* (1933, repr 2011) 219–49; 1 Shaw-Rosenne (5th edn, 2016) 363–89. Also: Mackenzie et al, *Selecting International Judges* (2010); Kolb (2013) ch IV; Vukas in Boschiero et al (2013) 213; Mackenzie in Romano, Alter, & Shany (2013) 737; Hernández, *The International Court of Justice and the Judicial Function* (2014) ch V.
- 28 Of the present Court (as at 31 June 2018), seven previously served as national legal advisers or ambassadors; one as the legal adviser to an international organization; four were university professors; one was a senior national judge; and two were judges on international criminal tribunals. This enumeration is based on dominant occupation immediately prior to election.
- 29 Also: Rules of the Court, 1 July 1978 (ICJ Rules), Art 7(2).
- 30 In 2017, the UK judge was not re-elected.
- 31 For procedures to deal with deadlock: ICJ Statute, Arts 11–12. Informal consultation is used to avoid resort to a joint conference.
- 32 On the role of a judge ad hoc: *Genocide (Bosnia and Herzegovina v Yugoslavia)*, Provisional Measures, ICJ Reports 1993 p 325, 408–9 (Judge ad hoc Lauterpacht). Also: Schwebel (1999) 48 *ICLQ* 889; Scobbie (2005) 4 *LPICT* 421; Thirlway (2013) 881–96, 1741–53; Kolb (2013) 118–32; Hernández (2014) 145–54; Shaw-Rosenne (5th edn, 2016) 1111–26.
- 33 Generally: Fitzmaurice (1958) 34 *BY* 1, 8–138; Thirlway (2013) 691–819, 896–1104, esp 691–819, 1111–713, 1753–879, esp 1608–713; Kolb (2013) ch V; Quintana (2015) Parts 1, 2, 5; Shaw-Rosenne (5th edn, 2016) chs 12–14.
- 34 ICJ Statute, Art 34(1) provides: 'Only states may be parties in cases before the Court.'
- 35 E.g. *Anglo-Iranian Oil Co (UK v Iran)*, Jurisdiction, ICJ Reports 1952 p 93, 102–3; *Monetary Gold removed from Rome in 1943 (Italy v France, UK and US)*, Preliminary Question, ICJ Reports 1954 p 19, 32; *Military and Paramilitary Activities in and against Nicaragua (US v Nicaragua)*, Jurisdiction and Admissibility, ICJ Reports 1984 p 392, 431; *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, ICJ Reports 1992 p 240, 259–62; *East Timor (Portugal v Australia)*, ICJ Reports 1995 p 90, 101; *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction, ICJ Reports 1998 p 432, 453, 456. Further: Fitzmaurice (1958) 34 *BY* 1, 66–97; Shaw-Rosenne (5th edn, 2016) 571–84.
- 36 On the distinction, see Shany, *Questions of Jurisdiction and Admissibility before International Courts* (2016).
- 37 *Right of Passage over Indian Territory (Portugal v India)*, Preliminary Objections, ICJ Reports 1957 p 125, 149–52; *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)*, Preliminary Objections, ICJ Reports 1964 p 6, 41–7 (Judge Morelli, diss) 97–115; *Barcelona Traction*, Second Phase, ICJ Reports 1970 p 51, 57 (Judge Bustamante y Rivero), 110–13 (Judge Fitzmaurice), 115 (Judge Tanaka), 286–7 (Judge Ammoun), 356–7 (Judge Riphagen, diss). Also: Fitzmaurice (1958) 34 *BY* 1, 23–5; Kolb (2013) 240–6.
- 38 *Northern Cameroons (Cameroon v UK)*, Preliminary Objections, ICJ Reports 1963 p 15.
- 39 Further: Shaw-Rosenne (5th edn, 2016) 620–3, 632–43.
- 40 *Legality of Use of Force (Serbia and Montenegro v Belgium)*, Preliminary Objections, ICJ Reports 2004 p 279, 322–4.
- 41 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, pleadings, <https://www.icj-cij.org/docket/files/118/14526.pdf>, 40, 45–6, 55. The Court took another route: ICJ Reports 2008 p 412, 435, 444.
- 42 SC Res 9 (1946) paras 1–2. These requirements have been incorporated into ICJ Rules, Art 41. Further: Kolb (2013) 285–95; Quintana (2015) 27–34; Shaw-Rosenne (5th edn, 2016) 637–43.
- 43 E.g. *Corfu Channel (UK v Albania)*, Preliminary Objection, ICJ Reports 1947 p 15, 53.
