

DEVELOPMENTS IN DISPUTE SETTLEMENT:  
INTER-STATE ARBITRATION SINCE 1945

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## DEVELOPMENTS IN DISPUTE SETTLEMENT: INTER-STATE ARBITRATION SINCE 1945\*

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### I. INTRODUCTION

Promoting and securing peaceful settlement of disputes remains one of the most important—and most difficult—objectives of the international legal system. While Article 33 of the UN Charter lists as methods of peaceful settlement negotiation, inquiry, good offices, mediation, conciliation, arbitration and judicial settlement, this list is not exhaustive, and suggests a precision in classification which is belied by the complexity of dispute settlement practice.

Arbitration as a method of inter-State dispute settlement in the modern period is often treated as having been inaugurated in proceedings under the Jay Treaty of 1794.<sup>1</sup> In the subsequent evolution of practice concerning inter-State 'arbitration' a number of different interpretations of the term are discernible. The predominant approach is exemplified by the 1899 Hague Convention for the Pacific Settlement of International Disputes: 'In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle'. A comparable view was expressed by the International Law Commission in 1953, describing arbitration as 'a procedure for the settlement of disputes between States by a binding award on the basis of law and as the result of an undertaking voluntarily accepted', and adding that 'the arbitrators chosen should be either freely selected by the parties or, at least, . . . the parties should have

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<sup>1</sup> e.g. Stuyt, *Survey of International Arbitrations 1794-1989* (1990); Lapradelle and Politis, *Recueil des arbitrages internationaux* (1905); La Fontaine, *Pasicrisie internationale* (1902). It is sometimes overlooked that there was an appreciable amount of arbitral practice in early modern Europe, long after the well-known arbitrations of the ancient Greeks; John Jay did not develop his ideas in a vacuum. Vattel, for example, in *Droit des gens* (1758), Book II, §329, presents a recognizable modern view of arbitration, though no examples are given beyond a general reference to Swiss practice. Note too the proposal made by Charles VI in 1726 for arbitration of the Austro-Dutch dispute concerning the activities of the Ostende Company—discussed by Roelofsens, 'The Jay Treaty and All That'; Some Remarks on the Role of Arbitration in European Modern History and its "Revival" in 1794', in Soons (ed.), *International Arbitration: Past and Prospects* (1990), pp. 201-10. See generally Verzijl, *International Law in Historical Perspective*, vol. 3 (1976), pp. 71-3.

been given the opportunity of a free choice of arbitrators'.<sup>2</sup> The focus is thus on legal disputes. Arbitration is seen as an equitable *means* of settlement, but its object is the settlement of disputes by the application of legal rules, principles, and techniques, and not simply to reach an 'equitable' result. An alternative view, that arbitration is a means for settling non-legal disputes not suitable for judicial settlement, has been enshrined in a number of treaties, including the 1957 European Convention for the Peaceful Settlement of Disputes, but has received very little support in actual arbitral practice.

In the post-1945 period, arbitration is best understood as a *locus* of activity rather than a highly precise category, recognized as distinct in practice but not separated by clear lines from adjudication on the one side and conciliation on the other.<sup>3</sup> Thus, for instance, while conciliation is traditionally distinguished from arbitration on the basis that the parties are not obliged to accept the recommendations of a conciliation commission, treaty provisions occasionally provide that such recommendations are binding<sup>4</sup> or at least must be considered in good faith.<sup>5</sup> The United Nations Secretary-General in the 1986 *Rainbow Warrior* case<sup>6</sup> between New Zealand and France functioned as both conciliator and arbitrator in producing a ruling which was 'equitable and principled', which 'respect[ed] and reconcil[ed]' the differing positions of the parties, which was informed by diplomatic consultations the Secretary-General had undertaken with each party separately, which did not contain explicit legal reasoning, and which the parties had agreed in advance to accept as binding. Arbitral tribunals have on several occasions been asked to produce non-binding opinions on legal disputes,<sup>7</sup> or to attempt to achieve friendly settlement of a dispute in the manner of a mediator or conciliator before issuing a binding ruling.<sup>8</sup> The substantive differences between arbitration and judicial settlement have also become less precise; the ICJ has developed the chambers procedure so as to be comparable in many respects to the procedure of an *ad hoc* arbitral tribunal, although institutional and other differences remain important.

<sup>2</sup> *Yearbook of the International Law Commission*, 1953, vol. 2, p. 202. See also Article 37 of the 1907 Hague Convention.

<sup>3</sup> See generally *UN Handbook on the Peaceful Settlement of Disputes*, issued initially as *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, UN Doc. A/46/33 (1991), esp. ch. II, sections E-H. See also Merrills, *International Dispute Settlement* (2nd edn., 1991), ch. 2-8.

<sup>4</sup> See, e.g., Article 14(3) of the 1981 Treaty Establishing the Organization of Eastern Caribbean States, *International Legal Materials*, 20 (1981), p. 1166.

<sup>5</sup> See, e.g., the 1985 Vienna Convention for the Protection of the Ozone Layer, *International Legal Materials*, 26 (1987), p. 1529.

<sup>6</sup> 74 ILR 256.

<sup>7</sup> See, e.g., *Italy/US Air Services* (1965), *Reports of International Arbitral Awards*, vol. 16, p. 81; and the request for an advisory opinion on the subject of reprisals in *US/France Air Services* (1978), *ibid.*, vol. 18, p. 421.

<sup>8</sup> See, e.g., the *Taba* arbitration (1988), 80 ILR 354, in which pursuant to the *compromis* a chamber comprising three members of the tribunal (a national from each State and a non-national) attempted (unsuccessfully) to develop a recommendation to the parties on settlement of the dispute prior to the hearing of oral arguments by the tribunal.

One area of possible difference, to be considered in a preliminary way in the final section of this article, concerns the relative importance of arbitral awards and of International Court judgments and opinions in the development of rules and principles of international law.

Arbitration as a means of settlement offers considerable flexibility as to the legal status of the parties. The commercial arbitrations between States and non-State entities are well known, as are more unusual arbitrations such as that held in Geneva between Greenpeace and France. The France-UK Channel Tunnel Treaty of 29 July 1987 takes advantage of this flexibility in providing for the reference to arbitral tribunals of disputes between (i) States; (ii) States and concessionaires; and (iii) concessionaires.<sup>9</sup> This article will deal only with inter-State arbitration.

In light of the continued importance of arbitration in the peaceful settlement of disputes, the purposes of this article are to examine the principal features of inter-State arbitration in the period since 1945 (section II), to assess the extent to which arbitration is distinct from conciliation and judicial settlement (section III), and to evaluate the impact of arbitral decisions on the development of public international law (section IV).

## II. INTER-STATE ARBITRATION SINCE WORLD WAR II: AN OVERVIEW<sup>10</sup>

What is the role of inter-State arbitration today? What sort of arbitral practice has there been since the Second World War? One thing is immediately obvious: that arbitration is much less common since the Second World War than it was before. Stuyt in his *Survey of International Arbitrations 1794-1989*<sup>11</sup> lists approximately 178 inter-State arbitrations

<sup>9</sup> The Iran-US Claims Tribunal is empowered to resolve a limited range of claims which are in substance inter-State claims not involving private parties, in addition to the much larger number of claims espoused on behalf of nationals of the respective States. The UN Compensation Commission established by the Security Council to address certain claims arising from the 1990-91 Gulf crisis will deal primarily with diplomatic protection claims, although interesting questions may arise as to means for ensuring that moneys paid actually reach the individuals who have suffered loss, and it is possible that very large claims will be presented on behalf of States themselves.

<sup>10</sup> The subject of contemporary inter-State arbitration has attracted periodic interest since 1945: see, e.g., Hudson, *International Tribunals Past and Future* (1944), and Carlston, *The Process of International Arbitration* (1946); the unsuccessful draft convention on arbitral procedure produced by the ILC (1953); Simpson and Fox, *International Arbitration* (1959); 'The Circular Note of the Secretary General of the Permanent Court of Arbitration', *American Journal of International Law*, 54 (1960), p. 933; *Report of the UN Secretary-General on the Work of the Organization*, UN Doc. A/8001 (1979); Von Mangoldt, 'Arbitration and Conciliation', in *Judicial Settlement of International Disputes* (Max Planck Institute, 1974); a spate of articles at the end of the 1970s, particularly Decaux, 'Pratique française en matière d'arbitrage', *Annuaire français de droit international*, 24 (1978), p. 352, Caffisch, 'L'Avenir de l'arbitrage interétatique', *ibid.*, 25 (1979), p. 9, and Johnson, 'International Arbitration Back in Favour?', *Yearbook of World Affairs*, 1980, p. 305; and most recently the new edition of Stuyt, *Survey of International Arbitrations 1794-1989* (1990) (hereinafter Stuyt), and Coussirat-Coustère and Eisemann (eds.), *Repertory of International Arbitral Jurisprudence* (1989-91). The continued publications of the *International Law Reports* and the *Reports of International Arbitral Awards* are also of central importance.

<sup>11</sup> See previous note. While comprehensive, this work cannot be regarded as definitive.

between 1900 and 1945.<sup>12</sup> In marked contrast, the same number of years after the Second World War produced only 43 arbitrations.<sup>13</sup> The vast increase in the number of States and the corresponding increase in international transactions is accompanied by a decline in the number of arbitrations.

Another very striking contrast, noted by several commentators, is that between the 'astoundingly high number of arbitration and conciliation treaties concluded since the beginning of this century' and the 'astoundingly low' frequency of their application to actual disputes.<sup>14</sup>

There are a few very useful collections of treaty provisions for the pacific settlement of international disputes<sup>15</sup> and several studies of these provisions.<sup>16</sup> The marked disparity between the hundreds of treaty provisions for inter-State arbitration and the actual resort to arbitration by States seems to point to the obvious conclusion that the treaty provisions are rarely used. But the conclusion that they are superfluous should be resisted. One very important function of these treaties is to show the commitment of States to the peaceful settlement of disputes. And it has been argued that the possibility of arbitration provided by the agreement may itself help to motivate parties to settle their disputes by other peaceful means.<sup>17</sup>

The strength of this argument is difficult to assess: as with suggested explanations for the reluctance of States to resort to arbitration,<sup>18</sup> there is no way to test the apparently plausible suggestions about the motivations of States. As regards the clear reluctance of States to use arbitration, writers

<sup>12</sup> These figures are 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.

<sup>13</sup> This number can be reduced even further because some of the tribunals did not produce, or have yet to produce any award. See Stuyt, No. 421, *Great Britain/Saudi Arabia*; No. 423, *France/Tunisia*; No. 445, *France/Great Britain*. The award in No. 450, *Canada/France*, was produced on 10 June 1992, *International Legal Materials*, 31 (1992), p. 1149, and the award in No. 451, *Great Britain/United States*, was produced on 30 November 1992.

<sup>14</sup> Von Mangoldt, 'Arbitration and Conciliation Treaties', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 1 (1981), p. 28.

<sup>15</sup> See, e.g., Oellers-Frahm and Wühler, *Dispute Settlement in Public International Law—Texts and Materials* (1984); United Nations, *A Survey of Treaty Provisions for the Pacific Settlement of International Disputes 1949–1962* (1966).

<sup>16</sup> Sohn, 'The Function of International Arbitration Today', *Recueil des cours*, 108 (1963–I), pp. 9–113; Sohn, 'Settlement of Disputes Relating to the Interpretation and Application of Treaties', *ibid.*, 150 (1976–II), pp. 195–294; Von Mangoldt, *loc. cit.* above (n. 14); Wühler, 'Arbitration Clauses in Treaties', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 1 (1981), p. 37.

<sup>17</sup> Wühler, *loc. cit.* above (n. 16), p. 37. An interesting recent example arose under one of the network of Bryan treaties, which have been the subject of a good deal of condescending scepticism over the years. (See, e.g., Zimmermann, *The League of Nations and the Rule of Law 1918–1935* (1939), pp. 128 ff.) However, the claim made by the United States against Chile in 1989 concerning the deaths of Letelier and Moffitt was for the convening of the Commission provided for in the 1914 treaty, and it was agreed to convene the Commission to determine the amount of compensation payable by Chile as if liability had been established, although the payment would be *ex gratia*. It was agreed that the decision of the Commission would be binding. See Chile–United States: Agreement to Settle Dispute Concerning Compensation for the Deaths of Letelier and Moffitt, *International Legal Materials*, 30 (1991), p. 422, and the Commission's report, *ibid.*, 31 (1992), p. 1. In January 1992 Chile agreed to pay \$2,611,892, to be divided between relatives of those killed.

<sup>18</sup> Von Mangoldt, *loc. cit.* above (n. 14).

have suggested various possible explanations: that States are not willing to risk submitting important disputes to arbitration; nor, conversely, will they go to the trouble and expense of submitting unimportant disputes to arbitration; it is likely that if one party does not want to go to arbitration the other will not insist on this. But, as Jennings remarked with regard to the once limited use of the International Court of Justice, 'as long as few governments in practice resort to the Court, almost any explanation will seem to be borne out by the facts'.<sup>19</sup>

Studies of the vast mass of treaty provisions on inter-State arbitration<sup>20</sup> show certain clear developments since the 1794 Jay Treaty. From the end of the nineteenth century the early bilateral provisions for arbitration were supplemented by multilateral treaties—as a consequence of the general growth in multilateral treaty-making. At the same time the early provisions for *ad hoc* arbitration were followed by treaties establishing institutional arbitration. The gradual increase in general arbitration treaties in the nineteenth century, culminating in the 1899 and 1907 Hague Conventions, has tailed off. Since the Second World War general arbitration treaties such as the 1948 Pact of Bogotá and the 1957 European Convention for the Peaceful Settlement of Disputes are exceptional,<sup>21</sup> whereas arbitration clauses in treaties dealing with other matters have continued to increase. Attempts to strengthen arbitration clauses and agreements, to produce the perfect, binding, inescapable commitment to arbitration, continued after the Hague Conventions but have had very little impact in practice.<sup>22</sup> The International Law Commission originally intended to produce a draft Convention on Arbitral Procedure, but its provisions proved unacceptable to States because of their attempt to impose stronger obligations on States, and they were downgraded to the status of 'Model Rules' and have never been adopted as such in practice.<sup>23</sup>

The developments in treaty practice—from bilateral to multilateral, from *ad hoc* to institutional arbitration—have not been matched by analogous changes in actual arbitral practice. The contrast between the very substantial amount of treaty provision for arbitration and the very small number of actual arbitral awards<sup>24</sup> suggests that attempts to prescribe how States *ought* to use arbitration will be vain. It is more important to consider how

<sup>19</sup> Jennings, in *Judicial Settlement of International Disputes* (Max Planck Institute, 1974), p. 35 at p. 36.

<sup>20</sup> See the works cited in n. 10 above.

<sup>21</sup> Both these treaties provide for other means of peaceful settlement, in addition to arbitration.

<sup>22</sup> Perhaps the 1982 Law of the Sea Convention arrangements will eventually prove to be an exception. The 1991 Protocol on Environmental Protection to the Antarctic Treaty, *International Legal Materials*, 30 (1991), p. 1455, is of interest in providing for compulsory and binding dispute settlement by either the ICJ or an arbitral tribunal; the powers of the arbitral tribunal extend to issuing 'provisional measures'.

<sup>23</sup> Schlochauer, 'Arbitration', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 1 (1981), p. 13 at pp. 25–6; Von Mangoldt, loc. cit. above (n. 10), at p. 439. For the text of the 'Model Draft on Arbitral Procedure', see *Yearbook of the International Law Commission*, 1958, vol. 2, p. 12.

