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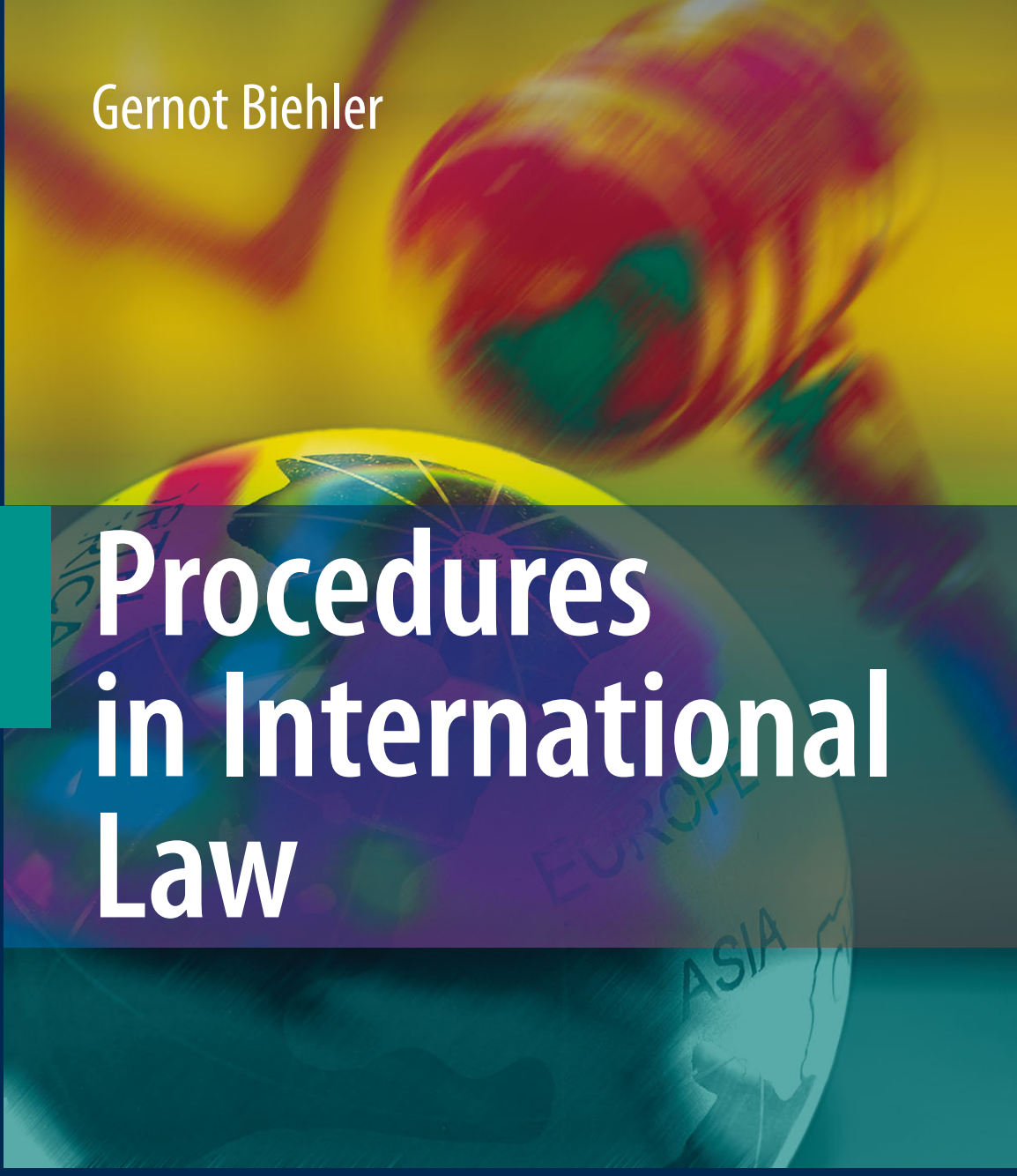

