

The University of Hull

**REFLECTIONS ON THE DOWNFALL OF PUBLIC
INTERNATIONAL ARBITRATION IN THE 20TH CENTURY**

being a thesis submitted for the Degree of
Doctor of Philosophy in Law
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by

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List of Abbreviations

1899 HCPSID	Hague Convention for the Pacific Settlement of International Disputes of 1899
1907 HCPSID	Hague Convention for the Pacific Settlement of International Disputes of 1907
AAA	American Arbitration Association
AGCC	Arab Gulf Co-operation Council
AJIL	American Journal of International Law
Art	article
Arts	articles
ASILP	Proceedings of the American Society of International Law
ASILP	Proceedings of the American Society of International Law
B.C. Third World L.J.	Boston College Third World Law Journal
BFSP	British and Foreign State Papers
BYIL	British Yearbook of International Law
CAS	Court of Arbitration for Sports
Colum. L.R.	Columbia Law Review
CTS	Consolidated Treaty Series
Doc.	Document
ECPSD	European Convention for the Peaceful Settlement of Disputes (1957)
EPIL	Bernhardt (ed.), Encyclopedia of Public International Law, 1981, vols. I-II
Harv. Int'l L.J.	Harvard International Law Journal
HCsPSID	Hague Conventions for the Pacific Settlement of International Disputes (1899 / 1907)
GAOR	General Assembly Official Reports
GCC	Gulf Co-operation Council
GATT	General Agreement on Tariffs and Trade
I.O.	International Organisation
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organisation
ICC	International Chamber of Commerce
ICJ Rep.	International Court of Justice Report
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
ITLOS	International Tribunal for the Law of the Sea
LCIA	London Court of International Arbitration

NAI	Netherlands arbitration Institute
OAS	Organisation of American States
OAU	Organisation of African Unity
OSCE	Organisation for Security and Co-operation in Europe
Pace Int'l L. Rev	Pace International Law Review
Para(s).	Paragraph(s)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Res(s).	Resolution(s)
RIAA	UN Reports of International Arbitral Awards
SCC	Stockholm Chamber of Commerce
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNAMET	United Nations Assistance Mission in East Timor
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Conference on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organisation.
UNY	Yearbook of the United Nations
UNSCOR	UN Security Council Official Reports
USA	United States of America
USSR	Union of Socialist Soviet Republics (Soviet Union)
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
WW1	World War 1
WW2	World War 2
YICJ	Yearbook of the International Court of Justice

Glossary

<i>ad hoc</i>	for a specific purpose.
<i>cause celebre</i>	a famous lawsuit, trial or controversy.
<i>competence de la competence</i>	competent to determine competence; the ability of a court or tribunal to determine its own jurisdiction or authority to hear a case.
<i>compromis</i>	an agreement to refer to arbitration or to judicial settlement some matter(s) in dispute, these being defined more clearly in the <i>compromis</i> .
Consent <i>ante hoc</i>	Consent given prior to the initiation of proceedings; before the occurrence of a dispute or matter in which the provision(s) of an international instrument regarding the peaceful settlement of disputes by arbitration or adjudication will be invoked.
Consent <i>post hoc</i>	after the initiation of proceedings.
<i>erga omnes</i>	valid against 'all the world' (against everyone).
<i>ex aequo et bono</i>	a judgement of an international court or tribunal based not on strict rules of international law but on justice and fairness (equity).
<i>exces de pouvoir</i>	beyond the powers of a tribunal.
<i>forum prorogatum</i>	the situation in which the consent of a party to a court's jurisdiction is implied from its conduct such as it taking part in proceedings. [where there is no formally expressed consent to a court's jurisdiction and the parties acquiesce, pleading the merits of the case, such action constitutes forum prorogatum].
<i>in abstracto</i>	in the abstract; without reference to specific circumstances.

<i>inter alia</i>	among other things.
<i>inter se</i>	between the parties to a specific transaction.
<i>ipso facto</i>	by that very fact.
<i>locus standi</i>	the existence of a sufficient legal interest in the matter or case in issue.
<i>non liquet</i>	when in a hypothetical situation a court is not able to give a decision on law because it lacks legally relevant rules.
<i>pactum de contrahendo</i>	clause in a treaty which obligates the parties concerned to conclude a further agreement on a specific matter.
<i>par in parem non habet imperium</i>	the principle that one sovereign State cannot sit in judgement on another sovereign State by reason of their legal equality. An equal has no authority over an equal.
<i>per capita</i>	of or for each person.
<i>ratione temporis</i>	by reason of time.
<i>sine qua non</i>	a condition which must be accepted in order for the proposing a party to accept the agreement.
<i>ultra vires</i>	outside the lawful powers of a person or agent.

INTRODUCTION:

Arbitration is a method that has been employed for the settlement of disputes ever since the earliest civilisations of mankind. Since it is essentially a voluntary means of dispute resolution, it is the parties who determine when to resort to arbitration, as well as the issues that are to be submitted to arbitration. State consent is a *sine qua non* for the initiation of any arbitral proceedings in a dispute involving States as parties. In its recent form, inter-State arbitral practice is a sequel of early Anglo-American practice, namely, the settlement of certain controversies that arose between Great Britain and the USA under the 1794 Jay Treaty and the 1871 Alabama Claims arbitration. The success of those and a number of other arbitral settlements, as well as the attractive nature of arbitration which maintains the parties' freedom in determining the structure, composition, jurisdiction, rules of procedure and the laws to be applied by the tribunal, all stimulated the momentum of arbitral practice which gradually increased since the 19th century and resulted in the establishment of a number of multilateral frameworks that provided for arbitration. These include the 1899 Hague Convention for the Pacific Settlement of International Disputes, which codified the laws of arbitral procedure and presented the international community with the first international court of arbitration, 'the Permanent Court of Arbitration'; the second Hague Convention in 1907; the 1924 Geneva Protocol; the 1928 & 1949 General Acts for the Pacific Settlement of International Disputes; the 1958 ILC Model Rules on Arbitral Procedure (which are all referred to hereinafter as **general inter-State arbitral mechanisms**)¹. Almost all of those mechanisms were established with a common aim of striking a balance between on the one hand, the interests of the international community as

a whole in preserving international peace and stability through devising a compulsory framework which States would be obliged to resort to automatically when the need arises (a notion which seems to contradict with the free and voluntary nature of arbitration mentioned above), and on the other, the interests of each State individually, through the avoidance of infringing the principle of State sovereignty, a basic rule of international law, whereby State consent is the basis of the jurisdiction of international tribunals. Between the two came the question of whether the *obligatorium* would cover categories of disputes that States considered as affecting their vital interests or national honour (the justiciable / non-justiciable or legal / political dispute dichotomy) or whether they were to be excluded totally or partially, and who was to determine that.

With the rapid expansion of the members of the international community during the last century from a few dozen States during the League of Nations era to where we stand today in which the composition has exceeded 190 States and the various social, ideological and religious diversities that have emerged as a result, and with the emergence of a new rival to international arbitration, namely, international adjudication following the establishment of the PCIJ, actual State resort to international arbitration in the post WW1 era has gradually declined. In the current era, recourse to inter-State arbitral tribunals is a rather rare occurrence, except for a few but important recent exceptions, such as the 1988 *Taba* arbitration between Egypt and Israel; the two awards of the tribunal in the *Hanish Islands* dispute 1998 and 1999 between Yemen and Eritrea; the Boundary and Mass Claims Commissions sitting currently at the Hague that were established pursuant to the Peace Agreement signed between Eritrea and Ethiopia on December 12, 2000; and the successful work of the Iran-USA Claims Tribunal established in 1981 which, in addition to claims between the two Governments, was also concerned with claims of the nationals of each

Government against the other Government. This is also the case with regard to general inter-State arbitral treaty practice, inasmuch as with the exception of the arbitral provisions embodied in UNCLOS III which, however, is only concerned with maritime issues, no further *significant* efforts were made in order to adopt a further *general inter-State arbitral mechanism* following the ILC's 1958 Model Rules. It is interesting to point out that some of those general inter-State arbitral mechanisms are now obsolete, while the others are seldom, if at all, referred to in actual inter-State dispute settlement practice, leave alone the fact that the provisions of most of them are considered now outdated according to current international standards.

The purpose of this thesis is to demonstrate the pattern of the rise and fall of inter-State arbitration as a means of international dispute settlement through the reflection of the legal doctrine over the past 100 years. The discussion will touch upon a number of basic issues related to the public international arbitral sector, such as the true nature of arbitration, as well as the origins of current-day arbitral practice, arbitral procedure, State practice, the legal and non-legal dispute dichotomy, jurisdiction of international tribunals, and the historical development of general inter-State arbitral mechanisms in the 20th century. Our examination will be conducted mainly in the light of the provisions of the various international instruments concerned with the peaceful settlement of international disputes adopted in the past century and also the views of leading legal writers and scholars on various aspects of the international arbitral process and State practice. It is interesting to note that despite the dramatic change in the level of utilisation of inter-State arbitration, within the domain of academic research, studies concerning the area of inter-State arbitration are rather scarce; the issue has been neglected. Instead, interest has shifted almost totally to arbitration in other fields and recent studies on arbitration are devoted to

the settlement of disputes between States, commercial concerns and individuals. Public international arbitration in general is a means of dispute resolution that was able to deliver prior to the current decline in tribunal utilisation and is still capable of fulfilling an important role in the area of peaceful settlement of international disputes, despite the significant changes that have occurred to the fabric of the international community over the past 100 years and the various ideological, cultural and religious diversities that have emerged as a result (the Iran – USA Claims tribunal and the two awards in the *Hanish Island* arbitration are examples). However, it may be that its image needs to be polished and re-introduced (hence, a few suggestions as to possible ways of revitalising the public international arbitral sector are provided at the end of the general conclusion in Chapter Six).

The study is divided into six main chapters, each covering a certain aspect of the issue under consideration. The first chapter is intended to provide the reader with a general background on the concept and nature of international arbitration, the origins of current arbitral practice and its historical evolution starting from the 19th century, as well as the main fundamental features of international arbitration which have made it an attractive means of settlement to States, namely, the parties' influence over the composition of the tribunal; their freedom in specifying the law(s) applicable; their freedom to specify the basic considerations with regard to the award; the possibility of secrecy; and the non-intervention by third parties into proceedings.

Chapter Two will attempt to provide a general background on the rise and fall of international arbitral practice by reviewing the momentum of arbitral practice in the last two centuries in the domains of both the number of disputes submitted to arbitration during that period and also arbitral treaty practice, which has tailed off following the 2nd World

War. The discussion in this respect will also include an examination of a number of possible factors behind States' disinclination to resort to arbitration, namely, the argument regarding the justiciability or otherwise of disputes; previous negative experiences with arbitration; the avoidance of the reaction of internal political factions within the State in the case of a non-favourable award; and the nature of dispute settlement by legal means. The examination will also reflect upon certain aspects of Soviet international law and practice concerning arbitration and also the practice of the so-called developing States in Africa and Asia.

Chapter Three will be totally devoted to the State consent requirement. The discussion in this respect will examine the principle of State sovereignty with regard to its origins; its main internal and external aspects; and the compatibility of the granting of consent by States for the submission of their disputes to international tribunals with the doctrine of State sovereignty. Light will also be shed on the significance of State consent in the field of the peaceful settlement of disputes, and how consent to arbitration is expressed.

In Chapter Four, light will be shed on the concept and nature of compulsory arbitration; the legal and non-legal dispute dichotomy with regard to its origins, theoretical dimensions and its implementation in actual dispute settlement and treaty practice. The discussion will also reflect on the compulsory jurisdiction of the ICJ by first discussing of all the voluntary means in which consent is expressed to the ICJ, and then examining the Court's compulsory jurisdiction under the Optional Clause.

Chapter Five will focus on the historical background and procedural aspects of the past general inter-State arbitral mechanisms.

Each chapter will be started with an introduction and followed by a conclusion and endnotes. A general summary and conclusion will follow in a separate chapter at the end of the thesis.

The central topic of this thesis is arbitration; however, where necessary, our discussion may also include other means of dispute resolution from among those listed in Art. 33(1) of the UN Charter, especially, international adjudication via. the ICJ. In this respect, since the dicta of the ICJ and arbitral tribunals on the issue of State consent to the jurisdiction of international tribunals are usually referred to by writers on consent to arbitration in an amalgamated matter, without distinction between the two areas, a similar approach will be adopted in our discussion on the issue. However, a distinction will be made with regard to the procedural and practical aspects of the granting of consent by States to each means.

The discussion in the thesis is confined solely to the area of inter-State arbitration involving public international law disputes between States only. However, where relevant, mention will also be made of certain examples of disputes involving States and non-State parties.

Notes to Introduction:

¹ Note that the whole of this study is concerned solely with those arbitral mechanisms indicated above under *general inter-State arbitral mechanisms* and which were intended for application on the universal level in general for the settlement of disputes involving States as parties (only) and concerning questions of a purely public international law character. The term *general inter-State arbitral mechanisms* for the purpose of this study does not cover regional instruments, such as the 1948 Pact of Bogota or the 1957 ECPSD; or specialised instruments such as UNCLOS.

CHAPTER ONE:

Preliminary Considerations on International Arbitration

Introduction:

Before wading through the technical aspects of State recourse to arbitration, and the various features and difficulties therein, it would be useful first of all to provide a general background on four major issues: first, the concept and nature of international arbitration, in order to underline the characteristics that distinguish it from other means of peaceful settlement; second, the origins of current arbitral practice in the 1794 arbitration under the Jay Treaty and the 1871 Alabama Claims arbitration, with their major contributions to the areas of international arbitration and international adjudication; third, the major developments in international arbitral practice in the 20th century; and fourth, an examination of some of the main distinctive procedural characteristics of international arbitration.

1. The Concept and Nature of International Arbitration:

In order to provide a clear description of the concept of inter-State arbitration, it appears necessary first of all to specify its status in relation to the other current methods of dispute resolution. The most useful criterion in this respect would appear to be Art. 33(1) of the UN Charter in which the main means of settlement may be classified into diplomatic means (negotiation, good offices, inquiry, conciliation and mediation), and legal means

(arbitration and judicial settlement via the ICJ)¹. Although all those means share the common aim of resolving a particular dispute peacefully, a distinction may be drawn between the functioning of the two categories indicated above, in as much as, with the exception of negotiation, the settlement of a particular dispute by diplomatic means involves the participation of a third party whose decisions are of no binding force on the parties to the dispute, while in contrast, the settlement of a dispute by legal means involves the submission of the dispute by the parties to an arbitral tribunal or an international court, in this case the ICJ, whose decisions are of a binding nature on the disputants.

Although it may appear not difficult to recognise the difference between the two categories of dispute resolution methods, it seems necessary to shed some light on the main characteristics of the two peaceful methods falling under the second category, viz. arbitration and judicial settlement. Arbitration is defined by Art. 15 and 37 of the 1899 and 1907 HCsPSID respectively as "...the settlement of differences between States by judges of their own choice, and on the basis of respect for law" and by Oppenheim² as "...the determination of a difference between States through a legal decision of one or more umpires or of a tribunal, other than the International Court of Justice, chosen by the parties." On the other hand, judicial settlement was defined by Steinberger³ as "...the employment of the judicial functions of international courts...for the purpose of settling actual disputes between subjects of international law concerning their international relations." Shaw⁴ clarified the concept of international adjudication as comprising "...the activities of all international and regional courts deciding disputes between subjects of international law, in accordance with the rules and principles of international law." From the above definitions, it appears that the concepts of both methods are closely similar, especially as they both share the common features that they are solely concerned with

disputes involving States as parties⁵ and, therefore, State consent is a prerequisite for the utilisation of both means⁶; they both have the objective of reaching a final⁷ and binding⁸ settlement of the dispute; and also the decision in both methods (unless otherwise agreed between the parties) is to be in accordance with international law⁹. However, it was this last feature which gave rise to the long debated question regarding the distinction between the two methods and whether arbitration is a "...judicial process designed to reach a decision based on the application of legal principles, or...an extension of a diplomatic process aimed at finding a middle ground that, it is hoped, will be perceived as fair and acceptable to the parties."¹⁰ The view which upholds the judicial nature of arbitration is illustrated by the statement of Professor Carlston¹¹ who, whilst acknowledging the element of compromise in the decisions of arbitral tribunals, maintains that "...it remains a judicial process characterised by a respect for law and legal process", a view which coincides with the definition of arbitration presented by the 1899 and 1907 HCsPSID cited above, which indicated that the award of the tribunal is to be on the "basis of respect for law". Scott¹², however, drew a distinction between the basis of respect for law and the application of principles of law¹³ by arguing that "...the two are not co-extensive, the possibility of compromise is not thereby excluded, because arbitrators may respect law without following it". The arguments in favour of the distinction between arbitration and judicial settlement were based on a number of criteria¹⁴, a comprehensive examination of all of which would fall beyond the scope of this thesis. Nevertheless, it appears necessary in this respect to shed some light on a fundamental factor which served as one of the bases of the arguments regarding the distinction between the two methods, namely, the jurisprudence of international arbitral tribunals and the effect of their decisions on the development of international law. The argument in this regard may be based on two foundations. The first

is regarding the temporary nature of arbitral tribunals which, even in the case of the PCA, cease their duties once they have rendered an award. Arbitral tribunals are therefore deprived of one of the fundamental characteristics of an international judicial court *capable of building a real case law*, viz. permanency¹⁵. This could be understood from the statement made by Brierly¹⁶, who indicated that an arbitrator:

“...differs from the judge of a standing court of justice in being chosen by the parties, and in the fact that his judicial functions end when he has decided the particular case for which he was appointed. The distinction is important, because a standing court is able to build up a judicial tradition and so to develop the law from case to case; it is, therefore, not only a means of settling disputes, but to some extent a means of preventing them from arising [emphasis added].”

It may be said that the most significant attempt to overcome this issue was the establishment of the Permanent Court of Arbitration by the 1899 HCPSID which, as Pinto points out “...confirmed the evolution of arbitration as an essentially judicial mode...”¹⁷. Nevertheless, the creation of the PCA added nothing new to the issue and the fundamental principle of the parties’ freedom to constitute the tribunal for each individual case (which ceases its duties after reaching the award) still remained¹⁸. This was recognised through the comments made by the founders of the PCA who considered the name PCA a misnomer, as the court’s nature is in contradiction with the nature of a real permanent Court¹⁹. This fact, as we shall examine in Chapter Five²⁰, later induced the parties to the 1907 HCPSID to address the cravings of the international community for ‘a real permanent court’ through the unsuccessful Draft Convention on a Judicial Arbitration Court, which later paved the way for the establishment of the PCIJ.

The second foundation to the argument about the distinction between arbitration and judicial settlement may be the decisions of arbitral tribunals. In this regard, those who argue in favour of the distinction believe that, unlike proceedings before the ICJ²¹, an arbitral tribunal, despite being bound by its legal obligations under the *compromis* (when it expressly states so) to base its decisions in accordance with law, shows an inevitable tendency to waive the application of strict principles of law in order to reach an acceptable settlement of the dispute²² by the application of other considerations, such as justice or equity or *ex aequo et bono*²³. The roots of such a belief may be traced back to the Greece of Aristotle, who was quoted by Grotius in the 17th century as saying:

an equitable and moderate man will have recourse to arbitration rather than to strict law...because an arbitrator may consider the equity of the case, whereas a judge is bound by the letter of the law. Therefore arbitration was introduced to give equity its due weight.²⁴

However, in criticising this approach, Lauterpacht pointed out that "...there exists in any case the very strongest objection to a view that decisions of an adjudicating body can be partially legal and partially non-legal. A body wielding such powers is not a legal body at all."²⁵ In this regard, since arbitration, as Reisman²⁶ pointed out, is "a creature of contract", it may be argued that if the basis of the decision of the tribunal specified by the parties in the *compromis* is to be in accordance with international law, then the tribunal must confine itself to acting within the sphere of action defined in the *compromis*, and any departure from this principle has been generally accepted²⁷ as rendering the award null and void on the ground of excess of jurisdiction (*exces de pouvoir*)²⁸. This also may be supported by the provisions of Art. 38 of the Statutes of both the PCIJ and the ICJ, as well as Art. 2(2.i) of the ILC Model Rules on Arbitral Procedure, in which the prior consent of

the parties is a basic prerequisite for the tribunal to make a decision *ex aequo et bono*. However, if the parties expressly granted such authority to the tribunal, the question regarding the development of international law by such a decision still remains controversial²⁹. Despite the complexity of this issue, the debate as to whether arbitration is judicial or diplomatic in nature may be concluded by the lengthy remark of Judge Holtzmann³⁰ who indicated that:

To this long-debated question, I have two observations and one more fundamental comment. First, 'diplomatic' and 'judicial' approaches often lead to similar results, by application of those principles, in parties receiving less than total victory or complete defeat. Second, compromised decisions are not always advantageous, because reasoned arbitral awards shown to be grounded on legal principles can (even if disappointing) often be more easily accepted, intellectually or politically, than decisions that can not be seen to have objective motivation. Third-and most important- the question of the nature of arbitration need not be debated at all, for arbitration is whatever the parties mutually agree that it should be. If parties want their dispute to be decided in accordance with established procedures and by application of defined legal principles, they are free to say so, or, alternatively, they are equally free to agree upon other procedures and guidelines for decision.

2. The Origins of Present Day Arbitral Practice:

An all-inclusive examination covering the settlement of international differences by arbitration in the perspective of world history would lead us back into the mists of antiquity. The evidence provided through ancient inscriptions and literature dating as far back as the ancient Greek era shows that arbitration is a method that has been employed for the settlement of disputes for more than 20 centuries³¹. To trace arbitral practice over such a period would require more than one thesis. However, the limited scope of this thesis

permits us to focus only on the starting point of current arbitral practice, which is generally ascribed to the settlements of certain controversies that arose between the mother country, Great Britain, and its former colony, the USA in 1794 under the Jay Treaty and 1871 under the settlement of what are known as the Alabama Claims. Both of these played a major role in the formation of some of the basic principles of international arbitration and adjudication which remain to this day the common law practice in those two areas.

2.1. The 1794 Arbitration under the Jay Treaty:

The 1794 Treaty of Amity, Commerce and Navigation, commonly known as the Jay Treaty³², between Great Britain and the USA is, due to its substantial impact on arbitral practice and the major role it played in the renaissance of international arbitration at the end of the 18th century after a period of abeyance³³, considered by the vast majority of writers³⁴ as the starting point of contemporary international arbitral practice³⁵.

The initiative for the negotiations that led to the conclusion of the treaty was taken by George Washington, the first American President, with the aim of resolving the differences³⁶ between the two States which still existed after the end of the American War of Independence and also to improve Anglo-American relations which were strained, especially after Great Britain entered into the war of the French Revolution. Therefore, with the aforesaid objectives in mind, President Washington, after the situation further deteriorated in 1794 and threatened to lead to war, sent Chief Justice John Jay as Envoy Extraordinary to London to negotiate with the British Secretary of State for Foreign Affairs, Lord Greenville, on a settlement of the issues outstanding between the two nations. The result was the signing of the treaty on November 19, 1794 (ratification exchanged on October 28, 1795)³⁷. The Treaty provided for three mixed commissions to deal with the

questions that could not otherwise be disposed of in the negotiation of the treaty, which also classified the questions that were to be submitted to each of the commissions. Art. 8 of the treaty embodied certain provisions regarding the payment of the expenses of the commissions and also the replacement of any of the members of the commissions in certain circumstances. The treaty also specified the method of appointing the members of all three commissions, a fixed time limit of 18 months for the reception of claims submitted to the second and third commission, which was subject to extension in certain cases, and the method by which the commissions were to reach their award, which was by majority vote. The practice of appointing a neutral member as umpire, however, was not introduced in the provisions of the treaty³⁸.

The first commission set up under Art. 5 of the treaty was charged with the determination of the precise position of the Saint Croix River, indicated in Art. 2 of the 1783 Paris Peace Treaty, which formed a part of the north-eastern boundary of the USA with Canada. According to Art. 5, the members of the first commission were three in number, one to be appointed from each side, and the third (the umpire) to be appointed either by agreement between the aforesaid members or, in case of failure to reach an agreement, by lot in their presence. In fact, it proved unnecessary to resort to lot and the commission was able to reach a unanimous award on the issue on October 25, 1798³⁹.

The second commission, set up under Art. 6 of the treaty for the purpose of dealing with allegations of judicial obstructions by certain American States to the collection of certain debts owed to British creditors was, according to the article, to be composed of five members, two to be appointed from each side and the umpire to be appointed either by agreement between them or, in case of their failing to reach an agreement, by lot in their presence. In the beginning, the commission found no difficulty in deciding a large number

of claims but, as a result of serious differences of opinion between the members that arose later, especially over the issue of whether it was the duty of the British creditors to exhaust local remedies before resorting to the commission, the commission was dissolved after the two American commissioners withdrew in 1799. However, after extensive negotiations, the issue was settled later by the Kings-Hawkesbury Convention of January 8, 1802, which annulled Art. 6 of the Jay Treaty and determined that the USA should pay a lump sum of \$600,000 in three annual instalments to Great Britain as a settlement of all claims⁴⁰.

The number and method of appointment of members of the third commission, set up under Art. 7 of the treaty with the task of dealing with the claims arising from the unlawful seizure of American ships and cargoes by Great Britain during its war with France, was the same as the second commission. The third commission met a number of difficulties during its work. First of all, it faced claims of jurisdiction made by the American Commissioners, in cases already decided by British courts. After this question was resolved, the commission's work was again brought to a standstill after the 18 month time limit for the bringing of claims under Art. 7 of the Jay Treaty elapsed. After this issue was also resolved, the work of the commission was again halted in 1799 when the British commissioners suspended the proceedings until the dispute between the members of the second commission was resolved. After the 1802 Kings-Hawkesbury Convention, the commission met again and was able to work smoothly until the end of its proceedings on February 2, 1804. The commission rendered 565 awards, 553 of them in favour of American subjects and the other 12 in favour of British claimants⁴¹.

Schwarzenberger⁴² cites a number of factors which indicate the judicial character of all three commissions established under the Jay Treaty, namely, the professional qualifications of the members of all three commissions, which chiefly consisted of lawyers

of a wide cultural background; the provision that members of all three commissions were to swear that they would impartially render their award on each subject according to the evidence laid before them by each party⁴³, a provision which provided the commissioners with a degree of autonomy against unwarranted interference by either of the parties; the basis of the decisions of all three commissions, indicated in the treaty either by implication, such as in the case of the first commission which depended generally on the interpretation of the 1783 Paris Peace Treaty, or expressly in the case of the second commission which was according to Art. 6, to decide in accordance with the merits of the several cases "...and as equity and justice shall appear to them to require", and the third commission which was to decide as indicated in Art. 7 "...according to the merits of the several cases, and to justice, equity and the law of nations"; the quality of the awards rendered by the commissions, especially the third commission, whose awards produced the most remarkable contributions to substantive international law on major issues such as necessity and maritime neutrality⁴⁴; the legal effects of the awards of all three commissions which were all to be final and conclusive⁴⁵; and the structure of the commissions. In addition to the above, the commissions of the Jay Treaty established a number of important precedents which, to this day, form some of the fundamental elements of international judicial and arbitral proceedings, such as the tribunal's right to determine its own jurisdiction (*competence de la competence*) and the exhaustion of local remedies⁴⁶. However, it appears that the overall significance of the Jay Treaty arbitrations was that, despite the difficulties faced by the second and third commissions, they affirmed the efficiency of arbitration as a means of settlement of even the most perilous forms of controversies which would otherwise have been settled by war⁴⁷.

2.2. The 1871 Alabama Claims Arbitration:

The 1871 Treaty for the Amicable Settlement of all causes of differences between Great Britain and the USA, signed in Washington⁴⁸ for the settlement of the differences arising out of what are known as the Alabama Claims, marked a new epoch in the field of international arbitral practice. The case arose out of claims made by the US Government that Great Britain had, during the American Civil War, violated neutrality by allowing the *Alabama*, which was a ship used by Southern States against the Northern States during the war, along with a number of other ships alleged to have committed acts of depredation during the war, to be built on British soil and to be freely admitted into the ports of British colonies⁴⁹. One of the most significant aspects of the whole case was the parties' agreement to submit the dispute to arbitration which, in the first instance, was avoided on the ground that the national honour of the parties was at stake⁵⁰. However, after tense negotiations, the agreement to submit the dispute to arbitration was finally signed at Washington on May 8, 1871.

The first and foremost distinguishing feature of the treaty was the laws that were to be applied by the tribunal. Three rules were especially adopted for this specific case, which were generally known as the Three Rules of Washington⁵¹. It was agreed that the tribunal was to apply these rules irrespective of their consistency with customary international law as it stood when the acts, which were the subject of the dispute, had been committed, a provision which was adopted in view of the uncertainty of the principles of international law that governed the duties of neutrality at the time when the acts were committed⁵².

Another striking feature of the treaty was that it provided in Art. 1, for the first time, for the participation of a third party neutral authority, along with Great Britain and the USA, in the appointment of the members of the tribunal, who were in this case five in

number, one each to be appointed by the Queen of Great Britain, the President of the USA, the King of Italy, the President of the Swiss Confederation, and the Emperor of Brazil. The Treaty also provided that a party, in certain cases, might appoint another arbitrator to replace one originally appointed by that party, and in case of failure to do so within two months, the King of Sweden and Norway might be requested to act as an appointing authority.

The tribunal was able to reach a decision on September 14, 1872, by a majority of four votes to one, by which it indicated that Great Britain had failed, by omission, to fulfil the duties prescribed in the Three Rules of Washington established by Art. 6 of the Treaty regarding the ship, the *Alabama*⁵³ and by which the USA was to paid a lump sum of \$15,500,000 in compensation by Great Britain.

The Alabama Claims arbitration had a major influence on the creation of a number of international instruments⁵⁴ and introduced into international judicial law a number of principles⁵⁵ which, ever since, have been standard practice in international arbitral proceedings⁵⁶. These include a tribunal model containing a predominant neutral element; the simultaneous submission by the parties of the memorials, counter-memorials and evidence, thereby avoiding the labelling of parties as plaintiff and defendant and the resentment that may consequently occur⁵⁷; and the provision in Art. 7 that the award "...shall be made in writing and dated, and shall be signed by the arbitrators who may assent to it." Moreover, although the treaty did not oblige the members of the tribunal to reason its award, the tribunal did so and also, for the very first time, permitted the common law practice of permitting the publication of dissenting opinions. The assertion of the tribunal's right to determine its own jurisdiction⁵⁸, although a precedent established by the commissions acting under the Jay Treaty, and also the formulation of the laws that were

applied by the tribunal through the Three Rules of Washington⁵⁹, were other features of the *Alabama* case which gained general recognition.

The significant aspect of the Alabama Claims arbitration and the impact it had on arbitral practice following that period can be deduced from the words of Bodie⁶⁰ who in this respect stated:

“Two large states had agreed to submit to arbitration a case that had brought them to the brink of war. Until this point, arbitrations had been sporadic and over non-vital interests, settling disputes over such issues as boundaries, fisheries, maritime prizes, and pecuniary claims. This case really did serve to change the tone of international arbitration.”

3. Arbitral Practice in the 20th Century:

The momentum of arbitral treaty practice and State recourse to arbitration⁶¹, as well as the establishment and provisions of the past major arbitral mechanisms adopted for the application of arbitration on the multilateral level and State attitudes towards them⁶² will be considered elsewhere in this thesis. The following discussion is intended only to examine very briefly the major developments that have occurred in the field of international arbitral practice during the 20th century. In this regard, it appears that arbitral practice evolved rapidly in that era and developed in accordance with the changing circumstances and needs of the world society. As a result, numerous national institutions concerned with arbitration⁶³ emerged and arbitration within the international level was no longer confined to the ‘traditional’ area of inter-State disputes (i.e. boundary delimitation, treaty interpretation, State responsibility.... etc) but also extended to other new and specialised categories of disputes such as those concerning intellectual property⁶⁴ and even sports⁶⁵.

Among the major developments in the field of international arbitration during the 20th century⁶⁶ are the following:

- (A) The emergence of the rapidly expanding area of international commercial arbitration which led to the establishment of a number of institutions and agencies devoted to the settlement of disputes within the commercial context, such as the ICC, the ICSID, the AAA, the LCIA, the SCC and the NAI⁶⁷, and also the adoption of a number of procedural rules that are to be applied by the parties to such categories of disputes⁶⁸. In this regard, one may notice a reciprocal relationship between the two areas of international commercial arbitration and inter-State arbitration, inasmuch as, while the latter provided the basic foundation from which the rules of procedure of international commercial arbitration were derived, the provisions of certain mechanisms for the arbitral settlement of inter-State disputes were based on arbitral rules which were originally framed for their application in disputes which fall within the commercial context. An example is the PCA's 1992 Optional Rules for Arbitrating Disputes between Two States, which were based on the UNCITRAL Arbitration Rules of December 15, 1976⁶⁹. In actual practice within the context of inter-State disputes, the UNCITRAL Rules were applied recently, after a few slight modifications, by the tribunal in the 1997 *Dispute over Inter-Entity Boundary in Brcko Area* case between Republika Srpska and the Federation of Bosnia and Herzegovina⁷⁰.
- (B) The 20th century also witnessed the emergence of the concept of 'specialised arbitration' whereby the agreement to arbitrate, in certain cases, requires the appointment of persons knowledgeable of the questions that may arise under the agreement. This new feature, as Sohn⁷¹ pointed out, may be ascribed to the fact that:

Modern international agreements tend to be more sophisticated than the older agreements which were usually satisfied with general principles. The new ones tend to be more specialised, are frequently technical in character, and their interpretation may require appropriate technical expertise.

The concept of specialised arbitration also applies to the functioning of certain institutions that specialise in the arbitral settlement of a certain category of disputes, such as the ICC regarding commercial disputes and the ICSID regarding investment disputes. However, within the context of inter-State disputes, the foremost example of this form of arbitration appears to be the arbitral mechanisms established under the 1982 UNCLOS⁷².

(C) The settlement of a multitude number of claims between citizens of different States; between citizens of a certain State and another State; or between States themselves⁷³ by a mixed claims commission (mixed arbitral tribunal) established by agreement between two or more States, is a practice which gained great significance in the 20th century. The origins of this practice can be traced to the second and third commissions established under the 1974 arbitration under the Jay Treaty⁷⁴; the Mixed Arbitral Commissions established by the Peace Treaties⁷⁵ following the First World War between the Allied and Associated Powers on the one side, and each of the Central Powers on the other, and in the post WW2 era, the Mixed Claims Commissions established under the 1953 London Agreement on German External Debts⁷⁶. Nevertheless, it was the Iran-USA Claims Tribunal established under Art. 3(1) of the 1981 Claims Settlement Declaration between Iran and the USA⁷⁷ and praised by Lillich⁷⁸ as “...the most significant arbitral body in history” and by Shaw⁷⁹ as “...one of the most sophisticated attempts at resolving international claims attempted” which

underlined the effectiveness of mixed claims commissions, due to the magnitude of the task and the quality of its awards⁸⁰. It restored the status of arbitration in general as a means of settlement of even the most complicated and intricate forms of disputes.

4. The Main Attractive Features of International Arbitration:

Arbitration in general is a flexible means of dispute resolution in which the *compromis* plays the role of the statute of the tribunal. What makes arbitration so special is that the *compromis* in *ad hoc* arbitration is formulated by mutual agreement between the disputants who lay down the basic procedural guidelines for the work of the tribunal. This reflects one of the main distinguishing characteristics of inter-State arbitration, namely, party autonomy. The following discussion is intended to shed some light on the main attractive procedural features of inter-State arbitration, which made arbitration a preferred means of inter-State dispute settlement, namely, the parties' influence over the composition of the tribunal; their freedom to specify the law(s) applied, the main procedural guidelines of the tribunal; the basic considerations with regard to the award; the possibility of secrecy; and non-intervention by third parties⁸¹.

4.1. The Parties' Influence over the Composition of the Tribunal:

One of the main traditional distinguishing factors of arbitration is the freedom of the parties to select and choose the members of the tribunal. However, in this respect, parties, when selecting a specific person as an arbitrator, are guided by certain considerations, mainly the moral and professional qualifications of the proposed arbitrator(s). In this respect, Arts. 23 and 44 of the 1899 and 1907 HCsPSID respectively regarding the

requirements of the four arbitrators selected by the parties to the Conventions both pointed out that they were to be persons “...of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of [a]rbitrator.” Art. 2 of the Statute of the ICJ regarding the Organisation of the Court indicated 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 recognised competence in international law.

However, with the decline in general treaties of arbitration⁸² and the emergence and rapid expansion of the area of specialised arbitration, the requirements of the arbitrator(s) also include that the arbitrator(s) are to be knowledgeable or ‘specialised’ in the questions that may arise under the agreement from which the obligation to arbitration derives⁸³. For example, with regard to international investments disputes, Art. 9 of the ICSID Arbitration (Additional Facility) Rules indicates that the arbitrators are to be “... persons of high moral character and recognised competence in the field of law, commerce, industry or finance, who may be relied upon to exercise independent judgement”. In the domains of inter-State arbitration, the expertise requirement can be inferred from Art. 3(5) of the 1958 ILC Model Rules on Arbitral Procedure which indicates that, subject to the “... *special circumstances of the case* ...” the arbitrators shall be selected “ from among persons of recognised competence in international law”. Moreover, this requirement is clearly expressed in Art. 2(1) of Annex VII (Arbitration) of UNCLOS III which states that “[e]very State Party shall be entitled to nominate four arbitrators, each of whom shall be a person experienced in

maritime affairs and enjoying the highest reputation for fairness, competence and integrity”⁸⁴.

Nevertheless, State practice indicates that States have entrusted persons from various categories as arbitrators, such as Heads of States⁸⁵ in the *Beagle Channel* case⁸⁶, Chiefs of Justice of National Supreme Courts in the 1928 *Tinoco Concessions* arbitration between Great Britain and Costa Rica⁸⁷, international lawyers in the *Island of Palmas* arbitration⁸⁸, and even the Secretary General of the UN was appointed as an arbitrator in the 1986 *Rainbow Warrior* case between New Zealand and France⁸⁹. In all of the aforesaid cases, the tribunal was composed of a sole arbitrator. One of the main reasons that induces the parties to a dispute to entrust a sole arbitrator with the task of arbitrating a dispute, is the saving in expenses and time⁹⁰. Nevertheless, Simpson and Fox⁹¹ point out that such practice nowadays seems to be rare, inasmuch as in modern arbitral practice, the arbitrator is expected to give a decision on his own personal and undivided responsibility. Therefore, States, having that in mind, are less willing to place the entire responsibility upon the shoulders of one man. In addition to this possible explanation for States’ non-preference of the single arbitrator tribunal, there appear to be certain other factors which may induce States not to resort to this form of tribunal, such as the fear of corruption, bias towards one of the parties, resignation or even death of the arbitrator and the unnecessary extra expenses and delay that may result thereby. Moreover, the magnitude and gravity of the issues at stake may be two other factors which guide States’ determination as to which form of tribunal to select. If the dispute involves multitude claims on the part of one or both parties, it appears logical that the entertainment of such a dispute would be too heavy a burden upon one arbitrator. Moreover, the importance of the issues involved may also become another influential factor inducing the parties to seek a decision on the dispute based on the

responsibility and determination of more than one arbitrator. This may explain the preference for collegiate tribunals composed of an uneven number of arbitrators, i.e. three-man and five-man tribunals⁹², especially the former, which is the most resorted to in practice⁹³. In this regard, Carlston⁹⁴ cites one of the main advantages of three-man tribunals over tribunals composed of a sole arbitrator, namely, that while the arbitrator in the latter only hears the arguments of the agents appointed by the parties, the neutral member or ‘umpire’ in three-man tribunals, whose vote is decisive in the case where the two national arbitrators disagree, will hear in addition to the arguments of the respective agents of each party, the views of the national arbitrators.

The five-man tribunal is the second most resorted to in practice after the three-man tribunal. The reasons why these forms of tribunals are less resorted to in practice than three-man tribunals, according to Carlston⁹⁵, is that they are more expensive than three-man tribunals and more cumbersome to select and to administer. However, despite these considerations, five-man tribunals are provided for in almost all of the major inter-State arbitral mechanisms adopted during the past century⁹⁶ and, moreover, a number of important international arbitrations that took place during the second half of the 20th century were of this kind⁹⁷.

4.2. The Parties’ Freedom to Specify the Law(s) Applicable:

In principle, the parties in the *compromis* specify the basis of the decision of an arbitral tribunal. Almost all the most recent international agreements for arbitration provide for international law as the applicable law by the tribunal⁹⁸. International law is also to be applied in the case where the *compromis* makes no express provision for the law to be applied by the tribunal⁹⁹. The parties may prefer to apply certain other rules to govern the

decision of the tribunal, such as, for example, the Three Rules of Washington, which were applied in the *Alabama Claims* arbitration¹⁰⁰, or the principles specified in the *British Guiana-Venezuela Boundary* dispute, which provided that fifty years' occupation should give rise to a prescriptive title to territory¹⁰¹, and the *Trail Smelter* case¹⁰², which provided that the law applicable was "the law and practice followed in dealing with cognate questions in the United States as well as international law and practice." In the absence of any international law applicable to a certain case, the tribunal is to make its decision in accordance with the principles of 'justice and equity'¹⁰³. However, as indicated by the practice of the PCA in the *Norwegian Shipowners' Claims* case¹⁰⁴, the words justice and equity cannot, in this context, be understood in the traditional sense in which these words are used in 'Anglo-Saxon' jurisprudence and are to be distinguished from any particular system of jurisprudence or the municipal law of any state¹⁰⁵. The tribunal, as a general rule, may not enter a finding of *non liquet*¹⁰⁶. This view is also drafted in Art. 11 of the ILC Model Rules which indicates that "The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of the law to be applied".

As to the power of an arbitral tribunal to decide *ex aequo et bono*, some international instruments¹⁰⁷, in the absence of any agreement to the contrary¹⁰⁸, do empower a tribunal to decide on this basis¹⁰⁹.

4.3. The Parties' Freedom to Specify the Major Procedural Guidelines Regarding the Functioning of the Tribunal:

The parties to a tribunal of arbitration are represented by agents and counsel or advocates. The agent is the direct representative of his government and acts as an intermediary between his government and the tribunal, while the counsel or advocates are

retained by the parties for the prosecution and defence of their rights and interests before the tribunal¹¹⁰. However, agents or counsel need not be lawyers¹¹¹, although self-interest will ensure that governments will select persons of acknowledged competence in international law to represent them before an arbitral tribunal¹¹².

The rules of procedure of an arbitral tribunal are usually either specified in the *compromis*, or, in the case where the rules of procedure in the *compromis* prove to be insufficient, formulated by the tribunal¹¹³, and in some other cases, although not often, they may be negotiated in whole or in part between the agents of the two parties¹¹⁴. Arbitral procedure with regard to the presentation and rebuttal of claims by each party is comprised, in general, of two distinct phases¹¹⁵. The first is the written pleadings which usually consists of the memorial or 'case'¹¹⁶; the counter-memorial or 'counter-case'¹¹⁷; the reply¹¹⁸; and the rejoinder¹¹⁹. The written pleadings are all to be made by the order and within the time limit fixed by the *compromis*, which may be extended either by mutual agreement between the parties or by the tribunal, when it deems it necessary for reaching a just decision and each party is to communicate a certified true copy of every document produced by it to the other party¹²⁰.

The written pleadings may be filed by the parties either simultaneously or successively, although each of these approaches has its disadvantages. For example, if the parties agree to file their pleadings successively, then they must bear in mind that the party which files its pleading in the beginning is the plaintiff while the other is to be considered the defendant. There may be genuine difficulty in reaching agreement on this point, such as, for example, in territorial disputes where both parties may consider themselves plaintiffs, or in a complex case where each party has claims against the other. Therefore, the solution to this procedural difficulty is the simultaneous filing of the pleadings, a

practice engendered through the *Alabama Claims* arbitration¹²¹, although this approach has its disadvantages, inasmuch as until the first pleading has been filed, neither of the parties can know the essential details of the case which it has to meet¹²².

The second phase of arbitral procedure is the oral hearings which, in principle, are directed to the issues that have developed by the written pleadings of the parties¹²³. Moreover, they are to be presented in the same manner; for example, if the written pleadings have been filed successively, the hearings are to be presented in the same order as the pleadings, while in the case where the pleading have been filed simultaneously, the tribunal is to determine the order of the hearings¹²⁴. This was the practice of the tribunal in the *Rann of Kutch* case, when by lot it selected India to present its oral hearings first¹²⁵. The oral hearings are to be presented by either the agent or counsel of each of the parties and the tribunal, after due notice, is to designate the time, place and the period of time allowed for the hearings¹²⁶. These are to be conducted by the president of the tribunal and, only when it is so decided by the tribunal with the consent of the parties, are to be made public. The records of the hearings are to be kept and signed by the president of the tribunal and the registrar or secretary, and only those so signed have an authentic character¹²⁷.

When the agents, counsel and advocates have completed their presentations and submitted all evidence and explanations to support their case, the proceedings shall formally be declared closed¹²⁸. Nevertheless, Art. 21(2) of the ILC Model Rules empowers the tribunal, as long as the award has not been rendered, to re-open the proceedings after their closure “...on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or if it considers, after careful consideration, that there is a need for clarification on certain points.” However, Simpson and Fox indicate that if this

prerogative is exercised by the tribunal, it should ensure that each party is given a reasonable opportunity of rebutting any new evidence that may be presented against it¹²⁹.

The proceedings may be discontinued in *ad hoc* arbitral settlements; however, such action is only possible by mutual agreement between the parties. On this issue, Art. 22(1) of the ILC Model Rules indicates that “except where the claimant admits the soundness of the defendant’s case, discontinuance of the proceedings by the claimant party shall not be accepted by the tribunal *without the consent of the defendant* [emphasis added]”. The requirement of the consent of the defendant party in this regard is presumably designed to safeguard the interests of the defendant party, which is unwilling to see the termination of the arbitration without securing from the tribunal a pronouncement in its favour. Therefore, in the case where the plaintiff party admits the soundness of the defendant’s case, the consent of the defendant would no longer be a prerequisite¹³⁰. In the case where the parties to a dispute reach a settlement on the dispute, that is, before the end of the proceedings of the tribunal, it is for them to decide on the procedure to be adopted in such event, such as, for example, whether the tribunal should immediately be dissolved or should first record the agreement reached¹³¹. However, Art. 23 of the ILC Model Rules indicates that the tribunal in such a case is to take note of the settlement and it may, if it thinks fit and at the request of either party, embody the settlement in the award.

4.4. The Freedom to Specify the Basic Considerations with Regard to the Award:

The award of an arbitral tribunal is to be rendered usually within a period fixed in the *compromis* which is also to indicate the method of reaching the award. This is usually based on the majority of votes of the members of the tribunal¹³² and their deliberations in

this respect are usually to be secret¹³³. The *compromis* usually indicates that the award is binding¹³⁴. The basic characteristics of the award according to the ILC Model Rules on Arbitral Procedure¹³⁵ are that:

- (a) It is to be drawn in writing and bear the date on which it was rendered;
- (b) It is to contain the names of the arbitrators and shall be signed by the President of the tribunal and the members of the tribunal who have voted for it;
- (c) It is to state the reason on which it was based;
- (d) It is, unless otherwise agreed upon by the parties, to be read in public sitting, the agents and counsel of the parties being present or duly summoned to appear; and
- (e) It is to be binding only on the parties to the dispute and carried out in good faith immediately, unless the tribunal otherwise has allowed a time limit for the carrying out of the award or any part of it.

When considering the provisions of some international treaties regarding the disputes that may arise between the parties with regard to the interpretation or execution of the award, we can find that some treaties indicate only that the question is to be submitted to the tribunal that rendered the award¹³⁶. Nevertheless, the ILC Model Rules under Art. 33 adopted a more strict approach in this respect by providing a fixed time limit of three months in which the parties are to refer the question to the tribunal that rendered the award and, in case of their failure to do so within the aforesaid limit, the issue may be referred to the ICJ at the request of either of the parties¹³⁷.

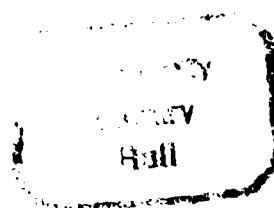
The right of the parties to demand revision of the award could be reserved in the *compromis*. This right, according to Art. 83 of the 1907 HCPSID, can be sought only on the ground of discovery of a new fact that is to constitute a decisive factor and that was unknown to the tribunal or to the party which demands revision at the time the discussion

was closed. The application must be addressed to the tribunal that rendered the award within a period fixed by the *compromis*. The tribunal, during the proceedings of revision, is to make a finding as to the existence of the new fact and rule on the admissibility of the application¹³⁸.

4.5. The Possibility of Secrecy:

Hearings before the ICJ are, as a rule, open to the public except in the case where the parties may demand otherwise¹³⁹. Moreover, the Court may "...after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings"¹⁴⁰. The Registrar is to transmit a copy of any application or notification of a special agreement instituting proceedings before the Court to, in addition to the Secretary-General of the UN, all members of the UN and to any other State(s) entitled to appear before the Court¹⁴¹, and any judgement rendered by the Court must be made public¹⁴². All of the foregoing aspects of proceedings before the ICJ give arbitration a significant advantage over judicial settlement when it comes to confidentiality. This can be clearly understood from the statement of Sir Robert Jennings¹⁴³ in which he pointed out that:

...any case before the International Court of Justice is *ipso facto* something of a *cause celebre*, and a special *cause celebre*, and a special object of juristic comment. Now that fact is that litigants, whether governments or individuals, are not usually ambitious to be remembered by posterity as parties to a *cause celebre*, especially a lost one. What governments very often want, when they consider whether to submit a dispute to litigation, is to sweep that dispute under the carpet as decently, fairly and as quietly as may be. Hence the relative popularity of quiet arbitration.



The parties, by resorting to *ad hoc* arbitration can, if they so wish, conduct the proceedings in total secrecy¹⁴⁴ and avoid the hanging of dirty laundry in public¹⁴⁵. This is because of the nature of *ad hoc* arbitration in which the whole scenario of the settlement process is mutually agreed upon between the disputants. Nevertheless, within the domains of institutionalised arbitration it appears that some instruments do provide for the discussions to be made public if the tribunal so decide, however, usually after the consent of the disputants is obtained. The traditional examples in this respect are Arts. 41 and 66 of the 1899 and 1907 HCsPSID respectively which both stated that the discussions “...are only public if it be so decided by the tribunal, with the assent of the parties”. Also in this respect Art. 16(1) of the 1958 ILC Model Rules on Arbitral Procedure provided that the hearings were to be public “...only if the tribunal so decides with the consent of the parties”.

4.6. Non-Intervention by Third States:

The Statute of the ICJ allows third States to intervene in cases pending before it under two circumstances, namely, in the case where a State may consider that it has an interest of a legal nature which may be affected by the Court’s decision whereby it is required to submit a request to the Court seeking its permission to intervene¹⁴⁶; and in the case where the construction of a treaty or convention to which the State willing to intervene is party is in question¹⁴⁷. However, again, the element of party autonomy in arbitration, *ad hoc* in particular, gives it virtue over judicial settlement when it comes to precluding third States from intervening in proceedings before the tribunal¹⁴⁸. Nevertheless, the provisions of some multilateral instruments on the peaceful settlement of international disputes by *inter alia* arbitration did permit third party intervention in circumstances almost similar to

those indicated above, such as Arts. 36¹⁴⁹ and 37¹⁵⁰ of the 1928 and 1949 General Acts for the Pacific Settlement of International Disputes respectively, or only in the case where the third State considers that "...its legitimate interests are involved..." as in Art. 33(1) of the 1957 ECPSD¹⁵¹.

Conclusion:

International arbitration is a method for the settlement of disputes that has its roots in the earliest civilisations of mankind. In its recent form, arbitral practice, as many writers have indicated, is a sequel of early Anglo-American practice, namely, the settlement of certain controversies under the 1794 Jay Treaty and the 1871 Alabama Claims arbitrations. However, the practice of arbitration subsequently evolved in accordance with the changes in the circumstances in the world community and covered a broad area of affairs, such as trade, navigation and labour. In the domain of inter-State arbitration, controversies arose over the nature of arbitration and whether it is a judicial process guided by the strict application of law or falls between the two methods of judicial settlement and conciliation by reaching an equitable but binding settlement of the dispute. Although the majority view appears to fall in favour of the latter, however, arbitral compromissory clauses are still included in the provisions of numerous international treaties and agreements on both the bilateral and multilateral levels and on a very large scale¹⁵². Indeed, arbitration is a voluntary means of dispute resolution, one in which the parties (mainly in the case of *ad hoc* arbitration) are to specify the main and basic procedural guidelines of the functioning of the tribunal. This underlines one of the most prominent characteristics of international arbitration, one which constitutes its very essence, viz., party autonomy¹⁵³ which is a

concept synonymous with a basic necessity in arbitral settlements, namely, consent. Although a number of attempts were made for the adoption of an international compulsory arbitral mechanism, some composed of stringent watertight rules of procedure¹⁵⁴ which intended to strip it of its voluntary nature, it may be said that the flexibility in arbitral proceedings¹⁵⁵, which maintains the parties' freedom to specify the tribunal's structure, composition, jurisdiction, procedures to be followed and the laws to be applied, as well as allowing the possibility of secrecy and avoiding intervention by a third party, distinguishes international arbitration from proceedings before the ICJ. It is this feature, which has attracted States to this method of settlement over the years.

Indeed, party autonomy is a traditionally fundamental principle of international arbitration, one that comes as a natural consequence of the doctrine of State sovereignty. This latter is also in itself composed of a number of sub-doctrines and principles, the most important of which, within this context, is the principle requiring the consent of States parties to a dispute before the initiation of any legal proceedings on the international level involving States as parties. In a naturally antagonistic world, means were necessary to be sought in order to deviate States from the course of armed conflict to peaceful and civilised means for the settlement of their differences. In the vanguard of those means was arbitration, which was viewed by many States as the most effective and reliable means of dispute settlement¹⁵⁶. However, in order to ensure that States made recourse to arbitration, several compulsory multilateral arbitral mechanisms were established, thereby stripping arbitration of its voluntary nature and also the element of party autonomy which were both among the main reasons why arbitration was so popular among States. Moreover, the framers of those instruments had to reconcile between the submission of important issues to the jurisdiction of international tribunals under the compulsory obligation arising from

them on the one hand, and the State consent requirement on the other. The basic characteristics involved in the above formula, as well as the attitudes of States towards those mechanisms in general, will be examined elsewhere in this thesis. However, it is interesting to point out that despite of the flexibility and attractive nature of arbitration, States' attitude towards arbitration in general has changed dramatically, and recourse to *ad hoc* inter-State arbitration reached the current level where the occurrence of a settlement every once in a while is considered as a rarity. The following chapter is intended to provide a number of possible reasons why States may opt for other means of dispute settlement rather than for arbitration, as well as presenting a brief evaluation of the momentum of arbitral practice within the domains of tribunal activity and treaty practice in the last two centuries.

Notes to Chapter One:

¹ Along with those peaceful means, Art. 33 provided that the parties may also "...resort to regional agencies or arrangements, or other peaceful means of their choice." For a highly authoritative and excellent background on the concept, application and functioning of all those means within the context of Art. 33, see in general, J.G. Merrills, *International Dispute Settlement*, Cambridge, the University Press, 3rd edition, 1998; and also D.W. Bowett, *The United Nations and Peaceful Settlement*, in Report of a Study Group of the David Davies Memorial Institute of International Studies (ed.), *International Disputes: The Legal Aspects*, London, Europa Publications, 1972, pp. 179ff (hereinafter cited as Bowett, *Peaceful Settlement*); M.N. Shaw, *International Law*, Cambridge, the University Press, 4th edition, 1997, pp. 717ff; The United Nations, *Handbook on the Peaceful Settlement of Disputes between States*, Sales No. E.92.V7; and P. Malanczuk, *Akehurst's Modern Introduction to International Law*, London, Routledge, 7th edition, 1997, pp. 273ff.

² *International Law: A Treatise*, London, Longmans Green & Co, vol. II, 1955, p. 22 (hereinafter cited as Oppenheim, *Treatise*, vol. II).

³ *Judicial Settlement of International Disputes*, (1981), 1, EPIL, pp. 120, 121 (hereinafter cited as Steinberger, *Judicial Settlement*).

⁴ *Op cit*, p. 745.

⁵ Note again that this analogy, as well as the whole discussion in this thesis, is concerned solely with the settlement of public international law disputes involving States as parties.

⁶ Consent is also equally required in the case of the settlement of disputes by diplomatic means. See *infra* 2.1. of Chapter Three.

⁷ E.g. Arts. 54 and 81 of the 1899 and 1907 HCsPSID respectively; Art. XLVI of the 1948 Pact of Bogota; and Art. 60 of the Statute of the ICJ.

⁸ E.g. Arts. 56 and 84 of the 1899 and 1907 HCsPSID; Art. XLVI of the 1948 Pact of Bogota; Art. 39 of the 1957 European Convention for the Peaceful Settlement of Disputes. Regarding judicial settlement see, Art. 94 of the UN Charter and Art. 59 of the Statute of the ICJ.

⁹ E.g. Arts. 15 and 37 of the 1899 and 1907 HCsPSID; and Art. 38(1) of the Statute of the ICJ.

¹⁰ Quoted from, H. Holtzmann, *Some Reflections on the Nature of Arbitration*, in S. Muller and W. Mijs (eds.), *The Flame Rekindled: New Hopes for International Arbitration*, London, Martinus Nijhoff Publishers, 1993, p. 67.

