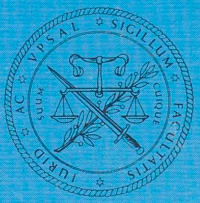

KAJ HOBÉR

EXTINCTIVE PRESCRIPTION AND APPLICABLE LAW IN INTERSTATE ARBITRATION

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Abstract

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This thesis deals with the resolution of international disputes through arbitration. It is devoted to one important aspect of interstate arbitration, *viz.*, the law and/or rules to be applied. After an introductory account of the history and development of interstate arbitration, the emphasis is first put on party autonomy in the selection of the applicable law. In addition to party autonomy in interstate arbitration, choice of law by parties in international commercial arbitration (between private parties), is discussed. The conclusion is that party autonomy is fully accepted in interstate arbitration, albeit that there are certain restrictions on it. Such restrictions are discussed both with respect to interstate arbitration and international commercial arbitration. It is suggested that the only restriction on party autonomy in interstate arbitration is *ius cogens*.

The attention is then turned to the more difficult situation concerning applicable law, *viz.*, when no choice of law has been made by the parties. With a view to studying this situation in detail, the thesis concentrates on the principle of extinctive prescription in international law. A fresh look is taken at this principle, in particular against the background of the traditionally suggested rule that in interstate disputes to the effect that an arbitral tribunal should apply public international law, unless the parties have made a choice of law.

Based on an analysis of the current understanding and application of the principle of extinctive prescription, it is suggested that the principle is in need of refinement. Proceeding from a differentiation between different categories of interstate disputes, it is further suggested that the need for refinement of the principle is the greatest with respect to economic and commercial disputes. The method suggested for the refinement of the principle of extinctive prescription is to resort to municipal law rules on limitation.

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I need hardly add that responsibility for errors and shortcomings lies solely with me.

Uppsala, July 2001

Kaj Hobér

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CHAPTER 1 – Introduction

1.1 The Problem

In 1972 the United States and the Soviet Union signed an agreement for the construction of embassies in Washington D.C. and Moscow, respectively. Some ten years later a dispute arose when eavesdropping equipment was found in the US Embassy in Moscow. The dispute lead to the commencement of arbitration proceedings in Stockholm. The United States claimed, *inter alia*, that the eavesdropping equipment constituted "intentional faults" under the agreement and asked for compensation of the damages allegedly incurred as a result thereof and asked the Soviet Union to take certain measures relating to the equipment.[1] In the arbitration it was argued that the claims put forward by the American side were time barred under Soviet law. The American side, however, argued that Soviet law was not applicable, but rather the public international law rules and principles with respect to extinctive prescription which, it argued, led to the conclusion that the claims were not time barred.[2]

In another, more recent dispute under a bilateral investment protection treaty, the two disputing states are arguing over, among other things, whether or not the claims of one state are time barred. The respondent state argues that they are, since the parties, i.e. the two states, have agreed, at least implicitly, to apply the statute of limitations of the respondent state. The claimant, however, denies any such agreement and

[1] *See* Svenska Dagbladet, 30 October 1988, at page 12.

[2] The dispute eventually seems to have been settled through diplomatic channels, *see* Dobrynin, In Confidence (1995) 128. President Reagan – just before he left office in 1989 – recommended that the building in question be razed and rebuilt. The Bush administration, however, recommended a solution which meant that part of the building was to be kept and a new, four story "top hat" of secure offices was to be built on the remaining structure, *see* International Herald Tribune, 23 February 1996, at page 2; *see* also discussion at p. 356 *et seq.*, *infra*.

insists that the rules of extinctive prescription in public international law must be applied.[3]

The cases just described illustrate two situations where the question of extinctive prescription may arise in interstate arbitration.[4]

Another recent example where extinctive prescription has come to the fore are claims for compensation addressed to the three former Baltic republics of the Soviet Union, subsequent to their independence following the disintegration of the Soviet Union. The claims concern compensation for property which was confiscated by the Soviet Union in connection with the occupation of the three Baltic states during the Second World War. Claims for compensation have not been raised against the Soviet Union. Some Western states, however, are now claiming compensation from the Baltic states for property of their citizens located in one of the Baltic states and confiscated by the Soviet Union. In some instances the response from the Baltic states has been to argue that the claims have been raised too late, both in relation to municipal legislation on restitution of property – such legislation does as a rule provide for specific deadlines for the filing of claims for restitution and/or compensation – and in relation to the rules on extinctive prescription under public international law. As far as is known, these claims have not yet resulted in any international dispute leading to international arbitration or adjudication.

The traditional approach to questions of applicable law in interstate disputes has been to say that international law is to be applied unless the parties have agreed otherwise.[5] This immediately raises two questions, *viz.*, (i) to what extent do parties enjoy autonomy to choose applicable law in interstate disputes, and (ii) what does international law have to say about extinctive prescription; what are the relevant rules?

[3] Most modern bilateral protection investment treaties have provisions for arbitration both with respect to disputes between the two contracting states and disputes between the investor and the host state, *see* Dolzer & Stevens, Bilateral Investment Treaties (1995) 119 *et seq.* – The dispute in question is of the former type, i.e. between the two contracting states.

[4] For the purposes of this Study the term *interstate arbitration* will be used for arbitrations between two, or more, states, without the involvement of any private parties; arbitrations between two private parties as well as arbitrations between one private party and a state, or state entity, will be called *commercial arbitration*; *see* pp. 25–26 *infra*, and further, p. 346 *et seq.*, *infra*, for a discussion of different categories of interstate disputes.

[5] *See*, e.g. Carlston, The Process of International Arbitration (1946) at 140, where it is said that: "Unless the *compromis* stipulates otherwise it is either an express or implied term that the arbitration should apply international law as the basis for his decision". *See* further p. 210 *et seq.*, *infra*.

Taking a broader perspective, the examples mentioned above raise a number of interesting and important questions relating to the settlement of international disputes. To begin with there is the very fundamental question of *how to define* an international dispute; somewhat surprisingly this still seems to be a controversial issue. An equally important question is *how to resolve* international disputes – what methods could and/or should be employed? As mentioned below there are a number of dispute settlement methods available. The suitability and efficiency of each dispute settlement mechanism will to a large extent depend on the circumstances of each individual dispute and above all on the will and ambitions of the disputing states. Arbitration has always played – and will continue to play – an important role as one, among several, methods for resolving international disputes. Arbitration has been used for centuries as a method to resolve international disputes.[6] While there has been a general decline in the number of arbitrations during the 20th century – in particular after the Second World War – arbitration continues to play a significant role in interstate disputes; in fact arbitration is one of the most respected dispute settlement mechanisms.[7]

The general aspects of international disputes – and the problems which they may give rise to – alluded to above will *not* be the focus of this Study. The problem to be discussed and analyzed in this Study is the *applicable law* in interstate arbitration. Finding and applying the law to the substantive aspects of a dispute is fundamental to any adjudicative process of an international character: it goes to the heart of resolving the dispute in question. The way in which, and how, international arbitral tribunals find and apply the applicable law is crucial to the efficiency of arbitration as a method to resolve international disputes, and thus ultimately to the trust and confidence in arbitration.

In discussing and analyzing the law applicable in interstate arbitration, extinctive prescription will be used as an illustrative example. At this

[6] *See* p. 34 *et seq.*, *infra*.

[7] Raymond, Conflict Resolution and the Structure of the State System. Analysis of Arbitrative Settlements (1980) 11, where it is also said that arbitration "is mentioned more than three times as often as adjudication, and more than five times as often as mediation in the treaties registered with the United Nations from 1945 through 1964" (footnote omitted). – A provocative and cynical view of how to resolve international disputes is suggested by Luttwak, Give War a Chance, in Foreign Affairs (July/August 1999) 36. He complains that since the establishment of the United Nations, great powers have rarely let small wars burn themselves out. He talks about "a true appreciation of war's paradoxical logic and a commitment to let it serve its sole useful function: to bring peace", *id.* at 44. He seems to suggest that interventions by international organizations and great powers only prolong wars and that wars should be allowed to burn themselves out.

stage, suffice it to define extinctive prescription as the effect of lapse of time on claims and other rights.[8]

Extinctive prescription has been chosen because it is an issue of decisive practical and legal importance in any dispute, i.e. if a claim has been extinguished by the lapse of time, that is usually the end of the dispute, or at least the arbitration. The claim is no more, consequently the arbitration is no more. The defense of extinctive prescription thus usually means that the issue of applicable law is brought to a head, and the tribunal must address it squarely and rule on it.

Another reason for selecting extinctive prescription is the fact that there has been little discussion and analysis of this issue during the last fifty years.[9] While the concept is well-known and regularly referred to in textbooks and manuals on public international law,[10] few details are discussed. Given the potentially draconian effects of extinctive prescription in interstate arbitration, the issue deserves more attention. Extinctive prescription continues to be of importance in interstate disputes. In the *Case Concerning Certain Phosphate Lands in Nauru*,[11] for example, the International Court of Justice, while rejecting a preliminary objection of Australia based on delay in submission of the claim, recognized that delay may under certain circumstances render a claim inadmissible.[12] Also, in a recent investment dispute involving the Egyptian government, it argued before the arbitral tribunal that the case was being heard too long after the events in question.[13] Questions relating to extinctive prescription are also of immediate interest and relevance to the work of the International Law Commission in attempting to codify the law of state responsibility. In the latest version of the Draft Articles on State Responsibility, Article 46 addresses the question of loss of the right to invoke responsibility.[14] For the time being, reference in the draft text is made to waiver and acquiescence; in the preceding discussion, however, the principle of extinctive prescription was debated. It would seem natural to assume that the International Law Commission will, before its work comes to an end, address the impact of the principle of extinctive prescription on the right to invoke state responsibility. For all the foregoing reasons, it is important

[8] *See* further p. 248 *et seq.*, *infra*.
[9] *See* p. 262 *et seq.*, *infra*.
[10] *See* p. 263 *et seq.*, *infra*.
[11] I.C.J. Reports (1992) 253–255.
[12] *Ibid.* 253–255.
[13] Financial Times, 12 December 2000, at page 5.
[14] *See* discussion at p. 306 *et seq.*, *infra*.

to take a new look at the principle of extinctive prescription, particularly as it relates to international claims and to interstate disputes.

Selecting extinctive prescription as an illustrative example makes it possible to discuss and analyze the question of applicable law in interstate arbitration at – what in the opinion of the present author is – the right level, i.e. at a relatively detailed level. Applicable law in interstate arbitration is mostly discussed in a general way in publications on public international law, and seldom as a separate issue.[15] As stated above, however, finding and applying the law applicable to a dispute is central to any adjudicative process of an international character, including arbitration. There are very few scholarly works which focus on applicable law in interstate arbitration, as a discrete and separate issue. Given the importance of applicable law in international disputes this is to be regretted. This Study will try to fill that void. The question of applicable law therefore merits treatment as a separate issue, as a separate, but at the same time integrated, aspect of international arbitration. To put it in plain – but perhaps unorthodox – English: the time has come to look at the nuts and bolts of applicable law in interstate arbitration, to move from the generalities of the literature to specific problems. For the reasons mentioned above, using extinctive prescription as an example will allow me to do that.

In addition to the two questions mentioned above – *viz.*, (i) to what extent do parties enjoy autonomy to choose applicable law in interstate disputes, and (ii) what does international law have to say about extinctive prescription, what are the relevant rules – further questions present themselves as forming part of the problem to be studied. Does the traditional approach described above – application of international law absent a choice of law by the parties – accurately reflect what arbitral tribunals in fact do today, or should do? Is the international law rule on extinctive prescription – whatever it may be – adequate and appropriate for interstate arbitration in the 21st century, or should it be changed, amended or refined?

1.2 International Disputes and their Settlement

Disputes between states based on claims arising from factual circumstances or legal relationships constitute an integral and unavoidable part of international relations. The Charter of the United Nations, Article 2(4), prohibits the use of force – with certain exceptions – and

[15] There are exceptions, however, *see* e.g. Simpson & Fox, International Arbitration (1959) 128–146 and Merrils, International Dispute Settlement (3rd ed. 1998) 99–105.

Article 2(3) requires member states to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". Article 33(1) of the Charter lists a number of methods which may be used for the peaceful settlement of international disputes.[16]

While there may be aspects of the referenced articles which are unclear or even controversial, there is agreement that the peaceful settlement of disputes is a general principle of international law.[17] One of the uncertain aspects is the very fundamental question of how to define an "international dispute".[18] In the opinion of the present author, the realistic and practical approach taken by the International Court of Justice in the *East Timor Case* will resolve many problems in this respect. The relevant passage is the following:

> "The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see *Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2, p. 11; Northern Cameroons, I.C.J. Reports 1963, p. 27;* and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1998*, p. 27 para. 35). In order to establish the existence of a dispute, 'It must be shown that the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections, I.C.J. Reports 1962,* p. 328); and further, 'whether there exists an international dispute is a matter for objective determination', *(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950,* p. 74).
>
> For the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the 'real dispute' is between Portugal and Indonesia rather than Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute."
>
> "On the record before the Court, it is clear that the Parties are in disagreement, both on the law and on the facts, on the question whether the conduct of Australia in negotiating, concluding and initiating performance of the

[16] Article 33(1) reads: "The parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

[17] *See* e.g. Brownlie, The Rule of Law in International Affairs (1998) 107.

[18] Tomuschat, Article 2(3), in Simma, (ed.), The Charter of the United Nations. A Commentary (1995) 97. For an interesting discussion of "political disputes" and their resolution, *see* Shaw, Peaceful Resolution of 'Political Disputes': the desireable parameters of I.C.J. Jurisdiction, in Dahlitz (ed.), Peaceful Resolution of Major International Disputes (1999) 49.

1989 Treaty was in breach of an obligation due by Australia to Portugal under international law.

Indeed, Portugal's Application limits the proceedings to these questions. There nonetheless exists a legal dispute between Portugal and Australia. This objection of Australia must therefore be dismissed".[19]

Interstate disputes can be of many different kinds and cover a wide range of subjects. Potential areas of disputes between states would include border disputes and disputes with respect to title to territory (in both cases concerning land as well as sea), armed conflict and terrorism, application, interpretation and validity of treaties, and other contractual arrangements, disputes concerning trade, investment and transportation, environmental issues and human rights.

Since the Second World War all aspects of modern life have gone through a remarkable globalization, in particular perhaps in the areas of trade, finance and investment. Stated in general terms, this development has lead to an ever increasing role for international law. A new phase in this development was introduced as a result of the dramatic events following the fall of the Berlin Wall in 1989 which gave rise to a wide range of new issues of international law and old issues but in new factual circumstances. Nothing suggests that the role and importance of international law will diminish in the years to come; it is rather likely to increase.

The methods of settling international disputes can be divided into two broad categories, *viz.* (i) diplomatic means of settlement and (ii) judicial means of dispute settlement.

In the first category we find negotiation, good offices, mediation, inquiry and conciliation.[20]

The second category, judicial settlement of disputes, includes arbitration and adjudication. The latter is typically being performed by a standing, or permanent, court, the most important of which is the International Court of Justice. This Study is devoted to arbitration as a method to resolve international disputes, with particular emphasis on the law applicable in such arbitrations.

[19] I.C.J. Reports (1995) 99–100.

[20] For a discussion of the different categories of diplomatic settlement, *see* e.g. Merills, International Dispute Settlement (3rd ed. 1998) 1–87, with references, and Malanczuk (ed.), Akekurst's Modern Introduction to International Law (7th rev. ed. 1997) (cited as "Akehurst") 275–281, with references.

1.3 What is Arbitration?

The list of dispute settlement methods in Article 33(1) of the U.N. Charter might create the impression that the various methods are clearly distinguishable from each other. In actual fact, however, there is often considerable overlap between the methods. In most arbitrations, for example, the parties will have started out with negotiations, trying to resolve the dispute themselves without any third-party involvement. They may also have tried conciliation and/or settlement through the good offices of a third party.

The aforementioned overlap notwithstanding, there are clearly distinctive features of each dispute settlement mechanism.

In general terms, arbitration can be described as a third-party dispute resolution mechanism resulting – typically – in an award binding on the parties to the arbitration. Like most methods of peaceful settlement of disputes, arbitration requires the consent of the parties. Such consent is manifested in the arbitration agreement – sometimes an arbitration clause in a treaty or contract – often referred to as the *compromis*. In the arbitration agreement the parties agree to submit a dispute to arbitration and – usually – to be bound by the resulting award.

Generally speaking, it is the arbitration agreement which gives the arbitrators the authority to act in the dispute. Arbitration is thus consensual in nature; this is indeed one of the most important distinctive features of arbitration. The arbitration agreement – in whatever form it has been entered into – is central to the consensual nature of arbitration.

Another important distinctive feature of arbitration is the fact that the resulting award, as a rule, is binding on the parties. Arbitration thus resolves the dispute in question, once and for all.[21] As a matter of principle, however, this important effect of the arbitral award – like most other aspects of international arbitration – is subject to the agreement of the parties. In other words, the parties may agree that the award is not to be binding, and/or that it may be subject to appeal to another arbitral panel, or other institution.

With respect to arbitrations not conducted between two states – for example between two private companies, or between a private company and a state, or state-owned entity – different so-called theories of arbitration have been discussed with a view to determining the nature of arbitration. This discussion usually focuses on the relationship between arbitration, as a private dispute settlement mechanism, and the place of arbitration, the

[21] For a discussion of the binding character of an arbitral award, including the possibilities to have the case re-opened and the award set aside, *see* p. 152 *et seq.*, *infra*.

ultimate question being to what extent the process of arbitration is independent from the law of the place of arbitration.[22] As far as interstate arbitration is concerned this discussion is, it is submitted, largely irrelevant. The explanation is that such arbitrations are conducted between two sovereign states on the basis of an agreement between them, be it in the form of an arbitration clause in a treaty – bilateral or multilateral – other contractual arrangement, or in the form of a separate arbitration agreement. Given the overriding importance of the consensual nature of interstate arbitration, arbitration is – simply put – what the parties decide it to be.[23]

1.4 Purpose and Scope of Study

The purpose of this Study is to discuss and analyze the law applicable in interstate arbitration. This will be done both at a *general level* – focusing on party autonomy and possible limitations thereon – and at a more *detailed level* using extinctive prescription as an illustrative example. I have referred to the consensual nature of arbitration as one of its distinctive features. One fundamental aspect of the consensual nature is the autonomy of the parties, *e.g.* when it comes to the issue of choosing applicable law. As far as international commercial arbitration is concerned, party autonomy is indeed one of the cornerstones of modern arbitration.[24] It is probably fair to assume that party autonomy is fully accepted also in interstate arbitration. A *first objective of the general level of analysis* is to examine the correctness of this assumption. It would seem less clear, however, what restrictions exist on party autonomy in interstate arbitration. I shall try to shed light also on this aspect of party autonomy. A *second objective*, as far as the analysis at the *general level* is concerned, is to address the axiom that international tribunals apply international law unless the parties agree otherwise. Does this axiom correctly state what

[22] The different theories of arbitration are usually referred to as the contractual theory, the jurisdictional theory, the hybrid theory and the autonomous theory depending on the degree of relevance of the law of the place of arbitration; for a discussion of these theories *see* e.g. Samuel, Jurisdictional Problems in International Commercial Arbitration: A Study in Commercial Arbitration Awards (1978); Chukwumerije, Choice of Law In International Commercial Arbitration (1994) 9–15 (with further references) and Grigera Naón, Choice-of-law Problems in International Commercial Arbitration (1992) 14–18 (with further references). For a general discussion of party autonomy in international contracts, *see* Nygh, Autonomy in International Contracts (1999).

[23] This proposition may need to be qualified, however, due account taken of possible limitations on the parties' autonomy; for a discussion of such possible limitations with respect to applicable law, *see* p. 106 *et seq.*, *infra* (international commercial arbitration) and p. 158 *et seq.*, *infra* (interstate arbitration).

[24] *See* p. 84 *et seq.*, *infra.*

international tribunals in fact do, for example, with respect to municipal law? While the Permanent Court of International Justice in the *German Interest in Polish Upper Silesia Case* stated that "/f/rom the standpoint of international law ... municipal laws are merely facts ..."[25], it is submitted that this statement is outdated. In this Study I shall discuss cases where international courts and tribunals have applied municipal law to resolve disputes pending before them. It is possible that the application by international tribunals of municipal law could – and perhaps should – enjoy wider acceptance with respect to applicable law in general, and extinctive prescription in particular.

At the *detailed level of analysis, a first objective* of the Study is to take a fresh look at the concept of extinctive prescription in public international law, with a view to identifying and crystallizing the rules of public international law in this respect.

Under most municipal law systems the lapse of time may influence the possibility to present claims in a court of law or before an arbitral tribunal. Generally speaking, delay in presenting a claim – however such delay is defined – may bar a party from presenting the claim. Municipal law generally contains specific time limits in this respect. As will be discussed below, public international law does not contain any such time limits.[26] This notwithstanding, the *principle* of extinctive prescription is recognized in public international law.[27] Despite the general acceptance of the *principle* of extinctive prescription, there seems to be a number of open issues, indeed uncertainties, as far as the *application* of the principle is concerned. One key element to be analyzed in this connection is the idea that there must be an unreasonable delay in the presentation of a claim for extinctive prescription to come into play. As opposed to municipal law rules on extinctive prescription, international law does not know any hard and fast rule – in terms of time periods – as to when a delay is unreasonable. Even if one were to assume that a delay is unreasonable, there would seem to be other additional criteria which need to be met, such as imputability of delay to the negligence of the claimant, absence of a record of facts and placing the respondent at a disadvantage in establishing his defense.[28] An analysis of these different criteria is necessary to understand the operation of the principle of extinctive prescription.

One possible reason why there is still uncertainty with respect to the application of the principle of extinctive prescription is the fact that there

[25] P.C.I.J. Reports, Series A, No. 7 (1926) 19.
[26] *See* p. 262 *et seq., infra.*
[27] *Id.*
[28] *See* p. 285 *et seq., infra.*

may be some overlap between certain elements of extinctive prescription and other general concepts of international law, such as waiver and abandonment of claims, as well as with acquiescence and estoppel in international law. Is it possible that arbitral decisions purportedly applying the principle of extinctive prescription could be explained on other grounds, such as the aforementioned general concepts of international law? If so, what is then the sphere of application of extinctive prescription?

The fact that uncertainty may surround the application of the principle of extinctive prescription leads to the *further question* – and the *second objective as far as the detailed level of analysis* is concerned – whether or not the principle, as currently understood, is a workable principle in modern interstate arbitration. Is it reasonable to apply the principle to all the different categories of interstate disputes which may arise today? If the answer is in the negative, one must look at ways of changing, adapting and/or refining the principle.

This Study will focus on, and take as its starting point, the very practical situation where an arbitral tribunal is faced with the question of what law, or set of rules, to apply to the question of extinctive prescription. The answer to this question will depend, in varying degrees, on the factors which are sketched out below.[29]

First a distinction is to be made between the situation where the disputing parties have made a choice of law, either in the contract, or treaty, which is the subject of the dispute, or in a separate agreement entered into after the dispute has arisen on the one hand, and the situation where the parties have not agreed on the law, or set of rules, to be applied, on the other. As mentioned above, the principle of party autonomy may be assumed to play a fundamental role in international arbitration.[30]

A *second* factor influencing the decision of the arbitrators as to applicable law, is the possible existence of limitations and restrictions on the party autonomy in interstate arbitration. There may, for example, be norms of international law, or considerations of public policy which could at least *theoretically* restrict party autonomy, so as to cause an arbitral tribunal not to apply, wholly or partially, the law chosen by the parties.[31]

A *third* element of importance is the situation when the parties have *not* made a choice of law, either explicitly or implicitly. In practice as well as in theory this is the most difficult situation for an arbitral tribunal.[32] As already mentioned, the traditional approach in this situation is

[29] The factors are listed without any hierarchical order.

[30] *See* pp. 21–22, *supra*.

[31] *See* p. 158 *et seq.*, *infra*.

[32] *See* p. 214 *et seq.*, *infra*.

to recommend the application of public international law. The viability of this approach today may perhaps be cast into doubt because of the ever increasing complexity of international disputes combined with the relatively rudimentary character of public international law, in the sense that it offers many principles and rules of a general nature which may not be specific enough to resolve a complicated dispute.[33] Municipal law rules on the other hand are typically specific enough. This difference creates a tension between public international law and municipal law, at least with respect to extinctive prescription.

Whether or not the application of public international law is viable – and to be recommended – with respect to extinctive prescription very much depends on a *fourth factor* to be considered in this Study, *viz.*, the actual content of public international law as far as extinctive prescription is concerned.[34]

A *fifth*, and final, factor which may influence the decision of the arbitrators concerning applicable law, is the character of the dispute in question. If a dispute between two states is of a purely, or predominantly, commercial character – in a general and broad sense – which is not unusual nowadays, there might be a case for arguing that the tribunal should apply municipal law rules on prescription, rather than public international law, for example, on the basis that the latter are deemed not to be specific enough. On the other hand, if a dispute deals primarily with sovereign, non-commercial, aspects it may be more natural to apply public international law.

A *secondary purpose* of this Study is to explore the possibilities of cross-fertilization between public (interstate) and private (commercial) international arbitration.[35] It goes without saying that many interstate disputes are of a political origin and nature and therefore typically require political rather than judicial solutions. This fact notwithstanding, it seems that there has always been some cross-fertilization between interstate and commercial international arbitration.[36] For example, mixed commissions so often used in interstate disputes, have found their counterpart in modern international commercial arbitration in the form of arbitral tribunals where each side appoints its arbitrator and the third

[33] *Cf.* e.g. Böckstiegel, Arbitration and State Enterprises. Survey on the National and International State of Law and Practice (1984) 33, and Redfern and Hunter, Law and Practice of International Commercial Arbitration (1986) 81.

[34] *See* Chapter 4 *infra*.

[35] For a definition of these categories, *see* pp. 25–26, *infra*.

[36] While this cross-fertilization has for the most part been brought about by arbitrators and counsel acting in both private and public arbitrations, academic research, teaching and

arbitrator, usually the chairman, is appointed by a neutral appointing authority.[37] Even the use of arbitrators as experts – quite often resorted to in interstate arbitration – is found in modern commercial arbitration.

The relationship between private and public international law, and thus ultimately between private and public international arbitration, is eloquently described by a well-known commentator in the following way:

> "The commercialization of treaties as well as the internationalization of contracts are different aspects of the same fundamental idea. It is no longer attractive to suggest that public international and private international law respectively have fields of application, which are clearly and perhaps even inflexibly defined and which are determined by *a priori* or conceptualist reasoning, such as the formula that public international law is applicable only as between international persons or that relationships between international persons are necessarily subject to public international law. Both branches of the law are branches of the same tree. They apply in conformity with the demands of reasonable justice and practical convenience. They overlap and pervade each other. Both are called upon to contribute to the progressive evolution of the law."[38]

In this Study I shall explore one potential area of the borderland between private and public international law and arbitration, *viz.*, extinctive prescription. The question whether or not this is yet another example of the above-mentioned cross-fertilization remains to be answered in this Study. This question runs like an undercurrent throughout the Study.

As mentioned above, this Study deals with *interstate arbitrations*, i.e. arbitrations where the disputing parties are two, or more, sovereign

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writing have typically separated the two and research in one area has been done in, perhaps not splendid, but certainly in definitive, isolation from the other: *Cf.* Wetter, The International Arbitral Process: Public and Private, Vol. 1 (1979) 3. For a notable exception, however, *see* Lowenfeld, Private International Law Redefined, in International Litigation And the Quest For Reasonableness (1996) 1, where the first lines read: "Fifteen years ago, I gave a short course at the Hague Academy of International Law entitled 'Public Law in the International Arena'. My purpose then was to break down the to me unconvincing separation between public and private international law, by focusing on those areas in which private and public interests, and often the interests of two or more states, collided. The lectures were well received – in the sense that they stirred a good deal of comment and reaction, and no little controversy." (footnote omitted).

[37] *See* e.g. the UNCITRAL Arbitration Rules Art. 7(1), which stipulates: "If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under Article 6".

[38] Mann, The Proper Law in the Conflict of Laws, International & Comparative Law Quarterly (1987) 56.

states. Consequently, I shall not focus on arbitrations where one party is a state, or state-owned entity, and the other a private enterprise, or an individual ("mixed arbitrations").[39] This category of arbitrations has grown dramatically after the Second World War[40] and is today a very important form of international arbitration. Nor will I focus on arbitrations where both parties are private companies or businessmen ("commercial arbitration"). The latter two categories – collectively referred to in this Study as "private" or "commercial" arbitration – constitute by far the most common form of international arbitration today. Even though the Study will focus on interstate arbitration, I shall review and discuss several aspects of the other two forms of arbitration,[41] primarily because some issues have been more fully dealt with in the context of such arbitrations, including the question of applicable law, and because the conclusions drawn in connection therewith may serve as reference points and possibly as models for solutions with respect to interstate arbitrations. As mentioned above, one of the aspects to be addressed by me in this Study, is the possibilities of cross-fertilization between interstate arbitration and commercial arbitration. In doing so, I address scholars and practitioners in the two aforementioned areas of arbitration. Not all of them can be presumed to be equally knowledgeable about the various aspects of interstate arbitration and commercial arbitration, respectively. That is why I have deemed it both appropriate and necessary, occasionally to dwell on and describe certain general – and sometimes fundamental – aspects of both interstate and international commercial arbitration.

1.5 Methodology and Materials

As I have indicated above, international arbitration is traditionally divided into three categories, *viz.*, (i) arbitration between two private parties, (ii) arbitration between a private party and a state, and (iii) arbitra-

[39] This term has been adopted from Toope, Mixed International Arbitration (1990). The focus of Toope's study is explained on page 2: "... specifically arbitration between states and foreign private persons. Such arbitration will, as a rule, deal with commercial disputes arising out of situations ranging from the breach of contract for the sale and purchase of goods to the complete expropriation of foreign-owned property".

[40] *See* e.g. Böckstiegel, The Legal Rules applicable in International Commercial Arbitration involving States or State-controlled Enterprises, in 60 years of ICC Arbitration – A Look at the Future (1984) 128. An important step in this development has been the establishment of the International Centre for Settlement of Investment Disputes (ICSID) on the basis of the 1965 Washington Convention On the Settlement of Investment Disputes Between States and Nationals of Other States (U.N.T.S. (1966) Vol. 575, p. 160, No. 8359.

[41] This is particularly the case in Chapter 3, *infra*.

tion between two states.[42] This Study deals with the last category, interstate arbitration. The topic of the Study thus squarely falls within the discipline of public international law. The natural starting-point would therefore be to approach the problems discussed in this Study strictly as public international law problems. The approach and methodology of the present author, however, are different.

As appears from the categorization above, the different forms of arbitration are defined on the basis of *who the parties* to the arbitration in question are. In the perception of the present author, however, the international arbitral process is one, the adjectives public, private and mixed merely describing different aspects of this process. Without expressing a view on the extent of cross-fertilization between private and public international arbitration at this stage of the Study, I submit that one essential common denominator between all categories of arbitration – public, private or mixed – is the consensual nature of arbitration. This is the thread which holds together the different aspects of the arbitral process. This conceptual and methodological approach permeates this Study and is the driving force behind the search for the law applicable in interstate arbitration, in general, and to the question of extinctive prescription in particular.

For a long time, arbitration between states was a matter for Kings and Queens, Popes and Emperors.[43] Not so any more.[44] Even though there is still a certain amount of pomp and glory surrounding arbitrations between states, and even though participation in such arbitrations is sometimes seen as a rare, but highly desirable, apex of a professional career, much of the mysticism surrounding interstate arbitration has disappeared. This is probably explained by the internationalization and constantly growing globalization of modern life in all its aspects, which in turn has resulted in an increased involvement of states in economic, financial and

[42] There is, however, a fourth category, at least theoretically, *viz.*, arbitrations involving international organizations. Arbitrations of this kind do exist, but do not seem to be as frequent as arbitrations falling in the other categories. However, due to the growing importance of international organisations, this will probably change in the future.

[43] *See* Chapter 2, where the history and development of interstate arbitration is discussed.

[44] The exception confirming the rule would be the Beagle Channel Arbitration; the award is published in International Legal Materials (1978) 634. It should be noted, however, that papal mediation took place after the award had been rendered; while the award was rendered in compliance with the arbitration agreement of the parties, the award failed to resolve the dispute in practice – it was at that stage that papal mediation was resorted to. Under a treaty from 1902 the arbitrator was the Queen of England as successor to her great grandfather King Edward II, but the sovereign had the right to appoint lawyers and other experts; in fact all arbitrators were members of the International Court of Justice at the time of appointment.

trading activities, both as participant and regulator, including, *inter alia*, the settlement of disputes resulting from such activities. It is probably no exaggeration to say that international arbitrations involving states' interests take place every day of the year in the leading arbitration centers of the world. The present author has had the privilege of participating in international arbitrations of both a public and private character and has come to view the international arbitral process as one. With this outlook in mind – without preconceived notions with respect to the issues to be studied as being primarily of a public or private character – an attempt will be made to discuss the question of applicable law in interstate arbitration.

The present Study is to a large extent based on a review and analysis of arbitral practice. The reference to "arbitral practice" includes not only published arbitral awards, but also doctrinal writings – monographs, textbooks, articles and case notes – discussing such awards. In the view of the present author, it is only natural that a study devoted to applicable law in interstate arbitration be based on arbitral awards; in fact, it would have been unthinkable to prepare such a study without focusing on arbitral practice. The reliance on arbitral practice in a scholarly study does, however, raise two significant issues, *viz.*, (i) the availability of arbitral awards and (ii) the status of arbitral awards as a source of law – in a broad sense of this word – and as a reliable source for scholarly research.

As to the *availability of arbitral awards*, I should note at the outset that one of the reasons why parties typically choose arbitration as a dispute settlement method is its private and confidential character. Unless the parties agree otherwise, the proceedings before the arbitrators are private and the resulting award is usually treated as confidential. As a result of this, few awards are in practice published or otherwise made public without the consent of the parties. This has always been the traditional ball-and-chain of scholarly research concerning commercial arbitration.[45] During the two last decades the situation seems to have started to change and several arbitration institutions – such as the International Chamber of Commerce in Paris and the Stockholm Chamber of Commerce – have started to allow publication of awards rendered under their auspices. With respect to interstate arbitration the situation has always been different. A significant number of awards resulting from interstate arbitration has been, and continues to be, published in *Reports of International Arbitral Awards*, published by the United Nations, in *International Law*

[45] For a discussion of this problem, *see* e.g. Lew, The case for the publication of arbitration awards, in Schultsz & van den Berg (eds.), The Art of Arbitration. Liber Amicorum Pieter Sanders (1982) 223–232.

Reports and in *International Legal Materials*. In addition there are several publications, based on individual initiatives, which publish awards – in abridged, or unabridged form – or summaries of awards. Examples of such publications include *Moore*, History and Digest of The International Arbitrations To Which The United States Has Been a Party (1898), *La Fontaine*, Pasicrisie International 1794–1900. Histoire Documentaire Des Arbitrages Internationaux (1902) and *de La Pradelle & Politis*, Recueil des Arbitrages Internationaux (1905). Modern publications of a similar nature include *Stuyt*, Survey of International Arbitrations 1794–1970 (1972), *Stuyt*, Survey of International Arbitrations 1794–1989 (3rd updated ed. 1990) and *Coussirat-Coustère & Eisemann*, Répertoire de la Jurisprudence Arbitrale Internationale 1794–1988 (1989–1991).

Taken together, the aforementioned publications ensure – it is submitted – that the scholar has a sufficient *number* of arbitral awards resulting from interstate disputes to review and analyze. This leads to the second issue raised above, *viz.*, the *status of arbitral practice as a source of law* and as a *reliable source for scholarly research*. Even though Article 38 of the Statute of the International Court of Justice does not set forth an exhaustive list of sources of international law, it has become the traditional starting point for discussions on the sources of international law.[46] Article 38 (d) of the Statute authorizes the Court to "apply" "judicial decisions ... as subsidiary means for the determination of rules of law". Judging from this language, it would seem that the Court is expected to use judicial decisions to *find* the applicable rules of law, rather than treating them as a source of law.[47] Article 38 (d) refers to Article 59 of the Statute which states that "/t/he decisions of the Court has no binding force except between the parties and in respect of that particular case". While Article 59 makes it clear that previous case law is not *binding* on the Court, it is equally clear from the judgments of the Court that it takes account of earlier decisions and pronouncements which are considered to have a bearing on the case before it. As far as arbitral awards are concerned, the Court, and its predecessor, the Permanent Court of International Justice, are restrictive in referring to individual awards, but seem to prefer to refer to *arbitral practice* in general.[48] While the foregoing observations might be seen as indicating that the role of arbitral practice in the development of international law in general is debatable, it is submitted – without attempting to participate in this debate, nor that concerning sources of international law – that in studying interstate arbitration,

[46] *See* discussion at p. 214 *et seq.*, *infra*.
[47] *Ibid.*
[48] *Ibid.*

it is obviously central to review and analyze arbitral practice. Having said this, however, it is necessary to address the question whether all arbitral awards should be given the same weight in evaluating arbitral practice. It is submitted that the short answer is no. There are several aspects which must be taken into account in this connection.

First, in the view of the present author, it is not possible to lay down rules, or criteria, of a general nature which would determine the importance of a particular arbitral award. It would seem possible, however, to list several factors which *may* have an impact on the importance of an award, but always subject to the facts and circumstances of the individual case.[49]

One such factor is the experience and prominence of the arbitrators. An award rendered by arbitrators who have particular knowledge and experience from the issues resolved in the award would typically have greater weight than an award rendered by arbitrators who have no such knowledge and experience. In most arbitrations the parties have the right to choose one or several arbitrators, thereby allowing the parties to ensure that the required amount of expertise is represented on the tribunal.

Another factor which ought to be taken into account is the existence of dissenting opinions. It would seem that a unanimous award should typically be given greater weight than an award with one or several dissenting opinions.

An additional obvious factor to consider is the date of the award. Generally speaking, older cases should be treated with more caution than recent cases. In particular, it is important to determine whether older awards have been "overruled" and replaced by subsequent awards and/or whether the facts and circumstances – both in general and with respect to the case in question – have been overtaken by subsequent events and developments. When older cases are reviewed and analyzed it is thus important to understand the background against which it was rendered. On the other hand, the mere fact that a case is old does not *per se* detract from its value as a "precedent", or bearer of an important principle of law. The important thing is rather to analyze the award in question on the basis of the individual facts and circumstances of the case. A good number of the cases referred to and discussed in Chapter 4 below – dealing with extinctive prescription in public international law – are old, sometimes more than 100 years old. This fact notwithstanding, the cases in question do continue to be bearers of important legal principles. The

[49] For a discussion of such factors, *see* e.g. Gray & Kingsbury, Developments in dispute settlement: Interstate Arbitration since 1945, British Yearbook of International Law (1992) 120–128.

continued importance of these cases is illustrated by references to them in many modern textbooks.

A further factor of importance is the extent to which the award has been accepted both by the parties and by scholars and commentators in writings on the award. An arbitral award which stands out as a peculiarity either because the parties have refused to accept it, or because it has been heavily criticized by commentators, or both, is typically less important than an award which has been complied with by the parties and which has been universally approved by commentators. The extent to which an award has been followed, or quoted with approval by other arbitral tribunals is also an important factor in assessing the weight to be given to the award in question.[50]

There are thus a number of factors which should be taken into account when evaluating arbitral practice. It is submitted, that with due account taken of these factors, arbitral practice constitutes an indispensable source of information for the study of international law in general, and interstate arbitration in particular.

1.6 Outline of the Study

The Study is divided into three major parts, each corresponding to a chapter *viz.*, Chapters 3, 4 and 5. Before the major parts are addressed, the history and development of interstate arbitration is discussed in Chapter 2. In this chapter – with a view to introducing the reader to interstate arbitration and its distinctive features, and to providing a background to the following chapters – the history of modern interstate arbitration is traced and described. In the opinion of most scholars, the modern era of interstate arbitration started with the Jay Treaty Arbitrations of 1794. The discussion of the history and development of interstate arbitration thus starts with the Jay Treaty. In Chapter 2 I then discuss in a chronological order important arbitrations and commentaries on them. The purpose of Chapter 2 is not to provide an exhaustive account of the history of interstate arbitration, but rather to present highlights of it, focusing on questions of applicable law. In a final section of this chapter interstate arbitrations after the Second World War are discussed. One aspect which is mentioned there is the fact that the number of arbitrations has

[50] The extent to which an award has been referred to with approval by the International Court of Justice is also a relevant factor. As mentioned above, however, the Court seldom seems to refer to individual arbitral awards, but rather to arbitral practice in general, *see* also discussion in Gray & Kingsbury, note 49 *supra*, at 124–125.

decreased compared to earlier time periods, but that arbitration continues to play an important role in the settlement of international disputes.

The first main part of the Study is Chapter 3 which deals with applicable law in interstate arbitration. The focus is on party autonomy and possible restrictions on it. In this chapter choice of law in international commercial arbitration is discussed in detail. This is done with a view to giving a background to the following discussion with respect to interstate arbitration and to describe the level of detail at which the issue is being analyzed concerning commercial arbitration. The section on commercial arbitration is followed by an account of interstate arbitration, and in particular of restrictions – existing and potential – on party autonomy in interstate arbitration. These two sections demonstrate that while party autonomy is the common denominator for interstate and commercial arbitration, there are also important differences which become particularly clear when focusing on the restrictions on party autonomy in the two respective forms of arbitration.

In a concluding section of this chapter, I discuss the situation when the parties have made no choice of law. In public as well as private international arbitration this is the most difficult situation for an arbitral tribunal, i.e. to determine the applicable law when the parties, for different reasons, have decided, or failed, to exercise their autonomy. This section discusses interstate arbitration only. While a corresponding analysis of commercial arbitration would undoubtedly have been interesting, it is submitted that for purposes of the present Study, the contribution it would have made, would not have been commensurable with the time and effort required to do it. This section follows the traditional approach referred to above, i.e. when the parties have made no choice of law, tribunals usually apply public international law.[51] The discussion, which is thus limited to public international law, also serves as an introduction to the next main part of this Study, Chapter 4.

Chapter 4 is central to this Study in that it discusses and analyzes the concept of extinctive prescription in public international law. After some preliminary remarks on extinctive prescription under municipal law, I address the question whether extinctive prescription exists under public international law. After having answered that question in the affirmative, I continue to discuss several aspects of extinctive prescription focusing on criteria for its application and how to distinguish it from other concepts of international law, such as waiver, abandonment, acquiescence and estoppel. As I explain in Chapter 4, there is (still) relative uncertainty as to the details of applying the principle of extinctive prescription.

[51] Whether this approach is reasonable or not is discussed in Chapter 5.

Chapter 4 also addresses the interplay between municipal statutes of limitation and extinctive prescription under public international law, the relation between *ius cogens* and extinctive prescription and the question whether extinctive prescription is procedural or substantive in nature. As mentioned above, one question to be addressed in this Study is whether the traditional approach of applying public international law when the disputing states have made no choice of law is to be recommended with respect to extinctive prescription. The response to that question will – at least partially – depend on what public international law in fact has to say about extinctive prescription. Chapter 4 thus serves as a springboard for further discussion and analysis in the Study.

The final chapter – Chapter 5 – discusses the need for refining the principle of extinctive prescription and possible ways of doing so. In the view of the present author, there is a need for such refinement, at least with respect to certain categories of interstate disputes. In Chapter 5 I explain that, this need stems primarily from two factors, *viz.*, (i) the relatively vague and uncertain nature of the principle of extinctive prescription in public international law, and (ii) the increasingly complex nature of the different categories of interstate disputes. In the final section of Chapter 5 I suggest an approach as to how to refine the principle of extinctive prescription.

CHAPTER 2 – History and Development of Interstate Arbitration

2.1 Introduction

The modern era of international arbitration, in the opinion of the vast majority of scholars and commentators, dates from the signing of the Jay Treaty on 19 November 1794 between Great Britain and the United States.[1] Needless to say, arbitration had been used as a dispute settlement mechanism by states prior to this date. In fact, it has been suggested that an arbitration clause was included in a peace treaty concluded in 3100 BC between the two Mesopotamian states Lagash and Umma.[2] Prior to the Jay Treaty, however, arbitrations were generally considered to be "irregular and spasmodic".[3]

Throughout history – also prior to the Jay Treaty of 1794 – arbitration has been used to settle disputes between states, albeit that it is doubtful with respect to many such arbitrations if they can really be characterized as arbitrations in the "modern" sense, i.e. as an impartial dispute settlement mechanism.[4] Indeed, it is doubtful if international law, as we know it today, existed. It should also be noted that during the fourteenth to seventeenth centuries arbitration more or less fell into desuetude and did not revive until towards the end of the eighteenth century.[5]

[1] *See* e.g. Ralston, International Arbitration From Athens to Locarno (1929) vii, where it is said: "We are often told, and with truth, that the modern era of international arbitration began with the year 1794, when the Jay Treaty between the United States and Great Britain was signed".

[2] Nussbaum, A Concise History of the Law of Nations (1954) 1–2.

[3] Ralston, *op. cit.*, at 191.

[4] For comprehensive surveys of international arbitrations prior to the Jay Treaty, *see* Ralston, *op. cit.*, at 153–190; *see* Phillipson, The International Law and Custom of Ancient Greece and Rome (1911) Vol. II 129; Verzijl, International Law in Historical Perspective (1968) Vol. I 423–424; Raeder, L'arbitrage international chez les Hellènes (1912) 26–38; Revon, L'arbitrage international (1892) 118–125 and Novakovitch, Les compromis et les arbitrages internationaux du XIIe and XVe siècle (1905).

[5] Ralston, *op. cit.* at 115–116.

In this Study, however, I shall confine myself to discussing the history and development of interstate arbitration in its more modern form, starting with the Jay Treaty. I shall do this in a chronological order, without necessarily trying to arrange the various stages of development in any particular categories, but interspersing the chronological account with comments focusing on the law and/or the rules applied by the tribunals to resolve the disputes in question.[6]

I shall use the following chronological order:

- The Jay Treaty Arbitrations (1794)
- Post Jay Treaty Arbitrations (1795–1870)
- The Alabama Claims Arbitration (1871–1872)
- The last decades of the 19th Century
- The Hague Peace Conferences (1899–1920)
- The Treaty of Versailles and the League of Nations (1920–1940)
- Post Second World War Arbitrations and Developments

It must be emphasized that the time periods indicated above are intended to serve merely as milestones for the chronological account and do not signify any attempt to characterize the arbitrations from the respective time period in any particular way. The purpose of the following account is not to analyze the history and development of interstate arbitration in depth,[7] nor to use interstate arbitration as a yardstick to measure the efficiency of the rule of law in international relations,[8] but rather to provide a general background to the discussion which will follow. Special focus will be put on the law and/or rules which have been applied by international arbitral tribunals. This background is necessary properly to understand and assess the character of interstate arbitration, as well as the nature and importance of the issues analyzed in this Study.

[6] In describing the evolution of arbitration in international law, Pinto has introduced an interesting terminology, *viz.*, the *precurial phase* and the *curial phase*, the latter referring to the situation where arbitration existed alongside an international court, serving as an alternative method of settling international disputes, and the former situation when arbitration did not have to "compete" with any international court, *see* Pinto, The Prospects for International Arbitration: Inter-State Disputes, in Soons (ed.), International Arbitration: Past and Present (1990) 71 *et seq.*

[7] For a fuller discussion of the history of interstate arbitration, *see* Raymond, Conflict Resolution and the Structure of the State System. An Analysis of Arbitrative Settlements (1980) 12–25; *see* further the publications mentioned in the footnotes below, and references made therein.

[8] The role of arbitration in the settlement of international disputes is discussed, *inter alia*, in Mosler & Bernhardt (eds.), Judicial Settlement of International Disputes. International Court of Justice, Other Courts and Tribunals, Arbitration and Conciliation (1974).

2.2 The Jay Treaty Arbitrations (1794)

As I have mentioned previously, the commencement of modern arbitration is generally considered to start with the so-called Jay Treaty Arbitrations.[9] The Jay Treaty was concluded in 1794 between the United Kingdom and the United States and is called the Jay Treaty after John Jay, the then American Secretary of State. Of the various questions which had been outstanding between the United Kingdom and the United States since the latter proclaimed independence in 1776, the Jay Treaty settled all issues but three. These three issues were referred to arbitration. The form chosen was that of mixed commissions consisting of one or two commissioners appointed by each party, who worked together to choose a third or fifth commissioner by agreement, or by drawing lots.

The first outstanding issue was that concerning the river St. Croix and the boundary with Canada, or more precisely, between the United States and the remaining British possessions. This territorial dispute was referred to a commission consisting of three members which rendered a unanimous award. Article V of the Jay Treaty reads:

> "Whereas doubts have arisen what river was truly intended under the name of the river St. Croix, mentioned in the said Treaty of Peace, and forming a part of the boundary therein described, that question shall be referred to the final decision of commissioners ... The said commissioners shall, by a declaration, under their hands and seals decide what river is the River St. Croix, intended by the Treaty. The said declaration shall contain a description of the said river, and shall particularize the latitude and longitude of its mouth and of its source."[10]

The commissioners, who ruled in favor of the United States, did not have to become too involved in the application of international law. The only instructions laid down for the arbitrators was language in Article V to the effect that they "... be sworn, impartially to examine and decide the said

[9] *See* p. 34, *supra*. – I shall discuss below *why* the Jay Treaty Arbitrations are considered to be the start of modern international arbitration. Even though most commentators agree that these arbitrations launched a new era in the history of international arbitration, *see* e.g. Ralston, *op. cit.*, at 191, this view is not undisputed. For a critical analysis of this proposition, *see* Roelofsen, 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.), note 6, *supra* at 201 *et seq.* His conclusion is this: "I therefore suggest that the history of eighteenth/nineteenth century arbitration until about 1850 is much more a *continuum* without any dramatic 'renaissance' than is commonly believed. If I wish to point to a conspicuous revolution it is probably to the Peace of Paris (1856) and above all to the Alabama arbitration that I have to turn"; *id.* at 210.

[10] As quoted in Stuyt, Survey of International Arbitrations 1794–1970 (1972) 1.

questions."[11] In practice the commissioners had to determine the identity of the River St. Croix on the basis of the evidence presented to them, including interpretation of the Peace Treaty of 1783 between the parties.[12]

The second outstanding issue concerned the alleged obstruction to the collection of certain debts owed to British creditors by debtors who had become citizens of the United States.

Article VI of the Jay Treaty reads:

> "Whereas it is alleged by divers British merchants and others His Majesty's subjects that debts, to a considerable amount, which were bona fide contracted before the Peace, still remain owing to them by citizens of the United Sates, and that by the operation of various lawful impediments since the peace, not only the full recovery of the said debts has been delayed, but also the value and security thereof have been, in several instances, impaired and lessened, so that, by the ordinary course of judicial proceedings, the British creditors cannot now obtain, and actually have and receive full and adequate compensation for the losses and damages which they have thereby sustained ... For the purpose of ascertaining the amount of any such losses or damages, five commissioners shall be appointed ..."[13]

This commission was quickly paralyzed by the withdrawal of the two American commissioners and broke up in 1799 without having rendered any decision. The dispute was eventually settled by the parties in a treaty in 1802, according to which the United States paid a sum of USD 2,664,000.[14] As indicated above, the debts in question were debts to British individuals incurred by citizens of the United States. As a matter of principle these debts were governed by municipal law, rather than international law. The commissioners were nevertheless required to take an oath which stipulated, *inter alia*, that they "decide all such complaints ..." "according to justice and equity".[15] Even if this should be seen as an implicit reference to international law, it only came into play to set limits on and override otherwise applicable municipal law.[16]

The third issue concerned claims arising from the seizure of ships and cargoes during the war between Great Britain and France. This commission

[11] *Id.*

[12] *Cf.* Schwarzenberger, Present-Day Relevance of the Jay Treaty Arbitrations, Notre Dame Lawyer (1978) 724.

[13] As quoted in Stuyt, *op. cit.*, at 2.

[14] Moore, History and Digest of The International Arbitrations to Which The United States Has Been a Party, Vol. 1 (1898) 298.

[15] Stuyt, *op. cit.*, at 2.

[16] Schwarzenberger, note 12, *supra*, at 2.

was ultimately able, after having had to suspend its sittings between 1799 and 1802, to make a large number of awards.

These claims were covered by Article VII of the Jay Treaty which reads:

> "Whereas complaints have been made by divers merchants and others, citizens of the United States, that during the course of the war in which His Majesty is now engaged, they have sustained considerable losses and damage, by reason of irregular or illegal captures or condemnations of their vessels and other property, under color of authority or commissions from His Majesty, and that from various circumstances belonging to the said cases, adequate compensation for the losses and damages so sustained cannot now be actually obtained, had, and received by the ordinary course of judicial proceedings ... That for the purpose of ascertaining the amount of any such losses and damages, five commissioners shall be appointed ....".[17]

These claims were to be decided in accordance with "justice, equity and the law of nations".[18] It was the work of this commission which produced the most significant contributions to international law on such substantive issues as necessity and maritime neutrality.[19]

One question which disrupted the work of this commission was whether or not it had the power to determine its own jurisdiction.

Three of the commissioners, all United States citizens, took the view that the commission had the right to determine its own jurisdiction, while the two British commissioners took the opposite view and withdrew from the commission. They returned, however, after having been instructed by Lord Grenville, the Foreign Secretary, and Lord Longborough, the Lord Chancellor, to do so. Lord Grenville instructed the British Commissioners to determine "every question that should be brought before them according to the conviction of their consciences".[20] The Lord Chancellor said that "the doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd", and that "they must necessarily decide upon cases being within, or without, their competency".[21]

In the commentaries to the Jay Treaty Arbitrations, it has been said that the right of the commissioners to determine their own jurisdiction was first laid down in these arbitrations, and this feature of the Jay Treaty Arbitrations has been described as one element which made these arbitrations

[17] As quoted in Stuyt, *op. cit.*, at 3.

[18] *Id.*

[19] Schwarzenberger, note 12, *supra* at 725. *See* also Schwarzenberger, International Law As Applied By International Courts and Tribunals (Vol. 1 1957) 641 *et seq.* and Vol. II (1968) at 31, 564, 577–578, 596, 620 and 646–647.

[20] Moore, *op. cit.*, at 328.

[21] *Id.*, at 327.

the first "modern" international arbitrations.[22] Two additional such features are the right of international tribunals to take decisions by majority vote and to settle disputes on the basis of international law.[23]

With respect to voting, however, it should be noted that the commission under Article V reached a unanimous decision. As far as the commissions under Articles VI and VII are concerned, the majority voting applied did in fact rest on express treaty provisions. Consequently, it would seem difficult to draw the conclusion that the Jay Treaty Arbitrations did establish a rule, or even a presumption, in favor of majority voting in international arbitration.

Generally speaking, all three commissions constituted under the Jay Treaty had to apply international law in the sense that they all had to interpret the provisions of the treaty on the basis of which they were functioning. As indicated above, however, it was only the commission under Article VII which became involved in the application of international law, and in particular maritime law. In the case of the other two commissions the role played by international law was in fact only nominal.

It should also be noted that for all three commissions equity played an important role. The commission under Article VI was explicitly authorized to apply "considerations of justice and equity"[24] and so was the commission under Article VII.[25] Also with respect to the commission under Article V it would seem fair to assume that equity was a decisive component in the decision making process, since the commission had to determine a disputed frontier in a presumed spirit of accommodation and common sense.

Thus, it would seem questionable whether the three aspects of the Jay Treaty Arbitrations discussed above,[26] upon closer scrutiny, in fact can be said to have ushered in a new era of arbitration under international law. This notwithstanding, this is the role that most commentators attribute to the Jay Treaty Arbitrations.[27]

[22] Schwarzenberger, note 12 *supra*, at 728. This principle has since become an inseparable part of modern international arbitration, commercial as well as interstate. It is usually referred to as the principle of *compétence de la compétence*, or *Kompetenz–Kompetenz*. *Cf.* e.g. Shihata, The Power of the International Court to Determine Its Own Jurisdiction (1965), and Schwebel, The Severability of the Arbitration Agreement, in International Arbitration: Three Salient Problems (1987) 1.

[23] Schwarzenberger, note 12 *supra*, at 728.

[24] *See* note 13, *supra*.

[25] *See* note 17, *supra*.

[26] *See* p. 36 *et seq.*, *supra*.

[27] It is interesting to note that to several legal commentators at the time, the Jay Treaty Arbitrations did not seem to mark a change; for example, in Wheaton's Elements of International Law (ed. Dana 1800) and Woolsey's Introduction to the Study of International

2.3 Post Jay Treaty Arbitrations (1795–1870)

Following the Jay Treaty, the United States and Great Britain agreed in the Treaty of Ghent of 1814, which terminated the war of 1812–1814, to arbitrate four territorial disputes. The form chosen was that of mixed commissions composed of one commissioner from each side. However, if the commissioners disagreed, a reference was to be made to a disinterested head of state. The commissioners charged with the question of sovereignty of certain islands in the Bay of Fundy were able to reach agreement in 1817 and thus rendered an award without having consulted any head of state.[28] With respect to the second territorial dispute, however, the *North Eastern Boundary Case*, the commissioners were compelled to refer the case to the King of the Netherlands. His award, which was not more than a recommendation, was not accepted and this matter was ultimately settled by negotiation in the Webster–Ashburton Treaty of 1842.[29]

The third territorial dispute concerned the division of the Saint Lawrence River and the Lakes of Ontario, Eire and Huron. In this case the commission reached the practical solution based on the principle that the boundary should always be on water and never divide an island.[30]

Finally, a commission was established to settle the dispute concerning the division of waters from Lake Huron to the Lake of the Woods. This commission, however, failed to reach any agreement and thus, did not render any award, but the question was again settled in the Webster–Ashburton Treaty.[31]

The commissions sitting in the three first arbitrations where instructed by Article 4 of the Treaty of Ghent to "decide upon the said claims according to such evidence as shall be laid before them on the part of His Britannic Majesty and of the United States respectively".[32] No such instruction was given to the forth commission. They were instructed to

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Law(1875), the Jay Treaty was not mentioned at all. In Phillimore's Commentaries upon International Law (4 Vols. 1879–1889) and Lorimer's Institutes of the Law of Nations (2 vols. 1883–1884) the Jay Treaty is mentioned, but not the arbitrations based on it. These circumstances are emphasized by Roelofsen, note 9 *supra* at 202–204. The turning point seems to have come in 1898 with the publication by Moore of his work History and Digest of the International Arbitrations to Which the United States Has Been a Party. La Pradelle and Politis were even more enthusiastic in their Recueil des Arbitrages Internationale, (1905), *cf.* Schwarzenberg, note 12 *supra* at 716–717. The Jay Treaty Arbitrations are also the starting point for Stuyt, *op. cit.*, in his survey of international arbitrations.

[28] *See* Moore, *op. cit.*, Vol. I at 45 *et seq.*

[29] *See* Moore, *op. cit.*, Vol. I at 70 *et seq.*

[30] *See* Moore, *op. cit.*, Vol. I at 166 *et seq.*

[31] *See* Moore, *op. cit.*, Vol. I at 171 *et seq.*

[32] Stuyt, *op. cit.*, at 14–16.

designate the boundary and to "state their decision on the points thus referred to them, and particularize the latitude and longitude of the most north western point of the Lake of the Woods, and of such other parts of the said boundary as they may deem proper".[33] Thus, no explicit reference was made to the rules of international law, or for that matter to any other rules. On the other hand, however, all four disputes involved interpretation of the provisions of the Peace Treaty of 1783 between Great Britain and the United States. This way the rules of treaty interpretation in international law became relevant.

Generally speaking, it would seem that the mixed commissions worked at best when the commissioners could give agreed decisions on questions submitted to them without having recourse to an umpire or arbitrator. This in turn meant that the mixed commissions, when successful, functioned more like negotiators than judges.[34]

Later a dispute arose concerning the interpretation of Article 1 of the Treaty of Ghent. This article provided for the evacuation of occupied territory and stipulated that slaves and other private property were not to be removed. A dispute arose whether or not the article applied to slaves who at the date of ratification were in any territory to be restored to the United States. This dispute was submitted to arbitration of Tsar Alexander I of Russia and thus not to a commission. However, certain ancillary issues were referred to mixed commissions consisting of one commissioner and one arbitrator appointed by each side to decide various issues.[35] No instructions were given as to the rules to be applied to resolve the dispute; the outcome, however, turned on the interpretation of the treaty.[36]

Subsequent to the Webster–Ashburton Treaty of 1842 relations between the United States and United Kingdom improved. In 1853, under a treaty signed in the same year, the two governments agreed that all private claims which had arisen since the Treaty of Ghent of 1814 were to be referred to arbitration.[37] Again the form chosen was that of the mixed commission. Each government appointed one commissioner and at the commencement of each case the commissioners were to agree upon an umpire. Failing their agreement, each was to make one nomination and the umpire was to be selected by lot. Altogether the commission heard 75 claims against the United States and 10 claims against the

[33] *Id.*, at 16.
[34] Simpson & Fox, International Arbitration (1959) 3.
[35] Simpson & Fox, *op. cit.*, at 3–4; Moore, *op. cit.*, at 350 *et seq.*
[36] Stuyt, *op. cit.*, at 27.
[37] *Id.*, at 4–5.

United Kingdom.[38] Generally speaking, this commission seems to have been working very smoothly.[39] Private claimants were allowed to be represented by counsel before the commission. Article 1 of the Treaty of 1853 stipulated, *inter alia*, the following with respect to the rules to be applied by the commission:

> "The Commissioners (and the umpire) ... shall ... impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, upon all such claims as shall be laid before them ...".[40]

Between 1856 and 1864 the United Kingdom participated in three arbitrations before the Senate of Hamburg which was then regarded as a sovereign body.[41] The interesting aspect with these three cases is that the Senate of Hamburg referred submissions to it to a committee which included lawyers. This procedure ensured detached consideration by several persons without inviting the diplomatic, compromising approach which was characteristic of the mixed commissions of that time, and thus facilitated the giving of reasons for the award.[42] One frequent feature of arbitrations at this time seems to have been the settlement by negotiation of the major controversy between two states which was then followed by a reference of secondary and subsidiary issues to arbitration. This was the case, for example, with the dispute concerning the interpretation of Article 1 of the Treaty of Ghent.[43]

Even though arbitration was quite frequently used at the middle of the nineteenth century to settle interstate disputes, in fact there was little general agreement on basic requirements for such arbitrations. This is, *inter alia*, evidenced by the constitution and procedure of the mixed commission of Caracas set up in 1869 to adjudicate on the claims of British subjects arising from the riots, insurrections and civil war which had occurred in connection with the establishment of the United States of Venezuela in 1863.[44] The convention in question did name the commissioners, but did not, however, specify on what basis the decisions were to be taken. On the other hand, following the signature of the convention,

[38] Stuyt, *op. cit.*, at 50.
[39] Simpson & Fox, *op. cit.*, at 4–5.
[40] Stuyt, *op. cit.*, at 50.
[41] Simpson & Fox, *op. cit.*, at 5.
[42] *Id.*
[43] *See* pp. 40–41, *supra*.
[44] Simpson & Fox, *op. cit.*, at 6–7. *See* also Stuyt, *op. cit.*, at 86. The awards rendered by the commissioners are reported in Lapradelle-Politis, Recueil des Arbitrages Internationaux (Vol. 2, 1923) 529–567.

the commissioners themselves signed a declaration that they would decide according to the rules of justice and equity. However, as the arbitration proceeded the commissioners gave the widest possible interpretation to this expression so as to include even "the examination of moral obligations".[45] The umpire of the commission was selected by lot with the consequence that he could not be the same for all cases, which in turn meant that decisions conflicted. Furthermore, disputes concerning the jurisdiction of the commission arose between the commissioners and had to be referred to the respective governments.[46]

On the other hand, another arbitration decided in 1870, between Great Britain and Portugal, the *Bulama Island Arbitration*, represents a considerable step forward with respect to certain procedural aspects.[47] The arbitrator, who was President Grant of the United States, was given wide discretion with respect to the procedure to be followed. He was, for example, authorized to seek advice of any person, or persons, he deemed fit. President Grant asked Mr. Bancroft Davis, Assistant Secretary of State, to examine the documents and prepare a draft award, thereby avoiding the unsatisfactory, unmotivated award which heads of states had usually been given in the past. Furthermore, the President was empowered to hear agents and counsel, although in fact he did not. Finally, President Grant was empowered to give an award which appeared to him to offer an actual solution of the dispute, should he be unable to render an award entirely in favor of one or the other party. The dispute concerned the sovereignty over an island off the West coast of Africa. In fact, however, the President's award was entirely in favor of Portugal.

The commonly accepted procedure at this time seems to have been not to issue instructions to the arbitrators as to the law, or rules, to be applied to resolve the dispute. To the extent that such instructions were issued, they mostly referred to "justice and equity". In the *Bulama Island Arbitration* no instructions in this respect were issued to the arbitrator. It is clear, however, from the report prepared by Mr. Bancroft Davis that his starting point was the law of nations as understood and applied by the United States.[48]

[45] Simpson & Fox, *op. cit.*, at 6–7.