Procedures in International Law

Springer

Chapter 8

Alternative Methods of Dispute Resolution

International law can be determined through a great variety of procedures of which the main classes are both the national and the international adjudicative bodies discussed in the preceding chapters. In particular, in the context of international courts and tribunals the character of most interstate adjudication as a kind of arbitration agreed between the states concerned became visible. Traditional interstate adjudication provides the procedural means which the state parties consider appropriate to facilitate their desire to settle the issue in a flexible manner. Although the procedural authority lies generally with the international courts reflecting the national model of a fixed and unalterable *lex fori proceduralis* it is never authoritatively exercised against the state parties. The basic idea is to facilitate dispute settlement rather than executing and enforcing an overarching international legal order. One major reason for this character of international adjudication is the lack of authority granted to international courts reflected in the most meagre and rare submission of states to jurisdiction according to Article 36.2 of the ICJ Statute. No enforcement of judgments against the will of the judgment debtor may be expected. The other major reason is that international law's incoherent structure is more apt and ready to settle disputes than to enforce coherent doctrines rarely endorsed by the states as the ultimate standard of their international behaviour. Article 16 of the ICC Statute which subjects the decision to take a criminal prosecution to the political decision of a non judicial organ provides evidence of this. Settling disputes is rather seen as a desirable end in itself and is encouraged with great priority over implementing substantive law. On the occasion of these procedures international law is invoked, defined and determined making these judicial decisions a "subsidiary means for the determination of the rules of [both national and international] law".[1] This clarifies the fact that dispute settlement procedures on the international plane are not substantially different from international adjudication but just display different features according to their specific setting such as diplomatic negotiation, "good services" of a third party (an individual arbiter, for example, the Pope, the Spanish King, a Professor or the Secretary General of the UN to name those employed in practice; or a state or international organisation trying to achieve a solution as the OAS currently is between Colombia and Ecuador/Venezuela) or "agreed" retaliation (a means employed successfully to enforce

[1] Article 38.1.d of the ICJ Statute.

the WTO/DSU panel decisions). From this perspective they are all valid procedures in international law just as international adjudication is. Therefore, they may be treated here too.

8.1 The Means Listed in Article 33 of the UN Charter

The high regard for dispute settlement as the overall aim in international procedures is linked to the ultimate aim of the international legal order as embodied in the UN Charter to preserve peace. In this context adjudication and other dispute settlement methods are a means towards this end. The close link of the Security Council to all measures in Chapter VI of the UN Charter underlines this aim. The following means are described authoritatively with many examples by the Legal Adviser to the UN.[2]

The dispute settlement methods gain their special significance in relation to the prohibition on the use of force in international relations in Article 2.4 of the UN Charter. The necessary corollary of any adherence to this prohibition of self help is a working system of dispute settlement which naturally assumes some legal properties due to its procedural nature. Chapter VI of the UN Charter was originally understood as a prerequisite for the enforcement measures provided for in Chapter VII of the UN Charter. This tendency is strengthened by the latter part of Article 36.3 of the UN Charter, which provides that

> "… legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

Therefore, primarily states should settle their disputes by the means listed in Article 33.1 of the UN Charter and should be encouraged by the Security Council when this does not work out satisfactorily to refer the dispute to the ICJ. Only if this remains unsuccessful may the Security Council proceed beyond Chapter VI going beyond the scope of legal and accountable procedures towards the use of force.

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[2] UN Legal Affairs Office, *Handbook on the Peaceful Settlement of Disputes between States* (New York, 1992) UN Doc OLA/COD/2394; OLA/COD/2612; OLA/COD/2416; ISBN 92-1-133428-4; 92-1-233236-6; 92-1-333201-7. A more current bibliography is to be found in the Notes of Rama Mani "Peaceful Settlement of Disputes and Conflict Prevention" in Thomas Weiss and Sam Daws (eds.), *The Oxford Handbook on the United Nations* (OUP, 2007) p. 300, 318 *et seq*.

