PART I

1

The place of international litigation in international law

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In 1982, the United Nations (UN) General Assembly passed a resolution known as the Manila Declaration on the Peaceful Settlement of International Disputes.[1] The Declaration confirms and elaborates certain provisions of the United Nations Charter and also of the Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States of 1970.[2] Thus paragraph 2 of Section I of the Manila Declaration, like Article 2(3) of the Charter, requires every state to 'settle its international disputes exclusively by peaceful means in such a manner that international peace and security and justice are not endangered'. The means available for settling disputes listed in these instruments are customarily divided into two groups. Negotiation, mediation, inquiry, and conciliation are termed diplomatic means, because the parties retain control over the disposition of their dispute and may accept or reject a proposed settlement as they see fit. Arbitration and judicial settlement, on the other hand, are employed when what is wanted is a binding decision, usually on the basis of international law, and these are therefore known as legal means of settlement.

Judicial settlement and arbitration provide states with ways of dealing with disputes through litigation, and as such provide the focus for this book, which will not be concerned with the various diplomatic methods, except incidentally.[3] This first chapter is intended to provide some general information on the significance of litigating disputes as a background for the more detailed treatments in later chapters. Historically, arbitration

[1] GA Res. 37/10, UN GAOR, 37th sess., 68th plen. mtg Supp. No. 51, UN Doc. A/RES/37/10 (15 November 1982).
[2] GA Res. 25/26, UN GAOR, 25th sess., Supp. No. 28, UN Doc. A/8028 (24 October 1970).
[3] For discussion of diplomatic methods of settlement see John G. Merrills, *International Dispute Settlement*, 5th edn (Cambridge University Press, 2011), chs. 1–4, 10, 11.

emerged before judicial settlement, and supplied the inspiration for the numerous courts and tribunals that now exist. The main features of arbitration are therefore a suitable place to begin.

Arbitration

Arbitration is the oldest of the legal methods of dispute settlement, and its origins for current international practice can be traced back more than two hundred years to the 1794 Jay Treaty. In that instrument, Great Britain and the United States agreed that various outstanding disputes should be resolved by panels of national commissioners appointed by the two states. These early Anglo-American commissions were not judicial tribunals in the modern sense, but were supposed to blend juridical with diplomatic considerations to produce what was in effect a negotiated settlement. The modern form of commission, however, is made up of arbitrators appointed by each side, together with one or more neutral members, who are required to follow a strictly juridical procedure and deliver a reasoned award. Variations on this basic pattern are possible, but the standard form of arbitration is now well established and employed in many kinds of international disputes.[4]

Traditionally, arbitration has been used for disputes in which the issues are legal and the desire to improve relations makes the idea of a binding settlement handed down by a third party attractive. Territorial and boundary disputes, for example, often fall into this category, as will be seen in later chapters.[5] For these and other types of dispute a further advantage of arbitration is that the parties define the question or questions they want the tribunal to answer and can also specify the basis of its decision. The definition of the issue is important because it establishes the scope of the arbitrators' jurisdiction. By defining the issue broadly, the parties can use arbitration to remove a major obstacle to good relations. Conversely (and more commonly), by defining the issue narrowly, they can prevent an investigation of wider questions. Such an investigation might cause more problems than it would resolve, or exclude from arbitration particular issues for which negotiation or some other means of settlement is considered more appropriate.

[4] On the development and use of arbitration see John L. Simpson and Hazel Fox, *International Arbitration: Law and Practice* (London: Praeger, 1959); Christine Gray and Benedict Kingsbury, 'Developments in Dispute Settlement: Inter-state Arbitration since 1945', (1992) 63 BYBIL 97; Merrills, above n. 3, ch. 5.

[5] See further Chapter 10, as well as Chapter 11, in this volume.