¹¹ *The Process of International Arbitration*, Westport, Greenwood Press Publishers, 1972, p. 259 (hereinafter cited as Carlston, *The Process*). See also, H. Cory, *Compulsory Arbitration of International Disputes*, New York, Columbia University Press, 1932, pp. 219f.

¹² *An International Court of Justice*, cited in R.Y. Hedges, *The Juridical Basis of Arbitration*, (1926), 7, BYIL, pp. 110-111.

¹³ See also, M.C. Pinto, *The Prospects for International Arbitration: Inter-State Disputes*, in A.H.A. Soons (ed.), *International Arbitration: Past and Prospects*, London, Martinus Nijhoff Publishers, 1990, pp. 63. 76-77 (hereinafter cited as Pinto, *Prospects*).

¹⁴ E.g. the greater influence of the parties in arbitral settlements on the composition of the tribunal; the parties' choice in appointing an individual arbitrator; that international adjudication is administered by permanent bodies epitomised in the ICJ while arbitration is not; that the decisions of arbitral tribunals are not regularly based on law; the right of the parties in arbitral settlements to exercise a decisive influence on the

competence and procedures of the tribunal; and the impact of arbitral awards on the creation and development of international law. See H. Mangoldt, *Arbitration and Conciliation*, in H. Mosler and R. Bernhardt (eds.), *Judicial Settlement of International Disputes: International Courts of Justice: Other Courts and Tribunals: Arbitration and Conciliation: An International Symposium*, Berlin, Springer Verlag, 1974, pp. 417, 424-428 (hereinafter cited as Mangoldt, *Arbitration and Conciliation*).

¹⁵ See, L. Jully, *Arbitration and Judicial Settlement: Recent Trends*, (1954), 48, AJIL, p. 380. For some opposing views, see, H. Mangoldt, *Arbitration and Conciliation*, *op cit*, pp.424-426; and H. Lauterpacht, *The Function of Law in the International Community*, Oxford, the Clarendon Press, 1933, n. 1 at p. 382 (hereinafter cited as Lauterpacht, *The Function of Law*).

¹⁶ *The Law of Nations: An Introduction to the International Law of Peace*, Sir Henry Waldock (ed.), Oxford, the Clarendon Press, 1963, p. 347.

¹⁷ Quoted from M.C. Pinto, *Prospects*, *op cit*, p. 72.

¹⁸ See, M.C. Pinto, *Structure, Process, Outcome: Thoughts on the 'Essence' of International Arbitration*, in S. Muller and W. Mijs (eds.), *op cit*, p. 46 (hereinafter cited as Pinto, *The Essence*).

¹⁹ See *infra* 1.5.2 of Chapter Five.

²⁰ See *infra* pp. 200-201.

²¹ See, Art. 38 of the Court's Statute.

²² See, H. Fox, *Arbitration*, in *International Disputes: the Legal Aspects*, in Report of a Study Group of the David Davies Memorial Institute of International Studies (ed.), *op cit*, pp. 101, 102 (hereinafter cited as Fox, *Arbitration*); M. Chaudhri (ed.), *International Arbitration Since 1945*, in *The Prospects of International Arbitration*, Karachi, Pakistan Publishing House, 1966, pp. 2-4; R. Hedges, *op cit* pp. 110-113; H. Lauterpacht, *The Function of Law*, *op cit*, p. 379; and M.C. Pinto, *The Essence*, *op cit*, pp. 58-62. See also in this regard the official reaction of the Government of India towards the award of the tribunal in the famous 1968 *Rann of Kutch* case with Pakistan at *infra* 2.2 of Chapter Two.

²³ For the basis of the decisions of international arbitral tribunals, see *infra* 4.2. of this Chapter.

²⁴ Quoted in M.C. Pinto, *The Prospects*, *op cit*, p. 65.

²⁵ H. Lauterpacht, *The Function of Law*, *op cit*, p. 380.

²⁶ *Systems of Control in International Adjudication & Arbitration: Breakdown and Repair*, London, Duke University Press, 1992, p. 6.

²⁷ See, K. Oellers-Frahm, *Judicial and Arbitral Decisions: Validity and Nullity*, (1981), I, EPIL, p. 118 (hereinafter cited as Oellers-Frahm, *Judicial Arbitral Decisions*); K. Carlston, *The Process*, *op cit*, pp. 140-169; and also Art. 35(a) of the ILC Model Rules.

²⁸ The major grounds of challenge of the validity of an arbitral award are specified in Art. 35 of the ILC Model Rules on Arbitral Procedure as the following:

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;
- (d) That the undertaking to arbitrate or the *compromis* is a nullity.

²⁹ In this regard, Hedges (*op cit*, p. 113) holds such an assumption to be “impossible”. However, Cory (*op cit*, pp. 229-230) draws a line between the basis of the decisions of international judicial courts and arbitral tribunals, and the legislative role of their decisions by indicating that “The power to act as a legislature is not a normal function of a court...this power to make new rules to govern the future relations of states must not be confused with the power sometimes granted a court by arbitration treaties to decide a dispute *ex aequo et bono*...”. For a wider discussion on this issue see, C. Gray & B. Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, (1992), 63, BYIL, pp. 97, 119-133.

³⁰ *Op cit*, pp. 67-68.

³¹ For a historical background on ancient and medieval arbitral practice, see in general, M.N. Tod, *International Arbitration Amongst the Greeks*, Oxford, Clarendon Press, 1913; J.H. Verzijl, *International Law in Historical Perspective*, Leyden, A.W. Sijthoff International Publishing Co, vol. VIII, 1976; and J.H. Ralston, *International Arbitration from Athens to Locarno*, London, Oxford University Press, 1929, pp. 153-193 (hereinafter cited as Ralston, *International Arbitration*).

³² For the text see, 52, CTS, p. 243.

³³ See, J.H. Verzijl, *op cit*, p. 222.

³⁴ E.g. G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, London, Stevens & Sons Ltd, vol. IV, 1986, p. 21 (hereinafter cited as Schwarzenberger, *International Law*); J.H. Verzijl, *op cit*, pp. 72-73; M.O. Hudson, *International Tribunals: Past and Future*, Washington, Carnegie Endowment for International Peace, 1944, pp. 3-4 (hereinafter cited as Hudson, *International Tribunals*); J.H. Ralston, *International Arbitration, op cit*, p. 191; H. Schlochauer, *Arbitration*, (1981), I, EPIL, pp. 13, 16 (hereinafter cited as Schlochauer, *Arbitration*); and H.M. Cory, *op cit*, p.4. For some authors who oppose this view see, C.G. Roelofsen, *The Jay Treaty and all that: Some Remarks on the Role of Arbitration in European Modern History and its 'Revival' in 1794*, in A.H.A. Soons (ed.), *op cit*, pp. 201-210; and Gray & Kingsbury, *op cit*, n. 1, p. 97.

³⁵ The 1794 settlement under the Jay Treaty was praised in the Presidential Address made by Judge Sir Muhammad Zafrulla Khan at the Special Commemoration Sitting of the ICJ in 1972 as “the historical landmark from which the trend which was to lead to the establishment of a true international judicial system is usually dated.” Quoted from ICJYB, (1971-1972), p. 130.

³⁶ The differences were regarding the North-Eastern boundary with Canada which in spite of the Paris Peace Treaty of September 3, 1783, still remained disputed; the timing of withdrawal of British troops and garrisons stationed on the frontier post of American territory; the compensation of British subjects for losses suffered due to legal obstacles laid by certain American States to the repayment of debts owed to British creditors; the military service of foreign nationals; the opening of West Indian trade to the USA; the abolition of the Rule of the War of 1756; and the claims arising out of the unlawful seizure of American ships and cargoes by Great Britain during its war with France. See, H. Schlochauer, *Jay Treaty (1794)*, (1981), I, EPIL, pp. 108-109 (hereinafter cited as Schlochauer, *Jay Treaty*).

³⁷ *Ibid*.

³⁸ This appears apparently in the composition of all three commissions in which the umpire agreed upon by the members of the first commission as well as the one in the third commission who was selected by lot, were both American while in the second commission, a British national was chosen by lot as umpire.

³⁹ See, J.B. Moore, *International Adjudications, Ancient and Modern: History and Documents*, New York, Oxford University Press, 1929, vols. 1-2. However, despite the parties' acceptance of the commission's award, further disputes arose later over the north-eastern boundary and a number of attempts to resolve the issue were undertaken under the 1814 Treaty of Ghent, the controversial award of the King of Netherlands in 1831 in what is known as the *North-Eastern Boundary* case and finally the Webster-Ashburton Treaty of August 9, 1842. See, H. Schlochauer, *Jay Treaty, op cit*, p. 110.

⁴⁰ *Ibid.* Also see in general, J.B. Moore, *op cit*, vol. 3.

⁴¹ See H. Schlochauer, *Jay Treaty*, *op cit*, p. 110; and in general, J.B. Moore, *op cit*, vol. 4.

⁴² *International Law*, *op cit*, pp. 30-40.

⁴³ See Arts. 5-7.

⁴⁴ See also H. Schlochauer, *Jay Treaty*, *op cit*, p. 110.

⁴⁵ See Arts. 5-7.

⁴⁶ J.H. Ralston, *International Law*, *op cit*, p. 193.

⁴⁷ See H. Lauterpacht, *The Function of Law*, *op cit*, pp. 145-147.

⁴⁸ For the text see, 143, CTS, p. 145.

⁴⁹ See, J.G. Wetter, *The International Arbitral Process: Public and Private*, Dobbs Ferry, New York, Oceana Publications INC, vol. I, 1979, pp. 40-43 (hereinafter cited as Wetter, *Arbitral Process*); and P. Seidel, *The Alabama*, (1981), II, EPIL, pp. 11-12.

⁵⁰ From the British point of view, the issue was a matter of pride, or in other words, the conduct of a traditional sea super-power being submitted to the jurisdiction of a court of arbitration to judge alleged claims of violation of neutrality from its side, while on the other side, the American attitude was strongly driven by the political pressure on the US government which was due to economic factors arising out of the costs of the Civil War in which the British interference caused a great deal of indignation. See, T.J. Bodie, *Politics and the Emergence of an Activist International Court of Justice*, Westport, Praeger Publishers, 1995, p. 23.

⁵¹ See Art. 6 of the treaty..

⁵² See G. Schwarzenberger, *International law*, *op cit*, p. 62.

⁵³ Moreover, the tribunal, by the same majority, reached the same conclusion regarding the ship, the *Florida*, and by a majority of three votes to two, that Great Britain had failed to fulfil the duties prescribed in the second and third of the Three Rules of Washington regarding the ship *Shenandoah*. On the other hand, the tribunal regarding the ships the *Georgia*, the *Sunter*, the *Nashville*, the *Tallahassee* and the *Thickamanga*, indicated that it was unanimously of the opinion that Great Britain had not failed, by any act or omission, to fulfil any of the duties prescribed by the aforesaid rules, or by the principles of international law not inconsistent therewith. For the original text of the award, see, J.G. Wetter, *Arbitral Process*, *op cit*, vol. I, pp. 48-55.

⁵⁴ E.g. the 1875 Draft Regulations for International Arbitral Procedure adopted by the *Institut de Droit International* which served as the basis of the discussions of the parties to the 1899 HCPSID on the topic of arbitral procedure, and also Arts. 5 and 8 of the 1907 Hague Convention XIII on the Rights and Duties of Neutral Powers in Naval War which were both a revised version of the Three Rules of Washington employed in the *Alabama* case. See, P. Seidel, *op cit*, p. 13.

⁵⁵ See G. Schwarzenberger, *International Law*, *op cit*, pp. 74-78.

⁵⁶ The *Alabama* case model was applied, after a few slight modifications, in a number of important disputes following 1872, such as the *Newfoundland Lobster* dispute between Great Britain and France; the 1893 *Behring Sea Fur-Sea* arbitration between Great Britain and the USA; and the 1899 *British Guiana-Venezuelan Boundary* case. See, *ibid*, pp. 81-93.

⁵⁷ This method was also employed by the tribunal in the 1968 *Rann of Kutch* case between India and Pakistan (7, ILM, 1968, pp. 633, 640) in which the memorials were filed simultaneously after the parties indicated that “it being understood that in the case neither of the Parties is to be considered as either claimant or defendant”.

⁵⁸ In this regard, the ICJ in its judgement in the *Nottebohm* case [Preliminary Objection] (ICJ Rep, 1953, pp. 111, 119) indicated that:

“Since the *Alabama* case, it has been generally recognised, following the earlier precedents, that in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.”

This principle is also embodied in Art. 36(6) of the Statute of both the PCIJ and the ICJ, and also Art. 48 and 73 of the 1899 and 1907 HCsPSID respectively.

⁵⁹ On this particular aspect of the *Alabama* case, Judge van Eysinga in the 1934 *Oscar Chinn* case (A/B 63, quoted in G. Schwarzenberger, *International Law, op cit*, p. 94, n. 104) pointed out that:

“...if in no given case, no international law exists or if the law is uncertain, it is comprehensible that the parties, in resorting to an international tribunal, should at the same time determine the law to be applied. The classic example of this is the *Alabama* case...”

⁶⁰ *Op cit*, p. 24.

⁶¹ See in general *infra* 1 of Chapter Two.

⁶² See Chapter Five of this thesis in general.

⁶³ To mention a few: Arbitration Tribunal of the Buenos Aires Commercial Stock Exchange; Australian Centre for International Commercial Arbitration; Belgian Centre for the Study of National and International Arbitration; Quebec National and International Commercial Arbitration Centre; China International Economic and Trade Arbitration Commission; Danish Chamber of Commerce Arbitration; German Institution of Arbitration; Hong Kong International Arbitration Centre; India Council of Arbitration; and the Vietnam International Arbitration Centre. For the rules of procedure of those, as well as other national and international arbitral institutions and courts, see (<http://www.internationaladr.com/intl.htm>) as visited on March 27, 2001.

⁶⁴ See for example the rules of procedure of the WIPO Arbitration and Mediation Centre at *supra* n. 63 below.

⁶⁵ E.g. the *Ad Hoc* Division of the Court of Arbitration for Sport that was set up in 1996 for the XXVI Olympic Games in Atlanta. For the rules of procedure of the CAS, see the website at *supra* n. 63.

⁶⁶ See L. B. Sohn, *International Arbitration in Historical Perspective: Past and Present*, in A.H.A. Soons (ed.), *op cit*, pp. 9, 17-22 (hereinafter cited as Sohn, *International Arbitration*).

⁶⁷ See, J. Hill, *The Law Relating to International Commercial Disputes*, London, Lloyds of London Press Ltd, 1994, pp. 465-471.

⁶⁸ E.g. the UNCITRAL Arbitration Rules, and the arbitration rules of the ICC and ICSID.

⁶⁹ It may be noted that the PCA’s Optional Rules are not a duplicate version of the UNCITRAL Arbitration Rules. The Rules were slightly modified in order “reflect the public international law character of disputes between States, and diplomatic practice appropriate to such disputes.” For the text of both rules see, The Secretary-General and the International Bureau of the PCA, *Permanent Court of Arbitration Basic Documents*, the Hague, 1998, pp. 41 & 237 respectively (hereinafter cited as the PCA, *Basic Documents*).

⁷⁰ 36, ILM, 1997, p. 396.

⁷¹ *International Arbitration, op cit*, pp. 17-18.

⁷² See in particular Art. 2 of Annex VII (Arbitration) and Annex VIII (Special Arbitration) regarding the requirements of the arbitrators appointed by the parties. A further example in this regard can be implied from Art. 3(5) of the 1958 ILC Model Rules on Arbitral Procedure which provided that “*subject to the special circumstances of the case*, the arbitrators shall be chosen from among persons of recognised competence in international law [emphasis added].”

⁷³ R. Dolzer, *Mixed Claims Commissions*, (1981), I, EPIL, p. 146 (hereinafter cited as Dolzer, *Commissions*).

⁷⁴ See *supra* p. 7.

⁷⁵ I.e. the 1919 Versailles Peace Treaty; the 1919 Saint Germain Peace Treaty; the 1919 Neuilly Peace Treaty; the 1920 Trianon Peace Treaty; the 1923 Lausanne Peace Treaty. See, N. Wuhler, *Mixed Arbitral Tribunals*, (1981), I, EPIL, pp. 142, 143 (hereinafter cited as Wuhler, *Mixed Arbitral Tribunals*).

⁷⁶ For the text, see, 333, UNTS, p. 2. On the Agreement, see, N. Wuhler, *London Agreement on German External Debts (1953), Arbitral Tribunal and Mixed Commission*, (1981), I, EPIL, p. 140 (hereinafter cited as Wuhler, *London Agreement*).

⁷⁷ 20, ILM, 1981, pp. 223, 231. For the awards produced by the tribunal, see the various volumes of *The Iran-United States Claims Tribunal Reports*, 1981.

⁷⁸ Cited at D. Caron, *The Nature of the Iran-United States Claims Tribunal and the evolving Structure of International Dispute Resolution*, (1990), 84, AJIL, p. 104.

⁷⁹ *Op cit*, p. 743.

⁸⁰ In this respect, Holtzmann indicated that the awards of the tribunal constituted “...a goldmine of information for prospective lawyers.” Cited in D. Caron, *op cit*, p. 104.

⁸¹ Note that it is not meant from the discussion in this part of the chapter to provide a comparison between international arbitral procedure and procedure before the ICJ, which can be found elsewhere. See *supra* n. 13 of this Chapter and also; D.W. Greig, *International Law*, London, Butterworth & Co Ltd, 1970, pp. 482-484.

⁸² See in general *infra* 1.2 of Chapter Two.

⁸³ L.B Sohn, *International Arbitration, op cit*, pp. 17-19.

⁸⁴ See also Art. 2(1) of Annex VIII (Special Arbitration) of UNCLOS III.

⁸⁵ It may be noted that when a Head of State is entrusted as an arbitrator, he or she usually does not examine and decide the matter personally, but remits the whole question to designated persons, the decision only being given in his or her name. See, W. E. Hall, *A Treatise on International Law*, Oxford, the Clarendon Press, 8th edition, 1924, pp.419-420.

⁸⁶ Queen Elisabeth II of Great Britain, see 17, ILM, 1978, p. 632.

⁸⁷ The Chief Justice of the USA, see 1, RIAA, 1948, p.369.

⁸⁸ The arbitrator was Max Huber who was a former member of the PCA. 2, RIAA, 1949, p. 829. For a good discussion on the proceedings of the case and the award, see, J.G. Wetter, vol. 1. *Op Cit*, pp. 189-249, and P. C. Jessup, *The Palmas Island Arbitration*, (1928), 22, AJIL, p. 735.

- ⁸⁹ 74, ILR, p. 241.
- ⁹⁰ H.V. Mangoldt, *Arbitration and Conciliation*, *op cit*, p. 524.
- ⁹¹ *International Arbitration: Law and Practice*, London, Stevens & Sons Ltd, 1959, p. 39.
- ⁹² However, there are examples, although rare, of arbitral tribunals that were composed of more than five arbitrators, such as in the case of tribunals dealing with international claims, ‘international claims tribunals’ e.g. the Claims Tribunals established under Art. 3(1) of the 1981 Claims Settlement Declaration between the USA and Iran (the Iran/USA Claims Tribunal), see, 20, ILM, 1981, pp. 223, 231.
- ⁹³ J.L. Simpson and H. Fox, *op cit*, pp. 39-40. See also H.V. Mangoldt, *Arbitration and Conciliation*, *op cit*, p.525. And D. H. Johnson, *The Constitution of an Arbitral Tribunal*, (1953), 30, BYIL, pp. 152, 164.
- ⁹⁴ *Codification of International Arbitral Procedure*, (1953), 47, AJIL, pp. 203, 209 (hereinafter cited as Carlston, *Codification*).
- ⁹⁵ *Ibid*, p. 208.
- ⁹⁶ E.g. the 1899 and 1907 HCsPSID; the 1928 and 1949 General Acts; the 1929 General Treaty of Inter-American Arbitration and Protocol of Progressive Arbitration; the 1948 Pact of Bogota; the 1957 ECPSID; the 1982 UNCLOS (Annex VII ‘Arbitration’ and Annex VIII ‘Special Arbitration’).
- ⁹⁷ E.g. the *Taba* arbitration, 27, ILM, 1988, p. 1421; and also 80, ILR, p. 244; and the *Hanish Island* case (see *infra* n. 18 in Chapter Two).
- ⁹⁸ C.Gray and B. Kingsbury, *op cit*, p.103.
- ⁹⁹ K. S. Carlston, *Codification*, *op cit*, p. 213.
- ¹⁰⁰ See *supra* p. 11.
- ¹⁰¹ British Parliamentary papers, C. 8439, 1897, cited in B.S. Murty, *Settlement of Disputes*, in M. Sorensen, *Manual of Public International Law*, London, Macmillan, 1968, pp. 673, 690.
- ¹⁰² 3, RIAA, 1949, pp. 1903, 1908.
- ¹⁰³ M.N. Shaw, *op cit*, p. 740, and K.S. Carlston, *Codification*, *op cit*, p. 213.
- ¹⁰⁴ 1, RIAA, 1948, pp. 307, 331.
- ¹⁰⁵ See J.L. Simpson and H. Fox, *op cit*, p. 129; M. Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes*, Cambridge, Harvard University Press, 1931, pp. 1051-1053; and C.W. Jenks, *The Prospects of International Adjudication*, London, Stevens & Sons Ltd, 1964, pp. 266, 316.
- ¹⁰⁶ J.L. Simpson and H. Fox, *Op Cit*, p.143.
- ¹⁰⁷ E.g. Art. 10(2) of the ILC Model Rules; and Art. 26 of the 1957 ECPSD.
- ¹⁰⁸ Regarding the stipulation of an agreement in order for an arbitral tribunal to decide *ex aequo et bono*, the tribunal in the *Rann of Kutch* case, after questions arose of whether it was empowered to decide on this basis, indicated that “as the parties have not by any *subsequent agreement consented* to confer the power upon the tribunal to adjudicate *ex aequo et bono*, the tribunal resolves that it has no such power.” See 7, ILM. 1968, pp.633, 643.

¹⁰⁹ On the issue of *ex aequo et bono* decisions, see in general, M. Huber, *The Power of the International Judge to give a Decision 'Ex Aequo Et Bono'*, London, Stevens & Sons Ltd, 1935; and H. Lauterpacht, *The Function of Law*, *op cit*, pp. 307-329

¹¹⁰ See Art. 62 of the 1907 HCPSID; and Art. 14(1-2) of the ILC Model Rules.

¹¹¹ M.O. Hudson, *International Tribunals*, *op cit*, p.87.

¹¹² K.S. Carlston, *Codification*, *op cit*, p.225.

¹¹³ Art. 12(1) of ILC Model Rules.

¹¹⁴ J.L. Simpson and H. Fox, *op cit*, p.152.

¹¹⁵ See Art. 63 of the 1907 HCPSID; and Art. 15 of ILC Model Rules.

¹¹⁶ The memorial or 'case' is the opening written pleading. The memorial communicated by the plaintiff party is to contain a statement that serves to advise the tribunal of the relevant facts, the laws to be applied, and the submissions. It is to be accompanied by all the documents and any other proofs relevant to the facts alleged therein that are available to the agent of that party, together with a list of the papers so filed. K.S. Carlston, *Codification*, *op cit*, p. 234.

¹¹⁷ The counter-memorial communicated by the defendant is to contain an admission or denial of the facts stated in the memorial, any additional facts, if necessary, observations concerning the statement of law in the memorial, a statement of law in answer thereto, and the submissions. It is also to be accompanied by all documents and other proofs relevant to the facts alleged in either the memorial or the counter-memorial available to the agent of the party filing the counter-memorial in addition with a list of the papers so filed. *Ibid*, p. 236.

¹¹⁸ The reply made by the plaintiff party is to deal only with the statement of the facts or law or submissions not adequately dealt with in the memorial and any new matter(s) or issue(s), if any, raised in the counter-memorial. It is to be accompanied by all the relevant documents and proofs that were not previously filed, upon which the agent relies in support of the new statement of fact made therein, together with a list of the papers so filed. However, the filing of the reply is to be at the discretion of the agent concerned, although the tribunal may, upon due notice, direct that a reply be filed, if in its judgement it deems that to be necessary. *Ibid*, p. 237.

¹¹⁹ The rejoinder is in reality the defendant party's reply to the reply of the plaintiff party. It is to be directed exclusively to the matters specified in the reply, and is also to be accompanied by all relevant documents and other proofs not previously filed upon which the agent relies in support of the new statements of fact made therein, with the list of the papers so filed. Its filing, as in the case of the reply, is at the discretion of the agent concerned, although the tribunal may again, upon due notice, direct the filing of the rejoinder, if it so deems necessary. *Ibid*.

¹²⁰ See Art. 15(3,5) of the ILC Model Rules and Arts. 63-64 of the 1907 HCPSID.

¹²¹ See *supra* p. 12.

¹²² See J.L. Simpson and H. Fox, *Op Cit*, pp.152-153. Such practice was resorted to in the *Rann of Kutch* arbitration between India and Pakistan in which the memorials were filed simultaneously after the parties indicated that "it being understood that in the case neither of the Parties is to be considered as either claimant or defendant." See 7, ILM, 1968, pp. 633, 640.

¹²³ See Art. 15(4) of the ILC Model Rules and Art. 63 of the 1907 HCPSID.

¹²⁴ J.L. Simpson and H. Fox, *op cit*, p.154.

¹²⁵ 7, ILM, 1968, p. 641.

¹²⁶ K.S. Carlston, *Codification, op cit*, p. 245.

¹²⁷ See Art. 16 of the ILC Model Rules and Art. 66 of the 1907 HCPSID.

¹²⁸ See Art. 21(1) of the ILC Model Rules and Art. 77 of the 1907 HCPSID.

¹²⁹ J.L. Simpson and H. Fox, *op cit*, p.213.

¹³⁰ *Ibid*, p. 219.

¹³¹ *Ibid*, p. 214. Art. IX of the *compromis* in the *Taba* arbitration which provided for a chamber of three members for the purpose of exploring “the possibilities of a settlement of the dispute” indicated in Art. IX (3) that “the arbitration process shall terminate in the event the parties jointly inform the tribunal that they have decided to accept a recommendation of the chamber and that they have decided that the arbitration process should cease. Otherwise, the arbitration process shall continue in accordance with this *compromis*.” See 27, ILM, 1988, pp. 1421, 1432.

¹³² E.g. Art. XLVI of the Pact of Bogota, Art. 5 of the Pact of the League of Arab States, Art. 78 of the 1907 HCPSID and Art. 28(1) of the ILC Model Rules.

¹³³ Art. 26 of the ILC Model Rules and Art. 78 of the 1907 HCPSID.

¹³⁴ However, an exception to this provision may be the Arbitration Commission created by the European Community in 1991 for the purpose of finding a peaceful solution for the crisis within the Socialist Federal Republic of Yugoslavia which in terms of its functioning was in reality not that of a true “independent judicial body” that rendered binding decisions, but instead a fact-finding body which rendered a number of advisory opinions that were not to be binding on any of the states concerned, see M.C. Craven, *The European Community Arbitration Commission on Yugoslavia*, (1995), 66, BYIL, p. 333.

¹³⁵ Arts. 28-32.

¹³⁶ E.g. Art. 82 of the 1907 HCPSID; Art. 7 of the General Treaty of Inter-American Arbitration; and Art. XLVII of the Pact of Bogota.

¹³⁷ It may be noted in this respect that, as a general rule, an arbitral tribunal has no power to interpret its award unless it expressly authorised to do so by the *compromis* or after obtaining the prior consent of the parties in the case where the *compromis* is silent on this issue. J.L. Simpson and H. Fox, *op cit*, p.245.

¹³⁸ Although Art. 38 of the ILC Model Rules is consistent with this provision, nevertheless, it provides for recourse to the ICJ in the case where it is not possible to make the application to the tribunal that rendered the award. It also indicates that the application is to be made within six months of the discovery of the new fact and within ten years after the award was rendered.

¹³⁹ Art. 46 of the Statute, and Art. 59 of the Rules of the Court.

¹⁴⁰ Art. 53 of the Rules of the Court.

¹⁴¹ Art. 40(3) of the Statute, and Art. 42 of the Rules of the Court.

¹⁴² Art. 58 of the Statute reads: “The judgement shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents”. See also Art. 93 of the Rules of the Court.

¹⁴³ From his *Report* at the International Symposium on the Judicial Settlement of International Disputes that took place in 1972 at the Max-Planck Institute for Comparative Public Law and International Law at Heidelberg, Germany, in H. Mosler & R. Bernhardt (eds.), *op cit*, pp. 35, 38.

¹⁴⁴ E.g. the *Dubai / Sharjah* case (91, ILR, p. 543); the second *Rainbow Warrior* case between New Zealand v. France (82, ILR, p. 499); and the *UK / US Heathrow Landing Charges* case (102, ILR, p. 216).

¹⁴⁵ C. Gray & B. Kingsbury, *op cit*, pp. 110-111.

¹⁴⁶ Art. 62 of the Statute of the ICJ.

¹⁴⁷ Art. 63 of the Statute.

¹⁴⁸ *Ibid*, p. 113.

¹⁴⁹ Art. 36 of the 1949 Revised General Act indicates that:

1. In judicial or arbitral procedure, if a third Power should consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit to the International Court of Justice or to the Arbitral Tribunal a request to intervene as a third party.
2. It will be for the Court or the Tribunal to decide upon this request.

¹⁵⁰ Art. 37 of the Revised General Act reads:

1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar of the International Court of Justice or the arbitral Tribunal shall notify all such State forthwith.
2. Every State so notified has the right to intervene in the proceedings; but, if it uses this right, the construction given by the decision will be binding upon it.

¹⁵¹ Further examples in this regard include Art. 84 of the 1907 HCPSID (see also Art. 56 of the 1899 HCPSID) which states that:

[w]hen it concerns the interpretation of a Convention to which the Powers other than those in dispute are parties, they shall inform all the Signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

¹⁵² See in general *infra* 1.2 of Chapter Two.

¹⁵³ *Ibid*, p. 68.

¹⁵⁴ The most notable in this respect was the proposed 'Draft Convention on Arbitral Procedure' of the ILC. See in general 3.2 of chapter five.

¹⁵⁵ See M.C. Pinto, *The Essence*, *op cit*, pp. 44-58.

¹⁵⁶ Arts. 16 and 38 of the 1899 & 1907 HCsPSID respectively.

CHAPTER TWO:

The Rise and Fall of Inter-State Arbitration

Introduction:

The following discussion aims at examining a number of possible factors which may induce some States to opt for diplomatic in lieu of legal means of inter-State dispute settlement techniques when the need arises. The discussion will also examine the attitudes of certain Communist and so-called Third World States towards the peaceful settlement of disputes by arbitration. However, to enable the reader to appreciate our discussion in this respect and the dimensions of the issues under focus, it appears necessary first of all in the following to provide a review of the momentum of inter-State arbitral practice in the past two centuries within the domain of both tribunal activity and, also, treaty practice.

1. The Momentum of Arbitral Practice in the Last Two Centuries:

Although the establishment, provisions and the evaluation of the past *general inter-State arbitral mechanisms* will be considered in detail in Chapter Five, this part of the chapter is intended to provide only the broadest and most general background on the evolution of inter-State arbitral practice from the 19th century till the current era¹. The discussion will be conducted under two sub-headings; the first is concerned with a limited examination of State practice within the domains of inter-State arbitral settlements: and the

second with international arbitral treaty practice on both the bilateral and multilateral levels and the scope and fields of their application.

1.1. Tribunal Activity:

When considering arbitral practice within the 19th century era, it appears from the well presented but imprecise² survey of Professor Stuyt³ that most of the 222 arbitral settlements that took place within that era were *ad hoc* (isolated arbitration). However, when analysing the findings of the aforementioned authority of arbitral practice during that era, one may realise the gradual and, in one instance, fluctuating pace in arbitral settlements from decade to another. For instance, the first decade (1800-1809) witnessed only one arbitral settlement, that between Spain and the USA in 1802. During the second decade (1810-1819), arbitral practice witnessed an increase, with the number of settlements reaching 17. However, this advance was followed by a considerable setback in the third decade (1820-1829) in which the number of settlements dropped to 4. Arbitral activity gained gradual momentum in the years that followed, reaching a total of 5 settlements in the decade (1830-1839); 9 in (1840-1849); 21 in (1850-1859); 24 in (1860-1869); 27 in (1870-1879); and 42 in (1880-1889), culminating in a peak of 72 settlements during the decade (1890-1899). The increase in arbitral activity in the second half of the 19th century seems to reflect States' confidence in arbitration as an alternative for the ready but increasingly unattractive option of resorting to the use of armed force for the settlement of their disputes⁴. This, as well as the successful outcome of a number of arbitral settlements, especially the award in the Alabama Claims arbitration⁵, had a positive impact on the vast growth in arbitral treaty practice, on both the bilateral and multilateral levels⁶.

However, despite this increase in tribunal activity, Pinto⁷ pointed out that certain characteristics of the arbitral process in that era, namely, the *ex aequo et bono* nature of the decisions of arbitral tribunals⁸ and also, the vulnerability of the arbitral process, which could be thwarted by the non co-operation of one of the parties to the dispute, a major problem which was witnessed earlier in the functioning of the second and third commissions acting under the Jay Treaty⁹, gave impetus to the trend towards the adoption of a more judicial model. The attempts to rid arbitration of its rather ancient and embryonic character in which equity served as the basis of arbitral decisions, by converting it into a rather judicial process guided by the application of strict principles of law¹⁰, and the establishment of an international tribunal which, notwithstanding the doctrine of sovereign equality of States and the consensual nature of recourse to arbitration, was to enjoy compulsory jurisdiction similar to that exercised by domestic courts, were both central to the evolution of mechanisms for the settlement of inter-State disputes by arbitration ever since the arbitrations under the Jay Treaty and the Treaty of Ghent. Nevertheless, it appears that the most momentous step in this direction was the 1899 Hague Convention for the Pacific Settlement of International Disputes which, as a Pinto¹¹ pointed out, "...confirmed the evolution of arbitration in an essentially judicial mode and introduced the basic elements which have since been held to characterise international arbitration."¹² The significance of the 1899 Hague Convention lies in the fact that it was the first and most influential international mechanism to consider the peaceful settlement of disputes as a whole¹³. It resulted in the codification of the law on international arbitral procedure, introduced a new element into the concept of international arbitration, viz. institutional arbitration and resulted in the establishment of the Permanent Court of Arbitration (the PCA). However, despite the significance ascribed to the 1899 Convention, it failed in

achieving some of its main objectives, inasmuch as the PCA established by the convention was neither permanent nor a court and lacked any form of jurisdiction except for that conferred upon it by the parties resorting to it¹⁴. No real compulsory mechanism was established and no clear clarification of which disputes were legal (justiciable) and which disputes were non-justiciable was adopted¹⁵.

When turning to the momentum of arbitral practice in the 20th century, it appears that an evaluation based on the figures provided in the survey of Professor Stuyt¹⁶ (which covers arbitral practice only to the end of the 9th decade of that century) reveals two basic stages, the first covering the first three decades of that century and the second starting from the fourth decade onwards. The first stage, which may be considered as an extension of the positive attitude towards arbitral settlement which culminated in the second half of the 19th century and was greatly influenced by the impact of the 1899 Hague Convention and later on the 1907 Hague Convention, witnessed 156 arbitrations (65 in the decade 1900-1909, 36 in the decade 1910-1919, and 56 in the decade 1920-1929). However, this considerable momentum in tribunal activity later declined rapidly and fluctuated in the second stage, when arbitration appeared to have lost its attraction as a basic element in States' foreign relations. The overall total of arbitrations in that era was even lower than that in the first decade of the century (62 settlements, 18 in the decade 1930-1939; 6 in the decade 1940-1949; 14 in the decade 1950-1959; 8 in the decade 1960-1969; 5 in the decade 1970-1979; and 11 in the decade 1980-1989). However, the period which followed Stuyt's documentation witnessed a number of very important arbitrations. Most notable in this respect is the work of the Iran-USA Claims Tribunal which constituted the aftermath of the 1979-1980 hostage crisis¹⁷ and most recently the awards in both stages of the *Hanish Island* arbitration between Yemen and Eritrea¹⁸.

The subject matters of the disputes submitted to arbitration during the 20th century, according to Stuyt's survey, appear to be not very different from those of the century before. They covered a broad area of issues, such as State responsibility for injuries to aliens; boundary disputes; pecuniary claims; indemnity claims; fishery rights; and treaty interpretation. However, the question whether all these categories of disputes were *always* considered suitable for determination by an arbitral tribunal, or even the ICJ, will be dealt with in Chapter Four¹⁹.

1.2. Arbitral Treaty Practice:

The conclusion of arbitral treaties²⁰ is a practice which gained momentum following the successful outcome of the 1794 arbitration under the Jay Treaty already examined above²¹. The Jay Treaty arbitration initiated, to some extent, the conclusion of a considerable number of arbitral treaties, especially between Latin American States in the 19th century²². However, it was left to the 1899 HCPSID, which was influenced by the earlier success of the Alabama Claims arbitration, to fuel the already existing practice of the conclusion of arbitral treaties. The impetus imparted to the concept of arbitration at the beginning of the 20th century as a result of the 1899 Hague Convention not only made possible a considerable increase in the number of arbitral compromissory clauses embodied in the provisions of treaties concluded between States at that time, but also gave the genuine arbitral treaty an important role in connection with the peaceful settlement of international disputes²³. This fact is illustrated by the large number of arbitral treaties concluded following 1899, reaching its peak in the period following WW1, in which a number of treaty systems for the pacific settlement of international disputes were introduced²⁴, which prescribed arbitration alone²⁵, or arbitration in conjunction with other means of

settlement²⁶. However, the vast majority of those treaties provided only for 'conditional' arbitrability of all disputes; in other words, matters affecting the independence, national honour and vital interests of the parties were excluded from arbitration by means of reservation clauses, a practice which was engendered through the Franco-British Treaty of Arbitration of 1903²⁷. Even where unconditional arbitrability was agreed upon, the treaties only rarely contained provisions aimed at preventing an unwilling party from frustrating proceedings in a particular case, and the execution of the treaty was, therefore, left to the good will of the parties²⁸.

The period following the Second World War, owing to the lack of homogeneity in the post-war society of States²⁹, witnessed a change in the attitude of States towards the practice of concluding arbitral treaties; this time, however, in a negative direction. Hardly any extension of the system of bipartite arbitral treaties took place and new treaties of this type nowadays seem almost non-existent. Moreover, only a few of the arbitral treaties concluded between the wars are still in force and even fewer continue to be applicable³⁰. State interest, instead, shifted to the practice of inserting compromissory clauses³¹ into the provisions of the vast number of international treaties concluded on the bilateral or multilateral level³², a practice which still remains predominant.

Within the context of multilateral treaty practice, the picture is no different. In this respect, although it may be said that the area of arbitral procedure is greatly indebted to the procedural frameworks established by some of the major international arbitral instruments adopted during the 20th century³³. Nevertheless, the practice of concluding international instruments totally devoted to the pacific settlement by, *inter alia*, arbitration of all forms and categories of inter-State disputes of a public international law nature in general, such as the 1899 & 1907 HCsPSID; the 1924 Geneva Protocol; and the 1928 General Act, has

almost totally tailed off in the post-war era, with a few exceptions, such as the 1949 Revised General Act, and on the regional level, the 1948 Pact of Bogota; the 1957 European Convention for the Peaceful Settlement of Disputes and the 1964 Protocol of Conciliation, Arbitration and Mediation of the OAU. Further attempts to adopt a comprehensive multilateral arbitral mechanism for application within the international level were sought through the ILC's proposed 'Draft Convention on Arbitral Procedure'. But, unfortunately, those attempts were severally aborted and, instead, the proposed draft convention was downgraded to the level of Module Rules on Arbitral Procedure in 1958³⁴. The applicability and effectiveness of the ILC Model Rules, as well as the past general inter-State arbitral mechanisms mentioned above and States' attitudes towards them will be assessed elsewhere in this study³⁵. Nevertheless, it is interesting to note that despite the astoundingly overall high number of treaties that provided for arbitration concluded since the beginning of this century, State recourse to arbitration pursuant to such provisions when an actual dispute arises is just as astoundingly low³⁶.

2. Possible Factors behind a State's Disinclination to Arbitrate:

From the past review of the momentum of State recourse to international arbitration and arbitral treaty practice it appeared that arbitration is currently almost absent in the inter-State dispute settlement arena. The purpose of this part of the chapter is to examine a number of possible factors that may induce States not to resort to legal means of settlement in general and arbitration in particular when the need arises:

2.1. The Substance of the Dispute: The Justiciability and Non-Justiciability of International Disputes in Practice:

In Chapter Four, an examination will be made of the theoretical dimensions of the issue of the justiciability or non-justiciability of international disputes³⁷. However, in this part of the chapter, the issue will be examined from a different angle, namely, that regarding its direct affect on a State's determination to resort to legal means of settlement either on an *ad hoc* basis when the need arises or even pursuant to a prior commitment to arbitrate³⁸.

The effect of the issue of justiciability or non-justiciability within the context of international arbitral practice is twofold, i.e. either during the process of determining whether or not the dispute, according to the respective State's opinion, is suitable for submission to the jurisdiction on an international tribunal, or in inter-State treaty practice by directly influencing the extent of the compulsory nature of a given dispute settlement mechanism or even by guiding a State's determination whether or not to accept the provisions of a certain international instrument that may specify arbitration as a means of settlement³⁹. However, the major problem is that there exists no clear dividing line between the issues that are justiciable and those that are not⁴⁰. A dispute, be it one regarding a boundary delimitation claim or the interpretation of a treaty or a question concerning State responsibility, all of which have formed the subject matter of a large number of arbitral settlements in the past two centuries, may not be considered justiciable in certain circumstances⁴¹. In practice, a State's refusal to resort to arbitration on the ground of the non-justiciability of the dispute is illustrated in the statement made by the Government of the USA regarding its refusal to agree to the demands of Columbia, that the legality of the former's actions involving the gaining of independence by Panama, and in particular its premature recognition of Panama, as well as its measures with regard to the construction of

the Panama Canal, be submitted to the jurisdiction of the PCA at the Hague for determination⁴². In its refusal, the USA stated that:

[i]ndeed the questions presented....are of a political nature, such as nations of even the most advanced ideas as to international arbitration have not proposed to deal with by that process. Questions of foreign policy and of the recognition or non-recognition of foreign States are of a purely political nature, and do not fall within the domain of judicial decision⁴³.

The USA relied in its rejection of the Colombian demand for arbitration, *inter alia*, on the widely recognised⁴⁴ principle regarding the political nature of the act of granting or withholding recognition to States and which, therefore, *inter alia*, made the dispute a non-legal or non-justiciable one in the eyes of the US Government. Nevertheless, in other disputes of more or less intensity and which were clearly susceptible of settlement by legal means, such as those with Honduras and Mexico concerning certain acts committed against US nationals, namely, the shooting in the case the former and the imprisonment in the case of the latter of US nationals by those two States, the USA turned down the offers to arbitrate made by each of those States on the ground that, in her opinion, the issue of national honour was involved. Instead the USA enforced its respective indemnification claims by pressure in the former case and even by military force in the latter case⁴⁵.

The current stand off between the Republic of Iran and the United Arab Emirates regarding the former's occupation on November 30, 1971, of the three small but strategic islands of Abu Musa and the Greater and Lesser Tunbs located at the mouth of the Strait of Hormuz, through which a fifth of the world's oil supply passes, is another example of the rejection of a State of an offer to adjudicate a clearly justiciable dispute. The island of Abu Musa, prior to the Iranian occupation, was controlled by the Sheikdom of Sharjah, while

the Greater and Lesser Tunbs were under the rule of the Sheikhdom of Ra's Al-Kaymah. Both Sheikhdoms are now part of the current UAE, which was formed shortly following Iran's invasion of the islands in 1971⁴⁶. No attempts were made by the UAE either individually or collectively with the assistance of other States to retrieve the islands by use of military force. Nevertheless, it has asserted its sovereignty over all three islands on numerous occasions, such as recently at the 21st GCC summit at Manama on December 2000, which in its Final Declaration embodied the members' assurance to the UAE of the GCC's "...support for their right to the three islands and its refusal to go along with their occupation by Iran....[as well as the] full sovereignty of the UAE over the islands, an integral part of the Emirates..."⁴⁷. However, such statements were met with strong resentment from Iran, which has repeatedly asserted *its* jurisdiction over all three islands on the basis of historical⁴⁸ and geo-strategic⁴⁹ factors. Such conflicting views regarding the claims of sovereignty over the islands are further fuelled by the existence of large oil deposits near Abu Musa⁵⁰.

The subject matter of the questions involved in the Iran / UAE dispute, such as unlawful occupation, title to territory, sovereignty and treaty interpretation, may clearly indicate that the dispute is one of a legal nature susceptible of settlement by the employment of judicial or arbitral processes, in the same way as other disputes in that region, such as the Hanish Island dispute between Yemen and Eritrea which was settled by arbitration⁵¹ or, most recently, the *Case Concerning Maritime Delimitation and Territorial Questions* between Qatar and Bahrain which was settled by the ICJ through its recent judgement in March 16, 2001⁵². Indeed, the view that the dispute would and should be settled by such means was expressed in a number of statements made by UAE officials⁵³, such as that most recently by Sheikh Ziad, President of the UAE, who on December 1.

2001, urged Iran to agree to submit their dispute to international adjudication via the ICJ or to direct *serious* negotiations between the two States⁵⁴. Such offers were regularly turned down and firmly rejected by Iran, which maintains that its sovereignty over the island is not negotiable⁵⁵. The Iranian rejection of the offers to settle the dispute by legal, as well as diplomatic⁵⁶ means, and the grounds on which the Iranian claims of sovereignty to the islands were based, clearly indicate that there is, from the Iranian point of view, a non-justiciable dispute at hand. This can be easily understood from the statements made by Iran on a number of occasions, such as its declaration following the GCC's 1992 summit that if the UAE were to attempt to take the islands, it would have to cross 'a sea of blood' to do so⁵⁷. Most recently, in a statement made by Iran's Interior Minister, Abdol-Wahid Mussavi-Lari, in response to the final communiqué of the 21st GCC summit held at Manama on December 2000, he stated, "I caution Emirati leaders not to get fooled by the propaganda campaign because Iran will never yield a single inch of its territory"⁵⁸.

The Iran / UAE example illustrates that, in the absence of an *effective* compulsory framework, it is the States who determine when to resort to peaceful means of settlement and under which terms. This is visible not only in actual inter-State dispute settlement practice but also in treaty practice through the inclusion of reservation clauses excluding what a State might see as 'non-suitable' for third party settlement, an issue which will be examined in detail in Chapter Four⁵⁹. When examining some of the current disputes and conflicts of today, it appears that a great majority of those disputes are susceptible of settlement by legal means (leave alone diplomatic means). However, such disputes or conflicts become embroiled in political or ideological or religious tension too great to allow for even the thought of seeking a legal solution, even on the basis of compromise or a decision *ex aequo et bono*⁶⁰. Indeed it appears unimaginable for a highly volatile dispute.

such as, the question of Jammu & Kashmir⁶¹ between India and Pakistan, on which the two States are currently on the brink of full-blown direct military confrontation, to be submitted to the jurisdiction of an arbitral tribunal. Such categories of disputes are too hot to handle due to their political and / or religious content. However, although a State sometimes may view a certain dispute as susceptible to a 'legal' settlement or in other words 'justiciable', however, it must also be born in mind that there exist certain other considerations which may guide a State's determination in this respect and which will be examined in the following.

2.2. Previous Negative Experiences with Arbitration:

In some situations, a certain State's attitude towards arbitration may be affected by an 'unexpected' award which, from its point of view, is totally or partially biased to the other party involved in the settlement and contrary to its respective legally founded claims, or has only acknowledged part of that State's rights, a reaction which may lead to a total or partial feeling of mistrust towards arbitration. This psychological barrier towards arbitration may overlap with certain controversial issues that have surrounded arbitration and are discussed elsewhere, such as the true nature of arbitral proceedings, whether a judicial process based on strict principles of international law capable of providing a *final* and *decisive* settlement to the dispute or, otherwise, a diplomatic process based more on compromise, and the issue regarding the uncertainty of arbitral awards⁶². The following discussion will focus on an illustrative example in this regard⁶³, namely, the official reaction of the Government of India following the award of the tribunal in the *Rann of Kutch* case.

The *Indo-Pakistan Western Boundary* case, generally known as the *Rann of Kutch* case⁶⁴, between India and Pakistan is one concerned with an arbitral settlement involving

two traditionally hostile neighbouring States. The disputed area known as 'the Great Rann of Kutch' or 'the Rann' formed a sector of the disputed boundary between India and Pakistan, situated in the western region of the Indian subcontinent with what was formally the Indian princely State of Kutch lying to its south and the British-Indian province of Sind to its north, an area which possesses unique and rare geographical features. For half of each year, the Rann is a dry salt-crust desert or marsh, while for the remainder it is inundated except for a few elevated islands '*bets*'. This even led to a certain degree of controversy between the parties as to the exact nature of the area, India claiming that it was 'land' while Pakistan claiming that it was a 'marine feature'.

With the partition of British India into the two Dominions of India and Pakistan following Indian independence in 1947, Sind became part of Pakistan while Kutch acceded to India. Pre-existing uncertainties about the precise location of the Kutch-Sind boundary in the Rann area developed into a major international boundary dispute between India and Pakistan. India claimed that the whole of the Rann was Indian territory, while Pakistan claimed only the northern part of it. After prolonged diplomatic correspondence and direct negotiations between the Governments of India and Pakistan, military hostilities erupted between the two States in April 1965. However, after mediation of the British Prime Minister Harold Wilson, both parties to the dispute consented to the settlement of the dispute by international arbitration⁶⁵ in the Cease-Fire Agreement of June 30, 1965⁶⁶. Analysis of the procedural aspects of the settlement and the functioning of the tribunal can be found elsewhere⁶⁷. However, within the context of this discussion it appears relevant to focus on the aspect concerning the award of the tribunal, which is the main source of India's negative reaction towards this settlement in particular and inter-State arbitration in general. In a majority award, based to a large extent on its appraisal of the facts, the three-

man tribunal awarded the bulk of the disputed territory to India (nearly 90%), while recognising the remaining 10% as belonging to Pakistan. The award of the tribunal according to Art. 3(4) of the 1965 Cease-Fire Agreement was to be binding on both Governments and was not to be questioned on any ground whatsoever. Both parties were to undertake "...to implement the findings of the Tribunal in full as quickly as possible....". In fact, the award of the tribunal was respected by both parties and implemented in accordance with Art. 3(4) above, although the Indian nominated arbitrator dissented, upholding India's claims over all of the disputed area. However, this respect and implementation of the award of the tribunal did not prevent the Indian media, as well as a number of its highest State Officials from expressing their profound feeling of dissatisfaction with the terms of the award, which was described as 'perverse', 'political', 'politically motivated' and a 'reward for Pakistan'⁶⁸. Most of the criticism centred on a number of statements made by the chairman of the tribunal while giving details of the boundary that was determined by the tribunal⁶⁹, especially those regarding two deep inlets which, despite evidence that they formed a part of Kutch (or Indian) territory, were awarded to Pakistan on the ground that the two inlets were surrounded by Sind (Pakistani) territory. Therefore, from Chairman Lagergren's point of view⁷⁰:

...it would be inequitable to recognise these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be declared as such.

The amount of criticism levelled at the award seems to be a natural response, especially given the nature of the relations between the two States, and also the fact that

pursuant to the terms of the award, India was to vacate some of the strategic military points it had occupied during its clashes with Pakistani forces in 1965⁷¹. Even Prime Minister Indira Gandhi herself, while expressing that the award would be honoured and implemented by her government, indicated that “...it was evident that the tribunal’s [a]ward was not merely based on the material produced by the two countries but also on certain political considerations”⁷². Indeed, the element of compromise appears evident in the statement of the Chairman of the tribunal quoted above, regarding the two inlets that were awarded to Pakistan. However, this seems to contradict an earlier statement made by the tribunal, in which it ruled out the possibility of deciding *ex aequo et bono*⁷³.

Such an ‘un-welcomed’ outcome of an arbitral settlement may leave its negative imprint on the attitudes of decision-makers towards arbitration for a long period of time. This, in the aftermath of the *Rann of Kutch* case, is illustrated in the statement made by India’s Deputy Prime Minister, Morarji Desai, in the front page of the *Times of India* on February 28, 1969⁷⁴, in which he pointed out that he was unhappy about the award and felt that India *should not resort to international arbitration in the future in similar cases*. Such a view was also echoed, but in a more extreme instance, by former High Court Judge and ex-Minister of External Affairs of India, M.C. Chagla, who stated in the *Indian Express* on February 20, 1968⁷⁵, that India should shy away in the future from resorting to international tribunals. The best justice that India can get in such situations, according to Mr Chagla, is “from our own strength and not from looking to any international tribunal or the Security Council, whether it is a question of Kashmir or any other territory”. According to him, India must depend on its own resources for the solution of such issues. Although India has appeared before the ICJ in three cases⁷⁶ following the 1968 Award in the *Rann of Kutch* case (her overall number of appearances before the Court was four; in three of them as

defendant⁷⁷ and in one as plaintiff appealing against a decision of the ICAO Council to assume jurisdiction in a case between India and Pakistan involving aerial transport agreements⁷⁸), India to date, has never since resorted to *ad hoc* inter-State arbitration, despite its being a Signatory State of the 1899 HCPSID. It seems that India like a great many States of the world preferred⁷⁹ (and continues to prefer) flexible ‘diplomatic’ means of settlement, i.e. negotiation...etc, where greater control may be exercised over the outcome of the settlement process. Although India put arbitration to the test in the *Rann of Kutch* case, nevertheless, from the comments made in the aftermath of the award by India’s most senior State officials, and also from India’s practice with regard to the reservations attached to its current declaration lodged to the ICJ under the Optional Clause⁸⁰, there appears to be no intention on India’s part to repeat the experience.

2.3. Domestic Factors: The Avoidance of the Reaction of Internal Political Factions within the State:

In 1991, the Administrative Council of the PCA assigned a work group for the purpose of considering, *inter alia*, the reasons for lack of recourse of some States to the Court for the settlement of their disputes⁸¹. Among the first factors constituting the groups finding was, *inter alia*, the reluctance on the part of some governments:

...to remove a dispute from the level of negotiation, over which it exercises control, and to submit it an external tribunal – whether an international court or an arbitral tribunal – for a decision that *might not seem justified to domestic constituencies*....[emphasis added]⁸².

According to this finding, it appears, unsurprisingly, that domestic political factions within the political arena of a State may be a driving force against a decision to submit a

particular dispute to peaceful settlement by legal means. However, the influence of the above factor, as we shall see below, does not appear to be confined to States' reluctance to resort to the PCA's machinery alone, but has also played a role in States' reluctance to resort to inter-State arbitration in general. Indeed, the submission of a certain dispute, especially one affecting a State's national honour or vital interests, or in the case where there exists a certain degree of religious or ideological or cultural rivalry between both governments and / or the population on both sides (any of which could lead to the dispute being categorised as a political one), by a government to international arbitration or adjudication may be considered by the electorate or opposition, or even certain factions within the ruling political party itself, as an unforgivable mistake if the settlement does not go its way. Such a mistake may have grave political consequences for that party's future in subsequent elections. This can be deduced from Darwin's⁸³ observation on the influence on foreign policies of internal political forces, in which he pointed out that:

...a political leader rarely gains internal political support by a generous or internationally minded external policy. This is equally true in a parliamentary regime with an open debate between Government and Opposition, and in a power struggle within the committees of a one- party or authoritarian regime.

Therefore, in order to avoid this possibility, recourse to a more *controllable* means i.e. negotiations, is the logical alternative for some governments or, in other cases, the dispute is left open and passed on to the succeeding government or even to the next generation, in order for them to find a way out on their own responsibility⁸⁴. However, the fear of domestic reactions within the State as a deterrent against the submission of a certain dispute to legal means of settlement is a factor which is not solely confined to the instance

where the State concerned is a representative democracy in to the western sense of the term, but may also be present in the minds of decision makers in any other form of political system⁸⁵. This issue seems to have a close connection to the issue of the justiciability or otherwise of disputes⁸⁶.

2.4. The Reality of the Inter-State Dispute Settlement Process by Legal Means:

According to Darwin⁸⁷, the main constituting elements of an inter-State dispute⁸⁸ are:

- 1- The dispute must be between States;
- 2- The dispute must lead to some action by the aggrieved State (e.g. diplomatic protest or propaganda campaigns or application to an international organisation). In the absence of this factor, the dispute may not be considered an active one;
- 3- The dispute must be related to a reasonably well-defined subject matter.

Therefore, according to this observation, once the above elements all exist in a certain dispute, then it is an inter-State dispute. The settlement of an inter-State dispute by arbitration does not occur in a spontaneous manner, but is an issue which, according to Rusk⁸⁹, requires:

- 1- A willingness (consent) to settle the dispute by arbitration;
- 2- Factors that mitigate against settlement of the dispute by negotiation, such as, for example, public opinion;
- 3- A need for legal third party assistance as an only possible way out of the dispute;
- 4- The availability of rules of international to govern the dispute.

Needless to say, the premier function of international arbitration is to produce a settlement of a dispute. However, is the award in itself enough to turn the last page of that dark chapter in the relations between the disputants? This brings to mind the logical question once asked

by Darwin⁹⁰, when is a dispute considered to be ‘settled’? In his reply to that question he indicated that:

The word ‘settlement’ has in it an element of ambiguity. In one sense, a dispute may be regarded as settled when it has been submitted to a procedure which leads to a binding decision; in another, it is only settled when the disputing parties accept, even reluctantly, a solution reached and cease to foreword opposed viewpoints. The latter sense is in part subjective and psychological. The interplay of these two factors must be constantly borne in mind. Thus, in general *a judicial settlement settles a dispute effectively in the psychological sense....* [emphasis added].