8.2 Diplomatic Means as a Form of ADR in International Law

Diplomatic methods are probably the broadest category of interstate settlement procedures.[3] The list in Article 33.1 of the UN Charter refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements and other peaceful means of the states' choice. This would include the above introduced adjudication by the ICJ ("judicial settlement") and arbitration already discussed. In view of the ultimate aim of interstate settlement common to both arbitration and adjudication the functional differences between the ICJ proceedings and interstate arbitration are minimal. The same may be said of the other means and methods mentioned in Article 33.1. International adjudication, arbitration and other diplomatic means are mainly distinguished by the flexibility of their procedures rather than their function in settling disputes procedurally or by any hierarchy. These different procedures attract different degrees of publicity but are designed to achieve the same objective. The interstate settlement procedures listed in Article 33 of the UN Charter are not substantially different; diplomatic methods are viewed as the broadest category, arbitration is slightly narrower as it is more defined by convention not least in the PCA context and especially in the light of the procedures followed by the ICJ enacted under Article 30 of its Statute. All procedures are aimed at settling the issues in a way which is acceptable to the state parties. This is the only criterion which distinguishes one procedure from another – some achieve this aim while others do not.

However, distinguishing between the terms and principles used in national procedural laws and their use in the international legal context may be helpful. ADR is probably the closest equivalent in the national legal context to "diplomatic methods". It includes arbitration, mediation, conciliation or resort to other arrangements such as are provided by national chambers of commerce. The term ADR under International Law has emerged.[4] In the national context the emphasis is on "Alternative" as this represents alternatives to compulsory adjudication by the national courts. They are not entirely separate from the ordinary courts, which may ultimately enforce a settlement reached in ADR. To use the term ADR to describe the methods in Article 33.1 of the UN Charter would suggest that these means are alternatives to any ordinary adjudication process in the international field as they are not in any functional connection or hierarchy to other dispute settlement methods particularly not to adjudication provided by the ICJ. This distinction between the seemingly related procedures in both national and international law was emphasised by the ICJ in the *Great Belt* case when it affirmed that international adjudi-

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[3] P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., Routledge, London and New York, 1997) pp. 273-83.

[4] C. Chinkin "Alternative Dispute Resolution Under International Law" in M. Evans (ed.), *Remedies in International Law* (Hart, Oxford, 1998) p. 123.

cation before the ICJ is regarded as an alternative to settlement between the parties by other means.[5] This is the reverse of the position in the national context. Here again with ADR, it is the misleading use of terminology of national proceedings which suggests a substantial difference between diplomatic measures such as conciliation, arbitration, or resort to other arrangements and judicial settlement. As with adjudication by the ICJ and interstate arbitration their functional distinction is analogous to national law where indeed compulsory adjudication is the usual dispute settlement procedure and arbitration and all the other means like mediation and conciliation and so forth are further down the hierarchy. This is because in the national legal context all other means including ADR can rely on the ordinary courts for enforcement and if the settlement fails entirely may always be adjudicated in the ordinary courts. In short, the lack of compulsory adjudication at an international level leaves both arbitration and adjudication as mediation and conciliation to act virtually on the same level and distinguished in terminology only.

Therefore, the very close functional relationship or similarity which already exists between international arbitration and adjudication should be extended to other diplomatic methods such as negotiation, enquiry, mediation, conciliation or resort to agencies or arrangements. These further the objective of peaceful interstate settlement as do the ICJ or the Permanent Court of Arbitration. There is no hierarchy and their value for international law is based solely on how incisive the reasoning is. The states' performance on the basis of any of such proceedings would amount to state practice within the meaning of Article 38.1.b of the ICJ Statute while the judgment as such only acquires the status of subsidiary means for the determination of rules of law in accordance with Article 38.1.d.

This assessment reflects the entitlement of sovereign states to embark on whatever settlement procedures they consider suitable. The practical value of the procedures available to states is the best measure of their success. This perspective serves both the academic analysis of the procedures and the practitioner and his client best.

Having clarified the difference between ADR and diplomatic measures their parallels should also be mentioned; the terminology of Article 33.1 of the UN Charter refers to mediation, conciliation, arbitration, enquiry and negotiation as the methods open to parties to ADR in the national context. It is cheaper, more flexible and allows for more privacy for the parties than litigation. These "means of their choice" (Article 33.1) allow the parties freedom to use third party facilitators and to draw upon technical or legal expertise and to bring together teams they consider to be balanced and appropriate. The consensual nature of the process is taken to encompass all stages of procedure which can remain unfettered by abstract litigation rules and formality. The parties' control over procedure and even the outcome is thought likely to produce a more acceptable settlement to the dispute than anything imposed by a third party. It may save the faces of the parties by avoiding contests typical of the adversarial nature of national court procedures

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[5] *Finland v Denmark* Provisional Measures, Order of 29 July 1991 [1991] ICJ Rep 12.

which in the light of political sensitivities represents a distinct advantage.[6] Finally, the public character of litigation is avoided leaving the parties free to keep parts of the settlement or indeed its existence confidential. For diplomats this confidentiality would seem the normal basis on which to proceed and is particularly useful when the financial means for meeting a legal responsibility is at issue between States.