[46] *Id.*

[47] Moore, *op. cit.*, Vol. 2 at 1909 *et seq.*

[48] In his report Mr. Bancroft Davis states, *inter alia*: "Whatever force might be given to such a title in case of actual occupancy of the territory ceded at the time of the cession, to admit the validity of such title when the grantor did not reside upon or permanently possess and occupy the territory ceded, would be contrary to the whole *policy of the United*

2.4 The Alabama Claims Arbitration

If the Jay Treaty was the starting point for modern international arbitration, the *Alabama Claims Arbitration* of 1871–1872 was the second important milestone. This arbitration gave the arbitral process in general a new impetus and introduced a number of rules and practices which were gradually to gain general acceptance.[49] The most important effect of the *Alabama Claims Arbitration* seems to have been on a more general level, however, *viz.*, it was realized that arbitration was both a realistic and efficient alternative to war.

The *Alabama Claims Arbitration* arose from the alleged failure of the United Kingdom in her duties as a neutral during the American Civil War.[50] The United Kingdom had declared its neutrality at the outset of the American Civil War. As a result thereof it was under an obligation not to supply military equipment to either of the belligerents. However, in 1862 the Alabama war vessel was commissioned by the Southern Confederacy at shipyards in Liverpool. In order to circumvent the prohibition on British shipyards' supply of military equipment to any of the belligerents, the vessel was formally ordered by an agent allegedly acting on behalf of China. The British Government, however, had received indications to the effect that the Alabama had actually been commissioned by the Confederates, and notwithstanding this warning, let the vessel be delivered to them.

During the Civil War, the Alabama chased Northern freight vessels over many seas capturing more than 60 vessels. It caused considerable damage to the Northern economy. When the Northern Union first proposed to the British Government that American claims against Great Britain for damages were to be submitted to arbitration the British Government refused.[51] Ultimately, however, the United States and the British Government signed the 1871 Washington Treaty, in which the British

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States, and to all *the rules of public law recognized by it*. It is to be presumed that the parties made the submission knowing the American doctrine". Moore, *op. cit.*, Vol. 2 at 1918 (emph. added). Later on he stated: "*The law of nations* will therefore not acknowledge the property and sovereignty of a nation over any uninhabitated countries, except those in which it has really taken possession, and in which it has formed settlements, or of which it has made actual use". *Id.*, at 1919 (emph. added).

[49] Simpson & Fox, *op. cit.*, at 8.

[50] *See* Moore, *op. cit.*, Vol. I at 495 *et seq.*; *see* also Stuyt, *op. cit.*, at 97–98. A compilation of various documents, official and unofficial, including the award, relating to the Alabama Claims Arbitration is found in Wetter, The International Arbitral Process: Public and Private, Vol. I (1979) 3–173.

[51] The initial British reaction was rather abrupt. Earl Russel, the foreign secretary, replying to a statement made by the American diplomatic representative, said *inter alia*: "It

Government expressed its apologies for the escape of the Alabama and agreed to submit claims for damages to arbitration.[52] It was decided that there should be a five person arbitral tribunal. Thus, no reference was made to any head of state to settle the dispute, since the experiences from such arbitrations had been mixed. The tribunal, which was a new type of tribunal, consisted of one member appointed by each side and members appointed respectively by the King of Italy, the President of the Swiss Confederation and the emperor of Brazil. Thereby a collegiate international tribunal had been established, which was to set a pattern for many other international tribunals in the future. The proceedings started in December 1871 and lasted until September 1872. The award was rendered on 14 September 1872 determining the compensation to be paid by the British Government to the United States to an amount of USD 15,500,000. The members of the Tribunal voted differently on different issues, and a number of separate, and dissenting, opinions were filed. The practice of allowing and preparing separate and/or dissenting opinions was hereby introduced in international arbitration. This was later to become general practice in international arbitration.[53]

For the purposes of this Study, it is of particular interest that the Washington Treaty prescribed the rules on the basis of which the arbitrators were to decide the dispute. The dispute was thus not decided on the basis of British law in force at the time, but on the basis of the so-called Washington rules on the duties of neutrals. These rules, generally speaking, imposed higher standards on neutrals than those generally accepted at the time, thereby effectively concluding all issues against the United Kingdom.[54] The Washington Rules constitute the first notable example of the

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appears to Her Majesty's Government that neither of these questions could be put to a foreign government with any regard to the dignity and character of the British Crown and the British nation. Her Majesty's Government are the sole guardians of their own honor. They can not admit that they have acted with bad faith in maintaining the neutrality they professed. The law officers of the Crown must be held to be better interpreters of a British statute than any foreign government can be presumed to be"; Moore *op. cit.*, at 496.

[52] Article 1 of the Washington Treaty reads: "Now, in order to remove and adjust all complaints and claims, which are not admitted by Her Britannic Majesty's Government, the High Contracting Parties agree that all the said claims, growing out of acts committed by the aforesaid vessels, and generically known as the 'Alabama Claims', shall be referred to a Tribunal of Arbitration to be composed of five arbitrators ...", as quoted by Stuyt, *op. cit.*, at 97. As appears from the quoted language the *Alabama Claims Arbitrations* did not only concern the vessel Alabama, but also a large number of other vessels which had in different ways been involved in activities relating to the American Civil War.

[53] Simpson & Fox, *op. cit.*, at 8.

[54] The Washington Rules are laid down in Article VI of the Washington Treaty, which reads: "In deciding the matters submitted to the Arbitrators they shall be governed by the following three rules, which are agreed upon by the High Contracting Parties as rules to be

disputing parties instructing the tribunal to base its decision on certain principles which are to be treated as binding law.[55]

When the Alabama award was rendered it created a considerable impression on international public opinion and in many quarters arbitration came to be seen as the universal remedy against any further war.[56] The Treaty of Washington was comprehensive in character and consisted of forty-three articles. As far as the Alabama claims are concerned, the treaty addressed a number of procedural aspects which have become common practice in international arbitration.

It is also noteworthy that the treaty provided for three neutral arbitrators alongside the two appointed by the United States and Great Britain.[57] Even though it was the practice ever since the Jay Treaty Arbitrations for the parties to each appoint an arbitrator and for the umpire to be appointed by them or by lot, the manner of appointment in the *Alabama Claims Arbitrations* is different, since there are three neutral arbitrators.

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taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to have been applicable to the case:

Rules

A neutral Government is bound –

First, to use due diligence to prevent the fitting out, arming, or equipping, within it jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially, in whole or in part, within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any notation of the foregoing obligations and duties." The Treaty of Washington is reproduced in Darby, International Tribunals (3rd. ed. 1899) 148 *et seq.*; see also Moore, *op. cit.*, at 547 *et seq.* – In Article VI it is also laid down that Great Britain did not accept that the three rules mentioned above constituted a statement of the principles of international law at the time when the claims arose, but that it nevertheless accepted that the rules be applied to resolve the claims.

[55] Ralston, *op. cit.*, at 20.

[56] *See* e.g. Wetter, note 50, *supra*, reproducing passages of Strindberg's The German Lieutenant, addressing the Alabama Claims Arbitration, and Moore, *op. cit.*, at 664, quoting the leading American and British newspapers of the time.

[57] The neutral arbitrators were: Count Frederic Sclopis, named by the King of Italy, Jacques Staempfli, named by the President of the Swiss Republic and Baron d'Itajubu, named by the Emperor of Brazil; among themselves they selected Count Sclopis as the president. The two party-appointed arbitrators were Charles Francis Adams (United States) and Sir Alexander Cockburn (Great Britain).

It would seem clear that the neutral arbitrators regarded the party-appointed arbitrators more as representatives of their respective countries than as neutral arbitrators.[58] In this context it is interesting to note that the British arbitrator protested against the award and refused to sign it.[59] This notwithstanding, the award was recognized as valid in its entirety and was paid by Great Britain.[60]

The Treaty of Washington also contains provisions on the replacement of arbitrators (Article I), for the place of arbitration (Geneva) and for majority voting (Article II), on the procedure for the submission of briefs (Articles IV and V), an award period (three months) (Article VII) and provisions on the finality of the resulting award (Article XI).[61]

The successful conclusion of the *Alabama Claims Arbitration* did not, however, immediately change arbitral practice. The draftsmen of the Washington Treaty of 1871 themselves, for example, retained the older forms for the settlement of two other questions. One was a frontier dispute between the United Kingdom and the United States concerning the middle of the Channel which separates the continent from Vancouver's Island, commonly referred to as the *San Juan de Fuca Case*.[62] This arbitration was referred to the German Emperor. He was not, however, invited to determine the actual frontier, but merely to determine which was more in conformity with the relevant treaty, the Channel claimed by the United States or the Channel claimed by the United Kingdom.[63] The Emperor's award, which was in favor of the United States, gave no reasons. He had, however, been empowered to remit the question in issue to such persons as he thought fit and did in fact refer it to two German lawyers and a geographer.

2.5 The last decades of the 19th century (1875–1899)

In the last two decades of the nineteenth century there were approximately

[58] *See* the following statement made by Storey: "In the paper just read, the Geneva tribunal was mentioned. Mr. Charles Francis Adams told me that when the Geneva tribunal met there was a dais on which the three neutral arbitrators had seats and a long table in front with a single seat at each end, the seat at one end being assigned to Sir Alexander Cockburn, the English member of the tribunal, that at the other to Mr. Adams, the American member. As they entered the hall, Sir Alexander Cockburn said: 'You see Mr. Adams, they perfectly well understand our relations to this arbitration'. And so he assumed the attitude of counsel and understood that as his position." As quoted by Ralston, *op. cit.*, at 57.

[59] *See* Moore, *op. cit.*, at 659.

[60] *Id.*, at 665–666.

[61] For the wording of these articles, *see* Moore, *op. cit.*, at 547–553.

[62] *See* Stuyt, *op. cit.*, at 99.

[63] The relevant treaty was the so-called Oregon Treaty of 1846, *see* Simpson & Fox, *op. cit.*, at 9.

ninety international arbitrations between different states.[64] The mixed commission was still the form favored for the settlement of private claims, particularly when arising from the political upheavals in South America at the time. For example, the United Kingdom participated in mixed commissions with Chile in 1883 and again in 1893 and with Nicaragua in 1895.[65] Mixed commissions were also entrusted with resolving disputes and claims of ancillary and secondary importance. Furthermore, the mixed commission had long been considered to be a suitable body to settle border disputes. For example, in 1884 the dispute between the United Kingdom and the South African Republic concerning the *South-western Boundary* of the Republic was referred to a mixed commission.[66]

From 1870 and onwards, however, there is a noticeable trend to seek reference to wholly independent persons – preferably lawyers – as opposed to the members of the mixed commissions. In 1872 the dispute between the United Kingdom and Portugal concerning the *Delagoa Bay* was submitted to arbitration by the President of France.[67] The President was given the power to decide in equity and to refer the question to such persons as he thought fit.[68] He appointed a commission of five prominent Frenchmen including one lawyer as the chairman. The report which upheld the Portuguese position was fully motivated.[69] Heads of state had typically regarded the arbitral decision as their personal responsibility even though the decision was usually taken after obtaining advice from ministers or experts. In the *Delagoa Bay* arbitration the French President did no more than sign the award submitted to him by the commission. Another example of this procedure is the *Costa Rica Packet Case* between the United Kingdom and the Netherlands which was referred in 1895 to a lawyer selected by the Tsar of Russia.[70]

[64] La Fontaine, Pasicrisie internationale. Histoire documentaires des Arbitrages internationaux (1902) p. viii.

[65] Simpson & Fox, *op. cit.*, at 10.

[66] Stuyt, *op. cit.*, at 134; Moore, *op. cit.*, Vol. V at 5015.

[67] Stuyt, *op. cit.*, at 104; Moore, *op. cit.*, at 4984.

[68] The instructions to the arbitrator were such that should he be "unable to decide wholly in favour of either of the respective claims, he shall be requested to give such a decision as will, in his opinion, furnish an equitable solution of the difficulty", *see* Stuyt, *op. cit.*, at 104.

[69] Stuyt, *op. cit.*, at 104.

[70] The tsar appointed Professor F. de Martens of St. Petersburg as arbitrator. The dispute concerned the allegedly illegal arrest in the Netherlands Indies of the whaling ship Costa Rica Packet of Sydney, New South Wales. The arbitrator was instructed in the following manner: "... l'arbitre, tout en tenant compte des principes du droit des gens, decidera à l'egard de chaque reclamation formulée à charge du Gouvernement des Pays-Bas, si elle est bien fondée, et, dans l'affirmative, si les faits sur lesquels chacune de ses réclamations est basée son prouvés". As quoted by Stuyt, *op. cit.*, at 194; *see* also Moore, *op. cit.*, Vol. 5 at 4948.

Before the nineteenth century ended, three important arbitrations took place where use was made of the collegiate tribunal launched by the *Alabama Claims Arbitration.*

In 1891 France and the United Kingdom referred a dispute concerning the *New Foundland Lobster Fisheries* to a tribunal consisting of two members appointed by each party and "three specialists or jurisconsults designated by common consent" by the two governments.[71]

The same method was used in the *Behring's Sea Seal Fishing Arbitration* in 1892 between the United Kingdom and the United States. This tribunal consisted of seven members – two appointed by the United Kingdom, two by the United States and one each by the President of France, the King of Italy and the King of Norway and Sweden.[72] The arbitrators were required to be "jurists of distinguished reputation in their respective countries".[73] Furthermore, the arbitration agreement provided for majority voting and instructed the arbitrators to:

> "proceed impartially and carefully to examine and decide the questions that have been or shall be laid before them as herein provided on the part of the Governments of the United States and Her Britannic Majesty, respectively".[74]

The third arbitration concerned the *British Guyana and Venezuela Boundary Dispute* which caused a crisis between Great Britain and Venezuela. In a treaty of 1897 the two states agreed to refer the dispute to an arbitral tribunal consisting of five members, two of whom were appointed by Venezuela, one by the United Kingdom and one by the United States.[75] The fifth member – Professor de Martens, of St. Petersburg – was elected by the other four. The tribunal reached a decision in the main favorable to the United Kingdom, in 1899. The task for the arbitrators was to determine the boundary line between the Colony of British Guyana and Venezuela. In addition they were asked to ascertain the extent of the territories belonging to the United Netherlands or to the Kingdom of Spain, respectively, when Great Britain acquired the Colony of British Guyana.[76] The arbitration agreement contained the following

[71] In this arbitration, which was eventually resolved by a settlement between the parties, the arbitrators were given no instructions as to the law to be applied. Stuyt, *op. cit.*, at 171; Moore, *op. cit.*, Vol. V at 4939; Simpson & Fox, *op. cit.*, at 11.

[72] Stuyt, *op. cit.*, at 175; Moore, *op. cit.*, Vol. I at 755.

[73] Moore, *op. cit.*, Vol. I at 799.

[74] Stuyt, *op. cit.*, at 175.

[75] Stuyt, *op. cit.*, at 213; La Fontaine, *op. cit.*, at 554; Moore, *op. cit.*, Vol. V at 5017.

[76] Stuyt, *op. cit.*, at 213.

relatively detailed instructions to the arbitrators as far as the rules to be applied to resolve the dispute are concerned:

> "(a) Adverse holding or prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.
>
> (b) The arbitrators may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law, and on any principles of international law which the arbitrators may deem to be applicable to the case, and which are not in contravention of the foregoing rule.
>
> (c) In determining the boundary line, if territory of one party be found by the tribunal to have been at the date of this treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the tribunal, require."[77]

After more than 50 sessions of oral hearings the tribunal rendered an unanimous, but unmotivated, award, on 3 October 1899. The award was in favor of Great Britain, awarding it almost ninety per cent of the disputed territory. Venezuela continues to claim that the award is null and void, and that the greater part of the disputed territory in fact belongs to Venezuela.[78] One of the grounds relied upon by Venezuela is the view that the tribunal did not apply the rules they were instructed to apply by virtue of the arbitration agreement. In a government report on the matter this ground for nullity was summed up in the following manner:

> "(b) The fact that the arbitrators did not take into account, for their verdict, the applicable rules of right and particularly the principle of *uti possidetis juris*; neither did they make any effort to investigate and ascertain 'the extent of the territories belonging either to the United Provinces of the Netherlands or to the Kingdom of Spain', at the time of the so-called acquisition.

[77] As quoted by Moore, *op. cit.*, Vol. V at 5018.

[78] British Guyana having attained independence in 1966, the dispute continued between Venezuela and the Republic of Guyana. Venezuela has on many occasions officially formulated its claim that the award is null and void. It has done so before the United Nations and it has done so in connection with diplomatic negotiations leading to the signing of various protocols, *cf.* Wetter, *op. cit.*, Vol. III at 134 *et seq.* (The better part of Vol. III contains documents and materials relating to this arbitration). – An interesting account of this arbitration – partly based on de Martens' diaries – is found in Pustogarov, Our Martens (English translation by William E. Butler, (2000) 202–216.

...

(c) The fact that the arbitrators did not establish how the 50 years terms of prescription were to be computed, nor did they apply it according to what had been agreed in the Arbitration Treaty. ...

(e) The fact that (the) so-called Award was a result of diplomatic compromise explains why the arbitrators did not take into account the rules of law embodied in the Arbitration Treaty ...."[79]

2.6 The Hague Peace Conferences and beyond (1899–1920)

By the end of the nineteenth century arbitration had become a widely accepted method for settling disputes. The importance of international arbitration was also recognized by statesmen and writers. It was, thus, only natural that arbitration would occupy a considerable place in the deliberations of the Hague Peace Conference of 1899, called at the suggestion of the Emperor of Russia, Tsar Nikolaus II.[80] An important result of the work at the Conference was the preparation of a treaty providing for the formation of the Hague Permanent Court of Arbitration and signed by twenty-seven states. An equally important result was the conclusion of the Convention for the Pacific Settlement of International

[79] Report on the Boundary Question with British Guyana Submitted to the National Government by the Venezuelan Experts (published by the Venezuelan Foreign Ministry in 1967) 26–27, as quoted in Wetter, *op. cit.*, Vol. III at 140–141). Addressing the UN General Assembly in 1962, the then Foreign Minister, Marcos Falcon-Briceno, characterized the situation as follows: "The rules to be followed in the study and disposition of the case were established in the arbitration agreement, as is customary, but the truth is that when the time came to voice a decision, the rules, which were the only source of authority for the judges to pass judgment, were not taken into consideration at all" (as quoted in Wetter, *op. cit.*, Vol. V at 130–131). The obligation of arbitrators to apply the law and/or the rules determined by the parties will be discussed below at p. 101 *et seq.*, *infra*, and at p. 152, *infra*.

[80] The formal invitation to the conference at the Hague was issued by the government of the Netherlands on 7 April 1899, after a diplomatic initiative of the Russian Foreign Minister Count Muravieff. On 29 August 1898, Count Muravieff made a communication to all the foreign representatives accredited to the Court of St. Petersburg, which in fact constituted the invitation. The introductory paragraph of the communication read: "Le maintien de la paix générale et une reduction possible des armements excessifs qui présent sur toutes les nations se présentent, dans la situation actuelle du monde entier, comme l'idéal auquel devraient tendre les efforts de tous les Gouvernements. ..." Quoted from Darby, International Tribunals (1899) 412.) Generally on the history of the Hague Conferences, *see* Scott, The Hague Peace Conferences of 1899 and 1907 (1921); Foster, Arbitration and the Hague Court (1904); Zorn, Die beiden Haager Friedenskonferenzen von 1899 und 1907 (1915); Hudson, Permanent Court of International Justice 1920–1942 (1943); Dülffer, Regeln gegen den Krieg?: Die Haager Friedenskonferenzen von 1899 und 1907 in der internationalen Politik (1981).

Disputes of 1899. The Convention established the Permanent Court of Arbitration which could be characterized as a misnomer in the sense that it is little more than a list of names from which arbitrators may be selected when the occasion arises. Every nation signing the Convention was to appoint four persons competent in questions of international law who should be listed as members of the Court. Whenever any of the signatory powers might decide to have recourse to the Court, the arbitrators were to be chosen from the general list, or failing agreement as to the composition of the tribunal in question, each party was to appoint two arbitrators and these together were to choose a chairman.

In fact, the only permanent feature of the Permanent Court of Arbitration is the Bureau established in accordance with Article 22 of the Convention.[81] The services of the Bureau are available for tribunals formed under the auspices of the Permanent Court of Arbitration. Furthermore, Chapter III of the Convention lays down rules of procedure which apply failing an agreement to the contrary between the parties. In 1899 these rules – which were inspired by the Alabama Claims Arbitration – constituted a valuable contribution and corrective to the extreme informality of some of the earlier arbitrations. Generally speaking, it should be emphasized that the Convention did not provide for compulsory arbitration between states, but settlement of a dispute by arbitration was dependent on an agreement between the parties.

By way of introduction, it should also be noted that nowhere in Title IV of the Convention – which deals with international arbitration – is the question of applicable law, or rules, addressed. As previously mentioned the rules on arbitral procedure laid down in Chapter III apply, unless the parties have agreed otherwise. However, when a Sovereign or Chief of State is chosen as arbitrator, the procedure will be determined by him.[82] In general, Chapter III contains fairly detailed rules on the arbitral procedure, covering such aspects as appointment and replacement of arbitrators,[83] the conduct of the proceedings,[84] the right of the arbitrators to determine their own jurisdiction,[85] finality and revision of the award.[86]

[81] Scott characterized it in the following way: "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"; Scott (ed.) The Proceedings of the Hague Peace Conferences: Conference of 1907 (1921) Vol. 2, 319.

[82] Article XXXIII of the 1899 Hague Convention For the Peaceful Settlement of International Differences.

[83] Articles XXXII, XXXV.

[84] Articles XXXIX–XLVII.

[85] Article XLVIII.

[86] Articles LIV–LV.

Even though the rules laid down in the Convention were a useful contribution at the time, they have subsequently been criticized as being too brief and too general in character.[87]

Even though the question of applicable law is not directly addressed in the Convention, Article 15 of the Convention stipulates that: "International arbitration has for its object the determination of controversies between States by judges of their own choice, *upon the basis of respect for law*" (emph. added). This would seem to indicate that the drafters of the Convention intended arbitration to be judicial in character, in the sense that disputes were to be decided according to law.[88] This is, however, not explicitly stated in the Convention. Furthermore, it could be argued that there is a difference between deciding a case "on the basis of respect for law" and actually *applying* provisions in a statute or treaty, and principles of law; deciding a case "on the basis of respect for law" would seem to leave considerable leeway for the arbitrators not strictly to adhere to the provisions of the law.

Much of the criticism of the Permanent Court of Arbitration, and of the awards rendered under its auspices,[89] seems to stem from the fact that at that time the international community felt a need for, and was expecting, an international *court* rendering decisions strictly based on international law, rather than international arbitration, where the parties may also instruct the arbitrators to apply other rules and/or principles.[90] Nothing was done under this Convention, which entered into force in 1899, during the first years of its existence. This was generally interpreted as an evidence of lack of confidence in the impartiality of the Permanent Court of Arbitration. One example is the instructions issued by Elihu Root, Secretary of State of the United States, to the American delegates to the subsequent 1907 Hague Conference. He stated, *inter alia* that:

> "There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrators to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance

[87] *Cf.* Anand, International Courts and Contemporary Conflicts (1974) 36–37.
[88] For further discussion of this issue, *see* p. 78 *et seq.*, *infra*.
[89] *See* the arbitrations referred to on p. 54 *et seq.*, *infra*.
[90] *See* e.g. Anand, *op. cit.*, at 47–48, with references.

with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents ..."[91]

Other countries seemed to have other concerns. Emperor Wilhelm II of Germany made the following comment on a report from the Swedish Embassy:

"Einem Schiedsgericht unterwirft sich Holland oder Dänemark oder Schweden, weil es seine Ansprüche nicht verfechten kann, ein Großstaat lässt es besser bleiben."[92]

Recourse was, however, had to the machinery established by the Convention in four cases between 1902 and 1905. The first case arose in 1902 when Mexico and United States agreed to refer to arbitration differences which have become known as the *Pious Fund Case*. In September 1902 the first court of arbitration under the Hague Convention met at the Hague, consisting of Sir Edward Fry of England and Professor de Martens of St. Petersburg, Russia, named by the United States. Mr. Asser and Mr. Savornin–Lohman of Holland named by Mexico and Mr. Matzen of Denmark, who was chosen as president by the other arbitrators. An award was ultimately given in favor of the United States ordering Mexico to pay a certain amount to the United States.[93] The first case was quickly followed by the *Venezuelan Preferential Claims Case* in 1903,[94] then by the *Japanese House Tax Case* in 1904[95] and by the *Muscat Dhows Case* in 1905.[96]

In the *Pious Fund Case*, a certain claim had been advanced by the Roman Catholic Church of California against the Republic of Mexico. The claim was for annual interest from a fund known as "The Pious Fund of the Californias". A mixed commission rendered an award in favor of the Roman Catholic Church, which was now claiming further interest. A dispute eventually arose between the Republic of Mexico and the United States. Agreeing in a treaty to submit the dispute to arbitration, the parties stated, *inter alia,* that:

[91] Scott, Instructions to the American delegates to the Hague Peace Conferences and their Official Reports (1907) 79–80.

[92] As quoted in Dülffer, *op. cit.*, at 124.

[93] *See* Stuyt, *op. cit.*, at 251–252; Ralston, *op. cit.*, at 263–265.

[94] *See* Stuyt, *op. cit.*, at 262; Ralston, *op. cit.*, at 265–268; *see* also Silagi, Preferential Claims Against Venezuela Arbitration, in Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 2 (1981) 234.

[95] *See* Ralston, *op. cit.*, at 268–269; Miyazaki, Japanese House Taxation Arbitration, in Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 2 (1981) 234.

[96] Ralston, *op. cit.*, at 269–270.

"... to the determination of Arbitrators, who shall, unless otherwise expressed herein, be controlled by the provisions of the International Convention for the Pacific Settlement of International Disputes, commonly known as the Hague Convention, and which arbitration shall have power to determine:

1) If said claim, as a consequence of the former decision, is within the governing principle of 'res iudicata'; and
2) If not, whether the same be just.

And to render such judgment or award as may be meet and proper under all the circumstances of the case."[97]

In the *Venezuelan Preferential Claims Case* – which was a dispute between Germany, England and Italy on the one side, against Venezuela on the other side, for the settlement of claims of their respective nationals against Venezuela – there was only a brief reference to "The Tribunal at The Hague" which was to determine the dispute, "in default of arrangement". In the following two cases – the *Japanese Tax House Case* and the *Muscat Dhows Case* – there was no particular instruction to the arbitrators with respect to applicable law, or rules, but the disputes all concerned the interpretation of treaties and therefore involved the application of the rules on treaty interpretation of international law.[98]

When the next Hague Conference was held in 1907, the agreement establishing the Permanent Court was signed by 46 different countries and was based on the Convention of 1899 with changes, albeit minor ones. The amendments and changes did not in any material way interrupt the work of the Court as originally planned in 1899.

Before the Hague Convention of 1907 convened another important step was taken in the spreading of the gospel of international arbitration, *viz.*, the so-called Venezuelan Arbitrations in 1903. The governments of seven countries claimed that their nationals had been injured by Venezuelan authorities and sought relief in arbitration. Seven commissions sat in Caracas in 1903 for the purpose of trying these claims with the result that awards were rendered representing a total amount of some seven million US Dollars.[99]

[97] *See* Stuyt, *op. cit.*, at 251.

[98] *See* Ralston, *op. cit.*, at 268–269 and at 269–270.

[99] These arbitrations are based on the same factual circumstances as the *Venezuelan Preferential Claims Case*, *viz.*, claims raised by several governments against Venezuela for compensation to its nationals. At first, Venezuela refused to refer such claims to arbitration. As a result a portion of the Venezuelan coast was put under blockade by Germany, England and Italy. The arbitration between these countries and Venezuela is called the *Preferential*

The Hague Peace Conferences constituted an important step in furthering arbitration between states. As a result of the conferences the use of arbitration as a method for settling interstate disputes increased noticeably which was reflected in arbitration clauses being inserted in treaties and also in the number of actual arbitrations. This in turn resulted in increased activity at the Permanent Court of Arbitration which lasted until the establishment of the Permanent Court of International Justice in 1920. Until 1920 seventeen disputes were initiated with the Bureau of the Permanent Court of Arbitration. Some of these cases resulted in awards which continue to remain famous, such as the decision of the U.S. Chief Justice Taft in the so-called *Tinoco Case* between Costa Rica and Great Britain in 1923,[100] and the decision rendered by Professor Huber from Switzerland in the *Island of Palmas Case* in 1928 between the Netherlands and the United States.[101]

The fundamental issue in the *Tinoco Case* was the right of the Costa Rican Government to declare void the acts of a prior administration (the Tinoco Administration) which Great Britain considered as a government *de facto*. The Costa Rican Government issued Law No. 41 in 1920 which contained a Declaration of Nullity. This declaration affected the interests of two British corporations in Costa Rica, one having obtained an oil concession and the other having made a certain payment by depositing a check in a bank account. In deciding the dispute, the sole arbitrator – Chief Justice Taft – was instructed to take into consideration "existing Agreements, the principles of Public and International Law and ... the allegations, documents and evidence which each of the two Governments may present to him ...".[102]

The *Island of Palmas Case* was a dispute between the Netherlands and the United States concerning the territorial sovereignty over the Island of Palmas. The dispute was referred to the Permanent Court of Arbitration and Huber was appointed sole arbitrator. In the arbitration agreement

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Claims Case, because one of the issues was whether or not the compensation to be paid by Venezuela should be made preferentially to the blockading states or on a *pro rata* basis to all countries concerned. The other aspect of this controversy was resolved by seven tribunals with Venezuela on the one side and the United States, Belgium, France, the Netherlands, Spain, Mexico and Sweden–Norway, respectively, on the other. These tribunals resolved a large number of questions of international law mostly "according to justice and the provisions of this convention" and on the "basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation"; Ralston, *op. cit.*, at 223; *see* also Ralston, Venezuelan Arbitrations of 1903 (1904).

[100] Stuyt, *op. cit.*, at 353.

[101] Stuyt, *op. cit.*, at 382. The award is reproduced in Wetter, *op. cit.*, Vol. I at 189 *et seq.*

[102] Stuyt, *op. cit.*, at 353.

entered into between the parties he was instructed to resolve the dispute "... in accordance with the principles of international law and any applicable treaty provisions ...".[103]

In 1908 an arbitration was commenced under the auspices of the Permanent Court of Arbitration between Norway and Sweden. This was the so-called Grisbådarnedispute which concerned the maritime boundary between Norway and Sweden in the Fjord of Ide and to the sea.[104] The tribunal – Messrs. Reichmann (Norway), Hammarskiöld (Sweden) and Loeff (Netherlands), chairman – was asked to determine

> "... how far the boundary line shall be considered to be, either wholly or in part, determined by the Boundary Treaty of 1661, together with the charts appertaining to the same, and how such boundary line is to be drawn, and also, in so far as the boundary line can be considered as undetermined by the Treaty and chart in question, shall have power to determine the same..."[105]

In deciding the dispute the tribunal was instructed to have "regard to actual conditions and the principles of international law".[106] This was stipulated in the convention between Norway and Sweden entered into on 14 March 1908 by virtue of which the dispute was referred to arbitration.

The award discusses various aspects of international law, particularly with respect to delimitation of maritime boundaries; one conclusion drawn by the tribunal is that maritime territory is an essential appurtenance of land territory.[107]

Another well-known arbitration from this time period is the so-called *Russian Indemnity Case* also decided under the auspices of the Permanent Court of Arbitration.[108] The dispute arose out of a treaty entered into on 27 January 1879 in Constantinople and under which the Ottoman state had to pay compensation for war damages to Russia. In particular the dispute concerned the obligation to pay interest on such compensation. The arbitration agreement was entered into in August of 1910 and the award was rendered in November of 1912.[109] The award stated that as a matter of principle there was an obligation to pay interest, but due to the circumstances in the case, Russia was deemed to have waived its

[103] Stuyt, *op. cit.*, at 382.
[104] Reports of International Arbitral Awards, Vol. XI (1961) 153.
[105] Stuyt, Survey of International Arbitrations 1794–1989 (3rd ed. 1990) 293.
[106] *Ibid.*
[107] *Cf.* Brownlie, Principles of Public International Law (5th ed. 1998) 119, for comments on the award *see* e.g. Strupp, Der Streitfall zwischen Schweden und Norwegen (1914).
[108] Reports of International Arbitral Awards. Vol. XI (1961) 421.
[109] Stuyt, note 103, *supra,* at 307.

claim for interest.[110] The tribunal was not given any particular instructions as to applicable law and/or rules.[111]

2.7 The Treaty of Versailles and the League of Nations (1920–1940)

The next great leap forwards with respect to international arbitration was taken in the wake of the First World War. Above all there are two events which stand out as being of particular importance, *viz.*, the establishment of the League of Nations, with the Permanent Court of International Justice and the arbitrations following the Treaty of Versailles and other peace treaties.

An important milestone in the history of international arbitration was the establishment of the League of Nations and of the Permanent Court of International Justice.[112] The Covenant of the League of Nations was, generally speaking, intended to serve the aims of maintaining peace and preventing war. Pursuant to the Covenant, members of the League of Nations agreed to submit disputes between them to arbitration, unless they were able to settle the dispute in question by diplomacy.[113] Furthermore, certain types of disputes were declared as generally being suited for arbitration, *viz.*, disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach.[114] Article 14 of the Covenant stipulates that the Council of the League of Nations shall prepare, and the members shall adopt, a plan for the establishment of a Permanent Court of International Justice which shall be competent to "hear and determine any dispute of an international character which the parties thereto submit to it".[115] The Statute of the Permanent Court of International Justice stipulates that the Court has jurisdiction to hear "all cases which the parties refer to it".[116] As can be seen from the above, the general problem of distinguishing

[110] This aspect of the case is further discussed at p. 305 *et seq.*, *infra*.

[111] Stuyt, note 103, *supra*, at 307.

[112] There is a multitude of writings on the Permanent Court of Justice; general works on the Permanent Court of International Justice include, *inter alia*, De Bustamente, The World Court (1925), Hudson, Permanent Court of International Justice 1920–1942 (1943), Fachiri, The Permanent Court of International Justice (2nd ed. 1932); *see* also Schlochauer, Permanent Court of International Justice, in Bernhardt (ed.), Encyclopedia of Public International Law, Vol. I (1981) 163, with references.

[113] Article 13 of the Covenant of the League of Nations.

[114] *Id.*

[115] Article 14 of the Covenant of the League of Nations.

[116] Article 36 of the Statute of the Permanent Court of International Justice.

between disputes suitable for arbitration, judicial settlement and political resolution remained unresolved.[117] The Statute of the Court also enables parties to recognize the jurisdiction of the Court as compulsory *ipso facto* and without special agreement in relation to any other member or State accepting the same obligation. In this connection the Statute refers to "classes of legal disputes", thus introducing a distinction between legal disputes and other disputes. However, no definition or explanation is offered concerning this difference.[118]

The establishment of the Permanent Court of International Justice represented a considerable step forward with respect to the judicial settlement of international disputes. Previous attempts to establish a permanent international tribunal among a large group of states had failed to solve the problem of finding a method acceptable to the states concerned to select judges. This problem was now solved when the Permanent Court of International Justice was established, by providing for election of the judges by separate and independent action of the Assembly and, in the case of remaining unfilled seats, by a joint conference consisting of six members, three appointed by the Assembly and three by the Council.[119]

As far as the law and rules to be applied by the Court were concerned, Article 38 of the Statute stipulates:

> "The Court shall apply:
>
> 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> 2. International custom, as evidence of a general practice accepted as law;
> 3. The general principles of law recognized by civilized nations;
> 4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."[120]

As mentioned above, the other significant event during this time period was the Treaty of Versailles and the arbitrations generated by it, as well as by other peace treaties resulting from the First World War.

[117] *See* p. 17 *et seq.*, *supra.*

[118] For a discussion of legal v. political disputes, *see* p. 347 *et seq.*, *infra.*

[119] The procedure for electing judges is set forth in Articles 8–12 of the Statute of the Permanent Court of International Justice.

[120] Article 59 limits the binding force of the decision of the Court to the parties and in respect of that particular case.

The Treaty of Versailles provided in Article 304[121] for the establishment of mixed arbitral tribunals between each of the allied and associated powers on the one hand and Germany on the other. Each tribunal consisted of one member appointed by each government and a president appointed by the two governments jointly. If the two governments failed to agree on a president, he was to be selected by the Council of the League of Nations. Similar provisions for mixed arbitral tribunals were made in the Treaties of St. Germain with Austria,[122] in the Treaty of Trianon with Hungary,[123] in the Treaty of Neuilly with Bulgaria and in the Treaty of Sèvres and Lausanne with Turkey.[124] The decisions of these mixed arbitral tribunals turn to a large extent on points of private law and on interpretation of the peace treaties. In an agreement of 1922 between the United States and Germany[125] a mixed claims commission was established to deal with claims of U.S. citizens against Germany for damage to property, rights and interests in Germany, other claims for injury to persons, or property as a consequence of war, and debts due to U.S. citizens by the German Government or German nationals. Similar claims by U.S. citizens against Austria or Hungary were referred to the Tripartite Claims Commission, pursuant to the Agreement of 1924 between the United States, Austria and Hungary[126]. Since individuals appeared directly before these mixed arbitral tribunals they did not strictly speaking deal with interstate disputes. This notwithstanding, the mixed tribunals did represent a further step in the recognition of arbitration as a dispute settlement mechanism in international relations. One reason for this is that the number of claims decided by these arbitral tribunals was unprecedented and truly overwhelming. The Franco–German Arbitral Tribunal, for example, dealt with more than twenty thousand cases and the Anglo–American and German–Italian Arbitral Tribunals each rendered awards in about ten thousand cases.[127]

In this connection mention must also be made of the General Act for the Pacific Settlement of International Disputes of 1928 adopted on 26

[121] Treaties and Other International Agreements of the United States of America, Vol. 2, p. 43.

[122] The Treaty of Peace between the Allied and Associated Powers and Austria, signed at Saint-Germain-en-Laye, September 10, 1919.

[123] Journal Officiel 1921, p. 2608.

[124] L.N.T.S. Vol. 28, p. 11. – For an overview of these mixed tribunals, *see* e.g. Wühler, Mixed Arbitral Tribunals, in Bernhardt (ed.), Encyclopedia of Public International Law, Vol. I (1981) 142.

[125] L.N.T.S. Vol. 26, p. 357.

[126] L.N.T.S. Vol. 48, p. 69.

[127] *See* Werner, Interstate Political Arbitration, Journal of International Arbitration (1992) 72.

September in Geneva.[128] This represented another attempt to draw up a code for the settlement of international disputes. The three first chapters deal with conciliation, judicial settlement and arbitration, respectively. Pursuant to Chapter III, arbitration was to be resorted to with respect to disputes other than those concerned with legal rights, whereas disputes concerning such rights were to be submitted to the Permanent Court of International Justice.[129] If any such dispute did not, within one month following the termination of the work of the conciliation commission provided for in Chapter I, form the object of an agreement between the parties, it was to be brought before an arbitral tribunal; in this sense the General Act thus provides for binding compulsory arbitration. Chapter III further provides for the appointment of arbitrators and for the application of the 1907 Convention for the Pacific Settlement of International Disputes. It also stipulates, in Article 28, that failing an agreement to the contrary, the tribunal is to apply the rules with respect to the substance of the dispute enumerated in Article 38 of the Statute of the Permanent Court of International Justice, and insofar as there exists no such rule applicable to the dispute, the tribunal shall decide *ex aequo et bono*.[130] This particular provision of the General Act has generated criticism.[131] It is not difficult to sympathize with the critics. For example, it is not clear how Article 28, which refers to Article 38 of the Statute of the Permanent Court of International Justice, should be reconciled with the latter provision which authorizes the Court to decide *ex aequo et bono* only if the parties agree thereto. On the whole, arbitration seems to have been given a secondary role in the General Act and it has therefore not played any significant role in the development of international arbitration.[132]

The General Act was revised at an early stage of the existence of the United Nations. The revision which was adopted by the General Assembly on 28 April 1949 was, however, of a limited nature.[133] It applies only

[128] L.N.T.S. Vol. 93, p. 343. – For general comments, *see* e.g. Von der Heydte, General Act for the Pacific Settlement of International Disputes (1928 and 1949) in, Bernhardt (ed.) Encyclopedia of Public International Law, Vol. I (1981) 62.

[129] Article 17 of the General Act.

[130] For the wording of Article 38 of the Statute of the Permanent Court of International Justice, *see* p. 59, *supra*.

[131] *Cf.* Simpson & Fox, *op. cit.*, at 21.

[132] *Cf.* Wühler, Die internationale Schiedsgerichtsbarkeit in der völkerrechtlichen Praxis der Bundesrepublik Deutschlands (1985) 31–37, with references.

[133] General Assembly Resolution 268A (III); *cf.* e.g. Kunzmann, Die Generalakte von New York und Genf als Streitschlichtungsvertrag der Vereinten Nationen, Die Friedenswarte 56 (1961) 1.

as between states which have acceded to it and not all members of United Nations have done so.

The continued binding force of the General Act became an issue before the International Court of Justice in the *Nuclear Tests Case*.[134] The issue was not ruled upon by the Court, but a dissenting minority of six Judges dealt with it in detail and concluded that it was indeed still in force, stating *inter alia*:

> "In our view, therefore, close examination of the various objections to the Court's assuming jurisdiction on the basis of the General Act of 1928 ... show them all to be without any sound foundation".[135]

The establishment of the Permanent Court of International Justice in 1920 resulted in fewer cases being handled under the auspices of the Permanent Court of Arbitration and also in fewer *ad hoc* arbitrations. This notwithstanding, a number of important arbitrations took place within the framework of the Permanent Court of Arbitration, such as the *Norwegian Shipowners Case*.[136] An arbitration of particular interest is the so-called *Trail Smelter Arbitration*[137] finally decided in 1941, with an interim award made in 1938. The case concerned compensation for damages caused by fumes discharged from a smelter at Trail, British Columbia, Canada which caused damage in the State of Washington. A tribunal consisting of three arbitrators was asked to determine whether damage had occurred, and if so what compensation was to be paid therefor and to decide whether the smelter should be required to refrain from causing damage in the future. One interesting aspect of the arbitration was the

[134] I.C.J. Reports (1974) 253–455 and 457–528.

[135] Note 134, *supra* at 358. As explained by Verzijl, the conclusion of the minority rested primarily on two considerations, *viz.*, (i) "The fact that the Act formed part of a comprehensive system of settlement of disputes under the regime of the League of Nations does not alter the other fact that it was a separate international convention subject to the general law of treaties and to its own nature as such. That is why it did not lapse together with the League", *and*, (ii) "nor does the fact that the Act remained to a certain extent in the background of international relations by any means imply either its tacit denunciation or its lapse by falling into disuse, as is evidenced by many international acts and statements which confirm its continued validity", *see* Verzijl, International Law in Historical Perspective Vol. VIII (1976) 260.

[136] Reports of International Arbitral Awards Vol. I (1948), 307. The award which was rendered in 1922 dealt with compensation claimed by Norway for certain requisitions made by the United States Shipping Board Emergency Fleet Corporation. The arbitrators were instructed in the arbitration agreement to "examine and decide the aforesaid claims in accordance with the principles of law and equity and determine what sum, if any, shall be paid in settlement of each claim"; as quoted by Stuyt, *op. cit.*, at 349.

[137] Reports of International Arbitral Awards Vol. III (1949), 1905.

fact that the tribunal was instructed to apply municipal law as well as international law. Article 4 of the arbitration agreement read as follows:

> "The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as International Law and Practice, and shall give consideration to the desire of the High Contracting Parties to reach a solution to all parties concerned."[138]

2.8 Post Second World War Arbitrations and Developments

After the Second World War, the Permanent Court of Arbitration to a large extent lost in importance. Only one case was tried under its auspices.[139] Generally speaking, interstate arbitration found itself in a state of stagnation, indeed decline. Whereas the eighty year period from 1850–1930 saw some 360 interstate disputes being resolved through arbitration, only a little more than 50 interstate arbitrations have been recorded since 1930.[140]

The explanations for this development may be many and various, but it is difficult to identify the real reasons. The reason can hardly be – it is submitted – that the number of interstate disputes has decreased correspondingly. One explanation is rather that states are today less willing to submit their disputes with other states to be decided by independent impartial bodies such as arbitral tribunals.[141] To do so would mean – at least to a certain extent – subordination of national sovereignty and pursuance of political objectives to resolution on the basis of law, which in turn is feared to entail loss of control over such aspects. Another explanation could be that there seems to exist a certain measure of distrust with respect to the true impartiality of international arbitral tribunals.[142] It is also possible that uncertainty as to the soundness and viability of claims against other states

[138] As quoted by Stuyt, *op. cit.*, at 423. Canada was eventually ordered to pay compensation to the United States. For an overview of other arbitral awards rendered under the auspices of the Permanent Court of Arbitration and by *ad hoc* tribunals, *see* Verzijl, *op. cit.*, at 248–249.

[139] This is the so-called *Lighthouses Arbitration* between France and Greece. The arbitration agreement was signed in 1931 and partial awards were rendered in 1954 and 1956. The dispute was finally settled in 1957, *see* International Law Reports 1956 (1960) 659.

[140] Werner, note 127, *supra.*, at 72–73. This number – as per the beginning of 1992 – excludes interstate arbitrations related to the Second World War; for a brief discussion of this category of arbitrations, *see* p. 66 *et seq.*, *infra.*

[141] *Cf.* Gray & Kingsbury, Developments in Dispute Settlement, Interstate arbitration since 1945, British Yearbook of International Law (1992) 101.

[142] *Cf.* Verzilj, *op. cit.*, at 114.

coupled with the relative unpredictability of the outcome of interstate disputes, contributes to the feeling of lack of control which many states seem to have. Generally speaking, it is probably fair to say that, due to the nature of public international law, interstate disputes are more difficult to predict than disputes determined on the basis of municipal law.

Finally, one important explanation for the decline of traditional interstate disputes is the fact that many such disputes have now been "transformed" into private, commercial disputes, partially by virtue of the 1965 Washington Convention establishing the International Centre for the Settlement of Investment Disputes[143] and also as a result of the increasing number of international commercial arbitrations involving state parties.[144] Many investment contracts today, entered into between private investors and foreign states – e.g. concession agreements of different kinds – provide for arbitration pursuant to the arbitration rules of the aforementioned center, or for other forms of private, commercial arbitration. Prior to the establishment of the center, many investment disputes would typically have developed into interstate disputes based on diplomatic protection, but stemming from an individual claim, i.e. that of the private investor. In this sense, it is fair to say that a large number of interstate arbitrations have been privatized.[145]

If the General Act, discussed above,[146] in practice contributed little to the development of international arbitration, the same must generally be said of the United Nations. Needless to say, the establishment of the United Nations was a milestone event after the Second World War, and the organization has played, and continues to play, an unprecedented crucial role in all interstate relations.[147] The Charter of the United Nations, its application

[143] For a brief discussion of arbitrations under the Washington Convention, *see* p. 88 *et seq.*, *infra*; *see* also pp. 355–356, *infra*, where bilateral investment protection treaties are discussed – arbitrations under such treaties are often between the private investor and the host state.

[144] *Cf.* Böckstiegel, Der Staat als Vertragspartner ausländischer Privatunternehmen (1971); *id.*, Arbitration and State Enterprises (1984) and Toope, Mixed International Arbitrations (1990), with further references.

[145] *Cf.* Werner, note 127, *supra*, at 74.

[146] *See* p. 60 *et seq.*, *supra*.

[147] There is a formidable amount of literature dealing with all aspects of the United Nations; it is not meaningful to enumerate, let alone discuss, such writings here. However, in so far as dispute settlement is concerned the following works contain useful information: Raman (ed.), Dispute-Settlement through the United Nations (1977); Roberts & Kingsbury (eds.), United Nations, Divided World (1988); Bailey, How Wars End: The United Nations and the Termination of Armed Conflict 1946–1964 (1982); Waldock (ed.), International Disputes: The Legal Aspects (1972), Murphy, The United Nations and the Control of International Violence (1983), and Peck, The United Nations as a Dispute Settlement System (1996).

and interpretation, has become a very important source of public international law. The charter did not, however, make any great impact on the development of the judicial settlement, including arbitration, of interstate disputes. The relatively detailed provisions of Article 15 of the League of Nations' Covenant was replaced by Article 33 of the Charter of the United Nations, subsection (1) of which merely enumerates possible peaceful means of settling international disputes.[148] Article 33 does not, however, impose any obligations on the member states in this respect; subsection (2) states that the Security Council shall, "when it seems necessary, call upon the parties to settle their dispute by such means", i.e. peaceful means. To be sure, the Charter of the United Nations did give the International Court of Justice a definitive status within the United Nations and therefore a closer relationship with the other organs of the United Nations than the Permanent Court of International Justice had ever had with the League of Nations.

Apart from this, however, the establishment of the International Court of Justice did not *per se* represent any significant advancement of judicial settlement of international disputes, the trail – i.e. the establishment of a World Court – having already been blazed by the Permanent Court of International Justice.

Rather, the contribution of the United Nations to the development of international arbitration must be sought in the work of the International Law Commission. Already in 1949 the Commission selected arbitration as one of the topics with respect to which international law might be codified. The Commission started out with the objective to prepare a General Multilateral Convention on Arbitral Procedure. Generally speaking, the Commission set as its task to make international arbitration a more efficient method of settling interstate disputes. It focused on trying to eliminate, or minimize, the loopholes as it saw them, primarily of a procedural nature, inherent in traditional interstate arbitration.[149] The Commission concentrated on the following perceived deficiencies: the scope of the

[148] Article 33 (1) reads: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

[149] The work of the Commission must be seen against the background of the debate at that time – a debate which to a certain extent continues even today – between the advocates of a system of binding judicial arbitration and the advocates of diplomatic negotiations as the most important and most suitable method of solving international disputes. The proposal prepared by the Commission falls in the first category. – For a discussion of the various arguments put forward in this debate and of the positions of different states, *see* Neuhold, Internationale Konflikte – verbotene und erlaubte Mittel ihrer Austragung (1977) 416 *et seq.*

obligation to arbitrate, the constitution of the arbitral tribunal, filling of vacancies of arbitrators, preparation of the arbitration agreement when the parties disagree, special powers of the tribunal and finally revision and annulment of the award.[150]

Generally speaking, the Commission was relatively successful in closing the loopholes it had addressed. The General Assembly of the United Nations, at its session in 1955, however, apparently found the proposals too far-reaching, in terms of subjecting states to binding rules and provisions.[151]

The International Law Commission, eventually saw no hope of the draft convention being accepted by members of the United Nations. It therefore decided to put forward its draft as a set of model articles, the Model Rules on Arbitral Procedure.[152] Even in this form the draft proved controversial at the 13th Session of the General Assembly of the United Nations in 1958. The General Assembly decided only to take note of the draft articles and to bring them to the attention of member states for their consideration, to be used in such cases and to such extent as they considered appropriate in drawing up arbitration agreements.[153] The 1958 Model Rules address a number of important issues with respect to arbitral procedure, including the perceived deficiencies mentioned in the foregoing. The Model Rules also contain a provision concerning the law to be applied by an arbitral tribunal. Article 10 of the Model Rules starts out by referring to the choice of law made by the parties, and goes on to say that in the absence of any such agreement, the Tribunal shall apply the same sources of law as are stipulated for the International Court of Justice by virtue of Article 38 of its Statute.[154]

After the Second World War a number of mixed commissions and mixed arbitral tribunals were established on the basis of the peace treaties.

[150] *Cf.* the Commentary on the Commissions draft Convention; Document A/CN. 4/92 (1955).

[151] Resolution 989 (X), 14 December 1955.

[152] *See* International Law Commission Yearbook Vol. II (1957) 1 *et seq.*

[153] The Model Rules, which are without binding effect on States, were adopted by the United Nations General Assembly, Resolution 1262 (XIII), on 14 November 1958. *Cf.* Huaraka, The Model Rules on Arbitral Procedure of the International Law Commission of the United Nations, in 37/38 Annuaire de l'Association des Auditeurs et Anciens Auditeurs de l'Académie de Droit International de La Hague (1967/68) 20; Dhokalia, The Codification of Public International Law (1970) 292 and Schlochauer, Arbitration, in Bernhardt (ed.), Encyclopedia of Public International Law, Vol. I (1981) 25–26.

[154] The Model Rules were referred to in the Dubai–Sharjah Bounday Arbitration, International Law Reports, Vol. 91 (1993) 543, and described as an authoritative statement of customary international law; for comments *see* Bowett, The Dubai – Sharjah Boundary Arbitration of 1981, British Yearbook of International Law (1994) 103.

Many of these arbitrations deal with specialized issues, e.g. restitution and restoration of property rights, not seldom of a highly technical nature. For these reasons the resulting awards have, generally speaking, contributed little to the development of general international law and of international arbitration. This notwithstanding, the arbitrations resulting from the Second World War form an integral part of the history of international arbitration.

Under the peace treaties with Italy,[155] Rumania[156] and Bulgaria,[157] for example, and also in the State Treaty with Austria,[158] certain classes of disputes concerning the application of articles in the treaties with respect to the restitution and restoration of property rights and interests were referred to a conciliation commission consisting of one representative of the member of the United Nations concerned and one of the former enemy countries concerned. In case the conciliation commission had not reached an agreement within three months, either government had the right to ask for a third member of the commission to be chosen by agreement of the two governments, or failing such agreement, by the Secretary General of the United Nations.[159] This person had to be a national of a third country. The majority decision of the commission constituted in the aforementioned manner was definitive and binding on the parties. With respect to other disputes arising on the basis of the peace treaties, in particular concerning the interpretation and execution of the peace treaties, the emphasis was on diplomatic settlement rather than on arbitration and other forms of judicial settlement.

The division of Germany following the Second World War required several forms of dispute settlement. Consequently, a number of tribunals were established, each addressing different types of matters.[160]

[155] Treaty of Peace with Italy, Article 83, Treaty Series No. 50 (1948).

[156] Treaty of Peace with Rumania, Article 32, Treaty Series No. 55 (1948).

[157] Treaty of Peace with Bulgaria, Article 31, Treaty Series No. 52 (1948).

[158] State Treaty for the re-establishment of an independent and democratic Austria, Article 30, Treaty Series No. 58 (1957).

[159] In the case of Bulgaria, Rumania and Hungary this provision of the Peace Treaties gave rise to an Advisory Opinion by the International Court of Justice, *viz.*, Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania, Advisory Opinion, First Phase (1950) I.C.J. Reports, 65, Second Phase (1950) I.C.J. Reports, 221. The background was that the United States and the United Kingdom complained that Bulgaria, Hungary and Rumania violated human rights provisions of the treaties, and tried to initiate the arbitration procedure under the Peace Treaties. The respondents refused to appoint their respective representatives to the Commission. The question then was if the Secretary-General could appoint an arbitrator even in this situation, and not only when the parties had failed to agree. In the opinion of the Court, the answer was in the negative.

[160] For an overview *see* Wühler, Die internationale Schiedsgerichtsbarkeit in der völkerrechtlichen Praxis der Bundesrepublik Deutschland (1985) 92–96, 130–139, with further references.

The Agreement on German External Debts[161] provided for two bodies with jurisdiction over disputes to which governments were parties.[162] The first is the Arbitral Tribunal with jurisdiction over disputes between governments regarding the interpretation or application of the Agreement, or its annexes, with the exemption of any dispute concerning the interpretation of Article 34. That article provided for consultation between the parties to the Agreement, in a situation, for example, when the Federal Republic of Germany finds that it has difficulties in honoring its financial obligations. The Tribunal consisted of three members appointed by the Federal Republic, three members appointed respectively by France, the United Kingdom and the United States and two members appointed jointly by the four governments.[163]

The second body, the Mixed Commission for the Interpretation of Annex 4 to the Agreement on German External Debts, consists of the same eight members as the Arbitral Tribunal. The Commission had original jurisdiction over differences between a creditor and debtor as to the interpretation of Annex 4 referred to it by creditor and debtor jointly, or by a creditor or debtor whose government states that in its opinion the question at issue is of general importance for the interpretation of the Annex.[164] An unusual feature of the Agreement on German External Debts is that it provides for a hierarchy of tribunals each of which may try the same case but at different stages.[165]

Also the Bonn Conventions of 1955 provide for elaborate mechanisms for settlement of disputes.[166] The Bonn Conventions are two, *viz.*, the

[161] For general comments *see* e.g. Gurski, Das Abkommen über deutsche Auslandsschulden und seine Durchführungsbestimmungen (2nd ed. 1955) and Kienscherf, Die Regelung der deutschen Auslandsschulden im Rahmen internationaler Verträge (1959).

[162] The agreement also provides for four arbitral institutions in the creation of which private debtors and creditors participate and which deal with claims of predominantly a private law character, *cf.* Liepe, Die Schiedsgerichtsbarkeit im Dawes-Plan und im Londoner Schulden-Regelungsabkommen (1954) 141 *et seq.*

[163] Agreement on German External Debts, Article 28 and Annex 28 (1953). This Tribunal has on several occasions rendered awards concerning the interpretation of the Agreement, the most well-known perhaps being the so-called *Young Loan Arbitration*, decided in 1980 and reported in International Law Reports Vol. 59 (1980) 494.

[164] Agreement on German External Debts, Article 31 and Annex X.

[165] *Cf.* e.g. Article 17 of Annex IV to the Agreement on German External Debts.

[166] Documents relating to the Termination of the Occupation Regime in the Federal Republic of Germany (1955). – Article 11 of the Unification Treaty of 31 August 1990, 29 International Legal Materials (1990) 1186, signed by the two German States, stipulates, *inter alia*, that all international treaties and agreements to which the Federal Republic of Germany is a party are to remain valid. On 12 September 1990 the two German states and the Five Allied Powers, signed the Treaty on the Final Settlement with Respect to Germany, *ibid.*, which finally settles matters arising out of the Second World War.

Convention on Relations between France, the United Kingdom and the United States and the Federal Republic of Germany, and the Convention On the Settlement of Matters Arising Out of the War and the Occupation.[167] Article 9 of the Convention on Relations between France, the United Kingdom and the United States of America and the Federal Republic of Germany[168] provides for the establishment of an Arbitration Tribunal with exclusive jurisdiction of disputes between the aforementioned states, with certain exceptions. The tribunal which is not established until a dispute within its jurisdiction has actually arisen and has proven incapable of settlement by negotiation, consists of nine members, three appointed by the Federal Republic of Germany, one by each of the three other states and three neutral members who must not be nationals of any of the signatory states and will act as presidents and vice presidents of the tribunal. The neutral members are appointed jointly by the Federal Republic of Germany and the other three states mentioned above.

A third form for settling disputes arising out of the division of Germany is the Arbitral Commission on Property, Rights and Interests in Germany.[169] This commission was established under Article 7 of Chapter 5 of the Convention on the Settlement of Matters Arising out of the War and the Occupation.[170] As indicated by its title, the arbitral commission deals with a large variety of matters. Individuals as well as states have direct access to the arbitral commission, either by way of appeal from German courts and authorities, or at first instance if the claim has not been dealt with by the appropriate German authority within a specified time period. The jurisdiction covers the return of property in the Federal Republic of Germany and the restoration of rights and interests which suffered discriminatory treatment during the war. It also covers compensation for war damages to property located in the Federal Republic of Germany, as well as revision of judgments delivered by German courts during the war. For countries which were occupied by the military forces of Germany, or its allies, the jurisdiction of the Commission also covers the restitution of certain property wrongfully removed to Germany, and settlement of compensation for its loss, if irrecoverable, after identification. Cases before the Commission are heard in chambers consisting of one member appointed by the Federal Republic of Germany,

[167] For general comments, *see* e.g. Grewe, System und Grundgedanken des Bonner Vertragswerks, in Kutscher (ed), Bonner Vertrag (1952) 1.
[168] Note 166, *supra*, at 6.
[169] For an overview, *see* Arndt, Arbitral Commission on Property, Rights and Interests in Germany, in Bernhardt (ed.) Encyclopedia of Public International Law, Vol. I (1981) 9.
[170] Note 166, *supra*, at 88.

one member appointed by one of the three powers mentioned above, i.e. France, the United Kingdom and the United States and one neutral member, who must not be a national of a state which participated in the Second World War.[171]

As mentioned at the outset of this section, there has been a general decline in the use of arbitration to settle interstate disputes after the Second World War. This notwithstanding, arbitration has continued to play an important role as a dispute settlement mechanism and a number of important arbitral awards have been rendered during the last decades. Some of the more well-known arbitrations include: the *Lac Lanoux Arbitration*[172] between France and Spain (award rendered in 1957), the *Gut Dam Arbitration*[173] between Argentina and Chile (award rendered in 1966),[174] the *Rann of Kutch Arbitration* between India and Pakistan (award rendered in 1968),[175] the *Continental Shelf Delimitation Arbitration*[176] between the United Kingdom and France (award rendered in 1977), *the Beagle Channel Arbitration* between Argentina and Chile (award rendered in 1977)[177] the *Guinea–Guinea Bissau Arbitration*[178] (award rendered in 1986), the *Taba Arbitration* between Egypt and Israel (award rendered in 1988),[179] the

[171] Charter of the Arbitral Commission, *ibid.*, at 104 *et seq.*; *see* Hallier, Völkerrechtliche Schiedsinstanzen für Einzelpersonen und ihr Verhältnis zur innerstaatlichen Gerichtsbarkeit. Eine Untersuchung der Praxis seit 1945 (1962) 33.

[172] The award is reported in International Law Reports 1957 (1961) 101; for comments, *see* e.g. Laylin & Bianchi, The role of adjudication in international river disputes, American Journal of International Law (1959) 30.

[173] The dispute was settled by agreement in 1968, *see* Stuyt, *op. cit.*, at 452.

[174] The case is reported in International Law Reports, Vol. 38 (1969) 10. – In this case, and also in the *Beagle Channel Arbitration*, under a treaty from 1902 the Queen of England as successor to her great-grand-father King Edward II was empowered to act as arbitrator in territorial disputes between Argentina and Chile. In both cases, however, this power was delegated to lawyers and other experts. The two cases constitute an exception to the rule that in modern international arbitration heads of state do not act as arbitrators, *see* p. 45 *et seq.*, *supra.*

[175] The award is reported in International Law Reports, Vol. 50 (1976) 2; for comments, *see* e.g. Wetter, The Rann of Kutch Arbitration, American Journal of International Law (1971) 346.

[176] The award is reported in International Law Reports, Vol. 54 (1979) 6; for comments, *see* e.g. Merrills, The United Kingdom-France Continental Shelf Arbitration, California Western International Law Journal (1980) 314.

[177] The award is reported in International Law Reports, Vol. 52 (1979) 93; for comments, *see* e.g. Shaw, The Beagle Channel Award, 6 International Relations (1978) 415.

[178] The award is reported in International Law Reports, Vol. 77 (1988) 636.

[179] The award is reported in International Law Reports, Vol. 80 (1989) 224; for comments *see* e.g. Lagergren, The Taba Tribunal, Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce (1990) 9.

Rainbow Warrior Case,[180] the *Heathrow Airport User Charges Arbitration*[181] between the United States and the United Kingdom (awards rendered in 1992 and 1993), and the *Eritrea–Yemen Arbitration* concerning territorial sovereignty over Greater Hanish island in the Red Sea (award rendered in 1998).[182]

Many of these arbitrations concern different forms of territorial disputes. With respect to applicable law and/or rules, it is worthwhile noting that most of the arbitrations have been determined on the basis of international law, either as a result of direct instructions from the parties, or because the arbitrators assumed that the parties intended international law to apply. In the *Palena Arbitration*, the *Continental Shelf Delimitation Arbitration* and in the *Beagle Channel Arbitration*, the arbitrators were instructed by the parties to decide the disputes on the basis of international law.[183] On the other hand, in the *Rann of Kutch Arbitration* and in the *Taba Arbitration* there were no explicit directives as to applicable law. In the first case the arbitrators were asked to resolve the dispute on the basis of the respective claims of the parties and the evidence produced by the parties.[184] In the second case the arbitrators were asked to determine the location of the boundary pillars "of the recognized international boundary". In fact, the arbitrators could only choose between the boundary pillars put in place by Egypt and Israel, respectively, and could thus not select a different solution.[185] Despite these relatively limited instructions, the arbitrators seem to have assumed that the parties wished a decision on the basis of international law and proceeded to render their awards accordingly.[186]

One of the more illustrious instances of international dispute resolution during recent years, is the previously mentioned *Rainbow Warrior Case*, which arose as a result of the sinking of the civilian vessel Rainbow Warrior in Auckland Harbour, New Zealand, by French agents in

[180] Ruling Pertaining to the Differences between France and New Zealand Arising from the Rainbow Warrior Affair, International Law Reports, Vol. 74 (1987) 241.

[181] Reported in International Law Reports, Vol. 102 (1996) 216.