- 44 *Nottebohm*, Preliminary Objection, ICJ Reports 1953 p 111, 119–20, where the Court regarded this power as grounded in international law apart from any explicit provision in the Statute. Also: *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Order of 17 April 2013, ICJ Reports 2013 p 184, 191–2 (Judge Cañado Trindade). Further: Fitzmaurice (1958) 34 *BY* 1, 25–31; Crawford (2010) 1 *JIDS* 3, 15–20; 1 Thirlway (2013) 755–9, 1680–3. On the power of the Court to determine the jurisdiction of another international tribunal: *Ambatielos (Greece v UK)*, ICJ Reports 1953 p 10; Fitzmaurice (1958) 34 *BY* 1, 31–66.
- 45 Generally: Rosenne, *Provisional Measures in International Law* (2005); Wolfrum, 'Interim (Provisional) Measures of Protection' (2006) *MPEPIL*; E Lauterpacht (2011) 345 Hague *Recueil* 387, 507–17; Oellers-Frahm in Zimmermann et al (2nd

- edn, 2012) 1026; Kolb (2013) 611–58; Thirlway (2013) 929–70, 1770–811; Kawano (2013) 346 Hague *Recueil* 9, 305–41; Eisemann in Boschiero et al (2013) 121; Quintana (2015) ch 11; Shaw-Rosenne (5th edn, 2016) ch 24; Miles, *Provisional Measures before International Courts and Tribunals* (2017); Miles (2018) 88 *BY* (advance access).
- 46 *Anglo-Iranian Oil Co*, Order of 5 July 1951, ICJ Reports 1951 p 89, 92–3, 96 (Judges Winarski and Badawi, diss); *Nicaragua*, Order of 10 May 1984, ICJ Reports 1984 p 169, 179–80; *Interhandel (Switzerland v UK)*, ICJ Reports 1959 p 6, 117 (Judge Lauterpacht, diss); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Order of 28 May 2009, ICJ Reports 2009 p 139, 147; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Order of 8 March 2011, ICJ Reports 2011 p 6, 17–18; *Costa Rica v Nicaragua*, Order of 22 November 2013, ICJ Reports 2013 p 354, 359; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Order of 3 March 2014, ICJ Reports 2014 p 147, 151–2. Further: Fitzmaurice (1958) 34 *BY* 1, 107–19; Lauterpacht, *The Development of International Law by the International Court* (1958) 110–13; E Lauterpacht (2011) 345 Hague *Recueil* 387, 508–10; Thirlway (2013) 929–35, 1777–9; Kolb (2013) 622–5. The ICJ made an order for provisional measures in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v US)*, Order of 3 October 2018.
- 47 *LaGrand (US v Germany)*, ICJ Reports 2001 p 466, 501–6. Thirlway (2001) 72 *BY* 37, 111–26; Jennings in Valencia-Ospina (ed), 1 *The Law and Practice of International Tribunals* (2002) 13. Also: *Armed Activities on the Territory of the Congo (DRC v Uganda)*, ICJ Reports 2005 p 168, 258; *Timor-Leste v Australia*, Order of 3 March 2014, ICJ Reports 2014 p 147, 160; E Lauterpacht (2011) 345 Hague *Recueil* 387, 512–7; Oellers-Frahm in Zimmermann et al (2nd edn, 2012) 1026, 1062–7; Kolb (2013) 638–50; Thirlway (2013) 956–68, 1649–51, 1807–11.
- 48 On intervention under the ICJ Statute, Arts 62 and 63: Fitzmaurice (1958) 34 *BY* 1, 124–9; Chinkin (1986) 80 *AJIL* 495; Chinkin, *Third Parties in International Law* (1993) 147–217; 3 Zimmermann, ‘International Courts and Tribunals, Intervention in Proceedings’ (2006) *MPEPIL*; Chinkin in Zimmermann et al (2nd edn, 2012) 1529, 1573; Thirlway (2013) 1026–72, 1836–58; Kolb (2013) 694–743; Wolfrum in Boschiero et al (2013) 219, 222–7; Quintana (2015) chs 14–15; Shaw-Rosenne (5th edn, 2016) ch 26.
- 49 Preliminary Objection, ICJ Reports 1948 p 15, 31–2. Jurists generally agree with the joint separate opinion: Fitzmaurice (1952) 29 *BY* 1, 31–2, 44; cf Shaw-Rosenne (5th edn, 2016) 694–7.
- 50 Jurisdiction and Admissibility, ICJ Reports 1984 p 392, 397–411. For criticism: Crawford, ‘*Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*’ (2006) *MPEPIL*; Crawford (2012) 25 *LJIL* 471.
- 51 *Corfu Channel*, Preliminary Objection, ICJ Reports 1947 p 15, 27–8.