<sup>24</sup> Of course the small number of arbitral awards does not signify that the issues involved are unimportant, or that the awards themselves are legally insignificant.

States have used arbitration in practice and to decide whether any deductions may be made as regards the future of arbitration.

This section began with a reference to the decline in the number of inter-State arbitrations since the Second World War. Any such attempt to quantify inter-State arbitration necessarily raises the question what is to be counted. If Stuyt's list of the post-Second World War arbitrations is taken as the convenient starting point, some doubts arise about those tribunals that did not apply public international law.<sup>25</sup> This question of the actual (or the proper) scope of international arbitration is a controversial one. In international law, unlike municipal law, arbitration was the norm until the twentieth century; that is, it preceded judicial settlement. The creation of the Permanent Court of International Justice gave rise to new questions about the role of arbitration.

A significant number of treaties made after the creation of the Permanent Court of International Justice distinguish between legal and non-legal disputes; the former are to be referred to the Court, the latter to arbitration and other methods of settlement.<sup>26</sup> The distinction seems clear and logical and certain writers apparently accepted it.<sup>27</sup> But this simple dichotomy made in many arbitration treaties has not been reflected in arbitral practice. The legal/non-legal distinction has been attacked.<sup>28</sup> Other writers insist on the legal nature of arbitration.<sup>29</sup>

As Hersch Lauterpacht observed, there is an interesting relation between this legal/non-legal distinction and exclusion clauses.<sup>30</sup> The debate on the proper scope of international arbitration had earlier focused on exclusion clauses restricting the scope of tribunals' jurisdiction. Clauses excluding from arbitration matters affecting honour, vital interests and independence received extensive discussion.<sup>31</sup> Such clauses came to be replaced by those excluding matters of domestic jurisdiction.<sup>32</sup> Because almost all arbitration

<sup>25</sup> See Stuyt, No. 412, UN Tribunal on Eritrea; No. 413, UN Tribunal on Libya; No. 414, *Belgium/Netherlands*; No. 436, *France/Spain*. Discussion by Verzijl, *op. cit.* above (n. 1), at pp. 161 ff and Von Mangoldt, *loc. cit.* above (n. 10), at pp. 424-8.

<sup>26</sup> See Sohn, 'The Function of International Arbitration Today', *loc. cit.* above (n. 16); and Sohn in *Judicial Settlement of International Disputes* (1974), at pp. 147-8.

<sup>27</sup> See, e.g., Sohn, 'The Function of International Arbitration Today', *loc. cit.* above (n. 16). However, Sohn accepts that certain legal disputes should still be referred to arbitration—those involving large groups of claims, minor problems and those involving non-State parties. Otherwise he expresses the hope that legal disputes would be submitted to the International Court of Justice: 'Arbitration will have to look for other areas if it wants to retain its vitality and to continue its old-time tradition' (p. 86).

<sup>28</sup> See, e.g., Lauterpacht, *The Function of Law in the International Community* (1933).

<sup>29</sup> Von Mangoldt adopts a narrow conception of arbitration and includes only those based on international law: *loc. cit.* above (n. 10). Verzijl, *op. cit.* above (n. 1), also takes this view. For Scheuner the wishes of the parties determine whether arbitration is to be legal or non-legal: *Judicial Settlement of International Disputes* (1974), at p. 148.

<sup>30</sup> Lauterpacht, *op. cit.* above (n. 28), at p. 46.

<sup>31</sup> See Partsch, 'Vital Interests', in Bernhardt (ed.), *Encyclopedia of Public International Law* vol. 10 (1981), p. 526; Wilson, 'Reservation Clauses in Agreements of Obligatory Arbitration', *American Journal of International Law*, 23 (1929), p. 68; Wehberg, 'Restrictive Clauses in International Arbitration Treaties', *ibid.*, 7 (1913), p. 301.

<sup>32</sup> See Lauterpacht, *op. cit.* above (n. 28); Partsch, *loc. cit.* above (n. 31); and Wilson, *loc. cit.* above (n. 31).

tribunals have in practice been *ad hoc* tribunals established by special agreement,<sup>33</sup> these exclusion clauses more or less completely escaped any discussion by tribunals.

The shift in treaty practice is clear—from exclusion clauses to the legal/non-legal distinction. But this shift did not lead to any change in State practice as regards arbitration—and it would have been a very important change. Although some nineteenth- and early twentieth-century tribunals were required to apply considerations of justice and equity as well as, or instead of, international law, many others applied international law. The treaty division between legal disputes to be referred to the Court and non-legal disputes to be referred to arbitration is certainly not reflected in post-Second World War arbitral practice. (Indeed, with the decline in both the conclusion and the invocation of the once-popular general arbitration treaty, this type of division of disputes has largely disappeared.) If anything there has been an increase in the legal character of arbitration. The *ad hoc* agreements that have in fact established arbitration tribunals since the war overwhelmingly refer to international law as the applicable law.<sup>34</sup> An interesting development is that whereas a considerable proportion of the earlier post-War agreements did not include an express choice of law clause,<sup>35</sup> or referred only to the treaty under which the dispute arose,<sup>36</sup> almost all the most recent agreements make express provision for the application of international law by the tribunal. The first of the three *Rainbow Warrior* cases is a notable exception to this general rule.<sup>37</sup> In this case, in which France and New Zealand agreed to refer all the problems arising from the *Rainbow Warrior* affair to the UN Secretary-General for a ruling, the States parties did not give any direction as to the applicable law. In fact the arguments of both New Zealand and France were explicitly based on international law, although in introducing his ruling the Secretary-General said only that it was 'equitable and principled'. The 1986 agreements made between France and New Zealand pursuant to the Secretary-General's ruling provided that any dispute concerning the interpretation or application of the agreements (on the apology by France, compensation, the detention of the two French agents already convicted in New Zealand, and non-impairment of New Zealand exports to the European Community) could be referred by either party to arbitration, but again did not make any provision as to the applicable law. However, the 1989 agreement establishing the arbitral tribunal

<sup>33</sup> See below, n. 59.

<sup>34</sup> It is noteworthy that neither Stuyt, *op. cit.* above (n. 10), nor the summaries in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2 (1981), give a complete record of the applicable law in arbitral awards. But Coussirat-Coustère and Eisemann (eds.), *op. cit.* above (n. 10), especially vol. 3, pp. 1478–85, is more instructive.

<sup>35</sup> See, e.g., Stuyt, No. 420, *UK/Greece*; No. 422, *UK/Greece*; No. 425, *France/Spain*.

<sup>36</sup> See, e.g., *ibid.*, No. 423, *France/Tunisia*; No. 426, *Austria/FRG*; No. 427a, *Austria/FRG*; No. 430, *Italy/USA*.

<sup>37</sup> *Ibid.*, No. 446, *France/New Zealand*; see United Nations Secretary-General: Ruling on the *Rainbow Warrior* Affair between France and New Zealand, *International Legal Materials*, 26 (1987), p. 1346, and *Rainbow Warrior* (1986), 74 ILR 256.



following the departure of the French agents from Hao provided that decisions should be based on the 1986 and 1989 agreements and on 'the applicable rules and principles of international law'.<sup>38</sup> The Secretary General's ruling also referred to France's undertaking to enter into binding arbitration with Greenpeace on the assessment of damages payable to Greenpeace for reparation including loss of the *Rainbow Warrior*, but the question of the applicable law was left to arrangements between France and Greenpeace.<sup>39</sup>

It is also clear that, since the Second World War, arbitration tribunals in cases where there was no express choice of law clause in the agreement have uniformly chosen to apply international law. Thus, in the *Diverted Cargo* case<sup>40</sup> between Great Britain and Greece the arbitrator said that, as there was no express clause on the applicable law, he would limit himself to the role of judge and decide 'sur la base du respect du droit' as under the 1907 Hague Convention, Article 37. Similarly in the *Ambatielos* case<sup>41</sup> between the same parties there was no express choice of law clause in the 1926 declaration which established the obligation to arbitrate differences arising out of an 1886 treaty. The Tribunal had to consider the United Kingdom argument that it had no jurisdiction to decide the Greek claim because the claim was made under general international law and did not arise out of the 1886 treaty. Even so, the Tribunal did not discuss the question of the applicable law, but in its consideration of the effect of delay and of the local remedial rule it assumed that international law was applicable.

In the *Lac Lanoux* arbitration<sup>42</sup> the tribunal did discuss the applicable law because the parties disagreed on this. The tribunal said that, because the question before it related uniquely to an 1866 treaty, the tribunal would apply the treaty if it was clear. But if interpretation was necessary the tribunal would turn to international law, allowing it in this case to take account of the 'spirit' of the Pyrenees treaties and 'des règles du droit international commun'. This is the common pattern when the *compromis* refers simply to the treaty under which the dispute arose.<sup>43</sup>

Tribunals have also considered how far they are free to go outside international law. The UN Tribunal on Libya,<sup>44</sup> 'whose decisions shall be based on law', saw itself as limited by this and not free to make equitable arrangements.

<sup>38</sup> See the 1990 award of the three member tribunal (Stuyt, No. 448), *Rainbow Warrior* (1990), 8 ILR 499.

<sup>39</sup> This 1987 award remains unpublished, although it is known that the tribunal awarded \$8,159,000 to Greenpeace and that France complied with the award. This arbitration is described by Stuyt (No. 447) as 'France-New Zealand', but the specific agreement to arbitrate was between France and the Stichting Greenpeace Council, the argument was presented by Greenpeace, and the award was made in favour of Greenpeace. See further the Memorandum of the Government of the French Republic to the Secretary-General of the United Nations (1986), 74 ILR 264, 268.

<sup>40</sup> *Reports of International Arbitral Awards*, vol. 12, p. 57 (1955).

<sup>41</sup> *Ibid.*, at p. 87.

<sup>42</sup> *Ibid.*, at p. 285.

<sup>43</sup> See, e.g., Stuyt No. 423, *France/Tunisia*; No. 426, *Austria/FRG*; No. 427a, *Austria/FRC* No. 430, *Italy/USA*.

<sup>44</sup> *Reports of International Arbitral Awards*, vol. 12, p. 351 (1950).

ments, by which it seems to have understood arrangements that were not provided for by the General Assembly resolution establishing the tribunal and laying down economic and financial provisions for the relations of Italy and Libya. The term 'equity', as used in *compromis* and in arbitral awards, is fundamentally ambiguous: it may be interpreted as signifying 'principles *infra legem*, *praeter legem*, or *contra legem*', that is, as involving principles that are part of international law, that complement international law, or that are inconsistent with international law.<sup>45</sup> In the *Rann of Kutch* proceedings, as in the leading ICJ cases,<sup>46</sup> the term was used in the first sense. The *compromis* made no provision on the applicable law. The question arose whether the tribunal had the power to decide *ex aequo et bono* and it made a separate ruling on this matter. It found that a tribunal would have this wider power to go outside the bounds of law only if such power were conferred on it by mutual agreement between the parties. In this case the parties' agreement did not do this clearly and beyond doubt. The tribunal did say that as both parties agreed that equity was part of international law, they were free to present and develop their cases with reliance on principles of equity.<sup>47</sup>

Thus there is no sign that States want to use arbitration mainly for non-legal disputes.<sup>48</sup> The arbitration agreements establishing tribunals almost all refer to international law. And arbitral tribunals in the absence of any express choice of law clause apply international law; they do not seem prepared openly to avow that they will indulge in non-legal decision-making. The question how far tribunals in fact use compromise in resolving the disputes presented to them will be discussed in the next section.

Another basic question that arises in this consideration of post-Second World War arbitration and comparison with earlier practice is that of the composition of arbitration tribunals. Writers have described the diversity of pre-Second World War practice in this regard, a diversity that is apparent from the earliest days of modern arbitration.<sup>49</sup> The Jay Treaty provided for tribunals of three and five members, the umpire to be chosen by the other arbitrators on each tribunal. The umpires were of the nationality of one of the parties.<sup>50</sup> The next year the umpire of the three-man tribunal in the

<sup>45</sup> See, e.g., E. Lauterpacht, *Aspects of the Administration of International Justice* (1991), p. 117. An interpretive decision that in a particular context the term 'equity' falls into one or other of these three categories does not resolve all problems as to its specific application.

<sup>46</sup> *Rann of Kutch* case (1968), *Reports of International Arbitral Awards*, vol. 17, p. 5; cf. *Burkina Faso/Mali*, ICJ Reports, 1986, p. 554 at pp. 567-8.

<sup>47</sup> See further Section III, below.

<sup>48</sup> Conciliation is, of course, available for such disputes. See, e.g., *Jan Mayen*, *International Legal Materials*, 20 (1981), p. 797 (Iceland/Norway), although it is of interest that the reasoning of the conciliators in this case is not markedly different from that of an arbitral tribunal or of the ICJ in a maritime boundary case. For observations concerning justiciability and the legal nature of disputes, see *Nicaragua v. USA*, ICJ Reports, 1984, p. 392 (*Jurisdiction and Admissibility*), *Nicaragua v. USA*, ICJ Reports, 1986, p. 14 esp. at pp. 167-70 (*Merits*).

<sup>49</sup> See the works referred to in n. 10, above.

<sup>50</sup> *Stuyt* Nos. 1, 2 and 3.

Spain–United States arbitration was not a national of either party.<sup>51</sup> In 1797 the Empress of Russia was the sole arbitrator between Austria and Prussia; she referred the dispute to a three-man commission.<sup>52</sup>

Apart from a move away from tribunals composed solely of nationals of the parties, no clear pattern or line of development in the composition of tribunals has been readily discernible. Since the Second World War the large majority of tribunals have been three-man tribunals.<sup>53</sup> There have also been a significant number of tribunals with five or more members, and five cases were submitted to single arbitrators.<sup>54</sup> Among the three-man tribunals there is again the diversity that was to be expected on the basis of earlier practice. In some each party chose a national; in others they had to select a non-national arbitrator. In some the arbitrators chose the umpire; in others the parties were to agree on this. In the latter case, the States parties regularly failed to agree on an umpire and the *ad hoc* agreement included fall-back provisions for other means of appointment.<sup>55</sup> Such difficulties in the choice of umpire, however, do not seem to lead to any problems with compliance with the final award. They do not reflect on, or affect, the parties' commitment to the arbitration process.

This question of the composition of the arbitration tribunal is often considered to have implications for the role of the tribunal and the nature of the arbitration process. It has been suggested that tribunals with a majority of national arbitrators are more likely to turn to compromise, whereas tribunals composed of non-national arbitrators are likely to operate strictly on the basis of law.<sup>56</sup> This argument will be considered in the next section.

Another striking feature of post-Second World War arbitral practice—and another instance of continuity—is the *ad hoc* nature of the tribunals. As was mentioned above, arbitration treaties began to provide for what is commonly called institutional arbitration in the nineteenth century. That is, States agreed that all, or a particular category of, future disputes should be referred to arbitration. States were prepared to commit themselves in advance to arbitration, or so it seemed.

<sup>51</sup> *Ibid.*, No. 4.

<sup>52</sup> *Ibid.*, No. 43.

<sup>53</sup> The word 'man' is used advisedly. Apart from the Empress of Russia, the Queen of Spain and the Queen of England, there has been only one woman arbitrator in inter-State cases, Ruth Lapidoth of Israel in the *Taba* arbitration, *International Legal Materials*, 27 (1988), p. 1421.