[182] *See* Marques Antunes, The Eritrea–Yemen Arbitration: First Stage – The Law of Title to Territory Re-Averred, International & Comparative Law Quarterly (1999) 362; Reisman, Eritrea–Yemen Arbitration (Award, Phase II: Maritime Delimitation), American Journal of International Law (2000) 721.

[183] In the *Palena Arbitration*, for example, Article 1 of the arbitration agreement stipulated that "/t/he Court of Arbitration shall reach its conclusions in accordance with the principles of international law", as quoted by Stuyt, *op. cit.*, at 453.

[184] *See* note 175, *supra*.

[185] *See* note 179, *supra*.

[186] In territorial disputes, it would seem that international law has been understood by arbitrators to allow them to employ – at least to a certain extent – equitable considerations to

July of 1985. Eventually, the governments of France and New Zealand agreed to refer the ensuing dispute to the Secretary-General of the United Nations for a binding ruling. He was asked to rule on a number of issues, including the compensation to be paid by France to New Zealand and the future of the two French agents in New Zealand custody. The parties do not appear to have given the Secretary-General any instructions at all as to applicable law, or otherwise as to the basis on which the dispute was to be settled. His ruling, which was unreasoned, did, however, settle the dispute, *inter alia*, by ordering the French agents to be transferred to a French military base in French Polynesia for a period of three years.[187] It is perhaps doubtful if the ruling of the Secretary-General can be characterized as an arbitral award in the traditional sense, since many of the procedures differed from those in a conventional arbitration. Rather, it was akin to the concept of *bona officio*, i.e. third party involvement by the Secretary-General offering the services of his office. The parties had, however, agreed in advance to be bound by his ruling, so in practice the ruling had the same effect as an arbitral award. In his ruling the Secretary-General also decided that the agreements which would become necessary to implement his ruling were to contain provisions for arbitration of any dispute arising out of the application or interpretation of any such agreement.[188]

Arbitration has also been used in relation to the recent events concerning the former Yugoslavia. As a result of these events a number of complicated legal issues have arisen, particularly regarding state succession and state responsibility. Within the framework of the International Conference on the Former Yugoslavia, an Arbitration Commission was set up to address legal issues arising out of the aforementioned events; the juris-

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bring about a workable solution. In the *Rann of Kutch Arbitration*, for example, Pakistan was awarded certain territory on the ground that "it would be *inequitable* to recognize these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in the region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistani territory, also be regarded as such", (emph. added), *see* International Law Reports, Vol. 50 (1976) 520.

[187] Ruling Pertaining to the Differences between France and New Zealand Arising from the Rainbow Warrior Affair, International Law Reports, Vol. 87 (1987) 241; for comments *see* e.g. Pugh, Legal Aspects of the Rainbow Warrior Affair, International & Comparative Law Quarterly (1987) 655.

[188] France repatriated the two agents prior to the expiration of the three year period which led to a dispute which was resolved through the arbitration procedure envisaged by the Secretary-General in his ruling; *cf.* Merrills, International Dispute Settlement (3rd ed. 1998) 106–107 and Werner, note 127, *supra*, at 76–77. This arbitral award is reported in International Law Reports, Vol. 82 (1990) 499; for comments, *see* Davidson, The Rainbow Warrior Arbitration Concerning the Treatment of the French Agents Mefart and

diction of the Arbitration Commission, commonly known as the Badinter Commission, after its Chairman, has not been accepted by the Federal Republic of Yugoslavia.[189] While the Commission has the capacity to resolve actual disputes, in practice it only issues advisory opinions.

Finally, it should be emphasized that the usefulness and utility of international arbitration cannot be judged solely by the number of actual arbitrations. It is also necessary to take account of the number of international instruments which provide for arbitration as the method for settling international disputes. Against this background international arbitration continues to play an important role in international relations. One recent example is the 1982 Law of the Sea Convention which contains detailed provisions for the settlement of disputes, including arbitration.[190] Under the Convention, disputes concerning the law of the sea may be referred to arbitration if the parties so agree with respect to a specific dispute, or if both parties make declarations pursuant to Section 2, Part XV of the Convention to the effect that arbitration is the preferred dispute settlement mechanism, in which case the arbitration will be governed by the provisions of the Convention. However, even if no joint declaration has been made, arbitration under the Convention will be deemed to have been accepted.[191]

Another interesting development is the 1992 Convention On Conciliation And Arbitration Within the CSCE (now the OSCE), often referred to

Prieur, International & Comparative Law Quarterly (1991) 446. As far as applicable law is concerned, the tribunal was instructed as follows: "Le Tribunal statuera conformément aux accords conclus entre le gouvernement de la République française et le gouvernement de la Nouvelle-Zélande par échanges des lettres du 9 juillet 1986, au présent accord et aux règles et principes de droit international applicables"; as quoted by Stuyt, Survey of International Arbitrations 1794–1989 (3rd ed. 1990) 464. – There was also a third arbitration, *viz.*, between Greenpeace and France. The resulting award is not in the public domain, but it is known that Greenpeace was awarded an amount of approximately 8 million USD, *see* Gray & Kingsbury, note 141, *supra* at 104, note 39.

[189] For details and documents relating to the establishment of the Arbitration Commission, *see* International Law Reports, Vol. 92 (1993) 162, and International Law Reports, Vol. 96 (1994) 737.

[190] *See* Adede, The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea (1987); *Id.*, Settlement of Disputes Arising under the Law of the Sea Convention, American Journal of International Law (1975) 798 and American Journal of International Law (1978) 4; Merrills, *op. cit.*, at 170 *et seq.*

[191] Merrills, *op. cit.*, at 181. – It should also be noted that there is yet another form of arbitration under the Convention, *viz.*, so-called special arbitration reserved for disputes concerning provisions of the Convention dealing with fisheries, protection and preservation of the marine environment, marine scientific research, navigation and pollution from vessels and by dumping; *see* Merrills, *op. cit.*, at 183. As of yet, no arbitral awards have been rendered under the Convention.

as the Stockholm Convention.[192] The Convention provides for the creation of a Court of Conciliation and Arbitration to settle disputes between States participating in the Conference On Security and Co-operation in Europe. Neither conciliation, nor arbitration is mandatory under the Convention, but its provisions are drafted such as to encourage and facilitate the use of the dispute settlement mechanism. No arbitral award has so far been rendered on the basis of the Stockholm Convention.

In addition to the more traditional categories of arbitration, referred to above, a large number of – usually highly specialized – special arbitral tribunals have been established after the Second World War. Examples include the commissions and tribunals set up with respect to the divided Germany discussed above.[193] In recent years the most important such special arbitral tribunal is the Iran–United States Claims Tribunal in the Hague. The Tribunal was established in 1982 in the wake of the diplomatic hostage crisis and constitutes an important element of the understandings reached between the United States and Iran in resolving the crisis. The vast majority of cases heard by the Tribunal are between private entities, but it has jurisdiction to resolve disputes also between the two state parties.[194]

After the Second World War governments around the world – after having established the United Nations – also started to focus on the legal regulation of international trade. The eventual result was the creation of GATT (General Agreement On Tariffs and Trade) in 1947. In 1994 the so-called Uruguay Round of GATT concluded with the signing of the Final Act which includes the Agreement Establishing the World Trade Organization.[195] The WTO brings together into one legal framework the previous GATT agreements and related agreements. One of the novelties introduced by the creation of the WTO is a new dispute settlement mechanism which is embodied primarily in the so-called Dispute Settlement Understanding.[196] The dispute settlement in the WTO is based on panel proceedings, resulting in panel reports which may be appealed to the Appellate Body.[197] Articles 21 and 22 of the Dispute Settlement Understanding provide for

[192] For the text of the Convention, *see* SÖ 1993:61.

[193] *See* p. 67 *et seq.*, *supra.*

[194] *See* further p. 88 *et seq.*, *infra.*

[195] The text of the Agreement appears in 3 International Legal Materials (1994) 1125.

[196] For general comments on the dispute settlement mechanism *see* e.g. Petersmann, The GATT/WTO Dispute Settlement System (1997), and Cameron & Campbell (eds.), Dispute Resolution in the World Trade Organization (1998) and Hallström, The GATT Panels and the Formation of International Trade Law (1994).

[197] *See* Merrills, *op. cit.*, at 205–212.

compulsory arbitration when it comes to the implementation of rulings and recommendations. The Dispute Settlement Understanding does not, however, set forth any provisions governing the form and procedure of arbitration. It will be up to the parties to agree on the necessary details, such as applicable law.[198] While arbitration in the WTO context does have some peculiar features, international trade disputes constitute a new field where arbitration may very well come to play an important role.[199]

Another modern form of dispute settlement which resembles – albeit remotely – arbitration is the United Nations Compensation Commission (UNCC). The commission was established as a result of Iraq's invasion of Kuwait in 1990, with a view to dealing with the unprecedented number of claims for compensation filed against Iraq. The highest decision making body of the UNCC is the Governing Council, which mirrors the composition of the UN Security Council. The claims, which have been filed by individuals, corporations, organizations and governments from all over the world, are being tried by fifteen panels, each consisting of three members. As alluded to above, the procedure before the UNCC is not arbitration in the traditional sense, among other things because Iraq is not given the opportunity always fully to participate in the proceedings.[200] It is important to remember, however, that the activities of the UNCC are based on Resolution 687 of the Security Council, in particular paragraph 16, which reads in pertinent parts: "... Iraq ... is liable under international law for any direct loss, damage, including environmental damage ... as a result of Iraq's unlawful invasion and occupation of Kuwait".[201]

In other words, the difficult legal question of liability has already been resolved in Resolution 687. Thus, the primary function of the fifteen panels

[198] *Id.* at 215.

[199] Article 25 (2) of the Dispute Settlement Understanding stipulates, for example, that states contemplating arbitration must notify other member states so as to give them the opportunity to become a party to the arbitration, and Article 25 (3) requires that the award be brought to the attention of, *inter alia*, the Dispute Settlement Body so as to give other members the possibility to comment on the award, which will, however, remain binding on the parties. Even though the Dispute Settlement Understanding has been used in many cases – *see* p. 361 *infra* – no arbitral award has been rendered as of the time of writing.

[200] For general comments on the UNCC *see* e.g. Bettauer, The United Nations Compensation Commission (Thirteenth Sokol Colloquium) (1995); Malanczuk, International Business and New Rules of State Responsibility, in Böckstiegel (ed.), Perspectives On Air Law, Space Law and International Business Law for the next Century (1996) 117; Crook, The United Nations Compensation Commission – A New Structure to Enforce State Responsibility, 87 American Journal of International Law (1993) 144 and Wühler, The United Nations Claims Commission: A new contribution to the process of international claims resolution, Journal of International Economic Law (1999) 249.

[201] Security Council Resolution 687 (1991).

and the Governing Council is to administer the claims and to determine if claims are compensable – which involves the determination whether alleged damages are the direct result of Iraq's invasion, i.e. whether there is a direct causal link between alleged damages and the invasion – and if so, to determine the compensation to be awarded.

2.9 Concluding Remarks

While the modern era of interstate arbitration is generally believed to have started in 1794 with the Jay Treaty Arbitrations, the concept and practice of arbitration are indeed ancient. Modern interstate arbitration – in the meaning of an impartial, third party dispute settlement mechanism – has thus existed for more than 200 years. During this period of time the differences between arbitration and adjudication have diminished considerably.[202] As a result of the creation of the Permanent Court of International Justice and the International Court of Justice, respectively, many interstate disputes have been, and are being, submitted to these Courts rather than to arbitral tribunals. This notwithstanding, arbitration continues to play an important role in the settlement of international disputes. This is partially explained by some of the distinctive features of arbitration – such as the right of the disputing parties to appoint arbitrators of their choice, the flexibility of the parties to agree on the procedure to be used, the fact that arbitral tribunals are often created on an *ad hoc* basis for the purpose of deciding one single dispute, and the binding effect of an arbitral award – but also by the fact that interstate arbitration has developed and adapted to the changing needs of the international community. Of particular relevance for the purposes of this Study is that interstate arbitration has become increasingly "judicial" in character, in the sense that arbitral tribunals nowadays usually decide disputes on the basis of international law, rather than on the basis of "equity", or "law and equity".[203] One important step in this development was the Alabama Claims Arbitration of 1871[204] where the parties agreed to apply the so-called Washington Rules on the duties of neutrals. It has been suggested that the Alabama Claims Arbitration is much more of a watershed in the

[202] *Cf.* Brownlie, The Rule of Law in International Affairs (1998) 110, where it is said that: "/i/n its modern form arbitration does not differ essentially from adjudication ...".

[203] *See* e.g. Gray & Kingsbury, note 141, *supra*, at 103, discussing interstate arbitration since 1995: "If anything there has been an increase in the legal character of arbitration. The *ad hoc* agreements that have in fact established arbitral tribunals since the war overwhelmingly refer to international law as the applicable law" (footnote omitted).

[204] *See* p. 44 *et seq.*, *supra*.

history and development of interstate arbitration than the *Jay Treaty Arbitrations*[205]. Another important example of the parties choosing the law and/or rules to be applied by the arbitrators is the *British Guyana and Venezuela Boundary Dispute* where the parties agreed on rules with respect to title to territory.[206] Also in the Eritrea–Yemen Arbitration did the parties agree on the law to be applied – they referred to the Law of Sea Convention and "any other pertinent factor".[207]

While interstate arbitration was not necessarily always a legal procedure until the end of the nineteenth century – with arbitrators often acting as mediators and conciliators – most arbitral tribunals in the twentieth century, and particularly after the Second World War, usually have applied international law, unless the parties have given other instructions to the arbitrators.[208]

As indicated above, during this century the number of interstate arbitrations has decreased. The importance and utility of arbitration as a method to settle international disputes cannot, however, be measured only by the number of actual arbitrations. There seems to be a clear tendency in modern treaty practice to provide for arbitration as the preferred dispute settlement mechanism.[209]

[205] *See* Roelofsen, note 9, *supra*.

[206] *See* p. 49 *et seq.*, *supra*.

[207] *See* p. 71 *supra*.

[208] *Cf.* Gray & Kingsbury, note 141, *supra*, at 104 where it is said: "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."

[209] *See* e.g. Sohn, The Role of Arbitration in Recent International and Multilateral Treaties, Virginia Journal of International Law (1991) 91; Brownlie, note 202, *supra*, at 117–120.

CHAPTER 3 – Applicable Law in Interstate Arbitration

3.1 Introduction

The purpose of Chapter 3 is to discuss the law to be applied in interstate arbitration. Such a discussion is obviously based on the assumption that "law", however defined, does, and/or should, play a role in interstate arbitration. As a preliminary issue, it is necessary to try to ascertain if this assumption is correct.

In the preceding chapter, I have described the history and development of interstate arbitration.[1] As explained there, modern arbitration is deemed to have begun with the Jay Treaty of 1794 between the United States and Great Britain[2]. Its popularity increased after the *Alabama Claims Arbitration* of 1872.[3] From the Jay Treaty until the end of the 19th century arbitral tribunals were often instructed by the parties to decide disputes on the basis of "principles of justice and equity"[4] which frequently included compromises. Gradually during the 20th century, however, arbitral tribunals were instructed to resolve disputes according to law. This development lead commentators to focus on the nature of interstate arbitration.[5] This issue, which has long been debated by legal scholars, presents two basic positions, *viz.*, *that* arbitration is diplomatic in character – sometimes constituting an extension of the diplomatic process – and aims at finding a solution which both parties find fair and

[1] *See* p. 34 *et seq.*, *supra*.
[2] *See* pp. 36–39, *supra*.
[3] *See* pp. 44–47, *supra*.
[4] *See* p. 40 *et seq.*, *supra*.
[5] *See* in particular M.C.W. Pinto, The Prospects for International Arbitration of Interstate Disputes, in Soons (ed.), International Arbitration: Past and Present (1989) 63–99; *Id.* Structure, Process, Outcome: Thoughts On the 'Essence' of International Arbitration, in Muller & Mijs (eds.), The Flame Rekindled: New Hopes for International Arbitration (1994) 43–66.

acceptable, *and that* arbitration is a judicial process resulting in decisions based on the application of legal principles.

If one were to view interstate arbitration as largely diplomatic in nature, the role of law would inevitably be secondary, or much less important than if interstate arbitration is perceived as a judicial process.

Lauterpacht was critical of the proposition that interstate arbitration is diplomatic in nature and that

> "... arbitral tribunals, although bound to apply law, need not somehow apply strict law; that their function lies midway between the application of law and adjudication ex aequo et bono; and that, therefore, the reference to these of disputes other than those concerning respective rights introduces the possibility of the law being changed in accordance with justice and political requirements."[6]

Lauterpacht took the view that the judicial character of interstate arbitration was a historical fact and a matter of positive international law.[7]

In his writings Pinto has, on the other hand, argued that the Hague Conventions of 1899 and 1907, respectively, confirm the diplomatic character of interstate arbitration.[8] He goes on to describe what he calls the trend towards judicial arbitration[9] culminating, in his view, in the International Law Commission's Model Rules on Arbitral Procedure, completed in 1958.[10]

As previously described[11], the Model Rules were eventually "merely brought to the attention of Governments for their consideration ...".[12] Pinto quotes with approval statements made by the commission's Special Rapporteur in summarizing critical views on the Commision's proposal to the effect that it would undermine the traditional diplomatic character of interstate arbitration and transform it into adjudication.[13]

[6] Lauterpacht, The Function of Law in the International Community (1933) 379.
[7] *Id.*, at 381.
[8] Pinto, Structure, Process, Outcome: thoughts on the 'Essence' of International Arbitration, *supra* note 5, at 44–51.
[9] *Id.*, at 51–58.
[10] *Id.*, at 54.
[11] *See* p. 65, *supra.*
[12] Pinto, note 8 *supra*, at 55.
[13] The Special Rapporteur said the following: "The Commission's draft would distort traditional arbitration practice, making it into a quasi – compulsory jurisdictional procedure, instead of presenting its classical diplomatic character, in which it admittedly produces a legally binding, but final, solution, while leaving Governments considerable freedom as regards the conduct and even the outcome of the procedure, both wholly dependent on the form of the *compromis*", as quoted by Pinto, note 8, *supra*, at 55.

It would seem that the advocates of interstate arbitration as being diplomatic in nature, are concerned that the judicial character of arbitration would lead to inflexibility which in turn would decrease its appeal to governments and consequently the prospect of it being accepted by states in general as a method for solving international disputes.[14] Even though it is not clear what the "diplomatic nature" of arbitration really means, one idea seems to be that arbitrators could reach compromise decisions and/or bring about negotiated settlements: for example, it has been suggested that arbitrators may decide *ex aequo et bono*[15] unless the parties have agreed to exclude it.[16]

Although the present author finds the discussion of the nature of arbitration by and large sterile today – an aspect which will be addressed shortly – it is in his opinion doubtful that the diplomatic nature of arbitration would generate the positive effects hoped for. On the contrary, it is more likely – it is submitted – that an arbitral award with well drafted reasons based on law and legal principles would be more easily accepted by the parties, even for the loosing side. Consequently, arbitration of a judicial character would seem to be more likely to increase the willingness of states to resort to arbitration. This is the conclusion also of one well-known commentator in the field of arbitration:

> "It /interstate arbitration/ has shared with adjudication by international courts the fate of being subjected to a general hesitation of states to submit to future binding third party dispute settlement. But in recent decades, states have shown to prefer international arbitration to the adjudication by international courts especially in view of the greater influence they have on the selection of arbitrators and the arbitral procedure in concrete cases. If one looks for trends, it may be said that bilateral arbitration has been more widely acceptable for limited fields of economic cooperation where the cooperation in the interest of all participating states can only be assured if disputes are not left open but brought to a final decision in due course." [17]

As already mentioned, however, in practice states still seem to be reluctant to refer disputes to third party settlement, be it arbitration or adjudication by the International Court of Justice.[18] One of the primary reasons

[14] Pinto, note 8, *supra*, at 45 and 65.

[15] For a definition and discussion of the concept of *ex aequo et bono*, *see* pp. 93–95, *infra*.

[16] *Cf.* Pinto, note 8, *supra* at 49.

[17] Böckstiegel, Dispute Settlement by Intergovernmental Arbitration, in Petersman & Jaenicke (eds.). Adjudication of International Trade Disputes in International and National Economic Law (1992) 74.

[18] *Cf.* e.g. the following statement by Dean Rusk, former US Secretary of State: "A review of this checklist of matters that have come before the Security Council will show few

for this state of affairs seems to be the reluctance to give up control over the dispute – and to subject themselves to the risk of losing; many states are simply unwilling to take that risk.[19] By the same token it is unlikely that the nature of interstate arbitration – as being either diplomatic or adjudicative – will have significant impact on the willingness of states to accept third party settlement of international disputes.

Moreover, it is probably fair to state, that today it is accepted that modern interstate arbitration has developed into an adjudicative rather than diplomatic process. Brownlie, for example, provides the following characterization:

> "In recent times the distinction between arbitration and judicial settlement has become formal. The contrasts are principally these: the agency of decision in arbitration would be designated 'arbitral tribunal', 'umpire'; the tribunal consists of an odd number, usually with national representatives (but this element may be present in standing courts); the arbitral tribunal is usually created to deal with a particular dispute or class of disputes; and there is more flexibility than there is in a system of compulsory jurisdiction with a standing court."[20]

As mentioned above, in the opinion of the present author, the discussion of the nature of arbitration is by and large sterile. The explanation is this:

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disputes which could have been resolved by arbitration. Differences among the parties have been too wide and too deep. Many issues seem to be too vital to the security or other national interests of the contending parties to be submitted to third party determination"; in The Role and Problems of Arbitration with Respect to Political Disputes, in Carbonneau (ed.) Resolving Transnational disputes Through International Arbitration (1984) 16–17, *see* also Bilder, Some Limitations of Adjudication as an International Dispute Settlement Technique, in Carbonneau, *op. cit.*, at 3, where it is said: "Everyone knows that nations have resisted third-party settlement of their disputes and that adjudicative techniques thus far have played a very limited role in their relations. While nations pay lip service to the ideal of judicial settlement and often include compromissory clauses in their treaties, only rarely do they submit significant disputes to impartial tribunals".

[19] *See* e.g. Bilder, International Dispute Settlement and the Role of International Adjudication, in Ku & Diehl (eds.), International Law. Classic and Contemporary Readings (1998) 242. Bilder goes on to list twelve additional possible disadvantages of adjudication, *ibid.*, at 242–246.

[20] Brownlie, Principles of Public International Law (5th ed. 1998) 705 (footnotes omitted); *see* also McWhinney, The International Court As Constitutional Court and the Blurring of the Arbitral/Judicial Processes, in Muller & Mijs (eds.) *op. cit.* at 85, where it is said: "I do not think any intellectually persuasive distinction can be made, today, between arbitration and adjudication, viewed as a process of third-party decision-making", and Sohn, The Role of Arbitration in Recent International Multilateral Treaties, in Carbonneau (ed.) *op. cit.*, at 27, where it is said: "In some instances, interstate arbitration differs from international adjudication only in the method of selection of the decision makers; in other cases international arbitration may resemble commercial arbitration".

Arbitration is consensual in nature, i.e. it can come about only as a result of an agreement between the disputing parties; arbitrators derive their authority from this agreement. The will of the parties is therefore what ultimately determines what arbitration is – if the parties want it to be diplomatic, then it will be diplomatic; if they wish it to be adjudicative, then it will be adjudicative. The extent to which parties can express their will – party autonomy – is consequently of central importance to arbitration, both interstate and international commercial arbitration. The realization that party autonomy is a fundamental principle – a *sine qua non* – for the two aforementioned forms of international arbitration, is one sign of the erosion of the perception that there are fundamental differences between interstate arbitration and international commercial arbitration.[21]

The purpose of Chapter 3 is to discuss the law to be applied in interstate arbitration. I shall be focusing on the law applicable to the merits of a dispute, and thus leave procedural aspects outside the discussion.[22] The question of applicable law falls into two broad categories, *viz.*, when the parties have exercised their autonomy and chosen the applicable law themselves, and when no such choice has been made. These aspects are discussed in Sections 3.3 and 3.4 below. The discussion will at this stage of the Study be of a general nature, i.e. it will not focus specifically on extinctive prescription.

As alluded to above, party autonomy runs like an undercurrent in all forms of arbitration. Even though no official statistical data is available, it is safe to assume that the number of international commercial arbitrations is much greater than the number of interstate arbitrations. As a consequence, the question of applicable law has typically been discussed more often with respect to international commercial arbitrations. Section 3.2 therefore addresses applicable law in international commercial arbitration, with a view to providing an introduction to the problems involved, as well as a background to the subsequent discussion of applicable law in interstate arbitration in Section 3.3. Section 3.2 is also intended to illustrate the level of detail, and magnitude of varying problems, involved in questions of applicable substantive law in international commercial arbitration. The purpose is *not* to provide an exhaustive analysis of the question of applicable law in international commercial arbitration, but rather to highlight the more frequent and important problems. It must also be noted that no comparison *stricto sensu* between interstate and international commercial arbitration is intended in Chapter 3. That is

[21] *See* pp. 24–26, *supra*.

[22] For a discussion of whether or not the concept of extinctive prescription is of a procedural or substantive character, *see* p. 320 *et seq.*, *infra*.

why there is no discussion of applicable law in international commercial arbitration in situations when the parties have made no choice of law.[23] The purpose of Section 3.2 is primarily to discuss and illustrate the importance of party autonomy in international commercial arbitration, as well as to demonstrate how deeply entrenched it is in this form of arbitration. One important aspect of party autonomy is the restrictions on the same. In fact, it is not possible to understand the true meaning of party autonomy without analyzing its outer limits. Consequently, the restrictions on party autonomy in international commercial arbitration are explored in more detail in Section 3.2.2, particularly the concepts of public policy and so-called mandatory rules of municipal law. The detailed discussion of party autonomy in international commercial arbitration is necessary for evaluation of the possibilities of cross-fertilization between this form of arbitration and interstate arbitration. Such evaluation also requires a detailed discussion of party autonomy in interstate arbitration, which is provided in Sections 3.3.1–3.3.5. As in the case of international commercial arbitration, it is of particular importance to review the restrictions on party autonomy in interstate arbitration, Section 3.3.6, and of interest to contrast them with the restrictions on party autonomy in international commercial arbitration.

Section 3.4 addresses the situation when the parties to an interstate arbitration have made no choice of law and/or rules to be applied to the merits of the dispute. The subsection provides a general overview of the rules of public international law using Article 38 of the Statute of the International Court of Justice as the point of reference. As mentioned above, no corresponding analysis is made with respect to international commercial arbitration.

Since one of the purposes of this Study is to explore the possibilities of cross-fertilization between interstate arbitration and international commercial arbitration,[24] it is necessary to address also the latter, occasionally in detail. Another consequence of this focus is that I am addressing scholars and practitioners in these two fields of arbitration. I have therefore found it both appropriate and necessary to discuss in a relatively detailed fashion party autonomy and its restrictions both in interstate arbitration and international commercial arbitration.

[23] This is, not surprisingly, the situation which typically presents arbitrators with the most difficult problems: for a discussion of this situation, *see* references made in footnotes 31, 40 and 63, *infra*.

[24] *See* pp. 24–26 *supra*.

3.2 Choice of Law by Parties and the Concept of Party Autonomy in International Commercial Arbitration

3.2.1 General Comments

As mentioned above, the principle of party autonomy is today considered to be one of the cornerstones of international arbitration.[25] Indeed, it would seem to be one of the principles which enjoy general application in the field of international arbitration. This principle was explained by Lalive in the following way:

> "There are few principles more universally admitted in private international law than that referred to by the standard terms of the 'proper law of the contract' – according to which the law governing the contract is that which has been chosen by the parties, whether expressly or (with certain differences or variations according to the various systems) tacitly.
>
> The differences which may be observed here between different national systems relate only to the possible limits of the parties' power to choose the applicable law or to certain special questions or to modalities, but not to the principle itself, which is universally accepted."[26]

Generally speaking, under the principle of party autonomy, the parties are free to select themselves the law to govern their legal relationship. It should be noted, however, that there are certain limitations and restrictions on party autonomy.[27]

The principle of party autonomy seems to have been first developed by academic commentators. One of the leading commentators, Professor Niboyet, has attributed the idea to the French legal philosopher Dumoulin,[28] but its origin may be even earlier than that.[29] Academic commentators

[25] *See* p. 82, *supra.*

[26] Quoted from ICC Award No. 1512, doc. No. 410/1935 dated 24 February 1971. In this case Lalive was sitting as the sole arbitrator in a dispute between an Indian corporation and a Pakistani corporation.

[27] *See* discussion in Section 3.2.5, *infra.*

[28] *See* e.g. Niboyet, La théorie de l'autonomie de la volonté, 16 Rec. de Cours 1 (1926-I) 9 and Gihl, Skuldstatutet, in Liber Amicorum for Nial (1966) 178–180. – It is interesting to note that in his Hague Lectures Niboyet was quite critical of party autonomy and the choice of law. Some twenty years later, however, he accepted party autonomy, *see* Niboyet, Traité de Droit International Privé (1948) Vol. V, 51–60.

[29] *See* Lew, Applicable Law in International Commercial Arbitration. A study in Commercial Arbitration Awards (1978) 73, and Nygh, Autonomy In International Contracts (1999) 3–14.

having paved the way for this principle, it has now been accepted and adopted by national courts in virtually all countries of the world.[30]

If national courts thus are prepared to accept and recognize the principle of party autonomy, there does not seem to be any reason for arbitral tribunals not to do so. On the contrary, there are even more cogent reasons for arbitral tribunals to accept party autonomy. This is above all explained by the fact that arbitral tribunals owe their allegiance only to the parties, and to the arbitration agreement entered into by them, and typically not to any national law as do courts with respect to their respective national laws. The arbitrators derive their competence and authority solely from the arbitration agreement, without which they cannot function. Consequently, by applying the law designated by the parties, the arbitrators simply carry out the functions entrusted to them by the parties.

This being said, it must be emphasized that arbitral tribunals do not and cannot operate in a legal vacuum, in the sense that they do minimally depend on a national law permitting the very existence of arbitration and of arbitral tribunals in the territory within which the national law in question is applicable.[31] This fundamental premise does not, however, negate the above-mentioned importance of the arbitration agreement as the source for the arbitrators' authority.

[30] *See* Lew, *op. cit.*, at 73–75; Lew states, *inter alia*, that "despite their differences, common law, civil law and socialist countries have all equally been affected by the movement towards the rule allowing the parties to chose the law to govern their contractual relations", *Id.* at 75; and Lowenfeld, Party Autonomy: The Triumph of Practical Considerations, in International Litigation And The Quest For Reasonableness. Essays in Private International Law (1996) 202, where it is stated: "Today, the debates about selection of the applicable law by the parties to a contract seem a bit old-fashioned. The Rome Convention states as its main principle, '/a/ contract shall be governed by the law chosen by the parties'; so does the new German Law on Conflict of Laws; so does the new Swiss Law on Private International Law; and so on". (footnotes omitted).

[31] This touches on the much debated question of whether it is possible to insulate an international arbitration from the procedural and/or arbitration law of the country where the arbitration takes place, the so-called *lex arbitri*. This debate is often referred to as the delocalisation debate. For a thorough discussion of this and related issues, *see* Toope, Mixed International Arbitration (1990). Toope uses the term "delocalisation" both with respect to procedural law – as has been done above – and to substantive law; in the latter respect Toope defines the problem as the possibility to apply to the substance of a dispute a system of law not connected with any single national system of law. (*See* Toope, *ibid.* at 17–18) – When the term delocalisation is used in this Study, it refers only to the *procedural* aspects. The traditional approach has been that an international arbitral tribunal is governed by – as far as procedural questions are concerned – *lex arbitri*, *see* Mann, Lex Facit Arbitrum in Sanders (ed.) International Arbitration. Liber Amicorum for Martin Domke (1967) 161. – Much of the discussion concerning delocalisation has been confusing, but the ultimate objective seems to be to free international arbitration from any limitations which may exist

in various countries with a view to minimizing the legal significance of the place of arbitration. *See.* e.g., Fouchard, L'Arbitrage Commercial International 22–27 (1956); Goldman, Arbitrage, in Droit International Privé No. 128, 195. *See* also Paulsson, Arbitration Unbound: Award Detached from the Law of Its country of Origin, International & Comparative Law Quarterly (1981) 358; Paulsson, Delocalisation of International Commercial Arbitration: When and Why it Matters, International & Comparative Law Quarterly (1985) 53.

The theory of delocalized awards seems to have its origins largely in considerations of immunity in connection with arbitrations in which one party is a sovereign state. One example is *Saudi Arabia v. Arabian American Oil Co. (Aramco)*, International Law Reports, Vol. 27 (1963) 117, which took place in Geneva. The arbitral panel invoked rules of public international law on sovereign immunity to conclude that a sovereign state would not be subject to the law of another state, and found that Swiss law could therefore not be applied in the arbitration. For a thorough discussion of the origin and development of the theory, *see* Redfern and Hunter, Law and Practice of International Commercial Arbitration 55–64 (1986).

Despite the lively discussion that has taken place on delocalized awards, it must be very rare in practice for parties to state *expressly* that an arbitration and a resulting award should be delocalized or a-national. An instructive example of the difficulties such an arbitration can create is the infamous award in the *SEE v. Yugoslavia* case, which, thirty years after being rendered remains the subject of a challenge for voidness. An overview of all proceedings in connection with this case appears in van den Berg, The New York Convention of 1958 (1981) 41–43.

It should be mentioned in connection herewith, however, that there is one category of awards that may properly be called delocalized, viz., those rendered pursuant to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Citizens of Another State – so-called ICSID awards. The arbitration rules of the Washington Convention include, for example, provisions on challenges of awards on grounds of voidness and voidability, *see* discussion on p. 103 *et seq., infra*; in addition, ICSID awards are directly enforceable in signatory countries. *See*, e.g., the Swedish Act (1966:735) On Recognition and Enforcement of Awards in Certain International Investment Disputes. – The debate on delocalized arbitration has recently found a new question to focus on *viz.*, whether or not an arbitral award which has been set aside by a court in the country where the arbitration took place can nevertheless be enforced in another country; commentators in favor of enforcement include Gaillard, Enforcement of a Nullified Foreign Award, New York Law Journal, (1997) p. 3; Paulsson, The Case for Disregarding LSA:s (Local Standard Annulments) under the New York Convention, American Review of International Arbitration (1996) p. 99; *id.*, Rediscovering the New York Convention: Further Reflections on Chromalloy, Mealey's International Arbitration Report (April 1997) p. 20; Sampliner, Enforcement of Foreign Arbitral Awards After Annulment in the Country of Origin, Mealey's International Arbitration Report (September 1996) p. 22; commentators against enforcement include Schwartz, A Comment on Chromalloy: Hilmarton à l'americaine, Journal of International Arbitration (1997) 125; Charavi, Chromalloy: Another view, Mealey's International Arbitration Report (January 1997) p. 21, *id.*, A Nightmare Called Hilmarton, Mealey's International Arbitration Report (September 1997) p. 20; Hulbert, Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone, ICSID Review – Foreign Investment Law Journal (1997) 124. For a summary of this debate, see Hobér, Sista striden mellan internationalister och territorialister? – Berättelsen om Hilmarton och Chromalloy, in Liber Amicorum Ulf K. Nordenson (1999) 195.

As far as international commercial arbitration in general is concerned there is ample proof of the existence of the freedom of the parties to choose the law applicable to their contract.

The 1961 European Convention on International Commercial Arbitration, for example, stipulates in Article VII that: "The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute".

The UNCITRAL Arbitration Rules, provide: "The Arbitral Tribunal shall apply the law designated by the parties as applicable to the substance of the dispute".[32] Also the UNCITRAL Model Law on International Commercial Arbitration contains a rule recognizing party autonomy, *viz.*, Article 28(1), the first sentence of which stipulates that "/t/he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute".

Furthermore, the rules of most arbitration institutions contain provisions accepting party autonomy. Suffice it in this context to refer to the ICC Arbitration Rules which stipulate that "/t/he parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute".[33]

Given the widespread recognition of the principle of party autonomy in international conventions and in the rules of arbitration institutions, it should come as no surprise that the principle also enjoys widespread recognition in arbitral practice, an example of which is the arbitral award rendered by Lalive referred to above.[34] Some commentators have even characterized the principle of party autonomy as forming part of "the lex mercatoria and transnational *ordre public*"[35] and to be "a general principle of law recognized by civilized nations".[36] It should be noted, however, that the general and widespread recognition of party autonomy has by no means been uncontroversial, but is the result of a long and sometimes difficult evolutionary process.[37]

[32] Article 33(1) of the UNCITRAL Arbitration Rules.

[33] Article 17(1) of the ICC Rules of Arbitration.

[34] *See* note 26, *supra*. *See* also the overview of arbitral practice in Lew, *op. cit.*, at 86 *et seq.*

[35] *See* Berger, International Economic Arbitration (1993) at 490, with further references.

[36] Professor Lando, in International Encyclopedia of Comparative Law, Vol. III, Chapter 24, 33. – Another commentator states that: "The support of party autonomy is so widespread that it can fairly be called a rule of customary law", Lowenfeld, Party Autonomy: The Triumph of Practical Considerations, in International Litigation and the Quest for Reasonableness, Essays in Private International Law (1996) 200.

[37] *Cf.* Lew, *op. cit.*, at 75 *et seq.*

The discussion above has focused primarily on international commercial arbitration, i.e. not on inter-state arbitration. However, the recognition of the principle of party autonomy is widespread also with respect to inter-state arbitrations.[38]

In this connection mention must also be made of two important sets of arbitration rules which fall in the category of mixed arbitrations, i.e. between traditional international commercial arbitrations and interstate arbitrations, *viz.*, the ICSID Arbitration Rules based on the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States and the Rules of the Iran–United States Claims Tribunal.

With respect to the former, which, as the title indicates, deals with disputes between states and private parties, Article 42 explicitly enshrines party autonomy by stipulating that "/t/he arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute".[39]

As far as the Iran–United States Claims Tribunal is concerned, it should first be noted that the tribunal in question is somewhat of a hybrid, in the sense that some of the cases tried by it concern interstate disputes, i.e. disputes between the two states, Iran and the United States – and often involve the application of public international law – whereas the majority of the cases are of a commercial nature, in the sense that they arise out of international commercial transactions and involve at least one private party. As mentioned earlier, the Tribunal was established as one element of the arrangements between the USA and Iran leading to the release of American hostages held in Iran in January 1981. The various agreements entered into between the United States and Iran are contained in the so-called Algiers Accords and consist of seven interrelated documents.[40] One of the central documents in the Algiers Accords is the Claims Settlement Declaration which established the legal framework for

[38] *See* p. 134 *et seq.*, *infra*.

[39] In one ICSID award the following statement was made: "Under the doctrine of party autonomy, parties to a contract are free to choose for themselves the law which is to govern their relationship. This doctrine has gained almost universal acceptance, particularly in international commercial transactions"; *LETCO* v. *Republic of Liberia*, Award dated 24 October 1984 and 31 March 1986, reprinted in Yearbook Commercial Arbitration (1988) 35, 42–43. – For further discussion of ICSID arbitrations, *see* p. 103 *et seq.*, *infra*.

[40] The full text of the Algiers Accords is reprinted in Yearbook Commercial Arbitration (1982) 256. – For a general discussion of the background and role of the Tribunal *see* e.g. Lagergren, Iran–United States Claims Tribunal, Dalhousie Law Journal (1990) 505; Mangård, The Hostage Crisis, the Algiers Accords and the Iran–United States Claims Tribunal, in Liber Amicorum Lars Hjerner, Studies in International Law (1990) 313; Brower, The Iran–United States Claims Tribunal, 224 Hague Recueil (1990-V) 127 *et seq.*; van Hof,

the Tribunal. Article III of the Claims Settlement Declaration stipulates that the Tribunal shall apply the UNCITRAL Arbitration Rules, except as modified by the parties or the Tribunal.[41] Further, Article V of the Declaration provides that "/t/he 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 applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."

The Final Tribunal Rules of Procedure were adopted on 3 May 1983. As far as applicable law is concerned Article V of the Claims Settlement Declaration and Article 33 of the UNCITRAL Arbitration Rules were merged in the following way:

> "1. The arbitral 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 arbitral tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances. 2. The arbitral tribunal shall decide *ex aequo et bono* only if the arbitrating parties have expressly and in writing authorized it to do so."[42]

It is apparent from the provision quoted above that Article 33 of the Tribunal Rules has changed Article 33 of the UNCITRAL Arbitration Rules quite significantly, even to the extent of doing away with party autonomy. The Tribunal is consequently under no *obligation* to apply the law chosen by the parties. In practice, however, any choice of law by the parties will undoubtedly play, and has in fact played, an important role for the Tribunal in determining the applicable law[43], but the fact remains that the

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Commentary on the UNCITRAL Arbitration Rules: The application by the Iran–United States Claims Tribunal (1991); Baker & Davis, The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran–United States Claims Tribunal (1992); Westberg, International Transactions and Claims Involving Government Parties; Case Law of the Iran–United States Claims Tribunal (1990), Pellonpää & Caron, The UNCITRAL Arbitration Rules as Interpreted and Applied. Selected Problems in Light of the Practice of the Iran–United States Claims Tribunal (1994); Aldrich, The Jurisprudence of the Iran–United States Claims Tribunal. An Analysis of the Decisions of The Tribunal (1996) and Brower & Brueschke, The Iran–United States Claims Tribunal (1998).

[41] Article III reads: "Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing three-member tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal".

[42] Article 33 of the Final Tribunal Rules of Procedure, dated 3 May 1983.

[43] Pellonpää & Caron, *op. cit.*, at 98–99.

Tribunal has been given an unusual, even extraordinary, freedom in determining the applicable law. This departure from the principle of party autonomy is probably explained by the extraordinary circumstances leading to the establishment of the Tribunal and by the variety of claims tried by it. This is at least the explanation offered by the Tribunal itself in one of its awards, *viz.*, *CMI International Inc.* v. *The Ministry of Roads and Transportation of the Islamic Republic of Iran*, where it was said that the aforementioned freedom of the Tribunal is "consistent with and perhaps almost essential to, the scope of the tasks confronting the Tribunal, which include not only claims of a commercial nature ... but also claims involving alleged expropriations or other public acts, claims between the two governments, certain claims between banking institutions, and issues of interpretation and implementation of the Algiers declarations".[44] Even if the Tribunal Rules thus offer an example of where party autonomy has not been accepted, it is indeed a rare example in international arbitration and does not infringe on the validity of the general acceptability of the principle of party autonomy in international arbitration.

3.2.2 The Rationale of Party Autonomy

As I have mentioned above, the principle of party autonomy enjoys almost universal recognition in municipal law, by national courts, in international conventions on arbitration, in international arbitration rules and by international arbitral tribunals, public as well as private. The advantages of the principle would seem to be clear enough: it achieves the three traditional objectives of any normative act, *viz.*, certainty, predictability and uniformity.[45] Needless to say, in the context of international commercial arbitration the principle does not guarantee these three objectives on a *general level*, but certainly does so for the parties. By

[44] As quoted by Pellonpää & Caron, *Id.* – This distinctive feature of the Tribunal has prompted a statement by one commentator to the effect that the Tribunal's "case law shall be seen on a sliding scale from cases where national law is not applied at all but 'overruled' by general principles of international law, to cases where international law was applied directly, without any reference to national law", *see* van Hof, *op. cit.*, at 432. – For a more critical appraisal of the Tribunal's decisions concerning applicable law, *see* Toope, Mixed International Arbitration between States and Private Persons (1990) 370 *et seq.*; on p. 376, for example, the following statement is found: "In many cases the applicable law is left vague, or the decision of a Chamber to apply a given substantive law remains unexplained.", and on p. 375: "The striking feature of many awards is that they nowhere state expressly what sources of law are being applied".

[45] *Cf.* e.g. American Law Institute, Restatement of the Law, Conflict of Laws, Second (1971) Vol. I, para. 6(2)f, 10, 15–16.

allowing them to choose themselves the law governing their relationship they can be certain of what law will be applied to their dispute. The effect and interpretation of their contract becomes predictable and a uniform resolution of their dispute is ensured irrespective of who will try the dispute. This is correct, at least as a matter of principle, it being understood that different arbitrators may well apply and interpret the designated law differently.[46] Even so, however, party autonomy eliminates an additional, potential layer of complication in that the issue of what substantive law to apply need not be considered by the arbitrators.

That certainty, predictability and uniformity are desirable objectives in any legal relationship – in particular perhaps in international commercial and economic relations – is self-evident and hardly requires further explanation. On this background, and taking into account the *de facto* widespread recognition of party autonomy, it could perhaps be argued that there is no need to justify the principle by referring to any particular national system of private international law. Some commentators even argue that the principle of party autonomy has developed into a transnational conflict of laws rule which does not need the backing of any national system of law.[47]

This statement raises again the question of the extent to which an international arbitration is, must be, or should be, linked to any particular system of national law. This issue is particularly relevant to international commercial arbitrations. As far as the principle of party autonomy is concerned, it is submitted that this debate – which has generated a multitude of scholarly contributions[48] – is largely irrelevant from a practical point of view, at least with respect to recognition *per se* of party autonomy.[49] This is so primarily because the principle of party autonomy is now recognized in virtually all systems of law.

[46] As will be discussed below, there are also certain restrictions and limitations on the parties' freedom to choose the applicable substantive law, which *per se* may influence the desired certainty, predictability and uniformity; in addition such restrictions and limitations may be understood and interpreted differently by different arbitrators. – *See* p. 106 *et seq.*, *infra*.

[47] *See* e.g. Lew, *op. cit.* at 81–83 and McNair, The General Principles of Law Recognized by Civilized Nations, British Yearbook of International Law (1957) at 5: "It is submitted that an entirely adequate basis for the choice by tribunals of an appropriate system can be found in the intention of the parties, manifested either by express provision in their contract, as sometimes happens, or by implication from the terms of the contract and the nature of the transaction envisaged by it."

[48] *See* note 31 *supra*.

[49] The nexus between a particular national system of law and an international commercial arbitration may, however, be relevant when it comes to determining the limitations and restrictions on party autonomy, *see* p. 106 *et seq.*, *infra*.

One additional, practically important, advantage of party autonomy must be mentioned. By allowing the parties to choose themselves the law to be applied to their dispute, they are prevented from alleging, once the award has been rendered, that it was decided on the basis of some unjust or unfair law, a circumstance which helps to ensure the final and binding effect of an arbitral award.[50]

3.2.3 The Content of Party Autonomy

On the basis of the foregoing, it is submitted that we can safely assume that party autonomy *per se* is recognized in international arbitration, both public[51] and private, and that such recognition is based on a sound rationale. The next question to be answered is then: *what* exactly can the parties choose? Must they exercise their autonomy so as to choose a *national* law, or are there other possibilities?

Experience shows that with respect to international commercial arbitration a *national* law is mostly chosen by parties. With respect to international commercial contracts, particularly so-called state contracts, i.e. contracts between a foreign state and a private party, it is not difficult to sympathise with the following statement made by Baxter and Sohn:

> "No contract or concession exists in a legal vacuum. It draws its binding force, its meaning, and its effectiveness from a legal system, which must be so developed and refined as to be capable of dealing with the great range of problems to which the performance and violation of promises gives rise. 'Pacta sunt servanda' is undoubtedly the basic norm of any system of law dealing with agreements, but the principle speaks on such a high level of abstraction that it affords little or no guidance in the resolution of concrete legal disputes relating to agreements."[52]

The perceived need to anchor an international commercial contract in a system of law, may be understandable in a situation where the arbitrators must determine the applicable law in the absence of a choice of law by the parties. However, in so far as one is trying to determine the ultimate *content*, or put differently: the outer limits, of the principle of party

[50] This assumes, of course, that the arbitrators have in fact applied the law chosen by the parties; for a discussion of the consequences when the arbitrators have applied a law other than the one chosen by the parties, *see* p. 96 *et seq.*, *infra*.

[51] With respect to interstate arbitration, this is explained and discussed on p. 134 *et seq.*, *infra*.

[52] Quoted from the Harvard Draft on the Responsibility of States, in Böckstiegel, The Legal Rules Applicable in International Commercial Arbitration Involving States or State-controlled Enterprises, in International Chamber of Commerce, Court of Arbitration, Documents of the 60th Anniversary Conference (1983) 61.

autonomy such a requirement does not provide any guidance. In fact, the doctrine of party autonomy allows the parties to choose any set of rules or principles – whether they be characterized as "law", "rules of law" or anything else – to serve as the basis for resolving disputes, subject of course to any limitations and restrictions on party autonomy that may exist.[53] That this is so, is evidenced by the fact that parties are generally allowed to have arbitrators determine their disputes as *amiable compositeurs* or *ex aequo et bono*, i.e. without applying any law or rules of law at all; this possibility represents the outer limit of party autonomy in so far as its content is concerned.[54] There are no generally accepted detailed definitions of *amiable composition* and *ex aequo et bono*, respectively. Ordinarily, however, it means that arbitrators may disregard legal and contractual requirements with a view to arriving at an equitable and just resolution of the dispute, provided that the parties have authorized the arbitrators to so act.[55] The theoretical foundation underlying this possibility is the nature of arbitration, i.e. the fact that it is a consensual method of settling disputes depending on the agreement of the parties which agreement constitutes the sole authority for the arbitrators. Consequently, if the parties instruct the arbitrators to act as *amiable compositeurs* or to act *ex aequo et bono*, the arbitrators have an obligation in relation to the parties to follow such instructions.[56]

In international arbitration today, both public and private, it is generally accepted that parties can authorize arbitrators to act as *amiables compositeurs* or *ex aequo et bono*.[57] This is illustrated by the fact that all major sets of international arbitration rules contain provisions allowing

[53] For a discussion of such potential limitations and restrictions *see* p. 106 *et seq.*, *infra*.

[54] Again: the limitations and restrictions on party autonomy will be discussed on p. 106 *et seq.*, *infra*.

[55] When reference is made to "equity" and "equitable" in this connection, it is important to note that this is different from such terms as used in common law jurisdictions where they usually have a legal-technical meaning in that they refer to a system of specific rules and remedies, *see* Redfern & Hunter, *op. cit.* at 22. With respect to *amiable composition* and *ex aequo et bono*, "equity" and "equitable" are normally used in the sense of "fair" and "just" however nebulous these terms may appear.

[56] The proposition that the arbitrators have an obligation to follow the instructions of the parties as far as applicable law is concerned, is discussed on p. 101 *et seq.*, *infra*.

[57] With respect to interstate arbitrations, *see* e.g. Ralston, The Law and Procedure of International Tribunals (rev. ed. 1926) 36, 53; *Id.*; Supplement to 1926 Revised edition of the Law and Procedure of International Tribunals (1936) 18, 31; Simpson & Fox, International Arbitration: Law and Practice (1959) 140; Schlochauer, Arbitration, in Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 1 (1981) 24, and with respect to international commercial arbitration, Lew, *op. cit.*, at 123–124.

the parties to authorize the arbitrators to act in this way.[58] Needless to say, instructing arbitrators to act as *amiables compositeurs* or *ex aequo et bono* significantly reduces the possibilities for the parties to predict what rules or principles will be applied by the arbitrators and thus the outcome of the dispute. In all likelihood this also explains why parties relatively seldom confer such powers on arbitrators.[59] From a theoretical point of view, however, these concepts, which constitute the outer limit of party autonomy, are important in determining the content of party autonomy in international arbitration.

Having thus established the outer limit of party autonomy in so far as its content is concerned, it is clear that parties have a large variety of possibilities in exercising their autonomy. These possibilities include the following:[60]

1. The national law of either of the disputing parties;
2. The national law of a third, "neutral" country[61];
3. Several systems of law, or combinations of rules from several systems of law, or the principles common to more than one system of law;
4. General principles of law, either separately or in combination with one or several national laws;
5. Public international law, either separately, or in combination with one or several national laws;
6. International trade law (*lex mercatoria*);
7. *Amiable composition* or *ex aequo et bono*.[62]

[58] *See* Article 42(3) of the Washington Convention; Article 33(2) of the UNCITRAL Arbitration Rules; Article 28(3) of the UNCITRAL Model Law on Commercial Arbitration; Article 9(2) of the Model Rules of Arbitral Procedures (1958 Yearbook International Law Commission p. 83); Article 14(3) of the ICC Rules of Arbitration and Article 7(2) of the 1961 European Convention on International Commercial Arbitration (484 U.N.T.S. 364).

[59] *Cf.* e.g. Redfern & Hunter, *op. cit.* at 24 and Toope, *op. cit.* at 63 – There are, however, several examples in international arbitral practice. Under the Washington Convention, for example, the first case to be decided *ex aequo et bono* was *B&B* v. *Congo* (International Legal Materials (1982) 740) where the parties authorized the tribunal to decide *ex aequo et bono* during the course of the hearings. Another example under the Washington Convention is *Atlantic Triton* v. *Guinea* (Journal de Droit International (1988) 181).

[60] Similar lists of possibilities can be found e.g. in Böckstiegel, Arbitration and State Enterprises, Survey on the National and International State of Law and Practice (1984); Lalive, Contracts between a State or a State Agency and a Foreign Company, 13 International & Comparative Law Quarterly (1964) 987, 992 and Schwarzenberger, Foreign Investments and International Law (1969) 5.

[61] I have assumed that there is no requirement that the law chosen has "a reasonable connection" to the transaction, nor to the parties. This issue is discussed at p. 109 *et seq.*, *infra*.

[62] For a comprehensive discussion of *amiable composition*, *see* Loquin, L'amiable composition en droit comparé et international (1980).

Many of the options listed above have generated an abundance of scholarly writings which there is no need to review and discuss here.[63] I shall limit myself to a few selected comments of importance for explaining the content of party autonomy.

First, it must re-emphasized that there does not seem to be any requirement *per se*, that the parties choose a *national* system of law. Rather, they may choose any combination of rules and principles from different systems of national law, as they deem appropriate.

The reference in Article 33(1) of the UNCITRAL Arbitration Rules to "the law" and certain statements in the *travaux preparatoires*[64] could be understood as requiring the choice of a national system of law, or of a specific set of rules. The corresponding provision of the UNCITRAL Model Law does not refer to "the law", but rather to "rules of law". This language was chosen with a view to allowing the parties "to choose provisions of different laws to govern different parts of their relationship, or to select the law of a given state except for certain provisions ...".[65] At

[63] These writings, and the ensuing academic discussion, have primarily focused on so-called state contracts, i.e. contracts and arbitrations between states and private persons. Such arbitrations may give rise to complicated choice of law issues, in particular in situations when there has been an expropriation or confiscation by the state party. For a general discussion of applicable law in arbitrations between states and private persons, *see* e.g. Jennings, State Contracts in International Law, British Yearbook of International Law (1961) 156; Mann, The Proper Law of Contracts concluded by International Persons, British Yearbook of International Law (1959) 34; Mann, The Proper Law in the Conflict of Laws, International & Comparative Law Quarterly (1987) 437; Böckstiegel, *supra* note 52; Téson, State Contracts and Oil Expropriations, Virgina Journal of International Law (1984) 323; Greenwood; State Contracts in International Law – The Libyan Oil Arbitrations, British Yearbook of International Law (1982) 27; Stern, Trois arbitrages, un même problème, trois solutions, Revue de l'Arbitrage (1980) 2; Rigaux; Des dieux et des heros: Reflexions sur une sentence arbitrale, Revue Critique de droit international privé (1978) 435; Delaume, Transnational Contracts; Applicable Law and Settlement of Disputes (1985) Vol. 1, ch. 1, 1.; Lalive, Contracts between a State or a State Agency and a Foreign Company, International & Comparative Law Quarterly (1964) 987; Schwarzenberger, Foreign Investments and International Law (1969); Toope, *op. cit.*; Peter, Arbitration and Renegotiation of International Investment Agreements (1988); Regli, Contracts d'Etat et arbitrage entre Etats et personnes privées (1983); Paasivirtu, Participation of States in International Contracts and the Arbitral Settlement of Disputes (1990); Mann, State Contracts and International Arbitration, British Yearbook of International Law (1967) 1; Mann, The Aminoil Arbitration, British Yearbook of International Law (1983) 213.

[64] In discussing the meaning of Article 33(1), as excluding any provisions on *renvoi*, it would seem clear that the focus was on national systems of law; *see* Report of the UNCITRAL, 9th Session, United Nations General Assembly Resolution 31st Session, Suppl. No. 17, U.N. Doc. 19/31/17 para 172 (1976).

[65] *See* Report of the UNCITRAL, 18th Session, United Nations General Assembly Resolution 41st Session, Suppl. No. 17, U.N. Doc. A/40/17 para. 232 (1985).

the same time it was noted, however, that this possibility was recognized anyway by most legal systems under the more traditional approach represented by Article 33(1) of the UNCITRAL Arbitration Rules.[66] The present author would not wish to be read as undervaluing the fine art of drafting, but it is submitted that whether reference is made to "the law" or to "rules of law" is not decisive, since, as shown above, the principle of party autonomy would anyway allow the parties to combine several national laws, or to select different provisions from various laws. The principle of party autonomy as applied in international commercial arbitrations also allows the parties to choose rules which are not in force in any legal system, or provisions in a treaty or convention which has not yet entered into force; they may even choose Roman Law as applicable law if they so wish.[67]

Second, the reference to general principles of law in item 4 in the list above is not a reference to "the general principles of law recognized by civilized nations" found in Article 38.1(c) of the Statute of the International Court of Justice. The general principles referred to in the Statute form part of public international law as one of several *sources* of such law, and are typically not intended to be applied as a separate set of rules, or as a system of law.[68] This notwithstanding, there are a number of international arbitral awards – typically between states and private entities – where "the general principles of law" have been applied.[69] Although it is

[66] *Id.* at para 233. – Article 42(1) of the Washington Convention also refers to "rules of law" rather than to "the law". This language is also seen as a reference to the right of the parties to choose the legal rules they deem appropriate, even if such rules do not form part of an autonomous system of law, *see* e.g. Redfern & Hunter, *op. cit.*, at 90 and Hirsch, The Arbitration Mechanism of Investment Disputes (1993) 119. – The UNCITRAL Committee was referring to the concept of *dépeçage* – i.e. the possibility to apply different laws to one and the same contract or legal relationship – which is accepted in most legal systems.

[67] A related question is whether arbitrators must apply a specific law chosen by the parties as it was in force when they made their choice, or as it is at the time of resolving the dispute. The generally held view is that, in the absence of instructions by the parties, the arbitrators should apply the law as it is at the time of deciding the dispute, *see* e.g. Lew, *op. cit.*, at 136 and Hirsch, *op. cit.*, at 124.

[68] For a discussion of Article 38(1)(c) of the Statute of the International Court of Justice, *see* p. 222 *et seq.*, *infra*.

[69] The more well-known awards include Petroleum Development (Trucial Coast) Ltd. v. The Sheikh of Abu Dhabi, published in International & Comparative Law Quarterly (1952) 247 (In that case the sole arbitrator said, *inter alia*, the following: "The terms of that clause invite, indeed prescribe, application of principles rooted in the good sense and common practice of the generality of civilized nations – a sort of 'modern law of nature'. Id. at 250); Sapphire International Petroleum Ltd. v. National Iranian Oil Company, reprinted in International Legal Materials (1967) 136 (The contract in question did not contain any choice of law clause. The Iranian party had, however, entered into a number of similar contracts where reference had been made to "general principles of law". Referring

by no means clear, it would seem that for the most part when "the general principles of law" have been applied by arbitral tribunals they have not been applied as part of public international *stricto sensu*, but rather as a separate system of law.[70] It is beyond doubt that parties may exercise their autonomy in international commercial arbitration so as to choose the general principles of law. Such a choice would, however, seem to raise two major concerns, *viz.*, first and foremost: what are those principles, and secondly – on a more conceptual and theoretical level – the risk of confusing such general principles with the general principles referred to in the Statute of the International Court of Justice.

Generally speaking, it is probably fair to say that "the general principles of law" are not sufficiently developed and detailed to provide hard and fast rules for the resolution of detailed and complex legal issues. In fact, it would seem that the only "general principles" referred to in most of the arbitrations where such principles have been applied are "*pacta sunt servanda*" and the principle of "good faith".[71] The general principles of law have almost exclusively been applied in arbitrations involving state contracts, i.e. contracts concluded by a state and a private entity. In applying the general principles of law to such contracts, there is a risk of confusing contracts with treaties. Treaties are governed by a separate body of rules, forming part of public international law, which has been

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primarily to this fact the arbitrator applied "general principles of law"); In the three arbitrations arising out of the Libyan oil nationalisations, the choice of law clause was identical in the three contracts – it read: "This concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and, in the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals". In Texas Overseas Petroleum Company and California Asiatic Oil Company (TOPCO) v. The Government of the Libyan Arab Republic, reprinted in International Legal Materials (1978) 3, the sole arbitrator, Professor Dupuy, seems to have interpreted the clause primarily as a choice of public international law, whereas in British Petroleum (Libya) Ltd. v. The Government of the Libyan Arab Republic, reprinted in International Law Reports, Vol. 53 (1979) 297, Judge Lagergren appears to have regarded it as a choice of general principles. In the third arbitration, Libyan American Oil Company v. The Government of the Libyan Arab Republic, reprinted in International Legal Materials (1981) 42, Dr. Mahmassani held that Libyan law was applicable, excluding such provisions which were in conflict with the principles of international law. *See* also Government of the State of Kuwait v. The American Independent Oil Company, reprinted in International Legal Materials (1982) 976 and Lena Goldfields Ltd. v. Union of Soviet Socialist Republics, reprinted in Cornell Law Quarterly (1950) 42; for an interesting discussion of the latter, *see* Veeder, The Lena Goldfields Arbitration: The Historical Roots of Three Ideas, International & Comparative Law Quarterly (1998) 747.

[70] *Cf.* e.g. Lalive, *supra* note 63, at 992 where he suggests that general principles "may already be considered as a separate legal system".

[71] Toope, *op. cit.*, at 74.

developed for agreements entered into by and between states. It is by no means certain that "the general principles of law" – e.g. *pacta sunt servanda* – have the same meaning for contracts and for treaties. The presumption is rather the opposite.[72]

Third, even though it is traditionally accepted that public international law is the law to be applied in interstate arbitrations, unless the parties have agreed otherwise,[73] it has not always been accepted that parties to an international commercial arbitration can choose public international law, item 5 in the list above. The traditional position was expressed by the Permanent Court of International Justice in the *Serbian Loans Case*, where the Court stated:

> "any contract which is not a contract between states acting in their capacity as subjects of international law, is based on the municipal law of some country".[74]

It is submitted that today this statement is no longer valid, in so far as it has been read as precluding private parties from subjecting a contract to public international law. In fact, the idea that a contract between a state and a private entity can be subject to public international law, even *without* an explicit choice thereof, has been launched and supported by a number of scholars.[75] Having said this, however, it should be noted that the application of public international law to contracts between private entities, or where at least one party is a private entity, on the whole raises the same concerns as discussed above with respect to "the general principles of law". With respect to the suitability of public international law in this respect, it has been suggested by one commentator that "/p/ublic international law neither aims nor is equipped to regulate the commercial relations and activities of private individuals and organisations in the international arena".[76]

Another commentator has suggested that, if one were to apply public international law to international commercial contracts involving private

[72] *Id.*, and at 87–90.

[73] *See* p. 210 *et seq.*, *infra*.

[74] P.C.I.J. Series A, No. 20 (1929) 41.

[75] *See* e.g. Weil, Problèmes relatifs aux contrats passés entre un état et un particulier, 128 Hague Recueil 95 (1969) 181–182; David, L'arbitrage dans le commerce international (1982), O'Connel, International Law (2nd ed. 1970) 979 and the literature referred to by Professor Dupuy in the TOPCO award, cited in note 69, *supra*; *see* also Schwebel, The Law Applicable In International Arbitration. Application of Public International Law, International Council for Commercial Arbitration, XIIth International Arbitration Congress (1994) 562–569. For a critical view of this idea, *see* Toope, *op. cit.*, at 77 *et seq.*, and the references contained therein.

[76] Lew, *op. cit,*, at 403 – For further discussion of this issue, *see* p. 342 *et seq.*, *infra*.

entities, it would have to be a truncated version of public international law, excluding at the very least rules relating to the international responsibility of states, simply because such rules have been developed against the background of the special status of states and their role in the international community.[77]

Finally, with respect to *lex mercatoria,* item 6 in the list above, it should first of all be noted that this notion has generated an impressive amount of scholarly contributions, since the debate started approximately 50 years ago[78] and that the debate continues to focus on whether or not there is such a thing as *lex mercatoria.*

As far as party autonomy is concerned, it follows from what has been said above, that the parties may well chose such rules, principles and provisions in statutes and treaties which in their opinion form part of an international trade law. If they merely refer to *lex mercatoria*, however, it is unclear what practical effect such a choice will have, but they certainly have the *right* to make such a choice. Much of the discussion of this topic has focused on the situation when the parties have not chosen *lex mercatoria*, and in particular on whether or not arbitrators may then nevertheless apply *lex mercatoria.* One commentator has suggested that whenever the parties have agreed on international arbitration this constitutes an implied choice of *lex mercatoria.*[79] Most commentators, however, do not seem prepared to go that far, but rather focus on the question whether or not there really exists any body of law which can be called *lex mercatoria.*[80]

[77] Lalive, In Institute of International Law, Resolutions adopted by the Institute at its Athens Session 1979, British Yearbook of International Law (1980) 194.