- 52 Unilateral suspension of a treaty does not render jurisdictional clauses inoperative: *Appeal relating to the Jurisdiction of the ICAO Council (India v Pakistan)*, ICJ Reports 1972 p 46, 53–4.
- 53 For treaties providing the Court with jurisdiction see the Court’s website.
- 54 Merrills (1979) 50 *BY* 87; Merrills (1993) 64 *BY* 197; Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* (1994); Merrills in Ando, McWhinney, & Wolfrum (eds), 1 *Liber Amicorum Judge Shigeru Oda* (2002) 435; Thirlway (2013) 777–804, 1700–7; Kolb (2013) 447–529; Kawano (2013) 346 Hague *Recueil* 9, 126–75; Lamm, *Compulsory Jurisdiction in International Law* (2014); Törber, *The Contractual Nature of the Optional Clause* (2015); Shaw-Rosenne (5th edn, 2016) ch 12.
- 55 *Electricity Co of Sofia and Bulgaria* (1939) PCIJ, Preliminary Objection, Ser A/B No 77, 80–2; *Anglo-Iranian Oil Co*, Jurisdiction, ICJ Reports 1952 p 93, 103; *Certain Norwegian Loans (France v Norway)*, ICJ Reports 1957 p 9, 23–4; *Aegean Sea Continental Shelf (Greece v Turkey)*, ICJ Reports 1978 p 3, 37; *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction, ICJ Reports 1998 p 432, 454. Further: Thirlway (2013) 782–804; Kolb (2013) 474–87; Lamm (2014) ch 6.
- 56 *Nicaragua*, Jurisdiction, ICJ Reports 1984 p 392, 415–21; 466–7 (Judge Mosler); 547 (Judge Jennings); 620–8 (Judge Schwebel, diss). On the denunciation of declarations in general: Kolb (2013) 520–9; Shaw-Rosenne (5th edn, 2016) 810–13.
- 57 The declarations are valid without ratification, but may be made subject to ratification. They are registered as ‘international agreements’ under Art 102 of the Charter. On their interpretation: *Anglo-Iranian Oil Co*, Jurisdiction, ICJ Reports 1952 p 93, 103ff. On the question whether two optional clause declarations are a form of treaty *inter se*: *Nuclear Tests (Australia v France)*, ICJ Reports 1974 p 253, 352–6 (Judges Onyeama, Dillard, Jiménez de Aréchaga, and Waldock, diss).
- 58 Generally: Merrills (1993) 64 *BY* 197; Merrills in Kaikobad & Bohlander (eds), *International Law and Power* (2009) 431.
- 59 Lauterpacht (1958) 103.
- 60 Generally: Thirlway (2013) 710–12, 1652–6; Kolb (2013) 380–2; Kawano (2013) 346 Hague *Recueil* 9, 229–39; Shaw-Rosenne (5th edn, 2016) 697–724.
- 61 Preliminary Objections, ICJ Reports 1948 p 15, 27. But the institution of proceedings in that case was based on a special agreement.
- 62 *Certain Criminal Proceedings in France (Republic of the Congo v France)*, Provisional Measures, ICJ Reports 2003 p 102, 103–4; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, ICJ Reports 2008 p 177, 181.
- 63 *Ambatielos*, Preliminary Objection, ICJ Reports 1952 p 28, 39; *Anglo-Iranian Oil Co*, Jurisdiction, ICJ Reports 1952 p 93, 114.

- 64 Lauterpacht (1958) 213–23; Fitzmaurice (1958) 34 *BY* 1, 132–7; Pellet in Zimmermann et al (2nd edn, 2012) 731, 791–7; Kolb (2013) 360–70; Shaw-Rosenne (5th edn, 2016) 592–8.
- 65 Generally: Briggs (1958) 93 Hague *Recueil* 223, 328–63; Gross (1962) 56 *AJIL* 357; Collier & Lowe (1999) 143–6; Kolb (2013) 503–17; Kawano (2013) 346 Hague *Recueil* 9, 159–62.
- 66 The Court has avoided the issue, as in *Norwegian Loans*, ICJ Reports 1957 p 9, and *Interhandel*, ICJ Reports 1959 p 6. A number of judges have held the reservation invalid: ICJ Reports 1957 p 9, 42ff (Judge Lauterpacht), 68–70 (Judge Guerrero); ICJ Reports 1959 p 6, 55–9 (Judge Spender); 76–8 (Judge Klaestad); 92–4 (Judge Armand-Ugon). But cf Crawford (1979) 50 *BY* 63, arguing for the validity of the reservation.
- 67 Cf the view of the Court on an analogous reservation in *Right of Passage*, Preliminary Objections, ICJ Reports 1957 p 125, 143–4. Further: Briggs (1958) 93 Hague *Recueil* 223, 273–7; Shaw-Rosenne (5th edn, 2016) 810–13.