8.3 The Institutional Background of Diplomatic Settlement of Disputes

Based on the work of both Hague Peace Conferences for the Peaceful Settlement of Disputes 1899 and 1907,[7] diplomatic measures were defined in Article 33 of the UN Charter and adopted by many multilateral treaties such as the Permanent Conciliation Commission,[8] the Permanent Court of Arbitration[9] or the Mixed Arbitral Tribunals.[10] Constant use of these procedures is encouraged by the prohibition of the use of force in Article 2.4 of the UN Charter and the states' commitment to peaceful settlement of disputes as in the General Act for the Pacific Settlement of International Disputes[11] or regional provisions.[12] It is this connection to the maintenance of international peace and security symbolised by the link between Article 2, paras. 3 and 4 as well as Chapter 6 and Chapter 7 of the UN Charter, which gives those procedures a profile in international relations beyond simply addressing the actual issue at settlement. "Consequently, many domestic debates about the function and efficacy of ADR processes are meaningless in the international context where all third party processes are peaceful alternatives to conflict."[13]

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[6] The Mediators (among them the former President of the ECtHR) in the *Austria v EU* case when addressing the question of whether the then conservative-liberal coalition would meet the basic democratic standards to terminate the sanctions of the then predominantly socialist led countries in the EU against Austria helped to bring an end to a hardly tenable situation without losing too much face.

[7] International Convention for the Pacific Settlement of Disputes, The Hague, 29 July 1899, 32 Stat 1779 (UK), *International Convention for the Pacific Settlement of Disputes*, The Hague, 18 October 1907; 3 Martens (3rd) 360, 36 Stat 2199.

[8] John G. Merrills, *International Dispute Settlement* (2nd ed., Grotius, Cambridge, 1991).

[9] See Articles 20 to 29 of the International Convention for the Pacific Settlement of Disputes, The Hague, 18 October 1899, slightly amended by the 1907 Convention.

[10] Articles 296, 304 of the Versailles Treaty of 28 June 1919; 11 Martens (3rd) 323. See more comprehensively *UN Handbook on the Peaceful Settlement of Disputes Between States* (UN, New York, 1992).

[11] 26 September 1928, 93 LNTS 343; revised on 28 April 1949, GA Res 268 (A/900).

[12] European Convention for the Peaceful Settlement of Disputes, 1957, 320 UNTS, 243; American Treaty on Pacific Settlement, 1948, 30 UNTS 55; Protocol of the Commission on Mediation and Arbitration of the Organisation of African Unity 1964, 3 ILM 1116.

[13] C. Chinkin, *Alternative Dispute Resolution under International Law*, *loc cit*. p. 126.

In this sense, if ADR/diplomatic measures are an alternative to anything in international law, it is to the use of armed force.

Therefore, the last resort in international law is self help, armed force or no dispute settlement at all, giving the advantage to the stronger nations or to those with the more effective executive. It is not only the *Fisheries* and the *Great Belt* cases which exemplify this primacy of the directly negotiating executive government over the administration of law in the interstate context. The endless banana dispute before the WTO Panels was terminated by the US and EC negotiators in 2001 without settling the legality of the protective EC banana market order leaving those countries most affected like Ecuador and Costa Rica without any effective remedy.