[78] *Cf.* Kronstein, Business Arbitration – Instrument of Government, Yale Law Journal (1944) 36, and Goldman, La bataille judiciaire autour de la *lex mercatoria*, Revue de l'Arbitrage (1983) 379. – According to the late Professor Goldman – who is often regarded as the spiritual father of the modern *lex mercatoria* debate – the term *lex mercatoria* was first used by Professor Schmitthoff; *see* Goldman, La Lex Mercatoria dans les contrats et l'arbitrage internationaux: realité et perspectives, Journal de Droit International (1979) 475.

[79] *See* Carbonneau, Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions, 23 Columbia Journal of Transnational Law (1985) 579, where it is said that "/t/he parties' engagement in a transnational commercial venture and invocation of the international arbitral process constitute an implied submission to the law which governs all transnational commercial ventures", *Id.* at 597.

[80] Some commentators, however, seem to take the view that arbitrators have the right to apply *lex mercatoria* even if it has not been chosen by the parties; for a discussion of this view, *see* Schöldström, The Arbitrator's Mandate (1998) 281–283. – In the opinion of the present author application of *lex mercatoria* despite an explicit choice of a national law by the parties constitutes an excess of jurisdiction by the arbitrators; *Cf.* Samuel, Jurisdictional Problems in International Commercial Arbitration (1989) 255, and Schöldström, *id.* at 282–283.

In a trenchant contribution to the debate, Mustill[81] made a survey of norms which have been claimed to form part of *lex mercatoria*. He was able to find some twenty such rules, seven of which were at a very high level of abstraction, the remaining thirteen being of a more detailed nature. Mustill found this to be "rather a modest haul for twenty-five years of international arbitration".[82] With respect to the question whether *lex mercatoria* could be chosen as "the law" to be applied to the substance of a dispute he suggested that "the answer must surely be no".[83] Even one of the supporters of *lex mercatoria*, Lando, has stated that "the law merchant is still a diffuse and fragmented body of law".[84]

Mustill also notes that there are very few arbitral awards, at least reported awards, where *lex mercatoria* has in fact been applied. One of the most well-known examples is the so-called Norsolor case[85] where an ICC arbitral tribunal sitting in Vienna applied *lex mercatoria* in a dispute between a Turkish and a French company. The award was set aside by an Austrian Court of Appeal. This decision was reversed, however, by the Austrian Supreme Court and the award was eventually enforced in France.[86] It is important to note that in this case the parties had not chosen

[81] Mustill, The New Lex Mercatoria: The First Twenty-Five Years, in Brownlie & Bos (eds.) Liber Amicorum for the Rt Hn. Lord Wilberforce (1987) 149. – Since then UNIDROIT (The International Institute for the Unification of Private Law) has issued its Principles of International Commercial Contracts in 1994. The publication suggests in seven chapters – starting with general provisions and ending with rules on non-performance – "the best solutions" for international commercial contracts. In the Introduction it is stated, *inter alia,* that the UNIDROIT Principles "reflect concepts to be found in many, if not all, legal systems. Since, however, the Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not generally adopted", Principles of International Commercial Contracts (1994) vii. – In the Preamble it is stated that the Principles "may be applied when the parties have agreed that their contract be governed by 'general principles of law', the 'lex mercatoria' or the like", *Id.* at 1.

[82] Mustill, note 81, *supra* at 177.

[83] Mustill, note 81, *supra* at 160.

[84] Lando, The Lex Mercatoria in International Commercial Arbitration, International & Comparative Law Quarterly (1985) 752.

[85] Pabalk Ticaret Ltd. v. Norsolor S.A.; the award was rendered on 26 October 1979 and reprinted in 9 Yearbook Commercial Arbitration (1984) 110.

[86] The decision of the Austrian Supreme Court (Oberster Gerichtshof) was rendered on 18 November 1982 and reprinted in 9 Yearbook Commercial Arbitration (1984) 159. The Court of Appeal in Vienna which set aside the award characterized *lex mercatoria* as "world law of doubtful validity" ("Weltrecht fraglicher Geltung"). The Supreme Court, however, said that the principle of "good faith" – which the tribunal had found to be one of the guiding principles of *lex mercatoria* – was "inherent in the private law systems which in no way is contradictory to strict legal resolutions of the country concerned". *Id.* –

lex mercatoria as the law to be applied in the dispute, but its application was the result of the arbitrators' decision to do so.

Despite the long debate over *lex mercatoria*, it is an undisputable fact that it enjoys very meager support in arbitral practice. One critical commentator has offered the following assessment:

> "What this so-called law is or should be is a complete mystery. It is usually said that it comprises uniform law embodied in or derived from international conventions, trade usages, custom and ideas of business fairness, efficacy or reasonableness ... It is hardly necessary to emphasize that no such body of law exists".[87]

3.2.4 The Obligation to Respect Party Autonomy

There remains one aspect of party autonomy to be discussed, which in one sense represents the logical conclusion of what has been discussed above. The remaining aspect is this: one of the most important elements of the principle of party autonomy in international arbitration – and for the parties *the* most important aspect – is the fact that the arbitrators have an *obligation* to apply the law, the rules of law or the principles chosen by the parties. As mentioned above this is the necessary consequence of the consensual nature of arbitration: the arbitrators derive their authority from the agreement of the parties and must follow their instructions.[88]

If the arbitrators do not apply the law chosen by the parties, voluntary compliance with the resulting award is at risk.

More importantly, however, the award may be set aside by a national court of law. In this connection it is very important to distinguish between the arbitrators' failure, or perhaps even refusal, to apply the law chosen by the parties and the arbitrators' erroneous application of such law.[89] While the first situation may lead to the setting aside of the award, the second situation cannot. This follows from the fundamental principle

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Another example of *lex mercatoria* being applied is Deutsche Schachtbau – und – Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Company (1987) All ER 769 (CA). An ICC arbitral tribunal sitting in Geneva had applied "internationally accepted principles of law governing contractual relations". The English Court of Appeal held that the award was enforceable under the New York Convention.

[87] Mann, Private Arbitration and Public Policy, 4 Civil Justice Quarterly (1985) 257, at 264.

[88] The only exception follows from the restrictions and limitations on party autonomy, *see* p. 106 *et seq.*, *infra*.

[89] *Cf.* e.g. ICSID Ad Hoc Committee in Maritime International Nominees Establishment (MINE) v. Government of Guinea, ICSID Review – Foreign Investment Law Journal (1990) 95, at 104: "Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment."

of arbitration that awards are final and not subject to review on the merits. To allow an award to be set aside on the basis of erroneous application of the law chosen by the parties would amount to a review of the merits of the award. In practice it is impossible to determine that the law has been applied erroneously without reviewing the merits of the dispute in question. It would seem to be more or less generally accepted that erroneous application of the law chosen by the parties cannot result in the setting aside of the arbitral award.[90] Furthermore, the decision of the arbitrators with respect to which law or rules of law to apply, in the absence of a choice of law by the parties, cannot be reviewed by a court of law. The reason is again that such a review would necessitate reviewing the merits of the dispute – or at least part of the merits – and would thus militate against the finality of arbitral award. It is only when the arbitrators fail, or refuse, to apply the law chosen by the parties that the award can be set aside by a court of law. The ground for setting aside the award can be either that the decision of the arbitrators is on a matter "beyond the scope of the submission to arbitration"[91] or that the award is in conflict with the public policy of the state where the annulment proceedings take place.[92]

[90] *See* e.g. Sandrock, Zügigkeit und Leichtigkeit versus Gründlichkeit, 41 JuristenZeitung (1986) 370, 374; Sanders & van den Berg; The Netherlands Arbitration Act 1986 (1987) No. 97(b); Poudret, Challenge and Enforcement of Arbitral Awards in Switzerland, 4 Arbitration International (1988) 284; Aden, Internationale Handelsschiedsgerichtsbarkeit (1988) 26; Gottwald, Die sachliche Kontrolle internationaler Schiedssprüche durch staatliche Gerichte, in Festschrift für Nagel (1987) 56 – There are some commentators, however, who seem to be advocating exceptions from this fundamental rule in two situations, *viz.*, (i) if the decision of the tribunal has led to a distorsion of the law or the agreement in question and there is no objective and reasonable ground for the decision (*see* e.g. Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit (2nd ed. 1989) No. 872; and Samuel, Jurisdictional Problems in International Commercial Arbitration (1989) 254), and (ii) if the tribunal has interpreted the applicable law in such a way as to lead to a result which is not in conformity with the applicable law as set forth in statutes and expounded by case law (*see* e.g. Aden, *op. cit.*, at 27). In the opinion of the present author, neither of the suggested exceptions are acceptable, since they militate against the very fundamental principle of international arbitration, *viz.*, that arbitral awards are final and cannot be reviewed on the merits.

[91] *Cf.* e.g. Article 34(2)(a)(iii) of the UNCITRAL Model Law. The same position is found in Article 36(1)(a)(iii) of the Model Law dealing with grounds for refusing recognition or enforcement of an award, and in Article V(i)(c) of the 1958 New York Convention.

[92] The public policy ground is found, *inter alia*, in Article 34(2)(6)(ii) and in Article 36(1)(b)(ii) of the UNCITRAL Model Law and as well as in Article V(2)(b) of the 1958 New York Convention. – Some commentators – e.g. Berger, International Economic Arbitration (1993) 681, and further references made therein – argue that such an award can be set aside *only* on the basis of violation of public policy. For present purposes, it is not necessary to take a definitive position with respect to the ground to be relied upon. The important conclusion is that disregard of party autonomy in this connection may result in

In practice it will in most cases be difficult to distinguish between non-application of the law chosen by the parties and erroneous application of such law. This is well illustrated by the fate of two arbitral awards rendered under the auspices of the Washington Convention, *viz.*, *Klöckner* v. *Cameroon*[93] and *Amco Asia Corporation* v. *Indonesia.*[94] In both cases the awards were set aside by *ad hoc* committees organized under Article 52 of the Washington Convention, *inter alia*, on the ground that the arbitrators had exceeded their powers by not applying the proper law.[95]

In the *Klöckner Case*, the contract in question did not designate the applicable law. Consequently, under Article 42(1) of the Washington Convention the tribunal had to apply the law of the Contracting State, i.e. the law of Cameroon. The tribunal decided that in the eastern part of Cameroon, where the factory in question was located, French law was to be applied. In the annulment proceedings Klöckner claimed that the tribunal had not applied French law, but rather some vague general principles

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the award being set aside. For a different view, however, *see* Reymond, La Nouvelle Loi Suisse et le Droit de l'Arbitrage International, Reflexions de Droit Comparé, 34 Revue de l'Arbitrage 81989) 410, who seems to take the position that an award in which the arbitrators apply the "wrong law", i.e. a law not chosen by the parties, cannot be attacked under Swiss law.

[93] Klöckner Industrie–Anlagen GmbH, Klöckner Belge S.A. and Klöckner Handelsmaatschappij B.V. v. United Republic of Cameroon and Societé Cameronnais des Engrais (the "Klöckner Case"), reprinted in Yearbook Commercial Arbitration (1985) 71. – For comments *see* e.g. Paulsson, The ICSID Klöckner v. Cameroon Award: The Duties of Partners in North-South Economic Development Agreements, Journal of International Arbitration (1984) 145 and Niggeman, The ICSID Klöckner v. Cameroon Award: The Dissenting Opinion, Journal of International Arbitration (1984) 331.

[94] Amco Asia Corp., Pan American Development Ltd. and P.T. Amco Indonesia v. Republic of Indonesia (the "Amco Case"), reprinted in International Legal Materials (1985) 1022. – For comments *see* e.g. Branson, Another ICSID Arbitral Award Annulled, (8 Corporate Counsel's International Adviser (1986) 9.

[95] Article 52(1)(b) of the Washington Convention authorizes an *ad hoc* committee to annual an award if the arbitral tribunal "has manifestly exceeded its powers". For general comments on the ICSID annulment procedure, which comments usually discuss both the Klöckner case and the Amco case, *see* e.g. Khan, Le Contrôle des sentences arbitrales rendues par un Tribunal CIRDI, in La Juridiction Internationale Permanente (1988) 363; Pirrwitz, Annulment of Arbitral Awards under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 23 Texas International Law Journal (1988)74; Seidl–Hohenveldern, Die Aufhebung von ICSID Schiedssprüchen, 1989 Jahrbuch für die Praxis der Schiedsgerichtsbarkeit (1989)100; Thibaut, L'article 52 de la Convention de Washington du 18 mars 1965 et les premiers enseignements de sa pratique, Revue de l'Arbitrage (1988)95 and Giardina, ICSID: A Self-Contained, Non-National Review System, in Lillich & Brower (eds.), International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity? (1994) 199.

which were alleged to be universally accepted. The point at issue was whether or not there existed a duty of disclosure as between contractual parties under French law. The tribunal arrived at the conclusion that such a duty did exist. This conclusion was presented by the tribunal as being based on French law. The committee, however, concluded that the tribunal did not in fact apply French law, but rather acted as *amiable compositeur* and said that the duty of disclosure was assumed, not shown, to be a principle of French law.[96] While noting the difference between erroneous application of the applicable law and non-application of the same, the committee held that non-application of the applicable law may constitute excess of powers of arbitrators and that the tribunal acted outside the framework provided by Article 42(1) of the Washington Convention by applying concepts or principles it probably considered equitable, and thus "manifestly exceeded its powers" within the meaning of Article 52(1)(b) of the Washington Convention.[97]

Given the fact that the tribunal did present its conclusions as being based on French law, it would not be unnatural to say that the tribunal did in fact apply French law, but perhaps not correctly. If this view is accepted, the decision of the committee amounts to a review of the tribunal's application and interpretation of the applicable law which amounts to a review of the merits of the dispute. At the very least, the *Klöckner Case* shows how difficult it usually is to draw the line between non-application and erroneous application of the applicable law.

In the *Klöckner Case* it could perhaps be argued that the tribunal failed to apply the law of the Contracting State, since the tribunal expressly presumed the duty of disclosure to be a principle of French law, without referring to and examining the sources of French law in this respect. In the *Amco Case*, however, there can be no doubt that the tribunal did in fact apply Indonesian law, which was the law of the Contracting State.

The dispute in the *Amco Case* arose out of a contract between foreign investors and an Indonesian organization for the construction and management of a hotel in Djakarta. At one point, the Indonesian authorities revoked the investors' license to do business in Indonesia. The tribunal ruled, *inter alia*, that the revocation of the license constituted a breach of

[96] The decision of the *ad hoc* Committee in the Klöckner case is published in an English translation in ICSID Review – Foreign Investment Law Journal (1986) 89 – *See* paras. 67, 73 and 79 of this decision. – For comments *see* e.g. Thomson, The Klöckner v. Cameroon Appeal – A note on Jurisdiction, Journal of International Arbitration (1986) 93; Feldman, The Annulment Proceedings and the Finality of ICSID Arbitral Awards, ICSID Review – Foreign Investment Law Journal (1987) 85.

[97] *Id.*, at para. 79.

contract for which compensation was due both under Indonesian law and international law. The tribunal held that the revocation was unlawful because of lack of due process and, alternatively, because it was not justified from a substantive point of view.[98] The committee which reviewed the award decided, however, that the tribunal could not have reached its conclusions if it had applied Indonesian law.[99] As mentioned above, there is, however, no doubt that the tribunal in fact applied Indonesian law.[100] Whether it did so *correctly* is a completely different matter.

The Indonesian authorities revoked the license to do business due to the alleged failure to fulfill the requirements of the Indonesian investment legislation. In its award, the Tribunal discussed these requirements in detail and concluded that the claimants had an obligation to invest three million USD "composed by the elements listed in Article 2 of Law No. 1/1967 ..."[101]

The Committee, however, was of the opinion that the tribunal's calculation of the amount invested by claimants was erroneous. In its decision the committee concluded, *inter alia*:

> "The Tribunal in determining that the investment of Amco had reached the sum of USD 2,472,490 clearly failed to apply the relevant provisions of Indonesian law. The ad hoc Committee holds that the Tribunal manifestly exceeded its power in this regard and is compelled to annul this finding."[102]

From these brief passages it is, in the opinion of the present author, clear that the committee reviewed the merits in the *Amco Case de novo*. It is equally clear that the Tribunal did apply Indonesian law, as it understood such law. Consequently, when the Committee says that the Tribunal did *not apply* Indonesian law, it can only mean that the Tribunal did not – in the Committee's opinion – apply the law *correctly*. The decisions by the *ad hoc* Committees in the *Klöckner Case* and the *Amco Case*, respectively, have been severely criticized as going much too far in reviewing arbitral awards, in fact equating non-application with erroneous applica-

[98] *See* note 94, *supra*, at para. 242.

[99] The decision of the *ad hoc* committee in the Amco case is published in 25 International Legal Materials (1986) 1441. – For comments *see* e.g. Pirrwitz, note 95, *supra*; Feldman, note 96, *supra* and Branson, Annulments of Final ICSID Awards Raise Questions about the Sources, National Law Journal (1986) 25.

[100] The Amco award is full of references to Indonesian law, *see* note 94, *supra*, at paras. 148, 180–181, 183, 210–213, 221–234, 245–247 and 266.

[101] *See* note 94 *supra*, at para. 234.

[102] *See* note 99 *supra*, at para. 95.

tion.[103] Even though the approach taken by these two committees has been rejected in subsequent annulment proceedings with respect to ICSID-awards,[104] the two cases illustrate very well the difficulties in drawing the line between non-application and erroneous application.

These difficulties notwithstanding, the fundamental rule remains, *viz.*, non-application by arbitrators of the law chosen by the parties constitutes excess of jurisdiction which may lead to the annulment of an arbitral award.

3.2.5 Restrictions on Party Autonomy

3.2.5.1 General Comments

As described above party autonomy enjoys almost universal acceptance as far as international commercial arbitration is concerned.[105] At the same time, however, there seems to exist a consensus to the effect that there are certain, at least potential, restrictions on party autonomy. It remains then to consider what these restrictions, if any, are. The question I shall try to answer is that of which circumstances may cause *arbitrators* to set aside, or ignore, a choice of law made by the parties. Consequently, I shall not discuss how these potential restrictions may influence the *courts* in various countries.[106] As I have discussed

[103] For critical views, *see* e.g. Feldman, The Annulment Proceedings and the Finality of ICSID Arbitral Awards, ICSID Review – Foreign Investment Law Journal (1987) 85; Craig, Uses and Abuses of Appeal from Awards, 4 Arbitration International (1988) 174; Redfern, ICSID – Losing its Appeal? Arbitration International (1987) 98, and Berger, International Economic Arbitration (1993) 680–681.

[104] *See* Maritime International Nominees Establishment (MINE) v. Government of Guinea, ICSID Review – Foreign Investment Law Journal (1990) 95 and the decisions of the *ad hoc* committees which were established following challenges of the two "new" arbitral awards with respect to Klöckner and Amco; *cf.* Caron, Reputation and Reality in the ICSID Annulment Process: Understanding the Difference between Annulment and Appeal, ICSID Review – Foreign Investment Law Journal (1992) 21 and Broches, Observations on the Finality of ICSID Awards, ICSID Review – Foreign Investment Law Journal (1991) 321. – For a comment on the decision in the MINE v. Guinea case, *see* Niggemann, Die dritte Annullierung eines ICSID – Schiedspruches – Die Entscheidung in Sachen Mine v. Guinea, 11 IPRAX (1991) 77 – For a critical appraisal of the ICSID annulment procedure, *see* Reisman, Systems of Control In International Adjudication and Arbitration. Breakdown and Repair (1992) 46–106.

[105] *See* p. 84 *et seq.*, *supra*.

[106] In the context of international arbitration national courts may be required to address possible restrictions on party autonomy in at least the following three situations: (i) when one party institutes court proceedings, despite the existence of an arbitration agreement; in this situation the court may have to rule on the validity of the arbitration agreement, whether or not the dispute is arbitrable and whether or not the parties had the right and/or

above,[107] an international arbitral tribunal does not have a *lex fori* in the private international law sense of the term. Even if *lex arbitri* could – to a very limited extent – be equated with *lex fori*, it is very difficult, if not impossible, and sometimes not very fruitful, to approach issues concerning applicable law and party autonomy in the same way as this is done when national courts are involved. The lack of a *lex fori* has important consequences for the applicable law in international commercial arbitrations, *viz.*, that there is no such thing as a "foreign" law, but the laws of all countries are put on an equal footing and no single law *a priori* enjoys any priority over any other law. The obvious exception to the foregoing is, however, the law chosen by the parties.

As already mentioned, the recognition of party autonomy is so widespread that some commentators have equated it with an international custom or with a "general principle of law recognized by civilized nations" within the meaning of Article 38(3) of the Statute of the International Court of Justice.[108] Since party autonomy enjoys such a widespread acceptance, discussions of issues related thereto often stop at the acknowledgement of this fact. It is true that in practice it is usually not necessary to continue the debate beyond this point. When one is faced with potential restrictions and limitations on party autonomy, however, one must address the question of what law or rules should be relied on to determine any such limitations and restrictions. From a logical point of view it would seem that we must look for some other law, or rules, than those chosen by the parties in exercising their autonomy. Theoretically speaking there ought to be some "superior legal order" which determines the limitations on party autonomy. One possibility would be to refer to the *lex arbitri* as the ultimate benchmark in this respect.[109] Some commentators, however, refer to "transnational private international law" and

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capacity to submit to arbitration, (ii) when a national court is asked to enforce an arbitral award; in this situation it will often be required to determine whether or not enforcement of the award would violate the public policy of the forum state, *Cf.* e.g. Article V (2) (b) of the 1958 New York Convention, and (iii) when a national court is called upon to set aside an award as violating public policy. – For a discussion of judicial practice with respect to so-called transnational public policy, *see* e.g. Lalive, Transnational (or Truly International) Public Policy and International Arbitration, in Comparative Arbitration Practice and Public Policy in Arbitration. VIIIth International Arbitration Congress New York 6–9 May 1986 (1987) 273 *et seq.* For a discussion of international public policy, *see* p. 128 *et seq.*, *infra.*

[107] *See* p. 84 *et seq.*, *supra.*

[108] *Cf.* Lalive note 106 at 302, *supra,* and note 63, *supra.*

[109] *Cf.* p. 84 *et seq.*, *supra.*

to "transnational public policy" as determining the limits of party autonomy.[110]

In this section I shall try to identify and determine these limits, without necessarily offering a final answer to the question whether or not there is a "superior legal order" setting these limits, and if so, what this legal order is. It may be that it is unsatisfactory from a theoretical point of view not to look for the ultimate norm in this respect. It is submitted, however, that no such norm exists either in the theory, or in the practice of international arbitration. Under such circumstances, it is not very fruitful to search for the Holy Grail in the form of *the* legal order determining the limits of party autonomy. Moreover, in the opinion of this author the possible answers to this – almost metaphysical question – very much depend on the person who is providing the answer and on that person's perception of international arbitration.[111] The starting point for this author is the consensual nature of arbitration in the sense that it is the will of the parties who have agreed to arbitrate which, as a matter of principle, must reign.

For discussion purposes I shall consider four categories of circumstances which sometimes are referred to as constituting restrictions and limitations on party autonomy, *viz.*,

- the chosen law has no reasonable connection with the transaction in question, nor with the parties involved in it;
- national public policy;
- mandatory rules of municipal law; and
- international public policy.

As the following discussion will show, there are not necessarily clear borderlines between the different categories enumerated above. This is particularly true with respect to the three latter categories. By way of introduction, it should be emphasized that the term "public policy" will be used to cover what is understood by the civil law term "ordre public", as well as the common law term "public policy".[112]

[110] *See* e.g. Lalive note 106 at 302, *supra*.

[111] *Cf.* Lalive, *supra*, note 106 at 310, where it is said: "The same is probably inevitable with regard to transnational public policy and to the international community (of businessmen, or states, or both), so that it may be contended, without verbal precautions, that in the final analysis, a great deal if not everything is a question of personal feeling or sensitiveness, or of *Weltanschauung*".

[112] Even though these two terms are often used interchangeably and as referring to the same phenomenon, their meaning and application differ. For an explanation of the differences *see* e.g. Husserl, Public Policy and Ordre Public, 25 Virginia Law Review (1938) 37 and Simitis, Gute Sitten und Ordre Public (1960).

3.2.5.2 No Reasonable Connection

In the private international law rules of some municipal legal systems, while accepting the principle of party autonomy, there are provisions to the effect that the law chosen must have a reasonable connection to the parties, or to the transaction in question; if not, the law chosen by the parties will not be accepted by the national court.[113] Such provisions seem to proceed from the assumption that parties can only select a law with which they are familiar. Parties are thus assumed to consider and understand the provisions of the law applicable to their contract. It follows from this – so the argument continues – that parties cannot know and understand the provisions of some unconnected or neutral law, and that they can only choose a law that they know and understand. Needless to say, however, it is quite possible for the parties to familiarize themselves with an unrelated or neutral law if they so wish. It is submitted that this cannot be a valid argument for the requirement that the parties must choose a law which has some connection to them or to the transaction in question. Another argument which has sometimes been presented in support of this position is the desire to prevent the applicable law from being chosen in an irrational manner.[114] It is submitted that this argument constitutes a gross underestimation of the motives and capabilities of the parties. The vast majority of international contracts are entered into with serious purposes and the presumption must rather be that the choice of applicable law is made with an equally serious purpose.[115]

[113] This seems to be the case with respect to the laws of most states in the United States (*see* Restatement of Law, Conflict of Laws, Second, (Vol. 1, 1971) sec. 187 (2)(a), and also in Great Britain (*see* Cheshire & North, Private International Law (11th ed. 1978) 454–455. *See* also the Spanish Arbitration Act of 1988, Art. 62, in Cremades (ed.), Arbitration in Spain (1991) 122.

[114] *See* e.g. Branson & Wallace, Choosing the Substantive Law to Apply in International Commercial Arbitration, Virginia Journal of International Law (1987) 57.

[115] *Cf.* Delaume, Transnational Contracts: Law and Practice (1988) 109. *See*, however, Hirsch, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes (1993) 126 note 88, where it is said: "It is very doubtful, in our opinion, that a Tribunal at the Centre would indeed respect a selection by the parties that was made in an arbitrary manner, e.g. by a lottery". The present author does not share this view. If the parties for some reason wish to exercise their autonomy with respect to applicable law in the form of a lottery, it is difficult to understand why the result thereof should not be respected by the arbitrators, indeed they would still be under an *obligation* to apply that law.

The true rationale behind the potential limitation on party autonomy mentioned above would rather seem to be the presumed existence of a forum law (*lex fori*) and the desire to uphold the supremacy of the *lex fori*.[116] As mentioned above, however, in international arbitration there is no *lex fori* for the arbitrators. Consequently, arbitrators have no obligation to uphold *lex fori* of any national jurisdiction. On the contrary their obligation is to apply the law chosen by the parties.[117]

The generally held opinion today is that this potential limitation on party autonomy does not apply to international commercial arbitration.[118] In fact, in many international contracts a neutral law is chosen precisely because it does *not* have any connection with the parties, or with the transaction. One convincing example of this is Article 42 (1) of the Washington Convention which allows the parties to choose any other law than the law of the country where the investment is to be made notwithstanding the absence of a close connection with the transaction or with the parties.[119]

On the basis of the foregoing I submit that it is clear that the law chosen by the parties in an international commercial arbitration does not need to have a reasonable connection, nor indeed any connection, with the parties or with the transaction.

[116] *Cf.* Lew, *op. cit.*, at 104.

[117] *See* p. 101 *et seq.*, *supra*. As I have discussed above, in international arbitration the *lex fori* is to a certain extent – albeit to a very limited extent – replaced by the *lex arbitri*. As far as applicable substantive law is concerned, however, it is submitted that the *lex arbitri* does not come into play, but that its role is restricted to procedural issues of a fundamental nature.

[118] *See* Lew, *op. cit.*, at 105; Delaume *op. cit.*, at 109; Holtzman & Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary (1989) 765; David, Arbitration in International Trade (1985) 343; von Hoffman, Internationale Handelsschiedsgerichtbarkeit (1970) 67 *et seq.*; Craig/Park/Paulson, International Chamber of Commerce Arbitration (1984) Part III § 17.04 at 86. This is also confirmed by arbitral practice where virtually no awards can be found when arbitrators have refused to apply the law chosen by the parties, *see* Lew, *op. cit.* at 105. – Strictly speaking, this follows already from the conclusion drawn at pp. 93–94 *supra*, *viz.*, that parties have the possibility to instruct the arbitrators to act *ex aequo et bono*, or as *amiables compositeurs*.

[119] Another example is the contract practice which has evolved in East–West trade – particularly perhaps prior to 1989 – where the parties normally agree to apply the substantive law of a third, neutral country such as for example Sweden or Switzerland. As far as the application of Swedish law is concerned, *see* Hobér, International Commercial Arbitration in Sweden: Two Salient Problem Areas, in Studies in International Law, Liber Amicorum for Lars Hjerner (1990) 236–238.

3.2.5.3 National Public Policy

3.2.5.3.1 GENERALLY

The concept and meaning of national public policy is fraught with uncertainty and ambiguity.[120] No totally comprehensive definition has ever been offered. Generally speaking, however, it is clear that public policy reflects the fundamental legal, economic and moral standards of any given state. National public policy relevant to private international law typically comprises legislation which has an imperative character (such as e.g. employment conditions and currency controls) or which implements fundamental policies of a given state such as central economic planning.[121] When public policy is held to apply, an otherwise applicable

[120] For the avoidance of doubt, it should be noted that I do not address public policy as a ground for refusing to recognize and enforce international arbitral awards, e.g. on the basis of Article V of 1958 New York Convention; *cf.* the Report of the Committee on the International Commercial Arbitration, presented at the International Law Association London Conference 2000, Report of the Sixty-Ninth Conference (2000) 340.

In discussing public policy issues I shall distinguish between national public policy, mandatory rules of municipal law and international public policy.

When I refer to *national public policy* I mean both the so-called internal public policy of a state – which is concerned with internal legal matters, i.e. concerning primarily the citizens of the state in question – and external public policy which is concerned with private international law, e.g., generally speaking, the possible rejection of foreign law which would otherwise have been applicable. It is not unusual to include mandatory rules of municipal law in the public policy category. I have decided, however, to treat such rules as a separate category, since they seem to present some distinctive features which do not necessarily relate to other rules in the public policy category. The reference to *international public policy* is intended to cover public policy considerations which do not pertain to any particular municipal law – which is the case with national public policy – but which purportedly apply to several, or indeed most municipal law systems, in such a way that they have been said to have been transformed to a superior, international rule of law; this category is sometimes referred to as "transnational" public policy, however, not in this Study; *see* further discussion on p. 128 *et seq.*, *infra*. The term "*mandatory rules of municipal law*" is meant to cover rules which are deemed to be so important for an individual state that they must always, in the view of the state in question, be applied no matter which law has been chosen or determined as the *lex contractus*, *see* further discussion on p. 116 *et seq.*, *infra*. – Lew, *op. cit.*, at 533 *et seq.*, introduces yet another category of public policy, *viz.*, community public policy. As examples of communities having their own public policy Lew mentions the European Union, and its Treaty of Rome, and the Council for Mutual Economic Assistance and its Charter. Since the CMEA is no more, we need not discuss its public policy. The extent to which, if any, the various legislative and other normative acts of the European Union give rise to public policy concerns will be treated under the heading "Mandatory rules of municipal law", p. 116 *et seq.*, *infra*.

[121] In Sweden, for example, the *ordre public* test is whether or not foreign law would be patently incompatible with the basic principles of Swedish law. This *formula* is used in all relevant Swedish legislative acts, rather than identifying specific instances of violation of public policy, *cf.* Bogdan, Svensk internationell privat- och processrätt (5th ed. 1999) 70 *et seq.*

foreign law will not be applied or enforced. It will be replaced by another substantive law. In the practice of national courts that other law is mostly *lex fori*.[122] However, sometimes it may not be necessary to replace the foreign law with any other law at all. On the other hand, when such replacement does become necessary there may be other solutions than relying on *lex fori*. For example, the court might apply a similar provision of the foreign law in question, or perhaps arrive at a more reasonable provision by using analogies. As far as the international arbitrator is concerned he has no *lex fori* to rely on, nor can he rely on *lex arbitri* in this situation.[123]

As appears from the foregoing, under this section I shall focus on the so-called negative function of the public policy mechanism, i.e. the rejection of a foreign law which would otherwise have been applicable and its replacement with another law.[124]

As regards national public policy in international commercial arbitration a distinction must, it is submitted, be made between the public policy of the *lex contractus* and the public policy of other national laws than *lex contractus*.[125]

In international commercial arbitration there is, as previously stated, no *lex fori* in the private international law sense of the term. As regards applicable substantive law, this means, *inter alia*, that an international arbitrator is under no obligation to apply any national law *a priori*, with the exception of course of the law chosen by the parties. The absence of *lex fori* also means that the laws of all different nations have the same value and that none of them has a privileged status in relation to any other law. The primary allegiance of the international arbitrator is to the *lex contractus* as determined by the parties.

3.2.5.3.2 Public Policy of *Lex Contractus*

In discussing the public policy of *lex contractus* different considerations apply depending on whether *lex contractus* has been chosen by the parties or been determined by the arbitrators.

[122] *Cf.* e.g. Bogdan note 121 at 77, *supra*.

[123] As mentioned above – *see* note 117 – *lex arbitri* comes into play only with respect to procedural matters of a fundamental nature.

[124] The "positive" function of public policy will be dealt with under the heading "Mandatory rules of municipal law". The positive function of public policy is thought to entail the application of certain rules of *lex fori* in any and all circumstances irrespective of which foreign law may otherwise have been agreed upon. Such rules are sometimes referred to as "lois d'ordre public". – *See* further discussion at p. 116 *et seq.*, *infra*.

[125] *See* Hobér, note 119 at 252 *et seq.*, *supra*, where this distinction is explained and discussed. – The discussion below partially draws on this article.

A distinction must thus be drawn between these two situations. Only the first situation is, of course, directly relevant for our purposes. Nevertheless, I shall also briefly discuss the second situation.

3.2.5.3.2.1 Lex Contractus Determined by the Parties

As was stated above, an international arbitrator has an obligation to apply the law determined by the parties.[126] The starting point must therefore be that the parties' discretion is unrestricted in so far as the choice of the applicable law is concerned. Not only do the parties have the discretion to choose any law, or rules, they wish, but they may also *exclude* the application of any national law by referring, for example, to the general principles of law, or to *ex aequo et bono*, restrict the field of application of the national law selected by combining it with the general principles of law, freeze that law at a given date, etc. They may also exclude from the applicable law selected provisions that would otherwise make certain contractual clauses void.

It follows from the foregoing, that the parties are the masters over the law, or rules to be applied and also over the public policy of the law they may have chosen. After all, they can single out exactly what provisions of a law of a particular country they want to apply. From this one can draw two important conclusions.

First, any conflict between the wording of the contract and the public policy of the law chosen by the parties must be resolved by the international arbitrator in the light of the wording of the contractual clauses relating to the applicable law. For example, a clause providing that "for all questions not covered by the contract Swiss law shall be applicable" puts the arbitrators under an obligation to give effect to all the contractual stipulations even if these would be void by virtue of Swiss public policy. It is important to underline again that as far as the international arbitrator is concerned there is no natural hierarchy between the municipal laws of different countries. Quite the contrary, a law is only applied if the parties have chosen it, and, even then, only within the limits of the will of the parties. If the parties have expressly excluded certain rules of that law, the arbitrators may not enforce the application of those rules in the name of the public policy of any law and/or country. By introducing appropriate clauses into their contract, it is therefore, quite possible for the parties to exclude certain provisions of law which would otherwise have been applied. On the other hand, an arbitrator will not always, or even generally, conclude that it is the implied will of the parties to override public policy in every instance when a clause in the contract is contrary to the

[126] *See* p. 101 *et seq., supra.*

public policy of the law chosen by them. It is only by analyzing and interpreting the clause inserted by the parties that the arbitrator is able to determine the role that the parties intended to confer on that law. It is thus up to the parties to determine any hierarchical links between the contract and the law chosen by them. Consequently, it is not for the arbitrators to *evaluate* any such hierarchy created by the parties. Whether or not the arbitrators find it reasonable or well-founded is irrelevant. They must respect it anyway and cannot set it aside in the name of the public policy of *lex contractus* since the arbitrators have no authority to act as guardians of such public policy.

Second, if the parties have *not* created any hierarchy between the contractual provisions and the applicable law, the situation is different. If the parties simply refer to the law of a specific country as the applicable law – e.g. by stipulating that "this contract shall be governed by and construed in accordance with Swedish substantive law" – the natural interpretation of the will of the parties would seem to be that the parties wish to apply Swedish law in its entirety, including its public policy rules. However, since the ultimate test is the will of the parties, other interpretations *may* be possible, depending on the circumstances of the individual case. For example, if the parties have referred to the law of a particular country, but *also* authorized the arbitrators to act as *amiables compositeurs* it is unclear what role the public policy rules of the municipal law chosen by the parties will play. It is quite possible that such rules should be applied, notwithstanding the reference to *amiables compositeurs*.[127] On the other hand, if the parties have not referred to any municipal law at all, but only to *ex aequo et bono*, or to *amiable compositeurs*, it would seem impossible for the arbitrators to apply the public policy rules of any country since that would not seem to be in compliance with the will of the parties.[128]

3.2.5.3.2.2 Lex Contractus Determined by the Arbitrators

The situation is different if the *arbitrators* determine the applicable law where the parties have not specified it. In such a case, it is submitted that the arbitrators must apply that law as it stands.[129] It is difficult to see that the arbitrators have the right to exclude one provision or another from the

[127] *Cf.* Derains, Public Policy and the Law Applicable to the Dispute, in International Arbitration, in Comparative Arbitration Practice and Public Policy in Arbitration. VIIIth International Arbitration Congress, New York 4–6 May 1986 (1987) 240.

[128] It is possible that such a situation would – at least in theory – call for the application of international public policy, provided that the circumstances in the individual case so warrant. *See* further discussion at p. 128 *et seq.*, *infra*.

[129] *Cf.* e.g. Derains, *op. cit.*, at 536–537.

law determined by them, on the basis that such provision is contrary to the will of the parties as manifested in the contractual clauses. It is of course possible to envisage cases where the arbitrators take the view that the parties had the intention not to subject the contract to the public policy provisions in question, but this would presuppose that the parties' intention on this point could somehow be ascertained. This is typically unlikely to happen in a situation where the parties themselves have failed to agree on, or to specify, the applicable law.

3.2.5.3.3 Public Policy of Other National Laws than the *Lex Contractus*

As mentioned above, the primary allegiance of an international arbitrator is to the *lex contractus* as determined by the parties, or by the arbitrators. With respect to the applicable substantive law in a dispute, there exists no reason for him to look to the public policy of any national law other than the *lex contractus*.[130] It has been said at times that an international arbitrator should take account of the public policy of certain other national laws, for example, in order to ensure that the resulting award does not offend the public policy of the place where enforcement is sought.[131] This may be advisable from a practical point of view. It is submitted, however, that an international arbitrator is under no *obligation* to respect the public policy of any national law, except as described above under 3.2.5.3.2.[132]

Needless to say, it is of utmost importance for the parties to obtain a valid and enforceable arbitral award. In fact the entire arbitral process is geared towards this goal. Should the resulting award be unenforceable because it violates the public policy of the country where enforcement is sought,[133] the parties would have spent time, money and energy in vain.[134] It is probably fair to assume that most arbitrators do their utmost to ensure that the award will be enforceable. In real life this is, however, easier said than done, among other things because it will in most cases be impossible for the arbitrators to know in which country, or countries,

[130] *See*, however, the discussion at p. 116 *et seq.*, *infra*, on mandatory rules of municipal law.

[131] *See* e.g. Lew, *op. cit.*, at 536–537.

[132] *Cf.* e.g. Fouchard, L'Arbitrage commercial international (1965) 377. In fact Lew, *op. cit.*, recognizes that there is no such obligation for the international arbitrator: "... the international arbitrator is not obliged to respect any national public policy", *id.* at 536; referring to Fouchard, he goes on to say: "However, from a *practical* viewpoint an arbitrator *should* take account of certain national public policies" (emph. added), *id.* at 536.

[133] *Cf.* Article V(2)(b) of the 1958 New York Convention.

[134] *Cf.* Lew, *op. cit.*, at 537 where it is said: "If an arbitrator's award is not enforceable because it violates the public policy of the place of performance, the arbitrator will have failed the responsibility vested in him".

enforcement will ultimately be sought. Given the widespread acceptance of the 1958 New York Convention, enforcement will often be sought not only in the home country of the party which loses, but in any jurisdiction where he may have assets. As already mentioned, the practical considerations underlying the desire to render an enforceable award cannot and do not create any *obligation* for the arbitrator to apply, or to take account of, the public policy rules of countries where enforcement may ultimately be sought. This is evidenced, *inter alia*, by the fact that no arbitral awards are known, where arbitrators have refused to apply a law, or rules, chosen by the parties, on the basis that such law or rules would violate the public policy of a potential enforcement forum.

3.2.5.4 Mandatory Rules of Municipal Law

3.2.5.4.1 Generally

Mandatory municipal law rules are usually defined as rules which are deemed to be so essential from the viewpoint of an individual state that their application may *never* – in the view of the state in question – be set aside by foreign laws.[135] The scope of application of mandatory rules is determined basically with regard to their *objective* rather than to the *result* of their application. As opposed to the public policy rules of any given state – which come into play only on the basis of the circumstances of an individual case – mandatory rules are *always* to be applied, irrespective of which foreign law is applicable to the contract and irrespective of which results such application produces.[136]

The concept of mandatory rules has evolved on the basis of the legal status of particular rules in the *lex fori*. Such rules – which are sometimes referred to as public policy laws (*lois d'ordre public*), or *lois de police*[137]

[135] *See* e.g. Eek, Lagkonflikter i tvistemål II (1978) 107–110; Bogdan, Svensk internationell privat- och processrätt (5th. ed. 1999) 78–79; Pålsson, Romkonventionen – Tillämplig lag för avtalsförpliktelser (1998) 114–115 and, generally, Cordero Moss, International Commercial Arbitration and Mandatory Rules (1999).

[136] In Sweden, for example, labour law legislation and consumer protection legislation are sometimes mentioned as such mandatory rules, *cf.* Bogdan, *op. cit.*, at 79.

[137] Another term often used in French legal literature is lois d'application immediate, *see* Francescakis, Lois d'application immediate et règles de conflit, 3 Revue critique de droit international privé (1967) 691–697. Another way to describe such laws is to characterize them as "positive" public policy rules, where the positive function of public policy is to insist on the immediate application of certain rules whereby such rules replace the ordinarily applicable conflicts rules of *lex fori* rather than the foreign law in question, *cf.* Eek, Lagkonflikter i tvistemål II (1978) 107. – On *lois de police*, *see* Karaquilo, Etudes de quelques manifestations des lois d'application immédiate dans la jurisprudence française de droit international privé (1977).

– are different from the public policy mechanism in that they are deemed so essential as to be applied under any and all circumstances even if the foreign law in question does not violate the public policy of *lex fori*.[138] In the practice of national courts such rules often aim at protecting the weaker party in a contractual relationship.[139] While there seems to be general acceptance that such mandatory rules exist within the conflict of law rules of *lex fori*, the situation is much more complicated with respect to international commercial arbitration.

The international arbitrator does not have any *lex fori*. This fact was eloquently described by the sole arbitrator in the *Solel Boneh Case*. He stated *inter alia*:

> "As Arbitrator I am myself no representative or organ of any state. My authority as arbitrator rests upon an agreement between the parties to the dispute and by my activities I do not, as state judges or other state representatives do, engage the responsibility of the state of Sweden. Furthermore, the courts and other authorities of Sweden can in no way interfere with my activities as Arbitrator, neither direct me to do anything which I think I should not do, nor to direct me to abstain from doing anything which I think I should do."[140]

The international arbitrator need not take account of the distinction between mandatory rules of the forum and foreign mandatory rules. The distinction that he has to make, it is submitted, is between mandatory rules of *lex contractus* and mandatory rules of other national legal systems.

[138] *Cf.* Article 7.1 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, which stipulates: "When applying under this convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application." For a general discussion of Article 7 of the Convention, *see* Pålsson, *op. cit.*, at 114–126. – While mandatory rules may express the public policy of *lex fori,* there is no automatic link between the two categories. Technical rules of law, e.g. in the administrative law field, typically have little to do with upholding fundamental values of the legal system in question but would rather seem to be prompted by considerations of legal efficiency and order, *cf.* Böckstiegel, Public Policy and Arbitrability, in Comparative Arbitration Practice and Public Policy in Arbitration. VIIIth International Arbitration Congress, New York, 4–6 May 1986 (1987) 183.

[139] *Cf.* Bogdan, *op. cit.*, at 79, where reference is made to Swedish labour law legislation.

[140] ICC Award No. 2321, as quoted in Hjerner, Choice of Law Problems in International Arbitration with particular reference to arbitration in Sweden, Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce (1982) 25. (Professor Hjerner was the secretary to the sole arbitrator).

In discussing mandatory rules of municipal law we must thus distinguish between such rules of *lex contractus* and mandatory rules of other national laws than *lex contractus*. Furthermore, we must distinguish between situations when the parties have chosen *lex contractus* and when *lex contractus* has been determined by the arbitrators.[141]

3.2.5.4.2 Mandatory Rules of *Lex Contractus*

3.2.5.4.2.1 Lex Contractus Determined by the Parties

This situation resembles the situation discussed above with respect to national public policy when *lex contractus* has been chosen by the parties. This means, as a matter of principle, that party autonomy reigns supreme. There is nothing to prevent the parties from deciding to restrict the application of the law chosen to certain specific issues, or the other way around, to exclude certain contractual provisions from being subject to *lex contractus* which would otherwise have rendered such provisions invalid. Ultimately, the parties could have chosen another law which would not have rendered the contractual provisions in question invalid. As noted above, however, the ultimate test is the will of the parties.[142] To determine the will of the parties, the arbitrators must thus interpret the relevant contractual provisions. Thus, if the parties have simply stated that "this contract shall be governed by the substantive laws of France", the arbitrators must also apply the mandatory rules of French law.[143] The generally held opinion seems to be that the arbitrators must apply the mandatory rules of *lex contractus*, provided that the parties have not exercised their autonomy so as to exclude the mandatory rules of *lex contractus*.[144] This would mean, for example, that to the extent that EC

[141] *See* Hobér, note 119, *supra* at 252 *et seq.*

[142] *See* pp. 112–114, *supra.*

[143] *See* p. 112, *supra.* – *Cf.* e.g. Lazareff, Mandatory Extraterritorial Application of National Law, Arbitration International (1995) 135, where it is said – without distinguishing between the situation when the parties have chosen *lex contractus* and when it has been determined by the arbitrators – that "/t/here is no doubt that the mandatory rules of the *lex contractus* should be applied by the arbitrator, whether or not invoked by the parties". The latter part of the quoted language raises a crucial issue of – predominantly – a procedural character *viz.*, whether or not an arbitrator may apply a law, or provisions of a law, even if neither of the parties has relied on such law, or provisions, in the arbitration. As pointed out by Lazareff, Mayer has taken the view that an arbitrator has an obligation to apply the mandatory rules of *lex contractus* only if the parties have not excluded the application of such rules and provided that at least one of the parties has relied on such rules, *see* Mayer, Mandatory rules of law in international arbitration, Arbitration International (1986) 280.

[144] Lazareff, note 143, *supra*, with references; he does not distinguish between the situations where the parties have determined the *lex contractus* and when the arbitrators have

competition rules form part of *lex contractus*, and have not been excluded by the parties, the arbitrators must apply such rules. Some commentators take the view, however, that anti-trust rules must *always* be applied and cannot be "set aside" by virtue of a choice of law by the parties, nor ignored by arbitrators acting as *amiables compositeurs* or deciding *ex aequo et bono*.[145] In the opinion of the present author, this question must be answered on the basis of an interpretation of the will of the parties when they themselves have chosen the *lex contractus*.[146]

As far as the application of EC competition rules is concerned, it is a complicated question which has generated much discussion and many articles.[147] In the view of the present author, there is, however, a funda-

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done so. In the opinion of the present author, however, the parties have the right to exclude mandatory rules of *lex contractus*, if they so wish. In Lazareff's opinion there is a restriction on the arbitrators' application of mandatory rules, *viz.*, that they not violate international public policy, Lazareff, *Id.*, 139. – For a discussion of international public policy, *see* p. 128 *et seq.*, *infra*.

[145] *See* e.g. Dalhuisen, The Arbitrability of Competition Issues, Arbitration International (1995) 161. Dalhuisen refers, *inter alia*, to the 1980 Rome Convention on the Law Applicable to Contractual Obligations, Article 3 of which stipulates that mandatory rules of a country cannot be contracted out of when all the elements connected with the situation are relevant to that country; *see* also Weigand, Evading EC Competition Law by Resorting to Arbitration?, Arbitration International (1993) 251–252. Weigand makes the somewhat general statement that an arbitrator acting as *amiable compositeur* "is not entitled to disregard mandatory provisions which have a public policy character". The support relied on is a similar statement made by Jarvin, The Sources and Limits of the Arbitrators Powers, in Lew (ed.) Contemporary Problems in International Arbitration (1986) 68–69. However, neither Weigand nor Jarvin explains *why* this is so; in particular there is no discussion of how this position is to be reconciled with the fact that the arbitrators have a duty to apply the law chosen by the parties, but no other law. Jarvin does, however, say that "/t/his follows from the arbitrator's *duty* to make everything possible that the award is enforceable" (emph. added) *id.*, at 71: We are not told, however, who has imposed this duty on the arbitrators, if the parties have not done so. – As explained above, p. 115, in the opinion of the present author, there is no such obligation for an international arbitrator. – The relationship between EC competition rules and international commercial arbitration was discussed in a relatively recent judgment rendered by the European Court of Justice in Eco Swiss China Ltd. v. Benetton International N.V., C-126/97. In this case the European Court concluded that national courts of law must set aside arbitral awards which violate the EC competition rules, provided that the national legislation in question stipulates that arbitral awards which violate public policy may be set aside. It is still unclear what consequences this judgment will have for international commercial arbitration.

[146] None of the authors referred to in notes 143 and 145 *supra*, make any distinction between the situation when the parties have chosen the *lex contractus* and when this law has been determined by the arbitrators, nor between mandatory rules in *lex contractus* and in other municipal laws than *lex contractus*.

[147] For a general discussion, *see* Competition and Arbitration Law, ICC Publication No. 480/3 1993; Grossen, Arbitrage et droit de la concurrence, in Swiss Essays on International Arbitration (1984) 35; Beechey, Arbitrability of Anti-trust/Competition Law Issues

mental rule of the arbitral process which plays a decisive role in this connection, *viz.*, the prohibition for arbitrators to act *ultra petita* and to go beyond the authority bestowed upon them by the parties; as Roman law puts it with characteristic economy: *arbiter nihil extra compromissum facere potest.* This means, it is submitted, that unless at least one of the parties has raised the issue of EC competition law – e.g. invalidity of a contract on the basis of the provisions of the Treaty of Rome and/or in the Treaty of Amsterdam – the arbitrators cannot raise that issue *ex officio*; they have neither the right nor the obligation to do so. On the other hand, if that issue has been raised by at least one of the parties, then the arbitrators must address it, since otherwise they would be acting *infra petita*, which could render the award invalid.[148]

3.2.5.4.2.2 Lex Contractus Determined by the Arbitrators

It would seem that in cases where the arbitrators determine the *lex contractus*, the arbitrators will also have to apply the mandatory rules of *lex contractus*. For the same reasons as discussed above with respect to public policy, it is difficult to see why the arbitrators should have the right to exclude certain provisions of *lex contractus* in this situation.[149]

3.2.5.4.3 Mandatory Rules of Other National Laws than the *Lex Contractus*

The situation becomes even more complicated when the question of application of mandatory rules of other national laws than *lex contractus* must be answered. Against the background of the foregoing discussion – which proceeds from the assumption that it is the will of the parties which must be decisive – one is inclined to ask if there is any reason at all for the arbitrator to apply rules which have nothing to do with the *lex contractus*. Generally speaking, there would seem to be two potential grounds for the arbitrator to do so, *viz.*, (i) that the mandatory rules in question from part of international public policy and (ii) that the arbitrator has a duty to ensure that the resulting award is enforceable. If one were to accept the first proposition, it would seem that the ultimate

– Common Law, Arbitration International (1996) 179; Marenco, The uneasy enforcement of Article 85 EEC as between community and national laws, in Hawk(ed.), 1993 Fordham Corporate Law Institute (1994) 605; Zimmer, Schiedsgerichtsbarkeit und EG-Kartellrecht, Zeitschrift für Europäisches Privatrecht (1994) 163.

[148] If arbitratiors act *ultra petita* and beyond their authority this may also result in the award being annulled. – The issue discussed here is also connected with the principle of *iura novit curia* and the extent to which it is applicable in international arbitrations; for a brief discussion of *iura novit curia*, *see* p. 140 *et seq.*, *infra.*

[149] *See* pp. 113–114, *supra.*

ground is that the rules form part of international public policy, rather than constituting mandatory rules of any municipal law system.[150] With respect to the second proposition, it has already been said by the present author that in his opinion the arbitrator is under no such obligation.[151] Needless to say, such a position may result in an award not being enforceable, if for example, such mandatory rules are deemed to form part of the public policy of the country where enforcement is sought. It is submitted, however, that it must be up to the parties, rather than the arbitrators, to decide how they wish to address such a potential risk.

Before I discuss this question more in detail, it should be emphasized that there are very few published arbitral awards which deal with it. Furthermore, the awards which have been published do not present a clear picture, but rather solve the problem in different ways.[152]

In discussing this issue, it would once again seem necessary to distinguish between the situation where the parties have and have not, respectively, chosen the *lex contractus*.

3.2.5.4.3.1 Lex Contractus Determined by the Parties

As has been repeatedly stated, the arbitrators are bound to apply the law chosen by the parties. In my opinion, this principle is really all it takes for them to set aside mandatory rules of a national legal system other than the *lex contractus*. An example of this is a decision by the Court of Arbitration of the Chamber of Foreign Trade of the German Democratic Republic.[153]

The arbitrators ruled, *inter alia*, on the validity of a license agreement concluded between a company in the Federal Republic of Germany and an organization in the German Democratic Republic. The former company alleged, *inter alia*, that the contract was void since it militated against the competition law provisions of the Federal Republic of Germany and against Article 85 of the Treaty of Rome.

Emphasising that the parties had subjected the contract to the law of the German Democratic Republic, the arbitrators held that the validity of the agreement must be determined under this law. The arbitrators further-

[150] For a discussion of international public policy, *see* p. 128 *et seq.*, *infra*.

[151] *See* p. 115, *supra*.

[152] The conclusion drawn by Lazareff, for example, note 143 *supra*, is that one should approach this issue *in concreto*, i.e. depending on the circumstances in the individual case, rather than *in abstracto* proceeding from some general principle, or rule, which would provide an answer for the many different situations which may present themselves to the arbitrator, at 149–150.

[153] The award, which was rendered on 27 June 1976, is reprinted in Yearbook Commercial Arbitration (1979) 197.

more stated that even though the validity of the agreement could only be determined under the law of the German Democratic Republic, Article 85 of the Treaty of Rome could be taken account of as a *factual circumstance* preventing performance of the agreement, or making such performance effectively impossible, circumstances which under the law of the German Democratic Republic could have rendered the agreement invalid.[154]

There are two additional awards – of a more recent date – which address this situation, both rendered by arbitral tribunals within the commodities trade. Both cases concerned disputes between Dutch and Austrian parties on the basis of contracts which were subject to Dutch law, chosen by the parties. The question at issue in both cases was the applicability of Austrian exchange control regulations. In the first case[155] the arbitrators concluded that Austrian law could not be applied since the parties had agreed "that the contract is exclusively governed by Dutch law". The tribunal went on to say: "But even if the above Austrian law were to be taken into account, the arbitrators fail to understand how it could apply to a transaction which concerns the delivery of goods in the Netherlands to a Dutch buyer".[156] In the second case[157] the arbitrators reached the same conclusion, i.e. that Austrian law could not be applied. The arbitrators also said, however, that they "could give effect to mandatory provisions of the law of another country if a close link exists between the case and that country; in so deciding, the nature and extent of these provisions must be taken into account as well as the consequences of application or non-application".[158] The arbitrators found that the contracts did not have a sufficiently close link to Austria, so as to warrant the application of its exchange control regulations; the only connection with Austria was the fact that the seller was domiciled there.

It is interesting to note that in the second case, the arbitrators did not rule on the applicability *per se* of mandatory rules of another law than *lex contractus*. The same approach seems to have been taken by the sole

[154] Lazareff, note 143 *supra* at 144 has expressed the view that the importance of this case should not be overstated since it is quite old and since it "was apparently influenced by political circumstances which no longer exist". As far as the quoted language is concerned, it is submitted that there is no basis for this conclusion, at least not in the award as published.

[155] Published in Yearbook Commercial Arbitration (1982) 141. The award was rendered by the arbitral tribunal of the Royal Dutch Grain and Feed Association.

[156] *Id.*

[157] Published in Yearbook Commercial Arbitration (1983) 158. The award was rendered by the arbitral tribunal of the Amsterdam Grain Trade Association.

[158] *Id.*

arbitrator in yet another dispute, of an earlier date.[159] The case concerned non-performance by a Pakistani bank of a bank guaranty which was explicitly governed by Indian law and which was to be performed in India. The arbitrator did not apply Pakistani legislation-promulgated after the guarantee was issued as a result of hostilities which broke out between India and Pakistan – making any payment to Indian entities illegal. On the other hand, he did not altogether rule out the possibility of applying mandatory rules different from those contained in *lex contractus*.

Judging by pronouncements made in several, relatively recent, articles there may be a trend to argue that arbitrators have a *duty* to apply mandatory rules other than those found in *lex contractus*. One commentator has described this development in the following way:

> "The obligation of arbitrators to apply mandatory rules of other legal orders is the price international arbitration had to pay in order to gain acceptance by the various State judiciaries and enforcement authorities. The 1958 New York Convention, by conferring the same enforcement value to arbitral awards as to state court judgements, laid the ground for the massive expansion in the number of arbitral cases, which expansion in turn arouses the suspicion that arbitration could become a conduit for the circumvention of national or supra-national public-policy rules. [...] ... the arbitral doctrinal machine was put in motion and a string of articles written and congresses held on this subject matter. This resulted in the general opinion that arbitrators, irrespective of the contractual choice of law made by the parties, are bound to apply the mandatory provisions of other legal orders in certain circumstances, the list of which is open to debate, but one of them being certainly that such application is required in order to render the award enforceable in specific countries."[160]

Both the title of this commentator's contribution and the quote itself indicates that the commentator does not seem to be convinced that the trend which he describes is *de lege lata* rather than *de lege ferenda*. The present author shares this skepticism. The trend referred to seems to proceed

[159] Published in Yearbook Commercial Arbitration (1980) 174. This award is in the public domain as a result of an unsuccessful attempt to annul the award in English courts, Dalmia Cement v. National Bank of Pakistan, (1974) 3 All E.R. 189.

[160] Werner, Application of Competition Laws by Arbitrators. The Step Too Far, Journal of International Arbitration (1995) 23–24. *See* also Grigera Naon, Choice of Law Problems in International Commercial Arbitration (1992) 69; Blessing, Mandatory Rules of Law versus Party Autonomy in International Arbitration, Journal of International Arbitration (1997) 23; Craig, Park & Paulsson, International Chamber of Commerce Arbitration (2nd ed. 1990) 307; Schiffer, Normen ausländischen "öffentlichen" Rechts in internationalen Handelsschiedsverfahren (1990) 65–67, 169–170; Drobnig, Internationale Schiedsgerichtsbarkeit und wirtschaftsrechtliche Eingriffsnormen, in Festschrift für Kegel (1987) 95, 112, 117.

from assumptions the correctness of which is doubtful. For example, one of the assumptions seems to be that arbitration as an institution must exercise a certain amount of self-restraint so as not to end up in disrepute in the eyes of national judiciaries and enforcement authorities.[161] In the view of the present author there is no evidence that arbitrators are under such an obligation. As far as public policy is concerned, it would seem that states having doubts in this respect should avail themselves of Article V(2) of the New York Convention which allows them to refuse recognition and enforcement precisely on public policy grounds.[162]

Reference is sometimes made in this connection to Article 7(1) of the 1980 Rome Convention On the Applicable Law to Contractual Obligations.[163] Suffice it to point out that the article stipulates that "effect *may* be given to the mandatory rules of the law of another country ..." (emph. added). This means that courts in States which have ratified the Convention are not under an *obligation* to do so, but that they may. Moreover, it is unclear exactly what they may do – the words "effect may be given to" does not necessarily mean "apply", but could simply mean "consider" or "take into account".[164]

In order to apply mandatory rules, other than mandatory rules of *lex contractus*, it would, generally speaking, seem to be necessary for the transaction in question to have some connection with the country whose mandatory rules are relied upon.[165] If that is the case, the country concerned could be said to have an interest in having its mandatory rules applied by arbitrators. If such laws were *not* applied by the arbitrators, and if the resulting award were to be enforced in that country, there could

[161] *See* e.g. the following statement made by Hochstrasser, Choice of Law and Foreign Mandatory Rules in International Arbitration, Journal of International Arbitration (1994) 85, where it is said, *inter alia*,: "The standard reached under the New York Convention, should not be put at risk by an attitude of disrespect toward national laws. It is therefore advisable that arbitrators respect the rules that countries or transnational organizations like the EC have enacted in their reasonable exercise of their legislative powers" (footnotes omitted). – *See* also, Lando, The Law Applicable to the Merits of the Dispute, in Sarcevic (ed.), Essays on International Commercial Arbitration (1989) 158, where it is said: "Every arbitrator has to consider the importance of preserving commercial arbitration as an instrument for settling international disputes. Today commercial arbitration is highly regarded in most countries. Governments have not interfered with its operation and, indeed have encouraged its establishment in their countries. If, however, arbitration is used as a means of evading the relevant policies of countries which have an interest in the subject matter of the dispute, the reputation of arbitration will suffer".

[162] For a discussion of the assumptions underlying the above-mentioned trend, *see* Schöldström, The Arbitrator's Mandate (1998) 313–318.

[163] For the text of this article, *see* note 138, *supra*.

[164] *See* Pålsson, *op. cit.*, at 122–125 for a discussion of this aspect of Article 7(1).

[165] *Cf.* e.g. Article 7(1) of the 1980 Rome Convention.

be a risk that the mandatory rules in question would be deemed to form part of the public policy of that country, which is a ground on which refusal to enforce the award could be based.[166] Such a line of reasoning brings us back to the question whether or not the arbitrator has an obligation to ensure that the award is enforceable.[167] In the opinion of this author it is difficult to see that the arbitrator has any obligation *per se* to safeguard the interests of the state whose mandatory rules are relied upon. As I have stated above,[168] the only allegiance which the arbitrators have is in relation to the parties; it is their will that the arbitrator must comply with. However, there may – at least theoretically – exist one reason for the arbitrator to apply such mandatory rules, *viz.*, if non-application of them would violate international public policy.[169]

The questions discussed above, raise the more general question of *fraus legis*; differently put: is an arbitrator bound to apply the law chosen by the parties, even if such choice would constitute a *deliberate* evasion of certain provisions of a particular municipal law? If we assume, for the sake of argument, that international public policy does constitute a restriction on party autonomy in international arbitration, it could perhaps be argued that arbitrators should not uphold a choice of law by the parties which constitutes *fraus legis*.[170] It is, however, necessary to define the role of *fraus legis* in relation to party autonomy. Generally speaking, *fraus legis* means that the parties to a contract manipulate the various connecting factors of a specific conflict or laws rule so as to ensure that a desired substantive law will be applied. They may do so, for example, by changing the domicile, or place of registration, of a legal entity. As is indicated by the term itself – *fraus legis* – such manipulation must be done with a fraudulent intent. By manipulating the connecting factors the parties avoid application of a substantive law which would have been applicable, had the parties not changed the connecting factor(s). In the opinion of the present author, it is difficult to reconcile the concept of *fraus legis* with party autonomy as it has been accepted in international arbitration. Since there is no requirement that the law chosen by the parties has any reasonable connection with the parties, or with the transaction,[171] it is difficult to see how the concept of *fraus legis* could constitute

[166] *See* e.g. Article V(2) of the New York Convention and Article 36(1)(b)(ii) of the UNCITRAL Model Law.
[167] *See* pp. 114–115, *supra*.
[168] *See* pp. 111–113, *supra*.
[169] International public policy is discussed at p. 128 *et seq.*, *infra*.
[170] *See* e.g. Derains, note 127 *supra*, at 251.
[171] *See* pp. 109–110, *supra*.

a restriction on party autonomy in international commercial arbitration. From a theoretical, as well as practical, point of view, it is submitted that *fraus legis* does not play any role in international commercial arbitration.[172]

In summary, it is difficult to find any theoretically acceptable reason why arbitrators should apply mandatory rules of other laws than *lex contractus* when the parties have determined the latter. This notwithstanding, several commentators take the view that arbitrators have a right – and sometimes an obligation – to do so, depending on the circumstances in the individual case.[173] On balance, however, it would seem that *in practice* this restriction on party autonomy plays a limited role.