No less important than the definition of the issue is the parties' directive to the tribunal as to the criteria to be applied in making its decision. Often the tribunal's instructions are explicitly to decide the matter in accordance with international law. When there is no such directive, the parties' intentions must be inferred, and the usual practice is again to base the judgment on international law. Sometimes the parties want international law to provide the basis for the decision, but require particular aspects to be emphasized. This can be achieved by a suitably worded clause in the arbitration agreement (*compromis*). Similarly, if the parties are agreed that a solution in accordance with international law would not be appropriate for some reason, they can instruct the arbitrator to decide the case in accordance with equity, or on some other basis. The ability to specify the applicable law also enables the parties to require the arbitrator to apply national law, either alone, or in combination with some other system.[6]

Further control over the process of arbitration stems from the fact already mentioned that it is for the parties to choose their arbitrators. Although this, like other elements of an arbitration, requires agreement and so may cause delay, it means that the dispute will eventually be decided by a tribunal that has the parties' trust, a factor of fundamental importance in international litigation. As might be expected, difficulties can sometimes arise in appointing arbitral tribunals. If, for example, the parties cannot agree on the neutral members, a way of overcoming the problem is to allow the necessary appointments to be made by the president of the International Court of Justice (ICJ), or another disinterested third party. Similarly, in the rare case of a party attempting to sabotage an arbitration by refusing to appoint its own members,[7] a possible solution is a provision to the effect that, after three months, or some other suitable period, the necessary appointments may be made by an outside party.

The procedural arrangements are also a matter for the parties to determine. These govern the way in which the arbitration is to be conducted, where it is to be held, and how the proceedings will be paid for. It is usual to include in the arbitration agreement quite detailed provisions relating to such things as the number and order of the written pleadings, the oral stage of the proceedings, and the vital issue of time limits. Other matters which are normally covered in the *compromis* are how the tribunal

[6] See, e.g., *Trail Smelter Arbitration (United States* v. *Canada)* (1938 and 1941), 3 RIAA 1911.
[7] See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, [1950] ICJ Rep. 65; *(Second Phase)*, [1950] ICJ Rep. 221.

is to obtain evidence, whether it may appoint experts or conduct visits, whether it can order provisional measures, what languages will be used, how the decision will be taken, whether separate opinions are allowed and whether the award will be published. Although each of these matters can be negotiated separately, it is obviously convenient if the parties can agree on the use of standard provisions such as the model rules drawn up by the International Law Commission, the Permanent Court of Arbitration and other bodies.[8]

To encourage the use of arbitration, the 1899 Hague Convention established a list of qualified arbitrators, styled inaccurately 'the Permanent Court of Arbitration' (PCA), and created a bureau with premises, library, and staff that still exists and plays a major role in facilitating arbitration and other forms of peaceful settlement.[9] Like judicial settlement, arbitration is a method that can be employed ad hoc when a dispute arises, or provided for in advance by appropriate arrangements in a treaty. Consequently, it is to be found in the dispute settlement provisions of multilateral and bilateral conventions on a wide variety of subjects either as an optional or a compulsory procedure, and often in combination with other methods. The 1982 UN Convention on the Law of the Sea (UNCLOS), for example, gives a prominent role to arbitration,[10] as do the 1992 Stockholm Convention on Conciliation and Arbitration within the Commission on Security and Cooperation in Europe (CSCE)[11] and a number of recent conventions concerned with the environment.[12] In the dispute settlement system of the World Trade Organization (WTO),

[8] See the 'ILC Model Rules of Arbitral Procedure', (1958) II(12) *Yearbook of the International Law Commission*; text also in Simpson and Fox, above n. 4, 295; and the PCA's 'Optional Rules for Arbitrating Disputes between Two States' (1992), text in (1993) 32 ILM 572.

[9] Phyllis Hamilton, Hilmara C. Requena, Laurence de Blocq van Scheltinga, and Bette E. Shifman (eds.), *The Permanent Court of Arbitration and Dispute Resolution* (The Hague: Kluwer Law International, 1999); Belinda MacMahon and Fedelma Smith, *Permanent Court of Arbitration Summaries of Awards 1999–2009* (The Hague: TMC Asser Press, 2010).

[10] Merrills, above n. 3, 176–81.

[11] Convention on Conciliation and Arbitration (opened for signature 15 December 1992, entered into force 5 December 1994) 1842 UNTS 121; and see Merrills, above n. 3, 77–8 and 113.

[12] See, e.g., three conventions concluded in 1992: the Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79; the Convention on the Use of Transboundary Watercourses and Lakes (opened for signature 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269; and the Convention on the Transboundary Effects of Industrial Accidents (opened for signature 18 March 1992, entered into force 19 April 2000) 2105 UNTS 457.

similarly, although the emphasis is on panel proceedings (described below), arbitration is also an option and for certain disputes is mandatory.