The last resort in national law, however, is the binding decision of the courts. It is this which gives all procedures, tribunals, arbitration panels or mediation their function and legal validity and places them in a hierarchy in national law, which is unknown to international legal procedures. The equality of procedures under international law distinguishes them from their national counterparts. Certain distinctions between procedures in adjudication before the ICJ and arbitration under PCA auspices should, however, be identified. Adjudication before the ICJ and arbitration under PCA auspices may be distinguished because of the total confidentiality which may be secured in PCA proceedings but is unavailable before the ICJ. This already mentioned distinguishing feature may shed a different light on both and may be relevant to the parties to a conflict and must be fully understood as must many other subtleties by those advising. Conciliation and mediation take on a very different character depending on who the parties enlist as mediator, for example, the Pope, the Secretary General of the United Nations or the British Monarch (advised by the Privy Council). The latter is more popular with Commonwealth countries, the former with catholic and the second with other countries not unified by religious tradition or belief in a specific way. Issues are compromised, such as when the Secretary General mediates and the General Assembly or the Security Council are involved in the same issue. The Red Cross or Switzerland, on the basis of their neutral position, perform the same function. Additional authority facilitating adherence to settlements comes with a price. It is useful to examine each method included in the term diplomatic measures.

8.4 Good Offices

"Good offices" is a term often used in the international context where third party conciliation or mediation would be the term used in national procedures. The distinguishing mark of good offices is that they are provided by a third party outside a conflict; therefore, this goes beyond negotiations between the parties and may come close to other third party procedures depending on the status and involvement of the person providing good offices. Although the term does not appear in Article 33.1 of the UN Charter it is understood to be included in the list by virtue

of its function as facilitating dispute settlement within the meaning of Chapter 6 of the Charter. It is described in An Agenda for Peace as an attempt to bring disputing parties to agreement through the named Charter processes.[14]

A number of situations demonstrate the efficacy of the method of good offices. The activities of the UN Secretary General in mediating between Turkish Northern Cyprus and the Greek portion of the island and in the "Rainbow Warrior" incident between New Zealand and France are useful examples as are the Algerian good offices between Iran and the US in respect of financial issues. They are distinguished by the role of the person or institution providing the good offices. The UN Secretary General in the Cyprus mediation had to take into consideration express policies of the UN not least the Security Council and two of its permanent members' vested interests in the light of the parties' inability to set the agenda themselves. By contrast, in the Rainbow Warrior mediation, the parties played the dominant role throughout the process securing success albeit of a limited nature.

8.4.1 The UN Secretary General in the Turkish Republic of Northern Cyprus

The Secretary General offered good offices to the Greek and Turkish Cypriot communities which they originally accepted in 1964 which was endorsed by the Security Council. In 1974 Turkey invaded the northern part of Cyprus and set up the "Turkish Republic of Northern Cyprus" which remains unrecognised by any State except Turkey. Special Representatives were appointed by the Secretary General and finally drafted a plan that was put to a referendum in 2004 but failed to win popular approval. The support for the plan by the Cypriot Government was lukewarm at best.[15] This is not to enter into political analysis but to highlight the extreme length and the ultimate failure of the process as it was unable to secure the consensus of those concerned. This is generally attributed to the Cypriot Government's lack of control of the process resulting in a view that the proposed solution was shaped by interests other than theirs and presented as a "take it or leave it" option.

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[14] An Agenda for Peace: Supplement, Preventive Diplomacy, Peacemaking and Peacekeeping, Report of the Secretary General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992 and 17 June 1992, UN Doc. A/47/277, paras. 34-45; see generally T. Franck "The Secretary General's Role in Conflict Resolution: Past Present and Pure Conjecture" 6 EJIL 360; T. Franck, *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995) pp. 173-217 with an account of the Good Offices of the Secretary General up to that date.

[15] Claire Palley, *An International Relations Debacle – The UN Secretary-General's Mission of Good Offices in Cyprus 1999-2004* (Hart Oxford, 2005) gives a possibly not impartial but thorough account of the kind of good offices rendered, see p. 218 *et seq*.

