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A. Definition, Nature, and Historical Development of Arbitration

1. Definition

1 Along with → *negotiation*, → *mediation*, inquiry (→ *Fact-Finding*), → *conciliation*, and judicial settlement (→ *Judicial Settlement of International Disputes*), Art. 33 UN Charter identifies arbitration as a means for the pacific settlement of inter-State disputes (→ *Peaceful Settlement of International Disputes*). More specifically, arbitration represents a consensual procedure for the final settlement of disputes between States on the basis of law by adjudicators of their own choosing. By focusing on the elements of this definition, one may illuminate the nature of arbitration and distinguish it from the other techniques for the peaceful settlement of disputes listed in Art. 33 UN Charter.

2. Nature

2 Observers commonly divide the pacific resolution of disputes into two categories: diplomatic and legal processes. States resolve the vast majority of their differences through diplomatic means, characterized broadly as co-operative processes in which the disputing parties have no obligation to execute proposals for settlement but may accept or reject them in the exercise of political discretion. Negotiation and mediation clearly fall into this category. Although not everyone might agree, one can also describe inquiry into factual situations and conciliation of legal differences as diplomatic means of dispute settlement. While inquiry and conciliation both contemplate the establishment of commissions that conduct formal proceedings, receive evidence, hear arguments, and produce reasoned opinions on the facts (in the case of inquiry) as well as the law (in the case of conciliation), such commissions present their conclusions in the form of 'reports' which the disputing parties may accept, reject, or modify as they see fit (see also → *Mixed Commissions*). Thus, because inquiry and conciliation necessarily represent the preface to further rounds of negotiation and political decision-making, they logically fall within the ambit of diplomatic means for the settlement of disputes.

3 Despite the predominance of diplomatic settlement in international relations, States occasionally prefer a legal settlement of disputes, meaning one in which the disputing parties submit their differences to a third party who renders a binding decision based exclusively on the application of legal principles. Arbitration and judicial settlement fall into this category. The exclusive application of legal principles distinguishes these processes from negotiation, mediation, and inquiry. The obligation to implement the award or judgment also distinguishes arbitration and judicial settlement from conciliation. Given the exclusion of political considerations and the obligation to implement a third party's decision, States typically → *consent* to legal settlement only of disputes having secondary importance in which political compromise seems unduly awkward, costly, or time-consuming.

4 Arbitration and judicial settlement resemble one another in the sense that both involve the pacific settlement of disputes through the application of legal principles by third parties empowered to render binding decisions. Formally, the chief difference between arbitration and judicial settlement lies in the character of the tribunals to which the parties submit their disputes. In arbitration, the parties appear before ad hoc tribunals created to resolve a single dispute or a class of related disputes, staffed by arbitrators selected by (or with the participation of) the disputing parties (→ *International Courts and Tribunals, Judges and Arbitrators*). By contrast, in judicial settlement, the parties appear before permanent tribunals created by multilateral → *treaties*, associated with international organizations, and staffed by full-time judges elected by all States Parties to those multilateral treaties. Examples of such permanent tribunals include the → *International Court of Justice (ICJ)*, the

→ *International Tribunal for the Law of the Sea (ITLOS)*, the European Court of Justice (→ *European Communities, Court of Justice [ECJ] and Court of First Instance [CFI]*), the → *European Court of Human Rights (ECtHR)*, the → *Inter-American Court of Human Rights (IACtHR)*, and the Appellate Body of the → *World Trade Organization (WTO)* (→ *World Trade Organization, Dispute Settlement*).

5 Considering the differences between arbitration and judicial settlement largely to involve matters of form, some observers discourage efforts to draw a sharp distinction between the two processes. Yet, the distinction drawn by the UN Charter remains fundamental and concerns the range of interests brought to bear, directly or indirectly, on the dispute settlement process. For example, one may characterize arbitration as a three-party process involving only the two disputing parties and the tribunal. Thus, the two disputing parties appoint arbitrators who inspire their confidence based on characteristics—such as expertise and reputation—relevant to the dispute, define their mandate, and designate the procedural and substantive rules to govern the arbitral proceedings (→ *International Courts and Tribunals, Procedure*). Generally speaking, other States play no role in selecting the tribunal, have no right to intervene in the proceedings—save where exceptionally permitted in cases involving the interpretation of multilateral treaties, for example, under Art. 56 1899 Hague Convention for the Pacific Settlement of International Disputes ('1899 Hague Convention I'), Art. 84 1907 Hague Convention for the Pacific Settlement of International Disputes ('1907 Hague Convention I'), and Art. 1128 → *North American Free Trade Agreement (1992)*—and have no right to attend the proceedings which take place in camera. As ad hoc tribunals with no continuing existence, no institutional affiliation, and no capacity to affect the legal interests of third States, arbitral tribunals may see the disputing parties as their sole audience and the resolution of the dispute as their sole task.

6 By contrast, in judicial settlement, parties appear before permanent courts, staffed by full-time judges selected through periodic elections conducted by all States Parties to the relevant treaties. For example, in simultaneous elections, the United Nations Security Council and the United Nations General Assembly ('UNGA') select the 15 judges who make up the bench of the ICJ → *United Nations, Security Council*; → *United Nations, General Assembly*. Subject to the possibility of designating a judge ad hoc or requesting the formation of a chamber with a specific composition (→ *International Courts and Tribunals, Chambers*), disputing parties before the ICJ have little capacity to influence the Court's membership or the procedural rules that govern its proceedings (→ *International Court of Justice, Rules and Practice Directions*). Also, unlike the position in most arbitrations, other States may enjoy the right under Arts 62 and 63 Statute of the ICJ ('ICJ Statute') to intervene in proceedings before that court (→ *International Courts and Tribunals, Intervention in Proceedings*). In addition, the ICJ conducts public hearings and makes written pleadings available to the public before the conclusion of the proceedings. Furthermore, as a permanent tribunal and the principal judicial organ of the → *United Nations (UN)*, the ICJ may consider that it has the capacity and the duty to create a body of jurisprudence that will serve the long-term interests of all Member States. Under these circumstances, disputing parties should well understand that they will not constitute the ICJ's sole audience. Nor will resolution of their dispute constitute the ICJ's sole task.

7 In short, as a form of pacific settlement of disputes among States, arbitration encompasses the resolution of differences on the basis of law by ad hoc tribunals chosen by the disputing parties. It differs from negotiation, mediation, inquiry, and conciliation in that arbitration contemplates exclusive recourse to legal principles and an undertaking to implement the resulting decision. It differs from judicial settlement in that arbitration limits the extent to which the interests of third States may, directly or indirectly, influence the

tribunal's constitution, the designation of its mandate, the conduct of its proceedings, and the tribunal's development or application of legal principles.

8 As implied by the foregoing definition of arbitration, this entry discusses arbitration between or among States under international law (ie inter-State arbitration), not between or among private entities under municipal law (→ *Commercial Arbitration, International*). Where appropriate to understand the development of inter-State arbitration, this entry will, however, address arbitration between States and corporations or individuals (ie 'mixed arbitration').

3. Historical Development

9 As defined above, arbitration presupposes the existence of independent States enjoying juridical equality, recognizing a uniform body of law as the basis for decision, and willing to implement the awards of tribunals. Until these conditions obtained, the contemporary system of arbitration could not take hold. Although some publicists refer to 'arbitration' in ancient Greece and in Europe during the Middle Ages, inter-State arbitration did not appear in modern form until the final years of the 18th century.

(a) The Antecedents of Modern Arbitration

10 While noting that city-States in ancient Greece submitted disputes to third parties for binding decisions, observers hasten to distinguish such examples from the contemporary practice of arbitration on at least four grounds. First, such examples of third-party dispute settlement occurred infrequently and, therefore, never developed the regularity or systemic nature that characterizes modern arbitration. Second, they involved relatively small political communities easily distinguished from the modern conception of nation-States. Third, the tribunals cast themselves in the role of something akin to the modern understanding of *amiable compositeur*, one who seeks to compose an acceptable solution instead of engaging the legal merits of the dispute. In other words, the tribunals saw their first task as promoting order, not justice. Fourth, the structure of 'tribunals' could differ vastly from that contemplated in modern arbitration. For example, while three- and five-member tribunals were common in ancient Greece, one also finds references to tribunals having 151, 301, or even 600 members.