The use of arbitration in inter-state disputes must be distinguished from its use in a related context – to deal with disputes between a state on one side and an individual or corporation on the other. In cases of this type, known as mixed arbitrations, the tribunal's jurisdiction may derive from a contract, rather than a treaty, but in either event has international repercussions that are likely to be significant. The Iran–US Claims Tribunal,[13] for example, was set up in 1981 to handle a large number of disputes arising from the Iranian revolution, and exercised jurisdiction over both inter-state and private claims. Its decisions, running to more than thirty volumes, not only show the value of arbitration as a way of resolving serious and complex disputes of a commercial character, but, because the tribunal has had to address issues such as expropriation and state responsibility, have also made a telling contribution to international law.

Arbitration, then, is an important means of handling disputes, as its extensive use in international practice demonstrates. However, like every other method, it has certain limitations. Since everything is in the hands of the parties, both the decision to arbitrate and the conduct of the proceedings rest on their decisions. This means that many disputes are never arbitrated because the will to do so is lacking, while for those that are arbitrated, the arbitrators' powers are confined to those conferred in the *compromis*. A further limitation concerns enforcement. For although arbitration results in a binding decision, it can be difficult to ensure that an award is implemented in the absence of a procedure to compel the losing party to accept it. This does not mean that arbitral decisions are generally disregarded, for states have good reason to accept defeats gracefully. It is nonetheless a weakness. Ways of encouraging compliance are available, but the answer really lies with the protagonists. Arbitration, like other means of settling disputes in a world of sovereign states, relies for its effectiveness on responsible behaviour from the parties.

The International Court of Justice

Judicial settlement involves the reference of disputes to permanent tribunals for a binding decision. It is listed in the Manila Declaration

[13] See Charles Nelson Brower and Jason D. Brueschke, *The Iran–United States Claims Tribunal* (The Hague: Martinus Nijhoff Publishers, 1998).

immediately after 'arbitration', from which it developed, and is currently available through a number of courts with general or specialized jurisdiction. The only court of general jurisdiction is the ICJ at The Hague, which was founded in 1945 as the successor to the Permanent Court of International Justice (PCIJ), which was set up as part of the 1919 peace settlement. Courts with specialized jurisdiction include human rights courts and various other tribunals described in the next section. Any review of judicial settlement, however, must start with the ICJ.[14]

The Court is composed of fifteen judges who are elected for nine-year terms by the UN Security Council and UN General Assembly. The Court's Statute requires the judges to be broadly representative of 'the main forms of civilization and of the principal legal systems of the world', but they sit as independent judges, not as representatives of their national states. However, if a party to a dispute does not currently have a judge of its nationality on the bench, it is entitled to appoint an ad hoc judge who becomes a member of the Court for that case only. Cases are normally heard by the full Court, but if the parties wish, they can instead refer it to a smaller chamber.[15] Such chambers, which normally consist of five judges, have been used for several cases in recent years.[16] The composition of a chamber is in practice determined by the parties, making litigation before a chamber of the Court similar in this respect to arbitration.

The Court's authority to decide cases is conferred by the Statute and, as with arbitration, is based on the principle of consent. It is therefore open to states to agree to take future disputes, or any particular dispute, to the Court by concluding a treaty in appropriate terms, or to make a unilateral declaration under Article 36(2) of the Statute, known as the optional clause.[17] The latter, like a state's treaty commitment, can be unqualified – that is, covering all disputes – or, on the other hand, may be circumscribed by reservations or limitations, reflecting the types of dispute the state is prepared to litigate. In the event of a disagreement as

[14] For more detailed treatment of the International Court and its work see Arthur Eyffinger, *The International Court of Justice 1946–1996* (The Hague: Kluwer Law International, 1996); Merrills, above n. 3, chs. 6 and 7.

[15] See Rudolph Ostrinhansky, 'Chambers of the International Court of Justice', (1988) 37 ICLQ 30.

[16] See, e.g., *Frontier Dispute (Benin/Niger) (Judgment)* [2005] ICJ Rep. 90.

[17] For discussion of the optional clause with particular reference to recent practice see John G. Merrills, 'Does the Optional Clause Still Matter?', in Kaiyan Homi Kaikobad and Michael Bohlander (eds.), *International Law and Power Perspectives on Law, Order and Justice* (Leiden: Martinus Nijhoff Publishers, 2009) 431.

to whether jurisdiction has been accepted in a given case, the matter is decided by the Court, whose decision, according to Article 36(6), is final. Only states may be parties in cases before the Court, although Article 65 permits it to give advisory opinions on legal questions for the benefit of international organizations.