- 68 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports 1984 p 392, 418–20; 466–7 (Judge Mosler); 550 (Judge Jennings); 620–8 (Judge Schwebel, diss).
- 69 *Nottebohm*, Preliminary Objection, ICJ Reports 1953 p 111, 122–3. Also: Kolb (2013) 606–8; Shaw-Rosenne (5th edn, 2016) 964–70.
- 70 *Right of Passage*, ICJ Reports 1960 p 6, 33–6; *Electricity Co of Sofia and Bulgaria* (1939) PCIJ, Preliminary Objection, Ser A/B No 77, 82; *Phosphates in Morocco*, Preliminary Objections, (1938) PCIJ Ser A/B No 74, 23–4.
- 71 Higgins in Lowe & Fitzmaurice (1996) 567; Frowein & Oellers-Frahm in Zimmermann (2nd edn, 2012) 1605; Thirlway (2013) 820–63, 1714–32; Kolb (2013) ch VIII; Shaw-Rosenne (5th edn, 2016) chs 5, 15. Earlier: Lauterpacht (1958) 107–10, 248–50, 352–8.
- 72 For a list of organizations and agencies authorized to request advisory opinions: <https://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1>.
- 73 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971 p 16, 24; *Western Sahara*, ICJ Reports 1975 p 12, 24–5; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004 p 136, 157–9. Also: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Reports 1950 p 65 And cf the pending request on the *Chagos Islands* (GA Res 71/292, 22 June 2017) with the award of a PCA tribunal: *Chagos Marine Protected Area (Mauritius v UK)* (2015) 162 ILR 1.
- 74 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951 p 15. Here the issue was the conditions under which reservations to multilateral conventions could be made.
- 75 Art 83 of the ICJ Rules provides for appointment of judges ad hoc if the request concerns ‘a legal question actually pending between two or more States’. This was done in *Western Sahara*, ICJ Reports 1975 p 12.
- 76 (1923) PCIJ Ser B No 5. In *Peace Treaties*, ICJ Reports 1950 p 65, the Court distinguished *Eastern Carelia*, emphasizing its duty to comply with the request of another UN organ.
- 77 ICJ Reports 1971 p 16, 23–4.
- 78 ICJ Reports 1975 p 12, 24–6.
- 79 ICJ Reports 2004 p 136, 157–9.
- 80 Further: Waldock, *Aspects of the Advisory Jurisdiction of the International Court of Justice* (1976) 3–10.
- 81 As in *Eastern Carelia* (1923) PCIJ Ser B No 5; *Peace Treaties*, ICJ Reports 1950 p 65.
- 82 *Peace Treaties*, ICJ Reports 1950 p 65, 70.
- 83 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports 1996 p 66, 81.
- 84 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996 p 226.
- 85 *Conditions of Admission of a State to the United Nations (Article 4 of the Charter)*, ICJ Reports 1948 p 57, 61; *Competence of the General Assembly for the Admission of a State to the United Nations*, ICJ Reports 1950 p 4, 6–7; *Certain Expenses of the United Nations (Article 7, paragraph 2 of the Charter)*, ICJ Reports 1962 p 151, 155. At the San Francisco conference it was decided not to grant a power to settle disputes on interpretation of the Charter: 13 UNCTIO, 668–9, 709–10. Also: *Reservations*, ICJ Reports 1951 p 15, 20.
- 86 *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, ICJ Reports 2010 p 403, 415.
- 87 E.g. *(First) Admissions*, ICJ Reports 1948 p 57. Also: *(Second) Admissions*, ICJ Reports 1950 p 4.
- 88 *Certain Expenses*, ICJ Reports 1962 p 151.
- 89 *Peace Treaties*, ICJ Reports 1950 p 65, 71–2; *Reservations*, ICJ Reports 1951 p 15, 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, ICJ Reports 1956 p 77, 86; *Certain Expenses*, ICJ Reports 1962 p 151, 155; *Kosovo*, ICJ Reports 2010 p 403, 416.
- 90 *Peace Treaties*, ICJ Reports 1950 p 65, 70–1.
- 91 Generally: Damrosch (ed), *The International Court of Justice at a Crossroads* (1987); Lowe & Fitzmaurice (1996); Bowett et al (eds), *The International Court of Justice* (1997); Peck & Lee (eds), *Increasing the Effectiveness of the International Court of*

- Justice* (1997); Jennings (1997) 68 *BY* 1; Higgins (2001) 50 *ICLQ* 121; Higgins (2003) 52 *ICLQ* 1; Schulte, *Compliance with Decisions of the International Court of Justice* (2004); Kooijmans (2007) *ICLQ* 741; Tams in Tams & Sloan (eds), *The Development of International Law by the International Court of Justice* (2013) 377; Kolb (2013) chs X, XII; Kawano (2013) 346 *Hague Recueil* 9, esp 345–452; Shany & Giladi in Shany (2014) 161. Also: various items (2016) 7 *JIDS* 225–498 (proceedings of the Court’s 70th anniversary).