3.2.5.4.3.2 Lex Contractus Determined by the Arbitrator

As has been discussed above, an international arbitrator should in the opinion of this author proceed from the assumption that all national laws have the same weight, as long as the parties have not determined that one or several of them should be applied to the substance of the case. Consequently, there is theoretically nothing to prevent an arbitrator from applying mandatory rules of another law than the *lex contractus*, if the parties have made no choice of law. From a practical point of view, such application seems to be most frequently resorted to in relation to the mandatory rules of the state where the contract is to be performed. It should be pointed out, however, that there seems to be no consensus among arbitrators, nor among writers, as to the applicability of mandatory rules foreign to the *lex contractus* when this law has not been chosen by the parties. It would seem that several arbitrators and commentators tend to favor application of mandatory rules of the place of performance of the contract. Very few awards have been published addressing this situation. One award, rendered in 1983,[174] concerned a dispute between an Italian and Korean party. The contract between the parties was in fact performed both in Italy and Korea; for the larger part, however, in Korea. Before even reaching the question of applicable law to the contract (*lex contractus*) the arbitrator on his own initiative, tried whether or not the contract violated Article 85 of the Rome Treaty, and also the rules of the Korean competition laws.[175] The latter formed part of *lex contractus* – the arbitrator

[172] *Cf.* Lalive, note 106 *supra*, at 266. – *Cf.* Lando, The law applicable to the merits of the dispute, Arbitration International (1986) 107, where it is said: "Choice-of-law clauses which were made with an evasive intention and by which the parties committed themselves to what the French call 'fraud à la loi' have not been found in the arbitration cases".

[173] *Cf.* e.g. Lazareff, note 143 *supra*, at 144, 146 and 150, with references.

[174] Published in Yearbook Commercial Arbitration (1985) 49.

[175] *See* pp. 119–120, *supra*, as to the present author's view of the appropriateness of raising such an issue *ex officio*.

decided that Korean substantive law was to be applied to the contract – but did not seem to enjoy any priority over any other mandatory rules such as the competition rules of the European Community.[176] Other awards go in the other direction. In one case decided in 1978,[177] for example, concerning a dispute between a Swedish shipyard and a Libyan buyer, the tribunal refused to apply Libyan boycott laws against Israel, since the contract was subject to Swedish law, and it was – at least partially – to be performed in Sweden.[178] A more recent example is an award rendered in 1991, where an arbitral tribunal did not apply the US RICO (Racketeer, Influenced and Corruption Organizations) Act in a dispute between an American and non-American party, where *lex contractus* was not US law.[179] Both legal writings and arbitral practice thus present a rather mixed picture. At this point in time the only conclusion one can draw is that sometimes arbitrators do, and sometimes they do not, apply mandatory rules of other municipal laws than *lex contractus* and that they usually refer to some strong and purportedly legitimate interest of the state whose mandatory rules are concerned as justifying the application of such rules.[180]

In discussing the application of mandatory rules foreign to the *lex contractus* it is important to distinguish between the following two situations:

[176] Lazareff, note 143 *supra*, at 144 states: "In my opinion, an arbitrator confronted with the same situation, could also apply the competition rules of the EEC Treaty, whatever the *lex contractus*". The situation to which Lazareff refers is one where the European Commission had applied the EEC Competition rules to events taking place outside the territory of the community. Lazareff does not explain, however, *why* arbitrators should have this right; no explanation is offered how such application can be reconciled with the principle of party autonomy in international arbitration, in particular when the parties have chosen the *lex contractus* and such law is not the law of a member state of the European Union.

[177] Published in Yearbook Commercial Arbitration (1981) 133.

[178] One well-known example in *judicial* practice of the application of foreign boycott rules is *Regazonni* v. *KC Sethia Ltd*, decided in 1958 by the House of Lords – 1958 A.C. 301; 1957 3 AII E.R. 286 – where the House of Lords applied Indian boycott rules against South Africa to a contract governed by English law entered into between an English businessman and a businessman domiciled in Switzerland for the export of 500,000 jute bags to South Africa; *cf.* Lalive, note 106 *supra*, at 279–280; Lowenfeld, note 36 *supra* at 209–210.

[179] This case is discussed by Lazareff, note 143 *supra* at 146–149.

[180] Lazareff, note 143 *supra*, at 147, in discussing the award referred to in note 153 *supra*, states that "/t/he Tribunal considered that the heart of the conditions for the extraterritorial application of the mandatory law of a particular state is that such state must have *a strong and legitimate interest* to justify the application of such a law in international arbitration". We are not told, however, why the *arbitrators*, appointed as they are by the parties to the dispute, should be the guardians of such interest of the state concerned.

1. *Application* of mandatory rules, and
2. *Consideration* of mandatory rules as factual circumstances.

It is possible, for example, to take account of, or to consider, foreign mandatory rules, such as currency control regulations, import and export regulations, and the like, without *applying* such rules, in the sense that such rules do not form the legal basis for the decision of the arbitrators.[181] Assume, for example, that a contract is subject to the laws of the state of New York and that a debtor invokes the exchange control regulations of his home country as a ground for his non-payment of a certain sum, since the regulations lead to the invalidity of the contract in the given situation. To accept such an argument does not necessarily mean that the exchange control regulations are being *applied*, but could mean that they are merely taken account as a factual circumstance in deciding whether or not the agreement should be declared invalid under the laws of New York. All the legal conclusions as to the validity of the contract are thus to be drawn on the basis of the laws of New York. This does not mean that the arbitrator *applies* the exchange control regulations, but that he evaluates their effect on the performance of the contract, an evaluation which is done on the basis of the *lex contractus*.

3.2.6 International Public Policy

3.2.6.1 Introduction

In the foregoing sections numerous references have been made to international public policy as a potential restriction on party autonomy in international arbitration. The discussion above concerning national public policy and mandatory rules of municipal law has shown that there are no clear cut lines to be drawn between these two concepts. The concept of international public policy is even more difficult to define and to distinguish from the two other concepts. There is one distinctive feature, however, pertaining to international public policy, *viz.*, that it is not connected with any particular *national* system of law. Rather, it is based on, and stems from, notions and policies purportedly generally accepted by, and in, the international community as a whole. In that sense one could perhaps characterize international public policy as the lowest common

[181] As discussed on pp. 124–125, *supra*, this seems to be the approach taken in Article 7(1) of 1980 Rome Convention On the Law Applicable to Contractual Obligations; *cf.* also Pålsson, *op. cit.*, at 123–124. – For a critical view of Article 7(1), *see* e.g. Bogdan, 1980-års EG-konvention om tillämplig lag på kontraktsrättsliga förpliktelser, Tidsskrift for rettsvitenskap (1982) 37 *et seq.*

denominator of all legal systems of the world. There is, however, at least one troubling theoretical aspect with the concept of international public policy. Since it is not based on any municipal law rule, nor on any supranational rule, it is not possible to regulate, nor to enforce international public policy, or to apply any sanctions, should international public policy have been deviated from.[182] It has been suggested, however, that failure to apply international public policy "will result in anarchy in international commerce and a collapse in the structure of contemporary international commercial intercourse".[183] In practice, it would seem likely that if application of any law or rule would be deemed to be contrary to international public policy such application would in all likelihood also violate the *national* public policy of one or several states. Consequently, in such a situation the same result could be achieved by an arbitrator by applying the national public policy of a state, rather than by referring to international public policy. Seen in this perspective, it would seem difficult to characterize international public policy as an *additional* restriction on party autonomy.[184] Already for this reason, the field of application of international public policy must necessarily be very restricted. Nevertheless, there may, at least theoretically, be situations where an arbitrator would consider himself prevented from applying the national public policy of any given state and would therefore want to rely on international public policy.

Generally speaking, there seems to be a consensus that international public policy *does* exist in international commercial arbitration and that it *does* have a role to play.[185] However, this consensus seems to exist mostly at the conceptual level, rather than at the practical level when it comes to implementation of the concept. There are above all two aspects which continue to vex scholars and practitioners alike, *viz.*, (i) what is the *function* of international public policy in international commercial

[182] *Cf.* Lew, *op. cit.*, at 539. *See*, however, Lalive *supra* note 106, at 311 who takes the view that "/t/here is no valid theoretical reason to challenge the acceptance of a concept of transnational or really international public policy, a concept which, in practice, whether in the law of nations or in the law of international trade, has been recognized as real for quite a long time".

[183] Lew, *op. cit.*, at 539–540.

[184] Lalive, *supra* note 106, at 315.

[185] *Cf.* Lalive *supra* note 106, at 310, with references, where it is said: "There exists a notion of transnational, or really international public policy", and at 311 where he continues to say that any study of modern international arbitration "shows that it is impossible to deny the existence of the concept of transnational public policy, nor can the variety of its possible applications, nor its interest be questioned (an interest which, as will presently be shown, should not, however, be over-estimated)"; *cf.* Lew, *op. cit.*, at 534–535 and at 539–540 and the references contained therein.

arbitration? and (ii) what exactly is the *content* of international public policy? Before I discuss these two issues, there is, again, a very fundamental issue to be answered with respect to international commercial arbitration: *if* there is such a thing as international public policy, *why* must the international arbitrator apply it? We are faced again with the fact that the international arbitrator is the servant of the parties only and has no allegiance to any state, nor to any municipal law system. The explanation usually suggested is that "the international arbitrator does have, and is bound by, a private international law, but that such private international law can only be a 'transnational' one, constituted as it is by a number of general principles, either common to all the parties (including states) concerned by a given case, or universal."[186] While this is, in the opinion of the present author, to stretch the notion of a supranational, or transnational, norm binding the arbitrators too far, the fact remains that the concept of international public policy has been mentioned and discussed in a number of arbitral awards and is cited with approval in the legal literature. Thus, even though a sound theoretical base for the concept may be lacking, international public policy does seem to play a certain role in modern international commercial arbitration.

3.2.6.2 The Function of International Public Policy

As mentioned above, the *function* of national public policy is to replace a law – which would otherwise have been applied – with another law.[187] Traditionally, this has *not* been the function ascribed to international public policy. Rather, its role has generally been considered to be of a positive character, in the sense that its effect has been said *directly* to influence the arbitrators in resolving a given dispute.[188] In this sense the traditional function of international public policy could perhaps be said to be parallel to that of mandatory rules of municipal law.[189] While the positive

[186] Lalive, *supra* note 106, at 301. *See* also Lew, *op. cit.*, at 540, where it is said: "They /the arbitrators/ are the guardians of the international commercial order: They must protect the rights of participants in international trade; give effect to the parties' respective obligations under the contract; imply the presence of commercial *bona fides* in every transaction; respect the customs followed in international trade practice and the rules developed in relevant international treaties; uphold the commonly accepted view of the international commercial community and the policies expressed and adopted by appropriate international organizations and enforce the fundamental moral and ethical values which underlie every level of commercial activity" (footnotes omitted).

[187] *See* pp. 111–116, *supra*.

[188] Lew *op. cit.*, at 539.

[189] As discussed at pp. 116–121, *supra*, mandatory rules are said *always* to be applied, irrespective of the law chosen by the parties and irrespective of what results the application of such law produces.

function of international public policy is still considered to be its main function, it has been suggested that it may also have a *negative* function.[190] This negative function may take two forms: *first* to exclude the application of laws and rules which would normally be applicable, and *second* to exclude the application of the *national* public policy of a given state, in case such public policy would contradict *international* public policy.[191] In all likelihood the latter situation would in practice be an unusual one, but theoretically possible. One possible example would be the apartheid policy previously adopted by and practised in South Africa. It is conceivable that such policy was deemed to form part of the national public policy of South Africa and as such was violating international public policy on the assumption that the latter would prohibit any form of racial discrimination.[192]

For the purposes of this Study I approach international public policy with a view to finding out to what extent – both in its positive and negative function – it constitutes a limitation on party autonomy when parties choose the applicable law to a dispute.[193]

3.2.6.3 The Content of International Public Policy

Since most international arbitrations are typically based on one or several contracts a frequent, and typical, situation would be to determine the extent to which international public policy may influence the validity of the disputed contract(s). This brings us to the most difficult question of all in this connection, *viz.*, to determine the *content* of international public policy. It goes almost without saying that there is no generally accepted, comprehensive, definition of what constitutes international public policy. Rather one has to search for the constituent parts of international public policy in various sources of law and in other norms.[194] Despite the lack of a general definition, there seems to be a consensus as to certain occurrences which are deemed to form part of international public policy.

[190] *See* Lalive, *supra* note 106, at 312–313.

[191] *Id.*

[192] *Cf.* the Regazzoni case referred to in note 178, *supra*.

[193] International public policy may be relevant also for other aspects of international arbitration, e.g. with respect to procedural matters, arbitrability and the jurisdiction of arbitrators, *see* e.g. Lalive, *supra* note 106, at 296–301. *See* also Böckstiegel, Public Policy and Arbitrability, in Comparative Arbitration Practice and Public Policy in Arbitration. VIIIth International Arbitration Congress New York, 6–9 May 1986 (1987) 177 and Schwebel & Lahne, Public Policy and Arbitral Procedure, *ibid.*, 205.

[194] *See* e.g. Lew, *op. cit.*, at 534: "These truly international or 'pluri-national' criteria are drawn from the fundamental rules of natural law, the principles of 'universal justice', *ius cogens* in public international law and the general principles of morality and public policy accepted by civilized countries (footnotes omitted)."

One classic example is bribery and corruption. The landmark case in this sphere is an award rendered by Judge Gunnar Lagergren in 1963.[195] In that case a claim was made for payment of a commission for a contract obtained by a British company in Argentina. Pursuant to the agreement between the parties the claimant was to receive 10 per cent of the value of the contract. Although both parties agreed to submit their dispute to arbitration and to have the arbitrator decide on the merits of the dispute, Judge Lagergren felt compelled to dismiss the case *ex officio* on the basis that such a claim was not arbitrable, as a consequence of which the arbitrator did not have jurisdiction over the dispute. Judge Lagergren explained, *inter alia*, in his award that "it cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators".[196]

Judge Lagergren's characterization and rejection of bribery and corruption has not changed over the years. However, the conclusions to be drawn from this rejection have changed, such that the prevailing view today seems to be that the arbitrator ought not to decline *jurisdiction*, but should rather rule on the merits of the dispute in question, even if bribery and corruption are involved and thus *deny* such claims, based as they are on contractual clauses which are null and void, because they violate international public policy.[197] This new approach seems to have been first

[195] This award is probably one of the most frequently cited awards in the literature of international arbitration. The first comprehensive summary of the award was published by Lew, *op. cit.*, at 553–555. It was not until 1994, however, that the full text of the award was published, *see* Wetter, Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110, Arbitration International (1994) 277. This is the first known arbitration where an arbitrator has applied international public policy to refuse enforcement of a contract involving bribes. Arbitral practice does know of examples of illicit and/or immoral practices other than bribes, *see* e.g. Lalive, note 106 *supra* at 290–291.

[196] Quoted from Wetter, note 195 *supra* at 293.

[197] *See* e.g. El Kosheri & Leboulanger, L'arbitrage face à la corruption et aux trafic d'influence, Revue de l'Arbitrage (1984) 3; Lew, Determination of arbitrators' jurisdiction and the public policy limitations on that jurisdiction, in Lew (ed.), Contemporary Problems in International Arbitration (1986) 82–85, Böckstiegel, note 193 *supra* at 200–202; Lalive, note 106 *supra* at 291–292; Goldman, The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective, in ICC Court of Arbitration 60th Anniversary (1984) 272; Oppetit, Le Paradoxe de la corruption à l'épreuve du Droit Du Commerce International, Journal du droit international (1987) 5; Rubino-Sammartano, International Arbitration Law (1989) 317–321; Eriksson, Arbitration and Contracts Involving Corrupt practices: The Arbitrator's Dilemma, The American Review of International Arbitration (1993) 407–411.

launched by Loewe in an award rendered in 1982.[198] In subsequent arbitral awards and scholarly writings the approach used by Loewe has been followed.[199] Irrespective of which approach is used, there is general agreement that contractual provisions concerning bribery and corruption are null and void since they violate international public policy.[200]

Other areas where there seems to be a consensus – at least in scholarly writings – that they form part of international public policy include drug traffic, slavery, racial, religious and sexual discrimination, violation of human rights, kidnapping, murder, piracy and terrorism.[201] Consequently, contractual provisions aimed at facilitating such practices would typically be held null and void as violating international public policy, irrespective of which law the parties have chosen to govern their contract.

Another example where international public policy has been applied is an ICC award rendered in 1982.[202] The dispute concerned a number of contracts entered into between Yugoslav, Dutch and Swiss entities. One of the contracts was fictitious with the sole purpose of circumventing Yugoslav legislation on foreign exchange controls. After having concluded that contracts which are contrary to "the imperative laws or public policy, to ethics and morals" are null and void, the Tribunal went on to say:

[198] ICC Case No. 3916 rendered in 1982; parts of this award were published in Jarvin, Journal du droit international (1984) 930–934.

[199] *Cf.* Böckstiegel, note 193 *supra* at 201–202. One example is the preliminary award on jurisdiction rendered in 1991 in ICC Case No. 6401 between Westinghouse International Projects Company *et al.*, and National Power Corporation. The preliminary award is reproduced in Mealey's International Arbitration Report, Issue No. 1 (1992) B.1–B.69. The preliminary award was challenged before the Swiss Tribunal Fédéral which confirmed the award in a decision of 2 September 1993, Arrêts du Tribunal Fédéral Suisse 119 II 380-385.

[200] Even though there may be difficulties sometimes to distinguish between bribes and legitimate payments of commissions, bribery and corruption are prohibited in most legal systems of the world, a fact which is also reflected in a number of international instruments; *see* e.g. Report on the OECD Recommendation on Bribery in International Business Transactions (Report by the Committee on International Investment and Multinational Enterprises 1994); UN Commission on Transnational Corporations: Report of the Working Group on the Formulation of a Code of Conduct, 16 International Legal Materials (1977) 709; Economic and Social Council: Report of the *Ad Hoc* Working Group on Corrupt Practices in International Commercial Transactions, International Legal Materials (1983) 177 and International Legal Materials (1984) 626, International Chamber of Commerce, Les commissions illicites: Définition, traitement juridique et fiscal, ICC Publication No. 480/2 (1992) and the European Union Convention on Corruption adopted on 26 May 1997, EU Document 97/C 195/01.

[201] Lew, *op. cit.*, at 535; Lalive, note 106 *supra,* at 294, and the references made therein to various international instruments and national case law.

[202] ICC Case No. 2730, published in 111 Journal du Droit International (1984) 914–918.

> "This principle is recognized in all countries and all systems of law. It does constitute an international rule, an element of the common law of contracts in the international field. In the present case, the parties deliberately concluded a fictitious contract, in violation of the governing Yugoslav legislation, in order to procure to the fictitious exporter a credit equally fictitious which he would not have been able to obtain otherwise. There is therefore a violation of law, morality and good morals".[203]

From the brief discussion above, we can conclude that there is a fairly well-defined, but small, core group of situations which fall under the concept of international public policy and which typically bring about the invalidity of contracts which would otherwise be valid. Apart from this well-defined core group there are situations where it is doubtful, or uncertain, if they would be covered by the concept of international public policy. It has been suggested, for example, that it would be against international public policy to evade the imperative laws of a Sovereign state.[204] At least as far as international commercial arbitration is concerned, it is in the present author's opinion difficult to agree with this as a general proposition. Rather, one has to take a differentiated approach and take account of each situation where the application of mandatory municipal rules is suggested and evaluate such situation against the role of the international arbitrator.[205]

3.3 Choice of Law by the Parties in Interstate Arbitration

3.3.1 Party Autonomy in Interstate Arbitration

3.3.1.1 General Remarks

As I have discussed above, the principle of party autonomy plays a pivotal role in international commercial arbitration.[206] Indeed, it is a cornerstone in this context, proceeding as it does from the consensual nature of arbitration. The arbitration agreement is a most fundamental document which bestows upon the arbitrators the authority to decide the dispute

[203] As quoted by Lalive, note 106 *supra* at 292.

[204] Lew, *op. cit.*, at 535.

[205] *See* discussion at p. 116 *et seq.*, *supra*. – For a discussion of other cases, apart from the core situations, falling under international public policy, *see* Lalive, note 106 *supra*, at 295 *et seq.*

[206] *See* p. 84, *et seq.*, *supra*.

entrusted to them by the parties. It is the constitution for the arbitrators. As a natural consequence of this, the arbitrators are under an obligation to follow the (joint) instructions of the parties. This also applies to questions of applicable law. Should the arbitrators refuse, or fail, to apply the law chosen by the parties, the resulting award may be set aside at the request of one of the parties.[207]

Proceeding from the voluntary nature of international arbitration, commercial as well as interstate, it is only natural that states when agreeing to arbitration are free to agree on what principles of law and/or rules the arbitral tribunal is to apply. This follows from the general rule of public international law that states are in general free to contract out of such law.[208] By the same token, states are free, it is submitted, to provide *how* particular rules and principles are to be interpreted and applied and also to exclude rules and principles from application which would otherwise have been applicable.[209]

The arbitration agreement is thus the primary source of law for the arbitrators.[210] It may limit the powers of the arbitrators as to the rules and principles to be applied to resolve the dispute. As mentioned above[211], the generally held opinion is that if the parties have not made any choice of law, the arbitrators are under an obligation to apply public international law to resolve the dispute. If the arbitration agreement instructs the arbitrators to apply principles and/or rules which deviate from customary international law, the arbitrators must follow the instructions in the arbitration agreement.[212] There are, however, certain limitations on party autonomy which will be discussed below.[213] If the arbitrators do not follow the instructions of the parties, the resulting award may be a nullity.[214]

[207] *See* p. 101, *et seq.*, *supra.*

[208] *Cf.* the *Wimbledon Case*, P.C.7.J. Series A, (1923) 25.

[209] *See* e.g. Anand, International Courts and Contemporary Conflicts (1974) 346 – In the *Macedonian Arbitration* between the United States and Chile the parties agreed to exclude the question of extinctive prescription – and thus the relevant rules applicable to extinctive prescription – from the consideration of the arbitrator, *see* Moore, International Arbitrations, Vol. 2 (1898) 1461; *see* further p. 285 *et seq.*, *infra.*

[210] *See* e.g. Hudson, The Permanent Court of International Justice, 1920–1942 (1943) 601, where it is stated that: "In their search for the applicable law *ad hoc* arbitral tribunals are to be guided first of all by provisions agreed upon by the parties".

[211] *See* p. 14 *et seq., supra.*

[212] *See* e.g. Carlston, The Process of International Arbitration (1946) 80–81, and Hudson, International Tribunals: Past and Future (1944) 100.

[213] *See* p. 158, *et seq.*, *infra.*

[214] *See* p. 152, *et seq.*, *infra.*

The view that party autonomy is fully accepted in interstate arbitration is supported by most commentators[215] and by arbitral practice throughout the history of interstate arbitration.

One notable example in arbitral practice is the celebrated *Alabama Claims Arbitration*.[216] In this case the arbitration agreement stipulated that the arbitral tribunal was to apply to the dispute three rules of neutrality (the so-called Washington Rules) laid down by the parties in Article 6 of the arbitration agreement, as well as the rules of international law which were consistent with the Washington Rules.[217] The arbitrators followed the instructions of the parties.[218] It is interesting, and important, to note that the position of Great Britain was that these rules of neutrality did *not* represent a statement of principles of international law in force at the time when the claims arose; this notwithstanding the Washington Rules were accepted by Great Britain as the bases for the arbitrators to resolve the dispute.[219] Another example is the *British Guyana and Venezuela Boundary Arbitration*[220] where it was agreed by the parties that occupation for fifty years should be accepted as constituting a prescriptive title to territory. In the *Trail Smelter Case*[221] the arbitral tribunal was instructed to apply the "law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice", thus instructing the arbitrators to apply – at least partially – municipal law.

As far as arbitration rules are concerned there are numerous references to the principle of party autonomy. An early attempt to codify international arbitration was made by the Institut de Droit International in 1876. In that year the Institut adopted proposed rules for international arbitration.

[215] In addition to the authorities referred to above *see* e.g. Simpson & Fox, International Arbitration (1959) 128–130; Merrills, International Dispute Settlement (3rd ed. 1998) 99–105; Shaw, International Law (3rd ed. 1991) 651–653; but *see* Reisman, Nullity and Revision (1971) for a more critical view of party autonomy in interstate arbitration. Reisman's views are discussed on p. 148 *et seq.*, *infra*.

[216] Moore, International Arbitration, Vol. I (1893) 653; *see* also Wetter, The International Arbitral Process: Public and Private, Vol. I (1979) 27.

[217] For an account of the Washington Rules, *see* p. 44 *et seq.*, *supra*.

[218] Moore, *op. cit.*, at 656.

[219] *Ibid.*, at 494–558.

[220] Lauterpacht, Private Law Sources and Analogies in International Law (1927) 227–233. – The Treaty of Arbitration of 1897 signed in Washington stipulated, *inter alia*, the following in Article IV: "In deciding the matters submitted, the Arbitrators shall ascertain all the facts which they deem necessary to a decision of the controversy, and shall be governed by the following Rules, which are agreed upon by the High Contracting Parties as Rules to be taken as applicable to the case ...", quoted from the memorial of the United States of Venezuela, Vol. I (1898) 5.

[221] Reports of International Arbitral Awards, Vol. III (1949) 1905.

Article 18 of the proposed rules addressed applicable law. It reads: "The Arbitration Tribunal decides in accordance with the principles of international law, *unless the Agreement to arbitrate prescribes different rules* or leaves the decision to the free judgment of the arbitrators." (Emph. added.)[222]

In the 1899 Hague Convention For the Peaceful Settlement of International Differences, the question of applicable law is not directly addressed.[223] Article 15 of the Convention does, however, refer to "respect for law" as the basis for the decision of the arbitrators. The explanation to why the Convention does not address the question of applicable law, is probably that it was more or less self-evident that arbitrators had to apply international law, unless the parties had agreed otherwise.

The next major attempt to draw up a code for the settlement of international disputes was the 1928 General Act for the Pacific Settlement of International Disputes.[224] The practical value of the General Act has been negligible. It does nevertheless enshrine the principle of party autonomy in its Article 38, where it is said that with respect to the substance of a dispute an arbitral tribunal is to apply Article 38 of the Statute of the Permanent Court of Justice, unless the parties have agreed otherwise.[225]

Party autonomy was also explicitly referred to in the Model Rules on Arbitral Procedure prepared by the International Law Commission in 1953, originally with a view to being adopted as a Convention on Arbitral Procedure, but eventually adopted as a recommendation by the Generally Assembly of the United Nations.[226] Article 10 of the Model Rules starts out by referring to the choice of law made by the parties, and goes on to say that in the absence of such choice, the arbitrators are to apply the same sources of law as are stipulated for the International Court of Justice by virtue of Article 38 of its statute.[227]

The latest example of arbitration rules confirming the principle of party autonomy in interstate arbitration is the 1992 Optional Rules for Arbitrating Disputes between Two States, prepared and adopted by the Permanent Court of Arbitration. In 1992 the Administrative Council of

[222] Quoted from Darby, International Tribunals (3rd ed. 1899) 278.

[223] For a discussion of the Hague Peace Conferences of 1899 and 1907, *see* p. 51 *et seq.*, *supra*, with references.

[224] *See* p. 60 *et seq.*, *supra*.

[225] For the wording of Article 38 of the Statute of the Permanent Court of Justice, *see* p. 59, *supra*.

[226] *See* p. 65 *et seq.*, *supra* for a brief discussion of the Model Rules on Arbitral Procedure.

[227] For the wording of Article 38 of the Statute of the International Court of Justice, *see* p. 211, note 533, *infra*.

the Permanent Court of Arbitration authorized the Secretary General of the same institution to establish rules of procedure for interstate arbitration. These rules are patterned after the UNCITRAL Arbitration Rules[228] and were prepared with the assistance of a group of experts convened by the Secretary General.[229] Article 33 of the Optional Rules reads:

> "1. The arbitral tribunal shall apply the law chosen by the parties, or in the absence of an agreement, shall decide such disputes in accordance with international law by applying:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the arbitral tribunal to decide a case *ex aequo et bono*, if the parties agree thereto."

While we can thus conclude that the principle of party autonomy is widely accepted in interstate arbitration, it must be noted that parties seldom seem to make an *explicit* choice of law and/or rules to be applied. The history of interstate arbitration is full of examples when the parties have instructed the arbitrators to decide the dispute according to "international law", "justice and equity", or "law".[230] In the *Cayuga Indians Claims Arbitration*,[231] for example, the arbitrators were instructed to decide the dispute "in accordance with principles of international law and equity".[232] The United States–Mexican General Claims Convention of 1923 also stipulated that claims subsequent to 1868, and not arising out of the revolutionary disturbances in Mexico, were to be decided "in accordance with the principles of international law, justice and equity".[233]

General directions of this, and similar, nature to the arbitrators would seem to add little to what law arbitrators would have to apply, absent

[228] *See* pp. 87 and 95–96, *supra*.

[229] For a discussion of the work of the expert group *see* Bleich, A New Direction for the PCA: The Work of the Expert Group, in Muller & Mijs (eds.), The Flame Rekindled (1994) 17 *et seq.*

[230] *See* p. 34 *et seq.*, *supra*.

[231] Reports of International Arbitral Awards, Vol. VI (1955) 173.

[232] *Id.*, at 177.

[233] *See* Jenks, The Prospects of International Adjudication (1964) 607.

such directions. As mentioned above, the generally held view is that lacking instructions from the parties, the arbitrators are to apply public international law.[234] In the *Rann of Kutch Arbitration*, for example, there was no reference to applicable law, but the arbitrators were asked to decide the dispute based on the respective claims of the parties and the evidence produced by them.[235] Also in the *Taba Arbitration*, the arbitration agreement did not contain any reference to applicable law; the arbitrators were asked to decide the location of the boundary pillars of the recognized international boundary.[236] In both cases the arbitrators rendered their awards on the basis of international law. The conclusion that arbitrators are to apply international law, in the absence of a choice of law by the parties, is – it is submitted – based on the assumption that this corresponds to the will of the parties; in a dispute between two states, the natural starting point is to assume that the parties – i.e. the disputing states – wish international law to be applied with a view to resolving the dispute, unless the parties agree otherwise. Thus, the fundamental principle underlying this generally held opinion is that of party autonomy; the will of the parties is the ultimately decisive factor in determining the law to be applied.

The conclusion that international law is to be applied is obviously based on an *interpretation* of the arbitration agreement, as a document expressing the will of the parties, at least typically, and sometimes on the interpretation of the conduct of the parties. Needless to say, there are many situations where the interpretation of the arbitration agreement and the conduct of the parties – as expressions of the exercise of party autonomy – are crucial for determining the law and/or rules to be applied by the arbitrators. To the extent that arbitration agreements are embodied in treaties, the relevant provisions of the Vienna Convention will provide useful guidelines for the determination of the will of the parties.[237] In all likelihood the Vienna Convention would play an important role also when it is not applicable *per se*.

It is not proposed to discuss further these problems related to treaty interpretation and the interpretation of other arrangements between

[234] *See* p. 14, *supra*.

[235] *See* Wetter, The Rann of Kutch Arbitration, American Journal of International Law (1971) 348–349.

[236] *See* Lagergren, The Taba Tribunal, Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce (1990) 11–13.

[237] The rules on interpretation of treaties are set forth in Articles 31–33 of the Vienna Convention. For a general discussion of these rules *see* e.g. Sinclair, The Vienna Convention On the Law of Treaties (2nd ed. 1984) 119–154, with references, and Brownlie, *op. cit.*, at 631–638, with references.

states,[238] except to mention one factor to be considered in ascertaining the will of the parties in situations when there is no explicit choice of law, *viz.*, the *nature of the transaction or arrangement* in question.[239] For example, when an agreement has been signed by two states on a subject traditionally recognized as belonging to the central functions of a sovereign – e.g. protection of borders or the demarcation of a boundary line – it would seem reasonable to assume that the parties have intended the agreement to be subject to international law. On the other hand, if an agreement between two states concerning, e.g., the lease of embassy property is drafted in the language and in the form of a contract under the law of the state where the property is situated, that fact may well indicate that the parties intended their agreement to be governed by the law of that state, rather than by international law. Therefore, it is far from self-evident, in the opinion of the present author, that international law – or at least international law *only* – is always to be applied in interstate relations when the parties have failed to specify the applicable law.[240] As previously mentioned, the outcome of this interpretative exercise will ultimately depend on the will of the parties.

In discussing party autonomy and applicable law in interstate arbitration, two further concepts require brief mention, *viz.*, the principle of *iura novit curia* and the concept of *non liquet*.

3.3.1.2 Iura Novit Curia

The principle of *iura novit curia* is well-known in the judicial procedure of most municipal laws.[241] Simply put, it means that a court of law can and should raise questions of law of its own initiative, as opposed to questions of fact which must be raised by the parties. As far as the Permanent Court of International Justice and the International Court of Justice are concerned, there seems to be little doubt that the principle applies.[242] In the *Free Zones Case*, decided by the Permanent Court of International Justice in 1932, the following statement was made:

[238] For a discussion of informal international agreements, *see* Lipson, Why are some international agreements informal?, in Ku &Diehl (ed.) International Law. Classic and contemporary readings (1998) 91–124.

[239] *See* p. 342 *et seq.*, *infra*, for a discussion of the importance of the nature of a dispute in relation to the law and/or rules applicable to extinctive prescription.

[240] This issue is discussed in more detail below in Chapter 5.

[241] *Iura novit curia* is Latin and means "the court knows the law".

[242] *See* e.g. Cheng, General Principles of Law (as applied by international courts and tribunals (1953), 299–301; Reisman, *op. cit.*, at 542–543, and Rosenne, The Law and Practice of the International Court (3rd ed. 1997) 1592.

> "From a general point of view, it cannot lightly be admitted that the Court, whose function it is to declare the law, can be called upon to choose between two or more constructions determined beforehand by the Parties, none of which may correspond to the opinion at which it may arrive. Unless otherwise expressly provided, it must be presumed that the Court enjoys the freedom which normally appertains to it, and that it is able, if such is its opinion, not only to accept one or other of the two propositions, but also to reject them both."[243]

The Court is not bound by the *arguments* of the parties, but bound by the *law* chosen by the parties. There is thus no contradiction between the principle of party autonomy and the principle of *iura novit curia*, at least not at the conceptual level.[244] It is, however, in the opinion of the present author, doubtful to what extent the principle of *iura novit curia* can, and indeed should, be applied in international *arbitration*. The fundamental problem is this: arbitration is consensual in nature, which means, *inter alia*, that the parties determine the scope of the dispute both as to facts and as to law; against this background it is not self-evident that arbitrators have the right to determine a dispute on the basis of legal principles not raised by the parties and thus not argued by the parties during the arbitration. To allow this would be to undermine the right of the parties to be the masters of the arbitration. This would also introduce an undesirable element of potential surprise in international arbitration, in the sense that the parties may find out only in the award that the arbitrators have relied on rules and arguments which neither of the parties have referred to, thus depriving them of the possibility to introduce rebuttal arguments and evidence.[245]

3.3.1.3 Non Liquet

The concept of *non liquet* has primarily been used to denote a tribunal's unwillingness, or even refusal, to render a decision because the law to be applied, in the view of the tribunal in question, did not supply any rule for the dispute in question.[246] The concept of *non liquet* has given rise to

[243] P.C.I.J. Free Zones Case (1932) A/B. 46, 138.

[244] *See* p. 146 *et seq.*, *infra* for a discussion of party autonomy and the International Court of Justice.

[245] *Cf.* Calissendorff, Jura novit curia i internationella skiljeförfaranden i Sverige, Juridisk Tidskrift (1995/96) 141; he discusses the application of the principle of *jura novit curia* in international commercial arbitrations in Sweden and concludes that the principle should *not* be applied in such arbitrations, *id.*, at 148–149.

[246] The concept of *non liquet* stems from Roman law; it allowed judges to refrain from rendering a decision when a case was not clear from the pleadings, *see* Tamm, Romersk rätt och europeisk rättsutveckling (2:a uppl. 1996) 348; *non liquet* is Latin and means "it is

much debate in the past,[247] primarily as a consequence of the previously perceived incomplete nature of international law as a legal system, occasionally resulting in the impossibility to render a decision in accordance with the law. One school of thought has accepted that international tribunals may declare a *non liquet* since the gaps and lacunae of international law do by necessity limit the possibilities of tribunals to resolve disputes on the basis of international law.[248] At the other end of the spectrum we find commentators who take the view that there exists a prohibition against *non liquet*.[249] As far as the International Court of Justice is concerned, this follows, it is said, from Article 38 (1) (c) of its statute which authorizes the Court to apply the general principles of law recognized by civilized nations. Given the possibility to resort to such general principles, it is unlikely that it will be impossible to find rules or principles which may be applied to resolve a dispute.

The modern view seems to be that it is not permissible for a tribunal to declare a *non liquet*.[250] The explanation is that international law today is a sufficiently comprehensive legal system so as to allow every international question to be determined as a matter of law, either by applying existing legal rules or by applying legal rules derived from other legal rules or principles.[251]

Judging by the Advisory Opinion of the International Court of Justice in the *Legality of Nuclear Weapons Case*,[252] however, the question of *non liquet* seems to remain controversial. On 20 December 1994 the Court received a request from the United Nations General Assembly through a resolution dated 15 December 1994 for an advisory opinion on the

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not clear". – *Non liquet* is traditionally understood to mean that "an international tribunal should decline to decide a case where rules are not available for its determination because of gaps and lacunae in international law", Parry-Grant, Encyclopaedic Dictionary of International Law (1986) 259.

[247] For a general discussion of this debate *see* e.g. Reisman, *op. cit.*, at 131, 569–575; Anand, *op. cit.*, at 378–388, and Simpson & Fox, *op. cit.*, at 142–144.

[248] Authorities in favour of *non liquet* include de Lapradelle-Politis, Recueil des arbitrages internationaux (1905) 398; Politis, The New Aspects of International Law (1928); Siorat, La Problème des Lacunes en Droit International (1959) and Stone, Legal Controls of International Conflict (1959) 153–164; *id.*, *Non liquet* and the function of law in the International Community, British Yearbook of International Law (1959) 124–161.

[249] *See* e.g. Lauterpacht, Function of Law in the International Community (1933) 62 *et seq.*; *id.*, Some Observations On the Prohibition of *non liquet* and the completeness of the Law, in Symbolae Verzijl (1958) 205 and Habicht, The Power of a Judge to Give a Decision "Ex Aequo Et Bono" (1935) 9–14.

[250] *See* Oppenheim, International Law (ninth ed. 1996) 13.

[251] *Ibid.*

[252] I.C.J Reports (1996) 6.

following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[253] On 8 July 1996 the Court issued its advisory opinion with respect to the request from the General Assembly.

In the operative part of its opinion the Court first found that international law neither specifically authorized, nor prohibited the threat or use of nuclear weapons.[254] It also found that a threat or use of nuclear weapons must comply with Article 2(4) and Article 59 of the UN Charter, the general requirements of international law applicable in armed conflict and treaty obligations concerning nuclear weapons.[255] In a final conclusion the Court found that there is an obligation pursuant to Article VI of the Nuclear Non-Proliferation Treaty[256] to conclude in good faith negotiations leading to nuclear disarmament.[257]

With respect to the most crucial question of whether or not the threat or use of nuclear weapons would in fact be consistent with international law applicable in armed conflict, the Court, by virtue of President Bedjaoui's casting vote, arrived at the following conclusion:

> "It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.
>
> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake."[258]

[253] A similar request was made by the World Health Organization (WHO), adopted by its Assembly. The question put by the WHO was: "In view of the health and environmental effects, would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"; *see* World Health Organization Resolution WHA 46.40 The International Court of Justice decided that it could not respond to this request, since it was not within WHO's competence to address the legality or illegality of the use of nuclear weapons or any other types of weapons, I.C.J. Reports (1996) 79–84.

[254] I.C.J. Reports (1996) para. 105 (2) (A)–(B).

[255] *Id.*, para. 105(2) (C)–(D).

[256] Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 729 U.N.T.S. 161.

[257] I.C.J. Reports (1996) para. 105(2) (F).

[258] *Id.*, para. 105(2) (E). Judges Bedjaoui, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin and Ferrari Bravo voted in favor; Judges Schwebel, Oda, Guillaume, Shahabuddeen, Weeremantry, Koroma and Higgins voted against.

It has been suggested that this holding of the Court amounts to nothing less than a *non liquet*. Judge Higgins was very direct about this in her dissenting opinion. She stated: " ... in paragraph 2E of its dispositif, the Court effectively pronounces a *non liquet* on the key issue on the grounds of uncertainty in the present state of the law, and of the facts. I find this approach inconsistent."[259] She goes on to say:

> "The findings in a judicial *dispositif* should be clear. I believe paragraph 2E is unclear in its meaning (and one may suspect that this lack of clarity is perhaps regarded as a virtue). I greatly regret the *non liquet* offered in the second part of paragraph 2E."[260]

Judge Schwebel was equally critical in his dissenting opinion. He stated, *inter alia*:

> "This [referring to the second paragraph of para 105 (2) (E)] is an astounding conclusion to be reached by the International Court of Justice. Despite the fact that its statute 'forms an integral part' of the United Nations Charter, and despite the comprehensive and categorical terms of Article 2, paragraph 4, and Article 51 of that Charter, the Court concludes on the supreme issue of the threat or use of force of our age that it has no opinion. In 'an extreme circumstance of self-defence, in which the very survival of a state would be at stake', the Court finds that international law and hence the Court have nothing to say. After many months of agonizing appraisal of the law, the Court discovers that there is none."[261]

This is not the place to discuss in detail how *non liquet* relates to the completeness or incompleteness, of international law as a system of law,[262] suffice it to note that the *Legality of Nuclear Weapons Case* seems to indicate a new direction in the thinking of the International Court of Justice with respect to *non liquet*. It would seem that one possibility of reconciling the pronouncements of the Court in this case with its previous case law could be to distinguish between *non liquet* in advisory

[259] I.C.J. Reports (1996) 6; dissenting opinion of Judge Higgins, para. 2.

[260] *Id.*, para. 7 – It should be noted that the Court expressly refrained to state a view also on the legality of the policy of nuclear deterrence, paras. 67 and 96, and of reprisals using nuclear weapons, para. 46.

[261] I.C.J. Reports (1996) 6; dissenting opinion of Judge Schwebel, 9.

[262] For a discussion of this issue, *see* e.g. Aznar–Gomez, The 1996 Nuclear Weapons Advisory Opinion and *non liquet* in international law, International & Comparative Law Quarterly (1999) 3. – For general comments on the *Legality of Nuclear Weapons Case*, *see* e.g. Bekker, Legality of the Treat or Use of Nuclear Weapons, American Journal of International Law (1997) 126; Matheson, The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons, American Journal of International Law (1997) 417.

opinions and in the resolution of actual disputes, as suggested by Judge Vereshchetin in his declaration. He stated:

> "In critically assessing the importance for our case of the doctrinal debate on the issue of *non liquet*, one cannot lose sight of the fact that the debate has concerned predominantly, if not exclusively, the admissibility or otherwise of *non liquet* in a contentious procedure in which the Court is called upon to pronounce a binding, definite decision settling the dispute between the parties. ... In the present case, however, the Court is engaged in advisory procedure. It is requested not to resolve an actual dispute between actual parties, but to state the law as it finds it at the present stage of its development. Nothing in the question put to the Court or in the written and oral pleadings by the states before it can be interpreted as a request to fill the gaps, should any be found, in the present statutes of the law on the matter ... The Court cannot be blamed for indecisiveness or evasiveness where the law, upon which it is called to pronounce, is itself inconclusive."[263]

As far as international *arbitration* is concerned, the possibility to pronounce a *non liquet*, or not, will ultimately depend on the arbitration agreement, and the interpretation of it. In cases where the arbitration agreement explicitly, or implicitly, authorizes the arbitrators to decide a dispute on the basis of international law, general principles of law, or law and equity, or on the basis of respect for law, it is in the opinion of this author highly unlikely that there is any room for a *non liquet*. It may well be, however, that the arbitration agreement limits the possibilities of the arbitrators. For example, if the arbitrators are instructed to choose between two, and only two, proposed resolutions, it may be impossible to avoid a *non liquet*. In boundary disputes, it is not uncommon that the arbitrators are asked to choose between two boundary lines. In the *North-eastern Boundary Arbitration* between Great Britain and the United States, decided in 1831,[264] for example, the arbitrator, King William I of the Netherlands, was asked to determine the boundary of a disputed territory as described in treaties between the parties. He found, however, that the treaties were obscure, but rather than entering a *non liquet* proposed a new boundary line which led the United States to protest against the award. There are also examples of arbitration agreements permitting the

[263] I.C.J. Reports (1996) 6; declaration of Judge Vereshchetin, 1. – In assessing the Advisory Opinion issued by the Court, it must also be remembered that the issue before it is highly sensitive from a political point of view. As explained by one commentator: "It /the UN General Assembly/ had asked a question that could not effectively be answered in the abstract, and that was replete with serious political implications and pitfalls", Matheson, note 262 *supra*, at 435.

[264] Moore, *op. cit.*, Vol. I 85–161.

arbitrators to refuse to decide.[265] In the well-known *Island of Palmas Case*,[266] Judge Huber interpreted the arbitration agreement such that the parties had implicitly excluded the possibility of a *non liquet*. The arbitration agreement specified that the sole arbitrator had to decide whether the Island of Palmas in its entirety constituted territory of the Netherlands or of the United States. The preamble of the agreement stated that the purpose of the arbitration was to terminate the dispute. The arbitrator concluded:

> "It is the evident will of the parties that the arbitral award shall not conclude by a *non liquet*, but shall in any event decide that the island forms a part of the territory of one or the other of the two litigant Powers."[267]

In the view of the present author, there is typically little – if indeed any – room for *non liquet* solutions in modern international arbitration. This is so because when parties submit a dispute to arbitration they typically do it because they want the dispute to be resolved; that is the ultimate instruction from the parties to the arbitrator(s).[268]

3.3.2 Party Autonomy and the International Court of Justice

As I have discussed in the preceding section, party autonomy is accepted in interstate arbitration.[269] In this context it is worthwhile briefly to look at party autonomy in proceedings before the International Court of Justice.[270] However, given the fact that the Court operates on the basis of a statute to which other states are parties – as opposed to an arbitral tribunal which is typically created by the disputing parties themselves on an *ad hoc* basis – it is not self-evident that party autonomy plays, or should play, a decisive role in proceedings before the Court. It could be argued that the Court – whose duty it is to decide disputes submitted to it "in accordance with international law" – should not be restricted by an

[265] *See* e.g. the Bulama Island Case (Great Britain v. Portugal 1869) in La Fontaine, Pasicrisie Internationale (1902) 82–83 and the Delagoa Case (Great Britain v. Portugal 1872) *idem.*, at 170–171.

[266] United Nations Reports of International Arbitral Awards, Vol. II (1949) 829. The award is also reproduced in Wetter, *op. cit.*, Vol. I, at 195–249.

[267] Wetter, *op. cit.*, at 247.

[268] *Cf.* Witenberg, L'organisation judiciaire, la procédure et la sentence internationales (1937) 314–315.

[269] For a discussion of a more restricted view of party autonomy, *see* p. 148 *et seq.*, *infra*. Restrictions on party autonomy in interstate arbitration are discussed on p. 158 *et seq.*, *infra*.

[270] For a general discussion of public international law as applied by the International Court of Justice, *see* p. 214 *et seq.*, *infra*.

agreement between the parties in exercising its judicial function, and that it is for the Court, and not the parties, to "decide" what international law says. Already the wording of Article 38 of the Statute of the Court, however, suggests that party autonomy is decisive also in proceedings before the Court.

First, Article 38 (1) (a) of the Statute stipulates that the Court is to apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting parties". This implies acceptance of the principle of party autonomy.

Second, Article 38 (2) of the Statute empowers the Court to decide a case *ex aequo et bono*, if the parties so agree. In the *Continental Shelf Case*, between Tunisia and Libya, the Court made the following statement:

> "Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The Court can take such a decision only on condition that the Parties agree ... and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement".[271]

This statement confirms that the Court may deviate from the sources of law enumerated in Article 38(1) of the statute.[272] While there has been no case where the Court has been requested to decide *ex aequo et bono*,[273] Article 38(2) confirms – *a fortiori* – the principle of party autonomy; if it is consistent with the function of the Court to decide *ex aequo et bono* at the request of the parties, it must also – it is submitted – be consistent for the Court to apply the *rules of law* agreed upon by the parties. In the *Minquiers and Ecrehos Case*,[274] for example, the Court was asked to decide whether sovereignty over the islets belonged to the United Kingdom or France by determining which of the parties had produced the more convincing proof of title. In its judgment the Court complied with this request.[275] In an earlier case, the Permanent Court of International Justice took a similar approach in the *Oscar Chinn Case*[276] where the court

[271] I.C.J. Reports (1982) 60. – For further discussion of *ex aequo et bono*, *see* p. 240 *et seq.*, *infra*.

[272] *See* Rosenne, The Law and Practice of the International Court 1920–1996 (1997) 1619. The statement also confirms that the right of the Court to decide *ex aequo et bono* is not merely a jurisdictional issue; *see* Rosenne, *ibid.*, at 587–594 for a discussion of this question.

[273] Rosenne, *op. cit.*, at 593.

[274] I.C.J. Reports (1953) 47.

[275] This decision has been criticized in Roche, The Minquiers and Ecrehos Case (1959), where it is said, on p. 149, that the agreement of the parties seems to have been intended "to restrict the Court in its freedom of decision by eliminating beforehand the possibility of the Court reaching the conclusion that the islets were under a condominium, or what was more probable, that they were still *res nullius*".

[276] P.C.I.J. Reports, Series A/B, No. 63 (1934) 80.

applied the 1919 Congo Basin Convention of St. Germain, which the parties regarded as applicable, without addressing the question of whether or not the convention was valid in the absence of the consent of all the parties to the 1885 General Act of Berlin and the 1890 General Act and Declaration of Brussels, relating to the Congo Basin.[277]

The Treaty of Berlin had been acceded to by thirteen states and laid down the basic policy of European states in Central Africa. The treaty stipulated that it could be amended only by agreement of all signatory parties. The General Act and Declaration of Brussels was the result of such an amendment. The Treaty of St. Germain, however, was acceded to only by United Kingdom and Belgium; it set forth a number of changes in the policy laid down in the Treaty of Berlin and the Brussels Declaration. The Court concluded, this notwithstanding, that as between the parties *inter se* the Treaty of St. Germain was decisive. The Court said: "No matter what interest may in other respects attach to these Acts – the Berlin Act and the Act and Declaration of Brussels – in the present case, the Convention of St. Germain of 1919, which both parties have relied on as the immediate source of their respective contracted rights and obligations, must be regarded as the Act which it is asked to apply".[278]

3.3.3 Unfettered Party Autonomy Criticized

As discussed above, the willingness of the International Court to accept party autonomy has occasionally been criticized.[279] While most commentators take the view that party autonomy reigns supreme in interstate arbitration[280] – Jenks simply states that "/i/t is, of course, quite true that the basis of adjudication to be adopted by an *ad hoc* tribunal is entirely a matter for the parties"[281] – there is at least one commentator who takes a more restrictive view of party autonomy in interstate arbitration. Proceeding from the policy orientation so characteristic of the so-called New Haven School,[282] Reisman states, *inter alia*, that "any international tribunal,

[277] For a discussion of Judge Schücking's forceful dissent, *see* p. 149 *et seq.*, *infra*.

[278] P.C.I.J. Reports, Series A/B, No. 63 (1934) 80.

[279] *See* note 275, *supra*.

[280] *See* p. 134 *et seq.*, *supra*.

[281] Jenks, *op. cit.*, at 610.

[282] For a general discussion of the characteristic features of the New Haven School, *see* Bring-Mahmoudi, Sverige och folkrätten (1997) 31–35; Koskenniemi, From Apology to Utopia. The Structure of International Legal Argument (1989) 170–178 and Chen, An Introduction to Contemporary International Law. A Policy Oriented Perspective (1989) 14–22; *see* also Falk–Higgins–Reisman–Weston, Myres Smith Mc Dougal (1906–1998), American Journal of International Law (1998) 729–733.

as such, owes an obligation to apply international policy."[283] In Reisman's view this obligation also exists for *ad hoc* arbitral tribunals established on the basis of a bilateral arbitration agreement. Later in his study, Reisman rephrases the same underlying philosophy when saying that "the development of a cohesive international community requires that compromissory restrictions [i.e. on arbitrators and judges] be ignored if their application would result in a decision incompatible with inclusive public order interests".[284] While one can, generally speaking, agree that there are restrictions on party autonomy in interstate arbitration,[285] Reisman does not elaborate on the details of any such restrictions. He cites with approval Judge Schücking's dissent in the *Oscar Chinn Case* and characterizes it as the *locus classicus* for the proposition that a private agreement may be void because of incompatibility with overriding community interests. Judge Schücking said, *inter alia*, the following:

> "The terms of Article 38 of the Statute – which indicates, in the first place, as the source of law for the Court's decisions 'international conventions whether general or particular, establishing rules expressly recognised by the contracting States' – cannot be intended to mean that the Court is bound to apply conventions which it knows to be invalid. The Court would never, for instance, apply a convention the terms of which were contrary to public morality. But in my view, a tribunal finds itself in the same position if a convention adduced by the parties is in reality null and void, owing to a flaw in its origin. The attitude of the tribunal should, in my opinion, be governed in such a case by considerations of public policy even when jurisdiction is conferred on the Court by virtue of a Special Agreement."[286]

Reisman divides the restrictions on arbitrators and judges in several categories. For present purposes they may conveniently be grouped in two categories. The *first category* includes situations when the parties to a dispute agree on substantive norms which are contrary "to either an international *jus cogens*, international morality, or superior rules of a jurisdiction to which the litigants would, under ordinary circumstances, be subject".[287] This category also comprises rules which would "contravene the statutory regime of a cogentive tribunal or, in the case of dispositive or ad hoc arenas, pre-emptory principles deriving from general international law".[288]

[283] Reisman, *op. cit.*, at 542.
[284] Reisman, *op. cit.*, at 550.
[285] *See* discussion at p. 158 *et seq.*, *infra*.
[286] P.C.I.J. Reports, Series A/B, No. 63 (1934) 149–150.
[287] Reisman, *op. cit.*, at 546.
[288] Reisman, *op. cit.*, at 547.

The *second category* includes restrictions which "on their face, are lawful yet will constrain a tribunal to reach a conclusion it deems either incorrect, unwarranted on the facts available, or decidedly less consonant with community goals than a decision in which the tribunal's options were unrestricted."[289]

In the view of the present author, it is not difficult to agree with the first category mentioned above, at least as a general proposition. It is only reasonable that there be some limitations on party autonomy and that the ultimate limitation be *ius cogens*.[290] Reisman's first category is unhelpful, however, in that it does not even attempt to define more in detail what lies behind the various concepts included therein. By contrast, the second category is more difficult to reconcile with the idea of party autonomy; in fact acceptance of it would undermine party autonomy and would threaten to render it meaningless. As discussed above, the very essence of party autonomy is that the parties, rather than the arbitrators, determine the rules to be applied and thereby enjoy the possibility to influence, and in many cases *de facto* determine, the outcome of the dispute.

It has been explained above,[291] that party autonomy is decisive also before the International Court of Justice. Reisman does not seem to share this conclusion, referring to the words "whose function it is to decide in accordance with international law such disputes as are submitted to it", found in Article 38(1) of the Statute.[292] It would seem that seen through the policy oriented prism of the New Haven School this view is more or less automatically transposed by him to *interstate arbitration*, thus leaving aside the fact that there are important differences between interstate arbitration and proceedings before the International Court. These differences have been described by Judge Schwebel in the following way:

> "In arbitration however judicially inspired or shaped, the parties choose the arbitrators, but in the International Court of Justice, the United Nations elects the judges. In arbitration, the parties may prescribe the governing law, which in the Court is prescribed by the Statute. In arbitration, the parties or the tribunal may decide upon the rules of procedure, but in the Court, the Rules of Court govern. In arbitration, the proceedings and sometimes the award are secret but in the Court, the oral argument is public and judgments are published."[293]

[289] *Id.*

[290] *See* discussion at p. 158 *et seq.*, *infra*.

[291] *See* p. 147, *supra*.

[292] Reisman, *op. cit.*, at 544, n. 16.

[293] Schwebel, The Prospects for International Arbitration: Inter-State Disputes, in Justice in International Law (1994) 228.

The critical views expressed by Reisman are in the opinion of the present author not convincing, certainly not in so far as interstate arbitration is concerned. Interstate arbitration has always been, and remains, a consensual dispute settlement mechanism which derives its authority from the agreement of the parties, albeit that such agreement is subject to certain limitations.[294]

3.3.4 The Rationale of Party Autonomy

The outcome of any dispute is by definition uncertain, in the sense that it is impossible to predict how a court of law or an arbitral tribunal will resolve the dispute in question. This is true of disputes decided on the basis of municipal law and, mostly, even more so with respect to disputes where international law is to be applied. At the same time, parties typically strive for certainty and predictability. In this context party autonomy plays a pivotal role – as the provider of certainty and predictability. By allowing disputing parties to agree on the law to be applied, they have the possibility better to control and predict the outcome of the dispute. Needless to say, it will never be possible fully to predict how the arbitrators will apply and interpret the law and/or the rules chosen by the parties. By allowing the parties to make such a choice, however, they can limit uncertainty and unpredictability.[295] This possibility has two important consequences for interstate arbitration. *First*, it will typically increase the willingness of disputants to submit the dispute in question to arbitration and thereby facilitate the resolution of international disputes through arbitration.[296] *Second*, if parties are allowed to choose themselves the law to be applied, their willingness to comply voluntarily with the resulting award is likely to increase.[297]

Party autonomy finds its roots in the generally accepted principle of *pacta sunt servanda*,[298] which generally speaking reflects the idea that the intention and wish of parties must be respected.

It could perhaps be argued that acceptance of party autonomy may create a situation where arbitrators must decide a case on the basis of rules

[294] The restrictions on party autonomy are discussed at p. 158 *et seq.*, *infra*.

[295] *Cf.* discussion at p. 90 *et seq.*, *supra* of the rationale for party autonomy in international commercial arbitration; this applies *mutatis mutandis* to interstate arbitration.

[296] *See* e.g. Jenks, *op. cit.*, at 336 *et seq.*

[297] *See* p. 80 *et seq.*, *supra*.

[298] *See* Cheng, *op. cit.*, at 112–114. – The principle of *pacta sunt servanda* is in fact one of the "general principles of law recognized by civilized nations" to which reference is made in Article 38 of the Statute of the International Court of Justice. The Vienna Convention On the Law of Treaties, in Article 26, describes the principle as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

of law and principles which in the view of the arbitrators do not correctly state the law. If this were true, it could be said that party autonomy impedes, indeed militates against, the proper development of international law; if arbitrators were allowed to apply rules chosen by the parties, and not corresponding to the generally held view on the contents of international law in the relevant area, this could only undermine international law. In the view of the present author, however, the arbitrators have no duty to state the law correctly; their instructions from the parties are rather to decide the dispute as presented to them by the parties. This conclusion goes back to the very fundamental fact that the arbitrators derive their authority from the parties, from the arbitration agreement entered into by the parties. Having said that it is not the duty of the arbitrators to state the law correctly, it must also be remembered that an arbitral award only binds the parties to the arbitration and thus no third parties.[299] In other words, when arbitrators have – in the view of the parties, or perhaps in a more objective sense, which, however, typically is unusual – stated the law incorrectly in an award, such award will have no binding effect as a precedent, nor otherwise on third parties. Any such award in and of itself can thus not bring any disorder in the *system* of public international law. Whether or not the award will have any effect on non-parties as a precedent entirely depends on the quality and persuasiveness of the award itself.

3.3.5 The Obligation to Respect Party Autonomy

An arbitral award duly rendered by a tribunal is, as a matter of principle, final and binding upon the parties. The principle of *res iudicata* is in fact one of the general principles of law recognized by civilized nations.[300] That a duly rendered judgment or award is binding is indeed a fundamental

[299] For a discussion of the principle of *res iudicata* and its qualifications, *see* e.g. Cheng, *op. cit.*, at pp. 336–372. – That an arbitration agreement is binding only on the parties to it and that a resulting award is binding only on the parties to the arbitration are two straightforward, simple rules of thumb which in fact, and in law, are very fundamental and have enormous importance in real life. (They have their origin in the classic so-called *pacta tertiis* rule – *pacta tertiis nec nocent nec prosunt* – which means that treaties can only bind consenting parties.) This is not to suggest, however, that third parties and third party interests do not play any role in interstate arbitration, because they do, *see* e.g. Chinkin, Third Parties in International Law (1993) 247–274 and Reisman, *op. cit.*, at 329–341. In the view of the present author, experience has shown that most issues which arise relating to third parties and third party interests in interstate arbitration are more or less efficiently, and more or less satisfactorily solved by a prudent application of the *pacta tertiis* rule; this is confirmed by the examples discussed by Chinkin, *ibid.*

[300] *See* e.g. Cheng, *op. cit.*, at 336 *et seq.*

principle inherent in the judicial process *per se*, whether international or municipal.

The general rule that arbitral awards are final and binding is, however, subject to the qualification that an award may under certain circumstances be null and void.[301] There is no general agreement as to what circumstances constitute grounds for nullity. Candidates include excess and/or lack of jurisdiction, violation of fundamental rules of procedure, manifest error of law and invalidity of arbitration agreement.[302]

For present purposes, it is sufficient to look at the first ground, i.e. excess and/or lack of jurisdiction. This ground falls into two sub-categories, *viz.*, (i) decisions by arbitrators going beyond the scope of the arbitration agreement and (ii) decisions by arbitrators deviating from the law or rules to be applied pursuant to the agreement of the parties. It is the second category which is of interest in the present context.

Stated in general terms, this category means that decisions where arbitrators have failed to, or refused to, apply the law and/or rules agreed upon by the parties are null and void, since the arbitrators have exceeded their jurisdiction, i.e. they have deviated from the authority conferred upon them by the parties in the arbitration agreement.

One well-known illustration of this rule is *the Orinoco Steamship Company Case*,[303] tried by an arbitral tribunal sitting under the auspices of the Permanent Court of Arbitration. In that case the tribunal made the following statement of principle:

> "... excessive exercise of power may consist, not only in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or principles of law to be applied."[304]

[301] In scholarly writings, however, one can find one school of thought, which seems to take the view that there is no such thing as a null and void arbitral award since there does not exist under international law any organization or institution which is entrusted with trying claims of nullity; that no such organization or institution exists, is confirmed e.g. by Schwebel, International Arbitration: Three Salient Problems (1987) 6. As will be discussed below, at p. 156 *et seq.*, the present author does not subscribe to this school of thought.

[302] *See* e.g. Carlston, *op. cit.*, at 185–192; Simpson & Fox, *op. cit.*, at 250–259 and Reisman, *op. cit.*, at 419 *et seq.*; *see* also Kaikobad, The Quality of Justice: Excès de Pouvoir in the Adjudication and Arbitration of Territorial and Boundary Disputes, in Goodwin-Gill and Talmon (eds.), The Reality of International Law, Essays in Honour of Ian Brownlie (1999) 293.

[303] Scott, The Hague Court Reports, 1916, Second Series (1932) 226.

[304] *Id.*, at 232.

The Orinoco Steamship Company – ninety-nine per cent of the shares of which were owned by American citizens – had certain claims against the Venezuelan government which were heard by the United States and Venezuelan Mixed Commission sitting under the protocol of 17 February 1903.[305] Under the protocol all claims were to be decided "upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation".[306] This explicit provision, notwithstanding, the umpire rejected substantial parts of the claim on the basis that certain specific requirements of Venezuelan law concerning notifications in connection with transfers of assets had not been complied with. The United States protested against the decision and eventually agreed with Venezuela to submit the award to (another) arbitral tribunal constituted under the auspices of the Permanent Court of Arbitration in the Hague. In the award, which was rendered in 1910, the first arbitral award was partially declared void.[307] The Orinoco Steamship Company Case was the first case where an arbitral award has been declared void by another arbitral tribunal.[308]

The International Court of Justice first had occasion to review an arbitral award in the *Arbitral Award made by the King of Spain on December 23, 1906 Case*.[309]

In 1894 Honduras and Nicaragua concluded the so-called Gómez–Bonilla Treaty relating to the settlement of territorial disputes between the two states. The treaty provided for the establishment of a Mixed Boundary Commission (Article I) and prescribed certain rules to be applied by the Commission (Article II). The treaty also provided for the appointment – under certain circumstances – of national arbitrators and for decisions to be made by the Government of Spain. In the circumstances, the King of Spain was appointed arbitrator and eventually rendered an award, in 1906, largely in favor of Honduras. In 1958 the award was brought before the International Court of Justice by Honduras asking, *inter alia*, the Court to order Nicaragua to give effect to the arbitral award

[305] Ralston, Venezuelan Arbitrations of 1903 (1904) 2. – For a general comment, *see* Dennis, The Orinoco Steamship Company Case before the Hague Tribunal, 5 American Journal of International Law (1911) 35.