However, the settlement of the dispute, as indicated above, does not necessarily mean that the state of hostility that may exist between the disputants as a result of the dispute will be dissolved. In some situations, a State may feel that there is no need to resort to arbitration or adjudication if the dispute, from its point of view, forms a secondary and minor aspect of a more general and complex problem not to be dealt with by the tribunal or court⁹¹. This can be understood more easily when examining the conception of the terms ‘dispute’ and ‘conflict’ adopted by Collier and Lowe⁹², who pointed out that the two should be distinguished. According to them:

...the term ‘conflict’ is used to signify a general state of hostility between the parties, and the term ‘dispute’ to signify a specific disagreement relating to a question of rights or interests in which the parties proceed by way of claims, counter-claims, denials and so on. Conflicts are often unfocused, and particular disputes arising from them are often perceived to be as much the result as the cause of the conflict. Conflicts can rarely, if ever, be resolved by the settling of the particular disputes which appear to constitute them: the feeling of hostility almost inevitably survive the settlement of the disputes.

They support this view by reference to the immediate crisis that emerged following the US Embassy hostage incident in Tehran, although it was solved later by the release of the hostages following a number of corresponding concessions made by the USA, nevertheless, a general state of hostility still exists between the two States to this day⁹³. Even the successful functioning of the Claims Tribunal established pursuant to Art. 3(1) of the 1981 Claims Settlement Declaration between the USA and Iran⁹⁴ had no significant impact on the state of relations between the two States.

The strict nature of legal means of settlement also causes some States to fear these means⁹⁵. This issue, within the context of international adjudication, was raised by some of the participants in the International Symposium on the Judicial Settlement of International Disputes that took place in 1972 at the Max Planck Institute for Comparative Public Law and International Law at Heidelberg, Germany⁹⁶, as a cause of State reluctance to resort to the ICJ. For example, Mr. Castaneda⁹⁷ of Mexico argued that it is possibly the most important factor contributing to State reluctance. This factor, as a cause of State hesitation to judicial settlement, was best illustrated in the observation of Professor Morawiecki⁹⁸, who pointed out that judicial settlement:

...afforded a very rigged and final way of solving international disputes, and they [the governments] preferred to settle them by political [diplomatic] means.... The judicial process might force the parties into the role of adversaries of whom only one could win while the other one had to lose. Thus it corresponded rather to the model of a 'zero sum game', not to the typical political [diplomatic] games in international relations which were more like 'non zero sum games': in which both parties could win or both could lose.

A former Judge of the ICJ, Sir Gerald Fitzmaurice⁹⁹ once indicated that:

...no tribunal that is a court of law....can give a decision that will be welcomed with applause by both or all parties, all groups, or all shades of opinion, ideological or other.... In short, one of the penalties of going to law, and one of the reasons why....there is a reluctance to do so, is that someone has got to lose or be disappointed.

Indeed, the fear of losing a case might sometimes carry far greater political weight than the advantages that might be gained from the settlement of the dispute¹⁰⁰, especially in the case where the relations between the disputants may be tense as a result of ideological or political or religious rivalry. Therefore, diplomatic means of settlement in this respect appears to be a more attractive option, on the basis that the final outcome, as well as any concessions made by the parties and whatever issue those concessions may be concerned with, is tailored in accordance with what each party has agreed. In other words, each party is the master of its own fate with regard to the dispute. This view, within the Symposium, was expressed by Professor Helmut Steinberger¹⁰¹, who indicated that the natural priority of diplomatic means over legal means is owed to the fact that disputants in diplomatic settlements are able to discuss all types of problems that may exist between them, legal or otherwise. Therefore, the chances of reaching a settlement to the dispute are thus considerably enhanced. Moreover, he pointed out that diplomatic means of settlement seem to be more discreet and flexible than judicial means, and above all, they provide a chance to avoid a defeat of another State in Court, which may have a far reaching negative impact on the relations between the two States.

The views cited above were concerned with international judicial settlement under the ICJ. However, one may ask whether arbitral awards are any different? When recalling our discussion in Chapter One regarding the true nature of international arbitration¹⁰², it appeared that among the factors on which the attack on the judicial nature of arbitration

was based was the inevitable element of compromise in arbitral awards, despite the absence of the consent of the parties to a decision of that nature. Indeed, Rosenne¹⁰³ in an observation on the differences between international arbitration and adjudication under the ICJ pointed out that “[a]n arbitrator may find it possible to act as *amiabile compositeur*, which the Court [the ICJ], it seems, in principle cannot or should not do”¹⁰⁴. However, regarding the school of thought which upholds the diplomatic nature of international arbitration and which results in a decision based on compromise, irrespective of whether consent to that affect was granted or not, it may be asked whether that was what the disputants, or at least one of them, really asked for? When looking at the award of the tribunal in the *Rann of Kutch* case examined above¹⁰⁵, and the official reaction of the Government of India towards it, the answer to the question seems to be in the negative¹⁰⁶. If the parties had really sought a compromise decision in the first place, they would have resorted to a *real* and *genuine* ‘diplomatic’ means of settlement, in which *they* and not the tribunal were to play the active role in determining the final outcome. Indeed, the loss of the parties’ control over the outcome of the settlement process was pointed out by Bowett¹⁰⁷ as among the factors which deter States from recourse to international arbitration or adjudication. The comment of Judge Fitzmaurice¹⁰⁸ in this respect is of timeless relevance and deserves extensive quotation. According to his view, such reluctance is because of the:

...preference of almost all governments for the prosecution and settlement of international disputes by means of the political arts they understand, rather than the juridical ones they do not and tend to dislike, together with their dislike of the *commitment* entailed by recourse to arbitration or adjudication – a dislike which stems from the loss of all freedom of manoeuvre once the dispute is fairly in the hands of a court or arbitral tribunal. No longer then – whatever may be achievable through the forensic arts – can the

outcome be influenced by what is so dear to the heart of the politician – the process of propaganda, persuasion, bargaining, lobbying, and the manipulation of votes. It is the feeling of *loss of control* over the future of the case when it becomes *sub judice*, and goes as it were into cold storage for perhaps two or three years before the final decision is given, as compared to with the ability to retain such control whenever the matter is dealt with on a political basis or in a political forum, which, even if only subconsciously, causes government to shy away from the arbitrator and the judge.

Nevertheless, strict decisions based on the application of strict black letter law may in themselves form a source of friction in inter-State relations, especially in the case where the disputants enjoy friendly relations. Therefore, it has been suggested by Bilder¹⁰⁹ that this issue may form a factor which may cause States to hesitate to resort to such means of settlement. According to him:

...[w]here two nations are necessarily involved in continuous long term relations, a solution which legally ‘settles’ a particular dispute but leaves one party feeling it has been treated unfairly may ultimately do more harm than good. Feeling of resentment and attempts to compensate in other areas for an unfavourable judgement may hamper future working relationships between the parties or even alienate the losing party from the legal system.

This is also attributed by some¹¹⁰ to the quarrel like nature of dispute settlement by legal means in general involving claims, counter-claims and evidence, etc. Moreover, some States consider an offer to arbitrate or a unilateral application filed to the ICJ as an unfriendly act¹¹¹, a factor which mainly manifests itself in the case where a weak State is the plaintiff against a more larger and powerful one¹¹². This factor may be more significant in the case where the underdeveloped State may receive political or economic aid from the defendant to be, the richer and more sophisticated and industrialised State. In such a case it

would appear more efficient (politically and / or economically) for the underdeveloped applicant to resort to the less provocative and more flexible alternative of diplomatic means rather than taking a step which may be perceived by its larger and more powerful adversary as ‘a bite to the hand that feeds it’ thereby risking the possibility of the loss or suspension of such aid or support. This issue, within the context of offers to arbitration, was expressly considered more than a century ago at the 1899 HCPSID which in Art. 27¹¹³ stated that:

[t]he signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court [the PCA] is open to them. Consequently, they declare that the fact of reminding the conflicting parties of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, *to have recourse to the Permanent Court, can only be regarded as friendly actions* [emphasis added].

Moreover, later on, the *Institut de Droit International* in its Neuchatel Session adopted a Resolution in 1959¹¹⁴ whereby it declared that:

....recourse to the International Court of Justice or to another international court or arbitral tribunal constitutes a normal method of settlement of legal disputes as defined in Article 36, paragraph 2, of the Statute of the International Court of Justice.

Consequently, recourse to the International Court of Justice or to another international court or arbitral tribunal can never be regarded as an unfriendly act towards the respondent State¹¹⁵.

The issue was also addressed in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes which stated that “[r]ecourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States”. In recent UN Resolutions concerned with peaceful

settlement, such as, for example, General Assembly Res. 54/28 of January 21, 2000 regarding 'The United Nations Decade of International Law', this issue is not mentioned expressly; however, it may be deduced from their content which carries the weight of the organ as well as the whole international organisation in which the Resolutions were promulgated, and which expressly encourages States to make full use of the means available for the settlement of disputes¹¹⁶. Although it has been mentioned¹¹⁷ that there is extreme difficulty in providing 'actual proof' about States that have shied away in practice from international arbitration or adjudication in order to avoid exasperating another State, nevertheless, State practice does affirm the fact that a unilateral application filed against a State may be met with a strong and angry reaction from that State¹¹⁸.

The element of unpredictability in international arbitral awards or judicial decisions may be another factor which gives rise to State reluctance to resort to those means¹¹⁹. As has been pointed out¹²⁰, settlement by legal means is certainly a good way of obtaining a decision and disposing of the problem. There is, however, no guarantee that the decision will be the 'right' one, because, even apart from the possibility of deliberate prejudice or clear incompetence by an international tribunal, any settlement of an international dispute by legal means involves a large element of chance. No matter how careful the parties are in selecting arbitrators or judges, no matter what the judges' reputations, any judge or arbitrator may simply fail to understand an issue, be subconsciously biased, try to avoid responsibility by compromising, or just reach a wrong decision. Akehurst¹²¹ pointed out that judges are likely to be influenced consciously or unconsciously by political considerations in the case where the subject matter of the dispute falls within an area where the law is uncertain.

Along with the above-mentioned factors behind State reluctance to resort to arbitration in particular comes the time element. The parties have to negotiate the essential details of the *compromis*, including the method of appointment of the members of the tribunal, their names, the tribunal's jurisdiction, the law(s) applied.... etc. All of this may take a significant period of time and may offer scope for frustration and impediment of the settlement process by an unwilling party. It has been widely acknowledged that resort to the ICJ, a pre-constituted judicial body with its own pre-established Registry, pre-drafted Statute and Rules of procedure and pre-specified rules of law to be applied to the dispute, is more efficient than arbitration in this respect¹²². Moreover, the parties in *ad hoc* arbitral settlements bear the expenses of the *whole* settlement (e.g. fees and expenses of the members of the tribunal; expenses of agents, counsel, experts and witnesses; any expenses with regard to the implementation of the award; and all other expenses related to the tribunal and its functioning) on their own. It can be imagined how heavy the bill would be on the exchequer of an underdeveloped State, especially bearing in mind the long period of time that some settlements may take¹²³. Therefore, as far as expenses are concerned, it appears that recourse to the ICJ is a more efficient option than *ad hoc* arbitration¹²⁴.

3. The Attitudes of Certain Groups of States towards Arbitration:

The discussion above on the momentum of arbitral practice, in particular, tribunal activity¹²⁵, underlined the current almost absolute standstill in such practice. Some States may have been individually influenced by any of the factors examined under heading (2) above. However, there are certain negative views and positions held by some in this world towards international arbitration, which have been a factor that allegedly influenced certain *groups* of States to abandon legal means of dispute settlement in general and inter-State

arbitration in particular, thereby, contributing significantly to the low number of disputes that were submitted to arbitration in the past century. Although this diverse world contains competing universal views in this respect, space in this section permits us to examine only two examples, namely, the positions of the former Eastern Bloc States of Europe and that of African and Asian States. In this section, an attempt will be made to clarify the positions of these groups of States towards inter-State arbitration.

3.1. The Attitudes of the former Eastern Bloc States¹²⁶ towards International Arbitration:

The first category of States accused of the almost total abandonment of inter-State arbitration (and even legal means of settlement in general) and which call for some examination in this respect were the States that composed what was formally known as the Eastern Bloc. However, again, space limits our discussion to only one of the aforementioned group of States, namely, the former USSR¹²⁷. The discussion in this respect will focus only on the practice of the former USSR with regard to the question of State sovereignty; adherence to international treaties or organisations that provided for arbitration; and its attitude towards the issue of compulsory jurisdiction.

Any mention of the 1899 HCPSID, the first and one of the most influential multilateral mechanisms for the settlement of inter-State disputes by peaceful means, almost immediately brings to the mind the enthusiastic invitation of Czar Nicholas II of Russia to the diplomatic representatives of the States that were to participate in the 1899 Hague Peace Conference which underlined the main aims of the conference, namely, the adoption of effective measures for the reduction of military and naval armaments and, most important of all in this respect, to devise means necessary for averting armed conflict

between states by the employment of peaceful methods of settlement, especially good offices, mediation and arbitration¹²⁸. However, this favourable position towards arbitration, as well as legal techniques of dispute settlement in general, was to change dramatically following the seizure of power by the Bolsheviks. The atmosphere following the famous October Revolution is best illustrated in the words of Hazard¹²⁹ who indicated that:

...Russia's new era was opened by men accepting no concept of restraint other than that of expediency; recognising the power of no unseen hand preventing the doing of what seemed necessary to speed the historical process toward its inevitable conclusion in a communist society. God was banished from their thoughts as legendary, lacking scientific proof of being. Natural law in the sense of the Greek philosophy was relegated to the scrap heap as a myth of history.

The founder of the 1899 Hague Peace Conference was, on the inter-State dispute settlement level, transformed into "...a systematic enemy of arbitration"¹³⁰. The newly emerged USSR owed no homage to law as a superior authority limiting realisation of its plans and objectives, but viewed it as a tool which was to be manipulated in accordance with the changing needs and interests of the State. This was clearly epitomised in the famous theme of Lenin, 'a law is politics'¹³¹. The USSR adopted the doctrine of quasi-absolute sovereignty¹³² in theory and practice towards the questions of international law and sovereignty. It took international law into its own hands and unilaterally determined matters of international concern or the interpretation of international treaties and other international obligations by its own sovereign will, in spite of the interests and rights of the other parties involved. Moreover, one of the most prominent Soviet jurists in the area of international law, A.J. Vyshinsky, even went on to assert the primacy of Soviet municipal law over international law in the case where the two were in conflict. Soviet Governments felt that

they had the supreme authorisation to decide unilaterally whether and what changes needed to be carried out in the internal as well as in the international spheres¹³³. This school of thought was quite evident in the minds and writings of some of its most prominent legal jurists, such as F.J. Kozhevnikov¹³⁴ (former Soviet Judge to the ICJ, 1953-1960) who sought to justify the ‘just nature’ of the Soviet Union’s war against Finland in 1939 on the ground that “...the Soviet Union has the right to ask for the shifting in her favour of the frontiers of a neighbouring State if, in the opinion of the USSR, that State endangers the security of the Soviet Union”¹³⁵. However, this absolutist Soviet approach cannot be looked at separately from the Cold War context it existed in and which started following WW2. In that struggle, sovereignty was constantly referred to by the USSR as the key concept in international relations and the basic legal means of shielding its freedom of action from what it considered as external interference in its own business¹³⁶. This can be easily understood from the statement of Korovin¹³⁷, another prominent Soviet jurist, who pointed out that:

[t]he Soviet Union is destined to act as the champion of the doctrine of ‘classical’ sovereignty in so far as its formal seclusion acts as a legal armour protecting it from interference of those factors under the pressure of which the frontiers of the contemporary capitalists States are changed and the forms of their laws are altered. So long as beyond the frontiers of the USSR there is only the ring of bourgeois encirclement, every limitation of sovereignty on behalf of it would be a greater or lesser victory of the capitalist world over the socialist order....

Therefore, Soviet jurists viewed the relativist theory of sovereignty, which will be examined elsewhere in this study¹³⁸, with suspicion. They perceived it as a means of imposing limitations on the sovereignty of the USSR to the direct benefit of its capitalist

rivals or as a means designed for subjecting the USSR to legal norms which were originally formed and created by capitalist States and, therefore, reflected the views and interests of those States¹³⁹, who were referred to by Korovin¹⁴⁰ as the ‘grave-diggers’ of sovereignty. Nevertheless, it seems incorrect to suggest that Soviet legal jurists envisaged lawlessness. Tunkin¹⁴¹, one of the Soviet Union’s leading legal jurists, pointed out that the ideas and principles of the October Revolution have functioned in the direction of creating new international relations and a new international law. According to him:

...the Soviet Union, and now the other Socialist States as well, tirelessly struggle for the introduction of progressive principles and norms into international law so that it becomes a more effective means of strengthening international peace and developing friendly relations among States on the basis of equality and self-determination of peoples¹⁴².

He believed that the principles and norms of international law (as applied by Western States) were operative essentially only in relations between civilised or Christian States and did not apply to their relations with Asian and African States. The Soviet State, according to him, was the only State which favoured the complete application of such principles to all States equally¹⁴³.

When it comes to the question of the peaceful settlement of inter-State disputes by legal means, it appears that although the USSR Government following the October Revolution did not reject the obligations that were made by Tsarist Russia in the field of the peaceful settlement of disputes, such as the 1899 HCPSID or membership to the PCA, nor did it later on reject Art. 33 of the UN Charter¹⁴⁴, nevertheless, the USSR, either in State or treaty practice, was never a real advocate of public international adjudication or arbitration, especially compulsory adjudication or arbitration, which it viewed as a stark violation of

State sovereignty. However, this resistance to compulsory reference of disputes under multilateral treaties was dissipated, in very extraordinary circumstances¹⁴⁵, in cases where it could not be avoided and would not lead to a possible infringement of the USSR's domestic affairs, or in cases where the interests of the USSR that were to be served by participation in an organisation or convention appear to outweigh the risk involved in accepting the compulsory jurisdiction of an international tribunal¹⁴⁶. Regarding treaty practice, the USSR in the field of peaceful settlement of international disputes usually concluded agreements with other States which did not provide for an obligatory solution, and were traditionally framed in such a manner that the presence of a neutral member or umpire in any permanent or *ad hoc* tribunal established for that purpose was avoided (the principle of parity) and that the possibility of third party arbitration was excluded¹⁴⁷. An explanation of the Soviet non-preference of third party arbitration or the traditional arbitral tribunal which consists of an odd number of arbitrators was provided by Kozhevnikov¹⁴⁸. In his words:

It goes without saying that under all circumstances there will remain unchanged that general principle of Soviet foreign policy, under which Soviet diplomacy will always seek to obtain such a bench for the arbitration tribunals or for other similar agencies as will guarantee to the USSR the same measure of disinterestedness and justice as is assured other [s]tates.

Regarding the Soviet view towards the ICJ, a number of arguments were advanced by Soviet jurists for the purpose of justifying this feeling of mistrust towards the Court, such as that State sovereignty was limited by international adjudication which imposes a binding judgement that is to be carried out by the State even in the event of an adverse pronouncement¹⁴⁹; that the Court in the majority of cases placed political considerations over purely legal arguments; that the Court is dominated by bourgeois and bourgeois-

oriented judges, which makes it easier for the Court to resort to all sorts of quasi-judicial suppositions and sophistry in order to justify its otherwise unlawful decisions¹⁵⁰; that adjudication is a very complex and formal procedure and, therefore, cannot be as adequate and effective as some of the diplomatic means of dispute settlement, such as negotiation; that the question of compulsory jurisdiction enshrined in 36(2) of the Statute of the ICJ was contrary to the principle of the freedom of selection of means¹⁵¹; that the quality of the judgements of the Court varied depending on the nature of the dispute, i.e. in the case where juridical aspects prevailed over political ones in contentious cases and requests for advisory opinions, the Court rendered, as a rule, just judgements and acceptable advisory opinions. However, once the political aspects in a contentious case or request for an advisory opinion prevailed, the Court often rendered ill-based judgements and advisory opinions¹⁵².

The USSR's negative attitude towards international adjudication and compulsory jurisdiction, as we shall see in Chapter Five of this study, was on a number of occasions a major stumbling-block in the way of the international community's quest in the past century towards the establishment of an effective and mandatory machinery for the peaceful settlement of international disputes by, *inter alia*, arbitration. Nevertheless, during the imminent decline of the Communist State at the late 1980s, a major crack in the wall with regard to the Soviet attitude towards such means of settlement occurred as a result of *Perestroika* that started in 1985¹⁵³. The change was manifested in the address of President Gorbachev to the UN on December 7, 1988¹⁵⁴, in which he suggested that all States should recognise the compulsory jurisdiction of the ICJ with regard to human rights agreements. The address was subsequently followed by the Decree adopted on February 10, 1989, by

the President of the USSR Supreme Soviet recognising the compulsory jurisdiction of the ICJ in six human rights conventions¹⁵⁵.

3.2. The New African-Asian States and their Views towards the issue of Dispute Settlement by International Arbitration:

It is commonly known that the group of States which make up what is known as the 'Third World' or 'Developing Countries' constitute the overwhelming majority of the international community¹⁵⁶. The vast majority of these States were formerly subject to colonial domination. However, after their emancipation from the fetters of colonialism, most of these States found themselves face to face with a number of new other problems, such as the lack of infrastructure; economic underdevelopment and (what concerns us in this respect) numerous disputes with neighbouring States of an inter-State character concerning issues such as unsettled boundaries, title to territory and so on (especially in Africa)¹⁵⁷. In this regard, it appears that examination of the position of the Third World States of Africa and Asia (hereinafter cited as Afro-Asian States) towards the issue of the settlement of their inter-State disputes by legal means in general and arbitration in particular is necessary, in order to understand the possible reasons why such a significant number of disputes has not been submitted to such means of settlement by those States.

The debate on Afro-Asian States' views towards dispute settlement will be started by considering those States' views towards international law in general, since, this is the law usually applied by international tribunals. However, it must be admitted first of all that the category of States under examination cannot properly be treated as a single unit, in view of the considerable degree of diversity in those States' cultural and ideological backgrounds; their degree of economic or social development; their political alignment; and their

respective systems of public order¹⁵⁸. Regarding those States' attitudes towards international law, Briery¹⁵⁹ once indicated that some of those nations were "...inclined to look onto international law as an alien system which the Western nations, whose moral or intellectual leadership they no longer recognise, are trying to impose upon them"¹⁶⁰. It has been pointed out¹⁶¹ that such a negative and, to a certain extent, suspicious attitude towards international law is owed to the concepts of law that prevail in most of those States which, although differing from one culture to another, are always profoundly distinct from that predominating in the West¹⁶². International law since Grotius and especially after the Peace of Westphalia in 1648 was largely European in both character and application¹⁶³. However, can this issue be linked to how Afro-Asian States viewed international law? In this regard, Anghie¹⁶⁴ draws attention to a significant relationship between 19th century positivism and colonialism. According to him, after numerous colonial wars, virtually all of the territories of Asia, Africa and the Pacific that were under the colonial control of the major European States by the beginning of the 20th century were subjected to a system of law that was fundamentally derived from European thought and experience. According to the prevailing positivist jurisprudence at the time, the confrontations were not looked at as confrontations between two sovereign equals, but between a sovereign European State and a non-European, and at the same time, non-sovereign entity¹⁶⁵. This confrontation, according to Anghie¹⁶⁶, posed:

...no conceptual difficulties for the positivist jurist who basically resolves the issue by arguing that the sovereign state can do as it wishes with regard to the non-sovereign entity, which lacks the legal personality to assert any legal opposition.

A similar tone also appeared in the positivist vocabulary at the time which referred to the peoples of those non-European entities in denigrating terms, presented them as suitable objects for conquest and legitimised the use of the most extreme forms of violence against them¹⁶⁷.

The development of international law during that era in which the current Afro-Asian States were under the sway of colonial predominance¹⁶⁸ has led to certain concerns from the part of most of those States that in a certain case they might be held subject to obligations dating from their colonial past, ones they had no say in. This factor within the context of those States' attitudes towards peaceful settlement by legal means appears to have created a feeling of mistrust from those States towards those means for their application of rules of law that those States did not participate in creating and which, from their point of view, are basically of European origin and liable to sacrifice their interests to those of Western States¹⁶⁹.

The old law / new law argument, as well as the feeling of suspicion towards the 'European origin' of current international law, was clearly expressed in the statement of the Ambassador of India to the UN in 1961 during the Security Council's debates on the Status of Goa¹⁷⁰ in which he pointed out that:

[i]f any narrow-minded legalistic considerations arising from international law as written by European law writers should arise these writers were, after all, brought up in the atmosphere of colonialism.... The tenet which....is quoted in support of colonial powers having sovereign rights over territories which they won by conquest in Asia and Africa is no longer acceptable. It is the European concept and must die. It is time in the twentieth century that it died¹⁷¹.

The argument regarding the uncertainty of many of the rules of international law applied by international tribunals¹⁷² was expressly pointed out by some of the delegations that participated in the deliberations of the Sixth Committee of the UN General Assembly during the 1960s on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations¹⁷³. They attributed their lack of confidence in the ICJ, as well as arbitration, to the state of the substantive rules of international law as they existed which, in their view, were in large part antiquated, inequitable, fragmentary and uncertain¹⁷⁴. However, despite these doubts, it would be a great exaggeration to say that those States rejected all the rules of international law which were laid down before their independence, inasmuch as many of those rules operate to their advantage¹⁷⁵. A number of Afro-Asian writers went on the defensive with regard to accusations concerning those States' position towards international law, indicated above, by providing a clearer picture of those States' views and opinions in this respect. For example Anand¹⁷⁶ indicated that international law was in fact accepted and respected by those States, except where it is still found to support past colonial rights or is clearly inequitable from their point of view, according to the current standards of civilisation¹⁷⁷. Moreover, Shihata¹⁷⁸ defended those States' views regarding judicial settlement, by pointing out that members and representatives of 'new States' to the ILC as well as the Sixth Committee of the UN General Assembly respectively:

...have occasionally called for quantitative changes in international law to meet the quantitative change in the international community, but none of them have asserted that short of these changes no confidence will be invested in international adjudication.

The attitudes of some of these States towards dispute settlement by legal means at a certain stage has been greatly influenced by the ICJ's 1966 Judgement in the *South West Africa / Namibia* case¹⁷⁹ which led to profound and widespread dissatisfaction with the Court's Ruling and which was expressed in criticism of the Court's insensitivity to anti-colonial and anti-apartheid sentiments as formulated in resolutions and declarations of the UN General Assembly, and also criticism of the composition of the Court¹⁸⁰. Indeed, the issue regarding the composition of the ICJ in the light of the concept of geographical distribution has also been classified as a cause of reluctance of Afro-Asian States to resort to the ICJ¹⁸¹. However, the importance of this factor has been downplayed by some writers¹⁸², who considered it only as a psychological barrier. With those causes of hesitation towards the ICJ in mind, international arbitration would appear to be a more suitable option for such States, on the basis that the members of the tribunal¹⁸³, as well as the law(s) applied, are all specified by the parties. Even the neutral member or umpire, subject to the provisions of the *compromis* in this regard¹⁸⁴, is to be one approved by the parties.

The work group assigned by the Administrative Council of the PCA in 1991¹⁸⁵ to consider, *inter alia*, the reasons for lack of recourse of some States to the Court, found that among the reasons behind the reluctance of some developing countries to have recourse to the PCA, and to international arbitration in general, was the lack of human resources that would enable them to present their cases effectively. This has also been acknowledged by the former Judge and President of the ICJ, Keba Mbaye, during the 60th Anniversary of the Court of Arbitration of the ICC in 1983. He pointed out that "...developing countries were rarely the venue of an international arbitration, and, even more rarely, produced arbitrators"¹⁸⁶. However, the effect of this factor has been played down by Cassese¹⁸⁷ who pointed out that any of those States can nowadays rely upon the services of a few

outstanding lawyers who are in no way inferior to those belonging to sophisticated and more industrialised States. The argument of lack of highly qualified legal expertise in Afro-Asian States would seem to be of questionable validity. Indeed, the current composition of the ICJ consists of four Asian Judges and two African ones. Moreover, States such as Egypt have produced a significant number of highly qualified international legal personnel¹⁸⁸. In this regard, one must not forget the zealous efforts of the Asian-African Legal Consultative Committee in providing highly qualified legal training, services and advice to States in both continents¹⁸⁹.

Despite the factors already proposed as reasons for the reluctance of Afro-Asian States to have recourse to legal means of settlement, Professor Anand¹⁹⁰ points out that the real causes of reluctance to resort to the ICJ or any other tribunal by Afro-Asian States are no different from those of any other State. In this regard he notes a number of factors already discussed in this chapter, namely, a lawyer-like fear of losing the case¹⁹¹; the non-justiciability of certain classes of disputes¹⁹²; and the perception of international litigation as an unfriendly act¹⁹³. As for many States world-wide, diplomatic means of settlement are the usual and favoured alternative for Afro-Asian States. This appears evident when examining State practice, in particular, the experience of African States in dispute settlement by legal means¹⁹⁴. The first point which draws attention in this regard was the non-mentioning of the ICJ in the machinery established by those nations' principal regional organisation, namely, the 1964 Commission of Mediation, Conciliation and Arbitration adopted by the (former) OAU¹⁹⁵. Although the inclusion of arbitration in this regard was considered by some¹⁹⁶ as an acknowledgement of the value of arbitration as an institution, nevertheless, neither the arbitral machinery of the Commission nor its mediation and conciliation provisions were ever applied in practice. In fact, all of the inter-State disputes

that were settled in Africa following 1964 were settled outside the framework of the OAU's Commission. Even the non-mentioned ICJ was resorted to by some African States¹⁹⁷ on a number of occasions instead of the obsolete machinery of the commission¹⁹⁸. Recourse to the World Court was also made by a number of Asian States as well¹⁹⁹. Nevertheless, when compared to the overall number of unsettled disputes in both continents, such recourse is considered relatively still too low. Moreover, (with regard to African practice) some writers²⁰⁰ pointed out that the decision to have recourse to the ICJ by some African States was not made because those States originally favoured judicial settlement, but because those States had no other choice after recourse to other means of settlement proved ineffective; the ICJ was their only and final alternative in getting a definitive ruling on the dispute and bringing it to an end. The failure of the OAU's Commission in general was attributed by some²⁰¹ to the formality and institutional framework of the Commission, along with the provision for arbitration, which made the Commission appear to those States more as a court whose decisions were binding which, therefore, entailed (from their point of view) an element of partial surrender of their sovereignty²⁰², something that those States, as well as Third World States in general were hesitant to accept. This has been recognised in the statement of Mr M.A. Odesanya²⁰³, the first President of the Commission, in a paper presented by him at the Third Annual Conference of the Nigerian Society of International Law, held at the Nigerian Institute of International Affairs, Lagos between 19-20 March, 1971. According to him:

Sovereign States are understandably jealous of their sovereignty and independence. My O.A.U. experience is that they will always show great reluctance in limiting their own political and diplomatic freedom beyond that which they regard as absolutely necessary to secure their immediate objectives. In one inter-State dispute after another, secret offers of assistance by my Commission could not

induce the States involved in the dispute to submit to the jurisdiction of a body they persistently regarded as judicial. The political element in most inter-State disputes even where such political element is not the predominant one makes States assume that their vital interests are at stake in every dispute.

Afro-Asian States unsurprisingly (like a great many of the Members of the UN) have shown no enthusiasm towards the Optional Clause (to date only 28 of those States have accepted the Optional Clause²⁰⁴). Neither did the OAU's Commission of Mediation, Conciliation and Arbitration provide for compulsory jurisdiction.

When it comes to inter-State arbitration the picture is even less encouraging. Apart from the two awards in the *Hanish Island* case²⁰⁵ between Yemen and Eritrea and the Boundary and Mass Claims Commissions established pursuant to the Peace Agreement signed between Eritrea and Ethiopia on December 12, 2000²⁰⁶, no major arbitration of the likes of the *Taba* arbitration²⁰⁷ or the *Rann of Kutch* arbitration²⁰⁸ has taken place (or is likely to occur in the near future) in either continent. The instances (albeit few) in which recourse was made to the ICJ or to arbitration (albeit few) by Afro-Asian States seem to refute any suggestion that those States are *in general* anti-judicial or anti-arbitral. With regard to the almost total lack of recourse to inter-State arbitration it must be pointed out again that Afro-Asian States are not alone in this respect. The reluctance to resort to arbitration is a general issue, the causes of which appear to be related generally to the special circumstances and considerations of each individual State, some of which have been examined in this chapter.

Conclusion:

From the review of arbitral practice above it appears that inter-State arbitration in the domains of both tribunal activity and *multilateral* general arbitral treaty practice is at an almost absolute standstill at the moment. As shown in the review of the momentum of arbitral practice based on Stuyt's survey above, the level of State practice following the WW1 fell dramatically. In this regard, the creation of the PCIJ, now succeeded by the ICJ, appears to have almost wiped out *ad hoc* inter-State arbitration from the dispute settlement arena when it comes to State recourse to either means, notwithstanding that both, in principle, are intended to produce a binding judgement or award in the dispute, based on international law (of course when overlooking the debate regarding the diplomatic or otherwise judicial nature of arbitration already examined in Chapter One²⁰⁹). Nevertheless, this issue within the context of State recourse to the PCA will be examined in detail in Chapter Five²¹⁰.

This chapter has examined a number of possible reasons behind the reluctance of some States to resort to inter-State arbitration. Those factors are: the non-justiciability of certain disputes from the respective State(s)' point of view; previous negative experiences with arbitration; the fear of the reaction of internal political factions within the State if the settlement does not go its way; and certain aspects of the legal means of dispute settlement which may convince some States to resort to other, more flexible, non-legal means of dispute settlement. What can be noticed in this respect is that none of the above factors can be looked at as forming a constant deterrent which would totally alienate a State from having recourse to inter-State arbitration in particular or legal means of dispute settlement in general. State practice in this regard seems to indicate that, although a certain State may not prefer arbitration or adjudication as a result of one of the factors above, nevertheless, it

may still resort to it in certain circumstances. This appears clear in the USA's recourse to the ICJ in the 1987 *Electtronica Sicula S.p.A (ELSI)* case²¹¹ with Italy following its famous withdrawal from proceedings in the *Nicaragua* case, or the number of cases pending before the ICJ involving different African States²¹². Even the acceptance of the former Soviet Union of certain instruments that provided for international arbitration or adjudication, despite its vigorous defence of its ideological principles²¹³, may also be used as evidence to support this view. With regard to these latter two examples, it appears that the discussion supports the view that the former Eastern Bloc and current Afro-Asian States had a negative attitude towards legal means of settlement in general and inter-State arbitration in particular and, therefore, contributed significantly to the low number of disputes submitted to arbitration, especially in the second half of the past century. However, now that the confrontation between East and West has ceased to exist, more attention should be paid to the views and concerns of Third World States in general, should the international community decide in the future to adopt a new multilateral international instrument devoted to the settlement of disputes by arbitration, since it is these States in general that would mainly benefit from such a mechanism and form its major clients.

What can be deduced in this regard is that there appears to be no invariable practice when it comes to State hesitation towards *ad hoc* arbitration; the whole question appears to be dependent upon the circumstances of each individual State at the time the dispute arises and its own assessment of what actions are more effective in turning the situation into its own advantage. In the centre of all that comes the importance of the dispute as a major driving force which guides a State's determination on the steps to be taken with regard to the settlement of the dispute - whether to opt for settlement by legal means or pursue a diplomatic settlement, or even no settlement at all. The question regarding the justiciability

or otherwise of international disputes appears to be indeed the mother of all factors behind a State's reluctance to resort to arbitration or international adjudication in that the effects of this factor are not only evident in the domains of actual dispute settlement practice as we have seen in the Iran / UAE example above²¹⁴, but also extended, as we shall see in Chapter Five, to multilateral treaty formation with regard to the peaceful settlement of international disputes by, *inter alia*, arbitration. Moreover, that question was central to the debates regarding the issues of compulsory arbitration and adjudication.

It is the voluntary nature of arbitration and the freedom of action of the parties with regard to agreeing on the essential details of the settlement process which made arbitration an attractive forum for inter-State dispute settlement in the first place. However, despite this inherent characteristic of arbitration, in addition to the aforementioned factors behind State reluctance to arbitration which existed even in normal circumstances, irrespective of any formal commitment to arbitrate, schemes were sought in order to drag States into arbitration by means of an obligatory commitment (compulsory arbitration) notwithstanding those causes of reluctance, and in defiance of the nature of arbitration itself. Hence, the question of justiciability and its theoretical dimensions will be examined in detail in Chapter Four, in conjunction with the issue of compulsory arbitration. However, before moving on to that stage, we shall in the following chapter, lay the foundation for that discussion, by shedding some light on a major principle of international law which explains why a State, in principle, cannot be compelled to appear before an international court or tribunal in the same manner as individuals, namely, the necessity of State consent as the basis of the jurisdiction of international courts and tribunals, which is a sub-doctrine of the mother principle of State sovereignty.

Notes to Chapter Two:

¹ This part of the chapter, in particular, *infra* 1.2 is aimed at examining State practice with regard to the conclusion of bilateral and *multilateral* treaties and conventions for the pacific settlement of inter-State disputes in general and also the momentum of such practice. However, Chapter Five will provide an in depth account of each of the main provisions of the major multilateral arbitral mechanisms established in the past and also the success or otherwise of those mechanisms in securing the effectiveness of the arbitral process.

² The figures provided in the survey were criticised by Gray & Kingsbury (*op cit*, n. 12-13 p. 100) who provide a number of grounds of challenge of its accuracy by stating that it is:

“...based on the date of the award rather than that of the arbitration agreement. The numbers are misleading in that each tribunal counts as one, whether it made tens or hundreds of decisions or only one...The number [of arbitrations] can be reduced even further because some of the tribunals did not produce, or have yet to produce [at the time the survey was conducted] any award...”

³ *Survey of International Arbitrations 1794-1989*, Dordrecht, Martinus Nijhoff Publishers, 3rd edition, 1990, pp. 1- 236.

⁴ M.C. Pinto, *Prospects*, *op cit*, pp. 70-71.

⁵ Also influential in this respect were the awards in the Bulama arbitration in 1870; the first Behring Sea arbitration in 1873; the Delagoa Bay arbitration in 1875. See, H. Schlochauer, *Arbitration*, (1981), I, EPIL, pp. 16-17.

⁶ See *ibid*; and H. Mangoldt, *Arbitration and Conciliation Treaties*, (1981), I, EPIL, pp. 28, 30 (hereinafter cited as Mangoldt, *Arbitration Treaties*).

⁷ *Prospects*, *op cit*, p. 72.

⁸ On the debate regarding the nature of arbitral awards, see *supra* pp. 5-6.

⁹ See *supra* pp. 8-9.

¹⁰ On the debate regarding the judicial or otherwise diplomatic nature of inter-State arbitration see, *supra* pp. 3-6.

¹¹ *Ibid*, p. 72.

¹² It may be noted that an earlier effort in this regard was made by the *Institut de Droit International* in 1875 through its Draft Regulations for International Arbitral Procedure which were influenced by the provisions of the Treaty initiating the Alabama Claims arbitration in 1871 and served as the basis of the discussions of the parties to the 1899 Hague Convention regarding arbitral procedure. See *infra* p. 187.

¹³ I. Diaconu, *Peaceful Settlement of Disputes between States: History and Prospects*, in R. Macdonald & D. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, Dordrecht, Martinus Nijhoff Publishers, 1986, pp. 1095, 1096.

¹⁴ See the comments of some of the establishing members of the PCA at *infra* 1.5.2 of Chapter Five.

¹⁵ On this particular aspect of the Hague Conventions, see *infra* pp. 143-146 and 1.3 of Chapter Five.

¹⁶ *Op cit*, pp. 237- 466.

¹⁷ See *supra* pp. 15-16.

¹⁸ Pursuant to the arbitration agreement of October 3, 1996 between the two States, the tribunal provided rulings in two separate stages and in accordance with international law. The first rendered on October 9, 1998, concerned the territorial sovereignty of the island in the Red Sea and the scope of the dispute between the two States. The second award delimited the international boundary between the two States. The official text of the award of the tribunal in the first stage can be found in, 40-4, ILM, 2001, p. 900. The Award in the second stage in, *ibid*, p. 983. See also regarding documents in the case the PCA official website (<http://www.pca-cpa.org>), as accessed on 14/1/2002. For a discussion on the tribunals award in the first stage, see, B. Rudolf, *The Government of the State of Eritrea and the Government of the Republic of Yemen: Award of the Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, (1999), 3-93, AJIL, p. 668; N.S. Antunes, *The Eritrea-Yemen Arbitration: First Stage-The Law of Title to Territory Re-averred*, (1999), 48, ICLQ, p. 362; and W.M. Reisman, *The Government of the State of Eritrea and the Government of the Republic of Yemen*, (1999), 93-3, AJIL, p. 668. On the tribunal's award in the second phase see also by the same author, *Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)*, (2000), 94-4, AJIL, p. 721.

¹⁹ *Infra* 2.2 of Chapter Four. See also 2.1 of this chapter in general.

²⁰ The expression 'arbitral treaties' within the context of this discussion applies, unless otherwise indicated, to both either treaties of arbitration providing for arbitration alone or to treaties providing for arbitration along with other peaceful means of settlement, whether on the bilateral or multilateral levels.

²¹ *Supra* 2.1 of Chapter One.

²² H. Mangoldt, *Arbitration Treaties*, *op cit*, p. 30.

²³ H. Mangoldt, *Arbitration and Conciliation*, *op cit*, pp. 452-453.

²⁴ In this regard. Habicht (*op cit*, pp. 977-984) pointed out eleven different systems for the pacific settlement introduced by the treaties concluded in the post-WW1 era, namely, treaties for the arbitration of legal disputes; compulsory adjudication of legal disputes; arbitration of all disputes; arbitration of legal disputes and investigation in all other disputes; arbitration of legal disputes and conciliation in all other disputes; compulsory adjudication of claims of right, and conciliation in all other disputes; compulsory adjudication of legal disputes, and conciliation followed by arbitration in all other disputes; conciliation followed by arbitration in all disputes; conciliation in all disputes followed by compulsory adjudication of legal disputes; conciliation in all disputes followed by compulsory adjudication of legal disputes and arbitration of non-legal disputes; and conciliation followed by compulsory adjudication in all disputes.

²⁵ E.g. the Treaties of Arbitration concluded between Spain-Uruguay in 1922 (the text in, *ibid*, pp. 35-38); Austria-Hungary in 1923 (*ibid*, pp. 74-77); Japan-Switzerland in 1924 (*ibid*, pp. 182-185); Liberia-the USA in 1926 (*ibid*, pp. 387-388); and Sweden-the USA in 1928 (*ibid*, pp. 858-860).

²⁶ E.g. the Treaties of Conciliation, Arbitration and Compulsory Adjudication concluded between Germany-Switzerland in 1921 (text in, *ibid*, pp. 20-35); France-Switzerland in 1925 (*ibid*, pp. 226-232); Czechoslovakia-Sweden in 1926 (*ibid*, pp. 343-351); Chile-Italy in 1927 (*ibid*, pp. 544-551); Belgium-Denmark in 1927 (*ibid*, pp. 552-562); and Finland-Italy in 1928 (*ibid*, pp. 807-815). And also, the Treaties of Conciliation and Arbitration concluded between Czechoslovakia-Poland in 1925 (*ibid*, pp. 232-242); Estonia-Germany in 1925 (*ibid*, pp. 256-270); and the Netherlands-Siam in 1928 (*ibid*, pp. 891-893).

²⁷ See *infra* pp. 153-156.

²⁸ On the necessity of State consent not only before recourse to arbitration but also during the various stages of the settlement, see *infra* pp. 115-116.

²⁹ See H. Mangoldt, *Arbitration Treaties*, *op cit*, pp. 30-31,

³⁰ See, H. Mangoldt, *Arbitration and Conciliation*, *op cit*, pp. 455-456.

³¹ See in general *infra* 2.2.2.1 of Chapter Three.

³² N. Wuhler, *Arbitration Clauses in Treaties*, in Berhardt (ed.), *op cit*, vol. I, p. 37 (hereinafter cited as Wuhler, *Arbitration Clauses*).

³³ E.g. the 1899 & 1907 HCsPSID; the 1928 & 1949 General Acts for the Pacific Settlement of International Disputes; and the 1958 ILC Model Rules on Arbitral Procedure.

³⁴ See *infra* 3.2 of Chapter Five.

³⁵ See in general Chapter Five.

³⁶ H. Mangoldt, *Arbitration Treaties*, *op cit*, p. 31; and C. Gray & B. Kingsbury, *op cit*, pp. 100ff. See in general *infra* 2 of this Chapter for a number of possible reasons behind State hesitation to have recourse to arbitration; and 3 regarding the absence of certain categories of States from the arbitral dispute settlement arena.

³⁷ *Infra* 2.2 of Chapter Four.

³⁸ The issue of justiciability within the context of multilateral treaty practice for the peaceful settlement of international disputes, as well as, States' attitudes in that respect will be examined in detail in Chapter Five.

³⁹ See in general Chapter Five.

⁴⁰ *Infra* 2.2 of Chapter Four.

⁴¹ See the statement on this issue made by Baron Marschall von Bieberstein at the 1907 Hague Peace Conference. *Infra*, p. 145.

⁴² [1903] US Foreign Relations, pp. 293, 306, 313; [1910] *ibid*, p. 365; [1911] *ibid*, p. 87; [1914] *ibid*, pp. 144-145, cited in, H. Mangoldt, *Arbitration and Conciliation*, *op cit*, p. 477, n. 263.

⁴³ [1903] US Foreign Relations, p. 306, cited in, *ibid*, n. 264.

⁴⁴ G. Schwarzenberger, *A Manual of International Law*, London, Stevens & Sons Ltd., 5th edition. 1967, p.74; W.L. Tung, *International Law in an Organising World*, New York., Thomas Y. Crowell Co. 1968, pp. 49-50; H. Kelsen, *Recognition in International Law: Theoretical Observations*, (1941), 35, AJIL pp. 605, 610; and I. Brownlie, *Principles of Public International Law*, Oxford, the University Press, 5th edition, p. 90 (hereinafter cited as Brownlie, *Principles*).

⁴⁵ H. Mangoldt, *Arbitration and Conciliation*, *op cit*, pp. 477-478.

⁴⁶ R. Litwak, *Security in the Persian Gulf 2: Sources of Inter-State Conflict*, Aldershot, Gower Publishing Co Ltd, 1981, p. 56. However, it is interesting to note that the day before the invasion of Abu Musa, Iran and Sharjah had announced an agreement regarding the status of the island and which was reached despite of their continuance to maintain their respective claim to sovereignty over the island. The major terms of the aforementioned agreement were that:

- (A) Iranian troops would be stationed in an agreed upon part of the island where the Iranian flag was to be flown and in which Iran was to exercise total jurisdiction;
- (B) Sharjah was to retain jurisdiction over the rest of the island where its flag was to be flown and also its civil authorities and police force were to exercise control;
- (C) Both parties recognised the existence of a 12 mile territorial water limit around the island within which any revenues accruing from oil exploitation were agreed to be divided equally by the parties;

(D) Sharjah would receive from Iran an annual financial aid of £1.5 million for a period of nine years or until Sharjah's own annual petroleum revenues reached £3 million.

Although at the same period in which negotiations of the Iran / Sharjah agreement were under progress Iran was also in contact with Ra's Al-Kaymah for the purpose of reaching a settlement to their contending claims of sovereignty over the Greater and Lesser Tunbs, nevertheless, no agreement was reached. Hence, the landing of Iranian forces on the Greater Tunb on the day of the invasion was, unlike in the case of the Abu Musa Island, met with resistance from the Sharjah constabulary force and which resulted in the loss of life from both sides. *Ibid*, p. 58.

⁴⁷ From the 'Times of India Online' website: (<http://www.timesofindia.com/010101/01mide3.htm>), as visited on 21/04/2001. Also most recently at the 22nd Session of the AGCC Summit held at Muscat, Oman on the 30th and 31st of December 2001, the leaders in the final communiqué renewed the Council's calls "...to Iran to agree to refer the dispute to the ICJ" expressed the Council's full support for the steps taken by the UAE to restore its sovereignty over the three islands by peaceful means and reaffirmed its absolute rejection to all Iranian claims to the islands, considering those claims as void and legally baseless. From Arabic international news website Ain-Al-Yaqeen [<http://www.ain-al-yaqeen.com/issues/200220111/feat3en.htm>] as accessed on 11/1/2002.

⁴⁸ I.e. on the basis of continuous Iranian (or at that time 'Persian') occupation until the last quarter of the 19th century after which Iran, according to her facts on the case, was forcibly evicted by Great Britain, and the islands were transferred (unlawfully) to Sharjah and Ra's al-Kaymah. *Ibid*, p. 56.

⁴⁹ I.e. the importance of the islands, in view of their strategic location in the mouth of the Strait of Hormuz, for the free flow of oil and goods in and out of the Strait and which, therefore, in the interest of Iran as well as the West in general according to the Iranian argument, requires that the islands should be controlled by a power committed to the stability of the region. (*Ibid*, p. 56). This security-oriented argument is another factor that has attached a significant degree of importance to all three islands from the Iranian viewpoint at the time of the occupation. Indeed Iran during the reign of Shah Mohammed Reza Pahlavi and following the withdrawal of Great Britain from the Persian Gulf in 1971 played the role of policeman of the Gulf right until the Ayatollah Revolution in 1979, a status which fell in line with the so-called 'Nixon Doctrine' at that time. However, such justification at the current state of affairs seems rather outdated in view of the dramatic change in circumstances. Iran is no longer counted among the USA's allies in the region, a status it used to enjoy prior to the 1979 Revolution and the famous occupation by Iranian university students of the US Embassy in Tehran, and indeed the Iranian's continued possession and presence on all three islands is now in itself perceived as a major source of tension. Moreover, during the famous 'Tanker War' in the 1980's, Iran made considerable use of Abu Musa on which light boats, helicopters and silkorm missiles were stationed for their use in intimidating and attacking oil tankers navigating in the Gulf. For further analysis of the Iran / UAE dispute as well as its implications on security in the Gulf region, see in general, W.A. Rugh, *The Foreign Policy of the United Arab Emirates*, (1996), 50, Middle East Journal, pp. 57, 58-63; and D. Caldwell, *Flashpoints in the Gulf: Abu Musa and the Tunb Islands*, (1996), 4(3), Middle East Policy, p. 50. For a recent study on the legal aspects of the Iranian occupation of the islands, see in general, Y.E.A. Al-Naqbi, *The Sovereignty Dispute over the Gulf Islands Abu Musa, Greater and Lesser Tunbs*, (PhD Thesis submitted to the University of Glasgow), 1998. For a concise and good discussion on the history of and practical importance of the islands to both Iran and the UAE with political, military, strategic and economical analysis, see, 'Abu Musa: Island Dispute between Iran and the UAE', at (<http://www.american.edu.ted.ABUMUSA.HTM>) as visited on April 27, 2001.

⁵⁰ *Ibid*, p. 56. In the light of Iran's claims of total and irrevocable sovereignty over all three islands and, in particular, Abu Musa due to its oil deposits, the Iranian Parliament in April 1993 passed a law extending its territorial waters to 20 kilometres, a move which is alleged to be attributable to Tehran's displeasure with the amount of oil it receives from the Mubarak oil field near to Abu Musa which, according to the 1971 Iran / Sharjah agreement (see *supra* n. 46 of this chapter), is to be shared equally with the latter. C. Gentile, *Abu Musa oil-grab flares again*, at (http://www.metimes.com/issue99-7/reg/abu_musa_oil.htm) as visited on May 10, 2001.

⁵¹ See *supra* n. 18 of this chapter.

⁵² 40-4, ILM, 2001, p. 847.

⁵³ For an insight into the various past efforts to settle the dispute peacefully, see, Y.E.A. Al-Naqbi, *op cit*, pp. 222-237.

⁵⁴ Al-Quds Al-Arabi News Paper (Arabic), December 2, 2001, p. 3.

⁵⁵ C. Gentile, *loc cit* n. 50 of this Chapter.

⁵⁶ In this respect, Iran has recently refused to meet a high-level GCC tripartite committee set up for the purpose of finding a peaceful settlement to the dispute. Cited at:

(<http://www.arabia.com/article/0,1690,News%7C36587,00.html>), as visited on May 10, 2001.

Moreover, along with calls made by the UAE and other Gulf States either individually or collectively under the auspices of the GCC, efforts aimed at encouraging a peaceful settlement of the dispute were also made by the Secretary-General of the UN (Press Release SG/SM/6835), and most recently, former President Abdurrahman Wahid of Indonesia offered during a visit to the UAE on February 2001, to mediate a settlement to the dispute. (<http://uae.orientation.com/en/topstories/17141832.html>) accessed on May 10, 2001. However, there was no positive response from the Iranian side towards any of these initiatives.

⁵⁷ W.A. Rugh, *op cit*, p. 62.

⁵⁸ Cited at (<http://www.arabia.com/article/0,1690,News%7C36587,00.html>), as visited on May 10, 2001.

⁵⁹ *Infra* 2.2 of that chapter.

⁶⁰ See in general *infra* 2 of Chapter Four.

⁶¹ The reasons for this hesitation can be clearly understood from a letter sent by the Prime Minister of India, Jawaharlal Nehru, to his Pakistani counter-part, Liaquat Ali Khan, on October 8, 1950, in which he indicated that the Kashmir dispute is "...a non-justiciable and political issue and cannot be disposed of by reference to a judicial tribunal", a view which was also shared by Liaquat Ali Khan himself. *Correspondence between the Prime Ministers of India and Pakistan on the Subject of 'No War Declaration'*, New Delhi, 1950, pp. 20 and 31. Cited in R.P. Anand, *Studies in International Adjudication*, New York, Oceana Publications INC, 1969, p. 49, n. 34-35. (hereinafter cited as Anand, *Studies*). For an international law perspective on the Kashmir Question, see in general, I. Hussain, *Kashmir Dispute in International Law Perspective*, Quaid-i- Azam Chair; National Institute of Pakistan Studies; Quaid-i- Azam University, Islamabad, 1998, and in particular pp. 232-240 on the aspect concerning the non-justiciable nature of the Kashmir question in the eyes of both governments.

⁶² On this issue, see *supra* pp. 3-6.

⁶³ A further example in this regard, however, within an area not covered in this study (i.e. arbitration between two parties of which only one is a State) is the official reaction of the Saudi Arabian Government in the aftermath of the *Saudi Arabia v. Arabian American Oil Company* case 'the *Aramco* case' (27, ILM, p. 117. For a commentary on the case, see, R. Dolzer, *Aramco Arbitration*, (1981), II, EPIL, pp. 19-22, cited hereinafter as Dolzer, *Aramco Arbitration*) in which the award came in favour of the latter. In an unpublished paper for a lecture given in Arabic by Dr. Yahya Al-Sam'an at the Institute of Diplomatic Studies in Saudi Arabia in 1996 on the issue 'Arbitration as a Means for Settlement of Disputes Arising out of Dealings of a Private International Character', Dr Sam'an pointed out that the award raised serious doubts from the Saudi side as to the integrity of international commercial arbitration which it viewed as an instrument that was designed in order to safeguard and protect the interests of western companies and businesses, a view which was engendered following the non-application of Saudi law on the merits of the dispute by the tribunal (on the aspect in the *Aramco* case concerning the applicable law, see, J.G. Wetter, *op cit*, vol. II, pp. 411-431) and which if were applied, from the Saudi point of view, might have changed the whole outcome in its favour.

This resulted in the adoption of Resolution 58 of June 9, 1963 (corresponding to 17/01/1383AH), by the Saudi Council of Ministers which imposed a total ban on governmental concerns and institutions from resorting to arbitration as means of settlement of any dispute that may arise between them and any other party, whether national or overseas. The Resolution also banned them from entering into or concluding any agreements which are to be subject to the national law(s) of any other State besides Saudi Arabia. However, this negative attitude towards arbitration has changed following the boom in foreign investment in Saudi Arabia and which, therefore, made it necessary to establish means for the settlement of any disputes that may arise between foreign companies and Governmental institutions and concerns or *vice versa*. This was epitomised in the Saudi Arbitration Regulations of April 25, 1983 issued by Royal Decree No. M/46 (the text in 22, ILM, 1983, p. 1052). Moreover this positive view towards arbitration further on evolved and Saudi Arabia now is a signatory to a number of international instruments that provide for arbitration as means of settlement.

⁶⁴ 7, ILM, 1968, p. 633; and 50, ILR, p. 520.

⁶⁵ D. Conrad, *Rann of Kutch Arbitration (Indo-Pakistan Western Boundary)*, (1981), II, EPIL, pp. 240-241; and J.G. Wetter, *The Rann of Kutch Arbitration*, (1971), 65, AJIL, p. 346 (hereinafter cited as Wetter, *Rann of Kutch*).

⁶⁶ For the text, see, J.G. Wetter, *Arbitral Process*, *op cit*, vol. I, pp. 250-251.

⁶⁷ See D. Conrad, *op cit*, pp. 240-242; and J.G. Wetter, *Rann of Kutch*, *op cit*, pp. 346-357.

⁶⁸ R.P. Anand, *Studies*, *op cit*, p. 218.

⁶⁹ *Ibid*, pp. 237-238.

⁷⁰ 7, ILM, 1968, pp. 633, 692.

⁷¹ R.P. Anand, *Studies*, *op cit*, p. 218.