<sup>54</sup> Stuyt, No. 411, *Ecuador/Peru*; No. 415, the *Monetary Gold* case; No. 420, the *Diverted Cargo* case; No. 423a, *Belgium/Ireland*; No. 446, the first *Rainbow Warrior* case. (In the *Palena* (1966, 3 ILR 16) and *Beagle Channel* (1977, 52 ILR 93) cases between Argentina and Chile, the sole arbitrator specified by the 1902 Treaty was the Queen of England, but she referred the case to panels of three and five arbitrators respectively.) It is not obvious that these cases support Von Mangoldt's argument that single arbitrators will be appointed only when they have special personal qualifications. Rather most of them seem to be intended to save time and money in unimportant cases—Von Mangoldt's other suggestion to explain resort to a single arbitrator (*loc. cit.* above (n. 10), at p. 524).

<sup>55</sup> Stuyt, No. 425, *Lac Lanoux*, *loc. cit.* above (n. 42); Stuyt, No. 428, *France/US Air Service* (1963), *Reports of International Arbitral Awards*, vol. 16, p. 7; Stuyt, No. 433, *Rann of Kutch*, *loc. cit.* above (n. 46); Stuyt, No. 441, *Guinea/Guinea-Bissau* (1985), *Reports of International Arbitral Awards*, vol. 19, p. 149.

<sup>56</sup> See Von Mangoldt, *loc. cit.* above (n. 10), at pp. 528 ff.

Some, but not all, such agreements established standing tribunals ready to spring into action when called on. Several of these were to be attached to international organizations. These provisions for 'permanent' tribunals have received considerable academic attention,<sup>57</sup> but most have never been set up, and the treaty provisions thus remain a dead letter in many cases. Even when such tribunals have been established, they rarely decide any cases.

Similarly the treaty provisions for future disputes to be referred to arbitration have not been much used in practice. Many of these agreements are of a very general nature.<sup>58</sup> They are far from being self-executing and need to be supplemented by a special agreement in the event of an actual dispute. Unilateral application is rarely sufficient to get the arbitration process going. In all the cases where the parties had a prior treaty commitment to arbitrate future disputes (about a quarter of the total number of arbitrations since the war), the parties made a special agreement to establish the arbitral tribunal.<sup>59</sup> For example, in the *Beagle Channel* case, although Chile made an initial unilateral request for arbitration to the Queen of England under the 1902 Treaty between Argentina and Chile which conferred on the English monarch jurisdiction to arbitrate disputes between those two States, the Queen only undertook the arbitration after extensive consultations with the parties had established the willingness of both to accept arbitration, a willingness expressed in the *compromis* agreed in 1971. It is clear that States continue to prefer the freedom of *ad hoc* arbitration; the vast majority of tribunals that have made awards since the Second World War have been *ad hoc* tribunals.

How does the subject-matter of post-Second World War arbitration compare with earlier practice? The most obvious change is in the decrease in arbitrations concerning injuries to aliens. The Iran-US claims tribunal, the post-war conciliation commissions, and the United Nations Compensation Commission established after the 1990-91 Gulf conflict, deal with claims like those brought to the old mixed claims commissions. The individual arbitrations in cases such as *Ambatielos*,<sup>60</sup> *Diverted Cargoes*,<sup>61</sup> *Gut Dam*,<sup>62</sup>

<sup>57</sup> See, e.g., Oellers-Frahm and Wühler, *op. cit.* above (n. 15); Tomuschat, 'International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction', in *Judicial Settlement of International Disputes* (Max Planck Institute, 1974), at p. 285; Sohn in *ibid.*; and the works listed in n. 10, above.

<sup>58</sup> See Simpson and Fox, *op. cit.* above (n. 10), chapter 3; Von Mangoldt, *loc. cit.* above (n. 10), at pp. 489 ff.

<sup>59</sup> Stuyt, No. 422, *Ambatielos*, *loc. cit.* above (n. 41); Stuyt, No. 425, *Lac Lanoux*, *loc. cit.* above (n. 42); Stuyt, No. 432, *Argentina/Chile* (1966), *Reports of International Arbitral Awards*, vol. 16, p. 111; Stuyt, No. 435, *Beagle Channel*, *loc. cit.* above (n. 54); Stuyt, No. 444, *The Filetage* case (1986), 82 ILR 590; Stuyt, No. 450, *Canada/France*, *Revue générale de droit international public*, 93 (1989), p. 480; and the five air transport arbitrations (Stuyt, Nos. 423a, 428, 430, 439, 451).

<sup>60</sup> *Loc. cit.* above (n. 41).

<sup>61</sup> *Loc. cit.* above (n. 40).

<sup>62</sup> *International Legal Materials*, 8 (1969), p. 118.

and in some respects the *Rainbow Warrior*<sup>63</sup> also involve issues of State responsibility for injury to aliens, but the balance has clearly shifted away from the type of claims that made up over half of pre-Second World War arbitrations.<sup>64</sup>

The second largest category of pre-Second World War claims was boundary and territorial sovereignty cases. These formed about a quarter of all cases; as eleven out of the forty-three post-Second World War cases listed by Stuyt also concern territorial and boundary questions, this proportion has remained constant. Although limited in number, several of these awards attest to the considerable significance for international relations of arbitration and adjudication as means of settlement of boundary and territorial disputes. Where incentives exist to seek a settlement, such as the need to avoid violent conflict or to define rights with certainty in order to allow development, resource exploitation, or environmental protection, third-party settlement based on international law may secure legitimacy and acceptance for a solution which politicians and officials within the State concerned would have been reluctant to propose for fear of recrimination. Some territorial and boundary disputes are particularly susceptible to third-party settlement, where the structure of the dispute is such that both sides are likely to get something of what they want, and will thus be able to portray the outcome as a success rather than a loss. Settlements in boundary and territorial cases are legally distinctive in that, unlike an award of damages in a case concerning State responsibility, they are typically dispositive as to title to territory or delimitation of a boundary.

About a fifth of the tribunals listed by Stuyt dealt with claims arising out of the Second World War. The remainder are a diverse collection, but their common feature is that they all involve some aspect of treaty interpretation.

Finally, the question arises which States have resorted to arbitration since the Second World War? If the cases arising out of the war are discounted, it is France, the United Kingdom and the USA that have made the most use of arbitration.<sup>65</sup> The States of the former Soviet bloc have thus far been, not surprisingly, completely absent. As regards Third World States, they have resorted to arbitration in several major boundary cases although not thus far on other issues. Latin American States are no longer subjected to extensive arbitral claims for injuries to aliens by more powerful developed States. Their early commitment to peaceful settlement of disputes and their crucial influence on the development of arbitration treaties have not led them to turn to arbitration since the Second World War except

<sup>63</sup> Loc. cit. above (n. 37); this award refers to the determination of compensation due to Greenpeace and to the settlement between France and the family as to compensation for the death of the crew member killed. The unpublished France/Greenpeace award deals with reparation.

<sup>64</sup> In part this may be attributed to the rise of lump sum settlement and national claims commissions.

<sup>65</sup> A comparison with an earlier period is of interest. Politis, *La Justice internationale* (1924), p. 32 indicates that in the period 1794-1914 total numbers of cases submitted to arbitration for the following States were: Great Britain 71, USA 69, France 33, Italy 19, Germany (mainly between German States) 15, Russia 3, Austria 2, Japan 2.

in six boundary or title to territory cases. Asian, African and Middle Eastern States have also submitted boundary/title to territory cases to arbitration. In fact, all except two of these cases have involved Third World States. This corresponds to the willingness of developing States to use the International Court of Justice in boundary and territorial cases, and is further evidence of the peculiar suitability of these cases for arbitral and judicial settlement.

The hazards of generalization and prediction in this area are clear from earlier statements overtaken by events. Schlochauer spoke of an increase in arbitration since 1945 because of the tribunals established under the peace settlements. He said that '*ad hoc* tribunals are resorted to only in exceptional cases', and predicted that what he saw as the lesser authority of the International Court of Justice as compared with the Permanent Court would lead States to turn to arbitration.<sup>66</sup> Similarly Caflisch predicted a more promising future for arbitration because of the reduction in activity of the International Court of Justice.<sup>67</sup> But two basic conclusions may be ventured. It seems likely that arbitration will continue to be an important alternative to the International Court of Justice for legal disputes between States. And it seems very unlikely that generalized institutional arbitration will become more popular, although specialized bodies such as the GATT Disputes Settlement Panels and the Law of the Sea Tribunal may assume greater importance.

### III. THE CONTRIBUTION OF ARBITRAL DECISIONS TO DISPUTE SETTLEMENT

The three most obvious reasons for States to choose arbitration over settlement by the ICJ, particularly now that the modified and functional Chambers procedure is established and has demonstrably increased the flexibility of that body, are the possibility of secrecy, the possibility of greater party control over the composition of the tribunal, and the ability to avoid an intervention in the proceedings by a third State. A fourth feature is the possibility of closer control by the parties of the questions actually addressed by the tribunal, although the International Court has also shown considerable deference to the parties in special agreement cases. Further possible advantages which have been relevant if not highly significant in practice include the possibility of recourse to the ICJ against a tribunal decision,<sup>68</sup> and conceivably the non-application of provisions such as

<sup>66</sup> Schlochauer, loc. cit. above (n. 23), at p. 20 and p. 25.

<sup>67</sup> Loc. cit. above (n. 10).

<sup>68</sup> e.g. the *Arbitral Award of the King of Spain (1906)* case, *ICJ Reports*, 1960, p. 192, and *Guinea-Bissau v. Senegal*, *ICJ Reports*, 1991, p. 53. Fitzmaurice argued more generally: 'There is no doubt that one of the great psychological deterrents to resorting to international adjudication is the feeling governments have that, by doing so, they lose control of the case . . . whereas in an international political organ, a government can speak and manoeuvre up to the last moment when the final vote is taken. For this reason, however desirable finality may be in principle, it is at least worth considering

Articles 94 and 102 of the UN Charter.<sup>69</sup> Resort to arbitration may also be response of States discouraged by a particular experience with the ICJ.<sup>70</sup> Finally, where it is desired to entrust resolution of the dispute to person with particular technical competence, arbitration by technical experts or by international adjudicators closely assisted by technical experts may be preferred to ICJ adjudication.<sup>71</sup>

### *Secrecy*

Secrecy is precluded by the Statute and Rules of the ICJ. Notification of the request or *compromis* must be circulated to all other parties to the Statute,<sup>72</sup> and the judgment must be made public.<sup>73</sup> It appears that the Rules do not preclude the parties from providing for the oral hearings to be private (although this is likely to be rare in practice), and parties may conceivably be able to persuade the Court to exercise the discretion allowed to it by the Statute and Rules to keep the written pleadings private. In an arbitration, however, the parties are able to keep all phases of the proceeding private. Thus, for instance, very little is generally known about the proceedings or reasoning of the Dubai-Sharjah and second *Rainbow Warrior* (Greenpeace-France) arbitrations, although inter-State arbitrations in which not even the award is published remain exceptional. More common is the permanent confidentiality of pleadings and oral arguments, as in the *Anglo-French Continental Shelf* case. If such confidentiality can be relied upon, States become free to take positions in the pleadings and oral argu-

whether . . . some system of really adequate international appellate jurisdiction could not be instituted according to which a tribunal such as the International Court of Justice would rank as a final court of appeal, rather than of first instance . . .': review of Jenks, *The Prospects of International Adjudication*, *University of Kansas Law Review*, 13 (1965), p. 442 at p. 449.

<sup>69</sup> See the *Guinea-Bissau/Senegal* arbitration (1989), 83 ILR 1, in which the tribunal held that Article 102 of the UN Charter was not material in that while the 1960 Franco-Portuguese agreement had not been registered with the UN Secretariat, Article 102(2) did not preclude its invocation before the tribunal, which was not an organ of the UN. Cf. the considerable importance attached to Article 11 by the United Kingdom in negotiations with Iceland over a compromissory clause for reference to the ICJ (*Fisheries Jurisdiction* case, *ICJ Reports*, 1973, p. 3 at pp. 12-13), and its invocation by Pakistan in the *ICAO Council* case, *ICJ Reports*, 1972, p. 46 at p. 51, and on the part of South Africa in the *South West Africa* cases (e.g. dissenting opinion of Judge Van Wyk, *ICJ Reports*, 1962, p. 651, and separate opinion of Judge Van Wyk, *ICJ Reports*, 1966, p. 114).

<sup>70</sup> Thus it has been suggested that France's preference for arbitration in the *Anglo-French Continental Shelf* case was influenced by the *Nuclear Tests* cases, *ICJ Reports*, 1974, p. 253 and p. 457, and the reluctance of Thailand to risk return to the ICJ after the *Temple* case, *ICJ Reports*, 1962, p. 6, is associated with its reported preference for arbitration rather than reference to the ICJ in dispute settlement provisions in treaties (including the 1990 offshore resources joint development agreement with Malaysia). Article 95 of the UN Charter, in the chapter concerning the ICJ, provides: 'Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.'

<sup>71</sup> Thus the 1982 Law of the Sea Convention provides for binding arbitration by special arbitral tribunals consisting of five qualified experts if the dispute concerns fisheries, protection and preservation of the marine environment, marine scientific research or navigation. Concern has occasionally been expressed about the capability of the ICJ to handle, for example, a scientifically complex and technical environmental dispute.

<sup>72</sup> Statute, Art. 40(3), and Rules, Art. 42.

<sup>73</sup> Statute, Art. 59, and Rules, Art. 93.

ment without concern that these may be later cited by third States as, for instance, evidence of State practice or admissions against interest. Confidentiality during the proceedings, as in the UK-US *Heathrow Landing Charges* arbitration conducted discreetly in The Hague, may be useful to avoid potential domestic political difficulties resulting from publicity. The absence of publicity may be important also to enable States or individuals to preserve dignity in particular cases.

### *Choice of arbitrators*

States may value the capacity to choose or at least to influence the choice of arbitrators for many reasons. The case for the appointment by States of nationals as arbitrators is similar to that for the appointment of *ad hoc* judges in the ICJ: it gives the parties confidence that their particular national concerns will be represented and pressed throughout the tribunal's deliberations. As in the International Court, national arbitrators have on occasion voted with the majority against contentions advanced by their State,<sup>74</sup> although dissenting opinions by national arbitrators against their own State are rare.<sup>75</sup> The case for the appointment of all or all but one of the arbitrators by the parties (including the appointment of non-nationals) is principally that this ensures that each party feels a degree of confidence in the tribunal as a body likely to appreciate the factual, political and legal circumstances in a manner with which it can identify and which it can accept. In cases where the parties have shared perceptions, it may be possible for them to agree on all (or all but one) of the arbitrators. The freedom to choose arbitrators is now matched by the freedom offered to the parties by the ICJ Chambers procedure. In the *Gulf of Maine* case the power to choose the judges who would form the Chamber was clearly a major attraction of the Chambers procedure for Canada and the USA; they made it clear that, if the judges they wanted were not appointed by the Court to serve on the Chamber, they would turn to arbitration.<sup>76</sup> There was some initial doubt whether the provision in Article 17(2) of the Court's Rules that 'the President shall ascertain the views of the parties regarding the composition of the Chamber' allowed the parties actually to control the choice of judges by the Court.<sup>77</sup> Some judges still maintain that an essential difference between the ICJ and *ad hoc* arbitral tribunals is that in a court of

<sup>74</sup> See, e.g., the position taken by the Spanish arbitrator in *Lac Lanoux*, loc. cit. above (n. 42); and that taken by the Austrian arbitrator in the case concerning the *Interpretation of Article 24 of the Treaty of Finance and Compensation of 27 November 1961* (1972), *Reports of International Arbitral Awards*, vol. 19, p. 3.