11 Observers also mention the practice of certain European polities during the Middle Ages of submitting their disputes to 'arbitration' by the Pope (→ *Holy See*), the Holy Roman Emperor (→ *Holy Roman Empire [800–1806]*), or other sovereigns (→ *Heads of Governments and Other Senior Officials*; → *Heads of State*). Like their Greek counterparts, one may distinguish these examples from contemporary arbitration on the ground that the disputes generally involved relatively small political communities. In addition, the arbitrators did not render their decisions on the basis of international law. When the Pope and the Holy Roman Emperor began to adjudicate disputes, the modern concepts of international law had yet to take root. Also, given their involvement in political intrigues at the time, they arguably lacked the objectivity that inheres in the exercise of a judicial function. Furthermore, unwilling to expose the sufficiency of their analysis to outside critique, the Pope, the Holy Roman Emperor, and other sovereign arbitrators provided no reasons for their decisions, reinforcing the absence of a legal basis for their awards. Thus, many writers either describe 'arbitrators' of this period as *amiabiles compositeurs* or emphasize the difficulty of drawing clear distinctions between 'arbitration' of this period and mediation conducted by exceedingly powerful mediators. Whatever the proper designation of this antecedent to modern arbitration, the decline of the papacy's influence, the rise of absolute monarchies,

and a greater taste for resolving disputes through force made it decreasingly popular and effective by the 15th century. By the 16th century, it had fallen into disuse.

(b) Contemporary Arbitration

12 Most accounts describe the evolution of contemporary arbitration by reference to four events, each of which marked the crystallization of certain features that have come to characterize the modern practice of arbitration: *a)* the Treaty of Amity, Commerce and Navigation between Great Britain and the United States (→ *Jay Treaty [1794]*), *b)* the *Alabama* arbitration of 1872 (→ *Alabama Arbitration*), *c)* the → *Hague Peace Conferences (1899 and 1907)*, and *d)* the establishment of the → *Permanent Court of International Justice (PCIJ)* and the ICJ after World Wars I and II, respectively. To this list, one may add a fifth phenomenon: the rise of mixed arbitration; in other words, arbitration between States and → *non-State actors* drawing in varying degrees on institutions and practices developed in inter-State arbitration.

(i) The Jay Treaty

13 Virtually all writers trace the history of modern arbitration to the Jay Treaty concluded between Great Britain and the United States ('US') to settle a number of differences left outstanding after the War of Independence (→ *Wars of National Liberation*). Among other things, the Jay Treaty established three arbitral commissions (→ *Mixed Arbitral Commissions*; → *Mixed Claims Commissions*) comprised only of US citizens and British subjects, each to decide a class of issues not resolved by the negotiations leading up to the treaty.

14 The first arbitral commission established under Art. V Jay Treaty consisted of two party-appointed members and a third member to be appointed by agreement of the other two or, failing their agreement, to be chosen by lot. The mandate of this commission involved the resolution of a classic inter-State dispute: establishment of the exact location of the US' north-east boundary with Canada (→ *American-Canadian Ocean Boundary Disputes and Co-operation*). In performing its task, this commission had the fortune to reach a unanimous decision.

15 The second arbitral commission established under Art. VI Jay Treaty consisted of four party-appointed members and a fifth member to be appointed by agreement of the other four or, failing their agreement, to be chosen by lot. The mandate of this commission involved the resolution of claims by British merchants for → *debts* incurred by US citizens before conclusion of the peace in 1783 and still outstanding at the time of the Jay Treaty. Although this commission rendered some decisions, its work generated so many conflicts among its members that they suspended proceedings in 1799. Three years later, the US and Great Britain settled by treaty the issue of → *compensation* for British creditors.

16 The third arbitral commission established under Art. VII Jay Treaty also consisted of four party-appointed members and a fifth member to be appointed by agreement of the other four or, failing their agreement, to be chosen by lot. The mandate of this commission involved the settlement of complaints by US citizens relating to irregular seizures of vessels and cargo under the colour or authority of the British government. During the course of eight years, this commission rendered over 530 awards in favour of US claimants who received over US\$11 million in compensation (→ *Claims, International*).

17 Observers commonly credit the Jay Treaty with at least four contributions to the development of modern arbitration. Systemically, it provided a new impetus for arbitration, which had fallen into disuse for over a century. Structurally, it afforded the first prominent example of arbitration by a collegial tribunal issuing reasoned awards based on law. Substantively, it set a precedent not only for using arbitration to resolve classic inter-State

(eg territorial or boundary) disputes but also to resolve claims for injuries to → *aliens* under the law of → *State responsibility*. During the next two centuries, States would establish by treaty more than 65 claims commissions to decide classes of their nationals' outstanding complaints for injuries, usually incurred in the context of armed conflict or civil disturbance (→ *Compensation for Personal Damages Suffered during World War II*; → *Conciliation Commissions Established pursuant to Art. 83 Peace Treaty with Italy [1947]*; → *Property Commissions Established pursuant to Art. 15 Peace Treaty with Japan [1951]*). Procedurally, the Jay Treaty established the competence of tribunals to rule on their own jurisdiction (see also → *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*; → *Preliminary Objections*).

18 Although representing a clear step forward in the development of modern arbitration, there are two limitations associated with recourse to collegial tribunals under the Jay Treaty. First, because they consisted exclusively of the disputing parties' nationals, the tribunals to some extent saw their task as the extension of → *diplomacy*. Thus, although they rendered awards founded on legal principles, such tribunals worked best when their members found it possible to blend the functions of judges and negotiators as well as the demands of justice and the expediency of diplomacy. Second, although the Jay Treaty marked the commencement of a shift towards recourse to collegial tribunals, the institution of sovereign arbitration persisted throughout the 19th century despite periodic complaints that sovereign arbitrators rendered unmotivated awards, delegated their mandates to inferior and possibly unaccountable officials, and considered national policies a factor in shaping their decisions.

(ii) The Alabama Claims Arbitration

19 In addition to describing the *Alabama Claims* arbitration as the event marking a second stage in the development of modern arbitration, many writers consider it to be the most notable arbitration in history. Commenced under the Treaty of Washington of 18 May 1871, the *Alabama Claims* arbitration involved the US' complaint that Great Britain violated the laws of neutrality during the → *American Civil War (1861–65)* by permitting the construction and supply of Confederate → *warships* in British → *ports* (→ *Neutrality, Concept and General Rules*).

20 After initially rejecting the US' request for arbitration on the grounds of national honour, Great Britain later consented, even agreeing to apply principles of neutrality that favoured the US' position which had not yet achieved universal acceptance as principles of → *customary international law*.

21 Like two of its counterparts under the Jay Treaty, the *Alabama Claims* tribunal consisted of five members. Unlike its counterparts under the Jay Treaty, however, the *Alabama Claims* tribunal had only two party-appointed members: one US citizen and one British subject. The President of the Swiss Confederation, the King of Italy, and the Emperor of Brazil each appointed one of the tribunal's three remaining members. Thus constituted, the tribunal rendered an award against Great Britain for direct injury to US commerce in the amount of US\$15.5 million.

22 Like its counterparts under the Jay Treaty, writers commonly credit the *Alabama Claims* tribunal with many contributions to the development of modern arbitration. Systemically, if the Jay Treaty breathed life into arbitration, the *Alabama Claims* infused it with new vigour even for claims relating to matters of national honour. Thus, after the *Alabama Claims*, States had recourse to arbitration of nearly 100 disputes before the end of the 19th century. Furthermore, whereas States had previously consented to arbitration only of existing disputes, they began the regular practice of agreeing in bilateral and multilateral treaties to submit future disputes to arbitration (→ *Arbitration and Conciliation Treaties*). Structurally,

the *Alabama Claims* arbitration supplied the first prominent example of recourse to a collegial tribunal in which party-appointed arbitrators having the → *nationality* of the disputing parties constituted a minority of the tribunal. By enhancing the tribunal's independence and minimizing the role of party-appointed arbitrators, the parties reinforced the judicial character of arbitration. Procedurally, the *Alabama Claims* arbitration established the right of disputing States to subject the merits of their disputes to rules not firmly accepted as international law; it also established the right of arbitrators to state separate or dissenting opinions.

23 Although marking another clear step forward in the development of modern arbitration, there are two limitations associated with the enhanced independence of collegial tribunals during and after the *Alabama Claims* arbitration. First, while suggesting a preference for increased independence of the tribunal as a whole, the *Alabama Claims* arbitration did little to establish the independent character of party-appointed arbitrators. During those proceedings, the British party-appointed arbitrator suggested that he considered his task to include an element of advocacy, an assessment implicitly corroborated by the seating arrangement selected by the non-party-appointed arbitrators who took three seats behind a long table and placed the party-appointed arbitrators in single chairs at each end. In fact, until the middle of the 20th century, little authority existed for the right of disputing parties to challenge party-appointed arbitrators for lack of independence or impartiality. Second, States did not abandon recourse to tribunals chiefly consisting of arbitrators appointed by and enjoying the nationality of the disputing parties. Nevertheless, one may take the *Alabama Claims* as marking a consolidation both of arbitration's popularity and of its reputation as an effective judicial process involving the adjudication of disputes by independent tribunals on the basis of law.