⁷² *Times of India*, February 21, 1968, p. 1. Cited in *ibid*, p. 219.

⁷³ The tribunal, after questions arose of whether it was empowered to decide *ex aequo et bono*, indicated that "...as the Parties have not by any subsequent agreement consented to confer the power upon the tribunal to adjudicate *ex aequo et bono*, the tribunal resolves that it has no such power". 7, ILM, 1968, pp. 633, 643.

⁷⁴ Cited in R.P. Anand, *Studies*, *op cit*, p. 219.

⁷⁵ Cited in *ibid*.

⁷⁶ *Jurisdiction of the ICAO Council* case (Pakistan v. India), ICJ Rep, 1972, p. 46; *Trial of Pakistani Prisoner of War* case (Pakistan v. India), ICJ Rep, 1973, p. 327; and the *Case Concerning the Aerial Incident of 10 August 1999* (Pakistan v. India), 39-5, ILM, 2000, p. 1116.

⁷⁷ *Right of Passage over Indian Territory* case (Portugal v. India), ICJ Rep, 1957, p. 125; *Trial of Pakistani Prisoner of War* case (Pakistan v. India), ICJ Rep, 1973, p. 327; and the *Case Concerning the Aerial Incident of 10 August 1999* (Pakistan v. India), 39-5, ILM, 2000, p. 1116.

⁷⁸ *Jurisdiction of the ICAO Council* case (Pakistan v. India), ICJ Rep, 1972, p. 46.

⁷⁹ R.P. Anand, *Studies*, *op cit*, p. 52.

⁸⁰ See *infra* pp. 171-173.

⁸¹ See in general, The International Bureau of the PCA, *The Permanent Court of Arbitration: New Directions*, the Hague, 1991 (hereinafter cited as PCA, *New Directions*).

⁸² *Ibid*, p. 9.

⁸³ *General Introduction*, in Report of a Study Group of the David Davies Memorial Institute of International Studies (ed.), *op cit*, pp. 57, 65-66.

⁸⁴ See, D. Rusk, *The Role and Problems of Arbitration with Respect to Political Disputes*, in T.E. Carbonneau (ed.), *Resolving Transnational Disputes through International Arbitration*, Charlottesville, University Press of Virginia, 1984, pp. 15, 17.

⁸⁵ See, F.S. Northedge & M.D. Donelan, *International Disputes: The Political Aspects*, London, Europa Publications, 1971, pp. 198-199. Among the most illustrative examples in this respect (although within the domains of diplomatic or political means of settlement) was the famous assassination of President Anwar Sadat of Egypt in October 6, 2001, following his signing of the Camp David Accords with Israel.

⁸⁶ On this issue, see in general *supra* 2.1. of this Chapter and *infra* 2 of Chapter Four.

⁸⁷ *Op cit*, pp. 57-58. See also I. Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopedia*, London, C. Hurst & Co Ltd, 1979, p. 13.

⁸⁸ For a discussion on the concept and meaning of the term 'dispute' and the 'international character' of disputes see, N.L. Wallace-Bruce, *The Settlement of International Disputes: The Contribution of Australia and New Zealand*, the Hague, Kluwer Law International, 1998, pp. 3-18.

⁸⁹ *Op cit*, p. 19. Nevertheless, these factors appear mainly to apply in the case where the dispute involves questions of minor political importance. In fact, in most disputes involving important questions, the direct opposite of the first three of the above factors may occur, i.e. one or both parties may prefer to settle the issue via diplomatic means (or even refuse to consider any form of settlement of all) but not by legal means of settlement; public opinion or the fear of it by respective governments may be an obstacle in the way of submitting the dispute to an arbitral tribunal; and, therefore, no need for legal third party assistance arises. In other words the dispute, from the point of view of one or both parties, is non-justiciable.

⁹⁰ *Op cit*, p. 56.

⁹¹ R. Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, in T.E. Carbonneau (ed.), *Resolving Transnational Disputes through International Arbitration*, Charlottesville, University Press of Virginia, 1984, pp. 3, 6. See also the argument of the Government of Iran in the *Hostages* case at *infra* p. 152.

⁹² *The Settlement of Disputes in International Law: Institutions and Procedures*, Oxford, the University Press, 2000, p. 1.

⁹³ See also, R. Bilder, *op cit*, p. 6.

⁹⁴ 20, ILM, 1981, pp. 223, 231.

⁹⁵ R. Bilder, *op cit*, p. 6.

⁹⁶ The discussions that took place and the opinions expressed in the international Symposium are published in H. Mosler & R. Bernhardt (eds.), *op cit*.

⁹⁷ *Ibid*, p. 168.

⁹⁸ *Ibid*, p. 49.

⁹⁹ *Enlargement of the Contentious Jurisdiction of the Court*, in L. Gross (ed.), *The Future of the International Court of Justice*, New York, Oceana Publications INC, 1976, vol. II, pp. 461, 465 (hereinafter cited as Gross, *The Future*).

¹⁰⁰ in H. Mosler & R. Bernhardt (eds.), *op cit*, p. 168.

¹⁰¹ *The International Court of Justice*, in *ibid*, pp. 193, 228-231 (hereinafter cited as Steinberger, *International Court of Justice*).

¹⁰² See *supra* pp. 3-6.

¹⁰³ *Law and Practice of the International Court: 1920-1996*, the Hague, Martinus Nijhoff Publishers, 3rd edition, vol. I (The Court and the United Nations), 1997, p. 15 (hereinafter cited as Rosenne, *Law and Practice*).

¹⁰⁴ It should be noted that Art. 38(2) of the Statute of the ICJ does permit the Court to decide a case *ex aequo et bono* on the important stipulation that the parties *agree to that affect*, however, to this date, this has never been done and is unlikely to happen, therefore, it is usually assumed that the Court will apply legal principles in accordance with para. (1) of Art. 38. J.G. Collier, *The International Court of Justice and the Peaceful Settlement of Disputes*, in V. Lowe & M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*, Cambridge, Cambridge University Press, 1996, pp. 364, 367.

¹⁰⁵ See in general 2.2 of this Chapter.

¹⁰⁶ However, in other settlements involving parties with a lesser degree of hostility towards each other, every thing went smoothly. In fact, even cases where there existed a certain degree of hostility between the disputants, the settlement of the dispute in itself, irrespective of whether one or both parties got everything they wanted, was sometimes a prelude to a new chapter in the relations between the parties and entailed greater economical and political links between them. This is best illustrated by the outcome of the ICJ's Ruling of March 16, 2001, on the case concerning *Maritime Delimitation and Territorial Questions* between Qatar and Bahrain (40-4, ILM, 2001, p. 847), which entailed a significant boost in joint economic, trade, finance and investment relations between the two States after a long period of strained relations as a result of the dispute, see, Keesing's Record of World Events, (2001), 47-3, p. 44081. A similar example in this respect also appears in the case of Yemen and Eritrea following the two awards in the *Hanish Island* arbitration (for the case, see, *supra* n. 18 of this Chapter) where the two States signed an agreement at Asmara on April 18, 2001, on trade, transport and maritime issues, and strengthening economic and technical ties between them after the two States were on the verge of armed conflict. Erina news agency, from [<http://www.pca-cpa.org/RPC/ERY18apr.htm>] as accessed on 13/1/2002.

¹⁰⁷ *Contemporary Developments in Legal Techniques in the Settlement of Disputes*, (1983), 180, Hague Recueil, pp. 177, 180-181 (hereinafter cited as Bowett, *Legal Techniques*).

¹⁰⁸ *Op cit*, p. 463.

¹⁰⁹ *Op cit*, p. 6.

¹¹⁰ H. Mosler & R. Bernhardt (eds.), *op cit*, p. 49.

¹¹¹ L. Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, (1971), 65-II, AJIL, pp. 253, 273-275 (hereinafter cited as Gross, *Considerations*); P.C. Jessup, *International Litigation as a Friendly Act*, (1960), 60, Colum. L.R., p. 24; and C.W. Jenks, *op cit*, p. 108.

¹¹² H. Mosler & R. Bernhardt (eds.), *op cit*, p. 168.

¹¹³ Corresponding to Art. 48 of the 1907 HCPSID.

¹¹⁴ *Institute of International Law*, Annuaire 381 (1959-II). Reproduced in H.W. Briggs, *The Neuchatel Session of the Institut de Droit International*, (1960), 54-I, AJIL, pp. 132, 136.

¹¹⁵ Art. 1.

¹¹⁶ See also in this regard, UN General Assembly Resolutions 46 / 59 of December 9, 1991 (Declaration on Fact-Finding); 43 / 51 of December 5, 1988 (Declaration on the Prevention and Removal of Disputes); and 44 / 31 of December 4, 1989. On the issue regarding the obligations to settle disputes peacefully that may arise from UN Resolutions, see N.L. Wallace-Bruce, *op cit*, pp. 31-33.

¹¹⁷ L. Gross, *Considerations*, *op cit*, p. 274.

¹¹⁸ E.g. the reaction of the Government of the USA after Nicaragua's application to the ICJ in 1984 (the *Nicaragua* case, ICJ Rep(s), 1984 & 1986, pp. 392ff & 14ff respectively); and also Bahrain's angry reaction following Qatar's application to the ICJ (the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, 40-4, ILM, 2001, p. 847. See also, Keessing's Record of World Events, (2000), 46-5, p. 43599; (1996), 42-12, p. 41425; and (1991), 37-7-8, p. 38362.

¹¹⁹ P. Malanczuk, *op cit*, p. 302.

¹²⁰ R. Bilder, *op cit*, pp. 5-6.

¹²¹ *Op cit*, p. 211.

¹²² I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, London, Martinus Nijhoff Publishers, 1998, p. 116 (hereinafter cited as Brownlie, *The Rule of Law*).

¹²³ However, a praiseworthy effort in this regard is the 'Financial Assistance Fund for Settlement of International Disputes' (see, PCA, *Basic Documents*, *op cit*, p. 231) established by the Administrative Council of the PCA on December 11, 1995, for the purpose of providing financial assistance to qualifying States parties to the 1899 and 1907 Hague Conventions or any institution or enterprise owned and controlled by such States with the expenses arising out of recourse to the PCA or any of the means administered by it. For a comparison of the time consumed in proceedings before arbitral tribunals and the ICJ with surveys see in general, L. Gross, *The Time Element in the Contentious Proceedings in the International Court of Justice*, (1969), 63-1, AJIL, p. 74.

¹²⁴ See the statements made in the Sixth Committee of the UN's General Assembly by the representatives of the USA (Doc. A/8382, para. 346, p. 115); Sweden (*ibid*, para. 350, p. 116); Canada (*ibid*, para. 380, p. 126); Turkey (*ibid*, para. 18, p. 5, add. 3); New Zealand (*ibid*, p. 4, add. 4); Japan (Doc. A/C.6/SR. 1280, p. 6) at the Assembly's 25th Session.

¹²⁵ *Supra* 1.1 of this chapter.

¹²⁶ Although there existed during the period covered by this part of the chapter certain other socialist and communist regimes besides those of Eastern Europe, in South America, Asia and Africa, space only permits us to examine the Eastern Bloc, whose practice with regard to international law and the pacific settlement of international disputes was far more influential and consistent with the ideological principals espoused by those States, in particular, the former USSR. Moreover, many of the socialist and communist States not belonging to the Eastern Bloc may more accurately be categorised under Developing or Third World States.

¹²⁷ The reason for the reference to the former USSR as the only example in this respect is not difficult to see, namely, because it was the largest and most influential of the Eastern Bloc group and the most representative of the communist school of thought in international forums; it acted as the spearhead in defending and, also, observing communist ideology in the domain of international treaty practice with regard to the peaceful settlement of disputes by legal means.

- ¹²⁸ See *infra* 1.1 of Chapter Five.
- ¹²⁹ *Soviet Law*, in A. Larson & C.W. Jenks (eds.), *Sovereignty within the Law*, London, Stevens & Sons Ltd, 1965, p. 268.
- ¹³⁰ Korovin, *International Law of the Transitional Period* (in Russian), Moscow, 1924, pp. 48-49, cited in M.S. Korowicz, *Some Present Aspects of Sovereignty in International Law*, (1961-I), 102, Hague Recueil, pp. 6, 82, n. 38.
- ¹³¹ J.N. Hazard, *op cit*, pp. 268-269.
- ¹³² On the theory of absolute sovereignty, see *infra* pp. 102-103.
- ¹³³ M.S. Korowicz, *op cit*, pp. 30-31.
- ¹³⁴ *Creative Role of the USSR in the Just Solution of Territorial Problems*, in the Polish monthly review *Panstoi Prawo* (State and Law), Warsaw, No. 12 (December), 1950, p. 9 Cited in *ibid*, p. 32.
- ¹³⁵ See R.A. Jones, *The Soviet Concept of 'Limited Sovereignty' from Lenin to Gorbachev: The Brezhnev Doctrine*, London, the Macmillan Press Ltd, 1990, pp. 27-28.
- ¹³⁶ A. Cassese, *op cit*, p. 110.
- ¹³⁷ *Sovermennoye mezdunarodnoye publichnoye pravo*, p. 42. Cited in M. Chakste, *Soviet Concepts of the State, International Law and Sovereignty*, (1949), 43, AJIL, pp. 21, 31.
- ¹³⁸ *Infra* pp. 103-104.
- ¹³⁹ D. Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations*, the Hague, Martinus Nijhoff Publishers, 1970, p. 16.
- ¹⁴⁰ *The Second World War and International Law*, (1946), 40, AJIL, pp. 742, 748.
- ¹⁴¹ *Theory of International Law* (translated by W.E. Butler), Cambridge, Harvard University Press, 1974, pp. 3-20.
- ¹⁴² *Ibid*, p. 30.
- ¹⁴³ *Ibid*, p. 28.
- ¹⁴⁴ G. Shinkaretskaya, *International Arbitration in the External Policy of the Soviet Union*, in A. Carty & G. Danilenko (eds.), *Perestroika and International Law: Current Anglo-Soviet Approaches to International Law*, Edinburgh, Edinburgh University Press, 1990, pp. 110, 113 (hereinafter cited as Shinkaretskaya, *International Arbitration*).
- ¹⁴⁵ J.N. Hazard, *op cit*, p. 290-292.
- ¹⁴⁶ E.g. ILO; UNESCO; WHO; the 1947 Convention on the World Meteorological Organisation; the 1956 Supplementary Convention on the Abolition of Slavery; the IAEA in 1956; the 1975 Final Act for the Conference on Security and Co-operation in Europe; and UNCLOS III.
- ¹⁴⁷ *Ibid*, pp. 293-295; M.S. Korowicz, *op cit*, p. 82.
- ¹⁴⁸ *Uchebnoe Posobie po Mezhdunarodnomu Publichnomu Pravy (Ocherki)* [Teaching Aid in International Law (Essays)], 1947, p. 204 (in Russian). Cited in J.H. Hazard, *op cit*, pp. 293-294.

¹⁴⁹ M.S. Korowicz, *op cit*, p. 82.

¹⁵⁰ F. Kozhevnikov & G. Sharmazanashvili, *Mezhdunarudnyi sud oon- Organizatsiia, Tseli I Praktika* [The International Court of the United Nations Organisation-Organisation, Goals and Practice], 1971, p.4 (in Russian). Cited in C. Osakwe, *The Soviet Position on International Arbitration as a Method of Resolving Transnational Disputes*, in T. Carbonneau (ed.), *op cit*, pp. 184-185, n.2.

¹⁵¹ D.B. Levin, *The Principle of Peaceful Settlement of International Disputes*, Moscow, 1977, p. 99 (in Russian). Cited in E. Vilegjanina, *The Principle of Peaceful Settlement of Disputes: A New Soviet approach*, in A. Carty & G. Danilenko (eds.), *op cit*, pp. 119, 121.

¹⁵² F. Kozhevnikov & G. Sharmazanashvili, *op cit*, pp. 3-4. Cited in *ibid*, p. 121; and V.D. Kudryavtsev, *The Competence of the UN International Court of Justice*, 1970, p. 14 (in Russian). Cited in *ibid*.

¹⁵³ G. Shinkaretskaya, *A Changing Attitude towards International Adjudication in the Soviet Union*, in M. Brus, S. Muller & S. Wiemers (eds.), *The United Nations Decade of International Law: Reflections on international Dispute Settlement*, AD Dordrecht, Kluwer Academic Publishers, 1991, pp. 59, 64 (hereinafter cited as Shinkaretskaya, *A Changing Attitude*).

¹⁵⁴ See, Official Documents, *Soviet Union Accepts Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions*, (1989), 83-2, AJIL, p. 457.

¹⁵⁵ I.e. the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitutions of Others; 1952 Convention on the Political Rights of Women; 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 1979 Convention on the Elimination of all Forms of Discrimination Against Women; and 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁵⁶ The expression 'new States' or 'Third World States' within the context of this discussion covers only those States in *Asia and Africa* whose independence was gained following the establishment of the ICJ in 1945. For a concise discussion on the various conceptions in this regard see, I.F. Shihata, *The Attitudes of New States Towards the International Court of Justice*, (1965), 19-2, I.O., pp. 203, 204-205; and A. Cassese, *International Law in A Divided World*, Oxford, the University Press, 1994, pp. 115-116.

¹⁵⁷ For a good discussion on the major difficulties and conflicts in post-colonial Africa and the efforts of the former OAU in that respect see in general, M. Munya, *The Organisation of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, (1999), 19, B.C. Third World L.J., p. 537.

¹⁵⁸ A. Cassese, *op cit*, p. 116. An illustrative example in this respect is the position of most of the newly independent States which organised themselves in 1964 as the Non-Aligned Movement (the Group of 77). Indeed, unlike the States which formed part of either the then Western and Eastern Blocs during the Cold War era, none of these 'non-aligned' States shared any common ideology. Moreover, most of their governments varied from the far right to the far left of the political spectrum. These two factors, as well as those already indicated have raised questions as to whether this group forms a bloc in any real sense. See, P. Malanczuk, *op cit*, pp. 28-29.

¹⁵⁹ *Op cit*, p. 43.

¹⁶⁰ See also, H. Steinberger, *The International Court of Justice*, *op cit*, pp. 226ff; H.G. Darwin *op cit*, p. 67. Indeed, the negative attitude of some Asian-African States towards current international law was acknowledged in the findings of the work group assigned by the Administrative Council of the PCA in 1991 to consider, *inter alia*, the reasons for lack of recourse of some States to the Court, as a reason behind those

States non-recourse to the PCA or arbitration in general. See, International Bureau of the PCA, *The PCA: New Directions*, *op cit*, p. 9.

¹⁶¹ A. Cassese, *op cit*, pp. 117-118.

¹⁶² See R.P. Anand, *Role of the "New" Asian-African Countries in the Present International Legal Order*, (1962), 56-II, AJIL, pp. 383, 393-400 (hereinafter cited as Anand, *New Asian-African Countries*).

¹⁶³ T.O. Elias, *New Horizons in International Law*, London, Martinus Nijhoff Publishers, 1992, 2nd edition, p. 29.

¹⁶⁴ A. Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, (1999), 40, Harv. Int'l L.J., p. 1.

¹⁶⁵ *Ibid*, pp. 1-2.

¹⁶⁶ *Ibid*, p. 2.

¹⁶⁷ *Ibid*, p. 4.

¹⁶⁸ H.G. Darwin, *op cit*, p. 67.

¹⁶⁹ T. Maluwa, *The Peaceful Settlement of Disputes Among African States, 1963-1983: Some Conceptual Issues and Practical Trends*, (1989), 38, ICLQ, pp. 299, 302.

¹⁷⁰ UNSCOR, 987th Meeting, December 18, 1961.

¹⁷¹ See also the statements made by Dr. Pal, the Indian Member to the ILC, YILC, 1957-I, p. 158.

¹⁷² H. Steinberger, *The International Court of Justice*, *op cit*, pp. 227-228.

¹⁷³ UN General Assembly Res. 2625(XXV) on October 24, 1970.

¹⁷⁴ E. McWhinney, *The 'New' Countries and the 'New' International Law: The United Nations' Special Conference on Friendly Relations and Co-operation among States*, (1966), AJIL, 60(1), pp. 1, 20; and also P. Houben, *Principles of International Law Concerning Friendly Relations and Co-operation Among States*, (1967), AJIL, 61(3), pp. 703, 714.

¹⁷⁵ P. Malanczuk, *op cit*, p. 29.

¹⁷⁶ *New Asian-African Countries*, *op cit*, p. 388

¹⁷⁷ See also, M. Shaw, *op cit*, p. 35.

¹⁷⁸ *Op cit*, pp. 213-214.

¹⁷⁹ *South West Africa / Namibia* case (4 Advisory Opinions): ICJ Rep, 1950, pp. 128-145; *ibid*, 1955, pp. 67-123; *ibid*, 1956, pp. 23-71; and *ibid*, 1971, pp. 16-345. (2 Judgements): *ibid*, 1962, pp. 319-662; and *ibid*, 1966, pp. 6-505. On the case see, E. Klein, *South West Africa / Namibia (Advisory Opinions and Judgements)*, (1981), II, EPIL, pp. 260-270 (and also the references cited therein).

¹⁸⁰ L. Gross, *Considerations*, *op cit*, p. 267. See also by the same Author, *The International Court of Justice and the United Nations*, (1967-II), 121, Hague Recueil, pp. 313, 346-349 (hereinafter cited as Gross, *International Court of Justice*).

¹⁸¹ I.F. Shihata, *op cit*, pp. 220-221; and H.G. Darwin, *op cit*, pp. 67-68. On the 'geographical distribution' aspects of the composition of the ICJ, see, M. Sorensen, *The International Court of Justice: Its Role in Contemporary International Relations*, (1960), 14-II, I.O., pp. 261, 262-264. See also the statements made by the representatives of some of the Asian and African States in the debate of the UN General Assembly's Sixth Committee regarding the Review of the Role of the International Court. UN Doc. A/C.6/ SR. 1211, pp. 9ff.

¹⁸² I.F. Shihata, *op cit*, p. 220.

¹⁸³ However, one must not forget in this respect Art. 31 of the Statute of the ICJ regarding the provision of Judges *ad hoc*.

¹⁸⁴ However, the neutral member or umpire may be appointed by a third-party appointing authority if the *compromis* expressly states so after the expiry of any time-limits in that regard.

¹⁸⁵ See, International Bureau of the PCA, *The PCA: New Directions*, *op cit*, p. 9.

¹⁸⁶ Quoted in F.S. Nariman, *International Arbitration and Developed Countries*; unpublished paper presented to ICSID's Seminar on International Arbitration and Developing Countries in 1991. Cited in S.K. Asente, *The Perspective of African Countries on International Commercial Arbitration*, in S. Muller & W. Mijs (eds.), *op cit*, pp. 133, 135.

¹⁸⁷ *Op cit*, p. 120.

¹⁸⁸ E.g. Current Judge of the ICJ, Mr Nabil El-Araby; former Judges of the ICJ, A. Badawi, George Abi-Saab (also former Judge of the International Criminal Tribunal for the former Yugoslavia), and Mr. Ahmed Sadek El-Kosheri (Judge *ad hoc* in the *Cases Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom) and (Libyan Arab Jamahiriya v. United States of America), and also arbitrator in the *Hanish Island* case (Yemen v. Eritrea). Hamed Sultan arbitrator in the *Taba* arbitration.

¹⁸⁹ See, T.O. Elias, *op cit*, pp. 29ff.

¹⁹⁰ *Studies*, *op cit*, pp. 53-72, see in particular, pp. 71-72.

¹⁹¹ See *supra* p. 64.

¹⁹² See in general *supra* 2.1 of this chapter; and *infra* 2 of Chapter Four.

¹⁹³ See *supra* pp. 62-64.

¹⁹⁴ T. Maluwa, *op cit*, pp. 303-307. This may also be deduced from the relative success that was achieved by the OAU's (diplomatic) Central Organ for the prevention, management and resolution of conflicts established by the decision of the Organisation's Assembly of Heads of State and Government during its 29th session in Cairo in June 1993. See M. Munya, *op cit*, p. 546. For a detailed preview of the establishment, aims and up to date activities of the aforementioned mechanism see: (<http://www.oau-oua.org/document/mechanism/opening.htm>) as visited on 24-07-2001.

¹⁹⁵ The former OAU which came into existence in 1963 was recently replaced by the 'African Union' which took effect from May 26, 2001 following a unanimous endorsement by the Assembly of Heads of State and Government of the OAU at the year 2000 Summit that was held in Togo.

¹⁹⁶ H.G. Darwin, *op cit*, p. 68.

¹⁹⁷ I.e. *Continental Shelf* case (Tunisia v. Libyan Arab Jamahiriya), [Judgement] ICJ Rep, 1982, p. 18; *Frontier Dispute* case (Burkina Faso v. Republic of Mali), ICJ Rep, 1986, p. 554; the case concerning the *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), [Judgement] ICJ Rep, 1991, p. 53; *Territorial Dispute*

case (Libyan Arab Jamahiria v. Chad), ICJ Rep, 1994, p. 6; *Maritime Delimitation* case (Guinea-Bissau v. Senegal); *Land and Maritime Boundary* case (Cameroon v. Nigeria), 1994-; *Kasikili / Sedudu Island* case (Botswana v. Namibia), 1998-1999; *Ahmadou Sadio Diallo* case (Republic of Guinea v. Democratic Republic of Congo), 1998- ; and the *Armed Activities on the Territory of the Democratic Republic of Congo* (Democratic Republic of Congo v. Uganda [1999-]; Rwanda [1999-2001]; and Burundi [1999-2001]). On these latter cases, see the official website of the ICJ [<http://www.icj-cij.org/>].

¹⁹⁸ See, C.M.T. Mbu, *The Organisation of African Unity (O.A.U.) and the Settlement of African Disputes: An Appraisal of Machinery, Practice and Effectiveness*, (PhD Thesis submitted to the University of London), 1996, pp. 38-41; and M. Munya, *op cit*, pp. 543-545.

¹⁹⁹ I.e. *Temple of Preah Vihear* case (Cambodia v. Thailand), ICJ Rep, 1962, p. 6; *Right of Passage over Indian Territory* case (Portugal v. India), ICJ Rep, 1957, p. 125; *Jurisdiction of the ICAO Council* case, (Pakistan v. India), ICJ Rep, 1972, p. 46; *Trial of Pakistani Prisoner of War* case (Pakistan v. India), ICJ Rep, 1973, p. 327; *Sovereignty over Pulau Litigan and Pulau Sipadan* (Indonesia v. Malaysia), official website of the ICJ (<http://www.icj-cij.org/>); and the *Case Concerning the Aerial Incident of 10 August 1999* (Pakistan v. India), 39-5, ILM, 2000, p. 1116.

²⁰⁰ C.M.T. Mbu, *op cit*, p. 41.

²⁰¹ *Ibid*, pp. 459-460.

²⁰² On the issue regarding the compatibility of the granting of consent by states for the submission of their disputes to international tribunals with the doctrine of state sovereignty, see in general *infra* 1.3 of Chapter Three.

²⁰³ *Reflections on the Pacific Settlement of Inter-State Disputes in Africa*, in Papers of the Third Annual Conference of the Nigerian Society of International Law, held at the Nigerian Institute of International Affairs, Lagos between 19-20 March, 1971 (edited by T.O. Elias), p. 42.

²⁰⁴ The most recent of them, the Ivory Coast on August 29, 2001. From the official website of the ICJ [<http://www.icj-cij.org/>] as accessed on 13/1/2002.

²⁰⁵ See *supra* n. 18 of this chapter.

²⁰⁶ 40-2, ILM, 2001, p. 259. The Eritrea – Ethiopia five member Boundary Commission was established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties and applicable international law. Its hearings are not open to the public. The Claims Commission established under the treaty is also composed of five members for the purpose of deciding through binding arbitration all claims for loss, damage or injury by one Government against the other, and by the nationals (including both national and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) resulted from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. For more on the activities of both commissions see the official website of the PCA [<http://www.pca-cpa.org/>] under ‘Recent and Pending Cases’ as accessed on 15/1/2002.

²⁰⁷ 27, ILM, 1988, p. 1421; and also 80, ILR, p. 244.

²⁰⁸ *Ibid*, 1968, p. 633. See also *supra* 2.2 of this chapter.

²⁰⁹ *Supra* pp. 3-6.

²¹⁰ See *Infra* pp. 199-201.

²¹¹ ICJ Rep, 1987, p. 3; and ICJ Rep, 1989, p. 15

²¹² I.e. *Maritime Delimitation* case (Guinea-Bissau v. Senegal); *Land and Maritime Boundary* case (Cameroon v. Nigeria), 1994-; *Kasikili / Sedudu Island* case (Botswana v. Namibia), 1998-1999; *Ahmadou Sadio Diallo* case (Republic of Guinea v. Democratic Republic of Congo), 1998- ; and the *Armed Activities on the Territory of the Democratic Republic of Congo* (Democratic Republic of Congo v. Uganda [1999-]; Rwanda [1999-2001]; and Burundi [1999-2001]). On these cases, see the official website of the ICJ [<http://www.icj-cij.org/>].

²¹³ See *supra* p. 70.

²¹⁴ See in general *supra* 2.1 of this chapter.

CHAPTER THREE:

Consent to Arbitration: A Fundamental Element of State Sovereignty

Introduction:

The initiation of the arbitral process as a whole is dependent on the consent of the parties to the dispute to refer it to arbitration, a principle which also applies in the case of the submission of a particular dispute to international adjudication under the ICJ¹. State consent is considered as a *sine qua non* for the submission of a particular dispute to arbitration or international adjudication under the ICJ². Moreover, the availability of State consent is an essential factor not only before the submission of the dispute to arbitration, but also during the various stages of the arbitral process³.

The discussion in this chapter will be mainly devoted to the consent requirement and will involve an examination of the main principle of international law from which the requirement is derived, namely, State sovereignty; the significance of State consent in the field of inter-State dispute settlement in general and how it is expressed in the case of international arbitration in particular.

1. The Principle of Sovereignty:

In order to develop a clear understanding of the concept and significance of the consent requirement in inter-State dispute settlement to be examined in *infra* (2) of this chapter, it appears necessary first of all to clarify the basis from which the requirement is derived, namely, the principle of sovereignty and the main relevant factors therein. The reason for the inclusion of the principle of sovereignty within the context of our discussion on State consent is that a State's granting or withholding of consent to the submission of a dispute to legal or even diplomatic means of dispute resolution, as well as to adhere to an international instruments that provides for the settlement of disputes by such means is considered as an attribute of State sovereignty. Indeed, Nantwi⁴ pointed out that "...the engagement by a sovereign State to submit its disputes with another sovereign State or other sovereign States to international adjudication...is, indeed, attributable to the very exercise of sovereignty...."⁵.

The discussion on the principle of sovereignty will be conducted under two major headings. The first examines the historical origins and evolution of the principle, including two of the main theories regarding sovereignty. The second is concerned with the main elements of sovereignty as currently applied to govern relations between States. However, since the area of sovereignty in international law is a very broad and complex issue, a comprehensive examination of which would be far beyond the limited scope of this section, the following discussion will only briefly elucidate the basic aspects of the principle, and especially those relevant to the issue of State consent and the peaceful settlement of disputes.

1.1. The Origins of the Principle:

Sovereignty, as Nincic⁶ points out, is “a political concept which was subsequently given legal expression...” Although the (origins) of the legal doctrine of sovereignty are often traced to the French jurist and philosopher, Jean Bodin⁷, a number of writers⁸ have pointed out that the concept of sovereignty was not his creation⁹. Nevertheless, it was he who gave it doctrinal shape through his famous *Six Livres de la Republique* (Six Books of the Commonwealth)¹⁰. However, it is important to point out that Bodin’s conception of sovereignty was not primarily concerned with its application in the external context to govern the foreign relations of States at that time, but instead with the political order within the State and the relations between the ruler and his subjects¹¹; Bodin viewed sovereignty as “...the absolute and perpetual power...” within a State¹². On the essence of the authority of the sovereign, Bodin¹³ indicated that “...the principal mark of sovereign majesty and absolute power is the right to impose laws generally on all subjects regardless of their consent.” The law, as he pointed out, was “...nothing else than the command of the sovereign in the exercise of his sovereign power.”¹⁴ However, he further pointed out that the sovereign himself was not bound by such laws¹⁵. Although Bodin has often been linked to the early theories of absolute sovereignty, it appears that he did not envisage such a notion¹⁶, inasmuch as he recognised that the authority of the ruler was limited by the laws of God (Divine Law) and the Laws of Nature¹⁷, and also that certain limitations were imposed by the sovereign upon himself, such as his obligations towards other sovereigns or, in certain cases, obligations towards his subjects, and his observance of international engagements or agreements with other States¹⁸. Bodin’s theory of sovereignty, especially the aspect concerning the limitations of the rulers’ authority by Divine Law and the Laws of Nature, which represented the Natural Law School of thought, received the full

recognition of two of the most prominent founders of international law¹⁹, namely, Hugo Grotius²⁰ and Emerich de Vattel²¹.

Generally speaking, sovereignty, within the context of the modern nation State, is said²² to be a product of certain social and political developments that occurred in medieval Europe, namely, the struggle of the ruler to escape certain restrictions imposed upon his authority by the feudal order on the one hand and the Holy Roman Empire²³ on the other, in order to achieve an authority independent of any other higher authority. This struggle, as Nincic²⁴ points out, "...contributed to the downfall of a social and political system which had outlived its usefulness and to the creation of a new and more advanced one." Although what emerged was a 'new' social and political system in the words of Nincic, nevertheless, Brierly²⁵ pointed out that the previous system did leave its marks on this new emerging conception of authority. In particular, the nature of the relations between the 'lord' and his 'vassal' within the context of the feudal conception of society was reformulated and applied in the new system to govern relations between the ruler and ruled. As Brierly puts it:

...there were elements in the feudal conception of society capable of being pressed into the service of the unified national States which were steadily being consolidated in Western Europe from about the twelfth to the sixteenth centuries, and influential in determining the forms that those States would take. Thus, when its disintegrating effects on government had been eliminated, the duty of personal loyalty of vassal to lord which feudalism has made so prominent was capable of being transmuted into the duty of unquestioning allegiance of subject to monarch in the national State; the intimate association of this personal relationship with the tenure of the land made the transition to *territorial* monarchy easy and natural; and the identification with rights of property of rights which we regard as properly political led up to the notions of the absolute character of government, of the realm as the 'dominion' or property of the monarch, and of the people as his 'subjects' rather than as citizens. Feudalism itself had been an obstacle to the growth of the national State, but it left a legacy of conceptions to its victorious rival which strongly emphasised the absolute character of the government.

Sovereignty, which played a major and decisive role in the above struggle in favour of the total authority of the ruler, was understood at that time to provide theoretical justification for arbitrary rule in both domestic and external affairs; in other words, the absolute dominion of the ruler in the internal, as well as external affairs of his State, independent of any limitation whatsoever, as well as the inclination to identify sovereignty with force. These were the basic characteristics of the so-called theory of absolute sovereignty²⁶. This absolutist theory which dominated the 17th, 18th and 19th centuries and practically continued up to the First World War was subsequently elaborated and rationalised by a number of leading theorists in different parts of Europe, such as Hobbes, Hegel, Spinoza and Kant²⁷. Nevertheless, it should be noted that there were wide-ranging differences among the various theories and conceptions of sovereignty within the absolutist context and that some of the more moderate ones tended to come close to the theory of relative sovereignty²⁸ examined below. However, in its more extreme forms²⁹, the application of this notion of sovereignty in State practice would obviously lead to total anarchy and chaos. This was recognised by Fenwick³⁰, who criticised it as:

...a doctrine of legal anarchy, which fastened its hold upon governments, and in the name of maintaining the independence of States, denied their responsibility to the community as a whole and left sovereign weak States to the mercy of the sovereign strong.

Moreover, Brierly³¹, in a lecture delivered at the Hague Academy of International Law in 1936 on the rules of the law of peace, drew attention to the fact that, as a matter of principle, those theorists who developed the doctrine of sovereignty were not interested in the relations of States *inter se*, but were all concerned with the single State *in abstracto*;

they paid comparatively little attention to the question as to how the theory of sovereignty could be applied in a world composed of a fair number of sovereign States. He argued that the confusion reigning around the concept of sovereignty in international law is very largely due to the fact that the sovereign State was first defined by individuals like Bodin, Hobbes and Hegel, who, whatever their status was at their time, were not international lawyers and did not pause to think whether their theories would fit the facts of international relations. This theory, in principle, is inconsistent with a system of international law which, as we shall see in *infra* 1.2 of this chapter, is based on a foundation of reciprocal rights and duties imposed upon States in order to preserve their co-existence.

The increasingly obvious need to ensure the mutual adjustment of sovereignty in order to achieve peaceful co-existence among sovereign national States, led a number of theorists to seek ways to place sovereignty under certain limitations. This brings us to the theory of relative sovereignty. In the relativist school of thought,³² the expression 'sovereignty' came to mean that, while sovereign States were the sole masters of their actions, not all actions were permitted to them³³. Moreover, the perennial antinomy between sovereignty and international law according to the relativist school of thought was, clearly and irrevocably, settled in favour of the latter; and the limitations imposed upon sovereignty were defined by the law of nations and not by the States themselves. Furthermore, the concept of sovereignty came to merge more and more with that of independence. However, independence within this context does not connote independence from norms which should apply equally to all sovereign States; rather, what is meant is independence from any other sovereign authority. As an important corollary to States' independence came the concept of the equality of States³⁴ as a principle governing the external affairs of States and the autonomy of States in their internal affairs (or matters

which fall within their domestic jurisdiction), and as a safeguard to that autonomy came the principle of non-intervention in the internal affairs of other States.

The above developments came hand in hand with the revolutionary changes that occurred in the late 18th and the early 19th centuries and which gave rise to a new concept of sovereignty or, rather, led to the modification of the concept which had already emerged. Within the domestic sphere, sovereignty, with the coming of constitutional forms of government, was transferred from the 'ruler' to the 'people'. The freedom and equality of individuals within the State was paralleled by the independence and equality of States in their foreign relations, and sovereignty came to constitute the legal expression of their independence and equality. This above notion of sovereignty, as well as the principles derived from it, are consistent with the traditional doctrine which, as we shall examine in the following, has survived to our day.

1.2. The Basic Components of Sovereignty (Its Main Internal and External Aspects):

In the current state of international affairs, States³⁵ are commonly characterised as 'sovereign', and the expression 'sovereignty' comes as an implicit, axiomatic characteristic of Statehood³⁶. The current political system, which is composed of a large number of 'sovereign States' as its basic units, is governed by a number of fundamental principles which are derived from sovereignty³⁷, and which, in general, represent some of the main constituting features of what are commonly known as the fundamental rights and duties of States³⁸. Although the limited space of this section does not permit us to provide a comprehensive examination of all the basic elements derived from sovereignty, nevertheless, light will be shed on two major aspects of sovereignty, namely, its application

within the internal sphere of a State (internal sovereignty), and its external applications. This will involve a brief examination of three basic principles that are considered as basic elements of sovereignty and are often used interchangeably with the expression 'sovereignty', namely, the principles of independence, non-intervention, and the equality of States.

Regarding the internal aspects of sovereignty, the tribunal in the *North Atlantic Coast Fisheries* arbitration³⁹ once indicated that "one of the essential elements of sovereignty is that it is to be exercised within territorial limits..." Therefore, with regard to this observation it appears that sovereignty is essentially territorial⁴⁰, a principle which was also upheld by Judge Huber in his famous award in the *Island of Palmas* case⁴¹ in which he indicated that sovereignty:

...in the relations between States signifies independence. Independence in regard to a portion of a globe is the right to exercise therein, to the exclusion of any other State, the functions of a State...territorial sovereignty...serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum protection of which international law is the guardian.

Therefore, sovereignty within the internal sphere of a State is the total and exclusive power of the State, in the form of legitimate authority over all persons and things within the locale of its jurisdiction (its territory)⁴². This notion signifies the principle of domestic jurisdiction which refers to "...the exclusive internal competence of the highest legislative, judicial, and administrative (executive) authorities of the State."⁴³ International law sets limits on the exercise of domestic jurisdiction by States in two ways. First, a State may not prescribe rules or seek to enforce them outside its territorial limits and within the

jurisdiction of another State, without the consent of the territorial authority of that State. Second, the principle of domestic jurisdiction protects a State from unwarranted intrusion, whether legislative, administrative or physical, by another State⁴⁴; hence, the significance of the principle of non-intervention examined below.

Among the basic elements of sovereignty within the external sphere is independence. On the relationship between sovereignty and independence, Korowicz⁴⁵ pointed out that the two concepts are interchangeable by indicating that “sovereignty means independence, and independence implies sovereignty.” Moreover, “independence does not exist without sovereignty and vice versa, but sovereignty is a broader notion and covers the first”. Independence is considered as the political and legal autonomy of the State, in its not being subject to any external direction or interference or control by any other like authority⁴⁶ without its consent⁴⁷. However, independence within this context must not be confused with the concept of absolute sovereignty already examined above⁴⁸, which contemplates the total absence of any form of restriction or limitation, whether legal or moral, on States’ freedom of action in their internal as well as external affairs. The independence of States in international law is not absolute, but subject to the rules of international law⁴⁹, in particular, the respect and observance of the independence of other States, which is epitomised by refraining from interference in the internal affairs of other States⁵⁰. In this respect, although Art. 2(7) of the Charter indicated that “[n]othing in this present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State....”, nevertheless, such limitation according to the same article does not prejudice the application of enforcement measures under Chapter VII”. Moreover, one must also not forget the provisions of Arts. 2(5-6) and 103 of the Charter.

The rule *par in parem non habet iudicium* (non-intervention in the internal affairs of other States), which is well established in the practice of the ICJ⁵¹, as well as the UN⁵², reigns supreme in international law and inter-State relations and safeguards the exclusive authority of States in matters which fall within their own internal sphere of competence. Intervention, as Hall⁵³ pointed out:

...takes place when a State interferes in the relation of two other States without the consent of both of them or either of them, or when it interferes in the domestic affairs of another State, irrespective of the will of the latter, for the purpose of maintaining or altering the actual condition of things within it...

Therefore, with regard to the above observation, intervention can also take place in the external sphere as well as in the internal, and in a number of forms⁵⁴. However, Hall appears to stipulate that in order for such intervention to be unlawful, it *must* take place in the absence of the consent of the State(s) concerned, a situation which Oppenheim⁵⁵ calls ‘*dictatorial interference*’ in the external independence or the territorial or the personal supremacy of a State. If, in contrast, a certain party, whether a State or organisation or committee, is permitted to intervene in a certain matter by the State(s) concerned, then such intervention is considered lawful, due to the availability of the consent of the State(s) subject to the intervention⁵⁶.

The third external aspect of sovereignty within this discussion is the principle of equality of States, whereby despite the various differences between States with regard to their size, or degree of civilisation, or population, or power, whether militarily or economically, or form of government, or wealth *per capita*, all States are considered (legally) equal⁵⁷. The equality of States doctrine is best illustrated nowadays by the UN General Assembly’s one State, one vote rule. However, in addition to this practical aspect

of the equality doctrine, the doctrine seems to confer several other rights and obligations which apply on all States and which are elaborated in the UN General Assembly's 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States (Res. 2625 XXV)⁵⁸. The most significant attribute of the equality of States in this respect is that, *inter alia*⁵⁹, "...no obligation may be imposed upon a sovereign State without its consent, direct, or indirect, general or particular, given in advance or *ad hoc*." Further, and as an important corollary to this principle, *inter alia*⁶⁰, a State may not be compelled to appear before an international tribunal in the absence of its consent which, as the ICJ in its Advisory Opinion in the 1950 *Interpretation of the Peace Treaties* case⁶¹ indicated "...is the basis of the Court's jurisdiction in contentious cases."⁶²

1.3. The Compatibility of the Granting of Consent by States for the Submission of their Disputes to International Tribunals with the Doctrine of State Sovereignty:

From the above discussion, it appears that State sovereignty is not absolute, but subject to certain limitations imposed by international law⁶³. However, as an important and generally accepted principle of international law which comes as a consequence of State sovereignty, namely, the equality of States principle, no State may be compelled to submit its inter-State disputes to arbitration or international adjudication under the ICJ, or any other peaceful means of settlement, without its consent expressly given prior to the initiation of the settlement process⁶⁴. In this regard Schwarzenberger⁶⁵ pointed out that:

...the principle of consent reigns supreme in international law. States are sovereign and, for this reason, equal in the eyes of international law. *Par in parem non habet imperium*. Unless anything to the contrary has been agreed, every State is its own

judge and cannot be subjected against its will to the jurisdiction of any international court or tribunal....[t]hus, beyond the minimum of obligations imposed on States by international customary law and general principles of law recognised by civilised nations, every subject of international law may decide for itself whether to accept any further restriction of the unfettered exercise of its sovereignty.

From this observation, it appears that sovereign States remain free to decide whether or not to submit their disputes to the jurisdiction of international tribunals and, when they do so, such an undertaking imposes a limitation upon their sovereignty, a limitation which arises from the free will of the State(s) concerned and which, in turn, vests the tribunal with the necessary powers to adjudicate the dispute in question. The award of Walker D. Hines, the sole arbitrator in the case of the 1921 *Cession of Vessels and Tugs for Navigation on the Danube*⁶⁶, asserts not only this point but also that the submission of disputes by sovereign States to the jurisdiction of international tribunals by means of an international agreement is an exercise of their sovereignty. In his words:

The duty which the Arbitrator is compelled to perform by the explicit and unqualified language of the Treaties....is the most delicate and most difficult task which he is called upon to perform under any of the Treaties, but in discharging this duty the Arbitrator is not undertaking to interfere in any sense with the sovereign rights of the States. On the contrary, he is discharging this grave duty solely because all the States which have signed the treaties have each, by its sovereign act, called upon the arbitrator to do so.

Therefore, at least from the viewpoint of the relative sovereignty school of thought such an undertaking appears not to derogate from the sovereignty of the State(s) concerned⁶⁷, since the power to enter into international agreements is an attribute of State

sovereignty, a principle which is best illustrated in the judgement of the PCIJ in the famous 1928 *S.S. Wimbledon* case⁶⁸, in which it indicated that:

[t]he Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But *the right of entering into international engagements is an attribute of State sovereignty* [emphasis added]⁶⁹.

The application of the PCIJ's general observation above within the context of undertakings made by States for the submission of their disputes to the jurisdiction of international tribunals is best understood from the statement of Nantwi⁷⁰, in which he pointed out that:

...the assumption by a sovereign State of an international engagement is not only compatible with that State's sovereignty, but that, indeed, the power to enter into such an engagement is only attributable to the exercise of sovereignty itself. The result is thus not a derogation from sovereignty but merely a limitation on it – a limitation which can only be effected through the exercise of sovereignty....[c]onsequently, the engagement by a sovereign State to submit its disputes with another sovereign State or other sovereign States to international adjudication, far from being incompatible with the concept of sovereignty, is, indeed, attributable to the very existence of an exercise of sovereignty itself.

In conclusion, therefore, it may be said that the act of entering into an international engagement by a sovereign State, in which it imposes upon itself an obligation to submit its dispute(s) to international arbitration by the signing of a *compromis* in the case of an existing dispute (*ad hoc* arbitration), or in the case of general undertakings to refer future disputes to international arbitration, by the ratification of an international instrument that

embodies a certain arbitral compromissory clause or the adherence to a general arbitral convention or agreement (bilateral or multilateral), is considered as an exercise of its sovereignty. This act, in consequence, imposes a certain limitation upon its sovereignty, one which emanates from its own free sovereign will, and does not, therefore, infringe the doctrine of State sovereignty.

2. State Consent as the Basis of the Jurisdiction of International Tribunals:

In this part of the chapter, an examination will be made of the significance of State consent in the peaceful settlement of international disputes and the ways and means by which consent can be given in the case of international arbitration:

2.1. The Significance of the Consent Requirement in the Field of Inter-State Dispute Settlement:

The forms and means generally recognised for expressing a State's consent to refer disputes to the jurisdiction of arbitral tribunals will be examined in *infra* 2.2 of this chapter; however, this section will mainly focus on the significance and dimensions of the consent requirement in the field of the peaceful settlement of international disputes in general and, also, the area of the settlement of international disputes by legal means via., arbitration and international adjudication under the ICJ in particular.

From the above discussion it appeared that, as a consequence of State sovereignty and the equality of States under international law, State consent is a *sine qua non* for the submission of their disputes to the jurisdiction of international tribunals, and forms the

basis of the jurisdiction of international tribunals. This also can be clearly understood from the statement of Lauterpacht⁷¹ on this issue. He pointed out that:

...the theory of the sovereignty of States reveals itself in international law mainly in two ways: first, as the right of the State to determine what shall be for the future the content of international law by which it will be bound; secondly, as the right to determine what is the content of existing international law in a given case....[This] second aspect connotes that the State is in principle the sole judge of the existence of any individual rules of law, applicable to itself. [Therefore] [i]t is a canon of international law that the jurisdiction of international tribunals is one voluntarily accepted by States.

Therefore, a State, as a general rule, cannot summon another sovereign State to appear before an international tribunal for the purpose of settling a difference between them in the way that private individuals can compel one another to litigate under the municipal law to which they are subject⁷², inasmuch as, the jurisdiction of international tribunals is dependant solely upon the consent of the States concerned⁷³ which, therefore, is required in any legal proceedings on the international level which involves States as parties. “It hardly needs to be said how basic this assumption is. The requirement is normally rigorously applied.....”⁷⁴. This principle has been reaffirmed in the jurisprudence of both the former PCIJ and the current ICJ on several occasions, such as in the *Mavromatis Palestine Concessions* case⁷⁵, in which the PCIJ pointed out that its jurisdiction was limited and “...invariably based on the consent of the respondent and only exists in so far as this consent has been given....”.

In the case-law of the ICJ, this principle was again strictly observed in the 1995 *East Timor* case⁷⁶ following an application filed by Portugal, the original administrator of

East Timor, against Australia as a result of the latter's conclusion with Indonesia of an agreement in 1989 concerning the delimitation and exploitation of the continental shelf of East Timor. East Timor, a former Portuguese colony, was at that time under the *de facto* rule of the Indonesian Government⁷⁷ after being occupied by Indonesia on December 7, 1975, and annexed as its twenty-seventh province July 17, 1976. This action was strongly condemned by a number of States and by the UN which, in several instances, called upon Indonesia to withdraw from East Timor and confirmed the right of its people to self-determination and independence⁷⁸. The Portuguese application to the ICJ claimed that Australia, by the signing of the 1989 agreement, had infringed, *inter alia*, the rights of the people of East Timor to self-determination and permanent sovereignty over natural resources; and the rights of Portugal as the administering power with regard to its responsibilities towards the people of East Timor. The Court, although recognising the soundness of the arguments advanced by the Portuguese side, which asserted the right of peoples to self-determination as of an *erga omnes* character, dismissed the case because Indonesia, which was a substantially affected party in the case, had not consented to the Court's jurisdiction, pointing out that "...the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things."⁷⁹ The Court, with reference to its previous judgement in the 1954 *Monetary Gold* case⁸⁰, further held that:

...the effects of the judgement requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject matter of such a judgement made in the absence of that State's consent. *Such a judgement would run directly counter to the 'well-established principle of international law embodied in the Court's Statute,*

*namely that the Court can only exercise jurisdiction over a State with its consent' [emphasis added]*⁸¹.

However, the requirement of State consent in the field of the peaceful settlement of international disputes is not solely confined to disputes settled by legal means (arbitration and international adjudication) but also extends to the case of disputes settled by diplomatic means as well, i.e. negotiation, enquiry, mediation, conciliation and good offices. This has been asserted through the *dicta* of the PCIJ in its Advisory Opinion in the *Status of the Eastern Carelia* case⁸² in 1923 in which it declared that “[i]t is well established in international law that no State can, without its consent, be compelled to submit its dispute with other States either to mediation or to arbitration, or to any other kind of peaceful settlement.” Moreover, the State consent principle also extends to the parties’ freedom in selecting the means suitable for the resolution of their dispute⁸³. Examples with regard to UN practice include Art. 2(3) and 33(1)⁸⁴ of the UN Charter, as well as the main Declarations and Resolutions adopted by the UN General Assembly, that provided for the peaceful settlement of disputes, such as UN General Assembly Res. 54/28 adopted on January 21, 2000, regarding the United Nations Decade of International Law⁸⁵; the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States⁸⁶; the 1982 Manila Declaration on the Peaceful Settlement of International Disputes⁸⁷; the Declaration on the Prevention and Removal of Disputes and Situations which may Threaten International Peace and Security⁸⁸; and the Declaration on Fact-finding by the UN in the Field of the Maintenance of International Peace and Security⁸⁹. This is also the case in the provisions of some regional treaties that embodied certain provisions regarding the peaceful settlement of disputes, such as the 1948 Pact of

Bogota⁹⁰, the Charter of the OAU⁹¹, the 1957 ECPSD⁹², and the 1957 Helsinki Final Act of the Conference on Security and Co-operation in Europe⁹³. In all of the above instruments, no obligation was imposed on the States concerned to submit their dispute(s) to a specific means of peaceful settlement. Instead, States were given the freedom to choose among the peaceful means provided as they may find appropriate to the circumstances and the nature of the dispute in question.

Within the context of legal means of settlement, consent is not only required at the beginning of the settlement process but must continue during the various stages of the process until the court or tribunal reaches its decision. This point is best illustrated by the incident in the *Nicaragua* case⁹⁴ in which the USA withdrew from further proceedings after the ICJ ruled that it had jurisdiction to hear Nicaragua's claims⁹⁵, an important and significant decision by the Court which may be used as an example to demonstrate the integrity and independence of the ICJ even in cases involving the most strongest and influential parties⁹⁶. However, within the context of *ad hoc* arbitral practice this factor appears to be a much more vital one. The process of *ad hoc* arbitration appears to consist of three main stages. The first and most important is the stage before the initiation of the proceedings, in which the major guidelines of the process are negotiated and specified by the parties in the *compromis*, such as the basic considerations with regard to the constitution of the tribunal⁹⁷; the law(s) applied by the tribunal; the rules of procedure that govern the process⁹⁸; and the basic considerations with regard to the award⁹⁹. Therefore, this first stage may be regarded as the institutional stage. The practical stage in the arbitral process is the second, namely, when the proceedings have been initiated and the tribunal begins to function in accordance with sphere of action defined by the parties in the *compromis*. This is the crucial part of the whole process, in which the game of tug-of-war

begins between the disputants who undergo the process of rebutting their claims and arguments and refuting those of the other party which are in both instances scrutinised and evaluated by the tribunal. The third stage is after the tribunal has rendered its award, when the party against whom the award was made is to comply with the terms of the award either immediately or in accordance with any time-limits provided. The whole of that process is held together by the good faith and full co-operation of the disputants, which must be present during the various stages of the arbitral process, from the conclusion of the *compromis* until the tribunal has rendered its award, and any act of frustration or non co-operation in this regard, which clearly reflects the withdrawal of the consent on the part of the non co-operating State, would impede any further progress in the arbitral settlement or, indeed, render any chance of a settlement abortive. This appears clear in the statement of Fox¹⁰⁰ who pointed out that:

[i]t is scarcely necessary to review the many stages at which a State may call a halt to an arbitration; a State's consent may be refused to the recognition of any dispute requiring submission to arbitration, to the signing of the *compromis* which defines the terms of reference and powers of the arbitrator, to the constitution of the tribunal either by failure to appoint its own national member¹⁰¹ or by failure to agree to the neutral members. Even when the arbitration tribunal has been properly constituted and has opened its proceedings a State may block progress by failure to appear, refusal to afford the tribunal the necessary information or facilities for investigation and, in the event of some change in the membership of the tribunal, refusal to appoint or agree to the appointment of a substitute. *Consent, not only given at the beginning of the arbitration proceedings, but continued throughout the proceedings until the tribunal retires to make its award, is, therefore, an essential ingredient to the completion of any arbitration* [emphasis added].

Regarding the above observation, it may be added that the consent of the disputants must also exist after the award has been rendered. Such consent is epitomised by States' compliance with the award of the tribunal. The clearest example in this regard is Argentina's refusal to acknowledge the award of the tribunal in the 1978 *Beagle Channel* case¹⁰² with Chile, a matter which was strongly resented by the Government of the latter and almost brought the two States to the brink of war but was later, however, settled by the mediation of the Pope¹⁰³.

2.2. The Ways and Means of Granting Consent to Arbitration:

Since a State's consent is a basic prerequisite for it submitting to the jurisdiction of an international tribunal, this section of the chapter is intended to provide a brief preliminary identification of the generally recognised means for expressing a State's consent to the jurisdiction of international arbitral tribunals:

2.2.1. Consent *ad hoc*: Special Agreement (*compromis d' arbitrage*) for *ad hoc* arbitration:

States' consent in *ad hoc* arbitration can be expressed by the conclusion of a special agreement or *compromis d' arbitrage* for the reference of a particular dispute that has already arisen between the parties to an *ad hoc* arbitral tribunal. The *compromis* has been defined by Oellers-Frahm¹⁰⁴ as "...an agreement between two or more States with the view of submitting an existing dispute to the jurisdiction of an arbitrator, [or] an arbitral tribunal...". According to Art. 52 of the 1907 HCPSID and Art. 2 of the ILC's Model Rules on Arbitral Procedure combined, the *compromis* in general should specify the following:

- 1- The undertaking of the parties to submit the dispute in question to arbitration;

- 2- A definition of the subject matter of the dispute and, if possible, the points that are not agreed upon by the parties;
- 3- The number, methods of appointment and names of the arbitrators and any fixed time limits for their appointment;
- 4- The law(s) applied in the case, as well as the rules of procedure that govern the functioning of the tribunal and its jurisdiction;
- 5- The number of members required for the constitution of a *quorum* for the conduct of the hearings and any additional directions to be considered by them in this respect;
- 6- The language(s) to be employed by and before the tribunal for the conduct of the hearings;
- 7- The time fixed for the closing of the hearings, or within which the award shall be rendered including the method to be followed in reaching the award, as well as the main considerations therein;
- 8- The manner in which the expenses of the tribunal shall be apportioned between the parties.