<sup>75</sup> On the ICJ, see, e.g., Suh, 'Voting Behavior of National Judges in International Courts', *American Journal of International Law*, 63 (1969), p. 224; and Weiss, 'Judicial Independence and Impartiality: A Preliminary Inquiry', in Damrosch (ed.), *The International Court of Justice at a Crossroads* (1987), p. 123.

<sup>76</sup> See Oda, 'Further Thoughts on the Chambers Procedure of the International Court of Justice', *American Journal of International Law*, 82 (1988), p. 556; Schwebel, 'Ad Hoc Chambers of the International Court of Justice', *ibid.*, 81 (1987), p. 831.

<sup>77</sup> See the dissenting opinions of Judges Morozov and El-Khani in the *Gulf of Maine* case, *ICJ Reports*, 1982, pp. 11-12.



justice the parties do not, and ought not to, have the power to choose the judges (beyond the specific exception in relation to judges *ad hoc*).<sup>78</sup> But the Court has consistently given effect to the wishes of the parties in the establishment of Chambers.<sup>79</sup>

It may be important for the arbitrator to share the social or legal culture or the historical experience of one or both States. The *Temple* case illustrates the potential importance of these factors. In his dissenting opinion Wellington Koo, an Asian judge, did not regard the failure of Prince Danrong or the Siamese Government to protest at the flying of the French flag during his visits to the temple as having great legal significance. Koo quoted the Prince's daughter: 'It was generally known at the time that we only give the French an excuse to seize more territory by protesting'. Koo accepted this, adding that this 'was, generally speaking, the common experience of most Asiatic States in their intercourse with the Occident Powers during this period of colonial expansion'.<sup>80</sup> A view of Thai or Asian culture is also evident in his view that, rather than being a legally significant omission, it would have been inappropriate to raise the question of a minor boundary variation before the Franco-Siamese Commission when Thailand was trying before that Commission to regain whole provinces which claimed had been taken by France. In cases where the States share common cultural referents of central importance, arbitrators or judges who do not understand these may risk missing sensitivities and nuances in the parties' perceptions of the dispute. Where cultural differences are important to the substance of the case or to the presentation of the decision, the tribunal almost inevitably must aim for neutrality,<sup>81</sup> but a neutrality which engages with the relevant cultural *mores* rather than ignoring them.<sup>82</sup>

### *Intervention*

The Statute of the ICJ opens the way to intervention by third States in contested cases on two bases: a right to intervene where the construction

<sup>78</sup> See the dissenting opinion of Judge Shahabuddeen in *Gulf of Fonseca (El Salvador/Honduras Application by Nicaragua for Permission to Intervene)*, ICJ Reports, 1990, p. 3 (see also the dissenting opinion of Judge Tarassov).

<sup>79</sup> See the declaration by Judge Oda, ICJ Reports, 1987, p. 13.

<sup>80</sup> ICJ Reports, 1962, p. 91.

<sup>81</sup> Cf. Bernini, 'Cultural Neutrality: A Prerequisite to Arbitral Justice', *Michigan Journal of International Law*, 10 (1989), p. 39. An obvious area of difference concerns the powers and obligations of the State with regard to the expropriation or protection of property. Cf. more generally Cohen, *Negotiating Across Cultures: Communication Obstacles in International Diplomacy* (1991).

<sup>82</sup> The *Japanese House Tax* case (1905), *Reports of International Arbitral Awards*, vol. 11, p. 1. It may be open to criticism on this ground. The arbitrators were Ichiro Motono (Japan), Louis Renaudie (France, for the various Western powers), and Gregers Gram (Norway, as Umpire). Japan's disappointment with the award disinclined it to participate in international adjudication for many years. Note also the failure of the Franco-Moroccan Conciliation Commission established in 1957 following the diversion to Algiers of a flight from Rabat containing leaders of the FLN. Morocco withdrew from the Commission after the Commission decided by the vote of the three Western members (de Visscher (President), Ago, and Massigli) against those of the Lebanese and Moroccan members (Mekkaoui and Filalli) further to postpone consideration of a Moroccan request that evidence be heard from Ben

a treaty to which the State is party is in question,<sup>83</sup> and a power of the Court to permit intervention on application where a State has 'an interest of a legal nature which may be affected by the decision in the case'. All but one of the attempts to persuade the Court to exercise this power have been unsuccessful, and the one exception, Nicaragua's intervention in the *Gulf of Fonseca* case between El Salvador and Honduras, was permitted only within narrow substantive and procedural bounds.<sup>84</sup> It has been suggested that the Court's very restrictive approach to intervention reflects its concern that if States contemplating referring a dispute to the Court apprehend that another State whose participation is not welcome may nevertheless succeed in intervening, they are likely instead to go to arbitration.<sup>85</sup> Autonomy of the parties renders such intervention virtually impossible in *ad hoc* arbitration, although it is of interest that the 1991 Environmental Protection Protocol to the Antarctic Treaty does provide for intervention before the Arbitral Tribunal.<sup>86</sup>

### *Choice of questions*

It is not uncommon for the instrument referring a particular matter to arbitration to circumscribe the question in issue narrowly,<sup>87</sup> to define the

and other passengers. De Visscher's view was that the real issues were of law not of fact, and that Morocco's concern that these witnesses be heard was unjustified and a pretext (*Aspects récents du droit procédural de la Cour Internationale de Justice* (1966), at p. 214). For Moroccan and French views see respectively Hamzch, *International Conciliation*, 1963, at pp. 60-6 (reprinting a Moroccan government publication), and 'L'Affaire du F.OABV', *Annuaire français de droit international*, 4 (1958), p. 282.

<sup>83</sup> Cf. the *Haya De La Torre* case (*Colombia/Peru*), in which Cuba was permitted to intervene under Article 63 (*ICJ Reports*, 1951, p. 71, at pp. 75-7); the refusal to permit intervention by El Salvador in the then-current jurisdiction and admissibility phase of proceedings in *Nicaragua v. USA* (*ICJ Reports*, 1984, p. 215); the separate and dissenting opinions in this case; and the comments on this decision by Judge Kéba Mbaye, 'L'Intérêt pour agir devant la Cour Internationale de Justice', *Recueil des cours*, 209 (1988-II), p. 223 at pp. 294-5.

<sup>84</sup> *ICJ Reports*, 1990, p. 92 (decision of the Chamber). By this decision intervention did not make Nicaragua a party to the case, and the Special Agreement between Honduras and El Salvador remained *res inter alios acta*. See also the earlier decision of the full Court, *ICJ Reports*, 1990, p. 3, holding that the decision on intervention was a matter for the Chamber already constituted.

<sup>85</sup> See Brownlie, 'Arbitration and International Adjudication: Comments on a Paper by Judge M. Lachs', in Soons (ed.), *International Arbitration: Past and Prospects* (1990), p. 60. The *Libya/Malta Continental Shelf* case, in which both parties opposed Italy's application to intervene under Article 62 of the Statute (*ICJ Reports*, 1984, p. 3), and the *Libya/Tunisia Continental Shelf* case, in which both parties opposed Malta's application to intervene (*ICJ Reports*, 1981, p. 3), may be the type of situations to which this comment is applicable. Anxieties of this sort will be enhanced by the decision of the Chamber on Nicaragua's application to intervene in the *Gulf of Fonseca* case that, if the other requirements pertaining to Article 62 were satisfied, no jurisdictional nexus between the intervening State and the parties was required.

<sup>86</sup> Article 7 of the Schedule on Arbitration states: 'Any Party which believes it has a legal interest, whether general or individual, which may be substantially affected by the award of the Arbitral Tribunal, may, unless the Arbitral Tribunal decides otherwise, intervene in the proceedings.'

<sup>87</sup> e.g. in the *Austria/Federal Republic of Germany* case (1972), *Reports of International Arbitral Awards*, vol. 19, p. 3, the parties asked the tribunal to consider only exceptions to the renunciation clause in the 1961 treaty, rather than to interpret the renunciation clause itself.

rules which the parties intend the tribunal to apply,<sup>88</sup> or to limit the range of decisions which it is open to the tribunal to reach.<sup>89</sup> Arbitral tribunals have tended to accept and comply with such limitations.<sup>90</sup> The PCIJ did express concern in the *Free Zones* case about agreements between parties to request the Court to adopt procedures not provided for in the Statute,<sup>91</sup> but noted that it was for the Court to promote, so far as compatible with the Statute, 'direct and friendly settlement' of disputes, and did in fact do as the parties wished in making an order on a minor point in terms which indicated its likely views on the major issue.<sup>92</sup> In the *Minquiers and Ecreho* case<sup>93</sup> the International Court did not question the view of the parties that the islands must be under the sovereignty of one of them, and in the *Gulf of Maine* case<sup>94</sup> the Chamber did not controvert the view of the parties that the boundary must end at a point within a designated area. While the Court's duties to the entire international community are greater than those of an *ad hoc* tribunal, the apparent willingness of the full Court and of Chambers to countenance certain agreements as to the basis of litigation indicates that, subject to the Statute, the adaptability of the ICJ to the wishes of the parties is not so much less than that of arbitral tribunals in practice as theoretical analysis might suggest.<sup>95</sup> Furthermore, the parties may often not wish to, or be unable to agree to, define tightly the question posed and the law applicable even where they do resort to arbitration rather than to the Court.<sup>96</sup>

### *Dispute settlement*

As indicated above, inter-State arbitrations in recent years have almost always been initiated by special agreement, often in light of a modern treaty which had disputes of this particular nature firmly in view. Although changes of government or of perception could lead to withdrawal even from special agreement cases, inter-State arbitral tribunals since 1945 have not i-

<sup>88</sup> As with the rules for decision concerning neutrality (which were expressly stated by the parties to be *lex lata* for the *Alabama* arbitration, *British and Foreign State Papers*, vol. 62, p. 233) laid down in the 1871 Treaty of Washington; and the rules of prescription stated by the parties to be applicable in the *Guyana Boundary* arbitration (*British and Foreign State Papers*, vol. 92, p. 160).

<sup>89</sup> As in the *Taba* arbitration, loc. cit. above (n. 8), in which the tribunal was called upon to decide whether each boundary pillar was located as specified by Egypt or by Israel; other locations were ruled out.

<sup>90</sup> See, e.g., Stuyt, No. 427, *Honduras/Nicaragua* (1961), 30 ILR 76 at p. 88.

<sup>91</sup> The Court did not comply with an informal request by the parties to make the results of its deliberation available unofficially before giving judgment.

<sup>92</sup> PCIJ, Series A, No. 22 (1929).

<sup>93</sup> ICJ Reports, 1953, p. 47.

<sup>94</sup> ICJ Reports, 1984, p. 246.

<sup>95</sup> See also Jenks, *The Prospects of International Adjudication* (1964), pp. 604-16.

<sup>96</sup> See, e.g., Stuyt, No. 428, *US/France Air Services*, in which both parties asked the tribunal to determine its jurisdiction on the basis of broad interpretation of the arbitration agreement, and the tribunal was free to give a single answer to the two questions put to it, or to reverse the order of the questions.

fact been faced with the problems of the non-appearing or disappearing defendant, which has been a frequent feature of recent ICJ cases begun otherwise than by special agreement.<sup>97</sup>

The characteristics of special agreement, presence and co-operation of the parties, and *ad hoc* rather than permanent tribunals, provide the context in which distinctive features of the dispute settlement function of inter-State arbitral tribunals can be discerned. The parties to the case are the immediate audience to whom the tribunal's findings and decision are addressed. The similarities between arbitral tribunals and ICJ Chambers in most of these respects are clear. But the ICJ as a standing tribunal, with an enduring relationship to past and future decisions and with a widely circulated series of law reports, is inevitably concerned with a wider audience at the time of judgment, albeit that during the oral hearings the intimacy of the setting may lead the judges to treat their colleagues and the parties as the only audience. ICJ judgments do as a matter of practice seek to treat in some way the principal arguments and viewpoints advanced by each party, even where these would otherwise be peripheral to the main line of reasoning in the judgment.<sup>98</sup> However, particularly in judgments of the full court, the language and style of judgment, and the arguments and processes of reasoning employed, may be further removed from those favoured by the parties than is evident in some arbitrations.<sup>99</sup> The contrast is not absolute: some arbitral tribunals do not appear to have successfully engaged with both parties,<sup>100</sup> and some ICJ judgments have been notably successful in this regard.<sup>101</sup>

If the potential for arbitral tribunals (and perhaps Chambers) to be closer to the parties is not itself a source of controversy, the suspicion that arbitral tribunals may be inclined to depart from established principles of law has aroused more concern for some States and commentators,<sup>102</sup> and merits further consideration here. Although the power conferred upon

<sup>97</sup> Defendant States have also failed to appear in a number of arbitrations instituted by transnational corporations, e.g. *BP v. Libya* (1974), 53 ILR 297, *Texaco v. Libya* (1977), 53 ILR 389, *Liamco v. Libya*, *International Legal Materials*, 20 (1981), p. 1.

<sup>98</sup> The *Gulf of Maine* case, loc. cit. above (n. 94), provides a particularly clear illustration.

<sup>99</sup> Cf. Prott, *The Latent Power of Culture and the International Judge* (1979). The *Guinea/Guinea-Bissau* award, loc. cit. above (n. 55), pays greater attention to certain issues of concern to African States, including the right to development, than would be expected of a comparable ICJ judgment. The *Rann of Kutch* case, loc. cit. above (n. 46), was of interest in that the parties had an opportunity to comment on the tribunal's proposed award in draft, and these comments were taken into account in preparing the final version. The award also includes extensive passages attributed to the dissenting (India-appointed) arbitrator.

<sup>100</sup> e.g. *Japanese House Tax*, loc. cit. above (n. 82); *Beagle Channel*, loc. cit. above (n. 54).

<sup>101</sup> The *North Sea Continental Shelf* cases, *ICJ Reports*, 1969, p. 3, the *Libya/Tunisia Continental Shelf* case, *ICJ Reports*, 1982, p. 18, and the *Burkina Faso/Mali* case, loc. cit. above (n. 46), may be put readily into this category.

<sup>102</sup> See, e.g., Dennis, 'Compromise: The Great Defect of Arbitration', *Columbia Law Review*, 11 (1911), p. 493. Similar concerns have been expressed that the establishment of Chambers in the ICJ might lead to regionalization of decisions and to the destruction of the coherence of jurisprudence aspired to by the Court: see, e.g., Oda and Schwebel, loc. cit. above (n. 76).

many tribunals to decide on the basis of '(international) law and equity might appear wide, arbitral jurisprudence has established that such clause exclude departure from the principles of international law.<sup>103</sup> A number of early studies reached conclusions similar to that of John Bassett Moore: 'a one to whose lot it has fallen actually to examine the work of international arbitrators, from the earliest times to the latest, I am prepared to pronounce unjustified the invidious imputation to them of a disposition to substitute diplomatic compromises for conclusions based on law and justice'.<sup>104</sup> Some tendency toward compromise is inherent in any process of collective decision.<sup>105</sup> the question is whether arbitral tribunals take compromise to the point of sacrificing legal security or the trust of the parties.<sup>106</sup> Of the post-1945 single-case arbitrations, the vast majority appear to have ended with a legally defensible decision.<sup>107</sup> The *Anglo-French Continental Shelf*<sup>108</sup> and *Guinea/Guinea-Bissau*<sup>109</sup> maritime boundary arbitrations do not appear to involve more compromise or law-making than similar decisions of the ICJ. The air services cases produced effective decisions based upon plausible treaty interpretations. The *Lac Lanoux*,<sup>11</sup> *Austro-German*,<sup>111</sup> *Canada/France*<sup>112</sup> and first *Rainbow Warrior*<sup>113</sup> case resulted in clear findings that the conduct involved was lawful or not lawful. The decisions of M. Sauser-Hall on the Albanian monetary gold,<sup>114</sup> of the arbitral tribunal on non-exhaustion of local remedies in the *Ambatielo* claim,<sup>115</sup> and of the PCA in the *Lighthouses* claims,<sup>116</sup> all represent legally credible positions in cases which also arose before the ICJ. The lan-

<sup>103</sup> See, e.g., *Norwegian Shipowners' Claim* (1922), *Reports of International Arbitral Awards*, vol. p. 307; *Rann of Kutch*, loc. cit. above (n. 46).