8.4.2 The UN Secretary General in the "Rainbow Warrior" Case

The Secretary General's good offices in the "Rainbow Warrior" case were quite different. When New Zealand found out that Greenpeace's "Rainbow Warrior" had been blown up by French secret agents in a New Zealand port it resolved to claim damages. As France wanted to repatriate its agents then in New Zealand custody, there were interests on both sides to be aligned. The initial deal of payment and an apology in return for the release of the agents was facilitated by the Secretary General's mediation. This case is of particular interest and may serve as an excellent example of the procedures employed by states short of resorting to traditional adjudication or the display of their unmitigated powers. It gives one of these rare insights into a not too rare kind of state practice of dealing with highly contentious issues now extremely well documented in several criminal law decisions, enquiry reports and a UN Secretary General Arbitral Award. It has some follow up procedures which may also be considered.

On 10 July 1985 the British registered Greenpeace ship "Rainbow Warrior" was sunk at her berth in Auckland Harbour, New Zealand by two explosive devices set by two French secret agents who were arrested and prosecuted on charges of manslaughter and wilful damage.[16] They were convicted and sentenced to ten years imprisonment by the then Chief Justice of New Zealand. The French agents Mafart and Prieur had been travelling in New Zealand as a married couple under the names of Alain and Sophie Turenge. Although they were originally charged with murder (as a Dutch citizen, Fernando Pereira, was drowned in the sinking of the ship) the Crown prosecution reduced the charge because of the difficulty of proving an intention to kill. Immunity for the French agents was neither claimed by France nor considered by the New Zealand court. The background was that initially France denied any involvement in the affair and even instituted a national enquiry by a former high ranking civil servant.[17]

The conflict only became visible when the French agents were imprisoned in New Zealand and France took steps to get them out. There were interests on both sides; New Zealand wanted to have compensation paid and sought an apology from France to ensure that this kind of state practice would not grow into customary international law and France wanted its agents to be returned to France. In June 1986 both sides agreed to submit the dispute to the Secretary General of the United Nations Peres de Cuellar for a binding ruling which was handed down on 6 July 1986.[18]

No other conditions such as France's agreement to keep the agents in prison for some years outside mainland France were honoured, highlighting the prob-

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[16] *R v Mafart and Prieur* (1987) 74 ILR 241.

[17] Bernard Tricot, whose report absolving France from any involvement in the affair can be found in C. Lecomte, *Coulez le Rainbow Warrior!* (Messidor: Editions sociales, Paris, 1985) pp. 151-168; ISBN-10**:** 2209057698, ISBN-13**:** 978-2209057696.

[18] Text of the Decision in 26 ILM 1346 (1987); 74 ILR 241.

lem of lack of enforcement. It is the other extreme of a UN facilitated settlement which was clearly driven by the parties making them the final arbiters of what the UN provided guaranteeing the success of the settlement but not the adherence to the text and principles drafted by the UN Secretary General. It required France to apologise to New Zealand for its violation of international law and to pay $7,000,000 in compensation. It was held that the French agents should be transferred from prison in New Zealand to French military authorities on the remote Pacific Island of Hao, where they would be required to spend three years in isolation. The decision also provided for the establishment of a tribunal to rule on any disagreement between the parties resulting from the implementation of the decision. The decision was confirmed in an exchange of diplomatic *notes verbales*.[19]

France did not conform to the agreement in relation to keeping the agents in Hao for three years. They were returned to mainland France before this period had expired for medical and family reasons. New Zealand was not satisfied and asked for the tribunal provided for in the Secretary General's decision to be established to decide on the issue. The relevant part of the Secretary General's holding reads:

> "… Major Mafart and Captain Prieur will be transferred to a French military facility on the island of Hao for a period of not less than three years. They will be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They will be isolated during their assignment in Hao …"[20]

France suggested that it might deviate from the obligation to keep them in Hao because of distress.[21] Although the Tribunal held that this might have been so for a limited time, the failure to return the agents to Hao when the medical and family conditions justifying their removal ceased to exist constituted a material breach of the Secretary General's decision. However, the Tribunal did not order the return of the agents to Hao as requested by New Zealand. These obvious inconsistencies reflect the fine balancing of foreign policy interests in the case. The selection of the Secretary General as arbiter or judge in the case reflects the political nature of this kind of adjudication which applies international law as a tool to settle international conflicts. This focus of international dispute settlement using legal procedures is well evidenced in the "*Rainbow Warrior*".

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[19] See texts in NZTS 1987, No. 16.

[20] Decision of 6 July 1986, (1987) 26 ILM 1346; 74 ILR 241.