The *compromis* is indeed the soul of the arbitral tribunal in particular, as well as the whole arbitral settlement in general and provides the framework within the confines of which the tribunal is to operate. Although attempts were made to adopt a uniform model draft *compromis* applicable to all forms of inter-State disputes¹⁰⁵, it may be said that due to the variety and divergence of the nature and circumstances of the disputes submitted to *ad hoc* arbitration, the *compromis* is usually formulated in accordance with the special circumstances of each individual case¹⁰⁶.

The *compromis* is required not only in the case of *ad hoc* arbitration, but also in the cases of disputes referred to arbitration in compliance with an undertaking to arbitrate¹⁰⁷ in

the form of a compromissory clause¹⁰⁸ on the basis that such an undertaking is considered nothing more than an acceptance in principle of arbitration as a means of settling any dispute that may arise between the parties and *cannot* be given any effect without the conclusion of a special agreement or *compromis* which, as shown above, defines the question(s) to be referred to arbitration, the constitution of the tribunal and the other essential provisions in this respect. This applies also to the case of arbitrations under the mechanism of a general international convention or treaty for the pacific settlement of international disputes¹⁰⁹ which, although it may provide adequate provisions for the constitution of the tribunal and similar matters, such as the 1899 & 1907 Hague Conventions and the 1928 & 1949 General Acts for the Pacific Settlement of International Disputes for example, nevertheless, may still may require the conclusion of a *compromis* in order to define the question(s) which the tribunal is to decide. In both cases, such provisions are considered by some writers, such as Simpson & Fox¹¹⁰, and Murty¹¹¹ as nothing other than a mere *pactum de contrahendo*, an agreement to enter into negotiations for the conclusion of the *compromis*, which does not entail an obligation to reach an agreement in that respect.

2.2.2. Consent *ante hoc*: General Undertakings to Refer Future Disputes to International Arbitration:

2.2.2.1. Compromissory Clauses:

Compromissory clauses or 'jurisdiction clauses' serve to furnish a method for the pacific settlement of disputes and can be agreed upon and included in an international treaty¹¹² of any kind¹¹³. Although there are various trends in compromissory clause practice

with regard to the means of settlement¹¹⁴, nevertheless, the limited scope of this section only permits us to examine those relevant to the central topic of our study on international arbitration, namely, arbitral compromissory clauses. In this regard, there exist two major forms of arbitral compromissory clauses, namely, 'special' and 'general'¹¹⁵. Special arbitration clauses contemplate that all or all of a certain class of disputes arising out of the treaty containing the clause are submitted to arbitration¹¹⁶. General arbitration clauses relate usually either to all disputes that may arise between the parties¹¹⁷ or to the interpretation or application of the treaty in force between the parties containing the compromissory clause¹¹⁸. However, the content of arbitration clauses may vary considerably. In this regard, frequent international treaty practice shows that a number of multilateral conventions contain provisions for the settlement of disputes by arbitral tribunals, combined in part with other methods, either cumulatively or alternatively. An example of the former is Art. 4 of the 1947 Treaty of Friendship between Turkey and Transjordan (Jordan)¹¹⁹ which provided that the parties are to settle their disputes "...by peaceful means in conformity with the provisions of Article 33 of the Charter of the United Nations". However, in certain other cases the clause may adopt a more general approach, such as Art. 19 of the Extradition Treaty between Brazil and Argentina, which provided that "[a]ny dispute between the High Contracting Parties shall be settled by peaceful means recognised in international law". These forms of clauses leave the choice of suitable means of settlement to the parties, thereby upholding the principle of the freedom of selection of means already examined above. As regards compromissory clauses where the means of settlement are enumerated alternatively, an example is Art. 15 of the European Agreement Concerning the International Carriage of Dangerous Goods by Inland Waters, signed on May 25, 2000 which provides that:

1. Any dispute between two or more Contracting Parties concerning the interpretation or application of this Agreement shall so far as possible be settled by negotiation between the Parties in dispute.
2. Any dispute which is not settled by direct negotiation may be referred by the Contracting Parties in dispute to the Administrative Committee which shall consider it and make recommendations for its settlement.
3. Any dispute which is not settled in accordance with paragraph 1 or 2 shall be submitted to arbitration if any of the Contracting Parties in dispute so requests and shall be referred accordingly to one or more arbitrators selected by agreement between the parties in dispute. If within the three months from the date of the request for arbitration the Parties in dispute are unable to agree on the selection of an arbitrator or arbitrators, any of those Parties may request the Secretary-General of the United Nations to nominate a single arbitrator to whom the dispute shall be referred to for decision.
4. The decision of the arbitrator or arbitrators appointed under paragraph 3 of this article shall be binding on the Contracting Parties in dispute¹²⁰.

The mechanism established by the above article restricts the disputants' freedom of selection of means of settlement and resort to a subsequent method is not authorised unless the parties have failed to resolve their dispute by a method previously enumerated in the clause before that method. Therefore, as a rule in such cases, recourse to an arbitral tribunal is only permitted after the exhaustion of the other means¹²¹. The article also provided certain other provisions regarding the constitution of the tribunal, a practice which falls in line with the provisions of a number of international treaties and agreements, such as Art. 3(2-4) of the 1965 Cease-Fire Agreement between India and Pakistan following the outbreak of hostilities over the disputed boundary between the two States in the Gujerat

(India)-West Pakistan region, which was the prelude for the *Rann of Kutch* arbitration¹²². Moreover, in certain other international instruments, the relevant provisions regarding the peaceful settlement of disputes are contained in optional protocols, such as for example with regard to the 1961 Vienna Convention on Diplomatic Relations, the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes. The relevant provisions that govern the arbitral process are, in other cases, annexed to the original international instrument that embodies the compromissory clause, as in the case of Annex 3 (Arbitral Procedure) with regard to Art. 16(2) of the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter¹²³; and also with regard to Art. 287 of UNCLOS III, Annexes VII (Arbitration) and VIII (Special Arbitration).

2.2.2.2. Arbitral Treaties and Conventions:

The issue regarding the signing or conclusion of an international arbitral treaty or convention as an act of expressing a State's prior commitment to resort to arbitration whenever the need arises is a straightforward one. Such forms of treaties which provide that any dispute that may arise between the parties in the future is to be submitted to arbitration alone, or to arbitration in conjunction with other means of peaceful settlement, may be either bilateral or multilateral. The momentum of arbitral treaty practice in the last two centuries in both areas has been examined elsewhere in this thesis¹²⁴; however, the effectiveness or otherwise of the major general multilateral arbitral instruments in securing States' acceptance will be examined in detail in Chapter Five.

Conclusion:

The forgoing discussion on the voluntary nature of international arbitration concentrated on several issues of direct or indirect connection to the issue of State consent in the domains of the peaceful settlement of international disputes in general and by legal means in particular. The consent requirement is, indeed, a consequence of the State sovereignty principle (i.e. the equality of States doctrine), a principle which was rationalised by the thoughts and works of numerous writers, has evolved consequently during the various stages of the development of political entities and institutions and is well established in State and international treaty practice. It is a consequence of this principle that there exists no obligation imposed upon States to settle their disputes by peaceful means, but on the basis of mutual agreement epitomised in their express consent to employ such means, a factor which must be present during the various stages of the settlement process until a solution or judgement or award is reached. Therefore, States in the absence of any agreement enjoyed the power to refuse recourse to arbitration whenever they deemed it to be against their national interests, especially in the case where the dispute involved questions of vital importance, which are seldom referred to legal determination in State practice in the absence of an agreement. Since, however, the occurrence of disputes is inherent and inevitable in an international community composed of a large number of sovereign States with diverse political, economic and cultural backgrounds, and for the sake of international peace and stability, means were sought by which States were to accept, by their own free sovereign will, obligations made in advance to resort to *compulsory* means for the peaceful settlement of disputes by legal means should the need arise. However, whether such practice is consistent or not with the principle of State sovereignty and the State consent requirement, and whether the freedom of control that States enjoyed over the

forms of disputes that were to be submitted to the jurisdiction of international courts and tribunals was totally eliminated and whether States welcomed such step will be examined in detail in the following chapter.

Notes to Chapter Three:

¹ In this regard, the ICJ in its Advisory Opinion in the 1950 *Interpretation of the Peace Treaties* case indicated that “The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases.” ICJ Rep, 1950, p. 71.

² E.K. Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law*, Leyden, A.W. Sijthoff, 1966, p. 23.

³ H. Fox, *Arbitration, op cit*, p. 101.

⁴ *Op cit*, p. 64.

⁵ Moreover, Pinto (*The Essence, op cit*, p. 62) states that “[t]he authority to decide whether or not to submit a dispute to international arbitration is an incident of party autonomy and, in the case of inter-State disputes, of State sovereignty.”

⁶ *Op cit*, p. 1.

⁷ See for example the German writer J.K. Bluntschli in, *The Theory of the State* (translated into English), Oxford, The Clarendon Press, 3rd edition, 1921, p. 493.

⁸ See, M.S. Rajan, *United Nations and Domestic Jurisdiction*, London, Asia Publishing House, 1961, p. 1; and E. N. Van Kleffens, *Sovereignty in International Law*, (1953-I), 82, *Recueil des Cours* (hereinafter cited as ‘Hague Recueil’), pp. 1, 52ff.

⁹ In this regard, Korowicz (*op cit*, p. 7) points out that the sociological concept of sovereignty existed long before its legal concept. In support of his view, he refers to the period of antiquity, in particular, ancient Roman practice in which rulers were aware that they enjoyed supreme power over the State’s territory including its inhabitants independent of any other power except their own. Although recognising that the term ‘sovereignty’ did not exist during that era, nevertheless, he pointed out that the legal ‘content’ of sovereignty was expressed by the terms *liber* and *libertas* which, in his words, “...corresponded exactly, in their meaning, to the expressions ‘sovereign and sovereignty’, ‘independent and independence.’” See also, D. Nincic, *op cit*, n. 2 at p. 2.

¹⁰ J. Bodin, *Six Books of the Commonwealth*, translated and selected by M.J. Tooley, Oxford, Basil Blackwell, 1955.

¹¹ See M.S. Rajan, *op cit*, p. 2.

¹² J. Bodin, *op cit*, p. 25.

¹³ *Ibid*, p. 32.

¹⁴ *Ibid*, p. 35.

¹⁵ In this regard, he indicated that “ a law proceeds from him who has sovereign power, and by it he binds the subjects to obedience, but cannot bind himself.” *Ibid*, p. 30. He also pointed out that “if the prince is not bound by the laws of his predecessors, still less can he bound by his own laws.” In justifying this view, he pointed out that “one may be subject to laws made another, but it is impossible to bind oneself in any matter which is the subject of one’s own free exercise of will. As the law says, ‘there can be no obligation in any matter which proceeds from the free will of the undertaker. It follows of necessity that the king cannot be subject to his own laws.” *Ibid*, pp. 28-29.

¹⁶ In this regard, Rajan (*op cit*, p. 4) pointed out that

Sovereignty as conceived by Bodin was essentially a principle of political order within a State....by sovereignty he did not mean arbitrary authority; contrary to what latter writers either attributed to him, or inferred from his theory, he did not envisage its applicability among States, for then it would have meant international disorder, which he certainly did not envisage.

¹⁷ With reference to his earlier observations in which he contemplated that the sovereign was not subject to the law which, as he viewed, was a product of the sovereign's own creation (*supra* n. 15), Bodin (*ibid*, p. 29) further on indicated that:

...[I]t is far otherwise with divine and natural laws. All princes are subject to them, and cannot contravene them without treason and rebellion against God...the absolute power of princess and sovereign lords does not extend to the laws of God and nature. He who best understood the meaning of absolute power, and made kings and emperors submit to his will, defined his sovereignty as a power to override positive law; he did not claim power to set aside divine and natural law.”

¹⁸ *Ibid*, pp. 29-30.

¹⁹ The doctrine of State sovereignty according to this Naturalist School of writers led by Samuel von Pufendorf was based on the belief that international society appeared to be in a state of nature and international law was merely the law of nature as applied to States, as to the individual. See, M.S. Rajan, *op cit*, pp. 2-3.

²⁰ Grotius's views on sovereignty in his *De Jure Belli ac Pacis Libri Tres* (The Law of War and Peace, in J.B. Scott (ed.), Classics of International Law Series, , the Carnegie Endowment, vol. II, book I, translated by F.W. Kelsey, Oxford, the Clarendon Press, 1925, p. 102) seemed to fall in line with the then prevailing absolutist conception of sovereignty in which he defined the sovereign as one:

...whose actions are not subject to the legal control of another so that they cannot be rendered void by the operation of another human will. When I say 'of another' I exclude from consideration him who exercises the sovereign power and who has the right to change his determination...

Nevertheless, he did recognise (*ibid*, p. 121) that this 'absolute' authority was limited by divine law, the law of nature as well as the law of nations:

...sovereignty does not cease to be such even if he who is going to exercise it makes promises....I am not now speaking of the observance of *the law of nature and of divine law or the law of nations; observance of these is binding upon all kings*, even though they made no promises...[emphasis added].

²¹ See *infra* n. 34 of this chapter.

²² See, D. Nincic, *op cit*, pp. 1-5.

²³ The extent of the Church's involvement and its influence in the internal affairs of States in that era, as well as the struggle between the ruler and the Church and its outcome, are illustrated by Brierly (*op cit*, pp. 4-5) who indicated that:

...never until the Reformation was the civil authority in any country regarded as supreme. Always governmental authority was divided; the Church claimed and received the obedience of those who were also the subject of the State, even in matters far beyond the purely spiritual sphere....States might often act as

arbitrarily as any absolute State of the post-Reformation world. They might struggle this or that claim of the Church; but neither in theory nor in fact were they absolute. But just as the State was gradually consolidating its power against the fissiparous tendencies of feudalism within, so it was more and more resisting the division of authority imposed upon it by the Church from without; and this latter process culminated in the Reformation, which in one of its most important aspects was rebellion of the State against the Church. It declared the determination of the civil authority to be supreme in its own territory; and it resulted in the decisive defeat of the last rival to the emerging unified national State.

²⁴ *Op cit*, p. 2.

²⁵ *Op cit*, pp. 3-4.

²⁶ D. Nincic, *op cit*, pp. 2-3.

²⁷ See, E.N. Van Kleffens, *op cit*, pp. 40-74.

²⁸ D. Nincic, *op cit*, p. 8.

²⁹ In its extreme forms, the basic features and characteristics of sovereignty, according to the absolutist school of thought, and especially to German practice, contemplated States' total independence, not only of one another or any other authority, but of any higher principle, including any superior moral principal. States enjoyed full freedom with regard to the obligations they assumed and, moreover, had the freedom to denounce these obligations when they no longer considered them to serve a useful purpose and to resort to force as the supreme arbiter in international relations. This also included the power of the State to determine both the limits of its competence and the forms in which it would be exercised and, as a natural consequence, the only limitations to which sovereignty might be subjected, were those which States imposed upon themselves. Other consequences of the absolutist theory include the implicit negation of equality as a basic element of sovereignty and the equation of sovereignty with the actual power to exercise force; in other words, its identification with force. Sovereignty, according to the absolutist theory, also entailed the primacy of domestic law over international law and the antinomy between sovereignty and international law was solved by granting sovereignty supremacy over the latter. See, *ibid*, pp. 7-8.

³⁰ *International law*, New York, Appleton Century Crofts, 3rd edition, 1948, p. 29.

³¹ E.N. Van Kleffens, *op cit*, p. 53.

³² Note that the limited scope of this section does not permit us to explore all the various attempts and views that aimed to construct a theory of relative sovereignty. Therefore, the discussion in this regard will be conducted in general terms. However, a concise account in that respect can be found in D. Nincic, *op cit*, pp. 9-13.

³³ See, *ibid*, pp. 3-5, 9-15.

³⁴ The concept of the equality of States was introduced into the theory of international law and popularised by the French jurist Emerich de Vattel in his *Le droit des gens, ou principes de la loi naturelle* (The Law of Nations; or, Principles of the Law of Nature, Translated by J. Chitty, London, Stevens & Sons, 1834, p. lxii). He formulated the basic characteristics of this new concept which grew to become a basic element in the foreign relations of States to this day in his famous observation:

Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature-Nations composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherent from nature the same obligations and rights....a

dwarf is as much a man as a giant; a small republic is no less a sovereign State than the most powerful kingdom.

Among the factors which induced the emergence of this concept in an era when the absolutist conception of authority in the internal, as well as in the external affairs of States prevailed was, according to Dupuis (*Le Droit des Gens et les Rapports entre les Grandes Puissances et les autres Etats*, Paris, 1921, pp. 21-22. Cited in E. van Kleffens, *op cit*, p. 90) the fact that the new States, having asserted their independence from the supremacy of the Pope and Emperor, were unable to deny the very same sovereignty and independence, which they claimed for themselves, to those in the same position. Between sovereign and independent States freed from common inferiority, there could exist no relations of either superiority or subordination. The equality of States was the natural and necessary consequence of their sovereignty and independence.

³⁵ Note that the expression 'State' within the whole of this study refers to that territorial unit which for the purpose of the law of nations, is recognised as such, or in other words, a (fully) sovereign and independent State under international law. This excludes, unless otherwise indicated, other territorial units which cannot be properly regarded as falling within that category, such as colonies, composite States within a federal State; mandated and trust territories, and *condominium*.

³⁶ Art. 1 of the 1933 Montevideo Convention on the Rights and Duties of States provides the most widely accepted criteria of Statehood in international law. It states that "the State as person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States." Moreover, the Arbitration Commission of the European Conference on Yugoslavia in its Opinion No. 1 defined a State as "...a community which consisted of a territory and a population subject to an organised political authority..." and that such a State is "...characterised by sovereignty." 92, ILR, pp. 162, 163-164. See also, L. Oppenheim, *International Law: A Treatise*, H. Lauterpacht (ed.), London, Longmans Green & Co, 8th edition, vol. I, 1955, pp. 118-119 (hereinafter cited as Oppenheim, *Treatise*, vol. I).

³⁷ L. Henkin, *International Law: Politics, Values and Functions*, (1989-IV), 216, Hague Recueil, pp. 9, 24-29.

³⁸ According to the 1949 ILC Draft Declaration on Rights of Duties of States (YBILC, 1949, part II, Document A/925-A/4/10, para. 53), those fundamental rights and duties are mainly enumerated as independence; territorial jurisdiction; non-intervention in the internal or external affairs of other States; equality; to settle their international disputes by peaceful means; to refrain from resorting to war as an instrument of national policy and the threat or use of force against the territorial integrity or political independence of another State in any other manner inconsistent with international law and order; the right of individual or collective self-defence; the fulfilment of international obligations; and to conduct their inter-State relations in accordance with the principles of international law and to recognise the principle that the sovereignty of each State is subject to the supremacy of international law. See also, Art. 2 of the UN Charter; the 1933 Montevideo Convention on the Rights and Duties of States; Chapter IV of the Charter of the OAS; and Art. 3 of the Charter of the OAU.

³⁹ 11, RIAA, 1961, pp. 167, 180.

⁴⁰ R.P. Anand, *Sovereign Equality of States in International Law*, (1986-II), 197, Hague Recueil, pp. 12, 27 (hereinafter cited as Anand, *Sovereign Equality*). See also, L. Oppenheim, *Treatise*, vol. I, *op cit*, p. 286.

⁴¹ 2, RIAA, 1949, pp. 829, 839.

⁴² This may include: the administration of justice, the admission, residence and expulsion of aliens from its territory, the definition and grant of nationality, the rules governing marriage and divorce, the control and disposition of its police and military forces, including compulsory military service, company, labour and trade union legislation, monetary policy, the educational system, and the public acquisition of private property. See, J.E. Fawcett, *General Course on Public International Law*, (1971-I), 132, Hague Recueil, pp. 363, 392. (Hereinafter cited as Fawcett, *General Course*). Nevertheless, Van Kleffens (*op cit*, p. 94) adopts a broader view in this regard by arguing that:

...whilst a sovereign State must have....a territory, its authority is by no means confined to that territory....[a] sovereign State has authority over ships flying its flag and those on board wherever they are, on the high seas, and even in the homewaters and ports of other countries. Its consuls exercise their public functions in other States' territory. These examples here may suffice to make it clear that the authority of a State is by no means confined to its territory in the narrower sense.

⁴³ M.S. Korowicz, *op cit*, p. 65.

⁴⁴ J.E. Fawcett, *General Course*, p. 392.

⁴⁵ *Op cit*, pp. 12, 13 respectively.

⁴⁶ I.e. other States or international organisations and institutions. See, J.E. Fawcett, *The Law of Nations*, Harmondsworth, Penguin Books Ltd, 2nd edition, 1971, p. 41. (Hereinafter cited as Fawcett, *The Law of Nations*).

⁴⁷ In consequence of its external independence, a State is entitled "...unless restricted by a treaty, [to] manage its international affairs according to discretion; in particular, it can enter into alliances and conclude other treaties, send and receive diplomatic envoys, acquire and cede territory, make war and peace." L. Oppenheim, *Treatise*, vol. I, *op cit*, p. 287.

⁴⁸ See *supra*, pp. 102-103.

⁴⁹ In this regard, Fawcett (*The Law of Nations*, p. 41) pointed out that:

Independence is not a right of a State to do what it pleases in regard to other States. Sovereignty can never be unlimited; for in a world of States of unlimited sovereignty there could no independence; the large State would be free to overrun and absorb the small. The independence of each State can be seen as a set of limitations on the exercise of sovereignty towards it by every other State; to define these limitations is the function of international law.

This principle is also asserted by Shaw (*op cit*, p. 149) who indicates that "by independence, one is referring to a legal concept and it is no deviation from independence to be subject to the rules of international law."

⁵⁰ On this point, Oppenheim (*Treatise*, vol. I, *op cit*, p. 289) indicated that:

independence is not unlimited liberty for a State to do what it likes without any restriction whatsoever. The mere fact that a State is a member of the international community restricts its liberty of action with regard to other States, because it is bound not to intervene in the affairs of other States.

⁵¹ In its judgement in the *Corfu Channel* case (ICJ Rep, 1949, p. 35), the ICJ pointed out that it:

...can only regard the alleged right of intervention as the manifestation of a policy of force, which, in the past, has given rise to most serious abuses and which cannot, whatever be the present defects in international organisation, find a place in international law.

See also its judgement in the *Nicaragua* case. ICJ Rep, 1986, p. 14.

⁵² E.g. Art. 2(7) of the Charter; the UN's General Assembly 1965 Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and Protection of their Independence and Sovereignty (Res. 2131

XX); and the 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States (Res. 2625 XXV).

⁵³ *Op cit*, p. 337.

⁵⁴ Such forms of intervention can range from direct or indirect military or economical or political intervention to statements made by governmental officials of a State interfering in the internal policies of another State.

⁵⁵ *Treatise*, vol. I, *op cit*, p. 305.

⁵⁶ On this point, Korowicz (*op cit*, p. 63) indicates that “if there is consent, we may not speak of intervention, but we could rather use the expression ‘authorised interference’ in the internal affairs of a State.”

⁵⁷ In this respect, it appears important to note that the equality of States encompasses three major doctrines, namely, equality before the law or equal protection of the law (legal equality); equality of rights and obligations (commonly known as ‘equality of rights’); and equality of States in creating law. However, the question of the relevance of each of those doctrines to actual practice is a controversial one. For a highly competent discussion on this issue, see, R.P. Anand, *Sovereign Equality*, pp. 105-116. See also *infra* n. 59 of this chapter.

⁵⁸ Res. 2625 (XXV). The General Assembly’s Declaration stated that:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

- (A) States are juridically equal;
- (B) Each State enjoys the right inherent in full sovereignty;
- (C) Each State has the duty to respect the personality of other States;
- (D) The territorial integrity and political independence of the State are inviolable;
- (E) Each State has the right freely to choose and develop its political, social, economical and cultural system;
- (F) Each State has the duty to comply fully in good faith with its international obligations and to live in peace with other States.

⁵⁹ In this regard, Oppenheim (*Treatise*, vol. I, *op cit*, pp. 263-267) points out four major consequences of the doctrine of legal equality, namely, (a) that whenever a question which has to be settled by consent arises, each State has a right to a vote and to one vote only, unless it has agreed otherwise; (b) that the vote of the weakest State (legally although not politically) has as much weight as that of the largest and most powerful, unless otherwise agreed by it; (c) that no State can claim jurisdiction over another; and (d) that the courts of one State do not, as a rule, question the validity of the official acts of another State in so far as those acts purport to take effect within the latter’s jurisdiction. However, commenting on the past observation, some scholars view that all those rules can, with more logic “...be attributed to the principle of independence rather than that of equality” (P.J. Baker, *The Doctrine of Legal Equality of States*, 1923-24, 4, BYIL, pp. 1, 12). This view falls in line with those of a number of other distinguished writers who believe that the doctrine of the equality of States “...is redundant and unnecessary” (*ibid*, p. 10), such as Westlake (*International Law*, Cambridge, the University Press, part. I, 1904, p. 308) who considers the equality of sovereign States as nothing else than “...merely their independence under another name.” Moreover, Brierly (*op cit*, pp. 131-132) on Oppenheim’s above observation, commented that “[T]hese are all true statements of the law, but no theory of equality is needed to explain or justify them.” He went on to assess the value of the mother doctrine ‘the equality of States’ in the light of two of its principal sub-doctrines, namely, legal equality and the equality of rights by indicating that:

...the doctrine of equality is worse than merely redundant, for it may easily become seriously misleading....if it merely means that the rights of one State,

whatever they may be, are as much entitled to be protected by the law as the rights of any other...then the statement is true, but obvious. But it is not true if it means, as it is easily understood to mean, that all States have equal rights...if it is said that all States ought to have equal, rights whether they actually do or not, then the doctrine ceases to be merely innocuous and becomes mischievous.

With regard to the above observations, in particular, that on the equality of rights doctrine, this view nowadays seems to be easily supported by the status of the Permanent Members of the UN Security Council and their possession of the Veto. For a good discussion on UN, as well as the practice of other international instruments with regard to the sovereign equality of States doctrine, see, M. Korowicz, *op cit*, pp. 37-57; and L. Oppenheim, *Treatise*, vol. I, *op cit*, pp. 275-281. See also on UN practice, R.P. Anand, *Sovereign Equality*, pp. 117-164; and D. Nincic, *op cit*, pp. 100-135. For criticism of the equality of States doctrine as a whole, see, P.J. Baker, *op cit*, pp. 1-20.

⁶⁰ In consequence, this also entails that membership to international organisation is not compulsory, and that the power of the organs of such organisations to determine their own competence, to take decisions by majority vote and to enforce decisions is dependent on the consent of the States members of the organisation. I. Brownlie, *Principles*, *op cit*, pp. 289-290.

⁶¹ ICJ Rep, 1950, p. 71.

⁶² See in general *infra* 2 of this chapter.

⁶³ In this regard, Oppenheim (*Treatise*, vol. I, *op cit*, p. 123) observes that:

[t]he very notion of international law as a body of rules of conduct binding upon States irrespective of their Municipal law and legislation, implies the idea of their subjection to international law and makes it impossible to accept their claim to absolute sovereignty in the international sphere.

⁶⁴ The ways and means in which State consent is expressed in the case of international arbitration is examined in *infra* 2.2 of this Chapter; and adjudication under the ICJ in *infra* 3.1 of Chapter Four.

⁶⁵ *Power Politics: A Study of International Society*, London, Stevens & Sons Ltd, 1951, pp. 89-90.

⁶⁶ 1, RIAA, 1948, p. 103.

⁶⁷ See, E.K. Nantwi, *op cit*, pp. 59-64. In this regard, Lord McNair pointed out that “just as a human being who enters into a contract of employment does not cease to be a free man, a State which enters into a contractual engagement with a foreign State...does not cease to be an independent or sovereign State.” McNair, *Treaties and Sovereignty*, in *Symbolae Verzijl*, The Hague, 1958, p. p. 229. Cited in, *ibid*, p. 64.

⁶⁸ PCIJ Rep, Ser. A, No. 1, pp. 1, 25.

⁶⁹ This principle was again reaffirmed in the *dicta* of the PCIJ in its Advisory Opinion in the *Exchange of Greek and Turkish Populations* case (PCIJ Rep, Ser. B, No. 10, p. 21) and, also, its Opinion in the *European Commission of the Danube* case (PCIJ Rep, Ser. B, No. 14, p. 36). See also in this regard, the Court’s Judgement in the *Lotus* case (PCIJ Rep, Ser. A, No. 10, p.18); and the award of Judge Huber in the 1928 *Island of Palmas* case (2, RIAA, 1949, pp. 829, 838).

⁷⁰ *Op cit*, p. 64.

⁷¹ *The Function of Law*, *op cit*, pp. 3-4.

⁷² L. Oppenheim, *Treatise*, vol. II, *op cit*, p. 22.

⁷³ See the Advisory Opinion of the ICJ in the *Interpretation of the Peace Treaties* case, ICJ Rep, 1950, p. 71.

⁷⁴ E. Lauterpacht, *Aspects of the Administration of International Justice*, Cambridge, Grotius Publications Ltd, 1991, p. 23.

⁷⁵ PCIJ Rep, Ser. A, No. 2, p. 16. For more of the PCIJ's case-law on this issue, see also, the *Rights of Minorities in Upper-Silesia* case (PCIJ Rep, Ser. A, No. 15, p. 22); and the *Chorzow Factory* case (PCIJ Rep, Ser. A, No. 9, p. 37).

⁷⁶ ICJ Rep, 1995, p. 90. See also in this regard the *Case Concerning Legality of the Use of Force* (Yugoslavia v. Spain, Yugoslavia v. USA), para. 19 at the official website of the ICJ [<http://www.icj-cij.org/>]; the *Nauru* case (ICJ Rep, 1992, pp. 259-262); the *Monetary Gold* case (ICJ Rep, 1954, p. 32) the *Ambatielos* case (ICJ Rep, 1953, p. 19); the *Anglo-Iranian Oil Company* case (ICJ Rep, 1952, p. 165); and the *Interpretation of the Peace Treaties* case (ICJ Rep, 1950, p. 71).

⁷⁷ Following a UN-organised referendum on August 30, 1999, the overwhelming majority of the population in East Timor voted in favour of independence from Indonesia. The official results of the referendum were announced five days later by the leader of the UNAMET on September 4, 1999 and the East Timorese vote was finally ratified by the Indonesian Legislature on October 20, 1999, thereby officially declaring East Timor as an independent nation after 24 years of Indonesian occupation.

⁷⁸ E.g. UN General Assembly Resolutions 3485 (XXX) on December 12, 1975; 31/53 on Dec 1, 1976; 32/34 on November 28, 1977; 36/50 on November 24, 1981; and 37/30 on November 23, 1982. Also in this respect, Security Council Resolutions 384 on December 22, 1975 and 389 on April 22, 1976.

⁷⁹ ICJ Rep, 1995, p. 102.

⁸⁰ ICJ Rep, 1954, p. 32.

⁸¹ ICJ Rep, 1995, para. 34.

⁸² PCIJ Rep, Series B, No. 5, p. 27.

⁸³ See M. Shaw, *op cit*, pp. 718-720.

⁸⁴ In this regard, Art. 33(1) of the UN Charter solely enumerates the possible means available for the settlement of disputes peacefully. No obligation is imposed upon States to exhaust all of those means and the selection of the appropriate means of settlement is left to the States concerned to determine. See D.W. Bowett, *Peaceful Settlement*, *op cit*, pp. 101-102.

⁸⁵ Art. 16 of the General Assembly's Resolution merely obliged States "...to solve their disputes by peaceful means, including resort to the International Court of Justice...". However, the choice of the appropriate means of settlement is left to the parties.

⁸⁶ UN General Assembly Res. 2625(XXV) adopted on October 24, 1970.

⁸⁷ UN General Assembly Res. 37/10 adopted on November 15, 1982. The Resolution in Art. 3 provided that international disputes are to be settled "...on the basis of sovereign equality of States and *in accordance with the principle of free choice of means*...[emphasis added]." This principle was further emphasised on in Art. 5 which stated that:

States shall seek in good faith and in a spirit of co-operation an early and equitable settlement of their international disputes *by any of the following means*: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or other peaceful means of their own choice, including good offices. *In seeking such a settlement, the parties shall agree on*

such peaceful means as may be appropriate to the circumstance and the nature of their dispute [emphasis added].”

⁸⁸ UN General Assembly Res. 43/51 adopted on December 5, 1988. The Resolution declared in Art. 25 that “should States fail to prevent the emergence or aggravation of a dispute or situation, they shall continue to seek a settlement by peaceful means in accordance with the Charter.” However, no obligation was imposed on States to settle their disputes by any particular means and the choice of means was left for them to determine.

⁸⁹ UN General Assembly Res. 46/59 adopted on December 9, 1991. The Resolution in this regard recognised the necessity of the State consent requirement in Art. 6 which provided that “The sending of a United Nations fact-finding mission to the territory of any State requires *the prior consent of that State...*[emphasis added].” However, the parties’ freedom in choosing the means appropriate for the settlement of their dispute is clearly implied from Art. 30 which indicates that the sending of UN fact-finding missions “...is without prejudice to the use by the States concerned of inquiry or any similar procedure or any means of peaceful settlement of disputes *agreed by them* [emphasis added].

⁹⁰ 30, UNTS, 84.

⁹¹ 479, UNTS, 39.

⁹² 320, UNTS, 243.

⁹³ 14-4, ILM, 1975, p. 1292.

⁹⁴ ICJ Reps, 1984 & 1986, pp. 392ff & 14ff respectively.

⁹⁵ For the US statement see, 24, ILM, 1985, p. 246.

⁹⁶ For more on the Court’s jurisdiction in the *Nicaragua* case, see, pp. 159-160. On the ICJ’s compulsory jurisdiction in general, see *infra* 3 of Chapter Four.

⁹⁷ E.g. its structure and composition; the method of appointment of the members of the tribunal and any time-limits therein; and the jurisdiction of the tribunal.

⁹⁸ Such as the language(s) to be employed by and before the tribunal as well as the number of members required for the constitution of a *quorum* for the conduct of the proceedings; all the relevant provisions with regard to the method of filing of the written pleadings and the presentation of oral hearings as well as evidence; provisions with regard to the closure of the hearings; and, in some cases, provisions regarding the discontinuance of the proceedings.

⁹⁹ E.g. the method in reaching the award; the binding effect of the award and any time-limits with regard to its execution; any provisions with regard to the revision or interpretation of the award.

¹⁰⁰ *Arbitration, op cit*, p. 101.

¹⁰¹ E.g. the *Anglo-Iranian Oil Company* case between the Imperial Government of Persia (Iran) and the Anglo-Persian Oil Company which was incorporated in England. (ICJ Reps, 1951 & 1952, pp. 89 & 93 respectively); and the *Interpretation of the Peace Treaties* case between certain Allied and Associated Powers and Bulgaria; Hungary; and Romania. (ICJ Rep, 1950, pp. 65 & 221). However, it may be noted that the arbitral process was not initiated in either case and the failure to appoint the members of the tribunal from the side of Iran, and Bulgaria; Hungary; and Romania respectively in both cases came originally after their refusal to resort to arbitration from the very beginning after a request to arbitrate was made by Anglo-Persian Oil Company, and the Allied and Associated Powers respectively.

¹⁰² See 17, ILM, 1978, p. 738. For a good discussion on the case see, K. Oellers-Frahm, *Beagle Channel case*, (1981), II, EPIL, p. 33.

¹⁰³ See, 24, ILM, 1985, p. 1.

¹⁰⁴ *Compromis*, (1981), I, EPIL, p. 45 (hereinafter cited as Oellers-Frahm, *Compromis*).

¹⁰⁵ See for example, the *PCA Optional Rules for Arbitrating Disputes between Two States*, 32, ILM, 1993, pp. 572, 585; and K.S. Carlston, *Codification of International Arbitral Procedure*, (1953), 47, AJIL, pp. 203, 206-207.

¹⁰⁶ See M. Habicht, *op cit*, p. 1042.

¹⁰⁷ See J.L. Simpson & H. Fox, *op cit*, pp. 44-45.

¹⁰⁸ On compromissory clauses within the context of arbitral settlements, see *infra* 2.2.2.1 of this Chapter.

¹⁰⁹ *Infra* 2.2.2.2 of this Chapter.

¹¹⁰ *Ibid*, pp. 44-45.

¹¹¹ *Op cit*, p. 688.

¹¹² See N. Wuhler, *Arbitration Clauses*, *op cit*, pp. 34-37.

¹¹³ See H. Mangoldt, *Arbitration and Conciliation*, *op cit*, pp. 458-462.

¹¹⁴ In this regard, Sohn points out five major trends in compromissory clause practice, namely, clauses embodying a general obligation to settle disputes peacefully; clauses prescribing non-binding methods of settlement; clauses referring disputes to a permanent political or administrative organ; arbitration clauses; and clauses referring disputes to the ICJ or other permanent judicial bodies. See, L.B. Sohn, *Settlement of Disputes Relating to the Interpretation and Application of Treaties*, (1976-II), 150, Hague Recueil, pp. 195, 259-272 (hereinafter cited as Sohn, *Settlement of Disputes*).

¹¹⁵ See N. Wuhler, *Arbitration Clauses*, *op cit*, pp.34-35.

¹¹⁶ E.g. Art. 66(a) of the 1969 Vienna Convention on the Law of Treaties.

¹¹⁷ E.g. Art. 23 of the Charter of the OAS; and Art. 10 of the 1933 Montevideo Convention on the Rights and Duties of States.

¹¹⁸ E.g. Art. 15 of the European Agreement Concerning the International Carriage of Dangerous Goods by Inland Waters May 25, 2000; Art. 24 of the Convention for the Suppression of the Financing of Terrorism signed on January 10, 2000; and Art. 20 of the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes adopted on June 17, 1999.

¹¹⁹ 14, UNTS, pp. 49, 57.

¹²⁰ See also Part VI of the 1978 Vienna Convention on the Succession of States in Respect of Treaties.

¹²¹ See, N. Wuhler, *Arbitration Clauses*, *op cit*, p. 35.

¹²² For the 1965 Cease-Fire Agreement between India and Pakistan, as well as the *Rann of Kutch* arbitration see, 7, ILM, 1968, p. 633.

¹²³ 36, ILM, 1997, p. 1.

¹²⁴ See *supra* 1.2 of Chapter Two.

CHAPTER FOUR:

Striking the Balance: Compulsory Arbitration and the Exclusion of Important Issues from the Jurisdiction of International Tribunals

Introduction:

International law is complex on the questions of State sovereignty, consent and compulsion. The present chapter is intended to examine a formula which, seemingly, contradicts directly with the findings of our previous discussion above, namely, the compulsory settlement of international disputes. The discussion will focus on the true nature of compulsory arbitration and whether the concept of inter-State dispute settlement by compulsory legal means is in any way incompatible with the consent requirement and therefore, State sovereignty. The discussion will also focus on the justiciable and non-justiciable dispute dichotomy which is integral to any discussion on the issue of compulsory settlement of international disputes, regarding: its theoretical dimensions; the manner in which the distinction was dealt with and incorporated in actual State practice; whether there exists a real line of demarcation between the two; and who is in charge of determining the nature of such disputes when the need arises. Light will also be shed on one of the most important breakthroughs in the area of compulsory jurisdiction, namely, the Optional Clause, and the manner in which the balance between compulsory jurisdiction and

States' concerns over the submission of important issues to that jurisdiction was struck in the Statute of the ICJ.

1. The Concept and Nature of Compulsory Arbitration:

Despite the provisions of some international instruments¹ and the views of some writers² who recognise the settlement of disputes as a *duty* imposed upon States, some writers believe that such a duty does not exist. According to Professor Malcolm Shaw³:

...states are not obliged to resolve their differences at all, and this applies in the case of serious legal conflicts as well as peripheral political disagreements. *All* the methods available to settle disputes are operative *only* upon the consent of the particular States....
[emphasis added].

This view has been upheld by a number of other leading international jurists, such as Professor Ian Brownlie⁴ who, in a Blaine Sloan Lecture given in 1995 at the Pace University School of Law, titled: The Peaceful Settlement of International Disputes in Practice, stated that "...there is a duty in international law to settle disputes peacefully, but there is not a duty to settle disputes". The absence of such duty according to him "...constitutes a gap in the international system". Moreover, Steinberger⁵ stated that

...[u]nder present general customary international law, States are under no obligation to submit disputes to judicial settlement, nor does such obligation result from Arts. 2(3) and 33 of the UN Charter. Only by express consent do disputants assume an obligation to submit or acquire a right to refer disputes to judicial settlement.

Writing almost 70 years ago, Lauterpacht⁶ pointed out that this *rule* is one of the principal modes of the expression of the doctrine of State sovereignty in the international sphere, namely, that a sovereign State “...owes no obedience to a judge above itself”. This in practice is illustrated by the lack of any of the major organs of the UN, whether the Security Council, General Assembly or the Secretary General, of the power to *compel* two disputant States to resort peaceful means of settlement⁷.

Disputes between nations are inherent in a world where political, strategic and economical interests may collide. Therefore, the need to devise means for ensuring State recourse to peaceful modes for the settlement of their disputes, in lieu of the destructive alternative of resort to force, became central to the notion of a constantly stable world community. States have found it impossible to ignore entirely either the requirements of international peace and security or the pressures of public opinion. Therefore, means have been sought for reconciling their determination not to abandon the existing *status quo*, whereby their freedom of action was unshackled, with the necessity of assuming certain obligations towards the peaceful settlement of disputes⁸. Since States are sovereign and this sovereignty entailed that their consent, as already examined above⁹, is a *sine qua non* for recourse to any peaceful means of dispute resolution, such reconciliation of freedom of action with a binding obligation is impossible to achieve in juridical logic. Nevertheless, it has been achieved as a matter of terminology in the domain of compulsory arbitration and adjudication. The solution in this respect was to adopt certain mechanisms for obligatory arbitral or judicial settlement with regard to a certain class of disputes of relatively minor importance, generally categorised as ‘legal disputes’, thereby excluding disputes which are considered as non-justiciable or ‘political disputes’ from the machinery of those compulsory mechanisms¹⁰ unless the States concerned have agreed otherwise when the

need arises. This approach aimed to remove a major obstacle which has constantly blocked the way to any progress in the field of compulsory arbitration or adjudication, namely, the unwillingness of States to accept in advance a legal obligation of a general character to settle disputes by legal means which may in the future impose a duty upon them to submit for legal determination issues of vital importance, which they may not have agreed to submit freely.

Nevertheless, this step which aimed at transforming the settlement of disputes by international arbitration into a mandatory duty was, as we shall see in Chapter Five, not one effusively welcomed by all States. This may be attributed to a number of factors, some serving at the same time as factors behind States' decline to resort to *voluntary* arbitration in principle¹¹, leave alone the issue of making a commitment in advance to resort to arbitration when the need arises within a multilateral *compulsory* framework. Among the interesting arguments advanced in this regard, objecting to the establishment of a mandatory multilateral mechanism for the settlement of disputes by compulsory arbitration between States, was the one made by Baron Marschall von Bieberstien, of the German Delegation to the 1907 Hague Peace Conference. He strongly doubted the fruitfulness of such a mechanism by means of a world treaty. In his words:

It would be an error, however, to believe that a general [treaty of arbitration] agreed upon between two States can serve purely and simply as a model or, so to speak, a formula for a world treaty. The matter is very different in to cases. Between two States which conclude a general treaty of obligatory arbitration, the field of possible differences is more or less under the eyes of the treaty makers. It is circumscribed by a series of concrete and familiar factors, such as the geographical situation of the two countries, their financial and economical relations, and their historic traditions which have grown up between them. In a treaty including all the countries of the world, these concrete and factors are wanting, and hence, even in the restricted list of juristic questions, the possibility

of differences of every kind is illimitable. It follows from this that a general [treaty of arbitration] which, between two States, defines with sufficient clearness the rights and duties which flow from it, might be in a world treaty too vague and elastic and hence inapplicable¹².

It is interesting to note that this view was also advanced, almost on similar lines, in the British Official Memorandum submitted in 1928 to the Committee on Arbitration and Security which was set up by the Preparatory Commission of the Disarmament Conference during the League of Nations era for the purpose of investigating the issues of arbitration, conciliation, security and Arts. 10, 11 and 16 of the League's Covenant¹³ (and which resulted in the framing of the 1928 General Act for the Pacific Settlement of International Disputes). According to the British Memorandum:

In contracting an international obligation towards another State a country must take into account the nature of its relations with that State. Obligations which it may be willing to accept towards one State it may not be willing to accept towards another.... More progress is likely to be achieved through bilateral agreements than through general treaties open to signature by any State which so wishes¹⁴.

Commenting on this view, Lauterpacht¹⁵ pointed out that this is tantamount to saying that treaties of compulsory arbitration should be concluded only between States among whom no serious grounds of disagreement are likely to occur, and not between those whose mutual relations are unsettled, and, therefore, particularly in need of an effective mechanism for the peaceful settlement of disputes agreed upon in advance.

However, is compulsory arbitration or adjudication according to the *stricto sensu* meaning of the term really compulsory, meaning that the consent requirement is totally eliminated in such a case? When viewing the issue of compulsory arbitration from a

different angle, it appears that although the expression ‘compulsory’ in the first instance appears to contradict the principle of State sovereignty, the expression, as rightfully suggested by Lauterpacht¹⁶, is a misnomer, inasmuch as it is the State which has agreed to submit its future disputes to legal determination. This brings us back to our previous discussion on the compatibility of the granting of consent by States for the submission of their disputes to the jurisdiction of international tribunals with the principle of sovereignty¹⁷. There it was pointed out that the act of entering into an international agreement whereby a State assumes a prior obligation to resort to legal means of dispute settlement, whether international arbitration or adjudication, is, by its very nature, an exercise of its sovereignty. Therefore, what appears to be ‘compulsory’ is none other than a fulfilment of a prior commitment to have recourse to the compulsory means of settlement, which the State(s) concerned have freely accepted in advance. This view seems to fall in line with Cory’s¹⁸ conception of compulsory arbitration. She defined it as “[t]he system of obligations whereby [S]tates have undertaken, *in advance*, to have recourse to arbitration for the settlement disputes...[emphasis added]. Therefore, it appears that the basic principle of State consent is not at all absent in settlements involving compulsory arbitration or adjudication, in the sense that consent has in reality already been given, when the State(s) concerned signed or ratified the instrument from which the compulsory commitment to resort to arbitration or adjudication arises, whether an international treaty or convention containing a compromissory clause that provides for arbitration or adjudication; or an international treaty for the pacific settlement of international disputes by, *inter alia*, arbitration; or even the lodging of a declaration under the so-called Optional Clause with regard to recourse to the ICJ. However, again, it must be stressed that any advance achieved in the area of compulsory jurisdiction (with regard to inter-State dispute settlement

mechanisms) would not have been possible had States not been given the option to exclude certain categories of disputes from the jurisdiction of any courts or tribunals operating under those mechanisms. This brings us to the distinction often made between justiciable and non-justiciable disputes, which will be examined in the following section.

2. The Legal & Non-Legal Dispute Dichotomy: What is Justiciable and What is Not?

2.1. Clearing the Ground:

In his '*The Function of Law in the International Community*'¹⁹, Lauterpacht pointed out that the doctrine of the non-justiciability of disputes is a creation of the doctrine of State sovereignty, namely, the aspect concerning a State's right "...to determine what is the content of existing international law in a given case"²⁰. This aspect of the sovereignty of States doctrine connotes that it is the State that is, in principle, the sole judge of the existence of any individual rule of law applicable to itself; therefore, as a consequence, the settlement of inter-State disputes is solely dependant upon the consent of the disputants²¹. The original scope of the doctrine of the non-justiciability of disputes is attributed by Lauterpacht²² to Emmerich de Vattel, who was the first to introduce the doctrine into international law. Prior to the establishment of the first international mechanism for compulsory arbitration by the 1899 Hague Convention, Vattel, although an advocate of arbitration as a means for the settlement of disputes between States, adopted the view that not all disputes were to be submitted by States to arbitration. In this regard, he pointed out that in disputes involving sovereign States, "...a careful distinction must be made between essential rights and less important rights and a different line of conduct is to be pursued

accordingly.”²³ In other words, ‘rights of lesser importance’ were justiciable and ‘essential rights’ were not, in Vattel’s view. However, the practical *need* to distinguish justiciable disputes from non-justiciable disputes arose in connection with the attempts to make the settlement of inter-State disputes by legal means compulsory²⁴. In this regard, Lauterpacht, with a great degree of clarity, elucidated the practical basis of the distinction in relation to voluntary, as well as compulsory arbitration, by adding:

[t]hus in regard to the State’s claim, now fully admitted by existing law, to remain, as between itself and other States, the judge over a disputed right, international lawyers have called into being....the doctrine of non-justiciable disputes. This is based on an alleged fundamental difference between two categories of disputes: legal and non-legal, legal and political, justiciable and non-justiciable, disputes as to rights and disputes arising out of conflicts of interests. The doctrine connotes that by the very nature of international relations there are certain types of international disputes which are not an appropriate object for judicial settlement, in particular for judicial settlement following upon an obligation undertaken in advance within the frame of so-called ‘compulsory’ or ‘obligatory’ arbitration²⁵.

The modern origins of the doctrine are traced by Lauterpacht²⁶ to three events of significant importance in the history of international arbitration, namely, the preceding and following discussions between the parties to the 1872 *Alabama Claims* arbitration i.e. the USA and Great Britain²⁷; the deliberations in 1873, in its efforts to adopt Draft Regulations for International Arbitral Procedure, of the *Institut de Droit International* which was the first competent legal authority to consider the issue of justiciability and whose draft on arbitral procedure, adopted in 1875²⁸, served as the basis of the discussions of the parties to the 1899 and 1907 HCPSID on international arbitration; and the debates of the delegates of the parties to those two conventions on the issue. Although both Hague Conventions will be

examined in detail in Chapter Five of this thesis, nevertheless, a few remarks on how the issue of justiciability was approached in both conferences appear to be necessary within the context of the present discussion. In this regard, the circular note handed by Count Mouravieff, the Russian Minister of Foreign Affairs at that time, on December 30, 1898²⁹ to the diplomatic representatives of the States that were invited to the first Hague Peace Conference and which embodied an agenda for the conference, indicated that among the aims of the Czarist government initiative was, “[a]cceptance, in principle, of the use of good offices, mediation and *voluntary arbitration*....[emphasis added]”³⁰. Nevertheless, in a draft³¹ submitted by the Russian delegation to the third commission which was in charge of the issue of the pacific settlement of disputes, an enumeration was provided in Art. 10 of the draft regarding the issues that were considered justiciable and capable of being subject to ‘compulsory’ arbitration, under the important stipulation stated in Art. 8 of the same draft that the *vital interest* or *national honour* of the contracting parties remain intact. Those issues enumerated in Art. 10 of the Russian draft were:

- I- In case of differences or disputes relating to pecuniary damages suffered by a State or its nationals, as a consequence of illegal actions or negligence on the part of another State or its nationals.
- II- In case of disagreement relating to the interpretation or application of the treaties and conventions mentioned below:
 - 1- Treaties and conventions to the posts and telegraphs, railroads, and also those bearing upon the protection of submarine telegraph cables; regulations concerning methods to prevent collisions of vessels on the high seas; conventions relating to navigation of international rivers and inter oceanic canals;
 - 2- Conventions concerning the protection of literary and artistic property as well as industrial property (patents, trade-marks, and trade-names); conventions relating to money and measures; conventions relating to sanitation

- and veterinary surgery, and for the prevention of phylloxera;
- 3- Conventions relating to inheritance, exchange of prisoners, and reciprocal assistance in the administration of justice;
 - 4- Conventions for marking boundaries, so far as they concern purely technical and non-political questions.

However, after a number of suggestions made by the members and modifications to the aforesaid article in the fourth, fifth, and fourteenth meetings of the Third Commissions' Committee of Examination³², it appeared that the parties were not able to reach consensus on the issues that were considered suitable for compulsory arbitration. Therefore, the Russian scheme failed³³ and the best that the parties were able to reach in this respect was Art. 16 of the 1899 HCPSID which stated that:

In questions of a legal nature, especially in the interpretation or application of International Conventions, arbitration is recognised by the Signatory Powers as the most effective, and the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

However, no precise specification of which forms of international controversies constituted a legal dispute was provided.

The issue of justiciability was again considered at the second Hague Conference in 1907, where a number of propositions were presented, each embodying an enumeration of a number of issues that were considered to fall within the meaning of legal disputes and which were considered suitable for compulsory arbitration, again under the proviso that the vital interest and national honour of the parties remained intact. However, the second Hague Conference in this respect was not as successful as its predecessor. In fact, the whole

scheme of distinguishing between legal and non-legal disputes came under attack by a number of States, led by Germany³⁴. The argument advanced in this respect by Baron Marschall von Bieberstein³⁵ of Germany is of timeless relevance:

What is the meaning of this word [legal matters]? It has been said that it may exclude 'political matters'. Now it is absolutely impossible, in a world treaty, to trace a line of demarcation between those two notions. A question may be legal in one country, and political in another one. There are even purely legal matters which become political at the time of the dispute.....Do we desire to distinguish 'legal' questions from technical and economic questions? This would also be impossible. The result is that the word 'legal' states everything and states nothing, and in matters of interpretation the result is just the same. It has been asked: who is to decide in case of some dispute, whether a question is or whether it is not legal? So far we have had no answer.

The points that may be summed up from the statement above are clear: there is no clear dividing line between legal and political disputes (a problem which still persists to this day³⁶); that the determination of the nature of a dispute in actual State practice, whether legal or political, is subjective and is based on political considerations of the State(s) concerned or in accordance with the circumstances at the time when the dispute arises; and the absence of any impartial authority capable of determining the nature of disputes when the actual need arises. What was achieved in this respect by Art. 38 of the 1907 Convention added nothing new to the issue. In fact, the whole article was formulated in terms almost identical with Art. 16 of the 1899 Convention, which only specified questions concerning the interpretation or application of international conventions as those falling under the category of legal disputes. Even though no further specification of what constitutes a legal dispute was given, Art. 38 of the 1907 Convention went on to state that in disputes involving 'questions of a legal nature' as examined above, "...it would be desirable

that...the Contracting Powers should...have recourse to arbitration, *in so far as the circumstances permit* [emphasis added]. This last part of the article seemed implicitly to acknowledge the propositions of Baron Beiberstein above, which contemplated the variable nature of disputes between States, and that even those disputes concerning questions of a legal nature may, in certain circumstances, deviate from the realms of justiciability and be transformed into politically 'non-justiciable' disputes. Moreover, bearing in mind that no authority in charge of determining the nature of such disputes was specified, the wording of the article in that respect appears to have remitted the whole issue of determination to the parties. Although the outcome of the two Hague Conventions provided no definitive answer to the question of what is justiciable and what is not, nevertheless, it may be said that they were not the last stop for the debate over that question, which was carried on in the work of a number of writers and was also the subject of numerous reservation clauses employed almost on a regular basis in the provisions of many international treaties and conventions that considered the issue of the peaceful settlement of international disputes. Both of these will be examined in the following.

2.2. The Theoretical Dimensions of the Distinction and its Implementation in International Dispute Settlement and Treaty Practice:

The phrases 'legal' disputes and 'political' disputes are expressions often employed for the purpose of categorising certain controversies that involve States as parties. Each of those expressions encompasses a variety of issues and instances and is used to classify different things. For example, Lauterpacht³⁷ summed up four major clear-cut conceptions of legal disputes in accordance with the views of various writers on the distinction. According to him:

- (a) Legal disputes are such differences between States as are capable of judicial settlement by the application of existing and ascertainable rules of international law;
- (b) Legal disputes are those in which the subject-matter of the claim relates to questions of minor and secondary importance not affecting the vital interests of States, or their external independence, or internal sovereignty, or territorial integrity, or honour, or any other of the interests usually referred to in the so-called restrictive clauses [reservation clauses] in arbitration conventions;
- (c) Legal disputes are those in regard to which the application of existing rules of international law is sufficient to ensure a result which is not incompatible with the demands of justice between States and with a progressive development of international relations;
- (d) Legal disputes are those in which the controversy concerns existing legal rights as distinguished from claims aiming at a change of the existing law.