(iii) The Hague Peace Conferences of 1899 and 1907

24 Many writers describe the Hague Peace Conferences of 1899 and 1907 as events marking the third stage in the development of modern arbitration.

25 As the 19th century drew to a close, arbitration had become so popular, treaties provided so frequently for its use, and the desire to avoid armed conflict had grown so strong in certain quarters that the time seemed ripe for the establishment of a permanent institution to conduct, or at least to facilitate, inter-State arbitration. Under these circumstances, the delegates to the Hague Peace Conferences of 1899 and 1907 addressed not only the law of armed conflict but also the peaceful settlement of disputes, *inter alia*, through arbitration.

26 At the first Hague Peace Conference, the British delegate asserted the need for a permanent arbitral tribunal having the capacity swiftly to assume jurisdiction over requests for arbitration of inter-State disputes. Although a majority of the delegates favoured the proposal, a minority of States (led by Germany) opposed not only the concept of obligatory arbitration but also the creation of a permanent tribunal for the voluntary arbitration of inter-State disputes. In the end, the delegates agreed to a package of half-measures memorialized in the 1899 Hague Convention I, including a highly qualified endorsement of arbitration and establishment of the misleadingly-named → *Permanent Court of Arbitration* (PCA).

27 As noted by many observers, the PCA lacks permanency and does not constitute a court. Rather, it consists of a panel or list of potential arbitrators designated by States Parties, an International Bureau that provides registry and other support to ad hoc tribunals created under the convention as well as to ad hoc tribunals created outside its framework, and a Permanent Administrative Council or governing body made up of the States Parties' diplomatic representatives to The Hague, the seat of the PCA. In other words, the PCA

represents a device for establishing ad hoc tribunals and supporting the conduct of their proceedings.

28 In addition to establishing the PCA, the 1899 Hague Convention I also sets forth rules of procedure to govern arbitral proceedings absent a contrary agreement between the disputing parties. Though not directly applied for many years, disputing parties and tribunals still cite them as authority for procedural points in inter-State arbitration.

29 Although the 1907 Hague Convention I introduced some new provisions of a fairly technical character—relating, for example, to the signatures required on an award, the appointment of the presiding arbitrator failing agreement by the disputing parties, and requests for the interpretation of awards—it did not differ substantially from its predecessor (→ *Judgments of International Courts and Tribunals, Interpretation of*).

30 During the first two decades of its existence, the PCA represented the centre of gravity in arbitration, providing an institutional home for the majority of inter-State arbitrations during that time period. Thus, before the outbreak of World War I, States referred some 17 disputes to tribunals created under the auspices of the PCA.

31 Writers commonly credit the 1899 and 1907 Hague Conventions I with making important though not spectacular contributions to the development of modern arbitration. Systemically, though with limited success, they sought to broaden the role of arbitration and deepen its capacities. To broaden its role, they cast arbitration as a device for shifting international relations away from the power-based model of negotiation and armed conflict towards a more rule-based model founded on the objective application of universal principles. To deepen its capacities, the conventions sought to give arbitration a greater degree of institutional continuity. Procedurally, notwithstanding their optional status, the inclusion of detailed procedural rules tended to counterbalance the informality of earlier arbitrations and, thus, to reinforce the judicial character of the arbitral process.

32 Although marking another clear step forward in the development of modern arbitration, there are two limitations concerning the role of arbitration in the peaceful settlement of disputes under the 1899 and 1907 Hague Conventions I. First, despite the frequent resort to arbitration, States continued to reserve its use for matters of secondary importance. Second, the decisions of ad hoc tribunals, even within a common procedural framework, proved incapable of generating the continuity of substantive jurisprudence needed to support a coherent rules-based system of international relations. Yet, while the institutions established by the Hague conventions did not satisfy the most exaggerated hopes of their supporters, they helped to consolidate the emergence of arbitration as a genuine though modest system for resolving inter-State disputes by independent tribunals on the basis of law.

(iv) The Impact of the Permanent Court of International Justice and the International Court of Justice on Arbitration

33 The unprecedented destruction caused by World Wars I and II gave new impetus and urgency to calls for the peaceful settlement of disputes, the transition from a power-based to a rules-based system of international relations, and the establishment of intergovernmental organizations with the mandate to pursue such goals (→ *International Organizations or Institutions, General Aspects*; → *International Organizations or Institutions, History of*; → *Peace, Proposals for the Preservation of*). Furthermore, just as this constellation of circumstances formed a logical opportunity for the establishment of a permanent international tribunal, the military defeat of Germany removed a historic source of opposition to the concept. Thus, shortly after the → *League of Nations* came into existence, its Council sponsored the drafting of a statute for the PCIJ, which came into force in 1921. The PCIJ held its first sitting in 1922 and functioned continuously until World War

II forced the Court to suspend its work in 1940. Following World War II, the PCIJ's existence formally terminated and that of the ICJ began. Although a principal organ of the UN, and thus possessing a status that the PCIJ never enjoyed within the League of Nations, the ICJ remains in other respects an extension of the PCIJ, occupying the same facilities in The Hague, exercising powers under a virtually identical statute, receiving jurisdiction under instruments that referred to the PCIJ, and applying the former court's jurisprudence interchangeably with its own.

34 In one sense, the establishment of the PCIJ and the ICJ merely continued arbitration's trajectory from an ad hoc, quasi-diplomatic process informally conducted by quasi-advocates into a standardized legal process formally conducted by independent adjudicators. In another sense, establishment of the PCIJ and the ICJ constituted a radical step forward. As judicial institutions linked to global organizations with specific mandates, they acquired not only the task of resolving specific disputes but also of developing international law for the benefit of all Member States. Furthermore, as permanent institutions, the PCIJ and the ICJ also acquired the continuity needed for that task. Though perhaps the inevitable and desirable product of arbitration's evolution over the course of the 19th century, the advent of judicial settlement raised questions about the role, if not the continued existence, of arbitration as a legal process for the pacific settlement of disputes.

35 Following the PCIJ's establishment, the PCA's role as the centre of gravity in inter-State adjudication unquestionably waned. During the years of its existence, the PCIJ rendered over 30 judgments in contentious cases that came before it. Over the same time period, four arbitrations occurred under the PCA's auspices. In the five decades after World War II, recourse to arbitration within the PCA framework became even less frequent, not even achieving the rate of one case every ten years. While observers regularly drew a logical connection between the advent of judicial settlement and the PCA's seeming demise, the PCA has experienced a renaissance in recent years. Beginning in the mid-1990s, demand for the International Bureau's registry services increased dramatically. A decade later, its list of pending matters hovered at an average of 10 to 12 cases, marking the busiest period in the PCA's history. Although the new cases have included a number of traditional inter-State arbitrations involving disputes over → *boundaries*, territory, and injuries to aliens, a substantial minority have included commercial disputes between States and a variety of mixed arbitrations.

36 If the advent of judicial settlement seemed to threaten the PCA's continuing relevance—at least for a period of several decades—the same does not hold true for inter-State arbitration conducted outside the PCA framework. During the PCIJ's existence, States conducted some 50 arbitrations outside the PCA framework. Furthermore, although one prominent study finds a decline in the frequency of inter-State arbitration in the 45 years after World War II—178 arbitrations in the period from 1900 to 1945 as opposed to 43 arbitrations in the period from 1945 to 1990—others have noted the ICJ's similarly unimpressive usage during the corresponding time period amounting to roughly one or two contentious cases per year. Thus, while recourse to inter-State arbitration may have declined in absolute terms after World War II, it arguably held its own relative to judicial settlement and resolved a number of notable controversies, including: → *Monetary Gold Arbitration and Case*; *Diverted Cargoes Case (Greece v United Kingdom)*; → *Lac Lanoux Arbitration*; *Decision of the Arbitration Tribunal established pursuant to the Arbitration Agreement signed at Paris on January 22, 1963 between the United States of America and France*; *Advisory Opinion of Tribunal (Italy—US Air Transport Arbitration)* and the *Case concerning the Air Services Agreement of March 27, 1946 (United States v France)* (→ *Air Transport Disputes, Arbitrations on*); → *Gut Dam Claims*; *Award of Her Majesty Queen Elizabeth II, Pursuant to the Agreement for Arbitration of a Controversy between the Argentine Republic and the Republic of Chile concerning certain parts of the Boundary*

between their Territories, December 9, 1966; → Rann of Kutch Arbitration (Indo-Pakistan Western Boundary); → Beagle Channel Arbitration (Argentina v Chile); → Continental Shelf Arbitration (France v United Kingdom); the judgment in the Case of Belgium v Federal Republic of Germany; Dubai—Sharjah Border Arbitration; Maritime Boundary between Guinea and Guinea-Bissau Arbitration (Guinea v Guinea-Bissau); → Maritime Boundary between Guinea-Bissau and Senegal Arbitration and Case (Guinea-Bissau v Senegal); Ruling on the Rainbow Warrior Affair between France and New Zealand and the tribunal ruling on the Rainbow Warrior Arbitration (New Zealand v France) (→ Rainbow Warrior, The); → Taba Arbitration; → St Pierre and Miquelon Arbitration; United States—United Kingdom Arbitration concerning Heathrow Airport User Charges; → Eritrea—Yemen Arbitration; → MOX Plant Arbitration and Cases; Award of the Arbitration Tribunal in the Arbitration Regarding The Iron Rhine ('Ijzeren Rijn') Railway (Belgium/Netherlands); Arbitration between Barbados and the Republic of Trinidad and Tobago (→ Maritime Delimitation Cases before International Courts and Tribunals); the pending case of Eritrea—Ethiopia Boundary Commission (→ Boundary Disputes in Africa); and the case concerning the → Eritrea-Ethiopia Claims Commission.