<sup>104</sup> *The Collected Papers of John Bassett Moore*, vol. 5 (1944), at p. 308; quoted in Carleton, *The Process of International Arbitration* (1946), at p. 80.

<sup>105</sup> Cf. the remark by the Canada-appointed arbitrator, Donat Pharand, in his dissenting opinion in the *Filetage* case: 'I realize that the other members of the Tribunal have made considerable efforts to allay my fears on this point and my dissent should not be interpreted as a lack of appreciation on my part. Those fears have been mitigated but, unfortunately, an important difference of opinion remains'. loc. cit. above (n. 59), at p. 664. See also the indication by the Pakistan-appointed arbitrator, Nasrollah Entezam, in *Rann of Kutch* that he had shifted his position in order to accommodate the views of the Chairman (Lagergren) and enable a majority to form: loc. cit. above (n. 46), at pp. 571-2.

<sup>106</sup> Cf. Thirlway, *International Customary Law and Codification* (1972), at p. 34, applying to international adjudication the aphorism of Oliver Wendell Holmes: 'the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law'. See also Fitzmaurice, 'The Future of Public International Law', *Institut de droit international, livre du centenaire 1873-1973* (1973), pp. 284-90.

<sup>107</sup> Stuyt, op. cit. above (n. 1), purports to identify a 'winner' (in whole or in part) in 13 post-1945 arbitrations, and this without considering boundary cases.

<sup>108</sup> *International Legal Materials*, 18 (1979), p. 397.

<sup>109</sup> Loc. cit. above (n. 55).

<sup>110</sup> Loc. cit. above (n. 42).

<sup>111</sup> *Reports of International Arbitral Awards*, vol. 19, p. 3 (1972).

<sup>112</sup> *Ibid.*, at p. 225.

<sup>113</sup> *Ibid.*, at p. 199.

<sup>114</sup> 20 ILR 441 (1953).

<sup>115</sup> Loc. cit. above (n. 41).

<sup>116</sup> *Reports of International Arbitral Awards*, vol. 12, p. 155 (1956); 23 ILR 659 (1956).

boundary or title to territory cases are more difficult to characterize. The *Chile/Argentina* (1966),<sup>117</sup> *Rann of Kutch*<sup>118</sup> and *Taba*<sup>119</sup> awards upheld parts of each party's claim in a manner perhaps calculated to encourage the acceptance which each in fact achieved. None, however, has the character of crude apportionment; the dissenting opinions in the two latter cases point to legitimate differences, but not to the majority having abandoned law for compromise. In the *Beagle Channel* award a unanimous tribunal (comprised exclusively of individuals who were at the time of appointment ICJ judges) largely upheld the claims of Chile, but there was little in the award to appeal to Argentina, and the tribunal did not succeed in settling the dispute.<sup>120</sup>

In cases where much depends upon the weighing of complex historical, cartographic or survey evidence, the scope for a law-governed decision which can be seen as satisfactory by both sides may be considerable.<sup>121</sup> Where such issues are involved, authoritative third-party adjudication may be more acceptable domestically than bilateral negotiations, as Canada's experience with the Gulf of Maine illustrates. The reception of the decision may be affected both by the specific *dispositif* and by pronouncements as to the law; thus, for example, the tribunal may in some cases reject or minimize major contentions of one party as to the legal principles involved but nevertheless reach a result more satisfactory to that party when the law is applied to the specific circumstances of the case.<sup>122</sup> Arbitral tribunals may in principle play a particularly useful role where extensive fact-finding is required, whereas it has been suggested that the ICJ has preferred to base its judgments upon largely uncontested facts rather than to engage extensively in the fact-finding commonly expected of a tribunal of first instance. Certainly the ICJ has not used its power under Article 50 of the Statute to appoint experts, except in the *Corfu Channel* case to assist in the assessment of damages,<sup>123</sup> and it has seldom made use of visits by judges to the relevant site (*descentes sur les lieux*). As a practical matter, however, differences in fact-finding between the ICJ and arbitral tribunals dealing with single

<sup>117</sup> Loc. cit. above (n. 59).

<sup>118</sup> Loc. cit. above (n. 46).

<sup>119</sup> Loc. cit. above (n. 8).

<sup>120</sup> Loc. cit. above (n. 54). It is nevertheless clear that the award influenced the agreement ultimately reached through papal mediation (82 ILR 671).

<sup>121</sup> Fitzmaurice perhaps overstated the case in writing that 'no court of law can please both parties in a litigation, or all those interested in a request for an advisory opinion; not to do so is indeed the whole *raison d'être* of a court as opposed to a commission of conciliation. Before a court, someone has got to lose or be disappointed': loc. cit. above (n. 106), at p. 279.

<sup>122</sup> The *Anglo-Norwegian Fisheries* case (ICJ Reports, 1951, p. 116) is sometimes seen in this light; Norway's baselines were generally upheld, but the Court did not accept much of Norway's argument as to the law.

<sup>123</sup> ICJ Reports, 1949, p. 4. The ICJ has appointed experts in exercising a power conferred by the *compromis*, as in *Burkina Faso/Mali* (nomination of experts order), loc. cit. above (n. 46).

disputes have not been great; the contrasts are sharper between the ICJ and claims tribunals, partly owing to differences in subject-matter.<sup>124</sup>

Where the positions of the parties depend upon fundamentally different views of the applicable law, the scope for the tribunal may be very limited. A number of recent African cases illustrate the point. In the *Frontier Dispute* (Burkina Faso/Mali) case, the ICJ Chamber<sup>125</sup> was able to produce a unanimous ruling upon the general basis of *uti possidetis* as to French colonial boundaries, notwithstanding significant differences as to, for example, attitudes to colonialism between the two *ad hoc* judges. The *Guinea/Guinea-Bissau* arbitration tribunal<sup>126</sup> was also unanimous, applying *uti possidetis* to the 1886 Franco-Portuguese treaty. In both cases the delimitation met some of the concerns of each party. In the *Guinea-Bissau/Senegal* arbitration, however, the tribunal<sup>127</sup> was faced with irreconcilable legal views, Senegal taking a classical international law stance in arguing *uti possidetis juris* as to the 1960 Franco-Portuguese treaty, and Guinea-Bissau taking an anti-classical and anti-colonial position which denied both the validity and the effectiveness of the treaty. The President joined the Senegal-appointed arbitrator in holding that the 1960 boundary treaty did have the force of law between the parties with respect to the territorial sea, contiguous zone, and continental shelf, contrary to the views of the third arbitrator. But the President was not able to persuade the Senegal-appointed arbitrator that the tribunal was justified in proceeding beyond the literal terms of the first question posed in the *compromis* in order to delimit the EEZ and thus fully to resolve the underlying dispute. The Guinea-Bissau-appointed arbitrator dissented strongly from the majority holding as to *uti possidetis juris*, concluding that the 1960 treaty was not binding in relation between the successor States.

Whereas the lack of compromise may on occasion have made the disappointed State's rejection of the award more likely, other long-running problems have flowed from awards which were not comprehensively reasoned,<sup>128</sup> or from expressions of doubt in the award or subsequently by members of the majority which reduced the political effectiveness of the award.<sup>129</sup> While lack of unanimity has generally not undermined the effect

<sup>124</sup> Lachs, 'Arbitration and International Adjudication', in Soons (ed.), *International Arbitration: Past and Prospects* (1990), at pp. 49-50, opines that the ICJ is not well suited to handling disputes which involve the application of national law (as with aspects of the *Guardianship of Infants* case, *ICJ Reports*, 1958, p. 55) or such other matters as the non-public international law aspects of the religious allegiance and territorial rights of nomads (*Western Sahara*, *ICJ Reports*, 1975, p. 12).

<sup>125</sup> *ICJ Reports*, 1986, p. 554: Judges Mohammed Bedjaoui (President), Manfred Lachs, and Jo Maria Ruda, Judges *ad hoc* François Luchaire and Georges Abi-Saab.

<sup>126</sup> Loc. cit. above (n. 55): Judges Manfred Lachs (President), Kéba Mbaye and Mohammed Bedjaoui.

<sup>127</sup> Loc. cit. above (n. 69): Barberis (President), Bedjaoui, and Gros.

<sup>128</sup> e.g. the 1906 *Award of the King of Spain* (Nicaragua/Honduras).

<sup>129</sup> e.g. the 1899 *Guyana Boundary* award, loc. cit. above (n. 88) (UK then Guyana/Venezuela). See, e.g., the views expressed by Counsel for Venezuela, Severo Mallet-Prevost, in a memorandum published in the *American Journal of International Law*, 43 (1949), p. 528; and the difficulties with the *Guinea-Bissau/Senegal* award arising both from the fact that the award did not settle the underlying

tiveness of awards, uneasy compromise or suggestion of departure from legal principles in the award has done so. It has been suggested that where there is only a single 'neutral' (non-party appointed or jointly appointed) member, the psychological and political pressure to compromise will be at its greatest, for the 'neutral' needs the support of the arbitrator(s) appointed by one party to secure a majority: this proposition does seem to be supported by modern experience, especially with three-member tribunals.

The practice of issuing non-binding recommendations to the parties is a form of conciliation which need not undermine the integrity of the arbitral process, where the recommendations are clearly ancillary to but do not detract from the *dispositif*. The recommendation of the New Zealand/France Tribunal in the third *Rainbow Warrior* case that the parties establish a friendship fund with an initial \$2 million contribution from France may be placed in this category, although this is undoubtedly seen as a palliative or compromise by those who found the dissenting opinion of the New Zealand-appointed arbitrator persuasive.<sup>130</sup> In the *US-France Air Services* (1978) case<sup>131</sup> the parties asked the tribunal to make a non-binding finding on the reprisals question, although the decision on the primary question of the interpretation of the relevant treaty was to be binding.

#### IV. THE IMPACT OF INTERNATIONAL ARBITRAL AWARDS

Any modern study of international arbitration should consider the question of the impact of inter-State arbitration on international law and the significance of arbitral decisions as a source of international law in relation to other sources—in general terms and with regard to particular areas of international law. Clearly this is not a simple undertaking; there are more questions than answers in what follows.

A fundamental limitation of the otherwise valuable work edited by

dispute as to the course of the maritime boundary and from the declaration by President Barberis (83 ILR 48) that while he had voted that the tribunal should reply to the first question simply that the 1960 Agreement did have the force of law between Guinea-Bissau and Senegal with regard to the areas mentioned in the Agreement, namely the territorial sea, contiguous zone, and continental shelf, he believed the tribunal should have added that the agreement did not have the force of law with respect to the waters of the exclusive economic zone, and that the tribunal ought thereupon to have proceeded to delimit the waters of this zone in accordance with the second question posed in the *compromis*. The attempt by Guinea-Bissau to nullify the award on the basis of an alleged disagreement between the two arbitrators in the majority was rejected by the ICJ: judgment of 12 November 1991. See also the challenge to the decision of the Conference of Ambassadors in the *Delimitation of the Polish-Czechoslovak Frontier* case, *PCIJ*, Series B, No. 8 (1923); and the various differences between Nicaragua, El Salvador and Honduras relating to the 1917 decision of the Central American Court of Justice concerning the Gulf of Fonseca (*El Salvador v. Nicaragua*, *American Journal of International Law*, 11 (1917), p. 674), some of which were canvassed before the ICJ in the *Gulf of Fonseca* case, *ICJ Reports*, 1992, p. 351.

<sup>130</sup> See also the recommendation of the *Guinea/Guinea-Bissau* Tribunal concerning joint resource exploitation (*loc. cit.* above (n. 55), at para. 123).

<sup>131</sup> *Loc. cit.* above (n. 7).



Coussirat-Coustère and Eisemann<sup>132</sup> is that it treats all arbitral awards even all *dicta* in these awards, as of equal significance. They claim: 'The present Repertory has as its main objective to shed light on the role of arbitral awards in the formation of general international law'.<sup>133</sup> But in fact the collection of extracts from arbitral awards, without distinction between them on the basis of their relative importance, cannot itself shed much light on this question. Perhaps this collection will itself help to make arbitral awards more important 'in the formation of general international law', but by itself it cannot do much to help us to assess the value of a particular award. For anyone who has to determine the current state of international law on a particular topic, it cannot be right to treat all awards and *dicta* from awards as of equal value.

Coussirat-Coustère and Eisemann do discuss the legal significance of arbitral awards in general in their introduction. They reject the limited subsidiary role attributed to judicial and arbitral decisions in Article 38(1)(d) of the Statute of the International Court of Justice. They recognize that the first case law was arbitral and 'was of primary importance in the formation of unwritten international law'. They acknowledge the creative role of arbitral tribunals and accept that: 'By a dialectic process, particularly noticeable in the case of unwritten legal rules, the judicial decision which resolves a particular affair by clarifying the applicable law, serves at the same time to reinforce the rule invoked as a legal norm'.<sup>134</sup> They take the traditional view that within the case law, decisions of the Permanent Court and the International Court of Justice have greater authority than arbitral awards. Whether this is invariably so will be considered below.

But on the problem of identifying which extracts from which awards are more important than others, Coussirat-Coustère and Eisemann cannot assist. They say only: 'In this respect, several hundred awards constitute an exceptionally rich source of law, notwithstanding that they cannot all be considered as equally representative of the positive law'.<sup>135</sup> And they conclude their introduction: 'Furthermore, all references to general international law are reproduced herein without judgment being made as to the value of the rule invoked. It is left to the reader to decide the weight of authority attributable to each decision, taking into account other contemporary awards or the fact that the rule cited was without suite'.<sup>136</sup>

Thus we are left with the problem of how to distinguish between arbitral awards and how to assess what role particular awards have played or will play in the formation of international law. Is it possible to lay down criteria

<sup>132</sup> Op. cit. above (n. 10).

<sup>133</sup> Ibid., at p. xix. Here and in the following extracts the translation from the original French is that of Coussirat-Coustère and Eisemann themselves.

<sup>134</sup> Ibid., at p. xix.

<sup>135</sup> Ibid., at p. xxi.

<sup>136</sup> Ibid., at p. xxv.

by which to test the importance of a particular award? These questions will arise when there is a mass of awards on a particular topic: which, if any, are the more important? If the awards are inconsistent the question is more difficult.<sup>137</sup> Or if there is only one award on a particular topic, what is its weight? Are there areas where arbitral awards are inconsistent with rules produced by the other sources of international law?