[21] See Article 32.1 of the ILC Draft Articles on State Responsiblilty (1989) Yearbook of the International Law Commission Vol. II Part II.

8.5 Arbitration and the Permanent Court of Arbitration in The Hague

The primary facilitator of interstate arbitration remains the Permanent Court of Arbitration. Established at the Peace Conferences of 1899 and 1907 at The Hague, the Permanent Court of Arbitration is even more of a political misnomer than the ICJ. Members of the delegations at the Conferences establishing the Court were eminent lawyers and all unreservedly supportive of the PCA but nonetheless outspoken on the false labelling of the Court. It is briefly restated here to exemplify the need for critical distinctions, which are decisive in international law but virtually unknown to those operating only in the national context:

> "Instead of a permanent court, the Convention of 1899 gave but the phantom of a court, an impalpable spectre, or to be more precise yet, it gave as a recorder with a list. (Asser) In a word, the Permanent Court is not permanent because it is not composed of permanent judges; it is not accessible because it has to be constituted for each case; it is not a court because it is not composed of judges (Brown Scott). What then, is this a court whose members do not even know one another? The Court of 1899 is but an idea which occasionally assumes shape and then again disappears (Martens)".[22]

Indeed, despite the title, what exists until today is a recorder with a list of four names of lawyers from each state appointed by the respective foreign ministries. Those put on the list by the states may be deemed suitable for selection as arbiters or may call themselves Judges of the Permanent Court of Arbitration although a sense of realism fortunately meant that the judges hesitated to do so as most of them would never sit in any case before that Court at all. A second function of the list is to provide nominees for election to the ICJ bench. As Article 4 of the ICJ Statute provides:

> "1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration in accordance with the following provisions."

In the case of Members of the United Nations, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of the Hague of 1907 for the pacific settlement of international disputes.

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[22] James Brown Scott (ed.), *The Proceedings of The Hague Peace Conferences: The Conference of 1907* (London, 1920-1) Vol. 1, pp. 334, 347 and Vol. 2, pp. 234, 319, 327, 596.

Beside the organisational links and inter-institutional relations the Permanent Court of Arbitration is scarcely more than a label which may lead to interstate arbitration. Arbitration is the classical means of interstate dispute settlement leaving the choice of judges, the time frame and the issues entirely to the parties and is usually successful as the holdings are generally followed by the parties. The variety of subject matter decided in arbitration is unmatched in any other form of dispute settlement.

Two kinds of arbitral awards may be distinguished. First, there are those which deal with the traditional interests of states focused on international law and secondly those which use international arbitration as a shield to protect private economic interests. While the former (older cases) are usually found in the Reports of International Arbitral Awards (RIAA) the latter are only reported in the context of the enforcement of the arbitral awards through national courts. However, both fall within the ambit of the PCA.

A more recent example of the latter is *AIG Capital Partners Inc v Republic of Kazakhstan*.[23] This category is distinguished from the former in that there is no real agreement to adhere to the arbitral award which is often obtained by default by the private investor against a state on the basis of this state's prior submission to arbitration in an investment contract. Therefore, questions of enforcement and state immunity are the regular issue to be addressed in the latter class of cases rather than substantive international law. At this point only classical interstate arbitration which is based on mutual agreement leaving no issues of jurisdiction to be decided shall be focused on here as arbitration without the consent of one party (here that party is the Republic of Kazakhstan) is not arbitration in the traditional sense of the word.

Arbitration is the prime interstate dispute settlement procedure. This is so because it is in keeping with the character of international relations; the states explicitly agree to settle and remain in charge of the procedures on how to achieve this. This generally takes the form of an agreement, usually known as *compromis*. Arbitration makes clear that the consent of parties to settlement must never be assumed and is to be given explicitly in each case. This avoids the jurisdiction disputes regularly seen before the ICJ, in which jurisdiction is found to exist without the defendant's actual and continuing consent.[24] Unlike before the ICJ non-adherence is simply not an issue in interstate arbitration although it regularly is in all other proceedings when jurisdiction is construed without the actual and continuing consent of the defendant state. It is a feature which helps to make the procedure the prime choice of states and is reflected in the volume of arbitration agreements and in the variety of subject matter.