- 92 *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949 p 174; *(First) Admissions*, ICJ Reports 1948 p 57; *(Second) Admissions*, ICJ Reports 1950 p 4; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, ICJ Reports 1955 p 67; *Certain Expenses*, ICJ Reports 1962 p 151; *Namibia*, ICJ Reports 1971 p 16.
- 93 Ando, ‘Permanent Court of Arbitration (PCA)’ (2006) *MPEPIL*; Sands et al (2nd edn, 2010) ch 4.
- 94 29 July 1899, 187 CTS 410. Most states supporting the PCA became parties to the 1899 Convention. The 1907 Convention, which has received few ratifications, is not very different: 18 October 1907, 205 CTS 233.
- 95 PCA Optional Rules for Arbitrating Disputes between Two States, *PCA Basic Documents* (1998) 43; PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, *PCA Basic Documents* (1998) 69; PCA Optional Rules for Arbitration between International Organizations and States, *PCA Basic Documents* (1998) 97; PCA Optional Rules for Arbitration between International Organizations and Private Parties, *PCA Basic Documents* (1998) 125; PCA Arbitration Rules 2012, available at <https://pca-cpa.org>. Also: Macmahon & Smith (eds), *Permanent Court of Arbitration* (2010).
- 96 *Abyei arbitration (Government of Sudan v SPLM/A)* (2009) 144 ILR 348.
- 97 Generally: Holtzmann & Kristjánsson (eds), *International Mass Claims Processes* (2007); Caron in Romano, Alter, & Shany (2013) 278.
- 98 Generally: de Chazournes & Campanelli, ‘Mixed Commissions’ (2006) *MPEPIL*; Dolzer, ‘Mixed Claims Commissions’ (2011) *MPEPIL*.
- 99 Great Britain–United States, Treaty of Amity, Commerce and Navigation, 19 November 1794, 52 CTS 243. Generally: Ziegler, ‘Jay Treaty (1794)’ (2013) *MPEPIL*. Another significant forum for such claims were the Mexican Claims Commissions: Feller, *The Mexican Claims Commissions 1923–34* (1935).
- 100 E.g. *Iron Rhine (Belgium v Netherlands)* (2005) 27 RIAA 35, as to which see Baetens in Cordonnier Segger, & Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals 1992–2012* (2017) 297.
- 101 Generally: Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal* (1996); Lillich & Magraw (eds), *The Iran–United States Claims Tribunal* (1998); Brower & Brueschke, *The Iran–United States Claims Tribunal* (1998); Mohebi, *The International Law Character of the Iran–United States Claims Tribunal* (1999); Brower (2000) 94 *AJIL* 813; Pinto & McAsey, ‘Iran–United States Claims Tribunal’ (2013) *MPEPIL*.
- 102 Generally: di Rattalma & Treves (eds), *The United Nations Compensation Commission* (1999); Wühler in Ranzelzhofer & Tomuschat (eds), *State Responsibility and the Individual* (1999) 213; Gattini (2002) 13 *EJIL* 161; McGovern (2009) 14 *Harv NLR* 171; Mensah, ‘United Nations Compensation Commission (UNCC)’ (2011) *MPEPIL*; Gibson, Rajah, & Feighery (eds), *War Reparations and the UN Compensation Commission* (2015).
- 103 SC Res 687 (1991). The resolution was passed under Ch VII of the UN Charter, obviating the need for Iraqi consent.
- 104 Churchill & Lowe, *The Law of the Sea* (3rd edn, 1999) ch 19; Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005); Rothwell (ed), *Law of the Sea* (2013) Part XI; Oxman in Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (2015) 394; Rothwell & Stephens, *The International Law of the Sea* (2nd edn, 2016) ch 18.
- 105 UNCLOS, Art 287(5). For a case of subsequent agreement to accept ITLOS jurisdiction, see *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Case No 16 (Judgment 14 March 2012).
- 106 *Somalia v Kenya*, Preliminary Objections, ICJ Reports 2017 p 3.
- 107 Sands et al (2nd edn, 2010) ch 2; Rao, ‘International Tribunal for the Law of the Sea’ (2011) *MPEPIL*; Oyarce in Attard, Fitzmaurice, & Martínez Gutiérrez (eds), *IMLI Manual on International Maritime Law* (2014) 643; García-Revilla, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (2015).