Thus, any dispute which falls within any of the above conceptions is considered a legal dispute. However, whether each of the disputes above *per se* is a justiciable dispute is another issue. In this regard, Lauterpacht pointed out that the term 'justiciable' appears to be much wider than any of the definitions given of legal disputes³⁸. Therefore, in order for a dispute to be justiciable, it must contain the essential elements of each of those definitions. On the other hand, the now Judge of the ICJ, Rosalyn Higgins³⁹, once indicated that the matters which have been traditionally regarded as political disputes are fourfold, namely, those in which the dispute is incapable of being settled by judicial determination due to the lack of existing rules of law to applicable to the dispute; those in which the vital interests of the State(s) concerned are involved; those in which the motive of one of the parties is to promote certain political objectives rather than to resolve a genuine legal controversy; and those in which there exists a certain degree of anxiety regarding the likelihood of a party's compliance with the judgement or award of the tribunal. Moreover, Schachter⁴⁰ pointed out

three further arguments derived from State practice with regard to proceedings before the ICJ on which claims of the non-justiciability of a dispute were based, namely, a breach of an international obligation which forms nothing but one element in a complex political and historical situation that could not be dealt with satisfactorily in isolation from that political context⁴¹; disputes involving the interpretation of clauses or concepts that are claimed to be of a political nature even though embodied in the provisions of a treaty⁴²; and the case where a particular legal dispute is being adequately dealt with in political or diplomatic proceedings in which a judgement by or even a hearing by a court could jeopardise the possible settlement⁴³. However, to add more confusion, Brownlie⁴⁴ pointed out eleven candidate arguments on which a claim of the non-justiciability of a certain dispute may be based, some which have already been indicated above. They are, that there is a more suitable forum for the settlement of the dispute; that a pronouncement on the merits would prejudice, prospectively or retrospectively, the political means of settlement; that no effective relief is sought; that the exercise of jurisdiction or the enforcement of any judgement which might be given would be *ultra vires* in terms of the relevant substantive law; that the matters in issue are only capable of political appreciation; the absence of one of the parties from the proceedings; that there is a collateral reason for the application; that the tribunal was asked to decide a purely hypothetical question of a factual nature; that the dispute involves issues concerning the personality of parties to a dispute; the case where there is an artificial and incomplete formulation of the issues with which the court is asked to deal with; and the case where the tribunal is being asked to legislate. Although it is far beyond the limited scope of this chapter to explore all the various grounds and arguments on which each of the propositions above was based, nevertheless, the conclusion in this respect is evident; there appear to be various grounds on which the justiciability or non-

justiciability of a dispute or the legal nature or the political nature of a dispute may be based. However, the main question here is who is to determine that, when the need arises? The following discussion will attempt to lay down the basic foundations for any possible answer to that question.

The scholarly debate over the issue of non-justiciability of disputes has focused not only on the question of what sort of disputes are legal and, therefore, justiciable and what are not, but also, on whether the distinction between justiciable and non-justiciable disputes should at all exist. In this regard, there appear to be two major schools of thought, namely, that which contemplates the justiciability of all disputes and that which contemplates the existence of certain disputes which, by their nature, are considered non-justiciable. This is a complex debate, which is based mainly on the method of evaluation of the propositions made by each side, such as those indicated above, and their usefulness as *criteria* for determining the justiciability or non-justiciability of disputes in the light of the legal or political nature of a dispute and State and international tribunal practice in that respect, an examination of which would fall beyond the limited scope of this part of the chapter. The following brief discussion on that issue, therefore, will only shed some light on some of the main distinctive feature of the arguments advanced by each side. In this respect, the views of Lauterpacht in his *'The Function of Law in the International Community'*, appear to be representative of the school of thought not in favour of the distinction. Lauterpacht, a non-advocate of the distinction himself, aimed in his aforementioned work to establish three main propositions, namely, that no international tribunal dealing with matters of international law is justified in declining to render a decision on a matter on the ground of *non liquet* due to the absence of applicable rules of law; that the large scale of a matter does not deprive it of its susceptibility to adjudication according to law; and that the political

character of some disputes does remove or dominate the legal nature of all international disputes which, in his view, are all inherently justiciable⁴⁵. In this regard, he pointed out the dual character of all international disputes involving States as parties which, in his view, comprise both political and legal aspects. In his words “[t]he State is a political institution, and all questions which affect it as a whole, in particular in its relations with other States, are therefore political”⁴⁶. He further added that:

[w]hile it is not difficult to establish the proposition that all disputes between States are of a political nature, inasmuch as they involve more or less important interests of States, it is equally easy to show that all international disputes are, irrespective of their gravity, disputes of a legal character in a sense that, as long as the rule of law is recognised, they are capable of answer by the application of legal rules⁴⁷.

Therefore, all international disputes involving States as parties are considered by Lauterpacht as justiciable and any claim to the contrary is, according to him, “...nothing else than the expression of the wish of a State to substitute its own will for its legal obligation...”⁴⁸. This view, which contemplated the justiciability of all international disputes, was also shared by a number of certain other writers, such as Kelsen⁴⁹ and Borchard⁵⁰. However, this view did not remain unchallenged. In this regard, Schlochauer⁵¹, within the context of dispute settlement under the ICJ, pointed out that it is necessary to distinguish between legal disputes and political disputes which he refers to as ‘conflicts of interests’. In the latter, in his view, the matters at issue are not differences of opinion as to questions of international law, but rather, demands to have certain legal situations or relationships altered or to have political claims recognised. Political disputes, in his view, “...are not justiciable, and can therefore *only* be settled by diplomatic means or by non-

judicial methods for the peaceful settlement of disputes [emphasis added]. Also in this respect, Collier and Lowe⁵² point out that disputes not being capable of resolution by a judicial process, and not susceptible of a decision on the basis of law are non-justiciable disputes and, therefore, ought not to be submitted to judicial procedures. Although they acknowledge the impossibility of drawing up a list of the kinds of disputes that are considered as legal disputes and, therefore, justiciable, nevertheless, they point out that “...it is clear that some disputes are not legal”⁵³. They support their view by the practice of ICJ in the *Haya de la Torre* case⁵⁴ and the *Hostages* case⁵⁵. In the former case, the Court, after rendering its judgement in the *Asylum* case⁵⁶ in which it found, *inter alia*, that Columbia’s grant of asylum to Haya de la Torre was invalid according to the procedure of the Convention of Asylum signed between it and Peru at Havana in 1928, was confronted with the task of determining whether or not Haya de la Torre was to be handed over to Peru, an issue which formed the main source of tension between the two States and subsequently gave rise to the *Haya de la Torre* case⁵⁷. However, the Court, having in mind that the aforementioned treaty between the two States did not prescribe any method that was to be resorted to in a case where asylum had been irregularly granted, artfully evaded rendering a decisive judgement on this particular question by pointing out that there are different ways of terminating asylum but, however:

...these courses are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate. A choice amongst them could nor be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court’s judicial function to make such choice⁵⁸.

The Court in this respect aimed at avoiding any contact with the political aspects of the dispute and stuck to the treaty interpretation task it had set for itself from the beginning. However, its hands were tied in this case, since the treaty did not contain any provisions covering this sort of situation. The court, after dealing with all the legal issues it could, opened the eyes of the disputants to the unsuitability of settlement of this form of disputes through legal processes and that such disputes were *only* susceptible to settlement by the employment of political processes⁵⁹, a position which, according to Collier and Lowe⁶⁰, was taken due to the fact that the question was purely a political one and entirely devoid of any legal content.

In the *Hostages* case between Iran and the USA regarding the former's detention of the diplomatic and consular staff in the US embassy compound in Tehran, Iran argued that:

[t]he Court cannot and should not take cognisance of the case....For this question represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms....Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years⁶¹.

On this certain aspect of Iran's contention, Sir Robert Jennings⁶², in a Josephine Onoh Memorial Lecture given at the University of Hull on January 21, 1986, titled 'International Courts and International Politics', commented that it was obvious that the Court could not (and Iran was indeed assuming that the Court could not) undertake to examine in general terms 25 years of the history of the relations between it and the USA. In his view, such an

issue appears to be clearly a non-justiciable one, and one which "...is a matter for historians of international relations, perhaps, but not for a court of law." On this particular point the Court did recognise, however, that:

...legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form one element in a wider and longstanding political dispute between the States concerned⁶³.

Nevertheless, it firmly rejected the view that "...because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them"⁶⁴. Hence, the Court by this reply indicated that it was willing to separate the legal aspects of the case from its political aspects, and to rule only on the former.

When turning to international treaty practice, it appears that the vast majority of the treaties concerning the peaceful settlement of disputes by legal means concluded prior to WW1 almost uniformly employed the distinction between legal and non-legal issues⁶⁵. In this regard, despite the insufficiency of the provisions of both HCsPSID on the issue of justiciability⁶⁶, the era between the 1899 HCPSID and World War I witnessed the conclusion of over a hundred treaties that were influenced by the distinction between legal and non-legal disputes adopted by both Hague Conventions⁶⁷, a practice which was engendered by the Agreement of October 14, 1903, between France and Great Britain for the Settlement by Arbitration of Certain Classes of Questions which may arise between them⁶⁸. The employment of the distinction in inter-State treaty practice also was carried into the post WW1 era. However, the approaches regarding the methods devised for settling each category of disputes appeared far from giving the impression of a uniform practice.

This appears clear from Habicht's⁶⁹ survey of the treaties for the pacific settlement of international disputes concluded or renewed between the end of WW1 and 1930 in which he pointed out the following 11 systems:

- 1- Arbitration of legal disputes;
- 2- Compulsory adjudication of legal disputes;
- 3- Arbitration of all disputes;
- 4- Arbitration of legal disputes and investigation of all other disputes;
- 5- Arbitration of legal disputes and conciliation in all other disputes;
- 6- Compulsory adjudication of claims of right, and conciliation in all other disputes;
- 7- Compulsory adjudication of legal disputes, and conciliation followed by arbitration in all other disputes;
- 8- Conciliation followed by arbitration in all disputes;
- 9- Conciliation in all disputes followed by compulsory adjudication of legal disputes;
- 10- Conciliation in all disputes followed by compulsory adjudication of legal disputes and arbitration of non-legal disputes;
- 11- Conciliation followed by compulsory adjudication in all disputes.

What draws attention from Habicht's survey are those systems that provided for the settlement of *all* international disputes. However, such treaties were very few in number, and most of them did make a distinction between legal and non-legal disputes. Moreover, the vast majority of those treaties, as well as those not belonging to the aforementioned category of so-called comprehensive treaties, did contain significant reservations⁷⁰. The practice of inserting certain reservation clauses⁷¹ in the provisions of treaties for the purpose of providing a sphere of application which the provisions of the treaty regarding the peaceful settlement of disputes were not to exceed, was extensively in the first half of

the 20th century⁷². Reservation clauses, such as those exempting the vital interests, independence or national honour...etc, of the parties were made expressly. However, in latter agreements, the large variety of issues excluded were compressed and disguised under other shorter but also general formulas⁷³ such as disputes which fall ‘essentially’ or ‘solely’ or ‘by their nature’ “...within the domestic jurisdiction...” of the States concerned⁷⁴. Moreover, the *obligatorium* to adjudicate in some of instruments was limited to disputes “...with regard to which the parties are in conflict as to their receptive rights...”⁷⁵ or, ‘legal disputes’. In some such cases, a list of such disputes is provided. For example, according to Art. 36(2) of the Statutes of both the former PCIJ and the current ICJ:

- (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.

However, one must not forget in this respect the system of reservations attached to declarations filed under the Optional Clause which will be discussed elsewhere⁷⁶.

The intention of the parties behind the insertion of such clauses within the provisions of treaties or agreements for compulsory or obligatory arbitration is clarified by Lauterpacht⁷⁷ who considered such practice as:

...an expression of the view that important controversies which are likely to occur must be excluded from the scope of obligatory arbitration. For reservations are, as a rule, ingeniously framed generalisations of anticipated possible disputes, in regard to which

either of the contracting parties is anxious to preserve freedom of action....

This view, which contemplated the elastic and general nature of matters usually excluded from international arbitration in reservation clauses and also their stabilising affects on commitments to resort to arbitration, can also be easily understood from Wilson's⁷⁸ following observation on the issue:

[w]hen an arbitration agreement with reservation provisions is concluded, there is no implied consent on the part of the signatories to arbitrate a dispute as to the *nature* of the controversy arising between them. A review of practice seems to establish that, if an arbitration convention is ratified in which this point is not covered, but in which there are set forth certain categories of disputes which are not to be arbitrated, the presumption is that each State may decide for itself whether a particular dispute falls inside or outside of the reserved classes of questions.

This observation brings us to the subjective *criteria* used by States in determining whether a dispute is justiciable and whether it is not, a problem underlined earlier by Baron Bieberstien at the 1907 Hague Peace Conference⁷⁹, and one which appears to be mainly influenced by the concerned State(s) political and / or general strategic calculations. In this regard, Steinberger⁸⁰ pointed out several factors that States take into account when determining whether or not a certain dispute is appropriate for submission to judicial settlement, namely, the political climate between the disputants; the interdependence with other fields of relations or frictions; prospects of settlement of the dispute by other non-legal means of dispute resolution (i.e. negotiations, good offices, mediation, conciliation, inquiry and fact finding) bilaterally or multilaterally employed, for example, within the framework of an international organisation; the applicability of legal rules; the certainty of

the laws to apply and also the predictability of a possible decision; the effect of a decision on the settlement of the dispute in part or entirely; the effect of the reaction of internal and international public opinion to their conduct; the prospects for and the means of enforcement of the decision. Hence, Steinberger throws the ball into the Government court by concluding that "...justiciability or non-justiciability is a political question, with the answer left to the discretion of a disputant"⁸¹. This falls in line with the views of a number of other writers, such as Hedges⁸², who pointed out that:

...a legal dispute is not truly justiciable unless the mental attitude of States is such to make it so. In other words, although every legal dispute is *potentially* susceptible of solution by arbitration, yet it is not *actually* susceptible unless the parties are willing to treat it in that way.

Judge Hudson⁸³ in this respect also indicated that:

[a]ll disputes between States are in some sense political, and any controversy *may be lifted by agitation to the arena of high politics*. [However, disputes of any kind] may be submitted to the process of justice according to law *if the parties so desire....* [emphasis added].

In actual dispute settlement practice, it appears that there is a mass of arbitral jurisprudence and a significant body of judicial decisions on State responsibility; treaty interpretation; and disputes involving boundary or territorial sovereignty questions⁸⁴. Nevertheless, practice has also shown that even such categories of disputes are not *always* considered by States suitable for legal determination by international arbitration or adjudication⁸⁵. For example, with regard to the latter category of disputes above, it appears that States have submitted a great number of important and highly controversial boundary

and territorial disputes to legal determination by international tribunals. Examples include the submission of an important boundary dispute by India and Pakistan for legal determination by an arbitral tribunal (the *Rann of Kutch* arbitration)⁸⁶ following a fierce war between the two nations; and the dispute between Yemen and Eritrea regarding sovereignty over the islands of *Hanish* in an almost similar atmosphere of hostility⁸⁷. Nevertheless, even such disputes, although capable of being settled by the application of the rules of international law, are sometimes endowed with political baggage too great to allow their settlement by arbitration or international adjudication. Current examples in this regard include the ongoing dispute regarding the question of Jammu and Kashmir between India and Pakistan⁸⁸, and also the dispute between Iran and the UAE over the islands of Abu Musa and the Greater and Lesser Tumbs⁸⁹. Hesitation to resort to international adjudication in such cases by one or both parties may also be attributed to the strict nature of this means of settlement which is in theory a "...win-or-lose, zero-sum game"⁹⁰. Therefore, any judgement rendered on this category of disputes based on the strict application of the rules of international law constitutes an official legal acknowledgement of the validity of the claims of one of the parties, in whose favour the judgement is made, an acknowledgement which not only results in the other party losing its case and deprives it of the freedom of action it used to enjoy prior to its submission of the dispute to legal determination⁹¹ but, also, may undermine the validity of any legal or political grounds on which any further claims made by that party on the issue in the future may be based, a risk which neither party is willing to take. However, this proposition may be refuted on the ground that such a path has been walked by a large number of States who submitted to the jurisdiction of international tribunals questions of vital political importance. The classical examples in this regard are the 1794 *arbitration under the Jay Treaty*⁹² and the 1871

Alabama Claims arbitration⁹³. Moreover, if there was a real intention to seek a settlement of a standing dispute by legal means acceptable to both parties, then they could authorise the tribunal to decide on the basis of justice and equity or a decision *ex aequo et bono*. Therefore, what can be inferred from this is that the main problem in this respect is not the existence of deficiencies in the legal means of settlement, but the absence of the political will to resort to those means. In other words, the dispute is non-justiciable because one or all of the parties want it to be that way.

So the question arises whether compulsory jurisdiction provides any remedy to such subjective *criteria* used by States for determining the justiciability of disputes and their refusal to seek a settlement by legal means. In the *Nicaragua* case (Jurisdiction and Admissibility)⁹⁴, the Court, in the face of a strong respondent, firmly declared by an 11-to-5 vote that it had jurisdiction to adjudicate the dispute regarding alleged unlawful acts of aggression in the form of military and paramilitary activities carried out by the USA against the Republic of Nicaragua, in terms of Art. 36(2) of the Statute, and also in terms of the 1956 Treaty of Friendship, Commerce and Navigation between the two nations, despite the contentions made by the USA challenging the Court's jurisdiction in this particular case, mainly on the grounds that, *inter alia*, the dispute was:

...not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution....The international Court of Justice was never intended to resolve issues of collective security and self-defence and is patently unsuited for such a role⁹⁵.

Charles de Visscher⁹⁶, the former Judge to the ICJ, once pointed out that “[r]ecourse to an international court implies that, and is only completely effective when, the dispute is completely separated from politics”. The issues involved in the *Nicaragua* case were, from

the USA's point of view, of a political and non-justiciable nature. However, in the Court's majority judgement, the dispute was a legally justiciable one that was susceptible to judicial determination, despite the above claims to the contrary raised by the USA.

This brings us to the question raised earlier, namely, who is in charge of determining the political and, therefore, non-justiciable nature of a dispute? The answer would be the State, in the case of an *ad hoc* settlement or even the situation where there does exist a prior commitment to resort to international arbitration or adjudication at the time when the dispute arises, but, however, outside any effective compulsory framework. This is clear within the context of *ad hoc* inter-State arbitral settlements, in which it is seldom that an arbitral tribunal renders a judgement on the justiciability of a certain dispute, inasmuch as that decision has already been made by the disputants⁹⁷. However, in the case of international adjudication under the ICJ, once the parties have lodged their declarations under Art. 36(2) of the Statute, thereby accepting compulsory jurisdiction, then, the whole issue falls within the scope of the Court's jurisdiction⁹⁸. Although the Court has never *rejected* a case on the ground that the dispute involved non-legal issues⁹⁹, however, the Court may in certain circumstances *refrain* from rendering a judgement in a particular case or aspect of a case if the question(s) were of an *actual political nature*, whose determination falls beyond the Court's judicial functions, such as in the *Haya de la Torre* case and *Hostages* case, both examined above¹⁰⁰. However, it was the Court who determined that and not the parties. This appears to be one of the main sources of States' reluctance towards compulsory jurisdiction. Nevertheless, the Court's compulsory jurisdiction under Art. 36(2) of its Statute is not absolute, but subject to any reservations attached by one of the parties to its original instrument or declaration through which it accepts the Court's jurisdiction, and which was the only possible way to make compulsory

jurisdiction in advance acceptable to States. The extent of the Court's compulsory jurisdiction, as well as States' declarations made under the Optional Clause, will be considered in the following.

3. The Compulsory Jurisdiction of the ICJ:

The following discussion aims at examining the compulsory jurisdiction of the ICJ in the light of reservations attached to States' declarations and the effect of such reservations on the Court's jurisdiction. However, first of all, a general overview of the various other means of conferring jurisdiction upon the Court will be presented.

3.1. The Ways and Means by which Jurisdiction is Conferred upon the ICJ:

According to Art 36(1) of the Court's Statute:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties or conventions in force.

The wording of the above article, namely, the aspect regarding the jurisdiction of the Court as comprising 'all cases which the parties refer to it' implies that all parties¹⁰¹ to a dispute must agree that the case should be referred to the Court for determination¹⁰². Such agreement or 'consent' is the only basis of the Court's jurisdiction in contentious cases¹⁰³. Jurisdiction, in general, may be conferred upon the Court either *ad hoc* after a dispute has arisen by the signing of a special agreement (*compromis*) to that effect; or *ante hoc*, in advance, prior to the existence of a dispute, either under a treaty or under a compromissory

clause embodied in the provision of treaty or a declaration filed under Art. 36(2) of the Court's Statute (the system of the Optional Clause will be examined separately in 3.2). Moreover, jurisdiction may be conferred upon the Court *post hoc*, after the initiation of the proceedings by the unilateral application of a plaintiff State (the principle of *forum prorogatum*). Each of those means will be examined in the following:

3.1.1 Special Agreement (*compromis*):

Jurisdiction may be conferred upon the Court after a dispute has arisen, namely, by the conclusion of a special agreement or *compromis* in which the parties specify the issues to be determined. The parties are to notify the Registrar of the Court of the agreement pursuant to Art. 40(1) of the Statute. This means of conferring jurisdiction upon the Court has been employed in a number of cases, such as the *Asylum* case¹⁰⁴, the *Minquiers and Ecrehos* case¹⁰⁵, and the *Continental Shelf* case¹⁰⁶ between Tunisia and Libya.

3.1.2. Treaties and Compromissory Clauses Conferring Jurisdiction upon the Court:

Jurisdiction, according to Art. 36(1) of the Statute, may also be conferred upon the ICJ by international "...treaties or conventions in force." Numerous international treaties and conventions on both the bilateral or multilateral levels embody compromissory clauses conferring jurisdiction on the ICJ for the settlement of disputes that may arise between the parties. Such clauses, as in the case of arbitral compromissory clauses, may be either special¹⁰⁷ or general¹⁰⁸, and may be combined in part with other means of settlement¹⁰⁹. Among the famous examples in which the jurisdiction of the ICJ was established pursuant to the compromissory clause was the *Nicaragua* case (Jurisdiction)¹¹⁰ between the USA and Nicaragua, in which the Court's jurisdiction founded by virtue of Art. 24(2) of the Treaty of Friendship, Commerce and Navigation concluded between the two States in 1956. However, treaties containing such clauses may not be invoked unless they are operative on

the day of the institution of the proceedings and all the parties to the proposed proceedings must also be parties to the Court's Statute. Moreover, such treaties must also be registered with the Secretariat of the UN in accordance with Art. 102 of the Charter¹¹¹.

3.1.3. The Principle of *forum prorogatum*:

In conditions in which the obligatory jurisdiction of the Court operates by way of exception, the principle of *forum prorogatum* often makes possible the exercise of or submission to the jurisdiction of the Court through a method less formal than express acceptance of it¹¹². This principle, which achieved some prominence in 1948 after the famous *Corfu Channel* case¹¹³ between Albania and the United Kingdom, is a major particularity of judicial procedure proper, in the sense that it is almost impossible to be applied by a tribunal in *ad hoc* arbitral proceedings¹¹⁴. It contemplates that jurisdiction may be conferred upon the Court by a respondent State *post hoc*, by means of acts subsequent to the initiation of the proceedings, namely¹¹⁵, by formal agreement conferring jurisdiction upon the Court; or by informal agreement as a result of successive and independent statements of consent made by the defendant State; or from the conduct of the proceedings from which the tacit waiver of the requirement of express consent to the Court's jurisdiction may be deduced, each of which takes place after the matter has been unilaterally brought before the Court by an applicant State.

Some have regarded proceedings instituted under the principle of *forum prorogatum* as politically motivated and an abuse of Court procedures¹¹⁶. However, it is interesting to note that although the Court witnessed a number of cases¹¹⁷ instituted on the basis of *forum prorogatum* following the *Corfu Channel* case in 1948, the issue was not regulated in the Rules of the Court until 1978¹¹⁸, when Art. 38(5) was added. The Article indicated that:

[w]hen the applicant State proposes to found the jurisdiction of the Court upon a consent *yet to be given* or manifested by the State against which such application is made. It shall not however be entered in the General List, nor any action be taken in the proceedings, *unless and until the State against which such application is made consents to the Court's jurisdiction* for the purpose of the case [emphasis added].

In this respect, Rosenne¹¹⁹ pointed out three factors which enabled the Court to establish its jurisdiction based on *forum prorogatum* and which were deliberately omitted from the Statute and the Rules of the Court. The first is that in the case of proceedings instituted by application, neither the Rules of the Court nor its Statute require that the consent of the respondent State should be transmitted to the Court with the application; the second is that there are no provisions in the Statute or Rules of the Court as to specification of the form in which a State's consent to the Court's jurisdiction is to be expressed¹²⁰. This was also recognised by the Court in the *Corfu Channel* case (Preliminary Objections)¹²¹ in which it indicated that “[w]hile the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form”. The third factor is that there is no indication in the Rules or the Statute describing in as many words when proceedings should be instituted by application and when by special agreement. However, in any instance, the Court will not accept jurisdiction under *forum prorogatum* unless there is a *real* and not merely apparent consent¹²². As the Court indicated in the *Corfu Channel* case (Preliminary Objections)¹²³, the State's consent must be “...a voluntary and indisputable acceptance of the Court's jurisdiction”. Therefore, at least from the Court's point of view, there appears to be no possibility for a respondent State to be dragged into legal proceedings it never really intended to participate in. Indeed, such a situation would clearly constitute an infringement of the State consent requirement

which, as we have seen above, is a fundamental element of one of the basic principles of State sovereignty, namely, the equality of States doctrine, and would be a serious departure from the Court's own well established jurisprudence regarding the consensual nature of the settlement of disputes by peaceful means. The applicant State relying on *forum prorogatum* invites a positive reaction from the defendant State, a subsequent acceptance of the Court's jurisdiction¹²⁴. Therefore, a State not wishing to submit to the jurisdiction of the Court *must* refrain from any action from which consent may be deduced. Such an approach has been successfully followed by States in a number of cases in which the respondent State has clearly and consistently rejected the invitation to submit to the Court's jurisdiction made by the applicant State¹²⁵. The traditional example in this respect is the *Anglo-Iranian Oil Company* case. In that case, the United Kingdom suggested that Iran's objections to the admissibility of certain claims put forward in the latter's memorial were not considered as objections to the Court's jurisdiction, and could only be decided if the Court had jurisdiction; therefore, from the applicants' point of view, such action had conferred jurisdiction upon the Court on the basis of the principle of *forum prorogatum*. This view, however, was rejected by the Court. The Court's reply in this respect deserves extensive quotation:

The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court. But the Government has consistently denied the jurisdiction of the Court. Having filed a Preliminary Objection for the purpose of disputing the jurisdiction, it has throughout the proceedings maintained that Objection. It is true that it has submitted other Objections which have no direct bearing on the question of jurisdiction. But they are clearly designed as measures of defence which it would be necessary to examine only if Iran's Objection to the jurisdiction were rejected. No element of consent can be deduced from such conduct on the

part of the Government of Iran. Consequently, the submission of the United Kingdom on this point cannot be accepted¹²⁶.

3.2. The System of the Optional Clause:

As indicated above, it would have not been possible to endow the international court with compulsory jurisdiction had States not been given the freedom to exclude certain categories of disputes from the court's compulsory jurisdiction. This system of compulsory jurisdiction was first introduced in the Statute of the PCIJ¹²⁷ and came as a compromise between those who wanted true compulsory jurisdiction over legal disputes, as was proposed in 1920 by the Committee of Jurists which prepared the Statute of the PCIJ, and between those who wanted to retain the exclusively consensual basis of the Court's jurisdiction. The Optional Clause, a potentially important landmark in the history of the compulsory jurisdiction of international courts and tribunals, was taken over almost virtually unchanged in the Statute of the current ICJ¹²⁸. Art. 36(2) of the Statute of the ICJ reads:

The States Parties¹²⁹ 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 reparation to be made for the breach of an international obligation.

From the wording of the article above, it appears that acceptance of the Optional Clause is, in accordance with the *stricto sensu* phrasing of the expression, optional; however, once a State has filed a declaration thereby accepting the Court's jurisdiction, then reference to the Court, as stated in Art. 36(2) above, becomes "...compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation...". A State making a declaration under the Optional Clause¹³⁰ possesses the right to bring before the Court another State accepting the same obligation and *vice versa*. Professor Ian Brownlie¹³¹ pointed out that the expectation in this regard was that a general system of compulsory jurisdiction would be generated as States' declarations multiplied. Although he considered this conception sound enough, nevertheless, the effectiveness of this system, as Professor Brownlie rightfully asserted, was reduced due to the conditions in which it functioned. Among the main contributing factors cited by him in this respect is the crippling role of the reservations attached by States to their declarations made under the Optional Clause, in which certain matters are excluded from the Court's compulsory jurisdiction. These will be examined below.

The Court's *conception* of what forms a legal dispute was stated in its practice in the *Border and Transborder Armed Actions* case¹³² in which it pointed out that a legal dispute was a dispute "...capable of being settled by the application of principles and rules of international law...". Therefore, despite a State's claim to the contrary, all disputes are considered by the ICJ as legal or justiciable disputes *once they are capable of being settled by the application of the principles of international law*. A State's own assessment of the non-justiciability of a certain dispute is invalid in proceedings initiated under the Optional Clause, inasmuch as it is the Court which, under Art. 36(6) has the power to determine its

own jurisdiction. The classical example in this regard is Court's practice in the *Nicaragua* case¹³³.

According to Judge Mosler¹³⁴, to the extent that both parties have accepted the compulsory jurisdiction of the ICJ, the only preliminary objection possible against the jurisdiction of the Court or the admissibility of an application based on the Optional Clause is, therefore, that the dispute belongs to one of the categories exempted in a party's declaration. The Court's compulsory jurisdiction becomes deadlocked if the dispute in question is a matter excluded in a State's declaration of acceptance of the Court's jurisdiction, inasmuch as it is beyond the Court's competence to entertain a dispute which falls within the scope of a reservation made a party. The most recent example in this respect is the Court's ruling on June 21, 2000, in the *Case Concerning the Aerial Incident of 10 August 1999* between India and Pakistan¹³⁵, in which it found that it had no jurisdiction to entertain the application filed by the Islamic Republic of Pakistan regarding the alleged downing, on August 10, 1999, of an unarmed Pakistani military aircraft (the Atlantic) in Pakistan's territory by Indian forces on the ground that, *inter alia*, India's declaration excluded among other things "disputes with the Government of any State which is or has been a Member of the Commonwealth of Nations. The most common of reservations attached to State's declarations are those regarding past disputes; time-limits (*ratione temporis*) regarding the duration of a Declaration¹³⁶; those excluding disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement; and those regarding the exclusion of matters which fall within the domestic jurisdiction of the State(s) concerned. However, some¹³⁷ have argued that this latter form of reservation is unnecessary since, if a subject matter of a dispute falls within the domestic jurisdiction of a State according to current international law, it cannot be a

legal dispute governed by international law and, therefore, does not come within the scope of the Court's compulsory jurisdiction. The inclusion of this form of reservation is said¹³⁸ to be probably governed less by legal considerations than by political factors, and may be ascribed to the general reluctance on the part of States to entrust the settlement of their disputes to third parties beyond their control. Moreover, some States have even sought to increase the effectiveness of such forms of reservation by reserving to themselves the right to determine when a dispute falls within the scope of the domestic jurisdiction of the State(s) concerned. Among the most popular examples in this regard is the famous so-called 'Connally reservation' or 'Connally amendment' of the USA in its declaration of 1946 in which it excluded "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"¹³⁹. Although the USA withdrew its acceptance of the Optional Clause in the aftermath of the ICJ's ruling on Jurisdiction and Admissibility in the *Nicaragua* case, nevertheless, the declarations of a number of other States, albeit low in number, still do contain so-called 'automatic reservations' formulated on the same lines as the Connally formula. Sudan's 1958 declaration and Malawi's 1966 declaration are examples. A similar formula, was that in the 1972 declaration of the Republic of the Philippines, which excluded disputes "which the Republic of the Philippines considers to be essentially within its domestic jurisdiction"¹⁴⁰. Such forms of reservation have been criticised by a number of writers, such as Professor Brownlie¹⁴¹, who considers them as incompatible with the Statute of the Court on the ground that they contradict with the power of the Court under Art. 36(6) to determine its own jurisdiction and also are not genuine acceptance of the Court's jurisdiction *ante hoc*. In this regard, Rosenne¹⁴² also added that such subjective reservations would arguably nullify wholly or partially the acceptance of the Court's jurisdiction. With

regard to the Court's practice regarding the validity of such automatic reservations, it appears that although criticism has been advanced with great vigour on such practice by the late Sir Hersch Lauterpacht, as well as by other judges in the *Norwegian Loans* case¹⁴³, nevertheless, the Court has avoided making a definitive pronouncement on that issue. However, Rosenne¹⁴⁴ considered the Court's decision of November 26, 1984, in the jurisdictional phase of the *Nicaragua* case, to be an implicit rejection of the view that such reservations vitiate the acceptance of the Court's compulsory jurisdiction.

A declaration, being made under Art. 36(2) which expressly limits the effects of the declaration to "...any other State accepting the same obligation...." is always subject to the condition of reciprocity. This means that the Court can only have jurisdiction by virtue of Art. 36(2) where the declarations of the two parties in dispute meet. This does not mean, however, that both declarations of the parties must be in identical terms, but both declarations must grant jurisdiction to the Court to entertain the dispute in question. This also opens the way for a party to invoke a reservation made in the declaration of the other party for the purpose of challenging the Court's jurisdiction¹⁴⁵. It is interesting to note that the majority of declarations registered by States under the Optional Clause make reciprocity an express condition for their acceptance of the Court's jurisdiction. This would seem to be superfluous, since the principle of reciprocity is already inherent in the system of the compulsory jurisdiction of the ICJ under the Optional Clause¹⁴⁶. However, Art. 36 of the Court's Statute provided a rather confusing provision in Paragraph 3 which indicated that the Declarations made under the Optional Clause may be unconditional or "...on condition of reciprocity on the part of several or certain States, or for a certain time". This reciprocity condition is, unlike the one already examined above, optional and does not form an integral part of the Statute¹⁴⁷. The clearest example in this respect is the reservation regarding

disputes with Commonwealth countries, which is usually framed on similar lines to clause 2(b) of the Canadian declaration, which excluded “disputes with the Government of any other country which is a member of the Commonwealth...”. This is a similar formulation to the reservation of India above, which barred the Court’s jurisdiction in the *Aerial Incident of 10 August 1999* case¹⁴⁸.

There are currently 64 States that have accepted the Court’s compulsory jurisdiction under the Optional Clause, out of the total of 189 members of the UN¹⁴⁹, less than a third of the members. Moreover, to add insult to injury, a considerable number of those declarations accepting the Court’s compulsory jurisdiction contain reservations which would curb the Court’s jurisdiction on certain matters. This appears to reflect the great degree of mistrust that States have for the concept of compulsory settlement of disputes in general. States seem to prefer the rather traditional method of bringing claims before the Court, namely, by express agreement relating to a defined dispute¹⁵⁰. Some States may have accepted the jurisdiction of the Court under the Optional Clause, because it may be useful to them one day in compelling a certain party to appear before the Court for the purpose of redressing a certain wrong, a chance which would have been unlikely through the traditional ‘non-compulsory’ means of conferring jurisdiction upon the Court, which depends on mutual agreement. However, some of those States would block any path they can, that may result in them being put in the same position, through the reservations that they attach to their declarations, in which they exclude certain issues that they would hesitate to bring before the Court voluntarily, let alone under compulsory jurisdiction. An interesting example in this respect can be found in the Indian declaration of acceptance of the Court’s jurisdiction of September 18, 1974, in which it excluded in clauses 2, 4, 5 and 10 respectively the following:

2. disputes with the government of any State which is or has been a member of the Commonwealth of Nations;
4. disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar related acts, measures or situations in which India is, has been or may in future be involved;
5. disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purpose of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court;
10. disputes with India concerning or relating to:
 - a. the status of its territory or the modification or delimitation of its frontiers or any other matter concerning boundaries;
 - b. the territorial sea, the continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone, and the other zones of national maritime jurisdiction including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels;
 - c. the condition and status of its islands, bays and gulfs and that of the bays and gulfs that for historical reasons belong to it;
 - d. the airspace superjacent to its land and maritime territory; and;
 - e. the determination and delimitation of its maritime boundaries.

The crippling effects of such reservations on the scope of the compulsory jurisdiction of the ICJ need no comment here. However, some of those reservations may appear necessary to the Indian Government in view of the traditional state of hostilities that exists between it and Pakistan, especially concerning the disputed region of Jammu and Kashmir¹⁵¹, which is under Indian control and which is the subject of electrified military tension and constant indirect clashes between the two States. Indeed, the first of those reservations above successfully blocked the Court's jurisdiction in the *Aerial Incident of 10 August 1999* case

with Pakistan¹⁵². This may seem to echo the earlier statements indicated above made by Baron Beiberstein at the 1907 Hague Convention and the arguments advanced by the United Kingdom in its Memorandum submitted to the Committee of Arbitration and Security in 1928, which doubted the fruitfulness of any general international compulsory mechanism for the peaceful settlement of international disputes that would apply to the international community as a whole¹⁵³, even if such a mechanism was restricted to a limited category of disputes, in view of the diversity of inter-State relations which in some situations would render even those limited categories of disputes unsuitable for legal determination when circumstances change or when the counter-disputant is a State with which it originally may not have enjoyed friendly relations.

Although the limited scope of the ICJ's compulsory jurisdiction under the Optional Clause may not have satisfied the earlier advocates of a real compulsory jurisdiction during the framing of the Statute of the PCIJ, nevertheless, in current political reality, it appears more than enough to a great many *sovereign* States. A State's consent prior to the initiation of any legal proceedings in each individual case, as Professor Elihu Lauterpacht¹⁵⁴ pointed out, is "...required because it always has been required and that...is the way States want it".

Conclusion:

The general position of States towards the issues of compulsory arbitration and adjudication within a *general* multilateral mechanism covering all kinds of disputes what so ever are largely influenced by the question regarding the submission of important issues to such means of settlement. Indeed, many States apprehended that the *obligatorium* arising from such instruments might force them in the future to submit matters which those States may see as too vital to submit to legal determination, an action which they definitely would

not take voluntarily. Moreover, even a genuine legal dispute may be considered non-suitable for legal determination in certain circumstances. The major crack in the wall in this respect was the Optional Clause; however, the relative success of the Optional Clause may be considered as a result of the system by which it operates. Not only was each State individually given its say on the issues that are to be excluded from the jurisdiction of the ICJ in accordance with its own respective personal calculations, but also it was given the freedom to specify the duration of its Declaration under the Optional Clause. The system in this regard appears to provide States with a certain degree of confidence that the things they view as their own business are not to be subject to the Court's compulsory jurisdiction. Moreover, it technically was able to embody the various proposals of States on issues that were to be excluded from the Court's jurisdiction, albeit at the expense of a real *general* compulsory jurisdiction. Nevertheless, once a State puts its foot in the circle by accepting the Optional Clause, it then loses any freedom it used to enjoy in subjectively determining the justiciability or otherwise of a dispute and, therefore, whether to resort or not to judicial settlement in view that the ICJ is given the power under Art. 36(6) to determine whether a given dispute falls within the scope of its jurisdiction if that issue is disputed by one of the parties, taking into account any reservations attached to the parties Declaration. This indeed appears to be among the main issues that deter States from accepting the Optional Clause.

The question regarding the determination of the justiciability or otherwise of international disputes within the domains of *ad hoc* arbitration is really a question of chance inasmuch as, unlike proceedings before the ICJ, the question is already determined by the parties before the initiation of the arbitral process. This raises a major source of concern since each State has its own conception of what forms an important or 'non-justiciable' issue, or in other words, the issue as a whole is subject to the subjective determination of

the State(s) concerned. In this regard certain categories of disputes, such as territorial sovereignty claims or boundary delimitation matters or even treaty interpretation matters, have been the subject matters of disputes submitted to legal determination by international tribunals, but even those categories of disputes may, from a State's political point of view when the dispute arises, become too important to submit to legal determination due to their political content and, therefore, be seen as non-justiciable. The difficulties arising from this subjective determination process also persist in the domains of practical State treaty formulation with regard to the peaceful settlement of disputes by, *inter alia*, arbitration. States, in order not to leave anything out and to avoid the confusion that may occur when a dispute arises as to the exact nature of that dispute and whether it is covered by the *obligatorium*, have resorted to the practice of inserting vague, general and far-reaching reservation clauses, regarding the matters that were to be excluded from the peaceful settlement machinery established by those treaties. They thereby block any possibility of a dispute which, at the time, may affect a State's vital interests from being the subject of legal determination by an international arbitral tribunal which, as things currently stand, is usually constituted by the disputants in each individual case, who also vest the tribunal with the necessary jurisdiction in order for it to carry out its functions. Although, as already indicated above, the problem appears to be less significant within the domains of standing international tribunals with compulsory jurisdiction such as the ICJ which is empowered by Art. 36(6) of the Statute to determine its own jurisdiction, nevertheless, even the ICJ may be denied jurisdiction if it is faced with a (carefully drafted) reservation inserted in a State's declaration of acceptance of the Court's jurisdiction which excludes the matter from the Court's jurisdiction. The Court's practice in the *Aerial Incident of 10 August 1999* case examined above¹⁵⁵ supports this view.

Therefore, what can be said in conclusion is that since the determination of the justiciability or non-justiciability of a dispute is a decision which principally lies mainly within the scope of State dominance, it may easily be said that the adoption of an acceptable definition of what is 'political' as distinguished from 'legal' is non-foreseeable, either now or in the near future, and any attempt to be made in that regard, as pointed out by the former Judge Herman Mosler, would itself "...amount to a political choice"¹⁵⁶. Therefore, in consequence, it may also equally be said that the establishment of an international tribunal with a *real* and *general* compulsory jurisdiction appears also unforeseeable in the near future.

Notes to Chapter Four:

¹ E.g. the 1949 ILC Draft Declaration on Rights of Duties of States; the 1933 Montevideo Convention on the Rights and Duties of States; Chapter IV of the Charter of the OAS; and Art. 3 of the Charter of the OAU.

² See N.L. Wallace-Bruce, *op cit*, pp. 28-37.

³ *Op cit*, pp. 718-719.

⁴ *The Peaceful Settlement of International Disputes in Practice*, (1995), 7-II, *Pace Int'l L. Rev.*, pp. 257, 270 (hereinafter cited as Brownlie, *The Peaceful Settlement of International Disputes*).

⁵ H. Steinberger, *Judicial Settlement*, *op cit*, p. 126.

⁶ *The Function of Law*, *op cit*, p. 166.

⁷ See in general D.W. Bowett, *Peaceful Settlement*, *op cit*, pp. 179ff.

⁸ H. Lauterpacht, *The Function of Law*, *op cit*, p. 167.

⁹ *Supra*, 2.1 of Chapter Three.

¹⁰ *Ibid*.

¹¹ For our discussion regarding the possible factors behind a State's declination to resort to arbitration, see in general *supra* 2 of Chapter Two.

¹² Quoted from J.B. Scott, *The Proceedings of the Hague Peace Conferences: Conference of 1907*, New York, Oxford University Press, 1921, vol. II, p. 286 (hereinafter cited as Scott, *Proceedings of 1907*).

¹³ H.M. Cory, *op cit*, pp. 145-147.

¹⁴ Quoted from *ibid*, pp. 148-149, n. 9.

¹⁵ *The Function of Law*, *op cit*, p. 172.

¹⁶ *Ibid*, pp. 166-167.

¹⁷ *Supra*, 1.3 of Chapter Three.

¹⁸ *Op cit*, p. ix.

¹⁹ *Op cit*.

²⁰ *Ibid*, p. 3

²¹ *Ibid*, pp. 3-4.

²² *Ibid*, pp. 6-9.

²³ E. de Vattel, *Law of Nations or, Principles of International Law Applied to the Conduct and Affairs of Nations and of Sovereigns*, 1916, cited in *ibid*, p. 8.

²⁴ H. Mosler, *op cit*, p. 220.

²⁵ Lauterpacht, *The Function of Law*, *op cit*, p. 4.

²⁶ *The Doctrine of Non-Justiciable Disputes in International Law*, (1928), 8, *Economica*, pp. 277, 280-282 (hereinafter cited as Lauterpacht, *The Doctrine of Non-Justiciable Disputes*).

²⁷ The procedural aspects of the *Alabama Claims* arbitration has already been examined in *supra* 2.2 of Chapter One. However, for a concise account of the correspondence and views of both parties with regard to the issue of justiciability, see H. Lauterpacht, *The Doctrine of Non-Justiciable Disputes*, *op cit*, p. 281; and also by the same author, *The Function of Law*, *op cit*, pp. 147-148.

²⁸ For the text of the Institute's draft regulations on arbitral procedure, see J.B. Scott, *Resolutions of the Institute of International Law Dealing with the Law of Nations, with a Historical Introduction and Explanatory Notes*, New York, Oxford University Press, 1916, pp. 1-7 (hereinafter cited as Scott, *Resolutions*).

²⁹ For the text of the Russian circular note, see J.B. Scott, *The Hague Conventions and Declarations of 1899 and 1907 Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers and Texts of Reservations*, New York, Oxford University Press, 3rd edition, 1918, p. xvii (hereinafter cited as Scott, *The Hague Conventions and Declarations of 1899 and 1907*).

³⁰ Clause 8 of the Russian circular note, *ibid*.

³¹ For the text, see J.B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1899*, New York, Oxford University Press, 1920, pp. 797-800 (hereinafter cited as Scott, *The Proceedings of 1899*).

³² For the deliberations of the fourth, fifth and fourteenth meetings of the Third Commissions Committee of Examination, see, *ibid*, pp. 700-704, 705-708, and 767-772 respectively. See also in this respect, W.I. Hull, *The Two Hague Conferences and their Contributions to International Law*, Boston, Ginn & Co, 1908, pp. 326-331.

³³ H. Lauterpacht, *The Function of Law*, *op cit*, p. 27; and T.J. Bodie, *op cit*, p. 26.

³⁴ See in general J.B. Scott, *Proceedings of 1907*, *op cit*. For a concise account in this respect, see, H. Lammasch, *Compulsory Arbitration at the Second Hague Conference*, (1910), 4, *AJIL*, p. 83; and W.I. Hull, *op cit*, pp. 311-326, 331-348.

³⁵ Quoted from J.B. Scott, *Proceedings of the Hague Peace Conferences: 1907*, *op cit*, p. 50.

³⁶ See, E. McWhinney, *Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court*, Dordrecht, Kluwer Academic Publishers, 1991, p. 40 (hereinafter cited as McWhinney, *Judicial Settlement*); L.B. Sohn, *Exclusion of Political Disputes from Judicial Settlement*, (1944), 38, *AJIL*, pp. 694, 698 (hereinafter cited as Sohn, *Exclusion of Political Disputes*); T.D. Gill, *Political and Legal Disputes and the Problem of 'Real Consent'*, in A.H.A. Soons (ed.), *op cit*, pp. 195-200; and H. Mosler, *op cit*, p. 229.

³⁷ *The Function of Law*, *op cit*, pp. 19-20.

³⁸ H. Lauterpacht, *The Doctrine of Non-Justiciable Disputes*, *op cit*, p. 289.

³⁹ *Policy Consideration and the International Judicial Process*, (1968), 17, *ICLQ*, pp. 58, 65-74.

⁴⁰ *International Law in Theory and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 220-223.

⁴¹ E.g. the *Hostages* case, *ICJ Rep*, 1980, p. 3.

- ⁴² E.g. the *Nuclear Tests case*, ICJ Rep, 1973, p. 99.
- ⁴³ E.g. the *Aegean Sea Continental Shelf case*, ICJ Rep, 1978, pp. 3ff; and the *Nicaragua case*, ICJ Rep, 1984, pp. 392ff.; and ICJ Rep, 1986, pp. 14ff.
- ⁴⁴ *The Justiciability of Disputes and Issues in International Relations*, (1967), 42, BYIL, pp. 123, 124ff (hereinafter cited as Brownlie, *The Justiciability of Disputes*).
- ⁴⁵ *Ibid*, pp. 123-124.
- ⁴⁶ Lauterpacht, *The Function of Law*, *op cit*, p. 153.
- ⁴⁷ *Ibid*, pp. 157-158.
- ⁴⁸ *Ibid*, p. 159.
- ⁴⁹ *Principles of International Law*, R.W. Tucker (ed.), New York, Holt; Rinehart and Winston Inc, 1966, pp. 525ff.
- ⁵⁰ *The Distinction between Legal and Political Questions*, (1924), 18, ASILP, p. 50.
- ⁵¹ *International Court of Justice*, (1981), I, EPIL, pp. 72, 79 (hereinafter cited as Schlochauer, *International Court of Justice*).
- ⁵² *Op cit*, pp. 14-16.
- ⁵³ *Ibid*, p. 15.
- ⁵⁴ ICJ Rep, 1951, p. 73.
- ⁵⁵ *Case Concerning United States Diplomatic and Consular Staff in Tehran*, ICJ Rep, 1980, p. 3.
- ⁵⁶ ICJ Rep, 1950, p. 266.
- ⁵⁷ ICJ Rep, 1951, p. 71.
- ⁵⁸ ICJ Rep, 1950, p. 79.
- ⁵⁹ T.J. Bodie, *op cit*, pp. 65-66.
- ⁶⁰ *Op cit*, p. 15.
- ⁶¹ ICJ Rep, 1980, pp. 3, 8-9.
- ⁶² *International Courts and International Politics*, the Josephine Onoh Memorial Lecture, January 21, 1986, the University of Hull, (the University Press), pp. 5-6.
- ⁶³ ICJ Rep, 1980, p. 20.
- ⁶⁴ *Ibid*.
- ⁶⁵ T.J. Bodie, *op cit*, p. 28.
- ⁶⁶ See *supra*, pp. 143-146.
- ⁶⁷ *Ibid*, p. 27.

⁶⁸ 194, CTS, p. 19.

⁶⁹ *Op cit*, pp. 977-984.

⁷⁰ T.J. Bodie, *op cit*, p. 32.

⁷¹ Reservation clauses in the provisions of international treaties or agreements providing for compulsory arbitration or adjudication refer, according to Wilson (*Reservation Clauses in Agreements for Obligatory Arbitration*, (1929), 23, AJIL, pp. 68, 69) to any part of those agreements "...which have the effect of limiting the jurisdiction, of conditioning or substantially modifying the obligations which the parties accept".

⁷² In this regard, Habicht (*op cit*, pp. 992-999) pointed out the following trends in reservation clause practice:

- 1- Reservations concerning the vital interests, independence and honour of the parties;
- 2- Reservations regarding the Monroe Doctrine;
- 3- Reservations concerning the Covenant of the LN;
- 4- Reservations concerning the territorial integrity of the parties;
- 5- Reservations regarding constitutional principles;
- 6- Reservations concerning the interests of third parties;
- 7- Reservations regarding matters are solely within the domestic jurisdiction of the parties;
- 8- Reservations concerning procedures before national courts;
- 9- Reservations regarding disputes belonging to the past.

For a further account on the various systems of reservation clauses before and after the WWI, see in general respectively, H. Wehberg, *Restrictive Clauses in International Arbitration Treaties*, (1913), 7, AJIL, pp. 301ff; and R.R. Wilson, *op cit*, pp. 68ff.

⁷³ L.B. Sohn, *Exclusion of Political Disputes*, *op cit*, p. 694.

⁷⁴ Art. 2(7) of the UN Charter; Art. 27(b) of the ECPSD; and Art. 5 of the Pact of Bogota.

⁷⁵ Art. 17 of the 1928 General Act and the 1949 Revised General Act.

⁷⁶ See in general *infra* 3.2 of this Chapter.

⁷⁷ *The Function of Law*, *op cit*, p. 172.

⁷⁸ *Op cit*, p. 74.

⁷⁹ See *supra*, p. 145.

⁸⁰ *Judicial Settlement*, *op cit*, p. 127.

⁸¹ *Ibid.*

⁸² *Op cit*, pp. 119-120.

⁸³ *International Tribunals*, *op cit*, p. 242.

⁸⁴ C. Gray & B. Kingsbury, *op cit*, p. 132

⁸⁵ T.J. Bodie, *op cit*, p. 35.

⁸⁶ 7, ILM, 1968, p. 633. For the background of the case, see *supra* 2.2 of Chapter Two in general.

⁸⁷ See, *supra* n. 18 of Chapter Two.

⁸⁸ See n. 61 of Chapter Two.

⁸⁹ See in general 2.1 of Chapter Two.

⁹⁰ See *supra* pp. 59-60.

⁹¹ M. Sorensen, *op cit*, pp. 274-275.

⁹² *Supra*, 2.1 of Chapter One.

⁹³ *Supra* 2.2 of Chapter One.

⁹⁴ ICJ Rep, 1984, p. 392.

⁹⁵ Quoted from the USA's 'Statement of Department of State on U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice' on January 18, 1985. 15, ILM, 1985, 15, pp. 246-247.

⁹⁶ *Reflections on the Present Prospects of International Adjudication*, (1956), 50, AJIL, pp. 467, 468.

⁹⁷ T.J. Bodie, *op cit*, p. 35.

⁹⁸ Indeed, Art. 36(6) of the Court's Statute states that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

⁹⁹ O. Schachter, *op cit*, p. 223.

¹⁰⁰ *Supra* pp. 151-153.

¹⁰¹ The *ratione personae* jurisdiction of the ICJ in contentious cases is indicated in Art. 34(1) of its Statute which states that "[o]nly States may be parties in cases before the Court." Therefore, only States have a *locus standi* before the Court and may participate in a contentious case before it. All members of the UN according to Art. 93(1) of the UN Charter are *ipso facto* parties to the Court's Statute. However, non-members of the UN, according to Art. 93(2) of the Charter, may become members of the Court's Statute on conditions determined by the General Assembly in each individual case and upon the recommendation of the Security Council. Those conditions, according to the General Assembly's practice in this regard in the cases of Switzerland, G.A. Res. 91(1) on December 11, 1946; Liechtenstein, G.A. Res. 363(IV) on December 1, 1949 (acquired membership on September 18, 1990); San Marino, G.A. Res. 806(VIII) on December 9, 1953 (acquired membership on March 2, 1992); and Nauru, G.A. Res. 42/21 on November 18, 1987 (acquired membership on September 14, 1999) are: acceptance of the provisions of the Court's Statute; acceptance of all the obligations of a member of the UN under Art. 94 of the Charter; and an undertaking to contribute to the expenses of the Court as may be assessed by the General Assembly from time to time after consultation with the State concerned.

¹⁰² P. Malanczuk, *op cit*, p. 283.

¹⁰³ *The Interpretation of the Peace Treaties* case, ICJ Rep, 1950, p. 71. Also in this respect the Court in the *Anglo-Iranian Oil Company* case (ICJ Rep, 1952, pp. 102-103) indicated that

...the general rules laid down in Article 36 of the Statute...are based on the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court in accordance with Article 36, the Court lacks such jurisdiction.

¹⁰⁴ ICJ Rep, 1950, p. 260.

¹⁰⁵ ICJ Rep, 1953, p. 47.

¹⁰⁶ ICJ Rep, 1982, p. 18.

¹⁰⁷ E.g. Art. 19(1) of the 1991 Protocol on Environmental Protection to the Antarctic Treaty; and Art. 66(a) of the 1969 Vienna Convention on the Law of Treaties.

¹⁰⁸ E.g. Art. 20 of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; Art. 27 of the 1992 Convention on Biological Diversity; Art. 17 of the 1949 Revised General Act for the Pacific Settlement of International Disputes; Art. 1 of the 1957 ECPSID; and Art. 31 of the 1948 Pact of Bogota which was successfully relied upon by Nicaragua to establish the jurisdiction of the ICJ in the *Case Concerning Border and Transborder Armed Actions* (ICJ Rep, 1988, pp. 69, 76ff) with Honduras.

¹⁰⁹ E.g. Art. 287 of UNCLOS III; Art. 43 of the 1978 Vienna Convention on the Succession of States in Respect of Treaties; Art. 14 of the 1992 UN Framework Convention on Climate Change; and Art. 14 of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction;

¹¹⁰ ICJ Rep, 1984, pp. 426-429. See also the *Case Concerning Border and Transborder Armed Actions* between Nicaragua and Honduras (*supra*, n. 108 of this chapter); and the *Applicability of the Convention on the Prevention and Punishment of the Crime of Genocide* case, (ICJ Rep, 1996, p. 595, para.47).

¹¹¹ See J.L. Simpson & H. Fox, *op cit*, p. 51-52.

¹¹² See H. Lauterpacht, *The Development of International Law by the International Court*, London, Stevens & Sons Ltd, 1958, p. 103 (hereinafter cited as Lauterpacht, *Development*). For an in-depth discussion on the principle of *forum prorogatum*, see S. Rosenne, *Law and Practice*, *op cit*, vol. II (Jurisdiction), pp. 695ff.

¹¹³ ICJ Rep, 1948, p. 15.

¹¹⁴ S. Rosenne, *The World Court: What it Does and How it Works*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 89 (hereinafter cited as Rosenne, *The World Court*).

¹¹⁵ See, J.L. Simpson & H. Fox, *op cit*, p. 65.

¹¹⁶ S. Rosenne, *The World Court*, *op cit*, p. 89.

¹¹⁷ E.g. the *Treatment in Hungary of Aircraft of the USA* cases (ICJ Rep, 1956, p. 99); the *Antarctica* cases (ICJ Rep, 1956, p. 15);

¹¹⁸ S. Rosenne, *Law and Practice*, *op cit*, vol. II, p. 697.

¹¹⁹ *Ibid*, pp. 697-698.

¹²⁰ I. Brownlie, *Principles*, *op cit*, p. 724. See The ICJ in the *Corfu Channel* case (Preliminary Objections) stated that “[w]hile the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form.” ICJ Rep, 1948, pp. 27-28.

¹²¹ ICJ Rep, 1948, pp. 27-28.

¹²² I. Brownlie, *Principles*, *op cit*, p. 724.

¹²³ ICJ Rep, 1948, p. 27. See also the *Application of the Genocide Convention (Preliminary Objection)*, ICJ Rep, 1996, p. 595, para. 40.

¹²⁴ R.M. Wallace, *International Law*, London, Sweet & Maxwell Ltd, 1992, 2nd edition, p. 275.

¹²⁵ E.g. the *Treatment in Hungary of Aircraft of the USA* cases (ICJ Rep, 1956, pp. 99); the *Antarctica* cases (ICJ Rep, 1956, p. 15); and the *Problem of the River Danube* case (Press Communiqué of the ICJ, 92/25 of October 26, 1992).

¹²⁶ ICJ Rep, 1952, p. 114.