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[23] [2006] 1 All ER 284.

[24] *Nicaragua v US* (preliminary objections); *LaGrand et al*.; the frustration kicking in at last when the respondent State ignores proceedings on the merits and does not adhere to a decision.

When classifying arbitral awards in terms of sources of international law within the meaning of Article 38.1 of the ICJ Statute they are seen to relate to all three principal sources of international law; the *compromis* as such is a treaty within the meaning of Article 38.1.a of the Statute and often a treaty is an element of an award. The agreement as condensed in the *compromis* and the adherence to the award by the state parties is state practice within the meaning of Article 38.1.b of the Statute. A large portion of arbitral awards await analysis in relation to their true contribution to the body of international law. Many issues of great importance in interstate relations will be found to have been already addressed in this context. When viewed in the light of general legal principles common to national and international law within the meaning of Article 38.1.c of the ICJ statute the awards are a most useful source of law. When Hersch Lauterpacht discussed his view on the national law sources of international law[25] he examined arbitral awards. Discussion of the ILC on State Responsibility is less useful than arbitral awards, which reveal the amount of compensation states agree to pay, how this is paid and how this compares to the sum which may have been recoverable in damages in these circumstances according to the national laws of states when determining what international law is.[26]

The ILC pronouncements on State Responsibility and the many international arbitral awards relating to responsibility or liability in international law complement and do not conflict with one another. In the best tradition of Blackstone's Commentaries or the various American restatements of law the ILC contributes to the development of international law. Holding firmly to state practice as expressed in numerous arbitral awards ensures that the articles would be considered as restating international law and do not transgress into the unduly vast realm of texts which state for extraneous reasons what they believe international law should be.

One feature distinguishes international arbitral awards not only from ICJ proceedings but also from national decisions in international law matters such as the House of Lords decision in *Pinochet*.[27] Public awareness of them is generally very low. This is despite the frequency with which such awards are made and the variety of issues they deal with. It is no coincidence that the ICJ and national courts command much higher public and political attention. This does not reflect a lesser significance of arbitral awards in international law. It rather indicates even a higher significance. Many if not the majority of arbitral awards administered by the PCA and beyond are confidential. The confidential nature of the process avoids public scrutiny and the risk that settlements will become political instru-

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[25] Hersch Lauterpacht, *Private Law Souces and Analogies of International Law* (Longmans, London, 1927); see Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 92 *et seq*.

[26] Christine Gray, *Judicial Remedies in International Law* (Clarendon, Oxford, 1990) p. 5 *et seq*. gives an overview of arbitral practice in relation to damages (punitive, nominal, interests, *restitutio in integrum*).

[27] *R v Bow Street Stipendiary Magistrate, ex p Pinochet Ugarte (No.3)* [2000] 1 AC 147.

ments. Only when the parties explicitly agree to publish the proceedings will they appear on the PCA website. It is introduced by the sentence: "The following list includes only those proceedings under PCA auspices that the parties have chosen to make wholly or partly public. The PCA will provide no information about proceedings other than that contained on this page." This practice runs counter to the principle that justice should be administered in public, which is a cornerstone of all national legal systems and may only be limited in rare circumstances when the judge is persuaded that very strong legal interests of privacy, state security or foreign relations militate against it. This is very different in international settlements. Although obviously unpublished agreements may not be discussed, a glance at the published cases of the PCA shows that this practice is on the wane. The publication of memorials and counter memorials and transcripts is very extensive in some cases and very limited in others. The national legal background of countries often reflects the degree of openness with regard to the settlement. However, full discretion remains with the parties involved.

The US Supreme Court has observed that an "agreement to arbitrate before a specialised tribunal is, in effect, a specialised kind of forum selection clause that posits not only the *situs* of the suit but also the procedure to be used in resolving the dispute."[28] The same could be said of international law cases. With any interstate arbitral agreement the forum and *locus* of the suit is rendered international and international/diplomatic practice and procedure applies as does international law.

[28] *Scherk v Alberto-Culver Co* 417 US 506 (1974). See also the US procedural rule in 6 C.J.S. Arbitration para. 1 (1975).