- 108 *M/V ‘Saiga’ (No 1)* (1997) 110 ILR 736.
- 109 ITLOS Statute, Art 2(1); a representative geographic distribution is also required: Art 2(2).
- 110 ITLOS Statute, Arts 4–5.
- 111 UNCLOS, Art 305, Annex VII Art 13; Annex IX.
- 112 Klein (2005) 56.
- 113 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, 2167 UNTS 3, Arts 30–32. Further: García-Revilla (2015) 173–86; Rothwell & Stephens (2nd edn, 2016) 486–7.
- 114 Generally: Treves in Freestone, Barnes, & Ong (eds), *The Law of the Sea* (2006) 417.
- 115 ITLOS Rules, Art 138. E.g. *Request by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Case No

21. Further: UKMIL (2014) 85 BY 301, 594–6; García-Revillo (2015) ch 9; Tanaka (2015) 14 *LPICT* 318; Ruys & Soete (2016) 29 *LJIL* 155; Lando (2016) 29 *LJIL* 441.
- 116 ITLOS Statute, Art 35; ITLOS Rules, Art 23.
- 117 UNCLOS, Arts 1(1), 187, 287(2).
- 118 UNCLOS, Arts 159(1), 191. Further: *Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports 2011 p 10; García-Revillo (2015) ch 8.
- 119 15 April 1994, 1867 UNTS 410.
- 120 Palmeter & Mavroidis, *Dispute Settlement in the World Trade Organization* (2nd edn, 2004); Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (2009); Herdegen, *Principles of International Economic Law* (2nd edn, 2016) ch XX; Stoll, 'World Trade Organization, Dispute Settlement' (2014) *MPEPIL*; Shany (2014) 189–222; Matsushita et al, *The World Trade Organization: Law, Practice, and Policy* (3rd edn, 2015) ch 4; van den Bossche & Zdouc, *The Law and Policy of the World Trade Organization* (4th edn, 2017) ch 3.
- 121 WTO Agreement, Annex 2. Further: Martin, *WTO Dispute Settlement Understanding and Development* (2013).
- 122 Generally: Matsushita et al (3rd edn, 2015) 86–109.
- 123 Improvements to the GATT Dispute Settlement Rules and Procedures, GATT Doc No BISD 36S/61, 12 April 1989.
- 124 WTO Agreement, Art IV.3.
- 125 Access to the WTO dispute-resolution system is limited to WTO Members, though panels may accept *amicus curiae* briefs: *US—Shrimp*, WTO Doc WT/DS58/AB/R, 12 October 1998, paras 101, 104–6.
- 126 Also: *US—Section 301 Trade Act*, WTO Doc WT/DS152/R, 22 December 1999, para 7.75.
- 127 *Ibid*, para 7.43; *EC—Commercial Vessels*, WTO Doc WT/DS301/R, 22 April 2005, para 7.193. Also: Hartmann (2016) 48 *G Wash ILR* 617, 648–9.
- 128 DSU, Arts 6.1, 16.4, 17.14, 22.6.
- 129 DSU, Art 11; *EC—Hormones*, WTO Doc WT/DS26/AB/R, 16 January 1998, paras 116, 133; *EC—Poultry*, WTO Doc WT/DS69/AB/R, 13 July 1998, para 133; *Brazil—Retreaded Tyres*, WTO Doc WT/DS332/AB/R, 3 December 2007, para 185; *EC—Fasteners*, WTO Doc WT/DS397AB/R, 15 July 2011, para 441.
- 130 See Pauwelyn (2015) 109 *AJIL* 761.
- 131 DSU, Art 2.4. For recent difficulties with replacement of Appellate Body members, see Kuijper (2018) 45 *Legal Issues of Economic Integration* 1.
- 132 DSU, Arts 17.3, 17.5.
- 133 DSU Arts 17.6, 17.13. Further: *EC—Hormones*, WTO Doc No WT/DS26/AB/R, 16 January 1998, para 132; *EC—Bananas III*, WTO Doc No WT/DS27/AB/R, 9 September 1997, para 239; *EC—Fasteners*, WTO Doc WT/DS397/AB/R, 15 July 2011, para 441. Also: Bossche & Zdouc (4th edn, 2017) 238–42.
- 134 *Ibid*, 242.
- 135 DSU, Art 19.2.
- 136 See DSU, Art 22.1.
- 137 E.g. in the *EC—Bananas III* dispute the US increased the customs duty on carefully selected EC products to 100 per cent: *EC—Bananas III (Art 21.5—US)*, WTO Doc WT/DS27/RW/USA, 19 May 2008.