(v) The Rise of 'Mixed Arbitration'

37 Since at least the Jay Treaty, inter-State arbitral tribunals known as 'claims commissions' have adjudicated classes of claims arising from violations of the law of State responsibility for injuries to aliens. During the 19th and early 20th centuries, adjudication of such claims typically proceeded on the basis of → *diplomatic protection* and espousal by States before inter-State arbitral tribunals. Following World Wars I and II, however, the treaties of peace established 'mixed' arbitral tribunals before which individuals and corporations could pursue their own claims against defeated States and in some cases, the nationals of defeated States (→ *Peace Treaties [1947]; → Peace Treaty with Japan [1951]*). Despite these examples, mixed arbitration between States and non-State actors remained an exceptional phenomenon until roughly the last third of the 20th century when it began to eclipse diplomatic protection and espousal as the means for vindicating the rights of aliens in their dealings with foreign States. This development proceeded along three tracks, each drawing on slightly different traditions.

38 First, when concluding natural resource concessions with → *developing countries* in the 1940s, 1950s, and 1960s, large multinational corporations secured undertakings requiring arbitration of disputes before ad hoc tribunals having, to some degree, the authority to apply international law to relations between the disputing parties (→ *Contracts between States and Foreign Private Law Persons; → Investments, International Protection*). Examples of this genre include *Saudi Arabia v Arabian American Oil Co* (1958), *Sapphire International Petroleum Ltd v National Iranian Oil Co* (1963), *British Petroleum v Libya* (1973), *Texas Overseas Petroleum Co v Libya* (1977), *Libyan American Oil Co v Libya* (1977), and *Kuwait v American Independent Oil Co* (1982) (→ *Oil Concession Disputes, Arbitration on*). Because the relationships, the disputes, and the tribunals all find their source in State contracts relating to commercial activities, many describe this version of mixed arbitration as drawing on the model of international commercial arbitration. Despite the basic soundness of that proposition, however, most observers would recognize that the model of international commercial arbitration requires certain adjustments to account for the State's dual role as commercial partner and regulator with sovereign powers and responsibility for the public interest (→ *Public Private Partnership*).

39 Second, to create a dispute-settlement process tailored to differences between foreign investors and their host States, the World Bank (→ *World Bank Group*) drafted, sponsored, and now administers the Convention on the Settlement of Investment Disputes between States and Nationals of Other States—also known as the ‘Washington Convention’ and the ‘ICSID Convention’—which entered into force in 1966 and, as of January 2006, had 143 States Parties. Rather than establishing substantive rules on the treatment of foreign investors and their investments or even an obligation to arbitrate particular disputes, the ICSID Convention established the → *International Centre for the Settlement of Investment Disputes (ICSID)* which consists of a small secretariat (→ *International Organizations or Institutions, Secretariats*), a list of potential arbitrators nominated by States Parties, and a set of procedural rules. By ratifying the ICSID Convention, States Parties acquire the option, but not the obligation, of recourse to ICSID’s machinery for → *investment disputes*. Only a further written consent establishes the obligation of States Parties to submit particular investment disputes to arbitration. Because the ICSID Convention only establishes an optional device to facilitate the arbitration of investment disputes, some writers have observed that it draws on the model of the PCA created by the 1899 and 1907 Hague Conventions I. Despite the formal similarities of these two institutions, the development of their popularity has followed different paths. Thus, the PCA enjoyed its heyday before the PCIJ’s establishment, after which the PCA slipped into several decades of abeyance. Conversely, from its inception to the mid-1990s, observers referred to the underutilization of recourse to ICSID. For example, in 1995, ICSID had five pending cases with roughly US\$15 million in controversy. Ten years later, however, its docket had grown to some 90 cases involving more than US\$25 billion. Though the ICSID system seems well-designed for individual cases, the recent proliferation of more than 30 claims arising from political and economic turmoil in Argentina and proceedings before a multitude of different ad hoc tribunals have led some to question whether claims commissions provide a superior—and more historically correct—model for resolving the accumulation of related disputes connected to periods of civil disturbance.

40 Third, and building on the observations just made, to resolve over 3,800 claims arising out of the Islamic Revolution and left unresolved after the exchange of frozen assets for hostages pursuant to the Algiers Accords in early 1981, Iran and the US established a nine-member claims tribunal consisting of three judges appointed by each State and three judges appointed by the other six—or, failing their agreement, by an appointing authority designated by the Secretary-General of the PCA. Usually sitting in three chambers, the → *Iran-United States Claims Tribunal* has jurisdiction over claims brought by US nationals against Iran, claims brought by nationals of Iran against the US, claims between the two States relating to contractual arrangements for goods and services, as well as differences between the two States concerning the interpretation or performance by either State of their obligations under the Algiers Accords. The tribunal does not, however, have jurisdiction over claims relating to the events that nearly precipitated hostilities between the two States, namely, the seizure of 52 US hostages, their lengthy detention, or property damage suffered at the US Embassy compound (→ *Premises of Diplomatic Missions*). Although it draws on the tradition of claims commissions, the Iran-United States Claims Tribunal departed from the traditional format of diplomatic protection and espousal for the 965 private claims involving US\$250,000 or more. Thus, a significant proportion of its work involved mixed arbitration with corporations or individuals prosecuting their own claims against the respondent State (→ *Corporations in International Law*; → *Individuals in International Law*). Having played a key role in resolving matters of honour between hostile and culturally distinct States, having disposed of 95% of all claims in its first decade, having produced a body of reasonably coherent jurisprudence, having provided the training ground for a generation of counsel and arbitrators, and having enjoyed the facility of a security

account to satisfy all awards rendered against Iran, the Iran-United States Claims Tribunal laid much of the foundation for the current popularity of mixed arbitration.

41 The emergence of mixed arbitration in its various forms has produced two inevitable consequences. First, it has contributed to the sharp decline of diplomatic protection and espousal as a means for resolving the claims of aliens against foreign States. Although some thus hail mixed arbitration as relieving States of a tedious chore and others praise it as a means for depoliticizing the settlement of claims against foreign States, still others question whether the elimination of diplomatic protection as a filtering mechanism—and the consequent proliferation of claims—has led to the greater politicization of disputes among the populations of the developing States that inevitably constitute the vast bulk of respondents in mixed arbitration. Second, the emergence of mixed arbitration has reinforced the perceived flexibility of arbitration and, thus, its capacity to survive and flourish by adapting to new circumstances. Nevertheless, the ad hoc emergence of multiple hybrid processes, each based on different combinations of historical models, has led to a degree of confusion about the proper source(s) of authority for resolving questions of principle and procedure in mixed arbitration.

B. Organization and Functioning of Arbitral Tribunals

42 To understand the organization and functioning of arbitral tribunals, one must consider five issues: 1) the competence of tribunals; 2) the structure and formation of tribunals; 3) procedural rules; 4) the proper or applicable law; and 5) the form, finality, and implementation of awards.

1. The Competence of Tribunals

43 Because States have no obligation to submit to any form of dispute settlement except on the basis of consent and because, unlike international courts, arbitral tribunals have no permanent existence within the framework of international organizations, their competence depends solely on written agreements between the disputing parties. Until the 19th century's last quarter, State practice emphasized the submission of existing disputes to arbitration on the basis of a → *compromis*. Since then, it has become common for States to provide for arbitration of future disputes when concluding bilateral and multilateral treaties.