¹²⁷ Art. 36(2) and (3) of the Statute of the PCIJ stated that:

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a latter moment, declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the Jurisdiction of the Court in all or any of the classes of 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.

The declaration referred to above may be made unconditionally, or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

¹²⁸ S. Rosenne, *The World Court, op cit*, pp. 90-91. For an in-depth examination of the system of the optional clause and its origins, as well as its inclusion in the Statutes of the PCIJ and ICJ, see S. Rosenne, *Law and Practice*, vol. II, *op cit*, pp. 727-836.

¹²⁹ Access to the Court may also be available to a State which is neither a member of the UN nor party to the Court's Statute according to Security Council Res. 9 on October 15, 1946 after the State concerned has deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court in accordance with the UN Charter and with the terms and subject to the conditions of the Rules and Statute of the Court and accepts all the obligations of a member of the UN under Art. 94 of the Charter. According to the aforesaid Resolution, such a declaration may be either particular or general. A particular declaration is one accepting the Court's jurisdiction in respect only of a particular dispute or disputes which have already arisen. A general declaration is one accepting the Court's jurisdiction generally in respect of all disputes or of a particular class or classes of disputes which have already arisen or which may arise in the future. General Declarations may be in accordance with Art. 36(2) of the Statute by which they recognise as compulsory *ipso facto* and without special agreement the jurisdiction of the Court. However, the reciprocity principle embodied in Art. 36(2) of the Statute does not apply in cases where proceedings are instituted against a party to the Statute by a State non party to the Statute unless the former has 'explicitly agreed' to have recourse to the Court.

¹³⁰ According to paragraph 3 of Art. 36, declaration made under the Optional Clause are to be deposited with the Secretary-General of the UN who is to transmit copies thereof to the States parties to the Statute and to the Registrar of the Court.

¹³¹ *Principles, op cit*, p. 721.

¹³² ICJ Rep, 1988, p. 91.

¹³³ ICJ Rep, 1986, p. 26.

¹³⁴ *Op cit*, p. 221.

¹³⁵ 39-5, ILM, 2000, p. 1116. For a commentary on the Judgement see, P.H. Becker, *Aerial Incident of 10 August 1999 (Pakistan v. India)*, (2000), 94-4, AJIL, p. 707.

¹³⁶ States under Art. 36(3) are given the power to specify the period of duration of declarations made under the Optional Clause, as well as any provisions with regard its termination which in some cases is immediately after the expiry of the fixed time-limit provided or in other cases following a certain period of time notice. See S. Rosenne, *Law and Practice*, vol. II, *op cit*, pp. 782-802.

¹³⁷ S. Rosenne, *The World Court*, *op cit*, p. 91.

¹³⁸ *Ibid.*

¹³⁹ R. Dolzer, *Connally Reservation*, (1982), 1, EPIL, p. 55 (hereinafter cited as Dolzer, *Connally Reservation*). See also in general, L. Gross, *Bulgaria Invokes the Connally Amendment*, (1962), 56-II, AJIL, pp. 357-382.

¹⁴⁰ See also similar reservations in the Declarations of Liberia (1952); and Mexico (1947).

¹⁴¹ *Principles*, *op cit*, pp. 722-723. See J.L. Simpson & H. Fox, *op cit*, pp. 58-60; M. Shaw, *op cit*, p. 761.

¹⁴² *The World Court*, *op cit*, pp. 91-92.

¹⁴³ ICJ Rep, 1957, pp. 9, 43-66.

¹⁴⁴ *The World Court*, *op cit*, p. 92.

¹⁴⁵ M. Shaw, *op cit*, p. 760. See for example the *Norwegian Loans* case, ICJ Rep, 1957, pp. 9, 23.

¹⁴⁶ J.L. Simpson & H. Fox, *op cit*, p. 56.

¹⁴⁷ I. Brownlie, *Principles*, *op cit*, p. 722.

¹⁴⁸ See *supra*, p. 165.

¹⁴⁹ From the ICJ official website (<http://www.icj-cij.org/>); under (General Information--State Members of the United Nations) as accessed on 13/1/2002.

¹⁵⁰ See, S. Rosenne, *The World Court*, *op cit*, pp. 92-93.

¹⁵¹ I. Hussain, *op cit*, p. 240.

¹⁵² See *supra*, p. 168.

¹⁵³ See *supra* pp. 138-139.

¹⁵⁴ *Op cit*, p. 25.

¹⁵⁵ See *supra*, pp. 168.

¹⁵⁶ Quoted from Herman Mosler, *op cit*, p. 229

CHAPTER FIVE:

The Past General Inter-State Arbitral Mechanisms: A Critical Analysis

Introduction:

The purpose of this chapter is to shed some light on general inter-State arbitral mechanisms adopted during the past two centuries. The discussion will provide a general background of those instruments with regard to their establishment, current status whether in force or not, and how the issue regarding the justiciability of disputes was approached.

1. The Hague Machinery of 1899 and 1907:

1.1. The Hague Convention for the Pacific Settlement of International Disputes of 1899:

The Hague Convention for the Pacific Settlement of International Disputes of 1899¹ was one of the fruits of the 1899 Hague Peace Conference, brought to light on the initiative of Czar Nicholas II of Russia with the aim of adopting effective measures for the reduction of military and naval armaments, and to devise means of averting armed conflict between states by the employment of peaceful methods of settlement. The initiative began with the Circular Note handed by Count Mouravieff, the Russian Minister of Foreign Affairs at that time, on August 12, 1898², to the diplomatic representatives of the States that were invited to the conference. This was followed by another Circular Note handed by the Mr

Mouravieff to the aforementioned representatives on December 30, 1898³, which indicated the topics that were to be discussed at the proposed conference, namely:

1. an understanding stipulating the non-augmentation, for a term to be agreed upon, of the present effective armed land and sea forces, as well as the war budgets pertaining to them; preliminary study of the ways in which even a reduction of the aforesaid effectives and budgets could be realised in the future;
2. interdiction of the employment in armies and fleets of new firearms of every description and of new explosives, as well as powder more powerful than the kinds used at present, both for guns and cannons;
3. limitation of the use in field fighting of explosives of a formidable power, such as are now in use, and prohibition of the discharge of any kind of projectile or explosive from balloons or by similar means;
4. prohibition in naval battles of submarine or diving torpedo boats, or of other engines of destruction of the same nature; agreement not to construct in the future war-ships armed with bans;
5. adaptation to naval war of the stipulations of the Geneva Convention of 1864, on the base of the additional articles of 1868;
6. neutralisation, for the same reason, of boats or launches employed in the rescue of the shipwrecked during or after naval battles;
7. revision of the declaration concerning the laws and customs of war elaborated in 1874 by the Conference of Brussels, and not yet ratified; **[and what concerns us most in this regard]**
8. acceptance, in principle, of the use of good offices, mediation and voluntary arbitration, in case where they are available, with the purpose of preventing armed conflicts between nations; understanding in relation to their mode of application and establishment of a uniform practice in employing them⁴.

In that Note, it was stated that the Czar

“...considers it advisable that the conference should not sit in the capital of one of the Great Powers, where are centred so many political interests, which might, perhaps impede the progress of a work in which all countries of the universe are equally interested.

One month later, Queen Wilhelmina of the Netherlands expressed her assent that the proposed conference be held at her city of residence, the Hague. Accordingly the Netherlands' Minister of Foreign Affairs, on April 7, 1899, extended a formal invitation to the governments invited, to send their delegates to meet at the Hague⁵.

Although much is usually said on the meetings, deliberations and outcome of the 1899 Peace Conference, nevertheless, mention in this respect should also be made of the circumstances which gave rise to the Russian proposal in the first place and how the invitation was perceived by those powers invited to attend. It is interesting to note that despite the pacifist tone of the Czarist scheme, the whole scheme in the beginning was designed as a means to achieve another end⁶. The *real* and original intention behind it had nothing to do with peace, but was rather to spare an already weak Russian economy from being further weakened by the rearming of its weak military with new and more advanced weaponry in order to bridge any gap between it and the Austrian military. However, in order not to leave any ground for misgivings and to avoid invidious distinction, the Russian proposal was not to be confined to Austria alone, but was to include all nations⁷. Some of Russia's chief politicians who had formulated the *Czarist peace proposal* admitted that the whole scheme was nothing than a piece of 'hypocrisy and guile' that was wrapped in humanitarian wrappings⁸, such as, Mr Witte⁹, the Russian Finance Minister at that time, who even considered it as one of the greatest mystifications known to history¹⁰.

The Czarist invitation was received with mixed reactions by many of the Great Powers who were invited to the conference¹¹ and there was considerable speculation among the Powers on the reasons behind the reasons offered as to why the Russian Government proposed an international conference on peace and disarmament. The whole scheme from their point of

view was pointless, inasmuch as there had been no major war to be terminated by another peace conference of the likes of Westphalia or Vienna or Paris, and the issue regarding disarmament on land or sea was simply unacceptable to many of those Powers. However, despite all that, the Powers were trapped in a corner, in that international *courtoisie* at that time forbade them from rejecting the invitation. Therefore, those powers really needed a way out, but one by which the Czarist Government would not lose face. That way out was clause 8 of the Russian Circular Note regarding the peaceful settlement of international disputes¹², in particular the aspect concerning international arbitration. As pointed out by Professor Georg Schwarzenberger¹³:

...the reformist movement had pressed the need for learning and implementing the lessons of the *Alabama Claims* Arbitration. Here was a generally agreeable subject if only for the purposes of discussion: progress in international adjudication. While the reformist movement would expect from it an, at least, partial realisation of its programme, the governments could keep any developments under their own tight control. They were confident that, on essentials, their freedom of action could be preserved.

The Conference in general was attended by twenty-six States who were divided into three commissions; the first and second commission dealt with the military and naval proposals while the third commission was to deal with good offices and mediation, international commissions of inquiry and arbitration¹⁴. The efforts of the three commissions resulted in the Final Act of the 1899 Peace Conference, which consisted of the conclusion of three conventions, three declarations and six wishes¹⁵.

As to the key feature of the Final Act of the 1899 Peace Conference in this respect, viz. the Convention for the Peaceful Adjustments of International Differences, which is generally recognised as the Hague Convention for the Pacific Settlement of International

Disputes, the main motive of the parties to the Convention behind its adoption was to obviate "...as far as possible, recourse to force in the relations between States..."¹⁶. To this end, the Conference adopted a mechanism which comprised three various methods of dispute settlement, namely, good offices and mediation (Arts. 2-8), international commissions of inquiry (Arts. 9-14) and above all, arbitration (Arts. 15-57). The issue of arbitration was divided in the Convention into three main categories. The first was concerned with the system of international arbitration, which was defined in Art. 15 as: "...the settlement of differences between States by judges of their own choice, and on the basis of respect for law". Arbitration was also recognised by the parties¹⁷ in questions of a legal nature and especially in the interpretation and application of international conventions as: "...the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle"¹⁸. The Convention also considered the questions to be considered by arbitration¹⁹. The second issue was concerned with the functioning and the facilities of the Permanent Court of Arbitration which was established by the 1899 HCPSID and will be examined in *infra* 1.5 ahead, and the third issue embraced a set of optional rules and procedures that were to be applied by the parties when resorting to arbitration, unless they had agreed otherwise. The basis of the discussions of the parties regarding international arbitration was the Draft Regulations for International Arbitral Procedure adopted by the *Institut de Droit International*²⁰ (The Institute of International Law) on August 28, 1875 at the Hague²¹.

1.2. The 1907 Convention:

Although the 1899 Peace Conference was devoutly hoped to be only the first of an endless series of conferences meeting at the Hague, the next to be held the year after the

1899 Conference, the years passed by and Russia, which had called for the first conference, found itself at war with Japan, a conflict which was later terminated owing to the good offices of President Roosevelt of the USA who, in view of the Russian – Japanese war at the time, proposed a second peace conference on the Czar’s behalf. The initiative was resumed by the Czar, who himself proposed a second peace conference to be held at the Hague. This was accepted by everyone invited. The Netherlands Government invited the parties in order to meet at the Hague on June 15, 1907. The conference met as scheduled and adjourned on October 18, 1907²².

The Conference of 1907 was attended by forty-four States, divided this time into four commissions, which considered various issues such as the pacific settlement of international disputes, naval war, land war and prize law. The Final Act of the 1907 Hague Peace Conference resulted in the adoption of thirteen Conventions, one Declaration, several recommendations and an Annex containing a Draft Convention Relative to the Creation of a Judicial Arbitration Court²³. The 1899 HCPSID, like all the other conventions adopted by the 1899 Peace Conference, was revised in the 1907 Conference. As to international arbitration, the provisions of the 1907 Convention were almost the same as those of the previous Convention except for a few slight modifications on a number of provisions such as the requirement for the tribunal to be composed of, along with the one national member appointed by each side, three neutral members (one to be appointed by each side and the third or the umpire to be chosen by the two appointed neutral members along with the other two national members together)²⁴. Another distinctive feature of the 1907 HCPSID was Chapter IV of the Convention under the heading “Arbitration by Summary Procedure”²⁵ which includes a set of summary rules of procedure that are to be followed by the parties “...in the absence of other arrangements...”²⁶ when resorting to arbitration. This chapter

provided for a tribunal composed of three members, one national member appointed from each side and a third neutral member or umpire appointed by agreement between the national members, or in case of disagreement, by lot. Members were given powers to settle the time limits within which the parties were to submit their cases and it was also provided that the proceedings are conducted exclusively in writing, although, the tribunal was given the right to demand oral explanations from the agents of the two parties as well as from experts and witnesses, whenever necessary²⁷.

Despite the deceptive intentions of the founders of the 1899 and 1907 Hague Peace Conferences, both Conferences were attended by all the major powers at that time, this in itself being a point among several others in the favour of the Hague Conferences. Moreover, they were the first international instruments to consider the question of the peaceful settlement of international disputes as a whole²⁸. This, in turn, resulted in the adoption of two of the most prominent landmarks of international dispute settlement viz. the 1899 and 1907 HCPSID. These both codified the laws of international arbitration²⁹ and which provided a set of arbitral procedure rules which, although they appear rudimentary, influenced the formation of a number of international instruments following their adoption³⁰. The provisions of the 1899 HCPSID in particular on international arbitration were considered by some writers³¹ as customary international law, due to the wide recognition they received. The significance of the two Hague Conventions and the important role they have played in the field of dispute settlement since their adoption was acknowledged by the UN's General Assembly Resolution 44/23 of 17/Nov/1989, which proclaimed the period 1990-1999 the UN Decade of International Law and proposed the holding of a third international conference at the end of this century³². Other prominent features of the Hague Conventions include the establishment in 1899 of the PCA which

was able to survive two World Wars and is considered as the first and oldest standing international court till this day. However, the efforts made by the 1907 Convention for the establishment of an International Prize Court³³ and a Court of Arbitral Justice³⁴ did not share the same success. Nevertheless, the latter did pave the way for the establishment of the PCIJ³⁵, which was later on succeeded by the current ICJ³⁶.

1.3. Justiciability and Compulsory Arbitration at Both Conferences:

Regarding the issues of compulsory arbitration and non-legal (political) disputes at the 1899 Conference, it appears from clause 8 of the Russian circular note above that the third commission, which was in charge of the pacific settlement of international disputes, was intended only to deal with voluntary arbitration. However, as already pointed out elsewhere, Art. 10 of the Russian draft³⁷ submitted to that commission contained an enumeration of a number of legal or justiciable issues that were intended to be subject to compulsory arbitration, with the proviso stated in Art. 8 of the same draft that the vital interests and national honour of the contracting States were to remain intact³⁸. However, after a number of suggestions made by the members and modifications to Art. 10 of the Russian draft in the fourth, fifth and fourteenth meetings of the Third Commission's Committee of Examination, the aforementioned article was finally omitted, thanks to the requirement of unanimity for any decision to be made by the commission, as well as a strong and vigorous resistance led by Dr Zorn, the German delegate, who totally rejected the idea of including compulsory arbitration in an international instrument of which Germany was to be a member³⁹. In his statement to the Committee of Examination at its fourteenth meeting, he indicated that:

...[t]he German Government is not in a position to accept compulsory arbitration....The principle of compulsory arbitration shall be maintained in all cases when already adopted by special conventions. But Germany can go no further and believes she has already done much by accepting the list of arbitrators and the Permanent Court.

Dr Zorn attempted to justify the position of his government towards the issue by indicating that:

When a permanent court shall be established and in operation, the opportune time for enumerating cases of arbitration which will be obligatory for all will come after individual experience. But to hasten this evolution too greatly would be to compromise the very principle of arbitration, towards which we are all sympathetic.

Therefore, the best the parties could achieve in this respect was Art. 16⁴⁰ which stated that:

In questions of a legal nature, and especially in the interpretation and application of international conventions, arbitration is recognised by the signatory Powers as the most effective, and the same time the most equitable means of settling disputes which diplomacy has failed to settle.

The same difficulties were repeated in the proceedings of the 1907 Peace Conference, where a number of propositions were presented, each embodying an enumeration of a number of legal matters that were to be considered subject to compulsory arbitration, again subject to reservation of questions of vital interests and national honour; however, again, none of these propositions were adopted due to the strong opposition made by a number of States led by the German delegate, Baron Marschall von Bieberstein, whose views on the issue of enumeration have already been cited elsewhere⁴¹. All the parties were able to

achieve under these circumstances was Art. 38 of the 1907 HCPSID which was almost an exact duplicate of Art. 16 of the 1899 Convention above, with the addition that “[c]onsequently, it would be desirable that, in disputes about the above – mentioned questions, the contracting Powers should, if the case arose, have recourse to arbitration. in so far as circumstances permit”. This provision may indicate the failure of both conventions to impose any *real* direct obligation on the parties to submit their disputes, either legal or non-legal, to any form of arbitration, whether voluntary or compulsory. The impact that Arts. 16 and 38 of the 1899 and 1907 Hague Conventions receptively had on the non-justiciability question has already been discussed elsewhere⁴². However, what really draws attention in this regard was that, although no compulsory mechanism was established by either convention⁴³, Art. 40 of the 1907 HCPSID went on to state the rather strange and contradictory provision that the contracting Powers:

...reserve to themselves the right of concluding new agreements, general or particular, with a view to *extending compulsory arbitration* to all cases which they may consider it possible to submit to it [emphasis added].

Such wording was also repeated in the Final Act of the 1907 Peace Conference⁴⁴, which indicated the Powers’ unanimity:

1. In admitting the principle of compulsory arbitration;
2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements may be submitted to compulsory arbitration without any restriction.

Therefore, recourse to arbitration under both Hague Conventions is by agreement⁴⁵.

The 1899's Convention's approach to the issue justiciability according to Lauterpacht⁴⁶ "...marked the first recognition in conventional international law of the doctrine of 'inherent limitations'". Despite the inadequacy of the provisions of both conventions on that issue, the period between the 1899 HCPSID and WW1 witnessed the conclusion of over a hundred treaties that were influenced by the distinction adopted by both Hague Conventions⁴⁷.

1.4. The 1899 & 1907 Conventions Today:

The number of States parties to the 1899 and 1907 HCsPSID has multiplied significantly ever since the adoption of both conventions and currently stands at 95 States⁴⁸ the most recent of them to adhere to the 1907 Convention being Chile (1998); Guyana (1998); South Africa (1998); Costa Rica (1999); Republic of Korea (2000); Zambia (2000); Latvia (2001); Macedonia (2001); and Morocco (2001). This multiplication of parties to the Hague Conventions seems to distinguish them from the other mechanisms adopted during the 20th century which, in contrast, were renounced by a number of State-Parties to them. However, as already pointed out elsewhere⁴⁹, despite this relatively high number of States Parties to the 1899 and 1907 HCsPSID, the current level of utilisation (if it was ever utilised) of the arbitral machinery of both Hague Conventions by those States is in general still far from giving a positive impression.

1.5. The Permanent Court of Arbitration (PCA):

1.5.1. The PCA in a Glance:

The PCA is an independent legal institution and one of the fruits of the Hague Conferences established in the beginning by the Convention of 1899 for the purpose of “...facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy.”⁵⁰ The PCA enjoys the competence to arbitrate all classes of inter-State disputes submitted to it by mutual agreement between the parties, unless they have agreed to constitute another tribunal of their choice⁵¹. Unless the disputants have agreed on the application of other rules of procedure⁵², the PCA is to apply the rules provided in Chapter III of both Hague Conventions regarding arbitration⁵³. The structure of the PCA consists of an International Bureau, which serves as a registry of the court and has charge of the archives and conducts all the administrative business⁵⁴; a Permanent Administrative Council, which is charged with the direction and control of the International Bureau, composed of the diplomatic representatives of the States that had participated in the 1899 and 1907 HCsPSID and the Minister of Foreign Affairs of the Netherlands as President⁵⁵; and a court of arbitration. Along with arbitration, the PCA provides other services for the settlement of disputes between States, such as good offices and mediation, commissions of inquiry (fact-finding) and conciliation.

The PCA is considered by some writers⁵⁶ as “...the first global mechanism for the settlement of inter-state disputes”. In the words of Mr James Scott⁵⁷:

...it is only fair to say that the machinery, however imperfect, devised by the First Hague Peace Conference has nevertheless rendered inestimable services to the cause of arbitration by putting the stamp of approval of an international conference upon arbitration as a means of settling difficulties, and by turning the

minds and thoughts of nations in controversy to the Hague, where this temporary tribunal of a very special kind can be called into being for the settlement of their disputes which diplomacy has failed to settle.

1.5.2. A Real Permanent Court?:

A controversial aspect of the PCA was its composition. In this respect, the parties to both Hague Conventions were to select four persons who, according to Arts. 23 and 44 of the 1899 and 1907 HCsPSID respectively, were to be "...at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator". The names of those four persons were to be inscribed in a list notified to all Contracting Powers, and they were to be appointed for a six-year renewable term. Disputing parties wishing to have recourse to the PCA were to select the tribunal from the names inscribed in the list⁵⁸. Therefore, it appears that the question of an automatic compulsory jurisdiction does not at all exist in the case of the PCA, and the only form of jurisdiction it enjoys is that conferred upon it by the parties resorting to it.

The 'list of arbitrators' formula constituted a major ground of challenge regarding the real nature of the PCA which, according to the above provisions, was deprived of the status of a *real permanent court* inasmuch it was not composed of a panel of permanent judges like the PCIJ or its successor the ICJ, moreover, each tribunal is established for the purpose of arbitrating a certain case and ceases its duties once an award is rendered. Therefore, the name '*Permanent Court of Arbitration*' according to some of its critics is misleading. Such doubts as to the true nature of the so-called 'permanent court' is clear in the comments of even some of the delegates of the 1899 who had played an active role in its creation, such as the Dutch delegate, Mr Tobias Asser⁵⁹, who stated that "[i]nstead of a Permanent Court, the Convention of 1899 only created the phantom of a court, an

impalpable ghost, or, to speak more plainly, it created a clerk's office with a list". Similarly, Mr de Martens⁶⁰ who asked "[w]hat, then is this court whose judges do not even know each other? The Court of 1899 is only an idea which takes the form of body and soul and then disappears again". The attack on the true nature of the PCA was repeated again at the 1907 Peace Conference by a member of the delegation of the United States of America who argued "In a word, the Permanent Court is not permanent, because it is not composed of permanent judges; it is not accessible because it has to be formed for each individual case; finally, it is not a court, because it is not composed of judges"⁶¹. Professor Hazel Fox⁶², a prominent scholar in the area of arbitration, considered the word 'Court' as a 'complete misnomer' and even recommended that the title 'Permanent Court of Arbitration' should cease to be used and that anything done by the so-called *Permanent Court* in the future should be done in the name of and under the auspices of the International Bureau.

1.5.3. The PCA Today:

In the first years following its establishment, the PCA lived its golden years of glory and was responsible for most of the inter-state arbitrations and some important fact-finding commissions that took place during the first fifteen years of its existence⁶³. The case-law of the PCA covering the period between 1902 and 1922 is compiled and edited in the two series of J.B. Scott's, *Hague Court Reports*, 1916⁶⁴ and 1932⁶⁵. Such success of the PCA in the beginning of its existence may be expected in view that it was the first of its kind, however, the high noon of PCA utilisation was to come to an end following the establishment of the PCIJ, the creation of which calls for some examination here.

The change in loyalty from the ideal of international arbitration to judicial settlement, is best illustrated in the observation of Muller and Mijs⁶⁶ on the issue. According to them:

With the outbreak of the First World War much of the international political system collapsed and this cast a shadow over the Court [the PCA] as well; no cases were referred to it. In the interbellum new optimism led to the foundation of the League of Nations and to a new lettee in the Peace Palace: the Permanent Court of International Justice (PCIJ). The international community now had recourse to two mechanisms to settle their differences. Nevertheless, the installation of the famous roommate did not help the PCA, and little or no use was made of its facilities. The number of cases which were referred to it went down to almost zero. Perhaps part of this can be explained by the fact that, with the creation of the PCIJ, the world finally had what idealistic minds had always craved for: a real world court. At that time, the more flexible and *ad hoc* mode of dispute settlement 'arbitration' was generally seen as the best viable way to settle dispute states could agree upon; judicial settlement of disputes, however, was the dream⁶⁷.

Indeed, the endeavours for the establishment of an international court which, unlike the PCA, possesses a permanent character can be traced back to the Draft Convention Relative to the Creation of a Judicial Arbitration Court annexed to the Final Act of the 1907 Hague Peace Conference⁶⁸. However, in spite of the use of the term "arbitration" which was chosen according to the wishes of certain members to the 1907 Conference, the functions and organisation of the proposed court would not have been that of a court of arbitration, but of an international court of justice *stricto sensu*⁶⁹. The tragedy that the international community witnessed during WW1 and which left its mournful imprint on the minds of a large majority of the world population was the compelling force which impelled so many States to abandon the hesitations and doubts of 1907, which had blocked the way to the establishment of the proposed court⁷⁰. Calls for the establishment of such a court gained significant momentum during WW1 when various proposals that embodied certain schemes

were made⁷¹ by independent academic bodies⁷² and also a number of draft conventions were presented by neutral States⁷³. The efforts which led to the establishment of the court which was named the Permanent Court of International Justice were initiated in accordance with Art. 14 of the Covenant of the League of Nations which indicated that:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

The Council, acting in accordance with Art. 14 of the Covenant, formed a Committee of Jurists which was entrusted with the duty of drafting the Statute of the new court and which began its work on June 16, 1920. The Committee was able on July 20, 1920 to adopt a draft scheme of the Courts Statute which, after extensive discussions in the League's Council and Assembly and also after a number of amendments and additions were made to its text⁷⁴, was unanimously adopted by the Resolution passed by the League's Assembly on December 13, 1920⁷⁵ and came into force on September 2, 1921. The Statute was later amended again by the Protocol of September 14, 1929⁷⁶ and the revised Statute came into force on February 1, 1936⁷⁷.

Not only was the workload of the PCA almost totally wiped out following the establishment of the PCIJ, but the PCA was even faced with a proposal calling for its abolition, namely, that submitted by the Argentinean delegation to the First Assembly of the League of Nations in 1920, which was unanimously rejected by the committee to which it was referred⁷⁸. Therefore, under the new circumstances, the PCA had to fight for its share

of the market. As early as the 1930s, the PCA started to realise that new fields had to be found in which the court could extend its area of operations⁷⁹. The first of those fields to be discussed by the Administrative Council of the PCA was arbitration between States and non-State entities, however, as soon as work started out in that direction, WW2 broke out and it was not until 1962 that any rules of this kind were adopted⁸⁰. Moreover, the success of those rules did not live up to the expectations of their framers inasmuch as, *inter alia*, by then there were already a number of other successful and more specialised institutions operating in that field. The significantly low number of disputes submitted to the PCA has even induced the Court's Secretary General in 1960 to hand over to the Parties to the 1899 & 1907 HCsPSID a Circular Note⁸¹ which encouraged those States to make full use of the Court's facilities and attempted to water – down any differences between the recourse to the PCA and to the ICJ. However, it was not until 1981 that the PCA witnessed a major boost through the famous Iran / USA Claims Tribunal established in co-operation with the International Bureau of the PCA. Further impetus was given to the PCA through the *US / UK arbitration Concerning Heathrow Airport user Charges* (1989-1993)⁸² and also its assistance in the high profile *Hanish Island* case between Yemen and Eritrea [two phases]⁸³. The current case-load of the PCA consists of five cases⁸⁴, namely, *Saluka Investments B.V. v. Czech Republic* arbitration; the 'OSPAR' arbitration between Ireland and the United Kingdom; Eritrea – Ethiopia 'Boundary Commission', and also 'Claims Commission'; and the arbitration between The Netherlands and France regarding the application of the Convention of December 3, 1976, on the Protection of the Rhine against Pollution by Chlorides and the Additional Protocol of September 25, 1991. However, in all of the past and current cases mentioned above, the involvement of the PCA was limited to providing registry service only.

Even some of the States parties to the PCA did not take matters very seriously with regard to the qualifications of the persons nominated by them as national arbitrators under Arts. 23 and 44 of the 1899 and 1907 HCsPSID respectively, inasmuch as there have been some instances where the national members nominated were judges who were eminent in municipal law but had little knowledge of international law. In other cases, the names of nominees have appeared on the list long after their owners' retirement or even after their death⁸⁵! For example during the 1980s the Dominican Republic, Ecuador, Paraguay and Switzerland named members who were first appointed in the 1940s and still appeared on their lists of nominees four decades later⁸⁶.

The current number of States Parties to the 1899 & 1907 HCsPSID is 95 States⁸⁷. However, in the domains of inter-State disputes, the vast majority of those States have never stood as disputants *before* the PCA. The International Bureau of the PCA in 1991 assigned a work group of experts consisting of 22 international lawyers for the purpose of advising the Administrative Council and the International Bureau on the measures to be taken in order to improve the functioning of the PCA, and which resulted in a number of proposals and recommendations⁸⁸. These included: increasing awareness of the Court and of the facilities and services available through the International Bureau of the Court⁸⁹; the development of the constitutional⁹⁰, procedural⁹¹ and organisational⁹² measures of the Court; the adoption of a set of optional rules based on the UNCITRAL Arbitration Rules (Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States)⁹³, which were considered by the group as the most recent, most comprehensive and most tested in practice, and later paved the way for the adoption of other optional rules based on the UNCITRAL Arbitration Rules, such as, the 'Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of which Only One is a State in

1993'⁹⁴; the 'Permanent Court of Arbitration Optional Rules for Arbitration involving International Organisations and States in 1996'⁹⁵; and the 'Permanent Court of Arbitration Optional Rules for Arbitration between International Organisations and Private Parties', also in 1996⁹⁶.

Although it has now been more than a decade since the findings of the work group, speaking on the inter-State dispute settlement level, no *significant* advance appears to have occurred with regard to the level of State-members' recourse to the PCA. Even in the recent cases cited above, namely, the Iran / USA Claims Tribunal; the *US / UK arbitration Concerning Heathrow Airport user Charges*; and both phases of the *Hanish Island* case, the level of involvement of the PCA in those cases was limited mainly to providing premises and registry services to the parties. With this in mind, one may ask the logical question, since the vast majority of those States have seldom (if ever) utilised the PCA for the settlement of their inter-State disputes, and in many other instances had preferred to resort to the ICJ for their inter-State disputes or other specialised institutions in non-inter-State disputes, what is the point in their keeping on with the PCA? A possible answer to that question can be deduced from an observation made once by the former President of the PCA and now Judge of the ICJ, Professor Pieter Kooijmans⁹⁷, who stated that:

[a]lthough a not inconsiderable number...of states is party to the 1899 and / or 1907 Conventions and thereby a Member of the Administrative Council of the Court [the PCA], the Court's significance seems to lie more in the fact that it national groups nominate the candidates for the International Court of Justice⁹⁸ than in its role as an institution for dispute settlement. It might be interesting to ask the governments concerned why they keep in existence (keep alive would be a rather weird expression in this respect) an institution which they steadfastly refuse to use. Frankly spoken, I do not expect too many honest replies.

This issue has also been pointed out to by the work group above assigned by the PCA⁹⁹ which found that:

[n]on-recourse to the PCA may also be attributed to certain constitutional, procedural and organisational deficiencies of the Court. While many States Parties to the Conventions [1899 & 1907 HCsPSID] do select as members of the PCA ‘persons....of known competence in questions of international law....and disposed to accept the duties of arbitrator....’ it often appears that persons are selected more with a view to their function in a ‘national group’ for nominating candidates to the International Court of Justice, than to their serving as arbitrators, since they hold public offices of a quality likely, in practice, to preclude their appointment to tribunals which the parties to a dispute would want to convene and function expeditiously, and for which independence and the appearance thereof, are of critical importance.

Indeed, the nomination of the candidates or judges to be of the ICJ by the national members of the PCA¹⁰⁰ is considered as an important function of those groups in the eyes of their respective governments. However, questions have arisen as to the significance of this function since the decision in the end according to Art. 8 of the ICJ’s Statute lies between the General Assembly and the Security Council, and governments in that respect are under no obligation to vote for the candidates originally chosen by their national groups¹⁰¹.

A view critical of the PCA is that of Professor Hazel Fox¹⁰². In her words:

...it seems certain today that the original intention of the Permanent Court of Arbitration should act as a court of international law is obsolete. In so far as States are prepared to submit legal to an international tribunal, the appropriate and more efficient machinery exists in the International Court of Justice. The International Court is more efficient because it has a permanent body of salaried judges ready to try disputes; the Permanent Court of Arbitration offers Parties a list composed of the national groups of the States parties to the Hague Conventions.... [However] a State which is considering resort to the Permanent Court of Arbitration is uncertain as to the

identity of the persons who may determine the dispute and, more important, uncertain whether the tribunal will be constituted at all. When this uncertainty concerning the constitution of the Permanent Court of Arbitration is weighed against the prestige, permanence and development of a uniform jurisprudence which the International Court offers, it is evident that the Permanent Court of Arbitration cannot compete in the international field as an established tribunal for the determination of legal disputes.

Although it is noted that this view dates back to 1972 during the climax of the PCA's recession, nevertheless, things nowadays appear almost not that far from what they used to be then when it comes to the PCA's work load in the field of inter-State disputes. However, to suggest that the PCA is not useful at all would be an exaggeration. In the non-inter-State dispute settlement field, the PCA currently holds a noticeably better record and the Secretary-General of the PCA has been requested on a number of occasions recently to designate an appointing authority under Art. 7(2) of the 1976 UNCITRAL Arbitration Rules¹⁰³. However, when it comes to inter-State dispute settlement, it appears that the PCA is, in addition to the factors indicated in this part of the chapter, a victim of the general change in the international attitude towards *general* inter-State arbitration in general.

2. The League of Nations Era:

The end, in 1918, of the First World War which resulted in an estimated number of 50,000,000 killed and wounded, induced the international community to pursue the translation into reality of past dreams regarding the adoption of a kind of international framework which would undertake the duty of preserving peace between potentially antagonistic nations¹⁰⁴. The answer to those hopes was crystallised in the establishment of the League of Nations in 1919 with the aim of averting, as far as possible, the possibility of

war in international relations and devising means for peaceful settlement of international disputes between States based on a triple formula of security, disarmament and arbitration. Although this era witnessed the conclusion of a large number of bilateral treaties that provided for arbitration¹⁰⁵ as well as the famous 1925 Pact of Locarno¹⁰⁶ and the General Treaty of Inter-American Arbitration and Protocol of Progressive Arbitration signed at Washington in 1929¹⁰⁷, nevertheless the discussion in this regard will focus solely on those instruments devised under the direct auspices of the League of Nations, namely, the League's Covenant; the 1924 Geneva Protocol for the Pacific Settlement of International Disputes; and the 1928 General Act.

2.1. The League's Covenant:

The main articles in the League's Covenant concerned with the maintenance of peace and peaceful settlement were Art. 11-13 and 15¹⁰⁸. However, by a closer examination of those articles, it appears that their functions may be divided into two main categories, viz., the prevention of war (Art. 11) and the duty to settle any dispute likely 'to lead to a rupture' between any of the members by peaceful means, namely, arbitration, judicial settlement (the PCIJ) or inquiry by the Council of the League¹⁰⁹.

Regarding its mechanism for the peaceful settlement of disputes, the Covenant in its Art. 12(1) imposed a general obligation on all the members to settle any dispute "...likely to lead to a rupture..." by either arbitration, judicial settlement (the PCIJ) or to inquiry by the Council of the League. However, Art. 13 provided a more elaborate description of the Covenant's peaceful settlement mechanism by indicating in paragraph 1 that:

[t]he Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.

The aforesaid paragraph first of all clearly indicated the members' acceptance of the principle of arbitration and judicial settlement as means for settlement of their disputes. However, it appears from the wording that paragraph 1 did not impose any mandatory duty to submit disputes to arbitration. This further on is supported by the rather general phrasing that recourse to arbitration or the PCIJ was to be sought once that the dispute was recognised *by the parties* as *suitable* for submission to arbitration or the PCIJ, and after it appeared that a diplomatic settlement of the dispute had proved to be unattainable. However, paragraph 2 of the same article provided an enumeration containing a number of disputes that were considered as *suitable* for submission to arbitration or the PCIJ:

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

The above formula came later on under Art. 36(2) of the Statute of the ICJ to be categorised as 'legal disputes'. However, the express incorporation of the justiciable and non-justiciable dispute distinction in the text of the Covenant was deliberately avoided during its framing according to Lauterpacht¹¹⁰, who on the British Official Commentary on the Covenant which indicated the relative recognition by the Covenant of the distinction, indicated that:

[t]his view [that expressed in the British Official Commentary], however, although not wholly incorrect, cannot be accepted without serious qualification. In the first instance, as the main purpose of the doctrine of non-justiciable disputes is to limit the general obligation undertaken in a treaty of compulsory arbitration; and as Article 13 contains no such obligation, it is difficult to accept the view that the doctrine of necessary limitations of the international judicial function is impliedly contained in the Covenant. Not only does no express reference to the doctrine appear in the Covenant, but a study of the origin of Article 13 shows that such reference was deliberately excluded.

Paragraph 3 of Art. 13 indicated that for the consideration of any of the ‘legal disputes’ enumerated in paragraph 2 above, the court to which the case should be referred to was the PCIJ, unless the parties referred the dispute to any other tribunal agreed upon by them or stipulated in any convention existing between them. However, disputes that were considered not *suitable* for arbitration or judicial settlement, in other words political or non-justiciable disputes, were to be submitted to the Council under Art. 15. Nevertheless, given that the intention of the Covenant was that the Council was to deal only with ‘non-justiciable’ disputes, the functions of the Council were framed accordingly. No judicial or arbitral powers were vested in it and its primary function was to secure by any means possible to it the settlement of disputes by the common consent of the parties¹¹¹.

Paragraph 4 of Art. 13 provided the guidelines that were to be observed by the members regarding compliance with any arbitral award or decision of the Court. It indicated that such judgements were to be carried out by the members “...in full good faith...” and also proscribed the resort to war against any member of the League that had complied with such judgements, giving the League’s Council the power to determine what

steps should be taken against any member who failed to comply with such international judgements in order to give effect thereto.

When evaluating the provisions of the Covenant in this respect it appears that contrary to the provisions of the 1899 and 1907 HCsPSID, no procedural rules for arbitration were provided by the Covenant and, most of all, no compulsory obligation to resort to arbitration was devised. Regarding the distinction between justiciable and non-justiciable disputes, although from the discussion above it appears that any express mention of the distinction in the Covenant was avoided, the categories of disputes enumerated in Art. 13(2) came to be recognised later on under Art. 36(2) of the Statute of the ICJ as legal disputes. However, when looking at Art. 15 of the Covenant¹¹² and in particular paragraph 8, one may clearly notice that certain disputes were exempted from the Council's powers. Nevertheless, the most serious blow to the virtue of the whole League system was Art. 12(1) of the Covenant which indicated that the parties to any dispute were to agree not to resort to war until the three-month cooling off period after the rendering of any arbitral award, or judicial decision, or report by the Council has elapsed¹¹³. In the light of this provision, it appears that the League failed to fulfil one of the main objectives behind its creation, namely, the prevention and outlawry of war¹¹⁴.

2.2. Plugging the Holes in the League's Covenant: The 1924 Geneva Protocol for the Pacific Settlement of International Disputes:

The Geneva Protocol for the Pacific Settlement of International Disputes¹¹⁵ adopted by the League in 1924 by its Fifth Assembly, commonly known as the 'Geneva Protocol', was another effort made by the League of Nations in order to fulfil its aims for the maintenance of international peace and security based on its triple formula of security.

disarmament and arbitration. It was adopted following the failure of the Draft Treaty of Mutual Assistance submitted to the Fourth Assembly of the League of Nations and was influenced by some of the comments made by the members on the Draft Treaty¹¹⁶. The 1924 Protocol, in view of the Covenant's failure to outlaw war in general, was intended to be a supplement to the Covenant. Therefore, the central ideas of the Protocol were, first, the absolute proscription of all forms of aggressive warfare; second, the adoption of a mechanism of collective security with the obligation to jointly take measures of collective defence or the imposition of collective sanctions against an aggressor; third, the devising of a mandatory procedure for the pacific settlement of international disputes, and fourth, the reduction of armaments¹¹⁷.

Regarding its mandatory procedure for the pacific settlement of international disputes, the Protocol made arbitration the foundation of its system¹¹⁸. Its provisions in this respect attempted to plug the gaps in Art. 15 of the Covenant, by indicating that if a dispute submitted to the Council was not settled by it as provided in para. 3 of Art. 15 of the Covenant, then the Council was to persuade the parties to submit the dispute to either arbitration or judicial settlement¹¹⁹. In case of their failure to agree to do so, a Committee of Arbitrators was to be constituted at the request of at least one of the parties to the dispute who were both to agree on the particulars¹²⁰ of the constitution of the aforesaid Committee¹²¹. If they failed, in whole or in part, to agree on the particulars of the constitution of the Committee, within the time limit fixed by the Council, then the Council according to Art. 4(2,B) was granted the power to intervene¹²² in order to settle the points remaining in suspense. However, in the case where none of the parties asked for arbitration, then the dispute was again to be considered by the Council, and the members to the Protocol were to comply with any recommendations unanimously agreed upon by the

Council based on its report, other than the representatives of any of the parties to the dispute¹²³. If unanimity was not reached, then the dispute was to be submitted to compulsory arbitration in which the Council was itself to constitute the Committee of arbitrators¹²⁴. All signatory States were to undertake to comply in full good faith with any judicial sentence or arbitral award or solutions recommended by the Council, and in the case where a State disregarded any such undertakings and resorted to war, then "...the sanctions provided for by Art. 16 of the Covenant, interpreted in the manner indicated in the present Protocol, shall immediately become applicable to it."¹²⁵

It appears that the Protocol attempted to establish a framework of mandatory procedures which, in order to block any attempt made by any of the parties to frustrate or avoid the arbitral or judicial settlement process, was backed up by the Council's intervention and also supported by the imposition of sanctions on any party which disregarded or refused to comply with an arbitral award or judicial sentence¹²⁶. However, there were some loopholes in the Protocol's compulsory system for the settlement of disputes, such as that contained in Art. 3 which stated:

The signatory States undertake to recognise as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Permanent Court of International Justice in the cases covered by paragraph 2 of Article 36 of the Statute of the Court, *but without prejudice to the right of any State, when acceding to the special protocol provided for in the said Article and opened for signature on December 16th, 1920, to make reservations compatible with the said clause* [emphasis added].

Therefore, the jurisdiction of the PCIJ under the so-called 'Optional Clause' could have been barred even from the categories of 'legal' disputes enumerated in Art. 36(2) of the Statute, an issue already examined in our discussion on the ICJ¹²⁷. Another loophole this

time concerning arbitration was that in Art. 5 in which the Protocol attempted to overcome the insufficiency of Art. 15(8) of the Covenant in dealing with a dispute which a party claimed arose out of ‘a matter which by international law is solely within the domestic jurisdiction’ of that party, by granting the arbitrators the power to take the advice of the PCIJ on the issue, through the medium of the Council. The advisory opinion of the PCIJ was to be binding on the arbitrators, who, if the opinion of the Court was in the affirmative, were to confine themselves to so declaring in their award and the party claiming that the dispute was solely within its domestic jurisdiction was no longer under the obligation to submit the dispute to arbitration. Although Art. 5 went on to state that if such claim made by a party was sustained by the PCIJ that decision was not to prevent the consideration of the situation by the League’s Council or Assembly under Art. 11 of the Covenant, nevertheless, the powers of those two organs in this respect were limited to encouraging the parties to reach an agreement through mediatory or conciliatory measures. Neither had the power to render a decision or make a recommendation, even if it were by a unanimous vote, which was to be binding on any of the parties to the dispute¹²⁸.

The provisions of the Protocol regarding the determination of the aggressor; the application of sanctions¹²⁹ and also regarding compulsory arbitration¹³⁰ led to a considerable degree of controversy between a number of members of the Council, and hence, it never entered into force¹³¹. However, ultimately, Great Britain’s refusal to accept the scheme was the decisive factor behind its failure¹³². Nevertheless, the Protocol’s aims were further pursued in the Briand-Kellogg Pact of August 27, 1928¹³³.

2.3 The 1928 General Act for the Pacific Settlement of International Disputes:

In 1928 the League of Nations attempted to assemble and complement the numerous existing bilateral treaties for arbitration and conciliation by means of one extensive consolidating treaty¹³⁴. This was achieved through the adoption on September 26, 1928, of the General Act for the Pacific Settlement of International Disputes¹³⁵ by the League's Assembly during its Ninth Session at Geneva¹³⁶. The main idea of the General Act was the compulsory settlement of all disputes, either legal or non-legal, by conciliation or judicial settlement or arbitration. Therefore, the Act consisted of four chapters, viz. chapter one, Conciliation (Art. 1-16); chapter two, Judicial Settlement (Art. 17-20); chapter three, Arbitration (Art. 21-28); and chapter four, General Provisions (Art. 29-47).

The General Act was intended "to take into consideration the special situation of the different States with regard to the various methods for the pacific settlement of disputes" and to make the whole system "as elastic as possible"¹³⁷. This elasticity can be deduced from a number of the General Act's provisions. For example, States according to Art. 38 had a choice either to accede to the General Act as a whole or to certain portions of the Act indicated as follows:

- A. either to all the provisions of the Act (Chapters I, II, III and IV);
- B. or to those provisions only which relate to conciliation and judicial settlement (Chapters I and II), together with the general provisions dealing with these procedures (Chapter IV);
- C. or to those provisions only which relate to conciliation (Chapter I), together with the general provisions concerning that procedure (Chapter IV).

States were also able to make their accession to the Act conditional subject to certain reservations enumerated in Art. 39(2)¹³⁸ by which the parties were able to exempt

certain categories of disputes from its compulsory dispute settlement mechanism. However, other forms of reservations such as those excluding issues that might affect the vital interests, national honour, independence or constitution of any of the States concerned were not permitted¹³⁹.

Regarding its mechanism for arbitral procedure, the General Act adopted two different approaches, whose application, depended on the form of dispute in question¹⁴⁰. The first approach was regarding legal disputes or “disputes with regard to which the parties are in conflict as to their respective rights” which, according to Art. 17 included “...in particular those mentioned in Art. 36 of the Statute of the Permanent Court of International Justice.” The submission of such disputes to arbitration was made optional. On the other hand, their submission to judicial settlement was made compulsory for all parties who had accepted Chapter II of the Act regarding the settlement of such disputes¹⁴¹. The second approach was regarding non-legal (non-justiciable) disputes which were first of all to be submitted to conciliation¹⁴². However, if after one month¹⁴³ from the termination of the work of the Conciliation Commission no agreement had been reached between the parties, then the dispute, subject to any reservations made by the parties under Art. 39(2), was to be brought before an *ad hoc* arbitral tribunal, which unless the parties had agreed otherwise¹⁴⁴, was to be composed of five members, one to be appointed from each side and the other two including the Chairman (umpire) to be chosen from the nationals of a third party¹⁴⁵. Special backup provisions were introduced to ensure the establishment of the arbitral tribunal, first of all, by a third party agreed between the disputants in the case where one of them, within the period of three months after the constitution of the tribunal had been requested by one of the parties, had failed to participate in the appointment of the members of the tribunal¹⁴⁶. if they failed to reach agreement on the third party, then each

party was to designate a different party for the constitution of the tribunal¹⁴⁷. If the two parties thus chosen failed to agree on this issue, then the task was to be entrusted to the President or Vice President or oldest member of the PCIJ successively and in a descending scale, in the case that either of them was prevented from so acting¹⁴⁸. The General Act also embodied certain provisions regarding vacancies that may occur in the tribunal¹⁴⁹. The parties, according to Art. 25, were to draw up a special agreement, called a '*compromis*' determining the subject of the dispute and the procedures to be followed, and if the parties had failed after three months from the constitution of the tribunal to conclude such agreement, then the dispute was to be brought before the tribunal by the unilateral application of either of the parties¹⁵⁰ which, in this case, was authorised according to Art. 26 to apply the provisions of the 1907 HCPSID¹⁵¹ so far as necessary. However, in such a case, the tribunal, according to Art. 28, was obliged to apply:

...the rules in regard to the substance of the dispute enumerated in Article 38 of the Statute of the Permanent Court of International Justice [and] in so far there exists no such rule applicable to the dispute, the tribunal shall decide *ex aequo et bono*.

Some of the main factors that distinguished the 1928 General Act from the 1924 Geneva Protocol was that the General Act excluded the League's Council from playing any part in the settlement of disputes¹⁵². It also made recourse to a previous convention, namely, the 1907 HCPSID for the settlement of certain points by the Conciliation Commission¹⁵³ or the *ad hoc* arbitral tribunal¹⁵⁴. The General Act was intended to provide a comprehensive and acceptable system for the adjustment of international differences by compulsory means, which took into consideration States' attitudes towards the provisions of previous international instruments¹⁵⁵ regarding the tangled issues of non-legal (political)

disputes and their settlement by compulsory means¹⁵⁶. However, like its predecessors, some of the provisions of the General Act were subject to criticism¹⁵⁷ especially that empowering a tribunal to render a decision *ex aequo et bono* embodied in Art. 28¹⁵⁸. Moreover, the effectiveness of the 1928 General Act as an instrument for the settlement of inter-State disputes by *compulsory* peaceful means was hampered by its permitting partial accessions and reservations¹⁵⁹. This appears clear when examining the reservations of some of the 23 States who acceded to the Act¹⁶⁰.

Due to the fact that the 1928 General Act is attached to the League's system, which has now ceased to exist and is replaced by the current UN, it has been disputed whether or not its text is still valid¹⁶¹. This issue was clearly recognised by the General Assembly of the UN in its efforts to update the text of the 1928 General Act through its Resolution 268 (III) on April 28, 1949¹⁶² which indicated that:

...the efficacy of the General Act of 26 September 1928 for the pacific settlement of international disputes is impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared¹⁶³.

Therefore, in order to meet with the new circumstances, a revised version of the General Act was adopted in 1949¹⁶⁴. However the aforesaid Resolution went on to say that the amendments to the text of the General Act

...will only apply as between States having acceded to the General Act as thus amended and, as a consequence, *will not affect the rights of such States, parties to the Act as established on 26 September 1928, as should claim to invoke it in so far as it might still be operative* [emphasis added]¹⁶⁵.

The most recent debate on this issue was in the *Aerial Incident of 10 August 1999* case [Jurisdiction] between India and Pakistan, in which the latter invoked, *inter alia*, Art. 17 of the 1928 General Act¹⁶⁶ as basis of the ICJ's jurisdiction in its dispute with the former regarding the alleged downing, on August 10, 1999, of an unarmed Pakistani military aircraft (the *Atlantic*) in Pakistan's territory by Indian forces. In this case India, the defendant, *arguendo* contended, *inter alia*, that numerous provisions of the General Act, and in particular Arts. 6,7,9 and 43-47 refer to organs of the League of Nations and to the PCIJ, and, in consequence of the demise of those institutions, the General Act has "lost its original efficacy"; that the General Assembly of the UN indicated during its adoption of the 1949 Revised General Act that the parties to the 1928 Act cannot rely upon it except "...in so far as it might still be operative, that is, in so far....as the amended provisions are not involved" and that Art. 17 is among those provisions amended in 1949. Further grounds for challenge of the ICJ's jurisdiction by India were that the 1928 Act was according to her point of view an international agreement of a political character and, therefore, not automatically binding on successor States like her and Pakistan who were both under British control at the time of the agreement as one unit (the British Indian Empire) before there partition in 1947 into two independent sovereign States. Moreover, under that point, India argued that it had made no notification of succession as required by Arts. 17 and 22 of the Vienna Convention on Succession of States in Respect of Treaties of 1978, and that in its communication of September 18, 1974, addressed to the Secretary-General of the UN it has expressly stated that

[t]he Government of India never regarded themselves as bound by the General Act of 1928 since her independence in 1947, whether by succession or otherwise. Accordingly, India has never been and

is not a party to the General Act of 1928 ever since her Independence.

The Court in this respect recognised that the question whether the 1928 General Act is to be regarded as a convention in force for the purpose of Art. 37 of the Statute of the ICJ has already been raised, but not settled, in previous proceedings before the Court¹⁶⁷. However, the Court, again, declined to address this question and instead relied as a upon India's communication above to the Secretary-General of the UN to declare that India cannot be regarded as having been a party to the 1928 General Act on the date of the Pakistani application, therefore, consequently, Art. 17 of the 1928 Act was not regarded as forming a basis for the Court's jurisdiction in this case.

With the circumvention of the ICJ from addressing the question regarding whether the 1928 General Act was still operative after the demise of the institutions to which it refers and the adoption of an updated version (the 1949 Revised General Act), it may be said that although not all State-parties to the 1928 Act have denounced it¹⁶⁸, nevertheless, the question regarding its applicability or otherwise in current day inter-State dispute settlement practice appears to be still a live and open issue¹⁶⁹.

3. The UN and International Arbitration:

The emphasis of the UN on its role in the preservation of international peace and security can be deduced from the clear wording of the Charter's Preamble which stated the determination of its members "...to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind..." Therefore the UN Charter in its very first article recognises that one of the main purposes of the organisation

for the maintenance of international peace and security is “...to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to the breach of the peace.”¹⁷⁰. Alongside the Charter, the UN General Assembly adopted a number of resolutions and declarations that supported the provisions of the Charter regarding the peaceful settlement of disputes between States¹⁷¹. The peaceful means provided by the Charter can be found in Art. 33(1) which indicated that:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies and arrangements, or other peaceful means of their own choice.

The following discussion will examine the major inter-State arbitral mechanisms adopted under the auspices of the UN, namely, the 1948 Revised General Act for the Pacific Settlement of International Disputes, and the proposed International Convention on Arbitral Procedure of the ILC.

3.1. The Revised General Act of 1949:

In order to meet with the new circumstances that arose out of the cessation of the League of Nations and its organs, which were referred to in the 1928 General Act for the Pacific Settlement of International Disputes, the General Assembly of the UN, following a Belgian proposal, adopted on April 28, 1949, Resolution 268 (III)¹⁷² which instructed the Secretary General of the UN to “...prepare a revised text of the General Act, including the

amendments mentioned hereafter, and to hold it open to accession by States, under the title “Revised General Act for the Pacific Settlement of International Disputes.” The amendments made to the text of the original General Act¹⁷³ mainly substituted references to the former League of Nations and PCIJ with references to the newly created UN and ICJ respectively¹⁷⁴ and the whole scheme was almost an exact duplicate of its predecessor. Therefore, the same weaknesses that existed in the 1928 General Act were also present in the 1949 one. However, from the very outset this new system came under strong criticism and was opposed by a number of States led by the former Soviet Union which considered that the compulsory settlement of disputes was incompatible with the provision on States’ sovereignty embodied in the UN Charter¹⁷⁵. The Revised General Act came into force on September 20, 1950¹⁷⁶; however, only seven States had declared their accession to it by mid 1971¹⁷⁷.

3.2. The ILC’s Model Rules on Arbitral Procedure of 1958:

In its very first session on April 12, 1949, the ILC which was established pursuant to the UN General Assembly Resolution 174 of November 21, 1947¹⁷⁸ selected arbitral procedure as one of the main topics for codification. The aim of the ILC in this respect was the adoption of a so-called ‘Draft Convention on Arbitral Procedure’ which was to represent both a codification of the existing law on international arbitration, and a formulation of what were considered by the Commission as desirable developments in the field. The ILC took as its basis the traditional characteristics of arbitral procedure¹⁷⁹. Its endeavours in this respect were guided by the principle of non-frustration, i.e. to prevent the impediment or frustration that may occur before or during an arbitral settlement caused by the ill-will of one of the parties to the dispute, who wishes to obviate from recourse to

arbitration. Therefore, a number of procedural safeguards were adopted for securing the effectiveness of the undertaking to arbitrate, in accordance with the original common intention of the parties¹⁸⁰. Moreover, any dispute that may arise between the parties before the constitution of the arbitral tribunal regarding the arbitrability or otherwise of a certain dispute was according to Art. 1(1) to be "...brought before the International Court of Justice for decision by means of its summary procedure". However, if the tribunal was already constituted, any such dispute was then according to paragraph 3 of the same article to be referred to it.