[306] Ralston, note 305, *supra*.

[307] For a more detailed discussion of the case, *see* Carlston, *op. cit.*, at 145–151 and 192–194.

[308] Other examples of awards which have been considered void as a result of the failure to apply the law prescribed by the arbitration agreement include the *Pelletier Case* (Moore, *op. cit.*, Vol. 2 at 1757), the *Paraguay Navigation Company Case* (Moore, *op. cit.*, Vol. 2, at 1507) the *Chamizal Arbitration* (Lapradelle & Politis, *op. cit.*, Vol. 2, at 151). In these cases, however, the arbitral awards were never *formally* declared void by any other tribunal or similar body, but were informally treated and/or accepted as void.

[309] I.C.J. Reports (1960) 192. *See* also Wetter, *op. cit.*, Vol. III, at 214–282.

rendered by the King of Spain.[310] Nicaragua asked the Court to declare that the decision rendered by the King of Spain was not a binding arbitral award,[311] thus in effect arguing that it was a nullity. One of the grounds relied on by Nicaragua was the argument that the decision was rendered "in flagrant breach of the provisions of the Gómez–Bonilla Treaty".[312] It was argued by Nicaragua that the King of Spain had exceeded his jurisdiction by not observing the rules laid down in Article II of the treaty which were to form the basis for the decision.[313] The Court concluded that in its judgment the King of Spain had applied the rules laid down in Article II of the Treaty, and thus that he had not gone beyond the authority given him by the parties.[314]

In ruling on this aspect of the case, the Court made the following introductory statement:

> "... the Court will observe that the Award is not subject to appeal and that the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal. The Court is not called upon to pronounce on whether the arbitrator's decision was right or wrong. These and cognate considerations have no relevance to the function that the Court is called upon to discharge in these proceedings, which is to decide whether the Award is proved to be a nullity having no effect."[315]

This case is so far the only one in which the Court has been asked to declare an arbitral award null and void on the basis of non-observance of rules agreed upon by the parties to form the basis for the decision of the arbitral tribunal.[316]

The discussion above, and the cases referred to, show that failure to respect party autonomy may lead to an arbitral award being declared null

[310] *Id.*, at 197.
[311] *Ibid.*
[312] *Ibid.*
[313] *Id.*, at 214.
[314] *Id.*, at 215.
[315] *Id.*, at 214.
[316] In the Arbitral Award of 31 July, 1989 Case, brought by Guinea-Bissau against Senegal, the International Court of Justice was asked to declare an arbitral award null and void. The award was rendered on the basis of an arbitration agreement entered into on 12 March 1985 between the two states for the resolution of a dispute concerning maritime delimitation. One of the grounds relied on by Guinea-Bissau was that the arbitral tribunal had exceeded its powers by not providing adequate reasons for the award and by not including a map in the award. In its judgment the International Court of Justice concluded that the arbitral award was final and binding. Non-observance of rules agreed upon by the parties was not relied on as a ground for nullity. – For comments on the case, *see* e.g. Rosenne, The International Court of Justice and International Arbitration, in Muller & Mijs (eds.) The Flame Rekindled (1994) 111–114.

and void. This is an important, indeed fundamental, principle of international arbitration. While the principle is easily stated, it may in practice be difficult to draw the line between declaring an award null and void on this ground and reviewing the merits of an award.[317] In reviewing an award with a view to determining whether or not it is void on this ground, a second arbitral tribunal, and also the International Court of Justice,[318] will function as a court of cassation rather than a court of appeal and may thus only uphold or set aside an award, not substitute its findings on the merits with its own.[319]

While it is, in the opinion of the present author, clear that an arbitral award may be null and void under certain circumstances, a problem under international law is that there is no entity, tribunal or organization which is vested with the authority to try nullity claims.[320] This state of affairs has previously led some commentators to question whether there is such a thing as null and void arbitral awards under international law.

[317] *See* p. 101 *et seq.*, *supra* for a discussion of this problem in international commercial arbitration.

[318] *See* the pronouncement by the International Court of Justice in the King of Spain Award Case quoted at p. 155, *supra*.

[319] In this connection it is helpful to recall the differences between different categories of proceedings which may occur after the rendering of an award. The distinctions which follow are those of this author; no generally accepted definitions seem to exist, but it is believed that the following ones ought to find acceptance in most quarters. *Appeal* is a retrial of the merits of a dispute typically by a higher court or tribunal. Generally speaking, there is no room for appeals in international arbitration, unless the parties have so agreed in the arbitration agreement; *Cf.* Simpson & Fox, *op. cit.*, at 241. *Revision* is to be distinguished from appeal since revision does not involve recourse to a higher court but is performed by the tribunal which rendered the award in the first place; revision goes to the merits of a dispute and typically presupposes the discovery of new facts or circumstances which were unknown when the award was first rendered, and which may be of a decisive nature; *Cf.* Simpson & Fox, *ibid.*, and Wetter, *op. cit.*, Vol. II, at 539–627. *Interpretation* of an award involves the clarification by the tribunal in question of its award. Arbitrators would typically not have the power to interpret their award, unless the parties have authorized them to do so; *see* e.g. Article 35 of the Optional Rules for Arbitrating Disputes between Two States, adopted on 20 October 1992 by the Permanent Court of Arbitration. *Correction*, finally, means that arbitrators rectify an error in the award, e.g. with respect to calculation of amounts. Generally speaking, international tribunals would seem to have the power to correct errors apparent on the face of the award, at least until the time of execution of the award; *see* e.g. Article 36 of the Optional Rules for Arbitrating Disputes between Two States. – All these post-award proceedings can be said – in varying degrees – to infringe on the principle of the finality of the arbitral award. Clearly, nullification proceedings do so in a most significant way, since they may result in the award being set aside. That is why an award may be declared null and void only on very narrowly defined grounds, such as non-observance of the principle of party autonomy.

[320] In international commercial arbitration the situation is different in that such an arbitral award would typically be anchored in a municipal legal system which would provide a forum – in the form of a national court – for such claims; *see* p. 102, *et seq.*, *supra*.

The two most well-known advocates of this idea are Lammasch[321] and Lapradelle[322]. The origin of this theory seems to be a rather – in the opinion of the present author – tortured interpretation of Article 81 of the Hague Convention of 1907. This article reads:

> "The award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal."[323]

This language seems to have been interpreted such that the Hague Convention did in fact rule out the possibility to attack an award by alleging nullity. The only possibility to attack an award was by means of revision of the same, based on the discovery of new facts.[324] Revision of arbitral awards is provided for in Article 83 of the Hague Convention of 1907. This article reads, in relevant parts:

> "The parties can reserve in the *compromis* the right to demand revision of the award."[325]

Deplorable as it may be that international law does not provide an institution authorized to try claims of nullity, this circumstance does not eliminate the principle that an award may be null and void under certain circumstances, a fact which is confirmed, *inter alia*, by the decisions of the International Court of Justice referred to above.[326] As international law stands today it is rather left to the individual judgment of states to determine questions of nullity.

The discussion above has shown that international law accepts that states may under certain circumstances refuse to honor arbitral awards, for example, if the arbitrators have exceeded their powers by not applying the law and/or rules agreed upon by the parties. In this respect there is thus no difference between interstate arbitration and international commercial arbitration.[327] The difference is that in international commercial arbitration, there is usually a national court of law which has jurisdiction to try claims of nullity.

[321] Lammasch, Die Rechtskraft Internationaler Schiedssprüche (1913).

[322] Lapradelle, L'Excès de pouvoir de l'arbitre, 2 Revue de Droit International (1928) 5.

[323] Proceedings of the Hague Peace Conferences, Conference of 1907 (1920) 612.

[324] For a discussion of the ideas of Lammasch and Lapradelle *see* Carlston, *op. cit.*, at 213–223, with references, and Reisman, *op. cit.*, at 30–46, with references.

[325] Proceedings of the Hague Conferences, Conference of 1899 (1920) 804.

[326] *See* p. 152 *et seq.*, *supra*.

[327] *See* p. 102 *et seq.*, *supra*, for a discussion of international commercial arbitration in this respect.

3.3.6 Restrictions on Party Autonomy

3.3.6.1 Introduction

In the foregoing section, I have indicated that there may be certain restrictions on party autonomy in interstate arbitration.[328] In a general way, these possible restrictions mirror the limitations and restrictions on party autonomy in international commercial arbitration which I have discussed above.[329] Needless to say, there are, however, a number of fundamental differences. For one thing, municipal law does not *ex rerum naturae* play the same role in interstate arbitration as it does in international commercial arbitration.[330] As a consequence, questions of *ordre public*, or national public policy, and mandatory rules of municipal law very seldom, if ever, appear in interstate arbitrations.[331] They may do so, however, if two disputing states have chosen a municipal law as the law applicable to their dispute. Stated in a simplified fashion, one could say that the public policy of individual states in international commercial arbitration has been replaced by *ius cogens* and/or international public policy in interstate arbitration.[332]

Given the fundamental role of party autonomy in interstate arbitration, surprisingly little has been written on the possible *restrictions* on party autonomy.

Jenks mentions two limitations on the parties' freedom to determine the law applicable to a dispute. *First*, he states that "/w/here the parties are already bound, both as between themselves and towards other states, by an obligation to submit a matter for compulsory adjudication, they clearly cannot, in relation to other states, subtract from their existing obligation by agreeing to refer a matter for adjudication on some special basis".[333] *Second*, there is in his view a limitation with respect to the procedure agreed on by the parties. He states that "it is not open to the parties to impose upon the International Court or any other established tribunal

[328] *See* p. 135, *supra.*

[329] *See* p. 106 *et seq.*, *supra.*

[330] As will be discussed below, however, p. 377 *et seq.,* municipal law may, and does in fact, play an important role also in interstate arbitration.

[331] For a discussion of these issues in international commercial arbitration, *see* p. 116 *et seq.*, *supra.*

[332] *Ius cogens* and international public policy are discussed below, on p. 162 *et seq.*

[333] Jenks, *op. cit.*, at 615.

a procedure inconsistent with the requirements of the constituent instrument under which the court or tribunal operates".[334]

The second limitation suggested by Jenks, will not be further discussed here, since we are concerned with the law applicable to the substantive aspects of a given dispute. It should be mentioned, however, that Jenks does recognize the right of the parties in agreeing on the establishment of an *ad hoc* tribunal, to provide for any procedure they deem appropriate.[335]

The first limitation on party autonomy suggested by Jenks is of more interest for present purposes. In the opinion of the present author, it is not clear what the intended extent of this limitation is, at least not as far as interstate arbitration is concerned. As explained above,[336] an arbitration agreement is binding only on the parties to it, and a resulting arbitral award can only bind the parties to the arbitration in question. Consequently, if two states have signed a *bilateral treaty* containing an arbitration clause, providing for the application of a particular law, rules or principles, they may enter into a new treaty, or amend the treaty in question, such that it provides for a different basis for the resolution of a dispute. This would simply be an example of party autonomy being exercised by the two states in question, rather than an example of a limitation on party autonomy.

The situation may become more complicated if the two states in question are bound by a *multilateral treaty*, or some other kind of *multipartite instrument*. Would it then be possible for the two states to enter into a separate arbitration agreement which is different from the arbitration

[334] *Ibid.* – It should be noted, however, that there is a relatively new development at the International Court of Justice since 1978, when the procedural Rules of the Court were amended, encouraging the use of *ad hoc* chambers under Articles 26–29 of the Statute of the Court. The first case tried by an *ad hoc* chamber was the Gulf of Maine Case initiated by Canada and the United States (I.C.J. Reports (1984) 246). While Article 17(2) of the Rules of the Court gives the parties influence over the number of judges as well as over the composition of the chamber, the ultimate decision in these respects is taken by the Court. It is of particular interest in this context that in the Gulf of Maine Case the parties apparently made it very clear that unless their wishes as to the composition of the chamber were respected, they would instead submit the dispute to arbitration. In the event, the Court did elect the chamber requested by the parties; *see* Delimitation of the Maritime Boundary in the Gulf of Maine Area. Constitution of Chamber, Order dated 20 January 1982 (I.C.J. Reports (1982) 3). Other disputes which have been decided by *ad hoc* chambers include the Frontier Dispute (between Burkina Faso and Mali (I.C.J. Reports (1986) 554), the ELSI Case (between Italy and the United States) (I.C.J. Reports (1989) 15) and the Land, Island and Maritime Frontier Dispute between El Salvador and Honduras (I.C.J. Reports (1990) 92).

[335] *Ibid.*

[336] *See* p. 151 *et seq.*, *supra*.

clause in the multilateral treaty, or other multipartite instrument or to agree to submit the dispute to the International Court of Justice? First of all, one would have to analyze and interpret the arbitration clause in the multilateral treaty. It is possible – at least theoretically – that such clause would, explicitly or implicitly, allow the two states to enter into a separate, and different, arbitration clause referring a dispute for resolution on a special basis. If not, it is nevertheless, in the opinion of the present author, possible for the two states to enter into a separate and different arbitration agreement *as between themselves.*[337] As pointed out above, such an arbitration agreement will bind only the two states and the resulting award will bind only them and no other states which have signed the multilateral treaty.[338]

[337] *Cf.* Article 41 of the 1969 Vienna Convention on the Law of Treaties which reads:
"1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) The possibility of such a modification is provided for by the treaty; or (b) The modification in question is not prohibited by the treaty and: (i) does not effect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude an agreement and of the modification to the treaty for which it provides."
The situation described in the text also raises the general, and complicated, question of subsequent treaties on the same subject-matter with provisions inconsistent with provisions of an earlier treaty. The problem may be compounded by the fact that the party, or parties, may, or may not, be parties also to the first treaty. Article 30 of the Vienna Convention attempts to resolve such problems in a set of detailed rules. Article 30 reads:
"1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one: (a) As between States parties to both treaties the same rule applies as in paragraph 3; (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to Article 41, or to any question of the termination or suspension of the operation of a treaty under Article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

[338] *Cf.* the *Oscar Chinn Case*, discussed on p. 149 *et seq.*, *supra*, where the situation was similar.

Consequently, this limitation mentioned by Jenks and discussed above, does not in fact constitute a limitation on party autonomy in interstate arbitration. It may well be that the two states in our example commit a breach of their obligations under the multilateral treaty – such breach cannot, however, constitute a limitation *per se* of party autonomy.[339]

It is interesting to note that Jenks does not discuss *ius cogens*, nor international public policy, as potential limitations on party autonomy. Jenks does discuss international public policy, but only in general terms with a view to finding out what this concept really means and what role it plays in international adjudication.[340] As pointed out by Jenks,[341] the concept of international public policy has only rarely been addressed by either the Permanent Court of International Justice[342] or the International Court of Justice.[343] In the three cases in question, the Court has primarily discussed the concept of public policy (*ordre public*) from a private international law perspective. Consequently, the pronouncements of the courts have little value for the purposes of the present discussion.

There are also very few reported awards from interstate arbitrations where international public policy, *ius cogens*, or for that matter any other potential limitations on party autonomy have been discussed. In the *Norwegian Shipowners Claims Arbitration*[344], however, at least a reference is made to international public policy. In discussing the extent to which the municipal law of the United States was to be applied, the Tribunal said:

> "L'ordre public international' is obviously not at stake when this Tribunal deals with such contracts. But should the public law of one of the parties seem contrary to international public policy ('ordre public international'), an international tribunal is not bound by the municipal law of the states which are parties to the arbitration."[345]

[339] Breach of such treaty obligations would in most case constitute a breach of an international obligation, as such term is described in the Draft Articles on State Responsibility. Article 12 of the Draft Articles reads:
"There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."
Articles 30–39 of the Draft Articles outline the consequences and remedies with respect to breaches of international obligations, including reparation, restitution and compensation.
[340] Jenks, *op. cit.*, at 428–546.
[341] *Id.*, at 431.
[342] The *Serbian and Brazilian Loans Cases*, P.C.I.J. Reports (1929) Series A, No. 20/21.
[343] The *Guardianship Case*, I.C.J. Reports (1958) 55.
[344] Reports of International Arbitral Awards, Vol. I (1948) 330.
[345] *Ibid.*

In addition to Jenks, few commentators have discussed possible limitations on party autonomy in interstate arbitration. As mentioned above, Reisman has taken a critical view of the idea of unfettered party autonomy.[346] He recognizes that "international *ius cogens*, international morality" and "peremptory principles deriving from general international law" may restrict party autonomy.[347] Reisman does not, however, develop these ideas further so as to provide details on the exact meaning and content of these concepts.

Proceeding from the foregoing, at this stage of the analysis there seems to be two potential limitations on party autonomy which are worthy of further consideration, *viz.*, international public policy and *ius cogens*.

3.3.6.2 International Public Policy

The first question to be addressed, is whether or not there is a difference between international public policy and *ius cogens*.

As explained above,[348] the concept of international public policy is often mentioned in connection with international commercial arbitration. Reference is made to this concept with a view to distinguishing it from national public policy, or the *ordre public* mechanism in municipal law. The desire to distinguish between the two stems, in my submission – at least partially – from their different functions. International public policy, does not typically *replace* a law which would otherwise have been applicable – which is the traditional role of national public policy – but is rather said *directly to influence* the arbitrators when resolving a dispute.[349] This influence may result in a contract – or specific provisions thereof – being null and void as militating against international public policy.[350]

If the meaning and role of international public policy is uncertain in the context of international commercial arbitration, it is even more so with respect to interstate arbitration. As mentioned above,[351] when Jenks discusses limitations on party autonomy he does not even mention international public policy. He rather views this concept as one factor impor-

[346] *See* p. 148 *et seq.*, *supra*.

[347] *See* p. 149 *supra*. – Reisman mentions yet another, broader category of possible restrictions on party autonomy, *see* pp. 149–151 *supra*; as explained there, in the opinion of this author it is difficult to reconcile this category with the principle of party autonomy.

[348] *See* p. 128 *et seq.*, *supra*.

[349] *See* p. 130 *et seq.*, *supra*.

[350] *Ibid.*

[351] *See* p. 161, *supra*.

tant to the general development of international law. In trying to define and describe the function of international public policy, Jenks recognizes the difficulties; he states, *inter alia*, that

> "/a/ny concept of international public policy necessarily represents, at the present stage of development, a somewhat miscellaneous amalgam of ideas, derived in unstable proportions from legal history, comparative law, equity, contemporary legal thought ... and the current needs of international intercourse and international organization."[352]

Jenks also introduces a distinction between *ius cogens* and international public policy. He states that "... international public policy does not necessarily imply throughout its sphere of application an *ordre public international* which operates as a *ius cogens*, no modification of which by the parties is permissible; it may operate as a climate of interpretation of the intention of the parties; but we should not exclude the possibility that international public policy may increasingly have the effect of a *ius cogens* precluding the consent of states to agreements or wrongs inconsistent with international public policy."[353]

According to Jenks, it is thus possible that the concepts of international public policy and *ius cogens* may overlap. To the extent that international public policy does overlap with *ius cogens*, it is submitted that the former concept may be of relevance as a potential limitation on party autonomy in interstate arbitration, but, strictly speaking as forming part of *ius cogens*, rather than as a separate and independent restriction on party autonomy. When the two concepts do not overlap, international public policy does not in my view constitute a limitation on party autonomy, at least not at the present stage of development of public international law.[354] The ultimate benchmark in this respect remains *ius cogens*.

[352] Jenks, *op. cit.*, at 545. – In his discussion Jenks seems to include a number of rules and/or principles of customary international law in the concept of international public policy. With respect to the international law of torts, he mentions the principle of the international standard and says: "... the conception of an international standard of civilized conduct by which the treatment of persons and property by states must be judged. This concept is essentially the creation of international public policy ..."; *ibid.*, at 514; in discussing the local remedies rule, he says: "... the local remedies rule is also an expression of international public policy which does not favor recourse to international procedures for matters which can be settled justly and without undue difficulty or delay by national remedies"; *ibid.* at 527.

[353] Jenks, *op. cit.*, at 458.

[354] There does not seem to exist any arbitral award, nor judgment, where international public policy has been referred to, let alone applied as, a limitation on party autonomy in interstate arbitration. There are, however, occasional references to international public policy

3.3.6.3.1 THE CONCEPT OF *IUS COGENS*

The *concept* of *ius cogens* is based on the acceptance of certain fundamental and superior values in the system of public international law. In other words, the concept of *ius cogens* proceeds from the assumption that there are certain norms of international law which are of such a fundamental character that it is legally impermissible to derogate from them. In certain respects it is similar to the concept of *ordre public*, or public policy, in municipal legal systems.[355]

In virtually all systems of municipal law there has evolved over time the principle that the freedom of the parties to conclude contracts is not unrestricted, but is rather subject to certain restraints which are deemed to be essential to the existence, and perhaps even to the survival, of the legal system in question, and of the society in which that legal system exists.[356] The nature of these restraints will vary depending on the political, social and economic environment of the country concerned. Some restraints may result from statutes, others may be the result of case law.

Notwithstanding the conceptual similarities between *ius cogens* and public policy there are important differences. Generally speaking, public policy operates within a specific system of municipal law and presupposes the existence of some sort of superior legal order as the creator of public policy. This raises the classic question whether international law knows – or has indeed ever known – any similar or equivalent notion of a superior legal order enshrining rules and principles from which the parties

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in legal writings, *see* e.g. Czaplinski and Danilenko, Conflicts of Norms in International Law, Netherlands Yearbook of International Law (1990) 9–10, where it is said under the heading "Peremptory norms": "In our opinion, the I.C.J. has in this respect extended the notion of *ius cogens*. All cases decided by the Court and involving peremptory norms concern unilateral activities of States. The I.C.J. used several concepts, the relationship between them not being clearly established: obligations *erga omnes* in the *Barcelona Traction Case*, imperative, fundamental and vital obligations in the *American Hostages in Tehran Case* and *jus cogens* in the *Nicaragua Case*. The opinions of authors on the distinctions between these concepts are not uniform. In our view, they cover the same substance, therefore creating a form of international public order and introducing an element of morality into international relations. This solution (i.e. the transformation of the former scope of peremptory norms from the law of treaties into the general public order clause) was in our opinion confirmed by draft Article 19 on State responsibility dealing with international crimes and international delicts". (footnotes omitted). While reference is made to "international public order", it would seem clear that it is not perceived as a separate and independent legal concept giving rise to specific legal consequences.

[355] *See* p. 111 *et seq., supra.*

[356] *Cf.* e.g. Sinclair, The Vienna Convention on the Law of Treaties (2nd ed. 1984) 204.

may not derogate?[357] This question echoes the familiar debates between the naturalist and positivist schools of international law, and indeed these debates do cast their shadows over the modern debate concerning *ius cogens* in international law.[358]

Today, the *concept* of *ius cogens* is generally accepted, albeit that opinions differ as to the content of *ius cogens*.[359]

Acceptance of *ius cogens* is evidenced, *inter alia*, by Article 53 of the 1969 Vienna Convention on the Law of Treaties, which stipulates:

> "A treaty is void if, at the time of its conclusion, it conflicts with a pre-emptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[360]

Even though the Vienna Convention is concerned only with the codification of the law of treaties, the generally held opinion seems to be that the rule laid down in Article 53 also applies to customary rules.[361]

In modern judicial practice the concept of *ius cogens* has been accepted by the International Court of Justice, *inter alia*, in the *Barcelona Traction Case* (Second Phase). In the majority judgment of the court, the following distinction was made:

> "In particular an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[362]

[357] *Ibid.*

[358] *See* e.g. de Visscher, 75 Revue Générale de Droit International Public, Vol. I (1971) 11. For a brief overview of positivism and naturalism in international law, *see* Shaw, International Law (1991) 23–26 with references; *see* also Sztucki, Ius Cogens and the Vienna Convention on the Law of Treaties. A Critical Appraisal (1974) 59–66 for a discussion of the legal philosophies underlying *ius cogens*.

[359] *See* e.g. Brownlie, *op. cit.*, at 514, with references.

[360] 1155 U.N.T.S., 331.

[361] *See* e.g. Shaw, *op. cit.*, at 99, with references.

[362] International Court of Justice Reports (1970) at 32.

The court does not explicitly refer to the concept of *ius cogens*, but there seems to be little doubt that the Court is talking about this category of rules.[363]

The pronouncements made in the *Barcelona Traction Case* probably being the most significant from a general point of view, there are, however, other examples where the International Court of Justice has addressed or at least referred to the concept of *ius cogens*. In the *North Sea Continental Shelf Case*, for example, comments were made on the relationship between reservations to a treaty and *ius cogens*. One judge took the position that customary rules belonging to the category of *ius cogens* cannot be subjected to unilateral reservations.[364] In the case of the *United States Diplomatic and Consular Staff in Teheran*, the Court discussed the inviolability of diplomatic premises and in that connection referred to "the imperative character of the legal obligations incumbent on the Iranian Government".[365] The Court does not, however reach any conclusion in this respect, probably because no treaty purporting to derogate from the principle of inviolability was at issue in the case.[366] In the *East Timor Case*, the *ius cogens* nature of the principle of self-determination was confirmed. Accepting the assertions by Portugal, the Court left no doubt that in its new East Timor "remains a self-governing territory and its people has the right to self-determination". There was no discussion, however, of criteria to be used to determine the *ius cogens* nature of obligations, partially due to the fact that the case was dismissed because Indonesia, as a substantially affected party, had not consented to the jurisdiction of the Court.[367]

Generally speaking, there are few examples, in judicial practice where the concept of *ius cogens* in international law, has actually been applied to resolve a dispute.[368]

[363] Sinclair, *op. cit.*, at 213; *see* p. 170 *et seq.*, *infra*, for a discussion of *ius cogens* and *erga omnes* obligations.

[364] International Court of Justice Reports (1969) at 97–98. (Statement of Judge Padilla Nervo)

[365] International Court of Justice Reports (1980) at 41.

[366] *See* also the *East Timor Case* (Portugal v. Australia, I.C.J. Reports (1995) 90).

[367] *Ibid.*, at paras. 29 and 37.

[368] *Cf.* e.g. Sztucki, *op. cit.*, at 12–22. Sztucki discusses the jurisprudence of international tribunals in all cases which are usually regarded as having addressed the question of *ius cogens* from the *Bryan-Chamony Treaty Case*, decided in 1917 by the Central American Court of Justice to the *Barcelona Traction Case*. He concludes – at p. 17 – that it "appears to be highly debatable whether the above quoted material may be regarded as indicative of the recognition of the category of *ius cogens* in international law". Later on in his study, at p. 93, Sztucki draws the following conclusion: "The survey of modern international practice

Turning to doctrinal writings, it can be said that Suy, who is one of the leading commentators on *ius cogens*, has found the greatest support for the existence of *ius cogens* among German, Swiss and Austrian writers.[369] Berber,[370] Guggenheim[371] and Verdross,[372] for example, take the position that there are certain rules of international law which are so fundamental that treaties concluded in violation of them are invalid. French commentators, on the other hand, have been much more skeptical. Rousseau, for example, is of the opinion that a treaty with an illegal object is of little practical interest, the examples traditionally given being purely of an academic character.[373] Reuter too, while accepting the notion of *ius cogens*, finds that there is very little immediate practical significance of the notion.[374]

Perhaps the most skeptical commentator of all is Schwarzenberger, who *denies* the existence of *ius cogens*. He has stated that "the evidence of international law on the level of *unorganized* international society fails to bear out any claim for the existence of international *ius cogens*".[375] Skeptical commentators will also be found among a number of Scandinavian scholars.[376] Apart from Schwarzenberger, Anglo–American commentators have expressed a multitude of views on the existence of *ius cogens*. Brownlie, for example, accepts the existence of *ius cogens*, but concludes that there is more support for the concept than for its particular

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seems to justify the conclusion that there is not a single evidence of application of the concept of peremptory norms. There is not a single judgment by an international tribunal which would declare any treaty void for illegality of its object". *See also* Hannikainen, Peremptory Norms (Ius Cogens) in International Law. Historical Development, Criteria, Present Status (1988) 194. Hannikainen states – after having discussed the *Barcelona Traction Case* and the *United States Diplomatic and Consular State in Teheran Case* – that "the two cases analyzed above can hardly be regarded as actually confirming the existence of peremptory norms in international law, but the Court's statement in the Barcelona Traction Case may have come close to the recognition of their possible existence".

[369] Suy, The Concept of Ius Cogens in International Law (1969). For comprehensive surveys of modern doctrinal opinion *see also*, Gomez Robledo, Le ius cogens international: sa genèse, sa nature, ses fonctions, 172 Recueil des Cours (1981) 17–208, Hannikainen, *op. cit.*, and Sztucki, *op. cit.*

[370] Lehrbuch des Völkerrechts, Vol. 1 (1960) 439.

[371] In Strupp & Schochauer, Wörterbuch des Völkerrechts, Vol. 3 (1962) 531.

[372] Völkerrecht (5th ed. 1964) 130.

[373] Principes Généraux du Droit International Public, Vol. 1 (1971) 341–342.

[374] Introduction au Droit des Traités (1972) 141–143.

[375] International Law and Order (1971) 50.

[376] *Cf.* e.g. Ross, Laerobog i folkerett (4th ed. 1961) 252; Sundberg, Folkrätt (2nd ed. 1950) 233; Sztucki, *op. cit.*, at 93–96 and 158–163. On the other hand, Hannikainen, *op. cit.*, at 717 *et seq.*, takes a much more positive view.

content.[377] Jenks, on the other hand seems to be more hesitant, but does as a matter of principle accept the concept of international public policy.[378] McNair accepts that the rules of customary international law contain rules which have been accepted as being necessary to "protect the public interest of the society of States or to maintain the standards of public morality recognized by them".[379] On the whole little attention seems to have been paid to this topic by American scholars; for example the Harvard Draft Convention on the Law of Treaties – Art. 22(b) – does not address *ius cogens* at all.[380] In Restatement of the Law Third, however, *ius cogens* is mentioned as one of several grounds which may bring about the invalidity of an international agreement.[381]

3.3.6.3.2 The Contents of *Ius Cogens*

On the basis of the foregoing, we can safely conclude that most commentators are of the opinion that there is a place for the concept of *ius cogens* in international law,[382] albeit that there are not many examples of international judicial bodies applying *ius cogens* to resolve actual disputes. While the concept of *ius cogens* is thus generally accepted, it is difficult to determine what its contents is. Various examples of specific rules of *ius cogens* were discussed by the International Law Commission in its work preceding the adoption of the Vienna Convention on the Law of Treaties. The Commission gave three examples, *viz.*,

1. A treaty contemplating an unlawful use of force contrary to the principles of the UN Charter;
2. A treaty contemplating the performance of any other act criminal under international law; and
3. A treaty contemplating or conniving at the commission of acts, such as

[377] *Op. cit.*, at 512–515.

[378] The Prospects of International Adjudication (1964) 458–460, 504.

[379] Law of Treaties (1961) 214–215.

[380] *See* American Journal of International Law (1935), Supplement at 661.

[381] § 331 (2) (b) reads: "If at the time the agreement is concluded, it conflicts with a peremptory norm of general international law", Restatement of the Law. The Foreign Relating Law of the United States (1987) Vol. I 205. In Reporters' notes the following comments are provided: "The United States agreed to the inclusion of Articles 53 and 64 in the Vienna Convention. ... Where the Convention is not applicable, the principles of Articles 53 and 64 are effective as customary law, but there are no safeguards against their abuse. In such circumstances, the United States is likely to take a particularly restrictive view of these doctrines, and they can be applied as international law accepted by the United States only with caution."; *Id.*, at 209.

[382] *See* e.g. Sinclair, *op. cit.*, at 209; Hannikainen, *op. cit.*, at 150 and 194 and Suy, *op. cit.*, at 48 (where the following – rather broad – statement is made: "... writers on international law are virtually unanimous in their acceptance of the idea of an international *ius cogens*").

> trade in slaves, piracy or genocide, in the suppression of which every state is called upon to cooperate.[383]

Generally speaking, the examples given above would seem to be fairly uncontroversial, in the sense that most lawyers today would probably agree that states would not be free to derogate from treaty obligations covering the situations mentioned in items 1–3. On the other hand, there is some controversy surrounding even these categories, resulting, *inter alia*, from the fact that some multilateral treaties covering such topics contain traditional denunciation clauses, i.e., an individual state has the possibility to release itself from the treaty obligation in question. If that is the case, is it really adequate to characterize the obligation as forming part of *ius cogens*?

In addition to the categories mentioned above other *ius cogens* candidates have been suggested.

Brownlie suggests, for example, that the principle of permanent sovereignty over natural resources and the principle of self-determination probably belong to this category.[384] Vedross has a far-reaching suggestion to the effect that "all rules of general international law created for a humanitarian purpose" constitute *ius cogens*.[385] Scheuner takes the view that there are three categories of *ius cogens* rules, *viz.*, (i) rules protecting the foundations of law, peace and humanity, such as the prohibition of genocide, slavery, or the use of force, (ii) rules of peaceful cooperation in the protection of common interests, such as the freedom of the seas, and (iii) rules protecting the most fundamental and basic human rights.[386]

In his concluding chapter Hannikainen presents a long list of norms the peremptory status of which he finds to be supported by substantial evidence.[387] The list includes, *inter alia*, the following examples: The right of dependent peoples to self-determination; the prohibition against subjecting areas of the high seas, of the air above the high seas, of the international seabed and of outer space beyond the limits of national jurisdiction to the sovereignty of individual states; the obligation of all states to share a "reasonable" part of the benefit derived from their

[383] Draft Article 13(2) prepared by the Rapporteur Waldock, International Law Commission Yearbook 1963, Volume II, at 39 and 52.

[384] *Op. cit.*, at 515.

[385] Verdross, Ius Dispositivum and Ius Cogens in International law, 60 American Journal of International Law (1969) 59.

[386] Scheuner, Conflict of treaty provisions with a peremptory norm of general international law and its consequences, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1967) 520–532.

[387] Hannikainen, *op. cit.*, at 717–723.

exploitation of the natural resources of the international seabed with the international community or with developing nations; any use of nuclear weapons on a "widespread" or "substantial" scale and the obligation not to contribute to the creation and recognition of "States" which do not fulfill the minimum criteria of statehood.

Without forming an opinion on the views of these commentators, the present author notes that there does not seem to be any lack of suggestions with respect to *ius cogens* candidates, but rather a lack of unanimity among commentators. Moreover, most suggestions put forward are of a *de lege ferenda* nature and many of them would in the opinion of the present author seem to be too far reaching, at least if one proceeds from the extent to which *ius cogens* has found support in international arbitral and judicial practice.

3.3.6.3.3 *Ius Cogens* and *Erga Omnes* Obligations

The concept of *ius cogens* is connected with the issue of *erga omnes* obligations, as well as with the idea of international crimes as such term was suggested by the International Law Commission in its attempts to codify the law of state responsibility.[388]

For the purposes of this Study, it is necessary to determine whether *erga omnes* obligations constitute limitations on party autonomy, in addition to *ius cogens*. This ultimate objective is the underlying theme of this subsection.

Erga omnes is Latin and means "towards all". Even though there does not seem to exist any detailed definition which has won widespread acceptance, *erga omnes* obligations in international law are in general described as obligations in relation to all members of the international community.

Although the International Court of Justice had discussed *erga omnes* obligations in previous cases[389], it is the *Barcelona Traction Case* which has become the *locus classicus*. The two most relevant paragraphs of that judgment read as follows:

> "33. When a State admits into its territory foreign instruments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between

[388] *See* p. 176 *et seq.*, *infra*.

[389] Northern Cameroons Case, Preliminary Objections, I.C.J. Reports (1963) 3; South West Africa Case, Preliminary Objections, Judgment, I.C.J. Reports (1962) 319; *id.*, Second Phase, Judgment, I.C.J. Reports (1962) 6.

the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character."[390]

The Court has had the occasion to make pronouncements with respect to *erga omnes* obligations also after the *Barcelona Traction Case*,[391] but there is still uncertainty as to the true meaning and effect of *erga omnes* obligations. There seems, however, to be general acceptance of the term and concept of *erga omnes* obligations.[392] So far, however, the International Court of Justice has not decided any case on the basis of the notion of *erga omnes* obligations, but all pronouncements are, strictly speaking, *obiter dicta*. In other words: the law of *erga omnes* obligations is still unsettled. Neither has the distinction between "international crimes and international delicts" introduced and later withdrawn by the International Law Commission brought any certainty and predictability to this complex issue.[393]

What are then the distinctive features of *erga omnes* obligations? Before confronting this concept with that of *ius cogens*, it is necessary to try to understand the role which *erga omnes* obligations play, or at least are said to play, in contemporary international law.

[390] Barcelona Traction, Light and Power Company Limited, Second Phase, Judgment, I.C.J. Reports (1970) 32.

[391] *See* The Nuclear Test Cases – Australia v. France, Judgment, I.C.J. Reports (1974) 253, New Zealand v. France, Judgment, I.C.J. Reports (1974) 457; the Teheran Hostages Case, I.C.J. Reports (1980) 3; the Nicaragua Case, I.C.J. Reports (1986) 14.

[392] For a very useful study devoted to the concept of *erga omnes* obligations *see* Ragazzi, The Concept of International Obligations Erga Omnes (1997); *id.* International Obligations *Erga Omnes*: Their Moral Foundation and Criteria of Identification in Light of Two Japanese Contributions, in Goodwin-Gill and Talmon (eds.), The Reality of International Law. Essays in Honour of Ian Brownlie (1999) 455, *see* also Goodwin-Gill, Crime in International Law: Obligations Erga Omnes and the Duty to Prosecute, in Goodwin-Gill and Talmon (eds.), *op. cit.*, at 199.

[393] *See* discussion on p. 176 *et seq.*, *infra*.

At the outset, it is important to emphasize one fundamental aspect, *viz.*, that the concept of *erga omnes* obligations refers *not* to a *rule*, or norm, of international law, but only to the *obligations* imposed by the rule of international law in question.[394] Any rule of international law – like most other norms – gives rise not only to obligations but also to rights. If this conclusion is fully accepted, it would seem clear – already at this early stage of the inquiry – that there are difficulties involved in comparing the concepts of *ius cogens* and *erga omnes* obligations with each other, simply because they exist and operate in different spheres, and at different levels, of international law and thus serve different purposes.

On the other hand, there are several similarities between the two concepts. The examples of *erga omnes* obligations given by the International Court of Justice in the *Barcelona Traction Case* – i.e. prohibition of acts of aggression, prohibition of genocide, protection from slavery and protection from racial discrimination[395] – coincide with the classic examples of *ius cogens* norms[396]. In addition, both *erga omnes* obligations and *ius cogens* rules are intended to protect the interests of all states, as well as the international community, and to also certain basic moral values. Both concepts are said to be applicable to and relevant with respect to all states. In the case of *ius cogens*, this follows from the definition of peremptory international norms set forth in Article 53 of the Vienna Convention.[397] In the case of *erga omnes* obligations this conclusion would seem to be based primarily on the literal meaning of the Latin words *erga omnes*. This does not help, however, to understand the distinctive charac-

[394] Ragazzi, *op. cit.*, at 190; Gaja, Obligations *Erga Omnes*, International Crimes and *Ius Cogens*: A Tentative Analysis of Three Related Concepts, in Weiler, Cassesse, Spinedi (eds.), International Crimes of States (1989) 153.

[395] *See* p. 171, *supra.*

[396] *See* p. 168 *et seq.*, *supra.*

[397] *See* pp. 165–166, *supra.* It should be noted, however, that certain legal consequences following from *ius cogens* rules do not necessarily operate in relation to *all states.* Article 53 of the Vienna Convention stipulates that a treaty which violates *ius cogens* is void. The purported *erga omnes* character of this provision ought to lead to the conclusion that any state, any member of the international community, could invoke the invalidity of the treaty in question. Article 65, first paragraph, of the same convention seems to say, however, that it is only a party to the treaty – allegedly violating *ius cogens* – that can invoke nullity. The relevant part of Article 65 reads: "A party, which under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim". – For a discussion of other situations which may be said to fall in the same category, *see* Ragazzi, *op. cit.,* at 206–210. In my view, however, these examples do not undermine the general and conceptual character of a *ius cogens* norm to be binding for all states.

teristics of *erga omnes* obligations. After all, almost every norm of customary international law may be said to apply *erga omnes*, i.e. is binding on all states.[398] This does not mean, however, that all norms of customary international law give rise to *erga omnes* obligations. For one thing, unless a rule of customary international law forms part of *ius cogens*, two or more states may as a rule contract out of that custom, i.e. derogate by treaty from the rule in question. Second, a state may avoid the application of a rule of customary international law by virtue of the principle of the so-called persistent objector. The underlying philosophy of this principle is, simply put, that a state which has "persistently objected" against an emerging rule of customary international law may evade the application of the rule.[399]

The *erga omnes* character of an *erga omnes* obligation is thus something different. Its origin must be sought elsewhere.

It has been suggested that the distinctive feature of an *erga omnes* obligation is its indivisibility, or non-bilateralizable nature, in the sense that the obligation can be fulfilled, or breached, only in relation to *all* states belonging to the international community.[400] During the work to codify the law of state responsibility, the special raporteur Arangio-Ruiz concluded in his forth report that:

> "/t/he concept of *erga omnes* obligations is not characterized by the importance of the interest protected by the norm – this aspect being typical of *ius cogens* – but rather by the 'legal indivisibility' of the content of the obligation, namely by the fact that the rule in question provides for obligations

[398] In the *North Sea Continental Shelf Cases*, for example, the International Court of Justice said that customary international law "must have equal force for all members of the international community and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour", I.C.J. Reports (1969) 38–39. – A state will thus be bound by the rule in question without its consent and also without participating in the creation of the rule. Interestingly enough this conclusion has been accepted also by Soviet commentators on international law who were traditionally among the strongest advocates of the decisive role of *consent* in the formation of international law, *see* e.g. Tunkin, Theory of International Law (1974) 126–129; Lukashuk, Mekhanizm mezhdunarodno-pravovogo regulirovaniia (1980) 76 and Danilenko, Obychai v sovremennom mezhdunarodnom prave (1988) 38.

[399] The leading case in support of this principle is the *Fisheries Case* where the International Court of Justice said *obiter dictum* that "the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast", I.C.J. Reports (1951) 131 – The principle would today seem to be accepted by most commentators, *see* e.g. Akehurst, *op. cit.*, at 46–48, with references; Brownlie, *op. cit.*, at 10, with references and Verdross & Simma, Universelles Völkerrecht (3rd. ed. 1984) 352–353, with references.

[400] *See* e.g. Annacker, The Legal Régime of Erga Omnes Obligations in International Law, Austrian Journal of Public and International Law (1994) 135–136.

which bind simultaneously each and every addressee state with respect to all the others. This legal structure is typical not only of peremptory norms, but also of other norms of general international law and of a number of multilateral treaty rules (*erga omnes partes* obligations)".[401]

The concept of indivisibility must be viewed against the structure of most multilateral treaties. While the legal relations between the parties to a multilateral treaty, as parties to such treaty, are uniform and equal, the legal relations as between the individual parties remain of a bilateral character. A multilateral treaty is thus often a cluster of separate and bilateral relations between states, whereas an *erga omnes* obligation creates legal relations between a state on the one hand and the international community on the other. *This* is, in my submission, the distinctive feature of *erga omnes* obligations as far as their *structure* is concerned. On the basis of this structural characteristic alone it is not, however, possible to determine which obligations are *erga omnes* and which are not. As indicated by Arangio–Ruiz in his report,[402] the legal indivisibility is an outflow of the *content* of the obligation. Judging from the examples mentioned by the International Court of Justice in the *Barcelona Traction Case*[403], *erga omnes* obligations are such that express acceptance and protection of certain basic values.[404] In this respect *erga omnes* obligations very much resemble values which are intended to be protected by *ius cogens* norms. Again, the question of the difference between the two concepts arises. Before I try to answer this question, it is useful to discuss two issues concerning the relationship between *ius cogens* and *erga omnes* obligations, *viz.*, (i) do *ius cogens* rules always give rise to *erga omnes* obligations? and (ii) can *erga omnes* obligations result only from a rule of *ius cogens*?

As to the first question, the answer can in my view only be a positive one, i.e. obligations following from *ius cogens* norms are always *erga omnes* obligations. Any other conclusion would undermine the fundamental purpose of peremptory norms in international law; the protection of common interests which is the objective of *ius cogens* norms would

[401] Fourth Report on State Responsibility – Addendum Doc. A/CN. 4/444/Add. 1, para 92.
[402] *Ibid.*
[403] *See* p. 171, *supra.*
[404] *See* Ragazzi, *op. cit.*, at 182–185, where it is said *inter alia* that "/e/ach of the four obligations *erga omnes* listed by the International Court reflects an exceptionless moral norm (or moral absolute) prohibiting an act which, in moral terms, is intrinsically evil (*malum in se*). No state can elude the binding force of these obligations, not only because states recognize that it must be so, but also (and more fundamentally) because nobody can claim special exemptions from moral absolutes." (footnotes omitted)

not be achieved if obligations were not *erga omnes*.[405] As mentioned above[406], and as pointed out by Ragazzi[407], obligations resulting from *ius cogens* norms do not *always* operate *erga omnes*. In my view, however, this does not change the general character of obligations based on *ius cogens* norms as being binding for, and in relation to, all states, and, in particular, as preventing states from derogating from them. In this connection it is illustrative to refer to the idea of a regional *ius cogens*, without, however, entering into a discussion of this concept. There have been several attempts to argue in favor of regional sub-systems of international law, one of the more well-known being the idea of a "socialist international law".[408] Even the advocates of regional sub-systems, however, accept that regional treaties cannot derogate from peremptory norms of general international law.[409] As long as this condition is observed there would seem to be no legal impediment to create regional *ius cogens* norms. Peremptory norms of general international law are, however, always binding for, and in relation to, all states.

As far as the second question is concerned, while in practice most norms which generate *erga omnes* obligations will as a rule meet the requirements of *ius cogens* rules, there is no logical, nor legal, necessity that *erga omnes* obligations can be based only on *ius cogens* rules.[410] *Erga omnes* obligations thus represent a wider circle than *ius cogens* rules.

As the foregoing discussion has illustrated, it is not without difficulty to give a clear cut definition of *erga omnes* obligations and to distinguish them from other concepts, e.g. *ius cogens*. With respect to *erga omnes* obligations in general, part of the explanation is that, although the concept *per se* is well established, the waters surrounding it are still largely unchartered and many questions remain open.[411] As far as its relation to *ius cogens* is concerned, it must be remembered that the two concepts

[405] *Cf.* Gaja, note 393, *supra*, at 158–159; *Id.*, Ius Cogens beyond the Vienna Convention, Recuil des Cours (1981) Vol. III, 273 *et seq.*

[406] *See* p. 171 *et seq.*

[407] Ragazzi, *op. cit.*, at 194, 204–210.

[408] One of the leading proponents of this idea is Tunkin, *see* e.g. Tunkin, *op. cit.*, at 427–447 and also Schweisfurth, Sozialistisches Völkerrecht? Darstellung – Analyse – Wertung der sovjetmarxistischen Theorie vom Völkerrecht "neuen Typs" (1979).

[409] *See* e.g. Tunkin, *op. cit.*, at 444.

[410] *Cf.* Ragazzi, *op. cit.*, at 200. – One possible example of an *erga omnes* obligation which is not a *ius cogens* rule is the right of transit, and consequently the obligation to allow transit, through international straits; *cf.* articles 34, 38, 44 and 45 of the Law of the Sea Convention.

[411] This state of affairs has led one commentator to conclude that *erga omnes* obligations belong to the world of the "ought" rather than to the world of the "is", *see* Simma, Does

reflect different aspects of international law, in as much as the concept of *ius cogens* refers to the binding force of norms in general – and thereby describing the *qualitative* nature of the norm in question – whereas the term *erga omnes* refers to an obligation *resulting from a norm* of international law and describes the sphere of application of the obligation in question, thus explaining the *quantitative* nature of the obligation.

In my view it is not possible – at least not at the present stage of development of international law – to draw the conclusion that *erga omnes* obligations in and of themselves constitute a limitation on the autonomy of parties to agree on the law and/or rules to be applied to resolve a dispute. Most, if not all, obligations which are generally accepted as being of an *erga omnes* character, would also seem to qualify as *ius cogens* rules, or at least as potential *ius cogens* candidates. Thus in practice, it is in my opinion not possible to separate the two. On the other hand, from a conceptual point of view, it could perhaps be argued that if an obligation is of an *erga omnes* nature, it should be binding on *all* and should, consequently, prevent two disputing states from agreeing on the application of rules which would circumvent the *erga omnes* obligation. As I have discussed above, this is the effect of *ius cogens*. The problematic aspect of *erga omnes* obligations, from this perspective, is, however, that they do not address the *degree* to which they are binding; put differently: they are silent as to whether or not states may "contract out" of them. The benchmark in this respect is still the concept of *ius cogens* which does constitute a limitation on party autonomy.[412]

A discussion of *ius cogens* and *erga omnes* obligations must also address – albeit briefly – the concepts of international crimes of states and international delicts. A discussion thereof constitutes a good illustration of the problems involved in trying to analyze the meaning of and the role played by the concept of *erga omnes* obligations in international law. In its work to codify the law on state responsibility, the International Law Commission introduced a distinction between two categories of internationally wrongful acts, *viz.*, international crimes and international delicts. Article 19 of the then Draft Articles on State Responsibility, which was the relevant provision, read:

"Article 19 – International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is

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the UN Charter Provide An Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations *erga omnes*?, in Delbrück (ed.), The Future of International Law Enforcement. New Scenarios – New Law? (1993) 125.

[412] *See* p. 164 *et seq.*, *supra*.

an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

   a. a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

   b. a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

   c. a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

   d. a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict."[413]

It is noteworthy that the terminology – international crimes and delicts, respectively – was new, at least in the sense that it did not refer to, or build on, the concept of *ius cogens*. One might have expected that the definition of peremptory norms as laid down in the Vienna Convention On the Law of Treaties would have served as a fundamental starting point also in the field of state responsibility, rather than introducing new terminology. This is the method which was eventually chosen by the International Law Commission. At its fiftieth session in 1998, the Commission decided to leave the concept of international crimes of states aside for the time being and to focus on "whether the systematic development in the draft articles of key notions such as obligations *erga omnes*, peremptory norms (*ius cogens*) and a possible category of the most serious breaches of international obligations could be sufficient to resolve

[413] Quoted from the website of the International Law Commission, www.un.org/ilc/reports/1969.

the issues raised by Article 19".[414] In the Draft Articles adopted by the International Law Commission at its fifty-second session in 2000, Article 19 has been deleted and there is no mention of "international crimes", nor of "international delicts". It would seem that these concepts have at least to a certain degree been replaced by Article 41 which appears in Chapter III ("Serious breaches of essential obligations to the international community") of Part Two ("Content of International Responsibility of a State") of the Draft Articles. Article 41 reads:

> "1. This Chapter applies to the international responsibility arising from an internationally wrongful act that constitutes a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests.
>
> 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation, risking substantial harm to the fundamental interests protected thereby."[415]

The introduction of the new terminology was confusing in that it raised the question of the relation between *ius cogens* and the new terminology, as well as the possible interdependence between them. It is in my view also unfortunate that reference was made to "crimes", which inevitably lead the thoughts to criminal responsibility in municipal law which does not have any role to play in international law, in so far as states are concerned.[416]

As to the relation between international crimes and *ius cogens*, the International Law Commission stated the following:

> "It would be wrong simply to conclude that any breach of an obligation deriving from a peremptory norm of international law is an international crime and that only the breach of an obligation of this origin can constitute a crime. It can be accepted that obligations whose breach is a crime will 'normally' be those deriving from rules of *ius cogens*, though this conclusion cannot be absolute. But above all, although it may be true that failure to fulfil an obligation established by a rule of *jus cogens* will often constitute an international crime, it cannot be denied that the category of obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime".[417]

[414] *See* International Law Commission Report (1998) 147.

[415] Report of the International Law Commission UN Document A/55/10 (2000) 134.

[416] There is of course criminal responsibility of *individuals* under international law, as evidenced by the several war crime trials which have taken place throughout history, *see* e.g. Akehurst, *op. cit.*, at 353–356.

[417] Yearbook International Law Commission (1976) Vol. II, Part two, 119–120.

The concept of "international crime" was consequently deemed to be narrower than *ius cogens*,[418] but how did it relate to *erga omnes* obligations? It is difficult to answer that question at the conceptual level, primarily it would seem, because the theories underlying the two concepts – as well as any theory concerning the interplay between the two concepts – have not been sufficiently developed, and also because there is a dearth of practical experience and examples.[419]

One illustration of the problems one encountered in trying to define the concept of *erga omnes* obligations and their function was the treatment of countermeasures in the Draft Articles On State Responsibility.[420]

Article 47 of the Draft Articles dealt with countermeasures by an injured state. This provision, in its first paragraph, explained that "the taking of countermeasures means that an injured state does not comply with one or more obligations towards a state which has committed an interna-

[418] It is worthwhile noting that the list of examples of international crimes in Article 19 coincided with generally accepted *ius cogens* rules, with one exception, however, *viz.*, item d., which talked about the preservation of the human environment and the prohibition of massive pollution.

[419] It is telling that the most recent monograph on *erga omnes* obligations – Dr. Ragazzi's book referred to in note 392, *supra* – deals with the *concept* of *erga omnes* obligations and does not attempt to provide a list of such obligations, Ragazzi, *op. cit.*, at xi-xii; also, Ragazzi discusses the rights and remedies corresponding to *erga omnes* obligations only in a very limited way explaining that "while attracting considerable interest in the literature /such rights and remedies/ are still highly controversial and are likely to remain so unless the essence of the concept is more clearly grasped", *id.*, at xii.

[420] Generally speaking, countermeasures constitute one of the most difficult and controversial aspects of the regime of state responsibility and of the Draft Articles On State Responsibility. It is therefore not surprising that countermeasures have generated an abundance of literature. This Study is not the right forum for a discussion of the many complicated issues which arise in connection therewith – nor is such discussion necessary for the purposes of this Study. For a general discussion of countermeasures *see* e.g. Malanczuk, Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness, Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht (1983) 705; *id.*, Countermeasures and Self-Defence in the ILC's Draft Articles on State Responsibility, in Spinedi and Simma (eds.) United Nations Codification of State Responsibility (1987) 231 *et seq.*; Alland, International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility, *ibid.*, at 143 *et seq.*; Gilbert, The Criminal Responsibility of States, International & Comparative Law Quarterly (1990) 345 *et seq.*; Dupuy, Observations sur le "crime international de l'état", Revue Générale de Droit International Public (1980) 449 *et seq.*; Marek, Criminalizing State Responsibility, Revue Belge de Droit International (1978/79) 460 *et seq.*; Riphagen, State Responsibility: New Theories of Obligation in Interstate Relations, in McDonald and Johnston, The Structure and Process of International Law: Essays in Legal Philosophy, Doctrince and Theory (1983) 581 *et seq.*, and Riphagens Sixth Report on the Content, Forms and Degrees of International Responsibility, Yearbook International Law Commission (1985) Vol. II, Part 1 at 3 *et seq.*, and his Seventh Report on State Responsibility, A/CN. 4/397 at 1 *et seq.*

tionally wrongful act in order to induce it to comply with its obligations under articles 41–46 ...".[421]

Article 47 thus entitled an injured state to take unilateral measures of selfhelp. The wrongfulness of an act constituting a countermeasure was precluded under Article 30 of the Draft Articles.[422] The way in which Article 47 was structured, makes it crucial to understand how "injured state" was defined. The answer was found in Article 40 of the Draft Articles. Article 40 started out by explaining, in its first paragraph, that "injured state" means "any state a right of which is infringed by the act of another state, if that act constitutes, in accordance with Part One, an internationally wrongful act of that state". The second paragraph of Article 40 went on to list a number of specific examples of an "injured state". The most interesting aspect of Article 40 – in so far as *erga omnes* obligations are concerned – was the third paragraph which stated that "/i/n addition, 'injured state' means, if the internationally wrongful act constitutes an international crime, all other states".

It followed from the third paragraph of Article 40, that an international crime, as defined in Article 19 of the Draft Articles, entailed *erga omnes* obligations, i.e. obligations towards *all* states. The consequence seems to have been that also states which are not *directly* injured – in other words *all other* states – had the right to resort to unilateral countermeasures,

[421] Quoted from the website of the International Law Commission, www.un.org/ilc/reports/1969. Articles 41–46 of the draft articles addressed rights of injured states and obligations of states having committed internationally wrongful acts. Article 47 has been replaced by Article 50 of the Draft Articles adopted at the fifty-second session. Article 50 reads: "Object and limits of countermeasures.

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
2. Countermeasures are limited to the suspension of performance of one or more international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall as far as possible be taken in such a way as not to prevent the resumption of performance of the obligation or obligations in question".

(Part Two of the Draft Articles bears the heading "Content of International Responsibility Of a State".)

[422] Article 30 read: "The wrongfulness of an act of a state not in conformity with an obligation of that state towards another state is precluded if the act constitutes a measure legitimate under international law against that other state, in consequence of an internationally wrongful act of that other state". Article 30 has been replaced by Article 23 of the Draft Articles adopted at the fifty-second session. Article 23 reads: "Countermeasures in respect of an internationally wrongful act.

The wrongfulness of an act of a State not in conformity with its international obligations to another State is precluded if and to the extent that the act constitutes a countermeasure directed towards the latter State under the conditions set out in articles 50(47) to 55(48)".

provided that the wrongful act constituted an international crime.[423] Even though the Draft Articles imposed a number of conditions and restrictions on countermeasures,[424] the fact that not directly injured states would have been entitled to resort to them, created a potentially very dangerous situation, where escalation of countermeasures could not be ruled out. Moreover, it raised the very fundamental question whether not directly injured states indeed have, or should have, the right to resort to *unilateral* countermeasures, or if only *collective* reactions are, or should be, permitted. The latter alternative is certainly more attuned to the system of collective security enshrined in the United Nations Charter.[425]

The concepts of international crimes and international delicts, and their relation to the concept of *erga omnes* obligations, did not, in the final analysis, shed any further light on the question of possible limitations on the autonomy of parties to agree on the law and/or rules to be applied to resolve a dispute. As mentioned above[426], the ultimate test in this respect is the concept of *ius cogens*.

3.3.6.4 Decisions by the Security Council of the United Nations

3.3.6.4.1 INTRODUCTION

In the preceding sections, I have discussed *ius cogens* in relation to party autonomy and concluded that rules of *ius cogens* do constitute a limitation

[423] Paragraph 3 of Article 40 implied that only international crimes, as defined in Article 19 of the Draft Articles, gave rise to injury to all states. As mentioned above, p. 174, such a restricted view would undermine the fundamental purpose of peremptory norms in international law, *see* also Hannikainen, *op. cit.*, at 289; he explicitly states that violations of peremptory norms should have an *erga omnes* character. Article 40 has been replaced by Article 43 of the Draft Articles adopted at the fifty-second session. It reads:

> "The injured state
>
> A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:
>
> (a) That State individually; or
>
> (b) A group of States including that State, or the international community as a whole, and the breach of obligation:
>
> (i) Specifically affects that State; or
>
> (ii) Is of such a character as to effect the enjoyment of the rights or the performance of the obligations of all the States concerned."

[424] Articles 48–50 of the Draft Articles stipulated, *inter alia*, that negotiations must precede countermeasures, that countermeasures must be proportionate to the internationally wrongful act and that certain countermeasures are prohibited, such as the threat or use of force as prohibited by the Charter of the United Nations.

[425] Most of the commentators referred to in note 420, *supra*, take the position that reactions to international crimes should be collective.

[426] *See* p. 176, *supra*

on party autonomy. When discussing international commercial arbitration, I explained that public policy is a limitation on party autonomy in such arbitrations. I also explained that there may be further limitations on party autonomy in international commercial arbitration, *viz.*, different categories of mandatory rules in municipal law. Although party autonomy is accepted world-wide in international commercial arbitration, such mandatory rules are occasionally deemed to be of such importance to the municipal legal system in question, that they must be applied irrespective of the choice of law made by the parties.[427]

The starting point in this section is to find out whether there is any phenomenon in interstate arbitration equivalent to mandatory rules in municipal law. Put differently: is there any other limitation on party autonomy in interstate arbitration than *ius cogens*? Given the almost universal character of the UN Charter, and taking account of the fundamental changes in the decision making in the Security Council which have taken place as a result of the end of the Cold War, resulting in the re-activation of the Security Council, the discussion will concentrate on Security Council resolutions as a *potential* limitation on party autonomy in interstate arbitration. The ultimate question to be answered is whether a Security Council resolution can prevent two states involved in an arbitration from agreeing on the law and/or the rules to be applied to resolve the dispute.

One hypothetical example might be a situation where two States have agreed to refer to arbitration the determination of the borders of a third state, sandwiched in between the two arbitrating states, by applying principles agreed upon in the arbitration agreement but where the Security Council subsequently adopts a resolution seeking to stop the two arbitrating states from proceeding with the arbitration which in the view of the Security Council would result in two States dividing the territory of a third state.

Another example would be if the Security Council has adopted a resolution addressing the division of state property among newly independent states formerly constituting parts of a disintegrated federal state and if two or more of the newly independent states within the framework of arbitration proceedings purport to distribute property on the basis of other principles than those suggested by the Security Council.

What role do Security Council resolutions play in such, and similar, situations?

Under Article 25 of the UN Charter, members of the UN "agree to accept and carry out the decisions of the Security Council in accordance

[427] *See* discussion on p. 116 *et seq.*, *supra*.

with the present Charter". This language is sufficiently clear to warrant the general conclusion that decisions of the Security Council are binding on member states. If one accepts this conclusion, it would seem that decisions of the Security Council at least have the potential of constituting yet another limitation on party autonomy in international law and interstate arbitration. This would seem to become even clearer when account is taken of Article 103 of the UN Charter which stipulates that the obligations under the Charter prevails over any obligations of member states "under any other international agreement".

Following the end of the Cold War, the Security Council seems to have entered a new era of activism resulting, *inter alia*, in an increasing number of resolutions. In the past, resolutions were to a large extent prevented by the paralyzing conflict between the United States and the Soviet Union. The recent activism of the Security Council has led to concerns for the institutional balance within the United Nations and with respect to limitations on the decision-making power of the Council.

The possible *legal* limitations on the competence of the Security Council have not previously been an issue for discussion. It is only recently that questions of this nature have been debated. This is primarily a result of the *Lockerbie Case* decided by the International Court of Justice in 1992,[428] in which the Court is said to have deferred – at least partially – to a resolution adopted by the Security Council, pursuant to Chapter VII of the UN Charter.[429] Generally speaking, any discussion of limitations on the Security Council's resolutions, and the validity of such resolutions, goes to the very fundamental cornerstones of the UN security system, in particular to the obligation of member states to comply with Security Council resolutions under Article 25 of the Charter. On the one hand, this obligation would seem to be necessary for the UN system of collective security to be efficient. On the other hand, there must be – at least conceptually – limitations on the competence of the Security Council, violations of which may lead to invalidity of resolutions passed by it. The limitations on the Security Council and the consequences of violating them are discussed in Sections 3.3.6.4.4–5 below. This also raises the question of the role of the International Court of Justice, if any, in determining the validity of Security Council Resolutions, which is discussed in Section 3.3.6.4.6 below. In Section 3.3.6.4.7 the threads are tied together with a view to determining if Security Council resolutions constitute a

[428] Libya v. US, I.C.J. Reports (1992) 114 (Provisional Measures) and 234 (Older); Libya v. UK, I.C.J. Reports (1992) 3 (Provisional Measures) and 231 (Order); the case is discussed at p. 198 *et seq.*, *infra*.
[429] *See* p. 207 *et seq.*, *infra*.

limitation on party autonomy in interstate arbitration. Before these specific aspects are addressed, it is necessary briefly to look at the role and function of the Security Council.[430]

3.3.6.4.2 THE ROLE AND FUNCTION OF THE SECURITY COUNCIL

Of the six principal organs of the United Nations, the Security Council is the most important one from a political point of view. It consists of 15 members, including five permanent members. The structure and functions of the Security Council are described in Chapter V of the UN Charter. For present purposes Articles 24 and 25 are of particular importance.