44 Whether they pertain to existing or future disputes, arbitration agreements invariably address two issues that limit and define the competence of tribunals. These are jurisdiction over the person—encompassing both the standing of plaintiffs to assert claims (→ *International Courts and Tribunals, Standing*) and the authority of tribunals to bind particular respondents—and jurisdiction over the subject-matter. Though they arise more frequently in mixed arbitration, questions concerning jurisdiction over the person rarely arise in inter-State disputes submitted to arbitration by *compromis*. By contrast, inter-State arbitrations often raise questions about the tribunal's jurisdiction over the subject-matter (ie the class or scope of the issues submitted for decision by the tribunal).

45 Arbitration agreements may designate the law applicable to the merits of the dispute or the → *remedies* that the tribunal may impose. In the rare cases that an arbitration agreement contains such provisions and a tribunal fails to apply them, the resulting award constitutes a nullity (→ *Judicial and Arbitral Decisions, Validity and Nullity*).

46 Since the Jay Treaty arbitrations, the power of tribunals to rule on their own jurisdiction has achieved universal acceptance. Furthermore, tribunals have the discretion to decide jurisdictional objections as preliminary questions or to join them to the merits of the dispute.

2. Structure and Formation of Tribunals

(a) Structure of Tribunals

47 In modern inter-State arbitration, the disputing parties normally choose among tribunals consisting of a sole arbitrator, three members, or five members.

48 As noted above (see paras 11, 18), before and even after the Jay Treaty arbitrations, States often had recourse to arbitration before a sovereign sitting as sole arbitrator. During the early years of arbitration, this structure commended itself on the grounds that the dignity of States did not allow them to submit to the judgments of people holding lesser stature. Furthermore, at a time when the disputing parties commonly accepted arbitration as having a quasi-diplomatic character, sovereigns' experience in international relations arguably provided skills well-suited to the task. Over the course of the 19th century, however, arbitration by sovereigns lost its attraction for at least four reasons. First, in order to avoid the indignity of subjecting their analysis to outside criticism, sovereigns rarely provided reasons for their awards. Second, sovereigns generally delegated the performance of their function to inferior officials, which arguably diluted the judicial character of the process and the sense of personal accountability among those involved in the decision-making process. Third, sovereigns often regarded their own national policies as relevant considerations when formulating their awards. Fourth, as the judicial character of arbitration became more entrenched, submission of legal disputes for decision by political figures took on an increasingly anomalous character. For all these reasons, submission of disputes to sovereign arbitrators has become a rarity, although one periodically encounters comparable practices. Thus, while not involving a sovereign arbitrator in the classic sense, the submission of the first *Ruling on the Rainbow Warrior Affair between France and New Zealand* to the UN Secretary-General constitutes a recent example of recourse to a politically influential sole arbitrator who rendered an award that provided few reasons to support its conclusions.

49 If arbitration by sovereigns has lost its appeal, States may still submit their disputes to a sole arbitrator selected on the basis of legal expertise. States periodically use this format, which can prove less expensive and less time consuming, for the resolution of disputes over territory. The *Island of Las Palmas Case (Netherlands v United States of America)*, submitted to Max Huber, represents a prominent example. On the other hand, because disputing States value the opportunity to appoint one or more arbitrators in whom they have complete confidence and because larger tribunals can more easily avoid the eccentricities of reasoning to which sole arbitrators may be prone, collegial tribunals have become the norm in modern inter-State arbitration.

50 Typically, collegial tribunals have three or five members. Following the *Alabama Claims* arbitration, many observers came to favour five-member tribunals including three members not having the nationality of either party. Assuming that the national members would support their appointing States, they regarded such five-member tribunals as more conducive to disinterested analysis of controversies by several minds. Although five-member tribunals still remain common, three-member tribunals have become the norm in modern practice due in part to the proposition, now generally accepted, that all arbitrators must be impartial and independent of the parties who appoint them. Unlike their counterparts under the Jay Treaty, presiding arbitrators in modern three-member tribunals generally do not have the nationality of either disputing party.

(b) Formation of Tribunals

51 In inter-State arbitration, the formation of collegial tribunals generally adheres to the following pattern: each party appoints an equal number of arbitrators (ie one or two), after which either the parties or the party-appointed arbitrators in consultation with the parties select the presiding arbitrator. Occasionally, unwilling respondents may refuse to appoint their own arbitrator(s) or to participate in the appointment of the presiding arbitrator. Alternatively, the party-appointed arbitrators may fail to agree on a presiding arbitrator. Unless—as is usually the case—the arbitration agreement designates an appointing authority to make the necessary appointments when a party or the party-appointed arbitrators have failed to do so within a defined period of time, it may become impossible for an inter-State arbitration to proceed. When selecting an appointing authority, States have most often designated the president of the ICJ. Less common designations have included the UN Secretary-General as well as the PCA Secretary-General.

52 As late as the 1907 Hague Convention I, inter-State arbitration contemplated no device for challenging the appointment of arbitrators for lack of impartiality or independence from the parties. Perhaps this reflected the historical roots of arbitration as a quasi-diplomatic process in which party-appointed arbitrators served as quasi-advocates for their States of nationality. Under these circumstances, States might present concerns about independence and impartiality only after termination of the proceedings and only by asserting that the award constituted a nullity based on corruption of the tribunal (see para. 85 below).

53 By the middle of the 20th century, however, the judicial character of arbitration gained sufficiently wide acceptance that the → *International Law Commission (ILC)* Draft Convention on Arbitral Procedure and ILC Model Rules on Arbitral Procedure (see paras 55–56 below) introduced the right of disputing parties to seek disqualification of tribunal members at an early stage in the proceedings. In proceedings before the Iran-United States Claims Tribunal, both Iran and the US have challenged arbitrators for lack of impartiality or independence. Today, as a corollary to the recognition of arbitration as a judicial process, one must accept the right of disputing parties to challenge arbitrators, when appropriate, at an early stage of the proceedings.

54 Unless the arbitration agreement designates an appointing authority to consider the merits of challenges, that task will fall to the members of the tribunal not subject to challenge, a situation that may prove awkward in the extreme.

3. Procedural Rules

(a) Absence of Standardization

55 Despite the frequency of recourse to inter-State arbitration, the process has not lent itself to detailed procedural standardization. To the contrary, States have resisted such efforts. Thus, although the ILC produced a Draft Convention on Arbitral Procedure for inter-State disputes in 1953, which represented the zenith of legal scholarship on arbitral procedure, it attracted a tepid reception in the UNGA. Because the ILC Draft Convention on Arbitral Procedure purported to enhance the integrity of the arbitral process by requiring States to submit disputes regarding the jurisdiction of arbitral tribunals and the nullity of awards to judicial settlement by the ICJ, States complained that it undermined the principle of party autonomy and came dangerously close to transforming arbitration into a mere prelude to judicial settlement by politically elected judges having broader responsibilities to the → *international community*. In addition, even if the ILC Draft Convention on Arbitral Procedure seemed relatively well suited to the arbitration of discrete controversies, it

seemed less well suited to the work of claims commissions established to resolve classes of related claims arising from armed conflict or civil disturbance.

56 Ultimately, the ILC downgraded its Draft Convention on Arbitral Procedure to a set of Model Rules on Arbitral Procedure, which the UN General Assembly took note of in 1958. Although disputing parties have never formally adopted the ILC Model Rules on Arbitral Procedure for use in inter-State arbitrations, the tribunal in the *Dubai—Sharjah Boundary Arbitration* regarded them as indicative of customary international law, at least with respect to the characteristics of arbitral awards. Furthermore, tribunals in mixed arbitrations have referred to the ILC Draft Convention on Arbitral Procedure or the ILC Model Rules on Arbitral Procedure as authority when deciding procedural issues. Examples of this phenomenon include *Saudi Arabia v Arabian American Oil Co* and *Libyan American Oil Co v Libya*.

57 In 1976, the UN General Assembly approved the → *United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules*. Designed for international commercial arbitration between private parties, the UNCITRAL Arbitration Rules have been adapted for use in inter-State arbitration, for example, by a) the Iran-United States Claims Tribunal and b) the PCA in developing its 1992 Optional Rules for Arbitrating Disputes between Two States, which recently served as the basis for the procedural regime used by the Eritrea-Ethiopia Boundary Commission. Many investment treaties have also designated the UNCITRAL Arbitration Rules as one of the procedural vehicles for conducting mixed arbitrations between foreign investors and host States (→ *Investments, Bilateral Treaties*). The growing popularity of the UNCITRAL Arbitration Rules has not, however, led to a high degree of procedural standardization because they only provide a skeleton for the arbitration process and leave tribunals with great flexibility to shape procedural details to the circumstances of each case.

58 Among other things, the comparative lack of procedural standardization tends to confirm the proposition that the predominant features of inter-State arbitration include flexibility, relative informality, and a refusal to attach to matters of form the importance that they may enjoy under municipal law.