An initial, intuitive view might be that the most important inter-State arbitral cases since 1945 were *Ambatielos*,<sup>138</sup> *Lac Lanoux*,<sup>139</sup> *US/France Air Services* (1978),<sup>140</sup> *Gut Dam*,<sup>141</sup> *Rann of Kutch*,<sup>142</sup> *Beagle Channel*,<sup>143</sup> *Anglo-French Continental Shelf*,<sup>144</sup> *Iran/US*,<sup>145</sup> the two inter-State *Rainbow Warrior* cases,<sup>146</sup> *Guinea-Bissau/Senegal*,<sup>147</sup> and *Taba Boundary*.<sup>148</sup> But second thoughts follow swiftly. There was no award in the *Gut Dam* case; the *Beagle Channel* award was not accepted by Argentina; that in *Guinea-Bissau/Senegal* was rejected by Guinea-Bissau, although subsequently upheld by the ICJ; the *Iran/US* decisions are often not fully reasoned and not based on international law;<sup>149</sup> the *Taba* award was narrowly based because of the *compromis*. And one suspects that the above choice was the product of particular legal training and nationality.

A slightly more systematic, though still very crude, test (and not one that could be applied in anything other than an impressionistic way) would be to look at the leading international law textbooks in a range of major legal systems to see which arbitration decisions are included in the list of cases and, more importantly, which are discussed in the body of the text. But immediately we run into difficulties: the Anglo-American common law approach was traditionally more likely to make extensive reference to international arbitral practice. The civil law tradition of basing argument on principle rather than single cases used to put correspondingly less emphasis on arbitral decisions. Indeed some continental textbooks do not include a list of

<sup>137</sup> As, for example, on the question of the assessment of damages in international law (see Gray, this *Year Book*, 56 (1985), p. 25), and on the right to expropriate.

<sup>138</sup> Loc. cit. above (n. 41).

<sup>139</sup> Loc. cit. above (n. 42).

<sup>140</sup> Loc. cit. above (n. 7).

<sup>141</sup> Loc. cit. above (n. 62).

<sup>142</sup> Loc. cit. above (n. 46).

<sup>143</sup> Loc. cit. above (n. 54).

<sup>144</sup> 54 ILR 6 (1977); *Reports of International Arbitral Awards*, vol. 18, p. 3 (1977).

<sup>145</sup> See *Iran-US Claims Tribunal Reports*.

<sup>146</sup> Loc. cit. above (n. 37 and n. 38).

<sup>147</sup> Loc. cit. above (n. 69).

<sup>148</sup> *International Legal Materials*, 27 (1988), p. 1421.

<sup>149</sup> Article V of the Claims Settlement Declaration, *International Legal Materials*, 20 (1981), p. 223 at p. 230, allows a very wide discretion to the Claims Tribunal in its choice of the law to be applied. (See generally Crook, 'Applicable Law in International Arbitration: The Iran-US Claims Tribunal Experience', *American Journal of International Law*, 83 (1989), p. 278.) Art. V provides: 'The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances'.

cases.<sup>150</sup> But an examination of textbooks suggests that these differences are decreasing. It is interesting that a rough comparison of the list of cases in the textbooks of Brownlie, Carreau, Henkin/Pugh/Schachter/Smit, Nguyen Quoc Dinh/Daillier/Pellet and Verdross/Simma<sup>151</sup> produces only about seven inter-State arbitral awards that are common to them all: *Norwegian Shipowners*,<sup>152</sup> *Clipperton Island*,<sup>153</sup> *Island of Palmas*,<sup>154</sup> *La Lanoux*,<sup>155</sup> *Mergé*,<sup>156</sup> *Trail Smelter*,<sup>157</sup> and *Tinoco*.<sup>158</sup> Another dozen or so are common to four of the five textbooks.<sup>159</sup>

A more basic consideration is that of publication. Where an award is published and whether it is easily accessible will obviously affect its impact on international law. Unpublished awards have virtually no law-making effect;<sup>160</sup> also those not easily accessible or not reported in full will have little impact.<sup>161</sup>

A related question is that of the amount of discussion of a particular award in major academic journals. Although influenced by the general importance of the subject-matter, this is clearly affected also by the identity of the State parties involved. The national journals of a State party will often devote more attention to an award than will those of other States. Here again, as with textbooks, the question of the impact of a particular arbitral award is not straightforward; its impact will vary from State to State. It is also affected by the prominence of the arbitrators and their propensity (and that of counsel) to write about their awards. The language of an award also has an effect; it seems that an award in English (or, even better, in both English and French) secures the widest discussion. And perceptions of the importance of the States involved apparently affect perceptions of the importance of the award itself. Several of these factors together help to explain the relatively limited amount of discussion of the *Guinea*

<sup>150</sup> For example, Reuter, *Droit international public* (6th edn., 1983); Tunkin, *Theory of International Law* (transl. Butler, 1974); Rousseau, *Droit international public* (5 vols. 1971-83).

<sup>151</sup> Brownlie, *Principles of Public International Law* (4th edn., 1990); Carreau, *Droit international* (1986); Henkin, Pugh, Schachter, Smit, *International Law Cases and Materials* (1987); Dinh, Daillier, Pellet, *Droit international public* (3rd edn., 1987); Verdross and Simma, *Universelles Völkerrecht* (3. Aufl., 1984). There are differences in the functions and aspirations of these books.

<sup>152</sup> *Reports of International Arbitral Awards*, vol. 1, p. 307 (1922).

<sup>153</sup> *Reports of International Arbitral Awards*, vol. 2, p. 1105 (1931).

<sup>154</sup> *Ibid.*, at p. 829.

<sup>155</sup> *Loc. cit.* above (n. 42).

<sup>156</sup> *Reports of International Arbitral Awards*, vol. 14, p. 236 (1955).

<sup>157</sup> *Reports of International Arbitral Awards*, vol. 3, p. 1905 (1938 and 1941).

<sup>158</sup> *American Journal of International Law*, 18 (1924), p. 147.

<sup>159</sup> *Beagle Channel*, *Casablanca*, *Chamizal Tract*, *Chevreau*, *Delagoa Bay Railway Company*, *Janes*, *Naulilaa*, *North Atlantic Fisheries*, *Pinson*, *Russian Indemnity*, *Tacna-Arica*.

<sup>160</sup> The unpublished post-1945 awards listed by Stuyt are Stuyt, No. 411, *Ecuador/Peru*; Stuyt, No. 413a, *India/Pakistan*; Stuyt, No. 438, *Dubai/Sharjah*. To date the second *Rainbow Warrior* award (Stuyt, No. 447) remains unpublished.

<sup>161</sup> Those not published in ILR, *Reports of International Arbitral Awards* or *International Law Materials* but only reported in a national journal are unlikely to have any significant impact. For example, see *Belgium/Ireland* (1981), *Revue belge de droit international*, 17 (1983), p. 699; *France/Spain* (1974), *Annuaire français de droit international*, 20 (1974), p. 354; *Algeria/France* (1964), *ibid.*, 10 (1964), p. 383.

*Guinea-Bissau* award<sup>162</sup> in comparison with other maritime boundary decisions. Comparatively little attention has been paid to this decision in spite of the interesting novelty of its approach: the tribunal in its consideration of the general direction of the coastline took account of the coasts even of non-parties to the dispute.

Does the status of the arbitrators affect the value of an award? If the arbitrators are judges of the International Court of Justice (as in the *Beagle Channel* case<sup>163</sup>), does that increase their status and add to the value of their award? Clearly not enough to induce both parties to accept the award in that case. Does non-compliance affect the legal value of the award? In the jurisprudence of the International Court of Justice, non-compliance does not seem to undermine the value of the judgment as a source of international law. The status of the *Corfu Channel* case<sup>164</sup> and of the *Iranian Hostages* case<sup>165</sup> is not affected by the behaviour of Albania and Iran. Similarly the status of the *Nicaragua v. USA* merits judgment<sup>166</sup> is unlikely to be affected in the long term by the behaviour of the United States, although voluble criticisms of the Court's handling of the case<sup>167</sup> may have affected its immediate reception, particularly in the US. As regards arbitral awards, there are very few cases since the Second World War where the award has not been accepted by both parties. The *Beagle Channel* case<sup>168</sup> and the *Guinea-Bissau/Senegal* case<sup>169</sup> are the clearest examples.<sup>170</sup> As the main task of the tribunal in the former was the interpretation of the 1881 boundary treaty, the very lengthy award produced relatively little of general significance. The *Guinea-Bissau/Senegal* case was also mainly about the applicability of a particular boundary agreement: it was a question of succession rather than a question of the merits of the boundary established by the agreement.

Does the unanimity of an award make it more valuable or, if that unanimity is the product of compromise, does it make the award less valuable?

<sup>162</sup> Loc. cit. above (n. 55). The three members of the tribunal (Lachs (President), Bedjaoui, and Mbaye) were also judges of the ICJ, a point specifically noted in the joint separate opinion (Ruda, Bedjaoui and Jiménez de Aréchaga) in the *Libya/Malta* case (*ICJ Reports*, 1985, p. 88), where the approach to proportionality taken in the award is cited with apparent approval (see to similar effect separate opinion of Judge Sette-Camara, at pp. 73-4, and the passing reference in the dissenting opinion of Judge Mosler, at p. 114). The award was discussed also in the pleadings in the *Gulf of Fonseca* case.

<sup>163</sup> Loc. cit. above (n. 54).

<sup>164</sup> *ICJ Reports*, 1949, p. 4, and p. 244.

<sup>165</sup> *ICJ Reports*, 1980, p. 4.

<sup>166</sup> Loc. cit. above (n. 48).

<sup>167</sup> See, e.g., Maier, 'Appraisals of the ICJ's Decision: *Nicaragua v. United States (Merits)*', *American Journal of International Law*, 81 (1987), p. 77.

<sup>168</sup> Loc. cit. above (n. 54).

<sup>169</sup> Loc. cit. above (n. 69).

<sup>170</sup> Other possible instances are *Italy/USA Air Transport Agreement* (1965), *Reports of International Arbitral Awards*, vol. 16, p. 81; and the first (1986) *Rainbow Warrior* case; France was found in the third *Rainbow Warrior* case (1990) to have violated its obligations under the agreements based on the ruling of the UN Secretary-General in the first case.

Again the question arises whether the composition of the tribunal affects this.<sup>171</sup> If there is a unanimous decision of three or five non-national arbitrators, is this necessarily of a greater legal value than a unanimous decision by two or four national arbitrators plus an umpire?<sup>172</sup>

If none of these factors is relevant to any consideration of the legal significance of an arbitration, then the Coussirat-Coustère and Eisemann approach seems justified. That is, if impact on publicists, publication, status of arbitrators, unanimity, compromise and compliance are not relevant, we are left with the reasoning of the award itself, and of other awards. Coussirat-Coustère and Eisemann implicitly suggest that the only relevant considerations are 'other contemporary awards'—presumably this means conformity with such awards—and 'the fact that the rule cited was without suite'.<sup>173</sup> In the latter they apparently mean that the weight of an award is determined partly by its impact on later ICJ, arbitral and other jurisprudence.

Any assessment of the impact of a particular arbitral decision will involve an examination of International Court judgments and opinions.<sup>174</sup> How often do they refer to arbitral awards? How does this compare to their references to their own cases? Which awards do they refer to and to what effect? It is to be expected that any permanent tribunal will refer frequently to its own previous decisions, and that in view of its composition, jurisdiction and position the ICJ will attach great importance to its own pronouncements. Nevertheless, the short answer is that the International Court has seldom referred extensively to arbitral decisions.<sup>175</sup> Principal references to specific decisions include those by the PCIJ to the *Costa Rica Packet* in the

<sup>171</sup> See Section II, above.

<sup>172</sup> See Section III, above.

<sup>173</sup> Op. cit. above (n. 10), at p. xxiv. The relevant passage in French reads: 'C'est au lecteur qu'appartiendra d'attribuer l'autorité qu'il convient à telle ou telle sentence en la confrontant à d'autres décisions contemporaines ou en constatant que la règle formulée n'a pas eu de postérité'.

<sup>174</sup> Separate and dissenting opinions, and (going beyond the Coussirat-Coustère and Eisemann limits) the pleadings in International Court cases, refer more frequently to particular arbitral awards sometimes with considerable persuasive effect.

<sup>175</sup> See the useful discussion in Lauterpacht, *The Development of International Law by the International Court* (1958), at pp. 15–18. Hugh Thirlway states that when he became a member of the ICJ Registry Staff in 1968, there existed 'an unwritten rule of drafting that the Court only referred specifically to its own jurisprudence, never to arbitral awards. This rule appears now to have been abandoned' ('The Law and Procedure of the International Court of Justice 1960–1989, Part Two', this *Year Book of International Law* (1990), p. 1 at p. 128 n. 471). In his separate opinion in the *Mazilu* case, *ICJ Reports*, 1989, p. 1 Judge Shahabuddeen quotes the opinion of de Visscher (*Theory and Reality in Public International Law* (1968), at p. 391) that the rarity of references to arbitral awards in judgments of the International Court 'is a matter of prudence; the Court is careful not to introduce into its decisions elements whose heterogeneous character might escape its vigilance'. He notes too that citation of such awards may, as Jessup pointed out with respect to citation of individuals or national courts, risk the appearance of bias or predilection. Judge Shahabuddeen suggests, however, that individual judges may have more flexibility, and that in any event such a prudent policy of restraint ought not to 'disable the Court from benefiting from other experience, particularly where specific guidance in its own jurisprudence is lacking'. On this basis he justifies his discussion of the European Court of Human Rights' decision in the *Golder* case (Series A, No. 18). There are a significant number of references to arbitral awards in separate and dissenting opinions: for a partial list see Thirlway, loc. cit. above, pp. 130–1.

*Lotus* case,<sup>176</sup> and to *Pious Fund in Polish Postal Service in Danzig*,<sup>177</sup> and those by the ICJ to the *Alabama* arbitration (rather incidentally) in the *Nottebohm*<sup>178</sup> and *Guinea-Bissau v. Senegal*<sup>179</sup> cases, to the *Abu Dhabi* award in the *Aegean Sea Continental Shelf* case,<sup>180</sup> to the *Anglo-French Continental Shelf* case in the *Tunisia/Libya* case,<sup>181</sup> to the *Grisbadarna* decision in *Gulf of Maine*,<sup>182</sup> and the extensive discussion of the *Anglo-French Continental Shelf* case in the *Gulf of Maine* judgment, where that arbitration is quite exceptionally treated as if on a par with an ICJ judgment.<sup>183</sup> The judgment of 11 September 1992 in the *Land, Island and Maritime Frontier Dispute* is exceptional in its detailed discussion of the *Gulf of Fonseca* award<sup>183a</sup> of 1917, but then this award was central to El Salvador's arguments for a condominium.<sup>183b</sup> Unspecified arbitral jurisprudence is referred to in, for example, *Chorzów Factory*,<sup>184</sup> *Eastern Greenland*,<sup>185</sup> *Peter Pázmány University*,<sup>186</sup> *Reparation*,<sup>187</sup> *Anglo-Norwegian Fisheries*,<sup>188</sup> and *Barcelona Traction*,<sup>189</sup> although the two last of these refer to arbitral jurisprudence mainly to dismiss the relevance of it to the instant case.

It is notable that the parties arguing ICJ cases have often attached greater express importance to arbitral awards than has the Court, although the invocation of arbitral awards in ICJ pleadings is variable. As might be expected, pleadings make considerable reference to arbitral awards where an aspect of the law concerning arbitrations is at issue,<sup>190</sup> or where arbitral jurisprudence has been central to the development of the particular area of

<sup>176</sup> *PCIJ*, Series A, No. 10 (1927), p. 26.

<sup>177</sup> *PCIJ*, Series B, No. 11 (1925), p. 30.

<sup>178</sup> *ICJ Reports*, 1953, p. 119.

<sup>179</sup> *Loc. cit.* above (n. 68), at pp. 68–9 (quoting the *Nottebohm* passage referring to the *Alabama* case).