In the first paragraph of Article 24,[431] the member states confer on the council primary responsibility for the maintenance of international peace and security, and that it acts on their behalf. The principal functions of the Security Council are explained in the following two Chapters of the UN Charter, *viz.*, Chapter VI – Pacific Settlement of Disputes – and Chapter VII – Action with Respect to Threats To the Peace, Breaches of the Peace, and Acts of Aggression. In carrying out its functions, Article 24 (2) provides that the Security Council must act in accordance with the Purposes and Principles of the United Nations.[432]

As mentioned above, Article 25 of the UN Charter is important because it empowers the Security Council to take binding decisions, and creates an obligation for the member states to obey the decision in question.

It would seem reasonable to assume that the starting point for the activities of the Security Council should be Chapter VI which thus deals with the peaceful settlement of disputes and that the Security Council would first seek to confirm its authority to proceed on the basis of the provisions therein. If the Council finds that a dispute is likely to endanger the maintenance of international peace and security, it may under Article 33 (2) call upon the parties to settle the dispute by peaceful means. Under Article 33 (1) the parties to a dispute are themselves under an obligation to seek a resolution of the dispute by peaceful means,

[430] It goes without saying that there is a wealth of literature on the UN and its Charter in general, and on the Security Council in particular. In the following I address only such aspects of the Security Council as are necessary for answering the question formulated above. For general information on the UN and the Security Council reference is made to the publications of a general nature mentioned in the footnotes following below.

[431] Article 24 (1) reads: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

[432] The Purposes and Principles of the UN are laid down in Chapter I of the UN Charter; *see* further discussion at p. 194 *et seq.*, *infra*.

including those enumerated in this provision, *viz.*, negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or resort to regional agencies or arrangements. Alternatively, the Security Council may under Article 34 initiate an investigation with a view to finding out whether or not the dispute in question is likely to endanger the maintenance of international peace and security. The Security Council may also under Article 36 (1) "at any stage of a dispute" recommend an appropriate procedure or method to settle the dispute.

If the parties to a dispute fail to settle it by peaceful means, they shall, under Article 37 (1), refer it to the Security Council. The Council may in such a situation conclude that the measures foreseen in Chapter VI are insufficient and that measures under Chapter VII are necessary. Generally speaking, the measures and actions which the Security Council may take under Chapter VII rest on the above-mentioned Article 24 (1) of the UN Charter by virtue of which the member states delegate to the Council the primary responsibility for the maintenance of international peace and security.

With respect to disputes under Chapter VI, Article 27 (3) of the UN Charter plays an important role. Article 27 deals with the voting procedure in the Security Council. Paragraph 3 of the article stipulates that a party to a dispute shall abstain from voting with respect to decisions under Chapter VI. This provision serves as a procedural safeguard primarily for parties to a dispute which are not members of the Security Council, thus implementing the generally accepted procedural tenet *nemo judex in re sua*. Uncertainty surrounds the precise scope of Article 27 (3) resulting from the difficulties to distinguish between a "dispute" and a "situation",[433] the latter falling outside the scope of Article 27 (3), and the difficulties to define who is a party to a dispute[434]. Further complications arise from the "veto right" of the five permanent members of the Security Council.[435] If, however, a permanent member is a party to a dispute, the

[433] *See* Simma (ed.), The Charter of the United Nations. A Commentary (1995) 459; Conforti, The Law and Practice of the United Nations (1995) 64–83; for a critical discussion of Article 27 (3), *see* Blum, Eroding the United Nations Charter (1993) 193–216.

[434] Simma, *op. cit.*, at 459–460. – In its Advisory Opinion in the Namibia Case, the International Court of Justice stated, *inter alia*, that the application of the last clause of Article 27(3) of the UN Charter "... requires for its application the prior determination by the Security Council that a dispute exists and that certain members of the Council are involved as parties to such a dispute", I.C.J. Reports (1971) 23. Conforti, *op. cit.*, at 76–81, criticizes such an approach and advocates that the legal-technical definition of an "international dispute" ought to be abandoned in favor of a broader concept of "dispute" determined on the basis of the purpose of the last clause of Article 27(3).

[435] For comments, *see* e.g. Broms, Voting in the Security Council, in Studies in International Law, Festskrift till Lars Hjerner (1990) 93.

wording of Article 27(3) would seem to make it clear that it cannot vote in such a matter. Consequently, a decision can be taken against its will in such a situation.[436] Article 27 (3) notwithstanding, in the *Lockerbie Case* both the United States and the United Kingdom voted in the Security Council while the case initiated by Libya against them was still pending in the International Court of Justice.[437]

As far as measures under Chapter VII of the UN Charter are concerned, Article 39 is generally interpreted to mean that the Security Council must determine that a threat to the peace exists, or that a breach of the peace or act of aggression has occurred, before it can take any action under the relevant provisions of Chapter VII.[438] The generally held meaning is that absent such determination, the Council cannot take enforcement measures under Chapter VII.[439] Article 39 thus serves as the key opening up access to the other provisions in Chapter VII. It would seem that the Security Council has wide discretion in characterizing a given situation or action as constituting a threat to the peace, as a breach of the peace or as an act of aggression.[440] In making its determinations under Article 39, the Security Council acts as a political organ, i.e. taking primarily political considerations into account. Legal considerations can, however, and do play a role in the deliberations and decision-making of the Security Council, and its decisions do have legal consequences and implications. Generally speaking, it would seem that the Security Council has made extensive use of the wide discretion bestowed upon it – in my submission almost to the point of becoming arbitrary – in determining what constitutes a *threat to the peace*. The concept of *breach of the peace* would seem to be more straightforward and thus typically easier to identify and define. A breach of the peace can relate to several categories of hostilities: from the violation of a bilateral cease-fire agreement to a

[436] Simma, *op. cit.*, at 462.

[437] According to one commentator this is only one example of what seems to have developed into a practice; it has been suggested that "... in many cases the obligation to abstain from voting has simply been ignored; states have frequently taken part in votes about disputes to which they were parties, and objections have seldom been made by other states", Akehurst, *op. cit.*, at 376; *see* also Conforti, *op. cit.*, at 80–81.

[438] Article 39 reads: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

[439] *See* e.g., Simma, *op. cit.*, at 612–614; Goodrich & Hambro, The United Nations and the Maintenance of International Peace and Security (1955) 346–347; Schachter, International Law in Theory and Practice (1991) 392.

[440] For a discussion of the practice of the Security Council, *see* e.g. Simma, *op. cit.*, at 609–612, and the references made therein; *see* also Österdahl, Threat to the Peace (1998).

full scale war between two or more states. As far as the term *act of aggression* is concerned, it would seem that the Security Council has never, so far, made a determination that a given situation or use of force by any state constituted an act of aggression.

Once the Security Council has made the relevant determination under Article 39, the way is open for implementing collective enforcement measures. Such measures may take the form of non-military measures – e.g. economic and diplomatic sanctions – under Article 41 of the Charter, or the use of military force pursuant to Article 42.

Non-military sanctions under Article 41 may range from the symbolic to the coercive, in the latter case with a view to bring about compliance with the Council's decision. Examples of such sanctions are enumerated in Article 41, but sanctions may be others than those enumerated.[441] It was not until 1966 – i.e. more than 20 years after the creation of the UN – that the Security Council imposed sanctions on the basis of Article 41; sanctions were imposed on Rhodesia following its unilateral declaration of independence.[442] The next such decision was the arms embargo imposed on South Africa in 1977.[443] Until Iraq's invasion and occupation of Kuwait in 1990, these two decisions were the only instances when the Security Council had ordered measures under Article 41. The Gulf War resulted in a number of resolutions by the Security Council imposing sanctions on Iraq.[444] Also since the end of the Gulf War, sanctions of this nature have been imposed on, *inter alia*, Yugoslavia (Serbia and Montenegro),[445] the former Yugoslav Socialist Federal Republic (arms embargo relating to the entire territory)[446] and on Libya in relation to the Lockerbie incident.[447]

Article 42 of the Charter empowers the Security Council to take such military action as may be necessary to maintain or restore international peace and security. Such action may be taken if the Security Council considers that measures under Article 41 have proved to be inadequate or

[441] Simma, *op. cit.*, at 625.

[442] SC Res. 232, 16 December 1966.

[443] SC Res. 418, 4 November 1977.

[444] SC Res. 661, 6 August 1990 (trade embargo), SC Res. 665, 25 August 1990 (empowering states with naval forces in the area to enforce the embargo), SC Res. 670, 25 September 1990 (extended embargo to include all civil air traffic to and from Iraq).

[445] SC Res. 757, 30 May 1992 (economic, cultural and scientific sanctions on Serbia and Montenegro); *see* also SC Res. 787, 16 November 1992 and SC Res. 820, 17 April 1993.

[446] SC Res. 713, 26 September 1993.

[447] SC Res. 748, 31 March 1992 which ordered an arms embargo and a complete air blockade against Libya to be implemented if Libya did not comply with SC Res. 731, 21 January 1992; *see* discussion at 207 *et seq.*, *infra*. SC Res. 748 does not explicitly refer to Article 41, but can only be seen as being based on that article.

would be inadequate. It would seem that Article 42, creates a broad mandate for the Council to take a variety of military measures.[448]

Article 42 has never been *expressly* relied on by the Security Council. One reason for this is in all likelihood the absence of agreements to be concluded pursuant to Article 43. Under this article member states undertake to make armed forces available to the Security Council and to render assistance to the extent necessary for the maintenance of international peace and security. This undertaking does, however, presuppose that a special agreement has been entered into between the member state(s) in question and the Security Council. The undertaking in Article 43 is thus no more than a duty to negotiate.[449] Another reason is probably the fundamentally opposing interests, in a general sense, of the permanent members of the Security Council that existed during the Cold War era. Although agreements pursuant to Article 43 are strictly speaking required for military measures under Article 42, the absence of such agreements has in practice never been seen to prevent the Security Council from taking measures on the basis of Article 42.[450] In fact, there is nothing in Article 42 which prevents the Security Council from taking measures under that article by other means than those provided for in Article 43.[451]

An important provision for the system under Chapter VII is Article 48[452] which, generally speaking, confirms the obligation of member states to carry out decisions by the Security Council which are bind-

[448] Simma, *op. cit.*, 632–635.

[449] *See* e.g. Goodrich-Hambro-Simons, The Charter of the United Nations (3rd ed. 1969) 319–324 for a discussion of the positions of the permanent members of the Security Council with respect to the types of forces to be placed at the disposal of the Council.

[450] *See* e.g. Simma, *op. cit.*, at 633.

[451] On the other hand it has been argued that no operation can qualify as a military enforcement measure under Chapter VII, particularly under Article 42, unless it was carried out by forces made available to the Council through agreements under Article 43 and under the direct control of the Council; *see* e.g. Cot & Pellet, La Chartre des Nations Unies (1985) 708–716, 1399–1407 and Weston, Security Council Resolution 687 and Persian Gulf Decisions Making: Precarions Legitimacy, American Journal of International Law (1991) 519. This argument was rejected, however, already in 1962 by the International Court of Justice in its *Certain Expenses Advisory Opinion*, where the Court stated that: "It cannot be said that the Charter has left the Security Council impotent in the face of an emerging situation when agreements under Article 43 have not been concluded", I.C.J. Reports (1962) 167.

[452] Article 48 reads: "(1) The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the members of the United Nations or by some of them, as the Security Council may determine. (2) Such decisions shall be carried out by the members of the United Nations directly and through their action in the appropriate international agencies of which they are members."

ing.[453] Article 48 (1) also empowers the Security Council to limit such obligation to selected members. This provision does not, however, authorize the Council to *oblige* member states to take military actions without their consent.[454] That consent is required is clear from Article 43. Thus, Article 48 cannot be used as an independent basis for military enforcement measures. On the other hand, non-military sanctions appear to fall within the scope of Article 48.

3.3.6.4.3 When are Security Council Resolutions Binding?

As mentioned above, Article 25 of the UN Charter is viewed as general proof of the binding character of Security Council resolutions. For the purposes of the present discussion I am focusing only on *binding* resolutions of the Security Council. It can – it is submitted – be safely assumed that if a resolution is not binding, it does not constitute a limitation on party autonomy.[455] Article 25 raises two questions which are of interest in the present context, *viz.*, (i) what is the meaning of the words "... in accordance with the present Charter", and (ii) are *all* decisions – in the broadest sense of this word – taken by the Security Council binding.

In addressing the first question, it is necessary to keep Article 24 (2) in mind. This article states, *inter alia*, that "/i/n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations". Article 25 read together with Article 24 (2) appears to imply that there are certain limitations on the Security Council, resulting from the purposes and principles of the UN; this leads to the inference that violations of such limitations would render a decision invalid and thus non-binding. [456] To find out when Security Council resolutions are binding, it is thus necessary to identify and define the aforementioned limitations.[457]

[453] For a discussion of *when* Security Council resolutions are binding, *see* Section 3.3.6.4.3, *infra*.

[454] *See* e.g. Simma, *op. cit.*, at 652.

[455] The question whether or not the fact that a resolution *is* binding, is *sufficient* for such resolution to constitute a limitation on party autonomy is discussed in Section 3.3.6.4.7 *infra*. – Recommendations as well as resolutions which are not binding may nevertheless have legal consequences, *cf.* Conforti, *op. cit.*, at 275–276.

[456] As pointed out in Simma, *op. cit.*, at 413–414, it is possible to interpret the words "in accordance with the present Charter" as referring to the *obligation* of the members to accept and carry out decisions of the Security Council rather than to *decisions* – and thus qualifying them – to be accepted and carried out as binding; on balance Simma concludes that the expression in question must refer to the decisions, a conclusion which the present author shares.

[457] *See* p. 191 *et seq.*, *infra*, where I discuss also other potential limitations on the Security Council, i.e. potential limitations *not* resulting from the purposes and principles of the UN.

With respect to the second question, it has focused on whether or not the Security Council can take binding decisions only under Chapter VII of the UN Charter, or if it can do so also under Chapter VI. Some commentators have taken the position that the Security Council can take binding decisions only under Chapter VII.[458] Although it is not entirely clear what the legal basis for this position is, it would appear that it originates from the distinction between "decisions" and "recommendations".[459]

The language of Article 25 does not reflect the idea that the binding force of Security Council resolutions is limited to decisions under Chapter VII. Article 25 is placed in Chapter V which deals with the composition, functions and powers of the Security Council, i.e. general rules with respect to the Council. Judging from the language of Article 25 and its placement, the more reasonable interpretation would seem to be that it applies to all decisions of the Security Council irrespective of whether they fall under Chapter VI or Chapter VII. This conclusion is supported by the dramatic consequences which the contrary position would have. If Article 25 were to be applied only with respect to decisions under Article VII, this would seriously undermine the Security Council and its task to maintain international peace and security.[460] Given the fact that the Security Council has other tasks under the Charter – i.e. not only those discussed in Chapter VII – it would be reasonable to assume that Article 25 applies to any decision of the Security Council taken in accordance with the Charter. The idea that Article 25 is applicable only to decisions under Chapter VII was rejected by the International Court of Justice in its Advisory Opinion On Namibia.[461]

The foregoing does not, however, answer the question *when* resolutions of the Security Council are binding. In my view, it is clear that Article 25 extends beyond Chapter VII. On the other hand, the answer to the question cannot be found in Article 25, nor in Chapter VII, or at least not only there. To determine if a decision is binding, it is also necessary to take account of the intention of the Security Council when taking its decision – did it intend to create binding obligations when taking the decision? While it is true that the Charter makes a distinction between "decisions" and "recommendations" for more than semantic reasons, the

[458] *See* e.g. Bailey & Daws, The Procedure of the UN Security Council (3rd ed. 1998) 270–271; Simma, *op. cit.*, at 410–413; Conforti, *op. cit.*, at 278, goes even further in suggesting that the Security Council may issue binding decisions "only within the framework of Article 41".

[459] Simma, *op. cit.*, at 411, describing the position of Kelsen.

[460] Simma, *op. cit.*, at 410–411.

[461] I.C.J. Reports (1971), 52–54.

terminology is not always uniform in the Charter and the terminology and the language used by the Security Council is mostly heavily influenced by political considerations. For these reasons the language used by the Security Council is to be found on a gliding scale from explicit recommendations at one end, to binding orders at the other. As a consequence thereof, it is necessary to take an *ad hoc* approach to Security Council resolutions and determine with respect to each individual resolution whether or not it is binding.[462] When evaluating Security Council resolutions using the aforementioned *ad hoc* approach, it must be remembered that there are certain limitations on the competence of the Security Council. In other words, even if it can be established that the Security Council *intended* a specific resolution to be binding, such resolution may not be binding if the provision in the Charter on which the resolution is based, does not empower the Security Council to take a binding decision.[463]

3.3.6.4.4 LIMITATIONS ON THE COMPETENCE OF THE SECURITY COUNCIL

As indicated in the preceding section, the binding character of a Security Council resolution would seem to presuppose that the resolution in question does not violate, nor exceed, the allocation and limitation of the authority of the Security Council which are laid down in the Charter. This follows from Article 24(2) and Article 25 of the Charter. Consequently, Security Council resolutions are, generally speaking, binding only in so far as they are in accordance with the Charter.[464] This conclusion ultimately rests on the fact that the rights and obligations under the Charter are based on a treaty, i.e. the Charter. The parties to the treaty, the member states, have agreed to be bound by Security Council resolutions only to the extent that such resolutions comply with the provisions of the Charter.

I have grouped the limitations on the competence on the Security Council into three categories, *viz.*, (i) *ultra vires* restrictions (ii) purposes and principles of the United Nations and (iii) *ius cogens*. These categories will be discussed below, as will the possibilities to control and review that the Security Council is acting within its competence.[465] Before embarking on this discussion, however, one preliminary remark is

[462] *See* Bring, FN-Stadgans Folkrätt (1992) 302–304, 322; Simma, *op. cit.*, at 412–413; Conforti, *op. cit.*, at 193.

[463] Simma, *op. cit.*, at 413.

[464] For further discussion of the legal consequences of exceeding the limitations on the authority of the Security Council, *see* p. 198 *et seq.*, *infra*.

[465] *Cf.* discussion of similar issues in Lamb, Legal Limits to United Nations Security Council Powers, in Goodwin-Gill and Talmon, *op. cit.*, at 361 *et seq.*

called for, *viz.*, a reminder of the generally accepted position that the doctrine of *lis pendens* is not applicable as between the Security Council and the International Court of Justice.[466] Consequently, the fact that a case is pending before the Court, does *not* limit the authority of the Security Council and does not prevent it from exercising jurisdiction over questions which are simultaneously being addressed by the Court, and *vice versa*. As a practical matter, however, it is possible that there may be situations where one of the two organs may wish to show restraint with a view to avoiding interference in the sphere of activities of the other.[467]

3.3.6.4.4.1 ULTRA VIRES *RESTRICTIONS*

In my view, it is reasonable to take as a starting point that member states have accepted to be bound by Security Council resolutions which are in conformity with the Charter. As mentioned above, this follows from Article 25. Resolutions which are not in conformity with the Charter are thus *ultra vires*. As mentioned above, the Security Council is a political organ within the UN system. This fact does not, however, exempt it from the *ultra vires* doctrine; member states do expect the Council to act within the authority bestowed upon it under the Charter. In its *Advisory Opinion On Conditions of Admission to the United Nations*, the International Court of Justice stated:

> "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment."[468]

The idea that acts, measures and resolutions of organs of the United Nations may be *ultra vires* was formulated by the Court in the so-called

[466] *See* Rosenne & Gill, The World Court. What It Is and How It Works, (4th rev. ed. 1989) 36; Rosenne; The Law and Practice of the World Court 1920–1996 (1997) 127–138; Elsen, Litispendens Between The International Court of Justice and The Security Council (1986) 57–69; Ciobanu, Litispendens between the International Court of Justice and the Political Organs of the United Nations, in Gros (ed.) The Future of the International Court of Justice (1976) 209–211 and Klein, Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten, in Bernhardt-Jaenicke-Geck-Steinberger (eds.), Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte. Festschrift für Hermann Mosler (1983) 467. As explained by Rosenne, *supra*, this has been the consistent practice of the International Court of Justice; *see* also Gowlland-Debbas, The Relationship Between the International Court of Justice And the Security Council In the Light of the Lockerbie Case, American Journal of International Law (1994) 653–658.

[467] The role of the International Court of Justice, if any, in controlling and/or reviewing Security Council resolutions will be discussed at p. 200 *et seq.*, *infra*.

[468] I.C.J. Reports (1984) 64; *Cf.* Bowett, The Law of International Institutions (4th ed. 1982) 33 where it is said:

Expenses Case where the Court said: "... when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the organisation."[469]

It follows from the foregoing that the Security Council is bound by the Purposes and Principles of the UN described in Chapter I of the Charter.[470]

There is, however, another form of structural limitation on the Security Council, *viz.*, that which follows from specific provisions of the Charter, particularly in Chapters VI, VII and VIII. I refer to such limitations as *ultra vires* restrictions.

It would seem clear, for example, that the Security Council cannot decide on measures under Articles 41 and 42 without first having determined that there is a threat to the peace, breach of the peace or act of aggression pursuant to Article 39. If the Security Council were to take such a decision, its binding effect on member states is called into question. The Security Council is a political and executive organ in the UN system and as such primarily concerned with political and factual matters. In so far as the Council deals with factual and political issues it would appear that there are few limitations on it. The discretion which the Council enjoys, for example, in making determinations under Article 39 – i.e. whether there is a "threat to the peace, breach of the peace or act of aggression" – seems to be quite far-reaching.[471]

As long as the decision-making of the Security Council is confined to factual and political matters, few problems would seem to arise. On the other hand, as soon as the Council becomes involved in the determination of legal matters, questions as to the competence of the Security Council arise. If the Council, when issuing a resolution on the basis of Article 39, in addition to concluding that there is an act of aggression, decides that the state in question must pay compensation, such a finding goes beyond the factual and political aspects and does in fact involve application of international law. For example, in Security Council resolution 687 of 29

"The Council thus acts as the agent of all the members [discussing Articles 24–26 of the Charter] and not independently from its wishes; it is, moreover, bound by the Purposes and Principles of the organisation, so that it cannot, in principle, act arbitrarily and unfettered by any restraints. At the same time, when it does act *intra vires*, the members of the organisation are bound by its actions ...".

[469] Certain Expenses of the United Nations, I.C.J. Reports (1962) 168.

[470] This limitation on the competence of the Security Council will be discussed at p. 194 *et seq.*, *infra*.

[471] *Cf.* e.g. Simma, *op. cit.*, at 103–110.

November 1991, the Council decided that Iraq was liable for damages caused by Iraq's invasion and occupation of Kuwait.[472] It would also seem clear that the Security Council could not *impose* on the parties to a dispute any terms of settlement, nor indeed any method for resolving the dispute, including adjudication by the International Court of Justice. This follows from Articles 33, 36, 37 and 38 which emphasize the recommendatory character of the Council's authority to find a settlement and the free choice of dispute settlement methods. Likewise, the Security Council could not decide that a state is to transfer any part of its territory to another state, simply because the Charter does not empower the Council to do so.[473]

3.3.6.4.4.2 Limitations Following From the Purposes and Principles of the United Nations

The Purposes and Principles of the United Nations are set forth in Chapters 1 and 2 of the Charter. Generally speaking, they are very broad in scope and leave a wide room of discretion in interpreting them. While the Purposes and Principles are binding both on member states and the organization as such, I shall focus on their effect on the Security Council. In so doing, I will limit myself to the Security Council acting under Chapter VII of the Charter. As will be discussed below, there are in practice three limitations which follow from Articles 1 and 2 when the Security Council exercises its powers under Chapter VII, *viz.*, (i) the principle

[472] While the Security Council "reaffirmed" that Iraq "is liable under international law ...", it is clear that this part of the resolution constitutes more than a statement, more than a general confirmation of the principle of State responsibility. In fact, the Security Council seems to have determined a legal question, i.e. the liability of a specifically identified State – Iraq – arising out of acts and measures taken by such State. – For critical comments on this aspect of Security Council resolution 687, *see* e.g. Kirgis, Claims Settlement and the United Nations Legal Structure, in Lillich (ed.) The United Nations Compensation Commission (1995) 103.

[473] This issue has been discussed in connection with Security Council Resolution 662, 9 August 1990, in which the Council declared the annexation of Kuwait by Iraq null and void. In the subsequent resolution 687, Part A, the Council demanded that Iraq and Kuwait *respect* the boundary between the two states agreed on in 1963, and called for *demarcation* of that boundary with the assistance of the Secretary-General. The Security Council did thus *not* itself determine a new boundary, nor did it require Iraq to transfer territory to Kuwait; *see* Mendelson & Hulton, The Iraq–Kuwait Boundary, British Yearbook of International Law (1993) 135 *et seq.*; Post, Adjudication as a Mode of Acquisition of Territory? Some Observations on the Iraq–Kuwait Boundary Demarcation in Light of the Jurisprudence of the International Court of Justice, in M. Fitzmaurice & Lowe (eds), Fifty Years of the International Court of Justice (1995) 237 *et seq.*; Queneuduc, La demarcation de la frontière entre l'Irak et le Koweït, Revue générale de droit international public (1993) 767 *et seq.*

of self-determination, (ii) the respect of human rights and (iii) respect of territorial integrity.[474]

THE PRINCIPLE OF SELF-DETERMINATION

Article 1 (2) of the Charter refers to the *right* of self-determination. It is based on the fundamental principles of the independence of states and of respect for the self-determination of peoples. The right of self-determination is, as a rule, characterized as forming part of *ius cogens*[475]. In the context discussed here, the right of self-determination means that the Security Council could not *impose* any particular form or system of government on a majority, or significant portion, of a population of any state. This limitation would probably not prevent the Security Council from organizing *transitional* administrative measures by UN authorized forces. Any long term measures of this nature would, however, be

[474] As mentioned above, the volume of general literature on the United Nations – including its Purposes and Principles – is truly daunting; suffice it at this stage, to refer to the following publications: Simma, *op. cit.*, Goodrich-Hambro-Simons, *op. cit.*; Cot & Pellet (eds), La charte des Nations Unies (2nd ed. 1991); Wolfrum (ed.), United Nations: Law, Policies and Practice (1995); Conforti, *op. cit.*, and Joyner (ed.), The United Nations and International Law (1997); *see* also Bring, *op. cit.*, 40–260. – The sphere of domestic jurisdiction referred to in Article 2(7) of the Charter is sometimes mentioned separately as a limitation on the authority of the Security Council. I shall treat it as being subsumed under the principle of self-determination and the respect for territorial integrity. Enforcement measures under Chapter VII of the Charter constitute an explicit exception from the principle of domestic jurisdiction. Needless to say, it is often difficult to draw the line between what is, or should be, reserved for domestic jurisdiction and the interest of taking enforcement measures under Chapter VII. One example is the *Prosecutor v. Blaskic case* decided by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia. The Tribunal was established on the basis of Security Council resolutions, *viz.*, 808 (1993) and 827 (1993) taken under Chapter VII of the Charter. The issue in the case was the powers of the office of the Prosecutor at the Tribunal to issue subpoena orders to state officials and state organs. After having confirmed the principle of domestic jurisdiction, the Appeals Chamber noted, *inter alia*,: "However, Article 2, paragraph 7, of the Charter provides for a significant exception to the impenetrability of the realm of domestic jurisdiction in respect of Chapter VII enforcement measures. As the Statute of the International Tribunal has been adopted pursuant to this very Chapter, it can pierce this realm", Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, Case No. IT-95-14-AR 108 bis, para. 64, reprinted in International Law Reports Vol. 110 (1998) 723.

[475] Hannikainen, *op. cit.*, at 717–723; Simma, *op. cit.*, at 70. – The literature on the right of self-determination is vast. I shall not dwell on any other aspect than the right as a limitation on the competence of the Security Council in acting under Chapter VII. For general works on the right of self-determination *see* e.g. Tomuschat (ed.), Modern Law of Self-Determination (1993); Driessen, A Concept of Nations in International Law (1992); Crawford (ed.), The Rights of Peoples (1988); Meissner (ed.), Das Selbstbestimmungsrecht der Völker in Osteuropa und China (1986); Bucheit, Secession: The Legitimacy of Self-Determination (1978) and Simma, *op. cit.*, at 56–72.

precluded, unless the population in question through its representatives has consented thereto.

Respect for Human Rights

In Article 1 (3) of the UN Charter, reference is made to the "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". In terms of limitations on the Security Council, this means that the Council has a duty to respect human rights and humanitarian norms when deciding and implementing enforcement measures. Put differently, the respect for human rights requires the Security Council to take account of the import of enforcement measures on the population of the country which is being subjected to the measures in question.[476] In situations like this, the question will arise as to *which* rules of human rights the Security Council would be bound by. In general, this would depend on the character of the enforcement measure, the scope of the UN mandate and the factual circumstances of the individual case. In most cases, however, it would seem that the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights, both of 1966, ought to serve as a minimum level of protection.[477]

Respect for Territorial Integrity

The principle of respect for territorial integrity is not explicitly mentioned in the Charter. In my view, however, there is little doubt that such a principle is enshrined in the Charter; it is in fact reflected in Article 2

[476] A separate, but related question, is whether UN civil and military personnel must observe the rules of humanitarian law – traditionally referred to as the law of war – in fulfilling their tasks. While this appears to have been a debated question, several leading commentators have argued in favor of humanitarian law being applicable to UN and to UN authorized military enforcement measures; *see* e.g. Bowett, United Nations Forces (1964) 493–499; Schachter, United Nations Law in the Gulf Conflict, American Journal of International Law (1991) 465; *Id.*, International Law in Theory and Practice (1991) 400; Shraga, UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage, American Journal of International Law (2000) 406. It appears to be generally accepted that the UN is bound by customary international humanitarian law, whereas opinions are still divided on whether or not the Security Council and military forces operating under its authority are bound by treaties and conventions in the area of humanitarian law to which the UN has not acceded; *cf.* Bring, Folkrätt för totalförsvaret (1994) 265.

[477] The modern literature on human rights – and their role in contemporary international law – is overwhelming and cannot be addressed within the framework of this Study; works of a general nature include: Robertsson & Merrills, Human Rights in the World (3rd ed.) 1989; Henkin (ed.), The International Bill of Rights (1981); Meron (ed.), Human Rights in International Law (1984); *id.*, Human rights and Humanitarian Norms as Customary Law (1989); O'Flaherty, Human Rights and the UN: Practice Before the Treaty Bodies (1996).

(1) addressing the sovereign equality of all the members of the UN and in Article 2 (4) referring to political independence[478], as well as in Article 1 (2) on self-determination, discussed above. Reading these provisions together, with a view to determining limitations on the competence of the Security Council, the conclusion must be that the Council has a duty to respect the territorial integrity of states. Seen from a different angle, one might think it self-evident that an organization which was established with a view to maintaining the security, the independence and the territorial integrity of member states – i.e. the UN – does not have the authority to change, or perhaps even affect, that territorial integrity.

The consequence of this limitation on the competence of the Security Council is that the Council could not allocate title to territory – at least not on a permanent basis – nor transfer sovereignty over a state's territory without the consent of the state in question.[479]

3.3.6.4.4.3 IUS COGENS

Another limitation on the authority of the Security Council of a general nature, is that the Council cannot take measures which would violate fundamental rules and principles of international law, i.e. *ius cogens*.[480] Some of the limitations discussed above, flowing from the Purposes and Principles of the UN, do in fact form part of *ius cogens*. The right of self-determination is generally considered to form part of *ius cogens*[481]. Also the principle of respect of the territorial integrity of states includes an element which forms part of *ius cogens*, *viz.*, the prohibition against acquisition of territory by the threat, or use, of force. In the opinion of the present author, it is clear that also other peremptory norms of international law which are not, explicitly or implicitly, referred to in the UN Charter impose a limitation on the activities of the Security Council; to

[478] The more fundamental significance of Article 2 (4) is of course the prohibition of the use of force set forth in it. Constituting a cornerstone of modern international law, this principle has generated impressive amounts of scholarly comment, *see* e.g. Simma, *op. cit.*, at 106–128, and the references made therein; one of the more important contributions is Brownlie, International Law and the Use of Force by States (1963). The focus of my discussion is on limitations on the Security Council acting under Chapter VII of the Charter, i.e. the very starting point is the use, or potential use, of force by the Security Council. That is why I do not discuss the general prohibition of the use of force.

[479] *See* pp. 195–196, *supra*.

[480] For a discussion of *ius cogens* and various problems related thereto, *see* p. 164 *et seq.*, *supra*. As pointed out there, many problems of application remain, although there is general agreement on the concept of *ius cogens*.

[481] *See* p. 169, *supra*.

mention an extreme example: it is not imaginable that the Council would be authorized to take measures which constitute genocide.[482]

The potential clash between a Security Council resolution and peremptory rules of international law was addressed in the *Bosnia v. Yugoslavia Case*[483] concerning the arms embargo imposed on all of the territory of the former Yugoslavia. In this case Bosnia attempted to have the embargo – contained in Security Council Resolution 713, 1991 – declared incompatible with Bosnia's right to self-defense under Article 51 of the UN Charter and customary international law. It was also argued that the embargo exposed the Bosnian population to genocide, an aspect which was addressed by Judge Lauterpacht in his separate opinion. He stated, *inter alia*, that:

> "... the prohibition of genocide ... has generally been accepted as having the status not of an ordinary rule of law, but of *ius cogens* ... The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *ius cogens*".[484]

It was further argued that the embargo should not be construed so as to eliminate Bosnia's right to self-determination[485], a consequence of the embargo which – so the argument continued – would lead to Bosnia virtually being deprived of statehood.

3.3.6.4.5 Consequences of Exceeding Limitations on the Competence of the Security Council

Given the fact that there are certain limitations on the competence of the Security Council, and after having identified those limitations, the next important question is to determine what the legal consequences are if the limitations have been exceeded.

If the Security Council were to take a decision which violates the limitations on its competence discussed above, such decision would probably be without legal effect to the extent that it violates such limitations. In the

[482] For the sake of clarity it should be recalled that with respect to one of the most important peremptory norms of international law today, the prohibition against the use of force, as laid down in Article 2 (4) of the Charter, the Charter itself provides for an exception for the Security Council.

[483] Application of the Convention on the Prevention and the Punishment of the Crime of Genocide, I.C.J. Reports (1993) 325. Due to lack of jurisdiction, the Court never had the opportunity to rule on this issue on the merits.

[484] *Ibid.*, at 440.

[485] *Ibid.*, at 3 and 6.

view of the present author this follows from the doctrine of *ultra vires* which is widely recognized in a large number of jurisdictions and the general meaning of which is that acts taken in excess of prescribed authority are invalid.[486]

Moreover, to the extent that a decision of the Security Council were to constitute a violation of *ius cogens* – which may be the case if the Council exceeds the limitations on its competence[487] – such decision would be null and void *ab initio*. This is a reasonable conclusion based on Article 53 of the Vienna Convention On the Law Of Treaties, which in its first sentence stipulates: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Needless to say, Article 53 addresses a different situation in that it deals with treaties only, but the quoted language, it is submitted, embodies a general principle.

It has been suggested that invalidity must mean void *ab initio* – rather than voidable, pending judicial review – and that this consequence would seem to be particularly important within the UN system. In the *Expenses Case* Judge Morelli explained this as follows:

> "In the case of acts of international organisations, and in particular the acts of the United Nations, there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations. If an act of an organ of the United Nations had to be considered as an invalid act, such invalidity could constitute only the absolute nullity of the act. In other words, there are only two alternatives for the acts of the organisation: either the act is fully valid, or it is an absolute nullity, because absolute nullity is the only form in which invalidity of an act of the organisation can occur. An act of the organisation considered as invalid would be an act which had no legal effects, precisely because it would be an absolute nullity. The lack of effect of such an act could be alleged and a finding in that sense obtained at any time".[488]

If a decision by the Security Council violates the limitations on its competence, but does not violate *ius cogens*, there seems to be different views as to the legal effect of such a decision. Some observers appear to take the position that it is not certain that such a decision would be without

[486] *Cf.* Gowlland-Debbas, The International Court and the Security Council, American Journal of International Law (1994) 669–673.

[487] *See* p. 197, *supra*.

[488] Certain Expenses, I.C.J Reports 1962 (222) – For a discussion of the role of the International Court of Justice in reviewing the legality of decisions taken by UN organs, *see* p. 200 *et seq.*, *infra*.

legal effect.[489] In my opinion, as stated above, the better view is that such a decision does indeed lack legal effect. This is particularly true in the case of the UN, including the Security Council, where the member states have accepted the treaty obligation laid down in Article 25 of the Charter, i.e. to be bound by decisions of the Security Council, on the condition that the decisions of the Council are taken "in accordance with the present Charter". Even if one were to accept the view that decisions taken by the Security Council, exceeding the limitations on its competence, are not invalid *per se*, it would in my opinion be difficult to escape the conclusion that such decisions would not be *binding* on member states, since they must reasonably have the right to expect that the Council will act only within its competence.[490]

3.3.6.4.6 Review of Validity of Security Council Resolutions

A state which is of the opinion that a Security Council resolution by which it is affected, violates the limitations on the Council's competence, is faced with the question of which remedies it can resort to.

A state which takes the view that another state has breached an international obligation would typically – as a first step – present a diplomatic

[489] *See* Gowlland-Debbas, *op. cit.*, at 670–673, with references, where she discusses the views of different commentators.

[490] If we assume that the Security Council has taken a decision which violates *ius cogens* – and which is therefore void – but nevertheless proceeds to *implement* this decision, the question arises to what extent the Security Council and the UN and/or the states which have participated in the implementation of such decision bear responsibility therefor. Generally speaking, it would seem clear that some form of responsibility could and should be imputed to the organization in question, *see* e.g. Brownlie, *op. cit.*, at 686. As pointed out by Brownlie, *ibid.*, however, the law in this area remains undeveloped. One possibility would perhaps be to apply the traditional doctrine of state responsibility in such a situation. Although a certain amount of controversy still seems to surround several aspects of this doctrine, there is considerable agreement on its fundamental elements. On the other hand, it must in my opinion be questioned to what extent the traditional doctrine of state responsibility would be relevant to the illegal activities of an international organization, rather than a state, and to an organ of such an organization such as the UN which is a collective security organ acting on behalf of the international community. – The doctrine of state responsibility has generated a vast amount of literature, too vast even to list the leading works; general works of interest include: Spineti & Simma (eds), United Nations Codification of State Responsibility (1987); Brownlie, System of the Law of Nations: State Responsibility (1983); Zemanek & Salmon, Responsabilité internationale (1987); Rosenne, The International Law Commission's Draft Articles on State Responsibility (1991). The International Law Commission has devoted much of its work to the codification and development of the law of state responsibility, starting with the reports of Garcia-Amador in 1956 and continuing with reports from Ago, Riphagen, Arangio Ruiz and James Crawford; *see* Report of the International Law Commission. Fifty-second session (2000) 10–14.

protest and request cessation of the illegal conduct. As a second step it would have access to different dispute settlement mechanisms, including negotiations, arbitration and adjudication and possibly also to peaceful countermeasures. In relation to the Security Council the situation is different, however. The state may file a protest with the Security Council, or otherwise bring the matter before the Security Council. Given the composition and voting rules of the Council, it would as a rule seem unlikely that the Security Council would change, or even modify its decision. On the other hand, if a Security Council resolution violates *ius cogens* and therefore is void,[491] the state in question would from a legal point of view be justified in not complying with the resolution; such non-compliance would thus not constitute an illegal act on the part of the non-complying state. While non-compliance is legally justified, it may, however, have far-reaching political consequences both for the non-complying state and for the Security Council. The decision of a member state not to comply with a Security Council resolution is taken at its own risk, a risk which can be ultimately eliminated – or mitigated – only by *subsequent* confirmation by the International Court of Justice or other competent fora, such as arbitral tribunals. It is against this background that the possibility of reviewing the legal validity of Security Council resolutions has been discussed.

This discussion revived in the wake of the *Lockerbie Case*[492], and in particular the question of the role of the International Court of Justice, if any, in such a review procedure. During the Cold War era the political situation appears to have served as a controlling factor – checks and balances – on the Security Council. Failing the counterbalancing forces of superpower bipolarism, a new situation has emerged in the Security Council which has, *inter alia*, led to a significant increase in the activities of the Security Council.[493]

As far as the International Court of Justice is concerned, much of the discussion has focused on the question of whether or not the Court has the powers of "judicial review" of Security Council resolutions. If "judicial review" is taken to mean a mandatory and binding review by the Court, it is clear that both the UN Charter and the Statute of the International

[491] *See* p. 199, *supra*.

[492] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. US), Provisional Measures, I.C.J. Reports (1992) 3.

[493] According to Bailey & Daws, The Procedure of the UN Security Council (3rd ed. 1998) 273, the Council adopted 22 resolutions citing Chapter VII from 1946–1989 and 107 such resolutions from 1990–1996.

Court of Justice are silent on this issue. The Court does not have any such explicit power. As a matter of fact, a Belgian proposal to this effect made during the San Francisco conference preceding the adoption of the UN Charter was rejected.[494]

The Court has itself confirmed that it is not the constitutional court of the UN system. In the *Expenses Case* the Court stated:

> "In the legal systems of states, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were rejected."[495]

Later on in this judgment the Court stated that "/e/ach organ must, in the first place at least, determine its own jurisdiction."[496]

While some commentators appear to view the *Lockerbie Case* as the dawning of a new era for the International Court of Justice in this respect – as being, or becoming empowered to judicially review decisions taken by the political organs of the UN system[497] – it is in my opinion clear that the International Court does *not* have that power today. On the other hand, this does *not* mean that the International Court of Justice is altogether excluded from the possibility to review decisions taken by the Security Council. This may occur *either* within the framework of a dispute which is brought before it, and in which the question is being raised, *or* in an advisory opinion.

As to the first possibility, few would dispute that the Court may, in a case properly brought before it, address the validity of Security Council resolutions when that question is put *incidentally* to it. In the *Namibia Case*, for example, while emphasizing that it did not have any "powers of judicial review or appeal in respect of the decisions taken by the United

[494] UNCIO Docs., Vol. 13 (1945) 633, 710.

[495] Certain Expenses, I.C.J. Reports (1962) 168.

[496] *Ibid.*, at 203.

[497] *See* e.g. Frank, The Powers of Appreciation: Who is the Ultimate Guardian of the UN Legality?, American Journal of International Law (1992) 519; Watson, Constitutionalism, Judicial Review, and the World Court, Harvard International Law Journal (1993) 1; Bothe, Les Limites des pouvoirs du Conseil de Sécurité, in Dupuy (ed.), The Development of the Role of the Security Council (1993) 80; Conforti, Le Pouvoir discrétionnaire du Conseil de Sécurité en matière de contestation d'une menace contre la paix, d'une rupture de la paix ou d'une acte d'agression, in *id.*, at 60. For more critical views, *see* e.g. Reisman, The Constitutional Crisis in the United Nations, American Journal of International Law (1993) 83 and Alvarez, Judging the Security Council, American Journal of International Law (1996) 1.

Nations organs",[498] the Court concluded that it could not determine the legal consequences of the Security Council resolutions in question without first addressing their validity.[499] In the previously issued advisory opinion in the *Expenses Case*,[500] the Court refused to interpret a rejection by the General Assembly of a certain amendment to a resolution proposed by France to mean that the Court would be precluded from deciding whether or not a certain decision had been taken in conformity with the UN Charter.[501]

In addressing the question of the validity of decisions of the UN organs, the Court has proceeded on the basis of a *presumption* of validity. Thus, in the *Expenses Case* the Court stated, *inter alia*:

> "... when the organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the organisation."[502]

Similar language was employed by the Court in the *Namibia Case*[503] and in the *Lockerbie Case*[504]. Thus, while proceeding on the basis of a presumption of validity, the Court does not view itself as precluded from reviewing the validity of Security Council resolutions and from concluding that the decisions are invalid, thereby rebutting the aforementioned presumption. As discussed above, there are certain limitations on the competence of the Security Council, the non-observance of which may lead to the invalidity of the Security Council resolution in question[505]. Such resolutions may consequently be declared invalid by the International

[498] Namibia Case, I.C.J. Reports (1971) 45.

[499] *Id.*, at 143–144, 331–332.

[500] Certain Expenses, I.C.J. Reports (1962) 151.

[501] *Id.*, at 157.

[502] *Id.*, at 168.

[503] Note 498, *supra*, at 31.

[504] Note 492, *supra*, at 42, where the Court stated, *inter alia*, the following:

> "Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court ... considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992) ..."

[505] *See* p. 198 *et seq.*, *supra*. – Another example of indirect review of the legality of Security Council resolutions is the jurisprudence of the International Criminal Tribunal for the former Yugoslavia. In the *Prosecutor v. Tatic Case*, for example, the Appeals Chamber stated, *inter alia*, the following: "There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of other organs of the United Nations, particularly those of the Security Council, its own 'creator'. The question ... is whether the International Tribunal ... can examine ... the legality of the decisions of other organs as a matter of 'incidental' jurisdiction, in order to ascertain and be able to exercise

Court of Justice in a case pending before it. No such decision has of yet been taken by the Court. It must be recalled that any such decision would only be *inter partes*, i.e. binding only on the parties to the dispute in question, and could thus not quash the Security Council resolution for all purposes.[506]

If the Court were to find a Security Council resolution void *ab initio*, the Court would not apply, or rely on, the resolution in deciding the dispute pending before it. The other possibility is that the Court does review the legality of a Security Council resolution, but finds that the resolution is valid. The interesting question then – from the perspective of applicable law – is if, and to what extent, the parties and/or the Court are bound to apply and/or comply with the Security Council resolution within the framework of the dispute. This issue will be addressed in the following section. Before doing so, however, brief mention must be made of the second possibility for the International Court of Justice to address the question of validity of decisions of the political organs of the UN, *viz.*, in advisory opinions.[507] As mentioned in the foregoing, the Court has on a number of occasions interpreted the UN Charter in advisory opinions. Since advisory opinions are not binding, they cannot dispose of the question of the legality of Security Council resolutions.[508]

3.3.6.4.7 The Binding Effect of Security Council Resolutions – What does it Mean?

The purpose of this section is to answer the question put at the outset of Section 3.3.6.4 *viz.*, do Security Council resolutions constitute a limitation on party autonomy when it comes to applicable law in interstate arbitrations?[509]

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its 'primary' jurisdiction over the matter before it ... [This] power [of indirect review] does not disappear entirely, particularly in cases where there might be a manifest contradiction with the Principles and purposes of the Charter". Decision on the Defence Motion for Interlocutary Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, reprinted in *International Legal Materials (1996) 32.*

[506] This is a direct consequence of Article 59 of the Statute of the International Court of Justice; it reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case".

[507] *See* p. 202, *supra.*

[508] It is of course theoretically possible, but not very likely, that the Security Council would commit itself in advance to be bound by an advisory opinion. – For a discussion of the possibilities for a wider use of advisory opinions in this context, *see* Bedjaoui, Du contrôle de legalité des actes du Conseil de Sécurité, in Nouveaux Itinéraires en Droit: Hommage à François Rigaux (1993) 105–106.

[509] *See* p. 181 *et seq.*, *supra.*

As a first partial reply to this question, it is in my view clear that only *binding* Security Council resolutions could constitute potential limitations on the party autonomy.[510] In the preceding sections, I have discussed and concluded that resolutions of the Security Council are binding, but only under certain conditions, one of them being that the Council has intended the resolution to be binding.[511] The binding effect of Security Council resolutions – which is based on Articles 24 and 25 of the UN Charter – has its most practical consequences when the Council acts under Chapter VII of the Charter. In such situations, the obligation to comply with Security Council resolutions is often translated into practical implementation of the resolution in question.

Another initial conclusion is in my view that a binding resolution can be binding only on member states. Article 25 of the Charter is a treaty obligation and as such it can bind only parties to the treaty, i.e. the UN Charter. This follows from one of the classic rules of the law of treaties, *viz.*, *pacta tertiis nec nocent nec prosunt*, which is incorporated in articles 34–38 of the Vienna Convention on the Law of Treaties.[512] The foregoing conclusion is not free from controversy. Some commentators are of the opinion that Article 2 (6) of the UN Charter[513] leads to the conclusion that the obligation following from Article 25 extends also to non-members.[514] While the Principles of the UN Charter may well be binding on non-members as rules of customary international law and/or as *ius cogens*, it is in my view difficult to conclude that Article 25 as a treaty obligation could have this effect.[515] The almost universal acceptance of the UN Charter does of course give this issue very much the character of a theoretical exercise, but it is important not to lose sight of the legal principle.

Yet another initial comment is called for. Since many, if not most, Security Council resolutions issued under Chapter VII of the UN Charter, as mentioned above, typically deal with practical steps and measures

[510] *See* p. 189 *et seq.*, *supra*.

[511] *See* p. 191, *supra*.

[512] For general comments, *see* e.g. Sinclair, The Vienna Convention On the Law of Treaties (2nd ed. 1984) 98–106; for a detailed study of the *pacta tertiis* rule, *see* Chinkin, Third Parties In International Law (1993).

[513] Article 2 (6) reads: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

[514] *See* e.g. Simma, *op. cit.*, at 414, with references.

[515] The legal effect of Article 2 (6) of the UN Charter has been much discussed among legal scholars and will not be further discussed by the present author. For a summary of this debate, *see* Simma, *op. cit.*, at 137–139.

to ensure international peace and security, it is, as a rule not very likely, that they will come in conflict with an agreement between states on the law and/or rules to be applied to resolve a dispute. This is explained by the fact that the Security Council, which is a political body, cannot resolve legal disputes between states. This fact is also reflected in Articles 36 and 37 of the UN Charter. While both articles empower the Council to play an active role in the settlement of international disputes, the wording of the respective articles makes it clear that decisions of the Council are of a recommendatory character. Under Article 36, the Council *may recommend* "appropriate procedures or methods of adjustment". In this connection it is noteworthy that subsection 2 of Article 36 stipulates that any such recommendation should take into consideration any dispute settlement mechanism agreed by the parties. In contrast to Article 36, Article 37(2) empowers the Council to become involved in the merits of a dispute by recommending such "terms of settlement" as it may deem appropriate. The wording of Article 37 indicates that such involvement requires the fulfilment of certain conditions, *viz.*, the existence of a dispute; recourse to the Security Council by the parties (or at least by one of the parties) and the proven impossibility to settle the dispute by the means indicated in Article 33. In practice it would seem that these conditions are not always taken into account, but rather that the Security Council has become involved in the merits of a dispute when it has deemed appropriate.[516] This practice notwithstanding, from a legal point of view it is clear that such recommended terms of settlement are not, and cannot be, binding, however, "persuasive" they may be from a political point of view.

A Security Council resolution – binding, or not binding – and an agreement between states to apply certain rules to resolve a dispute may thus co-exist, but at different levels; they operate in separate spheres. This is again reflected in the fact that the Security Council is a political organ, whereas the International Court of Justice is the judicial organ of the UN charged with the task of resolving international disputes of a legal nature. There is thus a division of authority and powers between the two organs such that the generally held view is that there can be no *lis pendens*, – nor *res iudicata* – consequences as between the two.[517] From a legal point of view the Security Council and the International Court of Justice, and the respective results of their work, consequently lead separate lives. It must in my view be a fair assumption that member states do not typically expect, nor accept, that their legal rights would be conclusively

[516] *Cf.* e.g. Conforti, *op. cit.*, at 169–172.
[517] *See* p. 192 *supra*.

determined by the Security Council. On the other hand, it would probably not be too farfetched to assume that at the *practical level* there may occasionally be some degree of informal co-ordination from the Council as well as from the Court.

As a result of pronouncements made by the International Court of Justice in the *Lockerbie Case*[518], there may have been a shift of the aforementioned division of power. In this case the Court refused to grant interim security measures requested by Libya, apparently fearing that such measures would be likely to impair compliance with a Security Council resolution.

In 1992 Libya introduced proceedings against the United Kingdom and the United States concerning the application of the 1971 Montreal Convention. Following the Lockerbie incident, the United Kingdom and the United States circulated documents allegedly relating to the involvement of Libya and Libyan nationals in that incident. Eventually the Security Council passed resolution 731 of 21 January 1992, in which Libya was urged, *inter alia*, to surrender some of its nationals so as to contribute to the elimination of international terrorism. Since that resolution did not have the desired effect, there was talk of taking measures against Libya under Chapter VII of the Charter. Libya then instituted proceedings against the United Kingdom and the United States at the International Court of Justice, asking for a declaration that Libya was in compliance with the 1971 Montreal Convention. At the same time Libya asked for provisional measures with a view to preventing the respondents from taking any action against Libya aimed at forcing Libya to surrender its own nationals. After the oral hearings, while the Court was still deliberating, the Security Council adopted resolution 748 of 31 March 1992 in which the Council, on the basis of Chapter VII of the Charter, imposed a number of sanctions against Libya. Resolution 748 did not make any reference to the proceedings pending before the Court.

In the *Lockerbie Case* the Court stated, *inter alia*:

> "Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention."[519]

[518] *See* note 492, *supra*.
[519] Note 492, *supra,* at para. 42.

Even though the Court explicitly stated, referring to Article 41 of its Statute, that it could not make definitive findings either of fact or law on the issues relating to the merits and that the right of the parties to contest such issues at the stage of the merits must remain uneffected[520], the Court's decision has given rise to concerns about the possible impact of Security Council resolutions on the Court and on parties to disputes pending before the Court.[521] When referring to Article 25 and Article 103 of the UN Charter, the Court could be understood to say that Security Council resolutions are treaty obligations under the UN Charter. When Article 103 refers to treaty obligations, however, it does so by using the words "obligations of the Members of the United Nations under the present Charter". This language would seem to refer to obligations such as those enumerated in Articles 1 and 2 of the Charter, i.e. the Purposes and Principles of the UN, but not to decisions by the Security Council. Resolutions of the Security Council do not, in my submission, constitute treaty obligations under the UN Charter. In other words, Article 103 does not cover decisions by the Council *per se*, but may well refer to the *obligation to accept and carry out* decisions by the Council, which *is* a treaty obligation by virtue of Article 25 of the Charter.[522] Thus, if a member state were to sign a treaty under which it would be released from the obligation under Article 25 of the Charter, such treaty would be covered by Article 103. Resolutions by the Security Council are, however, not covered by Article 103.[523]

Article 103 will thus not provide an answer to the question formulated above. Rather, it is necessary – again – to interpret Article 25 of the Charter and the role of the Security Council. As mentioned several times above, the Security Council is a political organ within the UN system and the International Court of Justice is the judicial organ in that system, and as such they have, and fulfill, different tasks. Generally speaking, this division of authority and power is fundamental to that system. If one

[520] *Ibid.*, at para. 38.

[521] *See* e.g. the critical comments by Graefrath, Leave to the Court What Belongs to the Court. The Libyan Case, European Journal of International Law (1993) 184 and Bowett, The Impact of Security Council Resolutions On Dispute Settlement Procedures, European Journal of International Law (1994) 89.

[522] *See* Bowett, note 521 *supra*, at 92.

[523] Some commentators have explained this by suggesting that Article 103 only covers obligations resulting from norms at the same hierarchical level, e.g. two treaties, but not from two unequal norms, e.g. a resolution and a treaty; *see* Combaceau, Le pouvoir de sanction de L'ONU (1974) 293, and Sorel, Les Ordonances de la Cour Internationale du Justice du 14 April 1992 Dans L'Affaire Relative A Des Questions D'Interpretation et D'Application de la Convention de Montreal de 1971 Resultant de l'Incident Aerien De Lockerbie, Revue générale de droit international public (1993) 714–715.

were to assume, as a hypothesis, that resolutions of the Security Council – while binding pursuant to Article 25 of the Charter – were binding on the International Court of Justice, and on parties to a dispute before the Court, this division of authority and power would be undermined and indeed become meaningless. It would then be possible for a state, which had accepted the jurisdiction of the International Court of Justice, or which had signed an arbitration agreement, completely to disregard such undertakings and obligations by bringing a dispute to the Security Council and have it pass a resolution – which in essence would be a political decision – and thereby bring about a binding resolution of the legal dispute in question. In my view, this hypothetical example shows that resolutions of the Security Council cannot replace rulings of the International Court of Justice, nor those of arbitral tribunals. The Security Council reaches its decisions by means of a political process, not by applying judicial methods, and its conclusions remain of a political nature. They do not reach the qualitative and detailed level of judicial and arbitral decisions, nor are they preceded by the meticulous review and analysis of facts and law which is to be found in most judgments and arbitral awards. My conclusion is that Security Council resolutions – even if binding, under the conditions described above[524] – do not, and cannot, constitute a limitation on party autonomy exercised with a view to agreeing on the law, or the rules, to be applied to resolve a dispute.[525] This conclusion is in my view confirmed by the established practice that the International Court of Justice can try the validity of Security Council resolutions when that question is put incidentally to the Court.[526] Had Security Council resolutions been binding on the Court, no such possibility could have existed.

3.4 No Choice of Law by the Parties

3.4.1 Introduction

As I have suggested above, complicated situations with respect to applicable law may arise when the parties do not provide any directions or

[524] *See* p. 189 *et seq.*, *supra*; as mentioned above, if a Security Council resolution is not binding, it will not limit party autonomy.

[525] A Security Council resolution may of course incorporate or reflect rules of *ius cogens*; such rules would then limit party autonomy – *see* p. 164 *et seq.*, *supra* – however, not because they form part of a Security Council resolution, but rather because rules of *ius cogens* themselves constitute such limitation.

[526] *See* pp. 202–204, *supra*.

instructions to the arbitrators in this respect.[527] Generally speaking, the traditional starting point in such a situation is that the arbitrators are to apply (public) international law; to quote Carlston:

> "unless the *compromise* stipulates otherwise it is either an express or implied term that the arbitrator should apply international law as the basis for his decision."[528]

This is traditionally the generally accepted view, and it is difficult to argue against it as a matter of general principle; after all legal relations between sovereign states are, generally speaking, governed by international law. When it comes to the resolution of interstate disputes in the 20th – and even more so in the 21st – century, it is, however, in the opinion of the present author doubtful if this "formula" is sufficient. There would seem to be many situations where a more detailed formula, and/or rule, is desirable. As far as extinctive prescription is concerned, this aspect will be discussed below.[529] The rule of thumb suggested by Carlston also ignores the fact international tribunals do from time to time apply municipal law to resolve interstate disputes.[530]

If we, for the sake of argument, accept Carlston's suggestion, we are nevertheless left with two fundamental questions, *viz.*, what *is* international law, and how do we determine *which rules* of international law are applicable to a specific dispute?[531] These questions are briefly discussed in this Section. The discussion which follows, is general in nature and does not purport to be exhaustive, but rather aims at providing a background to the remaining chapters of this Study. It should also be noted that the rules of international law relating to extinctive prescription will be discussed in Chapter 4 below.[532]

[527] Also, when parties give instructions of a general nature – such as "to decide according to law and equity" or "according to law, justice and equity" – which has been a frequent occurrence in the history of modern arbitration, *cf.* p. 34 *et seq.*, *supra*, the arbitrators are left essentially in the same situation as if no instruction had been given, except to make clear that the arbitrators cannot decide *ex aequo et bono*; for a discussion of *ex aequo et bono*, *see* p. 240 *et seq.*, *infra*.

[528] Carlston, The Process of International Arbitration (1946) 140.

[529] *See* p. 341 *et seq.*, *infra*.

[530] *See* discussion on p. 377 *et seq.*, *infra*. With respect to extinctive prescription, one may question if it is even desirable always to apply international law, *see* p. 341, *et seq.*, *infra*.

[531] *Cf.* Jennings, What is international law and how do we feel when we see it? Annuaire Suisse de Droit International (1981) 59.

[532] *See* p. 248, *et seq.*, *infra*. – It goes without saying that the question discussed in this subsection is one of the very fundamental aspects of international law which has generated many learned scholarly contributions. For in-depth discussions of this issue reference is made to the publications mentioned in the following footnotes.

A convenient starting point is Article 38 of the Statute of the International Court of Justice.[533] Article 38 is usually recognized as the most authoritative statement concerning the sources of international law.[534] This is not to say, however, that there are no other sources of international law. In particular it has been discussed for some time – due primarily to the ever growing number and importance of international organizations – that the acts of international organizations ought to be recognized as a source of law.[535] One must also keep in mind that many international organizations have been created on the basis of a multilateral treaty; therefore many acts of such an organization could be said to be based on *treaty* rights and obligations[536], rather than on anything else.

[533] Article 38 reads:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

[534] *See* e.g. Brownlie, *op. cit.*, at 3, who says that Article 38 "is generally regarded as a complete statement of the sources of international law"; *see* also Mendelson, The International Court of Justice and the Sources of International Law, in Lowe-Fitzmaurice (eds.) Fifty Years of the International Court of Justice (1996) 63.

[535] For a general discussion of this question, *see* e.g. Barberis, Les Résolutions des organisations internationales en tant que source du droit de gens, in Beyerlin-Bothe-Hofman-Petersman (eds), Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt (1995) 21; Frowein, The internal and external effects of resolutions by international organisations, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1989) 778; Sloan, United Nations General Assembly Resolutions in Our Changing World (1991).

[536] It has been observed that in the *Nicaragua Case* (Merits), I.C.J. Reports (1986) 14, the International Court of Justice did refer to resolutions of international organizations as a source of law. This author shares the skepticism expressed in Akehurst *op. cit.*, at 53 as to the use by the Court of the resolutions in question as a source of law.

Related to the question of the status of acts of international organizations is that of international "soft law". This author has been unable to find a generally accepted definition of this term. For the most part "soft law" seems to include guidelines and recommendations which are not legally binding, nor, indeed, intended to be legally binding.[537] Already this conclusion indicates that "soft law" cannot *per definitionem* constitute a source of law, at least not in the legal-technical sense. This does not exclude the possibility that such guidelines and recommendations do in fact influence the behavior of states and may thus play a role in the development of international law. For the time being, there would seem to be two areas of international law where the concept of soft law has been used frequently, *viz.*, international economic law[538] and international environmental law.[539]

The brief comments in the foregoing on the two potentially additional sources of law – acts of international organizations and international 'soft law' – illustrate that these two potential sources are surrounded by uncertainty. Therefore, in the following I shall concentrate on Article 38 of the Statute of the International Court of Justice. Strictly speaking, the article is relevant only for the activities of the International Court of Justice and is not formally binding for arbitral tribunals. Most arbitrators sitting in

[537] For a general discussion of international "soft law", and related problems, *see* e.g. Hensel, 'Weiches' Völkerrecht: Eine vergleichende Untersuchung typischer Erscheinungsformen (1991); Chinkin, The Challenge of Soft Law: Development and Change in International Law, International & Comparative Law Quarterly (1989) 850; Francioni, International 'Soft Law': A Contemporary Assessment, in Lowe-Fitzmaurice (eds.) *op. cit.*, at 167.

[538] *See* e.g. Seidl-Hohenveldern, International Economic 'Soft Law', 163 Recueil des Cours (1979)165; Garcia-Amador, The Emergin International Law of Development: A New Dimension of International Economic Law (1990); Petersman; Constitutional Functions and Constitutional Problems of International Economic Law (1991); Fox, International Economic Law and Developing Countries: An Introduction (1992) – Much of the discussion previously focused on different aspects of the New International Economic Order (NIEO), the general idea of which is said to have found support in two resolutions adopted by the UN General Assembly in 1974 (the Declaration on the Establishment of a New International Economic World Order, UNGA Res. 3201 (S-VI), and the Programme of Action on the Establishment of a New International Economic World Order, UNGA Res. 3202 (S-VI)). The literature on NIEO is truly immense; this debate has by and large stopped with the advent of market economy models in most planned economies of the world. Nevertheless, I mention two important contributions to this debate, *viz.*, Bedjaoui, Towards a New International Economic Order (1979) and Meagher, An international Redistribution of Wealth and Power: a Study of the Charter of Economic Rights and Duties of States (1979).

[539] *See* e.g. Sands (ed.), Greening International Law (1993); Kiss-Schelton (eds.), International Environmental Law (1991); Kasto, Modern International Law of the Environment (1995) Sands-Tarasofsky-Weiss (eds.), Principles of International Environmental Law (1995).

interstate arbitrations are, however, likely to seek guidance from Article 38 in situations where the parties have made no choice of law.[540]

One preliminary question of relevance in the present context is to what extent the enumeration of sources of international law in Article 38 creates a hierarchy of sources, in the sense, for example, that source (c) – the general principles of law – can be applied only if sources (a) and (b) do not bring about any resolution of the dispute in question.[541] The wording itself of Article 38 does not suggest that the enumeration of sources constitutes a hierarchy. On the other hand, it would seem that the draftsmen intended the sources of law to be applied in a *successive* manner, i.e. the Court would be expected to look for the applicable law in the sources in the order in which they appear in the article.[542] Article 38 does emphasize, however, that source (d) – judicial decisions and teachings of the most highly qualified publicists – is to be applied "as subsidiary means for the determination of rules of law". While source (d) is thus not regarded as an actual source of law, it is probably wise not to exaggerate the significance of the label "subsidiary means". In practice "judicial decisions" – be it previous decisions of the International Court of Justice or international tribunals – can be of great importance.[543]

Even though the Court may be expected to observe the order in which the sources of law are enumerated, in reality, it is submitted, it will be difficult, if not impossible to adhere to any strict categorization of the sources of law.[544] Furthermore, it is questionable if any such categorization will be of any practical help in resolving a specific dispute. Indeed, in many situations it may be desirable – and necessary – to apply several sources of law simultaneously. For example, when interpreting a provision in a treaty, it may be necessary to take account of international

[540] *Cf.* e.g. the *Responsibility of Germany by Reason of Damage caused in Portuguese Colonies in South Africa Arbitration*, where the arbitrators considered themselves *bound* to follow Article 38, Reports of International Arbitral Awards, Vol. II (1949) 1016.