- 138 Further: DSU, Art 22.4.
- 139 *Japan—Alcoholic Beverages II*, WTO Docs WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/ABR, 4 October 1996, para 108; *US—Shrimp (Art 21.5—Malaysia)*, WTO Doc WR/DS58/AB/RW, 22 October 2001, para 109.
- 140 E.g. DSU, Art 3.2, which requires that the covered agreements be interpreted in accordance with customary international law reflected by the Vienna Convention on the Law of Treaties: *US—Gasoline*, WTO Doc WT/DS2/AB/R, 29 April 1996.
- 141 E.g. in *US—Shrimp*, the Appellate Body held that the 'chapeau' of GATT, Art XX was an expression of the general principle of good faith: WTO Doc WT/DS58/AB/R, 12 October 1998, para 158.
- 142 van den Bossche & Zdouc (4th edn, 2017) 65–71. On the relevance of equitable principles: Gourgourinis, *Equity and Equitable Principles in the World Trade Organization* (2016).
- 143 *US—Gasoline*, WTO Doc WT/DS2/AB/R, 29 April 1996, 17.
- 144 *Korea—Government Procurement*, WTO Doc WT/DS163/R, 1 May 2000, para 7.96.
- 145 Generally: Ganz in Bethlehem et al (2009) 237; Bartels, 'Regional Trade Agreements' (2013) *MPEPIL*; Baudenbacher & Clifton in Roman, Alter, & Shany (2013) 250; van den Bossche & Zdouc (4th edn, 2017) ch 10.
- 146 There are presently around 2,363 BITs in effect, the majority of which are maintained in an online database by UNCTAD: <http://investmentpolicyhub.unctad.org/IIA>.
- 147 Cf NAFTA, 17 December 1992, 1994 CTS 2, Ch 11; Energy Charter Treaty, 17 December 1994, 2080 UNTS 100, Part III; Association of South-East Asian Nations Comprehensive Investment Agreement, 26 February 2009, Section B; Dominican Republic–United States–Central American Fair Trade Agreement, 5 August 2004, Ch 20. Also: Trans-Pacific Partnership, 4 February 2016, Ch 28 (not yet in force); EU–Canada Comprehensive Economic and Trade Agreement, 26 September 2014,

- Ch 23 (not yet in force); Transatlantic Trade and Investment Partnership (currently being negotiated), Ch 2. Further: Bungenberg et al (2015) ch 4.III.
- 148 Generally: Douglas, *The International Law of Investment Claims* (2009); Schreuer et al, *The ICSID Convention* (2nd edn, 2009); Waibel et al (eds), *The Backlash Against Investment Arbitration* (2010); Dolzer & Schreuer, *Principles of International Investment Law* (2nd edn, 2012); Schreuer, 'International Centre for Settlement of Investment Disputes (ICSID)' (2013) *MPEPIL*; Schreuer in Romano, Alter, & Shany (2013) 295; Parra (2014) 374 *Hague Recueil* 313; Salacuse, *The Law of Investment Treaties* (2nd edn, 2015); McLachlan, Shore, & Weiniger, *International Investment Arbitration* (2nd edn, 2017).
- 149 Generally: Paulsson (1995) 10 *ICSID Rev-FILJ* 232.
- 150 The first such agreement was concluded between the Federal Republic of Germany and Pakistan: Treaty for the Promotion and Protection of Investments, 25 November 1959, 457 UNTS 23. On the history of international investment law, see Salacuse (2nd edn, 2015) ch 4.
- 151 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159. The Convention has 154 parties.
- 152 Douglas (2009) 3–6. Generally: Jagusch & Sullivan in Waibel et al (2010) 79.
- 153 *Asian Agricultural Products Ltd v Sri Lanka* (1990) 106 ILR 416.
- 154 Salacuse (2nd edn, 2015) 46–50.
- 155 E.g. UK Model BIT (2008), Art 2(2) ('Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party').
- 156 Generally: Sinclair (2004) 20 *Arb Int* 411; Shany (2005) 99 *AJIL* 835; Gallus (2008) 24 *Arb Int* 157; Crawford (2008) 24 *Arb Int* 351; Schill (2009) 18 *Minn JIL* 1; Dolzer & Schreuer (2nd edn, 2012) 166–78; de Brabandere, *Investment Treaty Arbitration as Public International Law* (2014) 38–42; Rigo Sureda in Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (2015) 375; Lim in Lim (ed), *Alternative Visions of the International Law on Foreign Investment* (2016) 349. See also chapter 28.
- 157 Generally: Schreuer et al (2nd edn, 2009) 71–347; Parra (2014) 374 *Hague Recueil* 313, 337–56.