(b) Competence for Establishing Procedural Rules

59 Just as the disputing parties may choose the arbitrators, so may they select the procedural rules for conducting the arbitration by express provisions in their arbitration agreements, by incorporating standard provisions, or by subsequent agreement during the course of the proceedings.

60 In general, arbitration agreements will define the broad outlines of the procedure by designating the issues submitted to arbitration, the size of the tribunal and the manner of its selection, the seat of the tribunal, the law applicable to the substance of the dispute, and the language(s) of the proceedings.

61 Although not common, States occasionally incorporate by reference standard provisions to specify more fully the procedural framework for their arbitrations. Thus, in the *Delimitation of the Maritime Boundary (Guinea v Guinea-Bissau)*, the disputing parties agreed to apply by analogy certain articles of the ICJ's Rules of Court. By contrast, in the *United States—United Kingdom Arbitration concerning Heathrow Airport User Charges*, the disputing parties formulated a set of procedural rules based on those that apply under the ICSID Convention.

62 To the extent that the disputing parties do not agree on matters of procedure, the tribunal may do so subject to two conditions. First, the tribunal should give the disputing parties the opportunity to express their views on the procedural matter under consideration. Second, the tribunal must adopt procedures compatible with the right to be heard and the right to equality of treatment of the parties.

(c) Commonly Accepted Assumptions regarding Procedure

63 At the risk of overgeneralization, one may identify the following principles as a logical starting point for discussion of procedures likely to be adopted by disputing parties or by tribunals in the absence of party agreement. First, the tribunal will likely hold one or more preliminary hearings to discuss procedural questions, after which it may issue one or more procedural orders. Second, the tribunal may divide the proceedings into two or more phases to address in sequence potentially dispositive issues, such as jurisdiction, liability, and damages. Third, each phase will likely consist of written submissions and oral hearings, which may include the presentation of evidence and legal arguments (→ *International Courts and Tribunals, Evidence*). Although sequential exchange of pleadings by the claimant and respondent seems preferable, some disputes involve competing claims to identical rights with respect to the same subject-matter, such as → *sovereignty* over territory. In such cases, if the parties cannot agree on the proper designation of claimant and respondent, the tribunal may have to accept multiple, simultaneous exchanges of pleadings. Fourth, to the extent that any phase involves the presentation of evidence, the emphasis will typically rest on documentary proof as opposed to oral testimony. Because inter-State arbitration has not produced a standardized or rigid body of evidentiary rules, tribunals will afford the parties wide latitude in presenting evidence but will also consider arguments about the appropriate weight to be given to particular submissions. Fifth, in inter-State arbitration, the parties typically bear responsibility for the costs of their own legal representation as well as an equal share of the cost of the arbitration. In mixed arbitration, practice with respect to legal fees and costs seems more variable.

4. Applicable Law

64 Because arbitration constitutes a means for resolving inter-State disputes on the basis of law, identification of the applicable law represents an important and inevitable step in the course of the proceedings.

65 As noted above (see paras 5, 45, 60), disputing parties have the right to select the law applicable to the merits of their disputes and generally do so in their arbitration agreements. Most frequently, disputing parties choose international law as the applicable law for inter-State arbitration. Some observers contend that inter-State arbitral tribunals apply international law more flexibly than does the ICJ in the context of judicial settlement. To support this proposition, they cite the difference between Art. 37 (1) 1907 Hague Convention I—indicating that arbitrators need only decide cases ‘on the *basis of respect for law*’ (emphasis supplied)—and Art. 38 (1) ICJ Statute—requiring the Court to decide cases ‘in accordance with’ international law. By contrast, others conclude that inter-State arbitral tribunals apply international law more conservatively than the ICJ because the latter may consider that it has greater freedom to engage in the progressive development of international law for the benefit of UN Member States (→ *Codification and Progressive Development of International Law*).

66 Where the disputing parties deem the content of prevailing international law to be unsuitable or inadequate for their purposes, they may require the application of legal principles that do not yet enjoy general acceptance as international law—as happened in the *Alabama Claims* arbitration—or identify specific categories of municipal law as auxiliary sources for resolving the merits—as happened in the → *Trail Smelter Arbitration*. At the risk

of overgeneralization, recourse to a combination of international law and municipal law occurs more frequently in mixed arbitration than in inter-State arbitration (→ *International Law and Domestic [Municipal] Law*).

67 Though exceedingly rare in modern times, the disputing parties may also instruct the tribunal to decide the case → *ex aequo et bono*, which—like *amiable composition*—allows the tribunal to decide the case outside the bounds of positive law. In addition to reducing the predictability of outcomes, this option seems incongruous with the description of arbitration as a process for resolving disputes on the basis of law.

68 If the parties to an inter-State arbitration fail to designate the applicable law, that task will fall to the tribunal. In such situations, tribunals generally start from the assumption that the disputing parties intended international law to govern their relations.

69 If the parties or the tribunal have designated international law as the applicable law, the tribunal may apply the principle of *iura novit curia*, meaning that the tribunal knows the law and may define its substance without being restricted to the parties' contentions. By contrast, the same principle does not apply to the tribunal's knowledge of municipal law.

5. Form, Finality, and Implementation of Awards

70 During the course of an inter-State arbitration, the tribunal may render several decisions. To the extent that they involve procedural issues, the decisions will constitute procedural orders. To the extent that they involve issues potentially dispositive of the entire controversy—such as jurisdiction, liability, or damages—the decisions will constitute awards. A partial award finally disposes of some but not all outstanding issues. By contrast, a final award finally determines all outstanding issues, thereby terminating the arbitration and, subject to the discussion on finality of awards (see paras 79–82 below), renders the tribunal *functus officio* as regards the claim covered by the award.

71 The issues likely to arise with respect to awards include matters relating to their form, finality, and implementation.

(a) Form of the Award

72 Unless otherwise stated in the arbitration agreement, tribunals have the authority to render awards by majority vote.

73 Whether partial or final, awards should be written and motivated. Thus, they should describe the composition of the tribunal, record the development of evidence and arguments by the parties, discuss the applicable law, and provide a reasoned application of the law to the facts as found by the tribunal. In addition, awards should include a *dispositif* with respect to the issues that they resolve.

74 For purposes of authentication, awards should be signed by all tribunal members. Although some arbitration agreements contemplate signature by the presiding arbitrator as the minimum requirement for authentication, in the absence of such a provision, better practice would seem to require at least the signatures of all tribunal members voting for the award.

75 While certain municipal legal systems frown on the practice, the right of arbitrators to state separate or dissenting opinions first appeared in the *Alabama Claims* arbitration and later became general practice. Perhaps the strongest justification for separate or dissenting

opinions lies in their tendency to encourage even more rigour by the majority in formulating its award.

76 While not strictly a matter of form, one may conveniently mention here the types of remedies most frequently encountered in awards. The most common form of relief is monetary compensation, including interest on the principal amount in dispute. In general, tribunals in inter-State arbitrations have declined requests for compound—as opposed to simple—interest. Although the same probably holds true for mixed arbitration, one may detect a growing number of tribunals awarding compound interest in that context. Declaratory relief represents another common remedy in inter-State arbitration, particularly in disputes over territory and in other situations where the declaration itself may provide adequate reparation.

77 More exceptional remedies would include → *restitution* or recommendations that a party take certain steps as a matter of grace. One may, however, find a recent example of the latter in the Tribunal Ruling of 30 April 1990 in the *Rainbow Warrior Arbitration (New Zealand v France)* where the tribunal exhorted France to contribute \$2 million to a fund to promote friendly relations between nationals of the disputing States.

(b) Finality of the Award

78 Although writers universally agree that awards become final and binding as between the disputing parties—but not third States—when rendered (→ *Res iudicata*), they do not agree on the exact moment at which an award becomes effective. Under the 1899 and 1907 Hague Conventions I, tribunals pronounced their awards at public sittings to which they invited the agents and counsel of the disputing parties (→ *International Courts and Tribunals, Agents, Counsel and Advocates*). Writers have also suggested that awards may become effective either after tribunal members have affixed the required signatures or when the tribunal transmits its award to the disputing parties. For avoidance of ambiguity, arbitration agreements should clearly define the point at which awards become effective.

79 The binding nature of the award reflects the judicial character of arbitration; if the parties do not seek a binding decision, their dispute-settlement process qualifies as conciliation, not arbitration. The final nature of the award reflects the parties' expectation that the tribunal's decision will mark the end of their controversy. At a minimum, this rules out both reconsideration of the merits by the tribunal and appeal of the merits to a tribunal of second instance (→ *International Courts and Tribunals, Appeals*). As explained below, however, the award may be subject to correction, interpretation, or revision under appropriate, though exceptional, circumstances (→ *Judgments of International Courts and Tribunals, Revision of*).