<sup>180</sup> *ICJ Reports*, 1978, p. 32.

<sup>181</sup> *ICJ Reports*, 1982, p. 57 and p. 79. Thirlway (*loc. cit.* above (n. 175), p. 129) suggests that the arbitral award is here referred to as an example of State delimitation practice rather than as a 'judicial decision' under Article 38(1)(d) of the ICJ Statute.

<sup>182</sup> *ICJ Reports*, 1984, p. 309.

<sup>183</sup> *ICJ Reports*, 1984: see, e.g., p. 293, and the Chamber's general comment (pp. 290–1) that in ascertaining the principles and rules of international law which in general govern the subject of maritime delimitation it will refer to conventions and international custom 'to the definition of which the judicial decisions ([Article 38] para. 1(d)) either of the Court or of arbitration tribunals have already made a substantial contribution'. The Chamber in this case appears to have paid more attention to the *Anglo-French* decision than did the full court in *Tunisia/Libya* and *Libya/Malta*.

<sup>183a</sup> *Loc. cit.* above (n. 129).

<sup>183b</sup> *ICJ Reports*, 1992, p. 351 at pp. 589–608.

<sup>184</sup> *PCIJ*, Series A, No. 17 (1928), p. 31.

<sup>185</sup> *PCIJ*, Series A/B, No. 53 (1933), p. 46.

<sup>186</sup> *PCIJ*, Series A/B, No. 61 (1933), p. 243.

<sup>187</sup> *ICJ Reports*, 1949, p. 174.

<sup>188</sup> *ICJ Reports*, 1951, p. 131.

<sup>189</sup> *ICJ Reports*, 1970, p. 40.

<sup>190</sup> e.g. *Arbitral Award of the King of Spain*, *ICJ Pleadings*, vols. 1 and 2, and the submissions made by States and by the UN in *Interpretation of Peace Treaties*. In each of these at least 18 arbitrations (mainly inter-State) are referred to.

law, as for example the *Barcelona Traction* pleadings.<sup>191</sup> Here the parties both gave lengthy expositions of the arbitral decisions on diplomatic protection of companies and shareholders, and accused each other of misunderstanding and misrepresenting the decisions. Although the eleven volumes of pleadings are replete with discussion of arbitral awards, the Court did not mention any particular award in its judgment, contenting itself with dismissing the whole corpus as limited to particular facts or based on particular terms of the *compromis*. Other pleadings contain extensive discussion of particular arbitral awards where the substantive reasoning of the award is seen by one or both parties as particularly useful to the argument.<sup>192</sup> In the *Gulf of Maine* case the USA relied to a surprising extent on the *Grisbadarna* award as a basis for its proposed adjusted perpendicular line.<sup>193</sup> In this case, as in *Tunisia/Libya* and *Libya/Malta*, each party invoked the *Anglo-French Continental Shelf* case in just the same way as ICJ cases. Arbitral proceedings are occasionally invoked where one party in a later case seeks to hold the other party to pleadings or admissions made in an earlier arbitral proceeding.<sup>194</sup> Some pleadings include references to arbitral decisions on incidental matters but not on the issues central to the case. There is an interesting difference between the UK pleadings in the *Fisheries Jurisdiction* case, which refer incidentally to several arbitral awards,<sup>195</sup> and those of the Federal Republic of Germany in the closely related case, which make no such references.<sup>196</sup> In some cases pleadings

<sup>191</sup> See also, e.g., *US Diplomatic and Consular Staff in Tehran*, ICJ Pleadings, 1979, pp. 181, 189, 307; *Aegean Sea Continental Shelf*, ICJ Pleadings, 1976, pp. 100, 122, 203, 221, 258, 271, 2337, 422, 477; and *Nuclear Tests*, ICJ Pleadings, 1973, vol. 1, pp. 190, 193, 209, 282, 292, 327, 336, 420, 480, 483, 494.

<sup>192</sup> See, e.g., the UK's use of the *Island of Palmas* case in *Minquiers and Ecrehos*, ICJ Pleadings, vol. 1, pp. 48 ff.; and France's use of *North Atlantic Coast Fisheries* in *US Nationals in Morocco*, ICJ Pleadings, vol. 1, pp. 65 ff., and vol. 2, p. 173.

<sup>193</sup> Responding to US reliance on the *Grisbadarna* award (United States Memorial, ICJ Pleadings, vol. 2), Canada pointed out that under Article 38 of the ICJ Statute the award 'could only be a subsidiary means for determining law' (Canadian Counter-Memorial, para. 43), and sought to distinguish it and to contest its specific authority, noting that it 'has not been followed in State practice, nor in judicial or arbitral decisions' (para. 45). The award had been explicitly discarded as a general guide to maritime delimitation by the International Law Commission, and was widely treated as being a product of the particular circumstances of the case. The Court itself did not purport to discuss the relevance or weight of the *Grisbadarna* case on this point, but dealt with the matter in a passage purporting to respond to an unrelated Canadian argument concerning estoppel or acquiescence. The Court commented: 'the relevance of that case [*Grisbadarna*] to the present one is however debatable, since problems of rights over maritime areas differed in many respects from those of the present day. The case concerned territorial waters, whereas the present one concerns vast areas of sea that have only recently come under the jurisdiction of the adjacent States. The differences between the two cases are so great that it is difficult to establish a parallel between them': ICJ Reports, 1984, p. 309.

<sup>194</sup> See, e.g., Norway's use of the British pleadings and oral argument in *North Atlantic Coast Fisheries*, in the *Anglo-Norwegian Fisheries* case, ICJ Pleadings, vol. 1, pp. 269-71, 338-9, 411, 511. See also *Minquiers and Ecrehos*, ICJ Pleadings, vol. 2, in which France cites (p. 268) the UK pleadings in the *Alaska Boundary* case and (pp. 232-3 and 266-7) its own pleadings in the *Clipperton Island* case.

<sup>195</sup> ICJ Pleadings, 1972, vol. 1, pp. 103, 249, 317.

<sup>196</sup> A similar contrast is found in the *Nuclear Tests* cases between the pleadings of Australia, which refer extensively to arbitral awards (see above, n. 191), and those of New Zealand which make few such references (ICJ Pleadings, vol. 2, pp. 181 and 182.)

make no reference to any arbitral awards,<sup>197</sup> although it is difficult to judge in each case whether this is due to an assessment that arbitral jurisprudence was not relevant to the particular issues, to an assessment that arbitral jurisprudence was potentially relevant but of no weight, or to other factors. Doubtless those drafting pleadings prudently tend to include any legal materials which may be viewed as supporting the position they espouse, and those responding equally refer to such materials in controverting arguments based upon them. It is nevertheless significant that States responding to the invocation of an arbitral award do not appear to challenge the general authority of such awards, but tend rather to offer different interpretations of awards,<sup>198</sup> to distinguish them,<sup>199</sup> or occasionally to argue that the law was erroneously stated or has since changed.<sup>200</sup>

It is also of interest to examine arbitral awards to see how far they expressly take account of the factors mentioned above—reliance on law, unanimity, status of arbitrators, compliance, impact on publicists—in according weight to prior awards.<sup>201</sup> If the assessment of the weight of a particular arbitral award were to be based on the additional factor of express references in later arbitral cases, most awards would weigh in as featherweight. And arbitrators rarely, if ever, mention the other factors

<sup>197</sup> e.g. the pleadings in the *Conditions of Admission, Asylum, Haya de la Torre, Electricité de Beyrouth Company, Northern Cameroons, Right of Passage, Pakistani Prisoners of War* and ICAO cases.

<sup>198</sup> See, e.g., the debate about the interpretation of the *Ambatielos* award (*Reports of International Arbitral Awards*, vol. 12, p. 91 (1956)) in *Norwegian Loans*, ICJ Pleadings, vol. 2, pp. 74 and 161-3.

<sup>199</sup> See, e.g., France's attempt to distinguish *Island of Palmas* by virtue of differences between its facts and those of the case at bar in *Minquiers and Ecrehos*, ICJ Pleadings, vol. 1, pp. 268-9; and the attempts by Honduras to explain the *Schreck, Sabotage* and *Trail Smelter* cases in *Arbitral Award of the King of Spain*, ICJ Pleadings, vol. 2, pp. 64-7.

<sup>200</sup> See, e.g., Canada's treatment of *Grisbadarna*, above, n. 193; and Honduras' (Briggs') response to Nicaragua's invocation of the *Parker* case (to the effect that there is no general corpus of rules of procedure in international law), that 'Much water has gone over the dam since . . . the *Parker* case': *Arbitral Award of the King of Spain*, ICJ Pleadings, vol. 2, p. 102.

<sup>201</sup> Parties in their ICJ pleadings do occasionally make reference to these factors. Canada's attack on the contemporary authority of the *Grisbadarna* award with respect to the US argument in *Gulf of Maine* has been noted (n. 193, above). In its reply in *Arbitral Award of the King of Spain*, Honduras buttressed its argument, that the *Orinoco Steamship Company* case (1910) correctly stated the law of the period as elaborated at the 1899 and 1907 Hague conferences, by reference to the 'exceptional authority' of this award, attributed by Honduras both to its intrinsic merit and to the quality of the three arbitrators (Professor Lammasch, Auguste Beernaert and Gonzalo Quesada), all of whom had participated in the second Hague conference: *Pleadings*, vol. 1, p. 497. (Nicaragua interpreted the *Orinoco* award differently but did not challenge its authority: *Pleadings*, vol. 1, pp. 780-1.) The eminence of particular arbitrators is sometimes mentioned by States seeking to make use of their awards, as with references to arbitrator Huber's awards in *Ziat Ben Kiran* (*Barcelona Traction Pleadings*, vol. 1, p. 155) and *Island of Palmas* (*Nuclear Tests (Australia v. France) Pleadings*, p. 480), references to arbitrator Hughes with regard to the *Tacna-Arica* award (*Aegean Sea Continental Shelf Pleadings*, p. 122), and references to arbitrator Petró with regard to the *Lac Lanoux* award (*Nuclear Tests (Australia v. France) Pleadings*, p. 209). Greece also referred to the unanimity of an award (*German External Debts*) as a factor relevant to its authority in *Aegean Sea Continental Shelf Pleadings*, p. 276. Belgium (in *Barcelona Traction Pleadings*, vol. 1, *Observations and Conclusions*, p. 134) mentioned that later cases had relied on the *Delagoa Bay Railway Company* case as a precedent. But the invocation of particular factors as relevant to the authority of any award is sporadic and generally somewhat incidental. They do not indicate any systematic pattern of distinguishing between different arbitral awards on the basis that some have greater authority than others.



discussed above. These patterns are readily apparent in the post-Second World War arbitral awards. References to PCIJ and ICJ decisions are common, whereas references to earlier arbitral awards are unusual.<sup>202</sup> As a practical matter, this is a clear indication of the superior legal status of the former.<sup>203</sup>

Of those awards referred to, the *Island of Palmas* case<sup>204</sup> occurs most frequently. The later air transport arbitrations refer to the earlier ones. Otherwise the cases mentioned seem a fairly disparate collection—*Tacna-Arica*,<sup>205</sup> 1932 *Sweden-USA*,<sup>206</sup> *Lac Lanoux*,<sup>207</sup> *Anglo-French Continental Shelf*,<sup>208</sup> *North Atlantic Fisheries*,<sup>209</sup> *The Carthage* and *The Manouba*, *Chamizal Tract*<sup>211</sup> and so on. The tribunals making these references do not mention the status of the arbitrators, unanimity, compromise or compliance.

The type of use that is made of earlier arbitral decisions varies. Some examples merely involve passing references to illustrate well-established rules and principles. Some of the citations of arbitral decisions relate to elementary propositions for which authority is scarcely needed, as for instance 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'.<sup>212</sup> Other citations relate to very broad doctrines which may mitigate or block the application of other rules of law. Examples include reference to the *Cayuga Indians* case on equitable considerations justifying, for instance, looking behind the legal person to see who are the real beneficiaries,<sup>213</sup> and the brief mention in *Lac Lanoux* of *Tacna-Arica*<sup>214</sup> as

<sup>202</sup> Such references are most commonly made by tribunals deciding many claims, such as the US Claims Tribunal, rather than tribunals deciding one case. Not surprisingly, tribunals with multiple cases refer quite frequently to their own jurisprudence.

<sup>203</sup> For contrasting views on the subject, cf. Lachs, loc. cit. above (n. 85), at pp. 37-54, and Brulic, *ibid.*, at p. 59 (arguing that there is no categorical difference of authority between courts of arbitration and the PCIJ and ICJ).

<sup>204</sup> Loc. cit. above (n. 154).

<sup>205</sup> *Reports of International Arbitral Awards*, vol. 2, p. 921 (1925).

<sup>206</sup> *Ibid.*, at p. 1239.

<sup>207</sup> Loc. cit. above (n. 42).

<sup>208</sup> Loc. cit. above (n. 144).

<sup>209</sup> *Reports of International Arbitral Awards*, vol. 11, p. 167 (1910).

<sup>210</sup> *Ibid.*, p. 449; *ibid.*, p. 463.

<sup>211</sup> *Ibid.*, p. 316.

<sup>212</sup> Judgment of the ICJ in the *Nottebohm* case, *ICJ Reports*, 1953, p. 119, quoted with approval in the separate opinion of Judge Onyeama in the *ICAO Council* case, *ICJ Reports*, 1972, at p. 88, (along with *The Betsey*) in the dissenting opinion of Judge Singh in the *ICAO Council* case, *ibid.*, p. 122.

<sup>213</sup> Separate opinion of Judge Fitzmaurice in the *Barcelona Traction* case, *ICJ Reports*, 1970, p. 179, quoting the *Cayuga Indians* case, *Reports of International Arbitral Awards*, vol. 6, p. 179 (1926). The same award is also cited in the separate opinion of Judge Lachs in the *Aegean Sea Continental Shelf* case, *ICJ Reports*, 1978, p. 51, in support of the proposition that 'no construction [of an international instrument] may be entertained which would imply that any provision was "not intended to have definite application"'.<sup>214</sup>

<sup>214</sup> Loc. cit. above (n. 42); loc. cit. above (n. 205).

example of discussion of the principle of good faith.<sup>215</sup> (As it turned out there was no doubt about the good faith of the parties in *Lac Lanoux*.)

In other cases the tribunal relies on the decision as authoritative; it accepts the reasoning in the earlier case as stating a legal rule or principle that it should apply in its own decision. The *Rann of Kutch* tribunal referred repeatedly<sup>216</sup> to the *Island of Palmas* award<sup>217</sup> on the legal significance of maps and of acts of sovereignty. The cases of *The Carthage* and *The Manouba*<sup>218</sup> are invoked as authority for the award of a declaratory judgment as satisfaction in the *Rainbow Warrior* decisions.<sup>219</sup> Sometimes the reference is made to the earlier case explicitly in order to distinguish it; this necessarily involves treating the earlier case as authoritative.<sup>220</sup> Or alternatively the reasoning in the earlier case may be referred to as mistaken.<sup>221</sup> There is no clear pattern to be found in the type of reference to earlier decisions.