- 158 Even where jurisdiction is established, the claim may nonetheless be inadmissible. The concept of admissibility is poorly defined in investment arbitration literature: Douglas (2009) 146–8, 363–472. Also: Heiskanen (2014) 29 *ICSID Rev-FILJ* 231, 237–45; Rosenfeld (2016) 29 *LJIL* 137, 148–53.
- 159 Generally: Marboe in Binder et al (eds), *International Investment Law for the 21st Century* (2009) 200; Kalina & Di Pietro, *ibid*, 221; Parra (2014) 374 *Hague Recueil* 313, 396–406. On the potential for the WTO Appellate Body to act as a model for an ICSID appeals facility: McRae (2010) 1 *JIDS* 371. For arguments in favour of an ICSID appeals facility: Ngangjoh-Hodu & Ajibo (2015) 6 *JIDS* 308.
- 160 10 June 1958, 330 UNTS 38. Further: Wolff (ed), *New York Convention* (2012); Bantekas, *An Introduction to International Arbitration* (2015) ch 8.
- 161 New York Convention, Art V(1), V(2)(b). These grounds are largely replicated in Arts 34 and 36 of the UNCITRAL Model Law (1985, amended 2006), which forms the basis of many national arbitration laws. Further: Kleinheisterkamp, 'Recognition and Enforcement of Foreign Arbitral Awards' (2008) *MPEPIL*; Hwang & Lim in Caron et al (eds), *Practising Virtue* (2015) 514.
- 162 Bishop & Marchili, *Annulment under the ICSID Convention* (2012); Shin in Kinnear et al (2015) 699.
- 163 Comprehensive Economic and Trade Agreement, signed on 30 October 2016 and provisionally in force since 21 September 2017 (European Commission, EU–Canada Trade Agreement Enters into Force, Press Release IP/17/3121, Brussels, 20 September 2017).
- 164 Baetens (2016) 43 *Legal Issues of Economic Interpretation* 367.
- 165 New York Convention, Arts III, IV.
- 166 ICSID Convention, Art 54.
- 167 Generally: Jenks, *The Prospects of International Adjudication* (1964); Helfer in Romano, Alter, & Shany (2013) 464; Ginsburg, *ibid*, 483; von Bogdandy & Venzke, *ibid*, 503; Shany (2014). Also: Alter, *The New Terrain of International Law* (2014).
- 168 Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) 3–7; Brown, *A Common Law of International Adjudication* (2007) ch 1; Buergenthal (2011) 14 *LJIL* 267, 267–72; Alter (2014) chs 3–4.
- 169 *Arctic Sunrise*, Provisional Measures (2013) 159 ILR 68; *Arctic Sunrise*, Merits (2015) 171 ILR 1; *South China Sea*, Merits (2016) 170 ILR 1. Also: Talmon in Talmon & Jia (eds), *The South China Sea Arbitration* (2014) 15, 19–25; Cembrano-Mallari (2014) 88 *Philippine LJ* 300, 328–32.
- 170 Fitzmaurice (1980) 51 *BY* 89; Thirlway, *Non-Appearance before the International Court of Justice* (1985); Thirlway (2013) 994–1007.
- 171 Garibaldi in Binder et al (2009) 252; Tzanakopoulos in Hofmann & Tams (eds), *International Investment Law and General International Law* (2011) 75; Wick (2012) 11 *JIBL* 239; Durney (2013) 17 *MPUNYB* 221; Voon & Mitchell (2016) 31 *ICSID Rev-FILJ* 413. Also: *Venoklim Holding BV v Venezuela*, ICSID Case ARB/12/22, 3 April 2015. Note that investment arbitration

presently available under NAFTA Ch XI will be largely excluded under the US-Mexico-Canada Agreement, 30 September 2018, once it enters into force.

- 172 Helfer (2002) 102 *Col LR* 1832, 1860–85; Tyagi (2008) 79 *BY* 86; Quigley (2009) 19 *Duke JCIL* 263; Naldi & Magliveras (2013) 33 *Pol YIL* 95. Also: Klein in Fastenrath et al (eds), *From Bilateralism to Community Interest* (2011) 477.
- 173 E.g. Energy Charter Treaty, 17 December 1994, 2080 UNTS 100, Art 47; First Optional Protocol to ICCPR, 16 December 1966, 999 UNTS 171, Art 12. See also chapter 16.
- 174 Alter, Gathii, & Helfer (2016) 27 *EJIL* 293, 295–314.
- 175 *Croatia v Slovenia*, PCA, Partial Award, 30 June 2016, PCA Case No 2012–04, ICGJ 509 (PCA 2016), paras 28–86; 29 June 2017, Final Award.

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