Two main drafts were submitted by the ILC on 1952 and 1953 respectively. However, both of them were subject to strong criticism on the part of a number of States led by the former Soviet Union, who perceived some of its provisions as a clear departure from one of the main fundamental principles of arbitration, namely, the autonomy of the will of the parties¹⁸¹. Therefore, in view of the many suggestions and comments made by Governments for the improvement of the draft, the General Assembly of the UN on December 14, 1955, adopted Resolution 989(X) which invited the ILC to take into consideration those comments made by the various Governments "...in so far as they may contribute further to the value of the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session."¹⁸² At this stage, the members of the Commission were convinced that a large proportion of those comments and conflicting observations were not calculated to improve the draft, but rather to destroy it, and that the whole Resolution was regarded as a polite rejection of the Commission's draft convention. It was noticed that States apparently preferred the traditional system of arbitration under which the States parties to the dispute remained masters of the procedures to be followed and could possibly frustrate or delay a settlement whenever their case might be lost, rather than the

Commission's proposed draft convention which was based on the 1907 HCPSID and the 1928 General Act for the Pacific Settlement of International Disputes and presented a watertight and strict system of judicial arbitration¹⁸³. States were divided among themselves as to their position towards the Draft of the ILC. One group of States, including the USA and the United Kingdom, were ready to adopt by resolution of the UN General Assembly the Commission's Draft. Another group which included the former Soviet Union, Brazil, Bulgaria, Byelorussia and others totally opposed any endorsement of the Commission's Draft and urged its rejection *in toto* or, at least, that some significant and fundamental amendments be made to it on the ground that it violated the autonomy of the will of the parties, a principle so well embedded in arbitral proceedings. A third group of States adopted the moderate view that, there being no sufficient time to make a further examination and amendments to the ILC's Draft, the General Assembly of the UN should nonetheless take note of it¹⁸⁴, and this indeed was what the Commission opted for in its 419th Meeting in 1957, after determining that the draft should be presented to the General Assembly as a set of Model Rules which States could use in concluding bilateral or multilateral agreements for arbitration or when settling disputes by *ad hoc* arbitration¹⁸⁵. As a result the Commission at its tenth session in 1958 drew up a set of 'Model Rules on Arbitral Procedure'¹⁸⁶ which were, after extensive discussions in the Sixth Committee of the General Assembly, adopted by Resolution 1262(XIII) on November 14, 1958¹⁸⁷. The Model Rules, as indicated in Art. 3 of the aforesaid Resolution were to be brought "...to the attention of Member States for their consideration and use, in such cases and to such extent as they consider appropriate, in drawing up treaties for arbitration or *compromis*."

To all those who may have complained over the existence of certain loopholes in the arbitral process, the ILC's Draft was *the* remedy to their concerns. Indeed the Draft was

praised by some experts as “...the high watermark of legal scholarship in the field of inter-State arbitration...”¹⁸⁸, and “...superb in its technical craftsmanship...”¹⁸⁹. However, did the ILC’s scheme encompass the seeds of its own destruction? In this regard, the draft was criticised by a number of prominent international jurists, such as Judge Stephen Schwebel¹⁹⁰ who, although recognising the distinctiveness of the Commission’s Draft, nevertheless, stated that:

...it should have been obvious that the generality of States was not at that time, as they are not at this time, prepared to accept it. The Commission’s Draft repeatedly would have endowed the International Court of Justice with compulsory jurisdiction over crucial questions of the arbitral process. If States generally were then and are today unwilling to accord the Court compulsory jurisdiction, why should it be supposed that they would be disposed to grant it such pervasive compulsory jurisdiction in the process of international arbitration?

Moreover, Professor Carlston¹⁹¹ in an extensive remark questioned “...whether the larger interests of the international community would be served by transforming the...conception of *ad hoc* arbitration into the conception of judicial arbitration...” as the Commission envisaged. He argued that:

...it must be remembered that arbitration is but one of a number of means for pacific settlement of disputes available to parties; that the International Court of Justice is already available to the parties in dispute with an established procedure of judicial settlement such as the Commission would like to create for *ad hoc* arbitration; the strength of the existing system of international arbitration *as a means for the pacific settlement of disputes* lies in its flexibility and responsiveness to the will of the parties, even though as a procedure it is subject to the interruptions which the Commission...seeks to remedy; that these interruptions or breakdowns of arbitration have in practice been few in number as against the great number of international arbitrations which have taken place successfully; that

many of these breakdowns could have perhaps been avoided by a more skilled use of technique; and, finally, that ultimate end to be sought is to preserve all the various procedures to be developed through history which will conduce to the amicable settlement of international disputes. Abuse of the privileges of the process of arbitration which has upon occasion occurred does not necessarily mean that those privileges should be destroyed when their existence represents a continuing safeguard to the great number of states and a strong inducing factor leading them to adopt the process as a means for the settlement of their disputes. The theoretical perfection of the process should not be carried to the point where it loses its unique identity, merges with the system of adjudication of the International Court of Justice, and discourages recourse to the arbitral process by states¹⁹².

Indeed, the efforts of the ILC were conducted in a time when inter-State arbitration was suffering from a drastic setback¹⁹³. The Commission's Draft attempted to alter a fundamental principle of arbitration, one which, as already stated elsewhere¹⁹⁴, constituted one of its main attractive features, namely, party autonomy, by transforming arbitration into a rigid, stringent judicial process, despite the fulfilment of that role already by the ICJ. The Commission from the very beginning should have expected strong negative reactions from States towards their proposals, especially when having in mind that certain (influential) States¹⁹⁵ were in principle clear in their opposition to voluntary legal means of settlement, leave alone a stringent and watertight framework as that of the ILC. However, despite the fact that the ILC's Draft failed to acquire convention status, it still represents a unique and ideal dispute settlement framework that States could make use of when the actual need arises¹⁹⁶.

Conclusion:

The adoption of an effective, comprehensive and, most of all, acceptable mechanism for the compulsory settlement of inter-State disputes in general based on arbitration has been one of the major aims of the international community for a very long time. The push for such a mechanism started with the 1899 HCPSID which was later followed by its successor, the 1907 Hague Convention. However, no binding obligation to settle disputes arose out of any of those instruments. Even the PCA established by the 1899 Convention was more like a shadow, a so-called court which lacked any form of jurisdiction except for that conferred upon it by the parties. Although the PCA played a considerably active role in the field of inter-State dispute settlement at the time of its establishment, nevertheless, things were to change drastically following the establishment of the PCIJ which States viewed as a *real* permanent court, and resulting in their turning their backs on the PCA. The PCIJ was looked at as a vital necessity following the scourge of the first Great War which was an inducing force behind the establishment of the Court. However, that step towards peace was preceded by the opening of a new era in international organisation through the establishment of the League of Nations of which the PCIJ forms an integral part of within its machinery. Nevertheless, neither the PCIJ nor the instruments established under the auspices of the League of Nations, namely, the 1924 Geneva Protocol and 1928 General Act, provide any definitive description as to the disputes suitable for submission to voluntary legal means of settlement leave alone compulsory means, a stumbling block in the way of any major success in the field of compulsory dispute settlement. Moreover, the first of those two instruments never came into force and the status of the second, whether operative or not, has still not been definitely.

Following the end of the Second World War and the establishment of the UN, interests in arbitration was again revived through the 1949 Revised General Act which was not as successful as its predecessor. Nevertheless, the most significant step towards the achievement of a comprehensive and reliable compulsory mechanism for the arbitral settlement of inter-State disputes was the proposed Draft Convention of the ILC, whose success of was severely aborted. Neither of these two mechanisms, nor those examined above, succeeded in gaining general State acceptance due to various reasons, mainly the questions regarding compulsory settlement and the submission of non-justiciable disputes to arbitration. However, when looking at the picture as a whole, it appears that the framers of these latter two mechanisms did not take into account the general mood towards arbitration which has changed dramatically following the World War¹⁹⁷.

Notes to Chapter Five:

¹ For the text of the 1899 HCPSID see, the PCA, *Basic Documents*, p.1; J.B. Scott, *Hague Conventions and Declarations of 1899 and 1907*, *op cit*, pp. 41-88; and, J.B. Scott, *The Hague Court Reports*, New York, Oxford University Press, 1st series, 1916, pp. xxxiii-cvii (hereinafter cited as Scott, *HCR*, 1916).

² For the text see, J.B. Scott, *Hague Conventions and Declarations of 1899 and 1907*, *op cit*, p. xv.

³ *Ibid*, p. xvii.

⁴ *Ibid*, p. xviii.

⁵ W.I. Hull, *The Two Hague Conferences and their Contributions to International Law*, Boston, Ginn & Co, 1908, p. 6.

⁶ See in general, R. Sharwood, *The Hague Peace Conference of 1899: A Historical Introduction*, in International Bureau of the PCA (ed.), *International Alternative Dispute Resolution: Past, Present and Future: The Permanent Court of Arbitration Centennial Papers*, The Hague, Kluwer Law International Law, 2000, p. 163; E.J. Dillon, *The Eclipse of Russia*, London, J.M. Dent & Sons Ltd, 1918, pp. 269-278.

⁷ *Ibid*, p. 276.

⁸ *Ibid*, p. 277.

⁹ *Ibid*, p. 278.

¹⁰ In the words of Dillon (*ibid*, p. 278):

However high we rate the contributory causes of the peace movement inaugurated by Nicholas II., history will retain the decisive fact that the motive of its prime author was to hoodwink the Austrian Government and to enable the Tsar's War Minister to steal a march on his Country's future enemies.

¹¹ See J.H. Ralston, *op cit*, pp. 254-257.

¹² See G. Schwarzenberger, *International Law*, *op cit*, pp. 99-100.

¹³ *Ibid*, pp. 100-101.

¹⁴ For the proceedings of the conference and discussions of the commissions see in general, J.B. Scott, *Proceedings of 1899*, *op cit*; and in general W.I. Hull, *op cit*.

¹⁵ For the text of the Final Act of the 1899 Hague Peace Conference see, J.B. Scott, *Hague Conventions and Declarations of 1899 and 1907*, *op cit*, pp. 1-31.

¹⁶ Art. 1 of the 1899 HCPSID.

¹⁷ For an examination of the proceedings and proposals of the parties on the issue of arbitration see, W.I. Hull, *op cit*, pp. 297-311.

¹⁸ Art. 16.

¹⁹ Art. 17 indicated that "The Arbitration Convention is concluded for questions already existing or for questions which may arise eventually. It may embrace any dispute or only disputes of a certain category."

²⁰ J.B. Scott, *HCR*, *op cit*, 1916, pp. xi-xii; and also by the same author, *Resolutions*, *op cit*, pp. viii-ix.

²¹ For the text of the Draft Regulations adopted by the *Institut de Droit International* see, *ibid*, pp. 1-7.

²² J.B. Scott, *Hague Conventions and Declarations of 1899 and 1907*, *op cit*, pp. vii-viii.

²³ The text of the Final Act of the 1907 Hague Peace Conference can be found in, *ibid*, pp. 1-39.

²⁴ See Art. 45 of the 1907 HCPSID regarding the rules of procedure to be followed by the parties to a dispute in the appointment of the tribunal when having recourse to the PCA. The Article also indicated the procedure to be followed in case of disagreement over the appointment of the umpire of the tribunal.

²⁵ Art. 86-90.

²⁶ Art. 86.

²⁷ These Summary Rules of Procedure were employed in the 1914 *Dreyfus Brothers* case between France and Peru. See J.B. Scott, *The Hague Court Reports*, New York, Oxford University Press, 2nd series, 1932, p. 31 (hereinafter cited as, Scott, *HCR*, 1932).

²⁸ See, I. Diaconu, *op cit*, p. 1096.

²⁹ L.B. Sohn, *The Function of International Arbitration Today*, (1963-I), 108, *Hague Recueil*, pp. 1, 9 (hereinafter cited as Sohn, *Arbitration Today*); and H. Schlochauer, *Arbitration*, *op cit*, p. 17.

³⁰ E.g. the 1924 Geneva Protocol; the 1928 and the revised 1949 General Act for the Pacific Settlement of International Disputes; and the ILC Model Rules on Arbitral Procedure of 1958.

³¹ B.S. Murty, *op cit*, p. 692.

³² See also in this respect Resolutions 50/44 on 26/Jan/1996; 51/159 on 30/Jan/1997 and 52/154 on 26/Jan/1998.

³³ The Convention Relative to the Creation of an International Prize Court was adopted by the 1907 Conference. The Court was intended to be a permanent institution established to deal with appeals made by neutrals, and in certain cases, by enemy subjects against the decisions of national prize courts. Due to the absence of sufficient rules on economic warfare at the time, the powers indicated in Art. 15 of the Convention who were the USA, Austria-Hungary, France, Great Britain, Italy, Japan and Russia as well as Spain and the Netherlands attended a codification conference at London in 1908 which resulted in the Declaration of London, which was signed by all the participating Powers but, till this day, never ratified. Therefore, the fate of the International Prize Court Convention became linked to the London Declaration; hence, it was never ratified. For the text of the International Prize Court Convention, see, J.B. Scott, *Hague Conventions and Declarations of 1899 and 1907*, *op cit*, pp. 188-203. For a discussion on the Convention and the Declaration of London, see, Ulrich Scheuner, *International Prize Court*, (1981), 1, *EPIL*, p. 106; G. Schwarzenberger, *International Law*, *op cit*, p. 118; and J.B. Scott, *The International Court of Prize*, (1911), 5, *AJIL*, p. 302; Editorial Comments, *Naval Prize Bill and the Declaration of London*, (1912), 6, *AJIL*, p. 180.

³⁴ The Draft Convention on a Judicial Arbitration Court which was a result of a proposition made by the American delegation to the 1907 Conference for the establishment of a Court of Arbitral justice which was to be of a permanent nature and composed of judges representing the various judicial systems of the world foundered to the strong opposition of the smaller powers who feared that the method of selecting the judges of the proposed Court might lead to the possible infringement of the principle of sovereign equality of States. For the text of the Draft Convention, see, J.B. Scott, *Hague Conventions and Declarations of 1899 and 1907*, *op cit*, pp.31-39. For the meetings and discussions of the parties on the issue, see, meetings 1-8 of the First

Commission's First Subcommittee Committee of Examination (B) in, J.B. Scott, *Proceedings of 1907*, *op cit*, vol. II, pp. 595-706; and W.I. Hull, *op cit*, pp. 410-426.

³⁵ See, *infra* p. 200.

³⁶ See H. Schlochauer, *Permanent Court of International Justice*, (1981), 1, EPIL, p. 163 (hereinafter cited as Schlochauer, *Permanent Court*).

³⁷ For the text of the Russian draft see, Scott's, *Proceedings of 1899*, *op cit*, pp. 797-800.

³⁸ See the explanatory note concerning Art. 10 of the Russian Draft in, *ibid*, pp. 173 - 178.

³⁹ According to Ralston (*op cit*, pp. 254-255) the instructions of the German Government to its delegates before the Conference were to the effect that

...no first-class power could submit to obligatory arbitration; that it was doubtful whether Russia would submit great political questions to such an Areopagus; and that Russia wanted to use it against England; that arbitration through interested judges, and in which all great powers were interested, was nothing but intervention; that courts of arbitration would result in bringing up the interests of different countries; forming groups for war, and taking advantage of the weaker group; that the State, the larger it is, regards itself as an end in itself and not as means for higher things; that it has no other interests than taking care of its own interest; that such are regarded by the great Powers – not maintenance of peace but taking advantage of enemies and competitors.

⁴⁰ Corresponding to Art. 38 of the 1907 HCPSID.

⁴¹ See, *supra* p. 145.

⁴² See, *supra* pp. 143-146.

⁴³ See the PCA: *New Directions*, *op cit*, p. 19.

⁴⁴ For the text of the Final Act of the 1907 Peace Conference, J.B. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, *op cit*, p. 27.

⁴⁵ The PCA: *New Directions*, *op cit*, p. 20.

⁴⁶ *Op cit*, pp. 29-30.

⁴⁷ T.J. Bodie, *op cit*, p. 27.

⁴⁸ From the official website of the PCA [<http://www.pca-cpa.org>] as visited on 13/1/2002.

⁴⁹ See in general *supra* 1.2 of Chapter Two.

⁵⁰ Art. 20 of the 1899 HCPSID.

⁵¹ Art. 21 and 42 of the 1899 and 1907 HCsPSID respectively.

⁵² Art. 30 and 51 of the 1899 and 1907 HCsPSID respectively.

⁵³ Art. 30-57 and 51-85 of the 1899 and 1907 HCsPSID respectively.

⁵⁴ The International Bureau of the PCA according to Art. 43 of the 1907 HCPSID:

...serves as a registry for the Court. It is the channel for communications relative to the meetings of the Court; it has charge of the archives and conducts all the administrative business.

The Contracting Powers undertake to communicate to the Bureau, as soon as possible, a certified copy of any conditions of arbitration arrived at between them and of any Award concerning them delivered by a special Tribunal.

They likewise undertake to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the Awards given by the Court.

⁵⁵ The Permanent Administrative Council of the PCA according to Art. 49 of the 1907 HCPSID is composed of the diplomatic representatives of the parties to the two Hague Conventions and of the Minister of Foreign Affairs of the Netherlands acting as President. Its discussions are to be rendered valid by the attendance of at least nine of its members and any decision in this respect is to be based on the majority of votes of the members attending. The Council is charged with the direction and control of the International Bureau and is also of the authority:

1. To settle its rules of procedure and all other necessary regulations;
2. To decide all questions of administration which may arise with regard to the operations of the Court;
3. To control the appointment, suspension, or dismissal of the officials and employees of the Bureau;
4. To fix the payments and salaries, and control the general expenditure.

The Council also is to communicate without delay to all the Contracting Powers any regulations adopted by it and also, furnishes them with an annual report on the labours of the Court; the working of the administration; and the expenditure.

⁵⁶ P.J.H. Jonkman, *Introduction*, in S. Muller and W. Mijs (eds.), *op cit*, p. 1.

⁵⁷ *HCR*, *op cit*, 1916, p. xviii.

⁵⁸ See, Art. 23-24 and 44-45 of the 1899 and 1907 HCsPSID respectively.

⁵⁹ Quoted from, J.B. Scott, *HCR*, *op cit*, 1916, pp. xvii-xviii.

⁶⁰ *Ibid*, p. xviii.

⁶¹ *Ibid*.

⁶² *Arbitration*, *op cit*, p. 111.

⁶³ P.J.H. Jonkman, *op cit*, p. 1.

⁶⁴ *Op cit*. For a recent compilation containing the summaries of Awards and reports of the PCA, see in general, P. Hamilton; H.C. Requena; L. van Scheltinga; and B. Shifman, *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution: Summaries of Awards, Agreements and Reports*, The Hague, Kluwer Law International, 1999.

⁶⁵ *Op cit*.

⁶⁶ *The Flame Rekindled*, in S. Muller and W. Mijs (eds.), *op cit*, pp. 5, 7.

⁶⁷ In this regard, Fox (*Arbitration*, *op cit*, p. 109) pointed out that “[w]ith the institution of the Permanent Court of International Justice and the continuance of its jurisdiction by the International Court of Justice, the historical ground for the existence of the Permanent Court of Arbitration was in the main destroyed”.

⁶⁸ See, *supra* p. 193.

⁶⁹ See, H. Schlochauer, *Permanent Court of International Justice*, (1981), 1, EPIL, p. 163 (hereinafter cited as Schlochauer, *Permanent Court*).

⁷⁰ A.P. Fachiri, *The Permanent Court of International Justice: its Constitution, Procedure and Work*, London, Oxford University Press, 1925, p. 2.

⁷¹ See, H. Schlochauer, *Permanent Court*, *op cit*, p. 164.

⁷² I.e. the Interparliamentary Union, the British Fabian Society and the American Society for the Judicial Settlement of Disputes.

⁷³ I.e. Denmark, Norway, Sweden and Switzerland.

⁷⁴ For a good on the meetings and deliberations of the Jurist Committee during their efforts for the adoption of the PCIJ Statute, see, *ibid*, pp. 164-165; A.P. Fachiri, *op cit*, pp. 1-13; and H.M. Cory, *op cit*, pp. 115-135.

⁷⁵ For the Assembly's Resolution, see, A.P. Fachiri, *op cit*, pp. 239-240.

⁷⁶ For the text see, M.O. Hudson, *World Court Reports: A Collection of the Judgements, Orders and Opinions of the Permanent Court of International Justice (1936-1942)*, Washington D.C., Carnegie Endowment for International Peace, vol. IV, 1943, pp. 3-4. (Hereinafter cited as Hudson, *WCR*).

⁷⁷ For the text, see, *ibid*, pp. 11-28. It must be noted that, unless otherwise stated, all references to articles of the Statute in this and all other chapters are to the revised Statute of February 1, 1936.

⁷⁸ M.O. Hudson, *International Tribunals*, *op cit*, p. 163.

⁷⁹ S. Muller & W. Mijs, *op cit*, p. 7.

⁸⁰ PCA 'Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of which only One is a State'. However, the PCA's 1993 'Optional Rules for Arbitrating Disputes between Two Parties of which One only is a State' have superseded the 1962 rules. For the text of the 1993 Rules, see, the PCA, *Basic Documents*, *op cit*, p. 69; and for the 1963 Rules, see, the PCA, *New Directions*, *op cit*, p. 45.

⁸¹ Official Documents, *Permanent Court of Arbitration: Circular Note of the Secretary General*, (1960), 54. AJIL, p. 933.

⁸² The PCA, *New Directions*, *op cit*, pp. 61-62.

⁸³ See, *supra* n. 18 of Chapter Two.

⁸⁴ See the official website of the PCA [<http://www.pca-cpa.org>] under 'Recent and Pending Cases' as accessed on 13/1/2002.

⁸⁵ H. Fox, *arbitration*, *op cit*, p. 110.

⁸⁶ E. McWhinney, *International Arbitration and International Adjudication: The Different Contemporary Lots of the Two Hague Tribunals*, (1991), 29, CYIL, pp. 403, 404-405 (hereinafter cited as McWhinney, *the Two Hague Tribunals*).

⁸⁷ From the official website of the PCA [<http://www.pca-cpa.org>] as accessed on 13/1/2002.

⁸⁸ See in general, the PCA, *New Directions*, *op cit*.

⁸⁹ E.g. obtaining endorsement of the UN; the publication of a brochure containing descriptions of the facilities and services provided by the PCA; seminars and lectures on the potential role of the PCA; encouragement of

members of the PCA and academic and other lawyers to write journal articles on the PCA and the other dispute settlement mechanisms available under the 1899 and 1907 HCsPSID. See, *ibid*, pp.11-13.

⁹⁰ *Ibid*, pp.13-14.

⁹¹ *Ibid*, p. 15.

⁹² *Ibid*, pp.15-17.

⁹³ For the text see, *The Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States*, (1993), 32, ILM, p.572; and the PCA, *Basic Documents*, *op cit*, p. 41.

⁹⁴ *Ibid*, p. 69.

⁹⁵ *Ibid*, p. 97.

⁹⁶ *Ibid*, p. 125.

⁹⁷ *International Arbitration in Historical Perspective: Past and Present*, in A.H.A. Soons (ed.), *op cit*, pp. 23, 25.

⁹⁸ Art. 4 of the ICJ's Statute states:

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.
2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.
3. The conditions under which a State which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

⁹⁹ PCA, *New Directions*, *op cit*, pp. 10-11.

¹⁰⁰ See M.D. Copithorne, *The Permanent Court of Arbitration and the Election of Members of the International Court of Justice*, (1978), 16, CYIL, p. 315; E. McWhinney, *the Two Hague Tribunals*, *op cit*, pp. 405-406.

¹⁰¹ See, E. McWhinney, *Judicial Settlement*, *op cit*, p. 95-100.

¹⁰² *Arbitration*, *op cit*, pp. 110-111.

¹⁰³ See in general the PCA's Annual Report for the year 2000, at the PCA's official website: [<http://www.pca-cpa.org>] as accessed on 5/11/2001. On the PCA's Secretary-General's role under the UNCITRAL Rules, see, P.J. Jonkman, *The Permanent Court of Arbitration, The Legal Capital of the World, and the UNCITRAL Arbitration Rules*, in W.P. Heere (ed.), *International Law and The Hague's 750th Anniversary*, The Hague, T.M.C. Asser Instituut Press, 1999, p. 285.

¹⁰⁴ R.B. Henig, *The League of Nations*, Edinburgh, Oliver & Boyd, 1973, pp. 19-21.

¹⁰⁵ For a collection of those treaties, see in general Max Habicht, *op cit*.

¹⁰⁶ The Final Protocol of the Locarno Conferences between Great Britain, Germany, Belgium, France, Italy, Poland, and Czechoslovakia resulted in the conclusion of two arbitration conventions between Germany and Belgium, and between Germany and France, and also the conclusion of two arbitration treaties between Germany and Poland, and between Germany and Czechoslovakia. For the texts of those conventions and treaties, see, J.A. Greenville, *The Major International Treaties 1914-1973: A History and Guide with Texts*, London, Methuen & Co Ltd, 1974, pp. 104-108.

¹⁰⁷ 130, LNTS, p. 135.

¹⁰⁸ For the criticism of the provisions of those articles, as well as the Covenant in general, including an excellent analysis and commentary, see in general, H. Kelsen, *Legal Technique in International Law: A Textual Critique of the League Covenant*, Switzerland, Geneva Research Centre, 1939 (hereinafter cited as Kelsen, *Legal Technique*).

¹⁰⁹ Art. 12(1).

¹¹⁰ *The Function of Law*, *op cit*, pp. 32-33.

¹¹¹ P.J. Noel Baker, *The Geneva Protocol for the Pacific Settlement of International Disputes*, London, P.S. King & Son Ltd, 1925, pp. 39-40; and H. Kelsen, *Legal Technique*, *op cit*, pp. 95-96.

¹¹² Art. 15(8) of the Covenant stated that:

[i]f the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is *solely within the domestic jurisdiction* of that party, the Council shall so report, and shall make no recommendation as to its settlement [emphasis added].

¹¹³ Nevertheless, in this regard, a more strict approach was found in the Pact of Paris (Briand-Kellogg Pact) signed on August 27, 1928, in which the parties in Art. 1, with the exception of the right of self-defence, condemned "...recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another." The treaty in Art. 2 further on indicated that "...the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." For the text see, 94, LNTS, 57.

¹¹⁴ Along with this shortcoming, a number of other events further undermined the League's credibility as a peacekeeping organisation, such as Japan's invasion of Manchuria in 1931, and Mussolini's annexation of Abyssinia in 1935 which was regarded as the final blow to the League's credibility as a coercive organisation capable of preserving the territorial integrity and political independence of its members and which was, further on, followed by Hitler's occupation of the Rhineland in 1936, Austria in 1938, and Czechoslovakia. However, despite the League's insufficiency in that field and also in the limitation of armaments, it held a notable record in promoting international and social collaboration in other activities such as health, economy and labour. See in general, R.B. Henig, *op cit*.

¹¹⁵ For the text, see, Max Habicht, *op cit*, p. 929.

¹¹⁶ See, Secretariat of the League of Nations, *League of Nations: Ten Years of World Co-operation*, London, Hazel, Watson & Viney Ltd, 1930, pp. 64-66; and J.W. Garner, *The Geneva Protocol for the Pacific Settlement of International Disputes*, 1925, 19, AJIL, pp. 123, 124.

¹¹⁷ F. Von Der Heydte, *Geneva Protocol for the Pacific Settlement of International Disputes (1924)*, (1981), 1, EPIL, p. 65 (hereinafter cited as Von Der Heydte, *Geneva Protocol*).

¹¹⁸ See, Secretariat of the League of Nations, *op cit*, p. 69.

¹¹⁹ Art. 4(1) of the Geneva Protocol.

¹²⁰ I.e. The number, names and jurisdiction of the arbitrators, the rules of procedure to be followed by the Committee and any other relevant issues in this regard.

¹²¹ Art. 4(2,A).

¹²² The Council in this respect was granted the authority to select the members of the Committee of arbitrators and their President at the utmost possible dispatch and in consultation with the parties from among persons "...who by their nationality, their personal character and their experience, appear to furnish the highest guarantees of competence and impartiality."

¹²³ Art. 4(3).

¹²⁴ See, Art. 4(4).

¹²⁵ See, Art. 4(6).

¹²⁶ The Protocol in Art. 10(1) went far beyond merely the imposition of sanctions on the disregarding State by indicating that any State would be determined as an aggressor if the unanimous decision of the Council declares that "...it has refused to submit the dispute to the procedure of pacific settlement provided by Articles 13 and 15 of the Covenant as amplified by the present Protocol, or to comply with a judicial sentence or arbitral award or with a unanimous recommendation of the Council, or has disregarded a unanimous report of the Council, a judicial sentence or arbitral award recognising that the dispute between it and the other belligerent State arises out of a matter which by international law is solely within the domestic jurisdiction of the latter State; nevertheless, in the last case the State shall only be presumed to be an aggressor if it has not previously submitted the question to the Council or Assembly, in accordance with Article 11 of the Covenant." For the Protocol's criteria in determining the aggressor, see in general Art. 10.

¹²⁷ On the system of the Optional Clause, see in general *supra* 3.2 of Chapter Four.

¹²⁸ See, J.W. Garner, *op cit*, p. 131.

¹²⁹ See, Secretariat of the League of Nations, *op cit*, pp. 74-76; F. Von Der Heydte, *Geneva Protocol, op cit*, pp. 65-66.

¹³⁰ See in this regard the arguments made by the Government of Great Britain in, H.M. Cory, *op cit*, pp. 147-148.

¹³¹ The entry into force of the Geneva Protocol required the ratification of the majority of the Permanent Members of the League's Council, as well as ten other members of the League, however, the Protocol was ratified only by Czechoslovakia.

¹³² F. Von Der Heydte, *Geneva Protocol, op cit*, p. 66.

¹³³ See *supra* n. 113 of this Chapter.

¹³⁴ F. Von Der Heydte, *General Act for the Pacific Settlement of International Disputes (1928 and 1949)*. (1981), 1, EPIL, p. 62. (Hereinafter cited as Von Der Heydte, *the General Acts*).

¹³⁵ For the text, see, 93, LNTS, p. 343.

¹³⁶ The 1928 General Act which is also known as the 'General Act of Geneva' was a result of the work of the Committee on Arbitration and Disarmament established by the Preparatory Commission for the Disarmament

Conference pursuant to a request made by the League's Assembly in 1927 in order to study and devise effective and acceptable mandatory means for the pacific settlement of international disputes based on arbitration, conciliation, security, and Art. 10, 11 and 16 of the Covenant. For a discussion on the work of the Committee, see, H.M. Cory, *op cit*, pp. 147-152.

¹³⁷ Quoted from the Introductory Note of the Secretariat of the League of Nations to the General Act, October 15, 1928. L.N. Publs. No. 1928. IX. 13, p. 8. Cited at L.B. Sohn, *The Function of International Arbitration Today*, (1963-I) 108 Hague Recueil, pp. 9; 35, n. 35.

¹³⁸ Namely:

- A. Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute;
- B. Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;
- C. Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories.

¹³⁹ See, *ibid*, p. 36; and F. Von Der Heydte, *The General Acts*, *op cit*, p. 64.

¹⁴⁰ See, *ibid*, p. 63; and L.B. Sohn, *Arbitration Today*, *op cit*, pp. 36-37.

¹⁴¹ Art. 17 indicted that:

All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to resort to an arbitral tribunal.

See also in this regard Art. 18-19.

¹⁴² Arts. 1 and 21.

¹⁴³ This time limit is based on the provision of Art. 20(3) which indicated:

In the event of recourse to and failure of conciliation, neither party may bring the dispute before the Permanent Court of International Justice or call for the constitution of the arbitral tribunal referred to in Article 18 before the expiration of one month from the termination of the proceedings of the Conciliation Commission.

¹⁴⁴ Art. 21.

¹⁴⁵ See, Art. 22.

¹⁴⁶ Art. 23(1).

¹⁴⁷ Art. 23(2).

¹⁴⁸ See Art. 23(3).

¹⁴⁹ See, Art. 24.

¹⁵⁰ Art. 27.

¹⁵¹ See, Art. 52 of the 1907 HCPSID.

¹⁵² See, A. Zimmern, *The League of Nations and the Rule of Law 1918-1935*, London, Macmillan & Co Ltd, 1936, p. 379.

¹⁵³ See, Art. 11 regarding inquiries of the Conciliation Commission.

¹⁵⁴ See, Art. 18 and 26 regarding the requirements of the special agreement '*compromis*'.

¹⁵⁵ I.e. The 1899 and 1907 Hague Conventions; the Covenant of the League of Nations; the Statute of the PCIJ; and the 1924 Geneva Protocol.

¹⁵⁶ E.g. the forms of reservations that States were able to make under Art. 39(2). *Supra*, n. 138 of this chapter.

¹⁵⁷ For the criticism of the 1928 General Act in whole, see, J.L. Brierly, *The General Act of Geneva, 1928*, (1930), 11, BYIL, p. 119.

¹⁵⁸ For the criticism of this provision, see, *ibid*, pp. 125-133; and H. Lauterpacht, *The Function of Law, op cit*, pp. 377-378.

¹⁵⁹ See, N.L. Wallace-Bruce, *op cit*, p. 45.

¹⁶⁰ See, United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1999*, New York, United Nations, 2000.

¹⁶¹ See, F. Von Der Heydte, *The General Acts, op cit*, pp. 64-65.

¹⁶² UNY, [1948/49], p. 415.

¹⁶³ In this regard, it may be noted that France on May 16, 1973, before the ICJ in the first *Nuclear Test* case with Australia, declared the 1928 General Act to be obsolete for her part on these same grounds, see, F. Von Der Heydte, *The General Acts, op cit*, , p. 64.

¹⁶⁴ See, *infra* 3.1 of this Chapter.

¹⁶⁵ *Ibid*.

¹⁶⁶ Art. 17 of the 1928 General Act reads:

All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.

It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice.

¹⁶⁷ I.e. the *Nuclear Tests* case (Australia v. France) [Judgement], ICJ Rep, 1974, pp. 253, 259ff; the *Trial of Pakistani Prisoners of War* case, ICJ Rep, 1973, pp. 328ff; and *Aegean Sea Continental Shelf* case [Judgement], ICJ Rep, 1978, pp. 3, 18.

¹⁶⁸ E.g. France on January 10, 1974 and Great Britain on February 6, 1974 both declared to withdraw from the 1928 General Act. See, H. Mangoldt, *Arbitration and Conciliation, op cit*, p. 439, n. 89.

¹⁶⁹ F. Von Der Heydte, *The General Acts, op cit*, pp. 64-65.

¹⁷⁰ Art. 1(1). See also in this regard, Art. 2(3).

¹⁷¹ E.g. the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States adopted by Res. 2625(XXV) on October 24, 1970; the Manila Declaration on the Peaceful Settlement of International Disputes adopted by Res. 37/10 on November 15, 1982; the 1988 Declaration on the Prevention and Removal of Situations which may Threaten International Peace and Security adopted by Res. 43/51; and the 1991 Declaration on Fact-finding by the UN in the Field of Maintenance of International Peace and Security adopted by Res. 46/59.

¹⁷² UNY, [1948/49], p. 415.

¹⁷³ For the drafting history of the 1949 Revised General Act, see, UNY, [1947/48], pp. 284-286; [1948/49], pp. 413-416.

¹⁷⁴ See, *ibid*, pp. 415-416.

¹⁷⁵ See, *ibid*, p. 414.

¹⁷⁶ For the text, see, 71, UNTS, p. 102.

¹⁷⁷ Those States are: Belgium (December 23, 1949); Burkina Faso (March 27, 1962); Denmark (March 25, 1952); Estonia (October 21, 1991); Luxembourg (June 28, 1961); Norway (July 16, 1951); and Sweden (June 22, 1950) and The Netherlands (June 9, 1971). The two later in their accession, both excluded compulsory arbitration. See, United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1999*, *op cit*.

¹⁷⁸ This Resolution was in accordance with Art. 13(1.A) of the UN Charter which called upon the General Assembly to initiate studies and make recommendations for the purpose of, *inter alia*, “[p]romoting international co-operation in the political field and encouraging the progressive development of international law and its codification.”

¹⁷⁹ E.g. the undertaking to arbitrate, the constitution of the tribunal, the general rules of procedure and the award.

¹⁸⁰ YILC, [1953], vol. II, Doc. A/2456, paras. 9-27, pp. 201-203.

¹⁸¹ The draft was mainly criticised on the ground that it tended to impose on contracting States an obligation to resort to arbitration even when the parties were unable to agree on the *compromis* so that no definite undertaking to arbitrate had been entered into; that the draft purported to secure the effectiveness of arbitration even in the absence of consent by the parties; that it tended to transform arbitral tribunals into a kind of supranational court of justice; and that by making provision in several instances for the intervention of the ICJ in arbitral procedure, was making every arbitration settlement subject to the supervision and jurisdiction of that Court. See, *ibid*, para. 28, p. 203-204.

¹⁸² YILC, [1957], vol. II, Doc. A/CN.4/109, para. 4, p. 2.

¹⁸³ YILC, [1957], vol. I, Doc. A/CN.4/109, paras. 9-14, p. 173.

¹⁸⁴ H. Fox, *Arbitration*, *op cit*, pp. 105-108.

¹⁸⁵ YILC, [1957], vol. I, Doc. A/CN.4/109, paras. 1-43, pp. 181-185.

¹⁸⁶ For the text, see, YILC, [1958], vol. II, Doc. A/CN.4/113, p. 12; and Official Document, *Report of the International Law Commission*, (1959), 53, AJIL, pp. 230, 239.

¹⁸⁷ UNY, [1958/60], vol. VII, p. 147.

¹⁸⁸ M.C.M. Pinto, *Prospects*, *op cit*, p. 80.

¹⁸⁹ Judge S.M. Schwebel, *The Prospects for International Arbitration: Inter-State Disputes*, in A.H.A. Soons (ed.), *op cit*, pp. 101, 104.

¹⁹⁰ *Ibid*, p. 106.

¹⁹¹ *Codification*, *op cit*, p. 218.

¹⁹² See also the comments of Judge Charles de Visscher, *op cit*, pp. 469-470; and J.H. Verzijl, *op cit*, p. 252.

¹⁹³ See in general, *supra* 1 of Chapter Two regarding the momentum of arbitral practice.

¹⁹⁴ See, *supra* pp. 16ff.

¹⁹⁵ In particular the former Soviet Union. See in general 3.1 of Chapter Two regarding the Soviet attitude towards inter-State arbitration and adjudication.

¹⁹⁶ The ILC's Rules have been relied upon in the *Aramco* case, 27, ILR, p. 117; and the *Liamco* case, 62, ILR, p. 140.

¹⁹⁷ See in general *supra* 1 of Chapter Two.

CHAPTER SIX:

General Conclusion

The aim of this thesis put forward in the introduction was to demonstrate the pattern of the rise and fall of inter-State arbitration as a means of international dispute settlement through the reflection of the legal doctrine over the past 100 years. During the process, several key issues were examined. The disinclination to arbitral practice during the past century can be looked at from two different angles. The first is regarding States' disinclination to resort to arbitral tribunals, a turning point which started following WW1, especially with the establishment of the PCIJ which is now succeeded by the current ICJ. Although it was far beyond the limited scope of this thesis to provide a detailed examination and analysis of the causes why the vast majority of States of the international community have declined to resort to arbitral tribunals for the settlement of their disputes, an enormous task which indeed would require sociological and psychological analysis of the international relations framework within the past over 100 years and the position of each individual State towards arbitration respectively, a number of factors which may induce a State not to resort to arbitration were examined. These were: the importance of the dispute; the effects of previous negative experiences with arbitration; the avoidance of the reaction of internal political factions within the State or government; and the nature of dispute settlement by legal means in general. What can be deduced from our discussion is that any State which may have been under the influence of any of those factors in the past may give way to arbitration if the interests of that State so requires. Therefore, it cannot be said that any of those factors

constitutes a constant obstacle that deters States from arbitration, but their impact rather, is dependent on the circumstances of each individual State. In this regard, one cannot overlook the issue regarding the justiciability or otherwise of international disputes and State practice therein.

The second angle is concerned with the disinclination for the practice of the general international arbitral treaty. In this regard it appears that none of the mechanisms examined in Chapter Five have succeeded in gaining general State acceptance or received universal application¹. Moreover, it also appears that no serious efforts for the establishment of a general inter-State arbitral mechanism, of the like of those examined in Chapter Five, were ever made following the failure of the ILC's Draft Convention. Even the plans which aimed at revising the 1899 and 1907 HCsPSID were turned down in 1994 by the broadly based Steering Committee set up by the International Bureau of the PCA for the purpose of preparing the Centenary of the PCA as part of the UN's programme under the 'Decade of International Law (1989-1999)'². The Committee decided that a revision of The Hague Conventions which were 'structurally sound', in the members' view, was not necessary at the time³. A large number of States are already members of the Statute of the ICJ and are bound by a number of regional agreements and treaties containing various methods for the peaceful settlement of international disputes⁴, irrespective whether those States have made full use of those instruments in actual practice⁵.

The issue regarding general arbitral treaty practice in the past century may also itself be looked at from two different angles. The first is concerning the periods in which most of those mechanisms (in particular those established in the post WW1 period) were found. When recalling the findings of our discussion on the momentum of arbitral practice (tribunal activity⁶) in particular in the era following the establishment of the PCIJ, right through until 1958, it appears that the *actual practice* of submitting inter-State disputes

to arbitration did not seem to indicate that States were willing to welcome a multilateral instrument concerned with the settlement *in general of all forms of inter-State disputes whatsoever* by arbitration, either alone or in conjunction with other means, and still less so, within the context of a compulsory framework. Something indeed seemed to be wrong regarding the strategy that was followed in that respect, which seemed like an attempt to sell to many States something they did not actually want to buy. This is best illustrated by the ill fate of ILC's Draft Convention which was considered as the high watermark in inter-State arbitral treaty craftsmanship according to a number of leading international jurists.

The compulsory framework adopted by those mechanisms mentioned above brings us to the second angle from which the issue of arbitral treaty practice in the 20th century may be looked at, namely, the compulsory nature of those mechanisms. States were and still are concerned, to a large extent, with the element of freedom of action they enjoy when a dispute arises outside of any binding multilateral framework. This may be clearly deduced from our discussion on the dichotomy between justiciable and non-justiciable disputes. In other words, States' main concern is their freedom to determine what action should be taken in accordance with the circumstances of the present time and situation, rather than the terms of a treaty commitment made, perhaps, years before the occurrence of the dispute. Even if they agree to adhere to a certain mechanism, many States will still want to exclude issues that they may feel as not-suitable for submission to those mechanisms. However, having in mind that such issues are sometimes as volatile as the political mentality which determines them when the actual need arises, no precise clear-cut specification of those issues within the context of a multilateral treaty has ever been brought to light, but only general, broad and far reaching phrases. This may be ascribed to the multiplicity of States that adhered to those mechanisms, each having its own specification of what should be excluded, and the difficulty in embodying all those

proposals into one instrument (hence the relative success of the Optional Clause in addressing the concerns of each individual State, albeit at the expense of a real general compulsory jurisdiction). It seems that the scope of those general arbitral instruments was too broad. There was no central focus on a certain topic, and each mechanism covered a wide spectrum of issues of a public international law character (e.g. international boundary delimitation, State responsibility, treaty interpretation etc...) all of which may become non-justiciable in certain circumstances, when the application of the machinery is called for. Therefore, States did not know what should be excluded and what should not. Although some may argue that this is also the case under the ICJ, the difference between the two systems seems to be that, while all members of the UN are according to Art. 93(1) of the UN Charter *ipso facto* parties to the Statute of the ICJ, in other words, they may resort to the Court on a consensual (voluntary) basis, States under the ICJ's system are not *obliged* to adhere to the compulsory aspect of the Court's system (the Optional Clause) as a condition to their becoming members to the Court. In contrast, in the 1924 Geneva Protocol, the 1928 and 1949 General Acts, and the ILC's proposed Draft Convention, the whole deal came in one package; a State either adhered to the system and became *ipso facto* subject to its compulsory framework, or remained outside it. This seems difficult to accept, especially when recognising the broad and generally undefined sphere of application of those instruments. With the failure of the past general inter-State arbitral mechanisms examined in Chapter Five, one may ask whether the adoption of a new *general* arbitral mechanism in the near future appears possible. And if one is adopted, will the level of utilisation be as desired? The answer to those questions simply appears to be in the negative.

This, however, does not imply that such a mechanism is not needed. Nor does it mean that *arbitration* as a *means* for the settlement of disputes is currently undesired or neglected. Indeed, arbitration is central to the dispute settlement mechanism of a

number of very important current-day international instruments, such as, the WTO and UNCLOS. This also comes hand in hand with the already long-established tradition of the compromissory clause attached to the provisions of numerous international treaties and agreements, which has replaced the now abandoned practice of bilateral or multilateral treaties of arbitration. However, arbitration within those instruments did not form the central topic, but rather came as an integral part. It was a means of settlement of matters that were already well defined and known to the parties who had negotiated them in full during the process of formulating the agreement or treaty, rather than the settlement of something unspecified and undefined (or even unexpected) which may arise in the future, as in the case of the general inter-State arbitral mechanisms examined in Chapter Five, which were intended to settle almost everything, at any time and any place.

Arbitration is a flexible and reliable means of dispute settlement that can be adjusted in accordance with the living circumstances and varying needs for the settlement of the new set of complicated and technical disputes of today. This statement may be supported by the success and popularity of specialised arbitration which is rapidly expanding; the examples mentioned above may suffice in this respect. Arbitration is not only capable of addressing a new set of disputes which have emerged but also of addressing the needs of a new set of States which have emerged with the end of colonialism and the proliferation of the members of the international legal community during the 20th century, and the various diversities that have emerged as a result. As already examined in this thesis, many of those States held certain reservations with regard to the western origins of international law which is usually applied by arbitral tribunals. However, in the current state of affairs, the ICJ is witnessing a considerable boost in its popularity among many Afro-Asian States, who used to look at the Court with suspicion in the past. Indeed the instability in inter-State relations has induced a

number of States in those regions to seek the services of the Court. This may indicate that many of those States have now started to overcome their past fears and hesitations towards legal means of dispute settlement which apply international law. However, arbitration clearly lags far behind international adjudication in this respect.

Arbitration is no less inferior to international adjudication under the ICJ when it comes attaining a final and binding settlement by the parties. It might appear, on the surface, that arbitration is a more flexible and sufficient alternative in view of the parties' control over the tribunal's constitution, the rules of procedure of the tribunal and, most of all, the law(s) applied by the tribunal, all of which may be tailored in accordance with the varying circumstances, as well as the varying cultural or ideological or religious backgrounds and systems of the parties, a privilege not available when resorting to the ICJ. Nevertheless, to be fair, these advantages can in certain circumstances amount to a disadvantage. It appears difficult (but not impossible) for States whose relations have long been strained as a result of political, ideological or religious rivalry, or who have been involved in constant interference in each other's domestic affairs, or even direct military engagement, simply to leave all of that aside and sit and negotiate all the above details of the arbitral process in a trustful and co-operative atmosphere, not to mention the time consumed during such efforts. This preferably would require the outside supervisory or mediatory assistance of a third party, such as that given by France in the case of the *Hanish Island* arbitration between Yemen and Eritrea. On the other hand, the ICJ is an already constituted Court composed of a number of salaried judges who have nothing other to do than adjudicate disputes that are submitted to the Court. It is an *institution* that is clearly visible, one that is ready and open to any State(s) which may seek its services at any time. In comparison *ad hoc* arbitration is more like a mirage that needs to be chased, a shadow without a body in which the disputants must negotiate the details of the process fully before any settlement can take place, and even worse, are to

share the expenses of the tribunal, which are usually equally divided between the disputants and may in the end result in a very heavy bill.

However, if the field of *ad hoc* inter-State arbitration were supervised and contained by an international legal institution or body, would the situation change? The nearest candidate (in fact it appears to be the only one) for such a role would be the PCA. However, it appears that the PCA itself suffers from the same problem as *ad hoc* arbitration, namely, the lack of a backing body. This shortcoming of the PCA was relied upon by Robert Badinter, the originator of the proposal for the (unutilised to date) Court of Arbitration and Conciliation established under the 1992 Convention on Conciliation and Arbitration of the OSCE, for discharging the PCA in his initial proposal⁷. This issue within the present context raises a fundamental question, namely, could the organisational backup that the ICJ enjoys as the 'major judicial organ of the UN' be a factor behind States' preference for the ICJ rather than the un-backed and organisationally independent PCA? Indeed, unlike the PCA which was solely mentioned for its role in nomination of the Judges of the ICJ in the Court's Statute⁸, the attachment of the ICJ to the UN system and Charter⁹ appears to have played a constant promotional role in favour of the ICJ. The 'lack of awareness of the PCA's facilities' was among the factors behind the lack of recourse to the PCA indicated by the work group assigned by the International Bureau of the PCA in 1991 for the purpose of exploring what measures can be taken in order to improve the functioning of the PCA¹⁰. The group proposed a number of recommendations that it viewed as capable of improving awareness of the Court. The first was *obtaining the endorsement of the UN*. Others included, *inter alia*, the publication of a brochure containing descriptions of the facilities and services provided by the PCA; seminars and lectures on the potential role of the PCA; encouragement of members of the PCA and academic and other lawyers to write journal articles on the PCA and the other dispute settlement mechanisms available

under the 1899 and 1907 HCsPSID; and a circular note to States Parties to the 1899 and 1907 Conventions encouraging them to refer to the PCA by means of compromissory clauses attached to the provisions of bilateral and multilateral treaties and agreements concluded¹¹. However, despite the importance of the group's recommendations and noticeable increase in State accession to The Hague machinery, more than ten years since the publication of those recommendations, it appears that the level of utilisation of the Court's inter-State dispute settlement mechanism still remains the same. This continued low level of recourse to the court comes hand in hand with the almost total abandonment of the practice of *ad hoc* inter-State arbitration for decades now.

As already examined in this thesis, even the States parties to the PCA preferred to have recourse to other means of settlement instead of it, and the major preoccupation of the national groups assigned to the Court is their participation in the nomination of Judges of the ICJ¹². Moreover, the PCA was even looked at by some of its founders (more than a hundred years ago) as not being a real court or tribunal *stricto sensu* but "...a clerk's office with a list..."¹³, an accusation that may raise the question of the ability of such an institution to compete today against a far more organised and better supported contemporary ICJ. Although some may view the almost total abandonment of the PCA's arbitral mechanism following the establishment of the PCIJ as proof that this mechanism is ineffective or unreliable, however, it must not be forgotten that the same mechanism was able to resolve tens of disputes effectively prior to the establishment of the PCIJ. Moreover, the 'list of arbitrators' formula appears in the dispute settlement provisions of recent and successful major international instruments, for example. UNCLOS. Leaving aside the 'real court or otherwise' arguments, it appears that the PCA with its 'list of arbitrators' formula is not as bad as some of its critics may think it is; it is just a question of choice.

It must not be forgotten that the PCA was responsible for the majority of arbitral settlements that took place in the period following its establishment. However, that record changed dramatically following the establishment of the PCIJ, succeeded now by the ICJ. The same also may be said about *ad hoc* arbitration, since such practice occurred mainly under the auspices of the PCA following its establishment. This may underline an interchangeable relationship between the two. Therefore, it would appear that any surge in the level of utilisation of the PCA's inter-State arbitral machinery would be reflected positively in the area of *ad hoc general* inter-State arbitration and *vice versa*. But when it comes to adopting a possible strategy for improving the level of utilisation in both areas, which of the two should be started with? The more logical option would indeed be the PCA, an actual structure. However, any efforts in that respect bring us back to the two points raised earlier, namely, the Court's lacking of organisational back up, and the need for UN endorsement. When looking at what has been offered by the UN so far as support to the PCA, it appears that the PCA was granted observer status by the General Assembly of the UN in Res. 48/3 of October 13, 1993, who also in Res. 54/28 of January 21, 2000, congratulated the PCA on its 100th anniversary and commended it for its role in the international system of peaceful resolution of disputes and invited States "...to consider making full use of the facilities of the Court and support its work"¹⁴. However, the UN should link the PCA more strongly to its dispute settlement system, in particular Art. 33. Such a step requires the launch of a major international campaign led by the Secretary-General of the PCA among the States Parties and also non-parties to the 1899 and 1907 Hague Conventions in order to rally support for this aim. He can rely on the valuable suggestions once made by Mr. P.J. Jonkman¹⁵, former Secretary-General of the Court, who indicated that the strength of the PCA settlement system lies in the fact that it can be a valuable complement to judicial settlement by the ICJ. He further pointed to certain categories of

disputes that were more suitable to be submitted to the PCA, such as disputes that are composed of complex political elements; disputes comprised of a considerable number of claims (mass claims); and disputes essentially involving questions of a highly technical nature. The General Assembly of the UN should draw the attention of its members to the capability of the PCA in resolving such disputes in a separate resolution(s), and should also include the PCA in any resolution concerning the peaceful settlement of international disputes next to the ICJ in the future¹⁶. Moreover, the General Assembly under Art. 14 of the UN Charter and the Security Council under Arts. 36(1) and 37, when recommending means for the peaceful settlement of international disputes, should also mention to the disputants the availability of the PCA, especially if the dispute in question concerns any of the categories above.

However, before any efforts in this regard, the PCA must not forget that it has some serious cleaning up to do, and any step towards creating stronger links with the UN system should be preceded first of all with some radical measures. When looking at how things currently stand, it appears that the qualifications of the persons nominated by some States as arbitrators under Arts. 23 and 44 of the 1899 and 1907 HCsPSID respectively should be strictly reviewed. Such persons currently include¹⁷ ministers of foreign affairs; heads of international organisations; senior diplomatic representatives; and chief justices. Such people are not likely always to be able to act as arbitrators in accordance with the aforementioned articles when they are needed, due to the responsibilities they hold under their respective positions. Moreover, an institution concerned with conducting and sponsoring research and studies regarding the settlement of disputes in general (not just the facilities, services provided by and reputation of the PCA) should also be attached to the Court's structure. Indeed, such an institution would be capable of generating awareness of the Court's potential and could play a strong promotional role for the Court, capable of giving a positive impression of the level of

expertise and experience the Court has in the field. The Court's success in the settlement of the categories of disputes indicated above may further encourage States non-parties to the Court to have recourse to it for the settlement of other categories of disputes. This may assist in removing any pressure on the ICJ's workload and may indirectly restore States' confidence in *ad hoc* arbitration outside the Court's framework. However, the adoption of an up-to-date version of the 1907 Hague Convention, that should encapsulate the experience gained by the international community in the years since its adoption with regard to dispute settlement mechanisms and meet with current international tribunal standards, should also be reconsidered in the future. Such a step will not only increase awareness of the *newly refurbished* court and restore the confidence of its members after a long period of inactivity, but may also give many Third World or new States this time a chance to participate in such efforts. It should not be forgotten that it is those States which have most problems and may form the main clients of the Court in the future. Therefore, they should be given a say during the process of revitalising the Court. This will also assist in removing any apprehension that some of those States may have regarding what they may view as the *western origination* or *pro-colonialism* nature of the Court.

Notes to Chapter Six:

¹ Although some may point out the gradual increase in State accessions to the 1907 HCPSID as proof of its success, nevertheless, the criterion used in this respect for determining the success or otherwise of the instruments under consideration is the level of State application, not accession. This in the case of the 1907 Convention, appears almost nil. With regard to the 1928 and 1949 General Acts, the practice of the ICJ does not seem to provide a definitive answer as to their status. However, again when reviewing their success in the light of State application and the rare occasions on which jurisdiction of the ICJ has been sought via. both General Acts, one will reach the same conclusion as in the case of the Hague Conventions.

² UN General Assembly Res. 44/23 of November 17, 1989.

³ See P.J.H. Jonkman, *Update and Recent Developments*, in International Bureau of the PCA (ed.), *International Alternative Dispute Resolution: Past, Present and Future: The Permanent Court of Arbitration Centennial Papers*, The Hague, Kluwer Law International Law, 2000, pp. 121, 122, and 124.

⁴ E.g. the Inter-American Committee on Peaceful Settlement; the 1957 ECPSD; the 1975 Final Act of the Helsinki Conference on Security and Co-operation in Europe; and the Principles adopted under the 1991 Valletta Report of the Meeting of Experts on Peaceful Settlement of Disputes of the OSCE, later modified at Stockholm 1992.

⁵ In this respect, one must not forget the obsolescence of the 1964 Commission of Mediation, Conciliation and Arbitration adopted by the (former) OAU; and the 1945 Pact of the League of Arab States, as well as the failure of the 1948 Pact of Bogota. Even the Court of Arbitration and Conciliation established under the 1992 Convention on Conciliation and Arbitration of the OSCE has not been seized with a single case until now.

⁶ *Supra* 1.1 of Chapter Two.

⁷ S. Muller & W. Mijs (eds.), *The Flame Rekindled*, *op cit*, pp. 8-9.

⁸ In particular Arts. 4-6.

⁹ Chapters XIV and VI.

¹⁰ *The PCA: New Directions*, *op cit*, pp. 9-10.

¹¹ *Ibid*, pp. 11-13.

¹² See, PCA, *New Directions*, *op cit*, p. 10.

¹³ Mr. Tobias Asser, the Dutch delegate to the 1899 Hague Peace Conference. Quoted from, J.B. Scott, *HCR*, *op cit*, 1916, p. xviii.

¹⁴ Para. 11. The ICJ was also mentioned in para. 16 of the Resolution which states that "...States have the obligation to solve their disputes by peaceful means, including resort to the International Court of Justice".

¹⁵ *Introduction by the Secretary-General of the Permanent Court of Arbitration*, in S. Muller & W. Mijs (eds.), *op cit*, pp. 1, 3.

¹⁶ Such as the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States (Res. 2625(XXV) adopted on October 24, 1970); the 1982 Manila Declaration on the Peaceful Settlement of International Disputes (Res. 37/10 adopted on November 15, 1982).

¹⁷ For the current panel of arbitrators of the PCA including qualifications and positions see, the official web-site of the PCA [<http://www.pca-cpa.org>] under 'PCA Members (Panel of Arbitrators)' as accessed on 10/01/2002.

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