It is also striking that references by arbitral tribunals to textbooks and other academic writing are at least as common as references to arbitral decisions.<sup>222</sup> Thus the earlier suggestion that textbooks may be used to assess the importance of particular arbitral awards receives some support: those arbitral awards relied on by writers have an indirect impact on the arbitrators who turn to the textbooks. Not surprisingly, cases incorporated into textbooks have a greater chance of influencing the development of international law. Perhaps Article 38(1)(d) of the Statute of the Court understates the authority of publicists just as it does that of arbitral and judicial decisions.<sup>222a</sup>

Finally, we shall try to assess the contribution of arbitral awards to particular areas of the law. In some areas it is possible to argue that they were the most important material source of law. Thus, on the procedural law of

<sup>215</sup> *Reports of International Arbitral Awards*, vol. 12, p. 281, at p. 307 (1957). Later cases have referred to the *Lac Lanoux* case on the importance of good faith, for instance to support the proposition that: 'There is no negotiation if each party, or either party, insists on its own position and refuses ever to contemplate any softening or change': dissenting opinion of Judge Gros in *Libya/Tunisia Continental Shelf*, *ICJ Reports*, 1982, p. 145.

<sup>216</sup> *Loc. cit.* above (n. 54), at pp. 88, 416.

<sup>217</sup> *Loc. cit.* above (n. 154). See also the *Land, Island and Maritime Frontier* case, *loc. cit.* above (n. 183b). The separate opinion of Judge de Castro in *Western Sahara*, *ICJ Reports*, 1975, pp. 168-9, endorses Huber's general analysis of the question of intertemporal law.

<sup>218</sup> *Loc. cit.* above (n. 210).

<sup>219</sup> In the first ruling by the UN Secretary-General, 74 ILR 256 (1986), and in the tribunal ruling, 82 ILR at pp. 574-5 (1990).

<sup>220</sup> The *Italy/US Air Transport* arbitration (1965) (*Reports of International Arbitral Awards*, vol. 16, p. 81, at p. 100) referred back to the *US/France Air Transport* arbitration—on the significance of subsequent practice of the parties for treaty interpretation—in order to distinguish it.

<sup>221</sup> For instance, the tribunal in *Guinea/Guinea-Bissau* (*loc. cit.* above (n. 55), at p. 294) rejected the approach adopted in *UK/France Continental Shelf* of giving priority to the equidistance line.

<sup>222</sup> This is also true in the pleadings in a number of ICJ cases: see, e.g., the pleadings of both the UK and Norway in the *Anglo-Norwegian Fisheries* case, of Albania and particularly the UK in the *Corfu Channel* case, and of Peru and particularly Colombia in the *Asylum* case. Discussion of the authority of writers in pleadings closely parallels discussion of the authority of arbitral awards: it is sparse and somewhat incidental. In *Arbitral Award of the King of Spain*, *ICJ Pleadings*, vol. 2, p. 65, counsel for Honduras (Guggenheim) suggested that on the topic of nullity arbitral decisions were perhaps more important than the opinions of authors, but this was a passing remark.

<sup>222a</sup> See also the *Land, Island and Maritime Frontier* case, *loc. cit.* above (n. 183b).

arbitration, including questions of nullity and revision, arbitral awards have played a crucial role. These issues have not arisen often in inter-State arbitration since the Second World War;<sup>223</sup> in most cases compliance was not a problem. But the awards in the *Beagle Channel* and *Guinea-Bissau/Senegal* cases were challenged by Argentina and Guinea-Bissau, each justifying its rejection of the award by arguing that the award was a nullity (each also argued that the award was 'non-existent'). The fundamental problem with allegations of nullity and with requests for revision<sup>224</sup> of arbitral awards, in the absence of any express provision for this in the arbitral agreement, is the problem of the invocation and effective operation of suitable control mechanisms:<sup>225</sup> in particular, which tribunal, if any, will have jurisdiction to decide such claims? This problem is especially serious for *ad hoc* tribunals. Under the ILC Model Rules, all allegations of nullity would be referred to the ICJ if the parties did not agree on another tribunal. But in practice the *Arbitral Award of the King of Spain*<sup>226</sup> and *Guinea-Bissau/Senegal*<sup>227</sup> cases are unusual in that in the former the parties expressly agreed that the question of nullity might be referred by either of them to the ICJ, and in the latter Senegal ultimately elected not to contest the Court's jurisdiction under the Optional Clause in respect of Guinea-Bissau's challenge to the award.<sup>228</sup>

The *Beagle Channel* case is more typical in that Argentina unilaterally rejected the arbitral award, arguing that it was null and void because it distorted the Argentine case, included opinions on questions not submitted to arbitration, contained contradictions between its arguments, faulty treaty interpretation, geographical and historical errors, and showed lack of balance.<sup>229</sup> None of these Argentine arguments seem very convincing in relation to the traditional grounds of nullity established in earlier arbitral practice. Chile rejected the Argentine declaration of nullity and said that the question should be referred to the ICJ.<sup>230</sup> The tribunal found that the *compromis* conferred no power on the parties to reject or purport to nullify

<sup>223</sup> See Reisman, *Nullity and Revision* (1971); Oellers-Frahm, 'Judicial and Arbitral Decisions: Nullity and Nullity', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 1 (1981), p. 1; Lauterpacht, *Aspects of the Administration of International Justice* (1991), at p. 99.

<sup>224</sup> In both the *Argentine/Chile* (1966) (*Reports of International Arbitral Awards*, vol. 16, p. 1) and the *UK-France Continental Shelf* (1977) (*Reports of International Arbitral Awards*, vol. 18, p. 1) cases the tribunals granted requests for interpretation; in both cases there was provision in the arbitral agreement for interpretation, but not for revision, of an arbitral award; in both cases the tribunals took an extensive view of what is covered by interpretation, and commentators have suggested that in both cases really allowed revision in the guise of interpretation.

<sup>225</sup> For discussion of the general subject of formal and informal control mechanisms see Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (1992).

<sup>226</sup> *ICJ Reports*, 1960, p. 192.

<sup>227</sup> *Loc. cit.* above (n. 68).

<sup>228</sup> Note the declaration of Judge Mbaye that Article 36(2) alone would not provide a general basis for the Court to exercise jurisdiction over challenges to arbitral awards (*ibid.*, at p. 80).

<sup>229</sup> *Loc. cit.* above (n. 54), at p. 269.

<sup>230</sup> *Ibid.*, at p. 277.

the award; such pronouncements were themselves nullities.<sup>231</sup> Argentina maintained its rejection of the award and relations with Chile deteriorated until the Pope intervened. The papal mediation that finally resolved the disagreement implicitly (but not explicitly) upheld the arbitral award in that it did not modify the tribunal's boundary line, but extended it and introduced new elements into the proposed settlement in order to facilitate Argentina's acceptance of the mediator's suggestions.<sup>232</sup>

On another important procedural subject, interim measures, arbitral tribunals initially established the law.<sup>233</sup> But actual awards are rare: since the Second World War interim measures have been requested in only one inter-State arbitration and they were refused in that case.<sup>234</sup> The Permanent Court of International Justice, the ICJ and other bodies including the Inter-American Court of Human Rights have developed a much more substantial case law. The Iran-US Claims Tribunal has also been faced with many requests for interim measures; these have not been awarded in any inter-State case,<sup>235</sup> but the Tribunal has referred to international law and to the jurisprudence of the International Court in making its awards.<sup>236</sup>

The mass of arbitral awards dating back to the Jay Treaty substantially created international law on State responsibility for injury to aliens (including the local remedies rule and nationality of claims). Other sources, such as diplomatic practice, played a complementary role, but the detailed rules evolved through arbitral decisions. But on this topic the dominant role of arbitral awards has not been sustained since the Second World War. The International Court of Justice has made important decisions on local remedies and nationality of claims. Regional human rights courts have developed a coherent jurisprudence on certain cognate issues. As regards the substantive standards of treatment of aliens, the traditional jurisprudence has been partly overtaken by the emergence of new States doubtful about the international standards imposed in the colonial era, the increase in bilateral treaties on this question and the development of the law of human rights.<sup>237</sup> Nevertheless, certain aspects of the law of State responsibility and of remedies are likely incidents of international litigation, and arbitral decisions have remained important sources as to some of these. For instance, the principal sources establishing the propriety of orders for monetary compensation where there has been moral and legal damage but

<sup>231</sup> Ibid., at pp. 281, 283.

<sup>232</sup> *International Legal Materials*, 24 (1985), p. 3. And see E. Lauterpacht in *Mélanges Michel Virally* (1991), p. 359.

<sup>233</sup> See Sztucki, *Interim Measures in the Hague Court* (1983); Oellers-Frahm, 'Interim Measures of Protection', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 1 (1981), p. 69.

<sup>234</sup> UN Tribunal for Libya, Application by Italy for Interim Measures (1952), 25 ILR 517.

<sup>235</sup> Although they were requested in Case B1 (*Iran v. US*), 22 CTR 105, and in Cases A4 (5 CTR 112) and A15 (13 CTR 173).

<sup>236</sup> See Caron, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 46 (1986), p. 465.

<sup>237</sup> But it is of interest that the Iran-US Claims Tribunal has dealt with many claims of the traditional type involving State responsibility for injury to aliens.

no material damage are the France/New Zealand cases<sup>238</sup> and the *I'm Alone* case (1935), along with requests made in the *Manouba* and *Carthage* case (1913). The *I'm Alone* and the two requests were referred to by Judge Jessup in his separate opinion in the *South West Africa* (1962) case to support his view that States have claimed a legal interest in the general observance of the rules of international law.<sup>239</sup>

Again, arbitral awards have played a crucial role in the creation of international law on acquisition of territory and boundary delimitation. This is the second largest category within arbitral jurisprudence. Although State practice played some role, the nature of the subject-matter—the uniqueness of each geographical and historical situation—meant that arbitral decisions were necessary for the creation of general rules. The continuing importance of the *Island of Palmas* case is obvious in the post-Second World War awards.<sup>240</sup>

The same process of law-creation by tribunals can be seen in the development of the law of maritime boundary delimitation by the ICJ. The arbitral tribunals in the *Anglo-French Continental Shelf* and *Guinea/Guinea-Bissau* cases played a part in this process. Although the impact of the *Anglo-French Continental Shelf* award on subsequent cases is obvious, the ICJ in *Tunisia/Libya*<sup>241</sup> and *Libya/Malta*<sup>242</sup> paid significantly less express attention to this arbitral award than to its own jurisprudence.

Similarly, on questions of treaty interpretation, the nature of the subject-matter gave arbitral decisions a central role in the evolution of the law. But the early arbitral awards have now been supplemented—even superseded—by the large jurisprudence of the PCIJ and the ICJ.

On these three topics, State responsibility, territorial disputes and treaty interpretation, there is a mass of arbitral jurisprudence and a significant body of judicial decisions. Similarly the various *ad hoc* air transport arbitral tribunals have taken trouble to develop a coherent jurisprudence. But it is also possible that a single arbitral decision may play a crucial role in the development of international law. Even where there is no shortage of State practice, an arbitral award may have an important crystallizing role and will be ritually invoked by States and writers to support their legal claims. Thus the *Naulilaa* case<sup>243</sup> on forcible reprisals and the *US/France Air Services Agreement* (1978) case<sup>244</sup> on non-forcible counter-measures formulate clear rules on the basis of inevitably more diffuse State practice.

<sup>238</sup> In the third case, France admitted that the UN Secretary-General in the first *Rainbow Warrior* case (1986) awarded monetary compensation for moral damage, and the tribunal in the third case agreed that such awards could be validly made: 82 ILR 574-5.

<sup>239</sup> ICJ Reports, 1962, p. 425.

<sup>240</sup> Loc. cit. above (n. 154).

<sup>241</sup> ICJ Reports, 1982, p. 18.

<sup>242</sup> ICJ Reports, 1985, p. 13.

<sup>243</sup> Reports of International Arbitral Awards, vol. 2, p. 1013 (1928).

<sup>244</sup> Reports of International Arbitral Awards, vol. 18, p. 421. Rosenne, *Developments in the Law of Treaties 1945-1986* (1989), at p. 52, treats this as 'the most important modern discussion' of non-forcible counter-measures in the law of treaties.

And where there is a gap in international law—as there was and to some extent still is on State responsibility in relation to environmental matters—the one or two relevant cases will be solemnly invoked even if the actual decisions in those cases cannot support the weight attached to them. Thus, early writing on international responsibility for environmental harm invariably relied on the distinctly limited *Gut Dam*<sup>245</sup> and *Trail Smelter* cases<sup>246</sup> to support the existence of a rule establishing State responsibility for transboundary pollution.

One further contribution of arbitral decisions can be to give weight to a judicial decision, treaty, resolution or other item of source material which might otherwise be ignored as an aberration or outlier. In his separate opinion in *Barcelona Traction*, for instance, Judge Jessup cites the *Flegenheimer* case<sup>247</sup> as reinforcing the link principle as a general principle of law and not merely an *ad hoc* rule for the decision of the *Nottebohm* case.<sup>248</sup> Similarly the arbitral tribunal in the third *Rainbow Warrior* case refers extensively and approvingly to the second report of Professor Arangio-Ruiz to the International Law Commission on part two of the draft articles on State responsibility.<sup>249</sup>

## V. CONCLUSION

The development of inter-State arbitration, and that of international adjudication and arbitration generally, is often taken as one gauge of the efficacy of the rule of law in the international system.

In the period since 1945, provisions for arbitration as one of several dispute settlement options have frequently been included in treaties dealing with other matters. The incidence of resort to arbitration in specific disputes in this period has been moderate but steady; the awards rendered have made significant contributions to dispute settlement, especially but not only on boundary or territorial issues. Other than in the aftermath of war, almost all arbitral tribunals which have operated successfully since 1945 have done so on the basis of special agreement. Nevertheless, in recent years there has been some evidence of an increased willingness of many States to enter into binding obligations to accept third-party settlement,<sup>250</sup> and both advance commitments and special agreements to arbitrate disputes may be important forms of assurance if international regulatory

<sup>245</sup> Loc. cit. above (n. 62).

<sup>246</sup> Loc. cit. above (n. 157). The *Trail Smelter* awards are cited with apparent approval in the separate opinion of Judge de Castro in the *Nuclear Tests* cases, loc. cit. above (n. 70), at pp. 388–9.

<sup>247</sup> *American Journal of International Law*, 53 (1958), p. 944. On the substantive point see Brownlie, *Principles of Public International Law* (4th edn., 1990), at pp. 402 ff.

<sup>248</sup> Loc. cit. above (n. 178), at p. 186.

<sup>249</sup> 82 ILR 499 (1990).

<sup>250</sup> See, e.g., the CSCE's Stockholm Convention on Conciliation and Arbitration of 1992 (providing for arbitration on the basis of advance reciprocal declarations or *ad hoc* agreement), and the provision for directed conciliation adopted by the CSCE Council Stockholm meeting in December 1992.

activity is to become more effective.<sup>251</sup> It is to be expected that linkage between purely inter-State dispute settlement and other forms of transnational dispute settlement will grow in importance, particularly in specialized fields such as international trade, investment, communications and environmental issues. In both its purely public and its hybrid forms, it is to be expected that the institution of inter-State arbitration will continue to play a significant role in international dispute settlement and in the development of international law.

<sup>251</sup> The provision for non-excludable binding arbitration in the 1991 Environmental Protection Protocol to the Antarctic Treaty appears to be indicative of a new attitude, at least in specialized areas (for text, see *International Legal Materials*, 30 (1991), p. 1461.) This is more sweeping than the compulsory provisions concerning dispute settlement in the 1982 Convention on the Law of the Sea and represents an important development from the 1989 Basle Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, which simply allows States parties to opt in to a system of compulsory arbitration, or the 1986 Convention on Early Notification of a Nuclear Accident, under which States may declare that the provisions for compulsory settlement do not apply to them. The increased willingness of the States of central Europe and the former USSR to accept compulsory third-party settlement is one factor, but not the only one, in this shift.