80 Whether or not arbitration agreements provide for such an eventuality, tribunals have the inherent authority to correct manifest typographical errors, computational errors, and other errors of a similar nature, at least until the parties have executed the award.

81 Although disputes may arise about the interpretation of awards, tribunals lack the competence to consider requests for interpretation except as contemplated by agreement between the parties. Even then, the tribunal may refuse such requests. Because requests for interpretation may constitute thinly disguised efforts to seek reconsideration of the merits, tribunals have shown great reluctance to interpret their awards.

82 Although the discovery of new evidence may prompt one of the disputing parties to seek revision of the award, tribunals lack the competence to consider such requests except as contemplated by agreement between the disputing parties. Even then, before granting relief, the tribunal must find the existence of a new fact likely to exercise decisive influence on the award and previously unknown both to the tribunal and to the party seeking revision. Because it results in modification of the award, tribunals have shown even less enthusiasm for revising awards than they have shown for interpreting awards.

(c) Implementation of the Award

83 Recourse to arbitration implies an undertaking to implement the tribunal's award(s) in → *good faith (bona fide)*. Having voluntarily submitted existing controversies to inter-State arbitration by *compromis*, disputing parties honoured virtually all awards rendered by tribunals during the 19th century. Even since World War II, when it became more common to provide for arbitration of future disputes in bilateral and multilateral treaties, awards have commanded similarly high levels of implementation. The few prominent exceptions include the *Beagle Channel Arbitration (Argentina v Chile)* and the *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*.

84 Because arbitral tribunals possess no means of enforcing their own decisions, they generally become *functus officio* after rendering their awards and deciding any timely motions to correct, interpret, or revise their awards. Thereafter, tribunals typically do not concern themselves with issues connected to execution of the awards. Exceptions to this rule may, however, occur before tribunals established to resolve a series of related disputes. For example, in two related cases, the Iran-United States Claims Tribunal first granted Iran a significant net award on its counterclaim against the Avco Corporation. After the United States Court of Appeals for the Second Circuit refused enforcement of the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Iran brought a second claim against the US, and the tribunal imposed liability based on the US' failure to enforce the tribunal's award against the Avco Corporation (→ *Recognition and Enforcement of Foreign Arbitral Awards*).

85 A State has no obligation to implement an award so legally defective as to constitute a nullity (→ *Nullity in International Law*). Widely accepted grounds of nullity include improper constitution of the tribunal, excess of jurisdiction (eg deciding issues not submitted to the tribunal, not deciding issues properly submitted to the tribunal, or failing to apply the law selected by the parties), serious departures from fundamental rules of procedure (eg independence and impartiality of the arbitrators, equality of treatment with respect to the parties, granting the parties a fair opportunity to present their cases), failure to provide a reasoned award, fraud in the presentation of the case, and corruption of the tribunal (→ *Corruption, Fight against*).

86 In general, disputing parties in inter-State arbitrations must resolve claims of nullity through diplomatic and political means, which may give rise to self-judging claims of nullity as happened in the *Beagle Channel Arbitration (Argentina v Chile)* mentioned above (see para. 83). Though exceedingly rare in inter-State arbitration, disputing States have occasionally agreed to submit the issue of nullity to a second ad hoc tribunal, as occurred in the *Orinoco Steamship Co Case (United States of America v Venezuela)*.

87 Recourse to a second tribunal for claims of nullity has become more common in mixed arbitration. Under Art. 52 (3) ICSID Convention, the losing party may seek nullification of the award by a second tribunal known as an '*ad hoc* [c]ommittee'. In arbitrations conducted

under investment treaties outside the ICSID Convention, it has become common for parties to seek nullification by municipal courts at the legal seat of arbitration.

88 In describing the work of tribunals and municipal courts hearing claims concerning the nullity of awards, observers have compared the tribunals and municipal courts to courts of cassation having the ability to uphold awards or to deny the effect of awards on narrow grounds but not to substitute their own findings and conclusions on the merits of the underlying dispute.

C. Assessment of Current Practice and Future Prospects of Inter-State Arbitration

89 Clearly, inter-State arbitration has not satisfied exaggerated hopes prominent in the early 20th century that the process would supplant armed conflict as a means for resolving political disputes of the first magnitude. On the other hand, it has proven an effective means for the resolution of inter-State claims having a legal character and in which the outcome possesses secondary importance for the disputing parties. These circumstances led Judge Stephen M Schwebel to observe that ‘arbitration is not the way to prevent war; it is rather a product of peace[ful]’ and stable relations among States (SM Schwebel ‘The Prospects for International Arbitration’ in Soons [ed] 101–8, at 108).

90 Furthermore, inter-State arbitration has never represented the centre of gravity in an international legal system dominated by States. Before the rise of permanent international courts, mixed arbitration, and multilateral treaties, however, inter-State arbitration arguably constituted the chief forum for developing principles relating to State responsibility for injuries to aliens, treaty law, and boundary/territorial claims. With the rise of → *human rights* courts and mixed arbitration, the need for diplomatic protection and espousal of claims by States has correspondingly waned. As a result, inter-State arbitration no longer constitutes the main venue for resolving claims relating to State responsibility for injuries to aliens. With the rise of multilateral treaties such as the → *Vienna Convention on the Law of Treaties* (1969), inter-State arbitral tribunals have shifted their focus from developing to applying rules of treaty law. Furthermore, with the rise of permanent international courts, ad hoc inter-State arbitral tribunals have come to play a less central, though still important, role in the development of jurisprudence relating to the application of treaty law. Despite the rise of permanent international tribunals, however, inter-State arbitration has remained a principal venue for the resolution of boundary/territorial claims.

91 Notwithstanding the proliferation of international courts, arbitration seems likely to remain a popular alternative to judicial settlement. While some have described permanent international courts as ‘icons’, others have portrayed arbitration as a ‘chameleon’. Thus, whereas judicial settlement lends itself to rigidity, public scrutiny, and possibly intense criticism, ad hoc arbitration lends itself to flexibility, relative obscurity, and indestructibility. Furthermore, whereas judicial settlement must view individual disputes through the lens of community interests, arbitration may focus more directly on the particular interests of disputing parties. Under these circumstances, inter-State arbitration may never become the hallmark of any particular generation, but its flexibility—repeatedly manifested over the course of more than two centuries—ensures the capacity to adjust and, thus, to play a supporting role that meets a range of important needs in all generations.

Select Bibliography

- A Mérignhac *Traité Théorique et Pratique de l'Arbitrage international* (Larose Paris 1895).
- WE Darby *International Tribunals. A Collection of the Various Schemes which Have Been Propounded; and of Instances in the Nineteenth Century* (4th ed JM Dent and Co London 1904).
- JH Ralston 'Some Suggestions as to the Permanent Court of Arbitration' (1907) 1 AJIL 321-29.
- RC Morris *International Arbitration and Procedure* (Yale University Press New Haven 1911).
- TW Balch *International Courts of Arbitration* (4th ed Allen, Lane and Scott Philadelphia 1912).
- GG Wilson *The Hague Arbitration Cases: Compromis and Awards with Maps in Cases Decided under the Provisions of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes and Texts of the Conventions* (Ginn and Company Boston 1915).
- JH Ralston *The Law and Procedure of International Tribunals: Being a Résumé of the Views of Arbitrators upon Questions Arising under the Law of Nations and the Procedure and Practice of International Courts* (Rev ed Stanford University Press Stanford 1926).
- JB Moore *International Adjudications: Ancient and Modern: Modern Series* (OUP New York 1929-33) vols 1-6.
- JH Ralston *International Arbitration from Athens to Locarno* (Stanford University Press Stanford 1929).
- CM Bishop *International Arbitral Procedure* (King Bros Inc Baltimore 1930).
- MO Hudson 'The Permanent Court of Arbitration' (1933) 27 AJIL 440-60.
- H Lauterpacht *The Function of Law in the International Community* (Clarendon Press Oxford 1933).
- AH Feller *The Mexican Claims Commissions 1923-1934: A Study in the Law and Procedure of International Tribunals* (MacMillan New York 1935).
- DV Sandifer *Evidence before International Tribunals* (Foundation Press Chicago 1939).
- MO Hudson *International Tribunals: Past and Future* (Carnegie Endowment for International Peace Washington 1944).
- KS Carlston *The Process of International Arbitration* (Columbia University Press New York 1946).
- KS Carlston 'Codification of International Arbitral Procedure' (1953) 47 AJIL 203-50.
- B Cheng *General Principles of Law: As Applied by International Courts and Tribunals* (Stevens London 1953).
- KS Carlston 'Draft Convention on Arbitral Procedure of the ILC' (1954) 48 AJIL 296-99.
- JL Simpson and H Fox *International Arbitration Law and Practice* (Stevens London 1959).
- LB Sohn 'The Function of International Arbitration Today' (1963) 108 RdC 1-113.
- CW Jenks *The Prospects of International Adjudication* (Stevens London 1964).
- FA Mann 'State Contracts and International Arbitration' (1967) 42 BYIL 1-37.
- WM Reisman *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale University Press New Haven 1971).
- A Broches 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136 RdC 331-410.