Disputes over jurisdiction must be dealt with at the outset and often form a separate stage of the proceedings. The legal issues that can arise when the Court's jurisdiction is challenged vary enormously, but centre on whether there is the necessary consent to the proceedings, as evidenced by a valid legal act. Thus the question may be, for example, whether the instrument alleged to be the basis for jurisdiction is a legally binding agreement[18] or, if that is not denied, whether the current dispute is covered by its terms.[19] Optional clause declarations have proved a particularly fruitful source of problems, a common cause of argument being whether the dispute falls within reservations in either party's declaration, although sometimes the validity of a reservation or of the declaration itself is at issue. Not all cases pose jurisdictional problems, but when they do the Court has to resolve the matter before it can proceed.

The Court's function is described in Article 38(1) of the Statute as 'to decide in accordance with international law such disputes as are submitted to it', and the list of materials which follows, beginning with 'international conventions' and ending with 'judicial decisions' and 'the teachings of . . . publicists', has come to be regarded as the core of modern international law. As well as interpreting and applying the law, the Court must, of course, also resolve any issues of fact that may be in dispute, and for this purpose it receives and assesses documentary and other evidence brought forward by the parties, the quantity of which can sometimes be very large. This may include the evidence of witnesses or experts, and the Court itself may decide to visit the scene, as happened in *Gabčíkovo-Nagymaros Project*.[20]

Under Article 38(2) of the Statute, the Court may at the request of the parties give a decision *ex aequo et bono* instead of on the basis of law. However, this provision, which blurs the distinction between adjudication and conciliation, has yet to be used in practice. A less radical alternative is to refer a case to the Court for a decision on an agreed basis. Like the

[18] See, e.g., *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain) (Jurisdiction)*, [1994] ICJ Rep. 112; and *(Admissibility)*, [1995] ICJ Rep. 6.

[19] See, e.g., *Oil Platforms (Iran* v. *United States) (Preliminary Objection)*, [1996] ICJ Rep. 803.

[20] *Gabčíkovo-Nagymaros Project (Hungary* v. *Slovakia) (Order of 5 February 1997)*, [1997] ICJ Rep. 3.

chambers procedure, this again brings adjudication close to arbitration, although the exercise of the Court's powers must always comply with the Statute. A further possibility is for the Court to extend its function on its own initiative by utilizing equitable considerations of various kinds.[21] While this is not a licence for freewheeling judicial legislation, it introduces a useful element of flexibility into the Court's decisions and may be seen in a number of contemporary cases.

In addition to its contentious and advisory jurisdiction, the Statute entitles the Court to exercise an incidental jurisdiction which includes the power to indicate provisional measures of protection, to allow third states to intervene in proceedings, and to interpret or revise a judgment. Because these powers are conferred by the Statute, they do not require any further expression of consent by the states concerned, and in appropriate circumstances the Court's exercise of its incidental powers can make a constructive contribution to resolving disputes. So, for example, provisional measures of protection can be used to preserve the parties' rights while litigation is in progress. Intervention takes account of the fact that disputes may involve more than two states. And interpretation and revision are designed to address problems that may arise after a decision is given.

When the ICJ decides a case, its judgment is binding on the parties and is final and without appeal. Whether it actually resolves the dispute, however, depends partly on whether the parties accept it – that is, whether they are prepared to treat it as binding – and partly on the precise question referred. States may, for example, prefer to use the Court only to obtain a decision on applicable rules and principles,[22] or to establish whether a dispute is subject to compulsory arbitration,[23] and in such cases further steps may be needed to achieve a final settlement. As regards the acceptance of decisions, difficulties can sometimes arise, especially when a party has tried unsuccessfully to challenge the Court's jurisdiction. On the other hand, disputes are often taken to the Court and resolved there without acrimony because the states concerned want a matter settled. In those cases, just as with arbitration, repudiation of the decision, as well as being unlawful, would merely return the dispute to the political arena and so be self-defeating.[24]

[21] Michael B. Akehurst, 'Equity and General Principles of Law', (1976) 25 ICLQ 801.
[22] As in the *North Sea Continental Shelf (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands)*, [1969] ICJ Rep. 3.
[23] As in the *Ambatielos (Greece* v. *United Kingdom) (Merits)*, [1953] ICJ Rep. 10.
[24] For discussion of the effectiveness of judgments see Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press, 2004).