JG Wetter *The International Arbitral Process: Public and Private* (Oceana Publications Dobbs Ferry 1979) vols 1-5.

D Johnson 'International Arbitration Back in Favour?' (1980) 34 YBWA 305-28.

V Mani *International Adjudication: Procedural Aspects* (Nijhoff The Hague 1980).

GR Delaume 'State Contracts and Transnational Arbitration' (1981) 75 AJIL 784-819.

C Greenwood 'State Contracts in International Law: The Libyan Oil Arbitrations' (1982) 53 BYIL 27-81.

LB Sohn 'The Role of Arbitration in Recent International Multilateral Treaties' (1982-83) 23 VaJIntL 171-89.

DW Bowett 'Contemporary Developments in Legal Techniques in the Settlement of Disputes' (1983) 180 RdC 169-235.

A Redfern 'The Arbitration between the Government of Kuwait and AMINOIL' (1984) 55 BYIL 65-110.

SM Schwebel *International Arbitration: Three Salient Problems* (Grotius Cambridge 1987).

H Fox 'States and the Undertaking to Arbitrate' (1988) 37 ICLQ 1-29.

DD Caron 'The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution' (1990) 84 AJIL 104-56.

AHA Soons (ed) *International Arbitration: Past and Prospects: A Symposium to Commemorate the Centenary of the Birth of Professor J.H.W. Verzijl (1888-1987)* (Nijhoff Dordrecht 1990).

SJ Toope *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Grotius Cambridge 1990).

P Peters 'Dispute Settlement Arrangements in Investment Treaties' (1991) 38 NYIL 91-163.

DJ Bederman 'The Glorious Past and Uncertain Future of International Claims Tribunals' in MW Janis (ed) *International Courts for the Twenty-First Century* (Nijhoff Dordrecht 1992) 161-94.

WE Butler 'The Hague Permanent Court of Arbitration' in MW Janis (ed) *International Courts for the Twenty-First Century* (Nijhoff Dordrecht 1992) 43-54.

C Gray and B Kingsbury 'Developments in Dispute Settlement: Inter-State Arbitration since 1945' (1992) 63 BYIL 97-134.

WM Reisman *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press Durham 1992).

M Hirsch *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Nijhoff Dordrecht 1993).

S Rosenne 'Some Thoughts on International Arbitration Today' (1993) 27 IsLR 447-59.

DW Bowett 'The Dubai/Sharjah Boundary Arbitration of 1981' (1994) 65 BYIL 103-33.

S Muller and W Mijs (eds) *The Flame Rekindled: New Hopes for International Arbitration* (Nijhoff Dordrecht 1994).

R Dolzer and M Stevens *Bilateral Investment Treaties* (Nijhoff The Hague 1995).

GH Aldrich *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon Press Oxford 1996).

WM Reisman 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication' (1996) 258 RdC 9-394.

CN Brower and JD Brueschke *The Iran-United States Claims Tribunal* (Nijhoff The Hague 1998).

JI Charney 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 RdC 101-382.

VV Veeder 'The *Lena Goldfields* Arbitration: The Historical Roots of Three Ideas' (1998) 47 ICLQ 747–92.

H Jonkman 'The Role of the Permanent Court of Arbitration in International Dispute Resolution' (1999) 279 RdC 9–49.

NS Marques Antunes 'The *Eritrea—Yemen* Arbitration: First Stage—The Law of Title to Territory Re-averred' (1999) 48 ICLQ 362–86.

CH Brower II 'Investor-State Disputes under NAFTA: The Empire Strikes Back' (2001–02) 40 ColumJTransnatlL 43–88.

K Oellers-Frahm and A Zimmermann *Dispute Settlement in Public International Law* (Springer Heidelberg 2001).

CH Schreuer *The ICSID Convention: A Commentary* (CUP Cambridge 2001).

B Legum 'The Innovation of Investor—State Arbitration under NAFTA' (2002) 43 HarvIntlLJ 531–39.

CH Brower II 'Structure, Legitimacy and NAFTA's Investment Chapter' (2003) 36 VandJTransnatlL 37–94.

Z Douglas 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYIL 151–290.

A-C Kiss 'Environmental Disputes and the Permanent Court of Arbitration' (2003) 16 HagueYIL 41–46.

CH Brower II 'Mitsubishi, Investor-State Arbitration, and the Law of State Immunity' (2004–05) 20 AmUIntlLRev 907–27.

G Petrochilos *Procedural Law in International Arbitration* (OUP Oxford 2004).

A Redfern and M Hunter *Law and Practice of International Commercial Arbitration* (4th ed Sweet & Maxwell London 2004) 474–501.

T Weiler (ed) *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational Publishers Ardsley 2004).

T Bingham 'The *Alabama* Claims Arbitration' (2005) 54 ICLQ 1–25.

RD Bishop, J Crawford, and WM Reisman *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer The Hague 2005).

JG Merrills *International Dispute Settlement* (4th ed CUP Cambridge 2005).

J Paulsson *Denial of Justice in International Law* (CUP Cambridge 2005).

B Shifman 'The Permanent Court of Arbitration: An Overview' in PJ van Krieken and D McKay (eds) *The Hague: Legal Capital of the World* (TMC Asser Press The Hague 2005) 127–80.

T Weiler (ed) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Investment Treaties, and Customary International Law* (Cameron London 2005).

DD Caron, LM Caplan, and M Pellopää *The UNCITRAL Arbitration Rules: A Commentary* (OUP Oxford 2006).

Select Documents

(1948–2006) 1–25 RIAA.

Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Order of 2 March 1990) [1990] ICJ Rep 64.

AM Stuyt *Survey of International Arbitrations: 1794–1989* (3rd ed Nijhoff Dordrecht 1990).

Beagle Channel Arbitration (Argentina v Chile) (1977) 52 ILR 93.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) (Iran-US CTR, 19 January 1981).

Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) (Iran-US CTR, 19 January 1981).

Delimitation of the Maritime Boundary (Guinea v Guinea-Bissau) (Award of 14 February 1985, Arbitration Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau) (1986) 25 ILM 251.

Dubai—Sharjah Border Arbitration (Award of 19 October 1981, Court of Arbitration) (1993) 91 ILR 543.

Eritrea—Ethiopia Boundary Commission (Pending Case).

Hague Convention for the Pacific Settlement of International Disputes 1899 (adopted 29 July 1899, entered into force 4 September 1900) (1898–99) 187 CTS 410.

Hague Convention for the Pacific Settlement of International Disputes 1907 (adopted 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 233.

H LaFontaine *Pasicrisie internationale 1794–1900: Histoire documentaire des arbitrages internationaux* (Impr Stämpfli Berne 1902).

Island of Las Palmas Case (Netherlands v United States of America) 2 RIAA 831.

JB Moore *History and Digest of the International Arbitrations to which the United States Has Been a Party: Together with Appendices Containing the Treaties relating to Such Arbitrations, and Historical and Legal Notes* vols 1–6 (Gov Print Off Washington 1898).

Orinoco Steamship Co Case (United States of America v Venezuela) (1961) 11 RIAA 237.

Rainbow Warrior Arbitration (New Zealand v France) (Tribunal Ruling of 30 April 1990) 82 ILR 499.

Ruling on the Rainbow Warrior Affair between France and New Zealand (6 July 1986) (1987) 26 ILM 1346.

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

Statute of the Permanent Court of International Justice (adopted 16 December 1920, entered into force 20 August 1921) 6 LNTS 389.

‘The Circular Note of the Secretary-General of the Permanent Court of Arbitration’ (1960) 54 AJIL 933.

Treaty between Great Britain and the United States of America for the Amicable Settlement of all Causes of Difference between the Two Countries (signed 8 May 1871, entered into force 17 June 1871) (1870–71) 61 BSP 40.

Treaty of Amity, Commerce and Navigation between Great Britain and the United States (signed 19 November 1794, entered into force 28 October 1795) (1793–95) 52 CTS 243.

UN ILC ‘Draft Convention on Arbitral Procedure’ (1 June–14 August 1953) GAOR 8th Session Supp 9, 9.

UN ILC ‘Model Rules of Arbitral Procedure’ (28 April–4 July 1958) GAOR 13th Session Supp 9, 5–8.

United States—United Kingdom Arbitration concerning Heathrow Airport User Charges (30 November 1992) (Award) 102 ILR 216