[541] For a general discussion of this issue, *see* e.g. Akehurst, The Hierarchy of the Sources of International Law, British Yearbook of International Law (1974/5) 273 and Czaplinski-Danilenko, Conflicts of Norms in International Law, Netherlands Yearbook of International Law (1990) 3.

[542] Article 38 was adopted from Article 38 of the Statute of the Permanent Court of International Justice. In one of the drafts prepared by the 1929 Committee of Jurists, which prepared the statute for the Permanent Court, it was suggested that the different sources of law were to be applied *in a successive order.* This reference was deleted, however, at a later stage; *Cf.* Hudson, The Permanent Court of International Justice, 1920–1942 (1943) 606.

[543] *See* discussion on p. 237 *et seq., infra.*

[544] Brownlie, *op. cit.*, at 1–2, mentions the discussion between formal and material sources of law. Formal sources of law create rules of a binding character, whereas material sources of law provide evidence of the actual content of the rules; *cf.* also Shaw, *op. cit.*, at 59–60.

customary law existing at the time of conclusion of the treaty, the general principles of law and also previous judicial as well as arbitral decisions.[545]

In light of the importance of Article 38 for the determination of the applicable rules of international law also for international arbitral tribunals, the sources of law enumerated in Article 38 will be briefly discussed below.[546]

3.4.2 Public International Law

3.4.2.1 International Conventions

In section (a) of Article 38, reference is made to "international conventions whether general or particular, establishing rules expressly recognized by the contesting states".[547]

It is quite natural that preference and superiority is given to international conventions. Article 38 (a) confirms the principle of party autonomy and freedom of contract in international relations. If two sovereigns have entered into an agreement regulating certain matters, there is all the reason for the International Court of Justice, or any other international court, or tribunal, to apply that agreement. Section (a) does not contain any definition of "international convention". Generally speaking, however, a convention can be described as a written agreement between two states in which they make legally binding commitments to achieve certain things.[548] Conventions in this meaning are known under many

[545] *Cf.* Hudson, *op. cit.*, at 606.

[546] The discussion below is primarily for the benefit of lawyers involved predominantly in international commercial arbitration and who may be presumed not to be familiar with public international law. – Article 38 of the Statute does of course raise a large number of classic and fundamental concepts and issues of international law, its nature and its function. The purpose of the discussion below is to focus on the procedural aspects of Article 38 – i.e. its function in determining the law applicable to an individual dispute – rather than to embark on a general discussion of the sources of international law. For discussion and analysis of this very fundamental aspect *see* e.g. Schachter, International Law in Theory and Practice (1991) Frngou-Ikonomidou (ed), Sources of International Law (1992), Fastenrath, Lücken im Völkerrecht (1991); Tunkin, Is General International Law Customary Only?, European Journal of International Law (1993) 534; Danilenko, Law Making In the International Community (1993); Akehurst, Custom As a Source of International Law, British Yearbook of International Law (1974/5) 1; Danilenko, The Theory of International Customary Law, German Yearbook of International Law (1988) 9; Wolfke, Custom in Present International Law (2nd ed. 1993); Villiger, Customary International Law and Treaties (1985); Parry, The Sources and Evidences of International Law (1965); D'Amato, The concept of Custom in International Law (1971); Koskiennemi, From Apology to Utopia: The Structure of International Legal Argument (1989).

[547] *See* note 533, *supra*.

[548] *Cf.* Shaw, *op. cit.*, at 79.

different names, e.g. treaties, international agreements, pacts, general acts, charters, protocols.[549] Needless to say, the important aspect is not what the document is called, but what it *de facto* says.

In the Vienna Convention, the term "treaty" is defined as follows, for purposes of the Convention:

> "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"[550]

It is interesting to note that a "treaty" must in the terminology of the Vienna Convention be governed by international law to fall under the Vienna Convention. This means, that different forms of commercial arrangements agreed upon between two, or more, states and governed exclusively by municipal law would not seem to be covered by the Vienna Convention.[551] This kind of agreements between states would still, however, fall under section (a) of Article 38. This article is thus broader than the definition contained in the Vienna Convention. In fact, Article 38 (a) sets forth very few limitations with respect to international conventions. It is, however, generally accepted that the convention in question must be in force, or otherwise "recognized as binding by the contesting states". This means that the convention must be in force *rationae personae*, i.e. between the parties in question.[552]

States which do not sign and ratify conventions are thus not bound by them. In the *North Sea Continental Shelf Cases*,[553] for example, the Federal Republic of Germany had signed but not ratified the Continental Shelf Convention. The Court therefore concluded that Germany was under no obligation to follow its provisions. To the extent, however, that a treaty reflects international customary law, a state is bound by the pro-

[549] With respect to the Vienna Convention on the Law of Treaties, *cf.* the provisional draft of the International Law Commission reproduced in Yearbook International Law Commission. Vol. 2, (1962) 161, which enumerates different appellations.

[550] Article 2 of the Vienna Convention.

[551] *Cf.* Brownlie, *op. cit.*, at 609, referring, *inter alia*, to Mann, 33 British Yearbook of International Law (1957) 20–51 and Mann, British Yearbook of International Law (1959) 34–57.

[552] *See* the River Oder Case, P.C.I.J. Series A, No. 23 (1929) 21; the Asylum Case, I.C.J. Reports (1950) 276, 277 and the Fisheries Case, I.C.J. Reports (1951) 139; but it can also mean in force *rationae temporis*, *see* the Corfu Channel Case (Merits) I.C.J. Reports (1949) 22 concerning the application of the 8th Hague Convention of 1907 in time of war, *cf.* Rosenne, *op. cit.*, at 421, note 4.

[553] I.C.J. Reports (1969) 3, 25.

visions of the treaty, not because it is a treaty, but because it confirms customary law.[554]

If conventions are binding only on parties who have signed (and ratified) them, why are conventions treated as a source of international law, thus implying that they are of relevance also for other states than the contracting ones? This could be explained by distinguishing between treaties as "lawmaking treaties" and other treaties. Lawmaking treaties are intended to have a general effect. States which are parties to lawmaking treaties ordinarily elaborate and define their perception of international law on any given topic, or establish new rules of international law which are to guide them in the future.[555] Such treaties necessarily require the participation of a large number of states to have the intended general, or sometimes even universal, effect, and may very well establish rules which are binding for all states.[556] Examples of such treaties include the Charter of the United Nations, the Genocide Convention and the Vienna Conventions on Diplomatic Relations.

Law-making treaties are thus distinguished from "other treaties", sometimes referred to as "treaty-contracts".[557] Such other treaties are usually of a bilateral character, or apply only between a small number of states. Furthermore, they typically address limited topics. As a consequence of the limited nature of the treaty-contracts, they have no "lawmaking effect". This notwithstanding, it is possible that also such treaties may have a more general effect, going beyond their limited scope. This may be the case, for example, if a series of bilateral treaties regulates a particular issue in the same – or in a similar – way. The bilateral treaties in question may then constitute evidence of customary rules.[558]

It must be noted, however, that Article 38(a) does *not* make any distinction between lawmaking treaties and other treaties. Thus, while this distinction may be important for an understanding of the nature and function of treaties in general, it does not seem warranted to base any limitation on the Court's application of agreements between states on this distinction, as long as such agreements are "expressly recognized by the contesting states".

[554] For a discussion of international customary law, *see* p. 217 *et seq.*, *infra*.
[555] Shaw, *op. cit.*, at 81.
[556] Brownlie, *op. cit.*, at 12–13.
[557] *Cf.* Shaw, *op. cit.*, at 80.
[558] *Cf.* Brownlie, *op. cit.*, at 13–14; he mentions bilateral treaties on extradition as an example. As pointed out by Brownlie, however, one should be careful not to draw too far-reaching general conclusions from bilateral treaty practice.

As indicated above, it is natural to emphasize the importance of "international conventions" in relation to other sources of international law; after all Article 38(a) merely confirms the universally accepted principle "pacta sunt servanda". International conventions are usually easily accessible. In addition, they typically reflect the express consent of the parties and impose upon them the obligation to fulfil their commitments.[559]

Even though the agreement of the parties is typically clearly expressed in an international convention, in reality it is frequently quite difficult to ascertain the intention of the parties, particularly in a situation where a dispute has arisen. First of all, the language of the convention may not be clear at all; it may prove very difficult indeed to ascertain the "ordinary" or "natural" meaning of specific terms in a convention.[560] In addition, the dispute in question may concern issues which have not at all been addressed by the parties to the convention in question. While the leading principle of treaty interpretation is to establish the intention of the parties, when they concluded the treaty, this may be easier said than done. In real life, it will often be difficult, and even impossible, for the Court to rely solely on Section (a) in resolving a dispute. In most cases it will be necessary to apply also the other sources of international law enumerated in Article 38.

3.4.2.2 International Customary Law

Article 38 (b) instructs the International Court of Justice to apply "international custom as evidence of a general practice accepted as law".

It is important to note that the article does not empower the Court to apply international custom *per se*, but refers to international custom which has been *accepted as law*. One prominent commentator has observed:

[559] It is perhaps symptomatic that in the former communist countries, treaties, or international conventions, were considered as the most important and reliable source of international law; *cf.* Tunkin, The Theory of International Law (1974) 91–113, Danilenko, The Theory of International Customary Law, German Yearbook of International Law (1988) 9; Mullerson, Sources of International Law: New Tendencies in Soviet Thinking, American Journal of International Law (1989) 494, 501–509.

[560] *Cf.* Article 31(1) of the Vienna Convention which stipulates that a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", and the *Competence of the General Assembly for the admission of a State to the United Nation Case* (I.C.J.) Reports (1950)4, where the International Court of Justice said that "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur."

> "It is not possible for the Court to apply a custom: instead it can observe the general practice of states, and if it finds that such practice is due to a conception that the law requires it, it may declare that a rule of law exists and proceed to apply it."[561]

Generally speaking, there are four factors which must be considered before concluding that an international practice has become binding customary international law, *viz.*, (i) uniformity and consistency of the practice, (ii) duration of the practice, (iii) generality of the practice and (iv) *opinio juris et necessitatis.*

As far as the first element – *uniformity and consistency* – is concerned, it is clear that the practice in question must have been uniformly and consistently applied. Even though there is no requirement of *complete* uniformity, there must have been *substantial* uniformity. In the *Fisheries Case*,[562] the International Court of Justice refused to accept the existence of a ten mile rule for the base line of territorial waters in the case of bays. The Court said, *inter alia*, the following:

> "... although the ten mile rule has been adopted by certain states both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these states, other states have adopted a different limit. Consequently the ten mile rule has not acquired the authority of a general rule of international law."[563]

Important pronouncements were also made by the Court in the *Asylum Case*,[564] in which the Court considered the argument of Columbia to the effect that there existed a customary rule of international law among the Latin American states such that a state granting asylum had the right to determine – by a unilateral and definitive decision – whether the circumstances and the nature of the offense in question warranted the grant of asylum. The Court started out by describing the necessary elements of a binding custom. It said:

> "The party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party. The Columbian government must prove that the rule invoked by it is in accordance with a uniform usage by the states in question, and that this usage is the expression of a right appertaining to the state granting asylum and duly incumbent on the territorial state." [565]

[561] Hudson, *op. cit.*, at 609.
[562] I.C.J. Reports (1951) 116.
[563] *Id.*, at 129.
[564] I.C.J. Reports (1951) 276.
[565] *Id.*

Turning then to the facts of the case before it, the Court concluded:

> "The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on different occasions; there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some states and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage accepted as law ...".[566]

With respect to *duration* of the custom in question it would seem that no *specific* duration is required in the sense that no specific time periods seem to have been established by the Court. On the other hand, it follows from the requirements of uniformity and consistency that the passage of time will be of importance.

Generality of the practice, supplements the requirement of uniformity and consistency. By definition, generality means that complete uniformity is not required. For example, in the *Asylum Case*, the Court did not reject the idea as such of a custom applying only among Latin American states, although in the event it found that no such custom had been established.[567]

In the *Right of Passage over Indian Territory Case*[568], the International Court of Justice accepted the possibility of local custom. The case concerned the existence of a local custom in favor of Portugal with respect to territorial enclaves inland from the port of Daman. The claim of Portugal was upheld by the Court over India's objection that there could be no local custom established between any two states. The Court said that it was satisfied that there had been constant and uniform practice allowing free passage. It furthermore concluded that the "practice was accepted as law by the parties and has given rise to a right and a correlative obligation."[569] It should be noted that the establishment of a local custom requires the positive acceptance of both, or all, states concerned. This is

[566] *Id.* – *See* also the *Rights of U.S. Nationals in Morocco Case*, I.C.J. Reports (1952) 200, where the Court, referring to the *Asylum Case*, it would seem rather summarily rejected the argument of the United States that its consular jurisdiction and other capitulatory rights were based on "custom and usage."

[567] It is interesting to note that Judge Alvarez, in his dissenting opinion, referred to "American international law", "Asian international law" and "European international law" as fully established systems of regional international law, I.C.J. Reports (1950) 294. Also Judge Read in his dissenting opinion, confirmed the existence of "American international law"; *ibid.*, at 316. *See* also pp. 174–175, *supra,* with respect to "socialist international law."

[568] I.C.J. Reports (1960) 6.

[569] *Id.*, at 40.

so because local customary law is an exception to the general nature of customary law.

Article 38 (b) refers to "a general practice *accepted as law*". This means that the practice in question must be observed by states because they themselves believe that they are under a legal *obligation* to do so, and not because of any moral or political reason. This requirement, referred to as *opinio juris et necessitatis*, is what transforms a usage into a custom forming part of international law. In other words: only if states observe a usage because they are convinced that they are under a legal obligation to do so, will the usage become part of international customary law.

Needless to say, this element of international customary law is highly subjective and rests very much in the discretion of the Court; it is for the Court to determine whether or not in its opinion the practice in question has been observed out of a conviction that there was a legal obligation to do so.

The International Court of Justice has had the occasion to address this aspect of international customary law in several cases. One such occasion was the *Nicaragua Case*[570]. In this case the Court stated, *inter alia*:

> "... for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitatis*. Either the states taking such action or other states in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*."[571]

As far as the requirement of *opinio juris* is concerned, there seems to be a practical problem in the sense that it must by definition be difficult, if not

[570] I.C.J. Reports (1986) 14.

[571] *Ibid.*, at 108–109. – In this case the Court referred to its previous decision in the *North Sea Continental Shelf Cases*, I.C.J. Reports (1969) 3, 41, where it said: "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of states where interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked, – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved"; *id.*, at 38. The approach reflected in the *Nicaragua Case*, and in the *North Sea Continental Shelf Cases* – which is a relatively strict approach, in the sense that rather extensive evidence is required – was begun already in the *Lotus Case* by the Permanent Court of International Justice, P.C.I.J. Reports, Series A, No. 10 (1927) 18.

impossible, for *new* customary rules – i.e. different or other than already existing rules – to develop, since this requires behaviour in accordance with law. From a strictly logical point of view this requirement would create a very rigid system, rarely leading to the creation of new customary rules of international law. In actual fact, however, new customary rules do develop. In practice, states act in a certain way in the belief that they are required by law to do so. It will then depend on the reactions of other states whether or not this behavior is accepted as being in accordance with law. If it is accepted, that will be the starting point for the development of a new rule of international customary law. One problem with such a *gradual* approach, is that it is difficult to determine exactly *when* a new rule has come into being.

On the basis of what has been said above concerning international customary law, it is clear that acceptance thereof by international courts and tribunals very much depends on the question of proof, i.e. proof of *how* states in fact act. While the behavior of states in practice forms the basis of customary international law, evidence of state practice can be obtained in many different ways, including, *inter alia*, diplomatic correspondence, policy statements, municipal legislation, international and national judicial decisions, opinions of official legal advisors, recitals in treaties and other international instruments and even press releases.[572] It is clear that the relative value and force of these expressions of state practice will vary depending on the specific circumstances of the individual case and also on the nature of the alleged rule of international customary law.

Generally speaking, it would seem fair to say that the International Court of Justice has taken a fairly restrictive view with respect to *proof* of the existence of customary international law, almost to the point of requiring clear and unequivocal acceptance.[573] Even though it is likely that the relative importance of customary international law will decline – in particular against the constantly growing number of treaty obligations

[572] *Cf.* Brownlie, *op. cit.*, at 5, with references.

[573] This approach has at times been severely criticized; *see* e.g. Jenks, *op. cit.*, at 225–265. In particular he discusses the following six decisions; the Lotus Case, the Asylum Case, The Genocide Case, the Fisheries (United Kingdom v. Norway) Case, the United States Nationals in Morocco Case and the Right of Passage over Indian Territory Case, which he characterizes as six controversial decisions. In concluding that a new approach by the Court is necessary he states, *inter alia*,: "A number of decisions of the International Court have created, and should create, grave concern as to whether the Court is not in process of evolving an attitude towards proof of custom which will severely limit its capacity to crystallise custom into law by its judicial recognition", *id.*, at 263.

– custom will for a long time continue to be an important part of international law.[574]

3.4.2.3 General Principles of Law

Article 38 (c) refers to the "general principles of law recognized by civilized nations" as a source of law to be applied by the Court. Since Article 38 does not set forth any strict hierarchy of sources of law,[575] the general principles of law are theoretically placed on the same footing as international conventions and international customary law. This notwithstanding, it would seem clear that this source of law can be applied *only* if the two aforementioned sources are silent, or provide inconclusive answers, with respect to a particular issue.[576] This conclusion would seem to follow from the nature of the "general principles of law" as a source of international law. While the two sources of law previously discussed – international conventions and international customary law – albeit in varying degrees, proceed from consent of the states concerned, the general principles of law are detached from, at least the express, consent of states. In fact, this source of law has provided the Court with vast discretionary powers to find rules of law to apply in resolving a dispute. However, there does not seem to exist any generally accepted opinion as to what the general principles of law are intended to refer to. At one end of the spectrum we find the view that they essentially refer to natural law, or natural law concepts, which are deemed to form the underlying basis of international law and which serve as the ultimate test of the validity of positive law.[577] At the other end, we find commentators who treat the general principles of law as a subcategory of international conventions and customary law and consequently incapable of adding anything new to international law unless the general principles of law reflect the consent of states.[578]

[574] Jenks, *op. cit.*, at 262.

[575] *See* p. 205, *supra*.

[576] *Cf.* Anand, International Courts and Contemporary Conflicts (1974) 357. – Even though it could thus be said that "general principles of law" play a less important role, this source of law is of particular interest with respect to the principle of extinctive prescription, which is generally accepted as forming part of the "general principles of law" – as explained in Chapter 4 *infra* – hence the relatively detailed treatment of this source of law in this section of the Study.

[577] This view can be traced to some of the lawyers who participated in the preparation of the Statute of the Permanent Court of International Justice; *see* e.g.Brownlie, *op. cit.*, at 15–16 and Sørensen, Les Sources de droit international (1946) 125; Proces-verbaux (1920) 316, 335, 344.

[578] A typical representative of this school of thought is Professor Tunkin of Moscow, *cf.* e.g. Theory of International Law (1974) Ch. 7.

Irrespective of these diverging views, it is clear that the general principles of law do constitute – as a matter of principle – a separate source of international law and have been applied as such by international courts and tribunals.

A reference to the general principles of law, and sometimes to the general principles of law and equity, or general principles of justice and equity, was often included in the arbitration agreements leading to some of the well-known arbitrations of the nineteenth century.[579] In fact, it has been suggested that when the reference to the general principles of law was included in the statute of the Permanent Court of International Justice, this was a mere codification of the previous practice of international tribunals.[580] It has been convincingly demonstrated that application of general principles of law has been a characteristic element of many international arbitral tribunals, including the British–American Arbitrations of 1910, arbitral awards rendered under the auspices of the Permanent Court of Arbitration, and a number of *ad hoc* arbitrations.[581] In his Study, based to a large extent on historically significant arbitrations, Lauterpacht identified a number of issues with respect to which international tribunals have resorted to the general principles of law, including, *inter alia*, acquisitive and extinctive prescription, state succession, the measure of damages, estoppel and *res judicata*.[582]

The expression used in Article 38 (c) – "general principles of law recognized by civilized nations" – is wide enough to include both general principles of international law and general principles of law common to municipal law systems of civilized nations. It would seem, however, that it is the latter aspect which has been the focus of most scholarly discussion and international adjudication.[583] Some commentators have taken the clear position that general principles of law must be viewed against the background of general principles accepted in the municipal legislation

[579] *See* p. 40 *et seq.*, *supra*.

[580] Jenks, *op. cit.*, at 268.

[581] *See* Lauterpacht, Private Law Sources and Analogies of International Law (1927). He refers to such well-known arbitrations as the Alabama Claims Arbitration (216–223); the Behring Sea Arbitration (223–227); the British Guyana Boundary Arbitration (227–233); the Alaska Boundary Arbitration (233–237); the Pious Funds Case (249–250); the Russian Indemnity Case (255–261); the Cayuga Indians Case (284–286) and Tacna-Arica Arbitration (291).

[582] *Id.*, at 108–116, 125–133, 147–151. 203–206 and 206–207, respectively.

[583] *Cf.* e.g. Cheng, General Principles of Law as applied by international courts and tribunals (1953).

of civilized nations.[584] On the other side, we find commentators such as Oppenheim, who states that

> "/t/he intention is to authorize the Court to apply the general principles of municipal jurisprudence, in particular of private law, *in so far as they are applicable to relations of states*."[585] (emph. added)

As will be discussed below, both the Permanent Court of International Justice and the International Court of Justice have on numerous occasions referred to and/or applied the general principles of law. This notwithstanding, the world courts do not seem to have developed any specific rules or principles with respect to this source of international law; the approach has largely been of an *in casu* nature. It is hardly meaningful to argue with the proposition that fruitful guidance and inspiration may be had from municipal law in matters of international law. Against the background of the different roles and functions of the two systems of law, one might perhaps have expected that more attention should have been paid to trying to develop guidelines for the use of municipal law analogies within the framework of the general principles of law. There are, however, pronouncements by individual judges in the International Court of Justice which may shed some light on this issue.

One such pronouncement, indeed nowadays a *locus classicus*, is Judge McNair's separate opinion in the *International Status of South West Africa Case* [586]. He said:

> "What is the duty of an international tribunal when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and institutions of private law? To what extent is it useful or necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38 (1)(c) of the Statute bears witness that this process is still active, and it will be noted that this article authorizes the Court to 'apply ... (c) the general principles of law recognized by civilized nations'. The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of the 'general principles of law'. In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of

[584] *See* Brownlie, *op. cit.*, at 16, referring to Root, Phillimore and Guggenheim.
[585] Oppenheim, International Law (Vol. 1, 9th ed. 1996) 36–37.
[586] I.C.J. Reports (1950) 132.

the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions".[587]

Thus, while municipal law may be used by the Court as a source from which analogies and rules can be developed, it is clear that this approach is surrounded by limitations, primarily due to the fundamental differences between the two systems of law. In several cases, however, the Court has pointed out that the principles on which it has relied in resolving a dispute are common both to international law and municipal law. In the *Chorzow Factory Indemnity (Jurisdiction) Case*, for example, the Court stated that it was

> "a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse in the tribunal which would have been open to him."[588] (*emph. added*)

When considering the merits of this case the Court observed that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[589]

Another case where a similar approach has been taken is the *Corfu Channel (Merits) Case*. In this case the Court held that "recourse to inferences of fact and circumstantial evidence is admitted in all systems of law and its use is recognized by international decisions", and that such indirect evidence "must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."[590]

[587] *Ibid.*, at 148. – In this case the Court concluded that the concept of "mandate" at the international law level had very little in common with several concepts of "mandates" in municipal law and that therefore it was not possible to draw any conclusions from such municipal law concepts. – *See* Jenks, *op. cit.*, at 271–276 for statements, in the form of separate opinions, by Judge Lauterpacht on this issue.

[588] P.C.I.J. Reports, Series A, No. 9 (1927) 31.

[589] P.C.I.J. Reports, Series A, No. 16 (1928) 29.

[590] I.C.J. Reports (1949) 18. – An interesting comment, on the relation between municipal law and international law was made in that case by Judge Krylov. He said, *inter alia*: "The terms of Roman law and of contemporary civil and criminal law may be used in international law, but with a certain flexibility and without making too subtle distinctions"; he added that he saw "no need to transfer the distinctions which we sometimes meet in certain

Generally speaking, it would seem that resort to the general principles of law in the practice of the Court has been most frequent with respect to issues of a procedural nature. This is probably due to the different roles and functions of municipal law and international law when it comes to the *substantive* aspects of a dispute, differences which seem to matter less with respect to procedural aspects. In addition, it is difficult for state practice on its own to develop general rules of a procedural nature which may be used in the international judicial process. To remedy this situation international courts and tribunals seem to be inclined to look to municipal law for guidance.[591] Examples of procedural issues with respect to which reference has been made to general principles of law include *res iudicata*,[592] litispendence[593] and the rule that no one can be the judge in his own suit.[594]

There are, however, several examples of when reference has been made to general principles of law with respect to the substantive aspects of a dispute. In the *Electricity Company of Bulgaria and Sofia Case*, Judge Hudson, endorsing the maxim *ius posterior derogat priori*, noted that:

> "when called upon to decide which of two inconsistent texts must be regarded as governing the case, the Court must apply a general principle of law and it must say that the expression of the parties' intention which is the later in point of time should prevail over that which is the earlier".[595]

A more recent example is the *Barcelona Traction Case* where the International Court of Justice addressed the issue of separation of liability

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systems of municipal law into the system of international law; *id.*, at 71. – *See* also the *Anglo–Iranian Oil Co. (Preliminary Objection) Case*, where Judge Carneiro characterised "a breach of the provisions of a treaty in reliance upon which large sums of money have been invested as a breach of the fundamental principles of modern international law, of principles recognized by the legal systems, the decisions and the jurisprudence of civilised countries", I.C.J. Reports (1952) 158, and the *Right of Passage (Preliminary Objection) Case*, where the *ad hoc* judge, Mr. Chagla said – with respect to a reservation made by Portugal to its acceptance of the Optional Clause – that "the doctrine of severance is well settled in municipal law and it also applies in international law", I.C.J. Reports (1957) 168.

[591] *Cf.* e.g. de Vischer, Theory and Reality in Public International Law (1957) 356–358.

[592] *See* e.g. Effect of Awards of the U.N. Administrative Tribunal, I.C.J. Reports (1954) 53 where the court said that "according to a well-established and generally recognized principle of law .... a judgment rendered by an independent and truly judicial body pronouncing final judgments without appeal within the limited fields of its functions is *res iudicata* and has binding force between the parties to the dispute."

[593] *See* e.g. German Interests in Polish Upper Silesia, P.C.I.J. Reports, Series A, No. 6 (1925) 20.

[594] *See* e.g. The Mosul Boundary Case, P.C.I.J. Reports, Series B, No. 12 (1925) 32.

[595] P.C.I.J. Reports, Series A/B, No. 77 (1939) 125.

between a legal entity and its owners. In referring to the municipal law concept of the limited liability company, the Court emphasized that if:

> "the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the court could resort."[596]

As appears from above, in the practice of the Court, the discussion concerning the general principles of law, has focused very much on the role of municipal law in this context. On this background it is worthwhile noting that *municipal legislative practice* has sometimes been invoked by the Court in support of a general principle of law.[597] For example, in the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal Case*, the Court concluded that the argument that the General Assembly was incapable of creating a tribunal which was competent to make decisions binding on itself "cannot be justified by analogy to national laws, for it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being".[598] Another example is the *Mavrommatis Palestine Concessions (Jurisdiction) Case*, where Judge Altamira in discussing the meaning of "public control", noted that "in many systems of legislation the recognition of concessions as public utility undertakings was a form designed to facilitate certain works of the undertaking or the fulfillment of certain necessary conditions such as the expropriation of land".[599]

Given the fact that municipal law plays such an important part in the Court's discussion of the general principles of law, it is perhaps rather surprising that the Court has been very hesitant, even reluctant it would seem, to refer to precedents from any particular municipal system, but has preferred to discuss this question in general terms. In the opinions of individual judges, however, references have sometimes been made to decisions of municipal courts. Judge McNair, for example, in the *Fisheries Case*, cited decisions from municipal courts relating to the delineation of territorial waters and historic titles.[600] Individual judges have also

[596] I.C.J. Reports (1970) 37.

[597] There is, of course, a distinction to be made between municipal legislation as *support* for a general principle of law and municipal law as *evidence* of international customary law.

[598] I.C.J. Reports (1954) 61.

[599] I.C.J. Reports (1962) 41.

[600] I.C.J. Reports (1951) 160, 183.

occasionally referred to commentators on municipal law to illustrate a general principle of law. In the *Temple of Preah Vihear Case*, Judge Alfaro in his separate opinion quoted Sir Fredrick Pollock in support of the view that estoppel is a rule of substantive law rather than a rule of evidence,[601] and in the *Norwegian Loans Case* Judge Lauterpacht cited Planion, Ripert and Williston.[602]

Generally speaking, it is probably fair to characterize the approach of the Court to general principles of law as cautious, and perhaps even conservative.[603] As far as international arbitrations are concerned it would seem that the general principles of law have played a more active role than in the practice of the Court. This is particularly true of the arbitrations of the last century, to wit, sometimes due to the fact that the tribunal in question had been instructed by the parties to do so.[604] There are, however, examples of more recent arbitrations where general principles of law have been referred to.[605]

In the *Trail Smelter Arbitration*, the tribunal was instructed by the parties to apply U.S. law as well as international law and practice.[606] In deciding the issue of liability, the Tribunal found it unnecessary to decide whether it should be determined "on the basis of US law or on the basis of international law since the law followed in the United States in dealing with quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law".[607]

In the *Lac Lanoux Arbitration*, which primarily concerned the interpretation of certain treaty provisions, the Tribunal took account of judicial decisions in federal states on the question of diversion of water.[608]

Another example is the *Diverted Cargoes Arbitration* where the sole arbitrator characterized the agreement in question as "an international agreement of a financial character between two States acting as persons

[601] I.C.J. Reports (1962) 41.
[602] I.C.J. Reports (1957) 49, 50.
[603] *Cf.* e.g. Jenks, *op. cit.*, at 305.
[604] *See* p. 40 *et seq.*, *supra.*
[605] It should be emphasized that I am only speaking of interstate arbitrations, thus *excluding* the numerous arbitrations between states and foreign investors (mixed arbitrations) which have taken place during the last century in which reference is frequently made to the general principles of law, *see* p. 97 *et seq.*, *supra.*
[606] Reports of International Arbitral Awards, Vol. III (1949) 1905.
[607] *Ibid.*, at 1963.
[608] International Law Reports 1957 (1961) 125.

subject to international law".[609] Addressing the question of interpretation of the agreement he said that:

> "the principles of international law governing the interpretation of international treaties or arguments /sic!/ and the manner of proof have been evolved by legal writers and more particularly by international case law in close conformity with the rules for the interpretation of contracts adopted by civilized nations".[610]

As we have discussed above, municipal law in the broadest sense, has played an important part in developing and providing details to the general principles of law referred to in Article 38(c). In a number of cases international courts and tribunals also refer to "equity" as forming part of the general principles of law.

The *locus classicus* concerning the application of equity in international adjudication is the *Water from the Meuse Case*[611] decided by the Permanent Court of International Justice in 1937. The dispute was between Belgium and Holland and concerned the rights and obligations to take water from the river Meuse. In his separate opinion Judge Hudson said:

> "What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals. – A sharp division between law and equity, such as prevails in the administration of justice in some states, should find no place in international jurisprudence; even in some national legal systems, there has been a strong tendency towards the fusion of law and equity. Some international tribunals are expressly directed by the *compromis*, which control them to apply 'law and equity' ... Whether the reference in an arbitration treaty is to the application of 'law and equity' or to justiciability depends on the possibility of applying 'law and equity', it would seem to envisage equity as a part of law ... The Court has not been expressly authorized by its Statute to apply equity as distinguished from law. Nor, indeed, does the Statute expressly direct its application of international law, though as has been said on several occasions the Court is 'a tribunal of international law'... Article 38 of the Statute expressly directs the application of 'general principles of law recognized by civilised nations', and in more than one national principles of equity have an established place in the legal systems. The Court's recognition of equity as a part of international law is in no way restricted by the special power conferred upon it 'to decide a case *ex aequo et bono*, if the parties agree thereto' ... It must be concluded, therefore, that under Article 38 of the Statute, if not independ-

[609] International Law Reports 1955 (1958) 824.
[610] *Ibid.*, at 825.
[611] P.C.I.J. Reports, Series A/B, No. 70 (1937) 76.

ently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply."[612]

In discussing equity in international adjudication, there are two important distinctions to be made, *viz.*, (i) equity is not to be understood in its more legal-technical meaning under Anglo-American law, but rather as referring to fairness and reasonableness[613] and (ii) application of equity is *not* the same as deciding a case *ex aequo et bono*; the latter will always require the consent of the disputing parties, for example, as provided for in Article 38(2) of the Statute of the International Court of Justice.[614]

When the Statute of the Permanent Court of International Justice was prepared in 1920 the inclusion of a specific reference to equity was discussed. Eventually, however, the majority of the committee drafting the Statute decided against it.[615] Presumably this was considered unnecessary since equity was deemed already to constitute part of international law. To quote Judge Hudson again:

> "This long and continuous association of equity with the law which is applicable by international tribunals would seem to warrant a conclusion that equity is an element of international law itself."[616]

[612] *Ibid.*, at 76–77.

[613] *Cf.* Brownlie, *op. cit.*, at 26. *See* also the Norwegian Shipowners Arbitration, where it was stated: "The words 'law and equity' used in the special agreement of 1921 cannot be understood here in the traditional sense in which these words are used in Anglo–Saxon jurisprudence."

"The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state", as quoted by Ralston, The Law and Procedure of International Tribunals (1926) 53; *see* also Habicht, Post-war Treaties for the Pacific Settlement of International Disputes: A Compilation and Analysis of Treaties of Investigation, Conciliation, Arbitration and Compulsory Adjudication, Concluded during the First Decade Following the World War (1931), where he concludes at p. 1052: "Equity in international arbitration treaties can, therefore, be taken only in its general sense, as equivalent to the French equité or German Billigkeit".

[614] Decisions *ex aequo et bono* are discussed on p. 240 *et seq.*, *infra.*

[615] Hudson, The Permanent Court of International Justice, 1920–1992 (1943) 194–195.

[616] *Ibid.*, at 617–618, discussing the practice of international arbitral tribunals. – In a later work Judge Hudson confirmed this view. He said: "Equity may be said to form a part of international law, serving to temper the application of strict rules, to prevent injustice in particular cases, and to furnish a basis for extension where lines have been formed by experience. Hence a tribunal may include principles of equity in the law which it applies even in the absence of an express mandate", Hudson, International Tribunals, Past and Future (1949) 103. *See* also Judge Lauterpacht who said the following in discussing decisions *ex aequo et bono*: "It differs clearly from the application of rules of equity in their

Thus, today it is generally accepted that equity forms a part of international law as such and is encompassed, as far as the International Court of Justice is concerned, by Article 38(c) of the Statute.

There are numerous examples of when both the Permanent Court of International Justice and the International Court of Justice have had occasion to make pronouncements on the application of equity, the most famous case still being the *Water from the Meuse Case* referred to above.[617]

As far as the Permanent Court of International Justice is concerned, there are references in the *Wimbledon Case*[618] and in the *Mavrommatis Palestine Concessions Case*[619] to assessment of compensation for damages on an equitable basis.

One of the first cases where the International Court of Justice took account of equitable considerations was the *Anglo-Norwegian Fisheries Case*[620]. In this case the Court based its decision – at least partially – on certain geographical and economic factors, rather than strictly legal considerations. The Court referred, *inter alia*, to the fact that "in these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing" and to "certain economic interests peculiar to a region, the reality and importance of which are clearly evidence by long usage".[621] In the *North Sea Continental Shelf Cases*[622] the International Court of Justice applied equitable principles in determining the lateral determination of adjacent areas of the continental shelf, since in the opinion of the Court there were no international conventions, nor customary international law which were binding on the disputing states. Also in the *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*[623] the Court proposed an "equitable solution" concerning the differences over the fishing rights in question. Furthermore, in the *Burkina Faso–Mali*

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wider sense. For inasmuch as these are identical with principles of good faith, they form part of international law as, indeed, of any system of law. They do so irrespective of the provisions of the third paragraph of Article 38 which authorizes the Court to apply general principles of law recognised by civilised states", Lauterpacht, The Development of International Law by the International Court (1958) 103.

[617] *See* p. 229 *supra*.

[618] P.C.I.J. Reports, Series A, No. 1 (1923) 17.32.

[619] P.C.I.J. Reports, Series A, No. 5 (1925) 8, 10, 46.

[620] I.C.J. Reports (1951) 116.

[621] *Ibid.*, at 128 and 133, respectively.

[622] I.C.J. Reports (1969) 46–52.

[623] I.C.J. Reports (1974) 30–35.

Case[624] the chamber of the Court applied *"equity infra legem"* in the territorial dispute in question.[625]

By way of conclusion, it would seem fair to say that equity has played a relatively minor role in the jurisprudence of the Permanent Court of International Justice and the International Court of Justice. This is probably explained by the uncertainty and unpredictability which necessarily surround the application of equity and equitable principles. By contrast, however, equity has played a much larger role in the practice of international arbitral tribunals. In fact, equity has played an important role throughout in the history and development of international arbitration.[626] This is partly explained by the fact that during the history of international arbitration, tribunals have explicitly been instructed to apply equity or equitable principles.[627] Even so, it is useful in this context to take a closer look at the practice of international arbitral tribunals, as it relates to equity. I will focus on two of the leading arbitrations in this context, *viz.*, the *Cayuga Indians Case* and the *Trail Smelter Arbitration.*[628]

The *Cayuga Indians Case* was decided by the Great Britain – United States Arbitral Tribunal under the Special Agreement of 1910. Article 7 of the Special Agreement for the submission to Arbitration of outstanding Pecuniary Claims stipulated that claims were to be decided by the tribunal "in accordance with treaty rights and with the principles of international law and of equity".[629] The tribunal was thus explicitly instructed to apply equity. The main question in this case was whether the Canadian Cayugas were entitled to a proportionate share of an annuity provided for by treaties of 1790, 1795 and 1798 between the State of New York and the Cayuga Nation. Payments to the Canadian Cayugas had been forthcoming, but were stopped in 1811 despite certain provisions in the Treaty of Ghent of 1814.

At the outset the tribunal noted that the Cayuga Nation – which was a legal entity under New York law – could not change its national character without the consent of the State of New York and become a legal unit under British law, while at the same time preserving its status under the

[624] I.C.J. Reports (1986) 554.

[625] *See* also the Tunisia-Libya Continental Shelf Case, I.C.J. Reports (1982) 18.

[626] *See* Chapter 2, *supra.*

[627] *See* Chapter 2, *supra.*

[628] A comprehensive review of arbitral awards, in fact the most comprehensive review which this author has been able to find, in this respect is found in Jenks, *op. cit.*, at 330–408. He reviews the practice of arbitral tribunals, including all the leading claims commissions, during a period of one hundred and sixty years. Thanks to the herculean work performed by Jenks it is unnecessary for this author to cover this ground again in detail.

[629] Reports of International Arbitral Awards, Vol. VI (1955) 10.

treaties with the State of New York and under the Treaty of Ghent. The Tribunal went on to say, however, that Great Britain could treat the Cayugas as a unit under British law, or deal with them individually as British nationals, and if the Cayugas had a just claim according to the principles of international law and equity, Great Britain was entitled to maintain such claim. The tribunal found that the Cayugas had such a claim "founded in the elementary principle of justice that requires us to look at the substance and not stick in the bark of the legal form."[630]

In reaching its conclusion, in this respect, the tribunal took account of certain special circumstances, *viz.*,

> "In the first place, the Cayuga Nation has no international status. As has been said, it existed as a legal unit only by New York law. It was a *de facto* unit, but *de jure* was only what Great Britain chose to recognize as to the Cayugas who moved to Canada and what New York recognized as to the Cayugas in New York or in their relations with New York. As to the annuities, therefore, the Cayugas were a unit of New York law, so far as New York law chose them to be one. When the tribe divided, the anomalous and hard situation gave rise to obvious claims according to universally recognized principles of justice.
>
> In the second place, we must bear in mind the dependent legal position of the individual Cayugas. Legally, they could do nothing except under the guardianship of some sovereign. They could not determine what should be the nation, not even whether there should be a nation legally. New York continued to deal with the New York Cayugas as a 'nation'. Great Britain dealt with the Canadian Cayugas as individuals. ... When a situation legally so anomalous is presented, recourse must be had to generally recognized principles of justice and fair dealing in order to determine the rights of the individuals involved. The same considerations of equity that have repeatedly been invoked by the courts where strict regard to the legal personality of a corporation would lead to inequitable results or to results contrary to legal policy, may be invoked here. In such cases courts have not hesitated to look behind the legal person and consider the human individuals who were the real beneficiaries. Those considerations are even more cogent where we are dealing with Indians in a state of pupilage toward the sovereign with whom they were treating."[631]

Relying on these circumstances the Tribunal concluded, referring to "general and universally recognized principles of justice" and to "the practice of English and American courts to look behind the corporate

[630] *Ibid.*, at 179.
[631] *Ibid.*, at 179.

fiction, that the Cayuga Indians permanently settled in Canada were entitled to their proportional share of the annuities."[632]

A more recent example of equity being applied by an international arbitral tribunal is the *Trail Smelter Arbitration*[633] The arbitration arose out of a complaint by the United States that a smelter at Trail, British Columbia, Canada had caused damage to the State of Washington. The tribunal was directed to apply the law and practice with respect to similar questions in the United States as well as international law and practice; it was furthermore instructed to give consideration "to the desire of the high contracting parties to reach a solution just to all the parties concerned."[634] In its decision, the tribunal also indicated that it had been guided by Article IV of the convention establishing the tribunal, as well as the preamble of the convention, referring to the "desirability and necessity of effecting a permanent settlement of the controversy".[635]

Proceeding on the basis of these instructions, the Tribunal said:

> "Considerations like the above are reflected in the provision of the Convention in Article 4, that 'the desire of the high contracting parties' is 'to reach a solution just to all parties concerned.' And the phraseology of the questions submitted to the Tribunal clearly evinces a desire and intention that, to some extent, in making its answers to the questions, the Tribunal should endeavour to adjust the conflicting interests by some 'just solution' which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the United States, and as would enable indemnity to be obtained, if in spite of such restrictions and limitations, damage should occur in the future in the United States."[636]

The Tribunal reviewed a number of decisions of the United States Supreme Court and concluded on the basis of such decisions that no state had the right to use, or permit the use of its territory, in such a manner as to cause injury by fumes in, or to, the territory of another state, or to property or persons therein. The Tribunal then went on to say:

> "The decisions of the Supreme Court of the United States which are the basis of these conclusions are decisions in equity and a solution inspired by

[632] *Ibid.*, at 183–184. – The reasoning of the tribunal also contains many interesting aspects of extinctive prescription in general, and in particular on the relation between equity and extinctive prescription. These matters will be discussed at p. 280 *et seq., infra,* and at p. 291 *et seq., infra.*

[633] Reports of International Arbitral Awards, Vol. III (1949) 1905.

[634] *Ibid.*, at 1908.

[635] *Ibid.*, at 1912.

[636] *Ibid.*, at 1938–1939.

them, together with the regime hereinafter prescribed, will, in the opinion of the Tribunal, be 'just to all parties concerned', as long as the present conditions in the Columbia River Valley continue to prevail. Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter"[637]

As the discussion above has indicated, equity and equitable principles have been applied by international courts and tribunals with respect to varying issues of international law.[638] However widespread the application of equity may be in international arbitral practice, it must be emphasized that equity does not mean unfettered discretionary powers for arbitrators. Rather, international courts and tribunals have usually applied equity within the context of a rule of law requiring them to do so and normally to mitigate certain inequities which would otherwise have resulted.[639] In other words, equity is not "abstractly" applied to the circumstances of a particular case, but is rather applied on the basis of, and within the framework of, the rules of law applicable to the dispute.[640] The role of equity in international law has thus been described by Carlston:

"The role of equity in the international tribunal is to lead to a decision consistent with justice in the particular circumstances of the case, but, nevertheless within a faithful application of legal principles. A tribunal may not rest its decision solely on the grounds of equity, and particularly so in the face of established rules of law ... Nevertheless, equity may be resorted to in order to supplement and fulfil the law."[641]

Attempts to define equity have also been made proceeding from the perceived function of equity. The function of equity has been discussed for

[637] *Ibid.*, at 1965–1966.

[638] Prominent examples include the concept of estoppel (*Cf.* Jenks, *op. cit.*, at 415–416) and delineation and demarcation of borders, including maritime boundaries, *see* e.g. Miyoshi, Considerations of Equity in the Settlement of Territorial and Boundary Disputes (1993).

[639] *Cf.* e.g. The North Sea Continental Shelf Case, I.C.J. Reports (1969) 47.

[640] *Cf.* e.g. the *Tunisia-Libya Continental Shelf Case* where the International Court of Justice said that "equitable principles cannot be interpreted in the abstract", I.C.J. Reports (1982) 59.

[641] Carlston, The Process of International Arbitration (1946) 155. *Cf.* also the following pronouncement by the International Court of Justice in the *Tunisia-Libya Continental Shelf Case*: "Equity as a legal concept is a direct emanation of the idea of justice. The court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term 'equity' has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice: in general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law", I.C.J. Reports (1982) 60.

many years and different opinions thereon have been presented.[642] It would seem, however, that there is now a consensus – at least at the conceptual level – as to the general functions of equity, *viz.*, (i) modification of the law on the basis of the facts of the particular case, (ii) supplementing the law by filling gaps in it and (iii) correction of the law or replacing the law.[643] In the opinion of the present author, too much effort should not be spent on the characterization of these different functions of equity, nor should one attempt to draw any particular conclusions from such characterization *per se*. Rather, the focus ought to be on finding out *what* the equitable principles are which have been applied by international courts and tribunals.[644]

Equity and equitable principles are by their very nature uncertain and vague and cannot be listed with definiteness. It would seem possible, however, to have a better understanding of what the equitable principles applied by international courts and tribunals really are by looking, however briefly, at the rules of equity developed in Anglo–Saxon jurisprudence.[645]

In Anglo–Saxon jurisprudence there are traditionally twelve so-called maxims of equity.[646] Even though these maxims are seldom quoted, or relied upon, as such in international disputes, many of them have in fact been taken into consideration by international courts and tribunals.

[642] *See* e.g. Witenberg, L'Organisation judiciaire: La Procedure et la Sentence internationales: Traité Pratique (1937) 304–305; *the George Pinson Case*, decided in 1928, with Professor Verzijl as the President of the Tribunal, Reports of International Arbitral Awards, Vol. V (1952) 327; de Visscher, L'Equité dans le Réglément arbitral ou judiciaire des Litiges de Droit International Public (1972) 12.

[643] *See* Miyoshi, *op. cit.*, at 12.

[644] The terms "equity" and "equitable principles" will be used interchangeably, mindful as this author is of attempts to distinguish between these two terms; *cf.* e.g. the Special Rapporteur Bedjaoui who stated the following in the Report of the International Law Commission on the Succession of States in Respect of Matters Other than Treaties discussing the *North Sea Continental Shelf Cases*: "In the view of the Court 'equitable principles' are 'actual rules of law' founded on 'very general precepts of justice and good faith'. These 'equitable principles' are distinct from 'equity' viewed as a matter of abstract justice"; International Law Commission Yearbook (Vol. II, part 2, 1979) 24. *See* also Miyoshi, *op. cit.*, at 107, who seems to subscribe to this distinction. The present author's view of this distinction goes back to his opinion that the essential aspect is to determine what it *in fact* means when international courts and tribunals resort to equitable considerations. Against this background, it is submitted that it matters little what label is used.

[645] Such an approach does not signify acceptance of the Anglo–Saxon concept of equity as being identical to, or even similar to, equity in international law; *cf.* note 613 *supra*; it is used simply to make clearer what equity in international law is all about.

[646] *Cf.* e.g. Chafee, Some Problems of Equity (1950) 87–94 and Walker & Walker, The English Legal System (3rd, ed. 1972) 33–39.

For example, the maxim: *Equity looks to the intent rather than to the form*, has been referred to frequently. This, perhaps self-evident but nevertheless helpful, principle of equity has been referred to in a great number of arbitrations, in different variations. For example, in the *Cayuga Indians Case* the tribunal concluded that the Cayuga Indians had a just claim "founded in the elementary principle of justice that requires us to look at the substance and not to stick in the bark of the legal form."[647]

In the *Orinocco Steamship Company Case* the tribunal said that "in absolute equity things should be judged by what they are and not by what they are called".[648]

Another maxim is: *Equity aids the vigilant but not the indolent.* This maxim has sometimes been relied upon to dismiss stale claims, characterizing them as inequitable, as for example in the *Gentini Case*.[649] It has also been used as the basis to dismiss cases where there has been an unreasonable failure to exhaust local remedies.[650]

3.4.2.4 Judicial Decisions and Teachings of Publicists

Article 38(d) of the Statute of the International Court of Justice authorizes the Court to consider judicial decisions and "the teachings of the most highly qualified publicists of the various nations". In briefly discussing this provision, there are two preliminary remarks to be made.

First, both judicial decisions and the teachings of publicists are characterized as "subsidiary means for the determination of rules of law". Even though one should perhaps not exaggerate the importance of the term "subsidiary means", it would seem clear that neither judicial decisions nor teachings of publicists are to be considered as sources of law, nor as rules of law, but rather as means which may be used to *find* the applicable rules of law.[651] This does not, of course, prevent them from playing important roles in practice, but then primarily as *evidence* of international law.

Second, with respect to judicial decisions, it is expressly stated that they are subject to the provisions of Article 59 of the Statute. This Article stipulates that "the decision of the Court has no binding force except

[647] Reports of International Arbitral Awards, Vol. VI (1955) 179.

[648] Ralston & Doyle, Venezuelan Arbitrations of 1903 (1904) 95.

[649] *Ibid.*, at 720, 727–728. – Equity as an element of extinctive prescription in public international law will be discussed at p. 280 and at p. 291 *et seq.*, *infra*.

[650] *See* e.g. the *R.T. Roy Case*, Reports of International Arbitral Awards, Vol. VI (1955) 147 and the *Canadian Hay Importers Case*, *ibid.*, at 142.

[651] *Cf.* Hudson, The Permanent Court of International Justice 1920–1942 (1943) 612, where he says: "Judicial decisions and teachings of publicists are not rules to be applied, but sources to be resorted to for finding applicable rules."

between the parties and in respect of that particular case". The purpose underlying Article 59 is not only to confirm the principle of *res judicata* with respect to the decisions of the Court, but also to avoid a system of legally binding precedents.[652] Consequently, the principles and rules developed and adopted by the Court in a particular case are not binding on other states, nor on the Court in subsequent cases. However, there is no rule *preventing* the Court from regarding such principles and rules as authoritatively stating what international law is on a particular point. In practice, there are several examples of the Court drawing support from its own previous decisions, as well as from its advisory opinions.

Generally speaking, the Court is supposed to *apply* the law while resolving disputes submitted to it, rather than to *create* it. This idea finds its reflection in Article 38 (d) and Article 59. While it is true that the Court does not – and cannot – observe any doctrine of binding precedent, it is only natural that it would attempt to maintain judicial consistency.[653] Thus, in practice there are numerous examples of when the Court in different ways refers to its own previous decisions and advisory opinions. For example, in the *Exchange of Greek and Turkish Populations*, the Permanent Court of International Justice referred to its previous decision in the *Wimbledon Case* as "the precedent afforded by its Advisory Opinion No. 3".[654] In the *Reparation Case* the International Court of Justice relied on a previous advisory opinion issued by the Permanent Court of International Justice in the *Case on The Competence of the I.L.O. to Regulate, Incidentally, the Personal Work of the Employer*, decided in 1926, with respect to a statement of the principle of effectiveness in interpreting treaties.[655]

The reference in Article 38 (d) to "judicial decisions" also covers international arbitral awards and decisions of national courts. As far as arbitral awards are concerned, the Permanent Court of International Justice and the International Court of Justice have been careful in referring to individual awards,[656] but seem to have been more willing to refer to international arbitral practice in general terms. In the *Chorzow Factory*

[652] *Cf.* the *Certain German Interests in Polish Upper Silesia Case*, P.C.I.J. Reports, Series A, No. 7 (1923) 19, where the Permanent Court of International Justice said: "The object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding on other states or in other disputes."

[653] Brownlie, *op. cit.*, at 21.

[654] P.C.I.J. Reports, Series B, No. 10 (1925) 21.

[655] I.C.J. Reports (1949) 182–183.

[656] According to Brownlie, *op. cit.*, at 20, reference to individual awards has been made only on five occasions; the judgements and the awards in question are listed by Brownlie in footnote 118 of p. 20.

(Jurisdiction) Case, for example, the Permanent Court of International Justice referred to "a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts".[657]

Decisions of municipal courts may also serve as *evidence* both of national practice and of international customary law. Municipal decisions have from time to time constituted important sources with respect to different issues of international law. Needless to say, however, the value of decisions of national courts varies greatly. In his dissenting opinion in the *Lotus Case* Judge Moore made the following statement with respect to decisions of municipal courts:

> "International tribunals, whether permanent or temporary, sitting in judgment between independent states, are not to treat the judgments of the courts of one state on questions of international law as binding on other states, but, while giving to such judgments the weight due to judicial expressions of the view taken in the particular country, are to follow them as authority only so far as they may be found in harmony with international law, the law common to all countries."[658]

As far as *writings of publicists* are concerned, it should be pointed out again that they merely constitute *evidence* of law. Even though the International Court of Justice has made very little use of this source, it is beyond any doubt that individual writers have had significant influence on the development of international law. One need only mention names like Grotius, Pufendorf, Bynkershoek and Vattel to realize the importance of writers. This notwithstanding, the International Court of Justice has seldom, if ever, referred to the views and opinions of individual writers in its decisions. On the other hand, it has occasionally referred to the writings of publicists in a collective way.[659] In addition, individual judges refer to this source in their separate and individual opinions.[660] The fact that opinions among writers frequently vary and sometimes their national outlook, and perhaps even national bias, does of course detract from their usefulness. These circumstances were pointed out by Judge Bustamente in the *Brazilian Loans Case*, in which he said:

[657] P.C.I.J. Reports, Series A, No. 9 (1927) 31; *see* Brownlie *op. cit.*, at 20, footnote 119, for further examples.
[658] P.C.I.J. Reports, Series A, No. 10 (1927) 74.
[659] Brownlie, *op. cit.*, at 25.
[660] *See* e.g., Hudson in the Diversion of Water from the Meuse Case; McNair in the International Status of South-West Africa Case; Azevedo in the Asylum Case and Alfaro in the Temple of Preah Vihear Case.

> "Writers of legal treaties just as much as anyone else, without wanting to and without knowing it, come under the irresistible influence of their surroundings, and the requirements of the national situation are reflected in their thoughts and have a great influence on their teachings."[661]

3.4.2.5 Decisions Ex Aequo Et Bono

Article 38(2) empowers the Court to "decide a case *ex aequo et bono*, if the parties agree thereto." As mentioned above, decisions *ex aequo et bono* must be distinguished from decisions where equity and equitable principles are applied[662]. In an ordinary judicial proceeding the Court is bound to apply international law as it understands it, *including equity*, proceeding from the provisions in Article 38(1) of the Statute. Decisions *ex aequo et bono* on the other hand empowers the Court to disregard the law if it deems it to be inequitable.

It should also be noted that decisions *ex aequo et bono* require an agreement to this effect between the parties to the dispute. Hudson has described to role of decisions *ex aequo et bono* as follows:

> "In a case where the parties are agreed that it may decide *ex aequo et bono*, the provisions in the Statute would seem to enable the Court to go outside the realm of law for reaching its decision. It relieves the Court from the necessity of deciding according to law. It makes possible a decision based upon considerations of fair dealing and good faith, which may be independent of or even contrary to the law. Acting *ex aequo et bono*, the Court is not compelled to depart from applicable law, but it is permitted to do so, and it may even call upon a party to give up its legal rights."[663]

The present wording of Article 38(2) was introduced following a suggestion made in the Third Commission of the Assembly of the League of Nations to amend the draft submitted by the 1920 Committee of Jurists. The interpretation of Article 38(2) suggested by Hudson seems to be

[661] P.C.I.J. Reports, Series A, No. 21 (1929) 133.

[662] *See* pp. 229–231, *supra*. Having said that, it should be emphasized that while the theoretical distinction is clear enough, in practice it is not always easy to draw the line between decisions based on equity and on *ex aequo et bono*. Sir Robert Jennings once said: "... what the litigants get is in effect a decision *ex aequo et bono* whether they wanted it or not. At any rate, the very serious question arises of what exactly is the difference between a decision according to equitable principles and a decision *ex aequo et bono*"; Jennings, The Principles Governing Marine Boundaries, in Hailbronner, Ress, et Stein (eds.) Staat und Völkerrechtsordnung, Festschrift für Karl Doehring (1989) 401. – Critical views are also set forth by Weil, L'Equité dans la jurisprudence de la Cour Internationale de Justice – Un mystère en voie de dissipation?, in Lowe-Fitzmaurice (eds.) Fifty Years of the International Court of Justice (1996) 126–129.

[663] Hudson, the Permanent Court of International Justice, 1920–1942 (1943) 629; *see* also Hudson, International Tribunals: Past and Future (1944) 102–103.

supported by its legislative history. It has been suggested by Habicht that the Assembly of the League of Nations "wished to reserve the possibility for the latter [i.e. the Court] to base its decision exclusively on the general principles of justice."[664]

It is clear that Article 38(2) grants the Court extraordinary powers in deciding a case. It is therefore not surprising that there has been some discussion as to what it in fact means when it is said that the Court has the right to disregard the law. There seems to be agreement that this does *not* give the Court unlimited and arbitrary powers. It has been suggested that prudence would require the Court always to use the law as a starting point in deciding *ex aequo et bono*.[665] In a similar vein, Hudson has stated:

> "[that a court acting *ex aequo et bono*] cannot act capriciously and arbitrarily. To the extent that it goes outside the applicable law, or acts where no law is applicable, it must proceed upon objective considerations of what is fair and just. Such considerations depend, in large measure, upon the judge's personal appreciation, and yet the court would not be justified in reaching a result which could not be explained on rational grounds."[666]

Given the far-reaching effect of Article 38(2) it is also not surprising that parties are very reluctant in conferring this power on the Court. In fact, there is not one single case decided by the Court on this basis. It is against this background that the *Free Zones of Upper Savoy and the District of Gex Case*[667] has generated particular interest. A dispute arose between Switzerland and France concerning the best way of implementing Article 435 of the Treaty of Versailles which, *inter alia*, directed the two countries to reach an agreement with respect to the free zones of the two aforementioned areas. In 1929 the countries reached an agreement according to which the Court was empowered first to make a certain pronouncement concerning the status of the free zones and second, assuming that the two countries could not agree, "to settle for a period to be fixed by it and having regard to present conditions, all the questions involved in the execution of paragraph (2) of Article 435 of the Treaty of Versailles." In its decision the Court was sharply divided as to its powers under the special agreement. The majority (six judges including the

[664] Habicht, The Power of a Judge to Give a Decision "Ex Aequo et Bono" (1935) 21.

[665] Lauterpacht, Function of Law in the International Community (1933) 315.

[666] Hudson, International Tribunals: Past and Future (1944) 620. *See* also Habicht, note 664, *supra,* at 73; he takes a further step, however, when saying that deciding *ex aequo et bono* will in practice be identical with the application of the general principles of law recognized by civilized nations, *id.*

[667] P.C.I.J. Reports, Series A, No. 24 (1930).

President with his casting vote), agreeing with Switzerland's position that the dispute should be decided on the basis of existing rights, said:

> "... even assuming that it were not incompatible with the Court's Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of expediency only, such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to that effect, which is not to be found in the Special Agreement."[668]

It is worthwhile noting that one of the judges in the majority, Kellog, went even further in his individual opinion. He took the view that the Court did not, and could not, have the power to decide *ex aequo et bono*, even with the express consent of the parties. He said, *inter alia*;

> "In view of the need this Court was created to fulfil and of the circumstances surrounding its organization, it is scarcely possible that it was intended that, even with the consent of the Parties, the Court should take jurisdiction of political questions, should exercise the function of drafting treaties between nations or decide questions upon grounds of political and economical expediency."[669]

It is submitted that the views of Kellog – and also the less emphatic, but nevertheless skeptical view of the majority – do not correspond to the generally held view today.[670]

First, it is difficult to escape the conclusion that such views are in contradiction to the explicit wording of Article 38(2). In addition, and perhaps more importantly, it would seem to be a logical consequence of the principle of party autonomy that international courts and tribunals can – and, with respect to international arbitration, indeed must – act *ex aequo et bono* if so instructed by the disputing parties. It also follows, it is

[668] *Ibid.*, at 10 – On the other hand there was a strong minority of six judges which did not see any reason why the Court should be more restricted than the parties in resolving the problems surrounding Article 435 of the Treaty of Versailles, and was thus prepared to decide the case on the basis of Article 38(2) of the Statute.

[669] P.C.I.J. Reports, Series A, No. 24 (1930) 29–43. Kellog's main concern seems to have been the prestige of the Court, which in his opinion would be undermined. He continued to say:

"... confidence which it should inspire among nations as an impartial body, wholly detached from political influence, should not be decreased or jeopardized, as would be the inevitable result of its assumption of jurisdiction over matters exclusively in the domain of the political power of a state. It seems to me incontestable that nothing could be more fatal to the prestige and high character of a great International Court of Justice than for it to become involved in the political disputes pending between nations, questions which may arise because of economic rivalry or racial, social or religious prejudice. No principles of law can be invoked for the settlement of such questions." *Ibid.*

submitted, from Article 38(1)(a) which instructs the Court to apply the agreements reached by the parties. It is difficult to see that an agreement among the parties to decide a case *ex aequo et bono* should not be covered by this provision. One aspect of practical relevance is of course whether or not the parties have in fact agreed to proceed *ex aequo et bono*. If there is an explicit agreement to such effect, the situation is clear enough. On the other hand, when there is no such agreement it is an open question whether the Court would decide *ex aequo et bono*. The wording of Article 38(2) does not refer to an *explicit* agreement, but only to an agreement between the parties. The majority of the Court in the *Upper Zones Case*, however, referred to "a clear and explicit provision."[671]

The concerns raised with respect to the International Court of Justice in this respect seem to be based mainly on the status and function of the Court. As far as international arbitral tribunals are concerned, the situation is different since they act exclusively by virtue of the authority granted them by the parties. Consequently, if the parties agree to instruct the tribunal to decide *ex aequo et bono*, the tribunal *must* follow this instruction. Again, this is a consequence of the principle of party autonomy which is paramount in international arbitration. In the history of interstate arbitration there are numerous examples of tribunals deciding disputes *ex aequo et bono*.

First of all it should be noted that there exists a large number of treaties containing arbitration clauses which empower the arbitrators to decide *ex aequo et bono*. Such arbitration clauses can be found both in multilateral and bilateral treaties, with the majority of such clauses to be found in the latter category.[672] Examples include the 1926 Treaty of Conciliation and Arbitration between Belgium and Sweden. Article 17 of this treaty simply states – concerning issues other than with respect to which "the Parties are in conflict as to their respective rights – that: 'Le tribunal statuera *ex aequo et bono*'.[673] Another example is the 1947 Polish-Czechoslovak Convention on Economic Co-operation, which – in Annex

[670] *Cf.* e.g. Lauterpacht, The Development of International Law by the International Court (1958) 217; Habicht, note 664 *supra*, at 25–27: Rosenne, The International Court of Justice (1957) 269; de Visscher, Theory and Reality in Public International Law (1957) 336. – As mentioned above, *ex aequo et bono* must be distinguished from equity and equitable principles. In maritime delimitation cases, "equitable principles" are frequently resorted to subsequent to the *North Sea Cases* (I.C.J. Reports (1969) 53). That it is sometimes difficult to distinguish between equity an *ex aequo et bono* is illustrated by the *Libya-Tunisia Continental Shelf Case* (I.C.J. Reports(1982) 60) where the Court, while recognizing the distinction, has been critized for resolving the dispute *ex aequo et bono*.

[671] *See* p. 242, *supra*.

[672] *Cf.* Miyoshi, *op. cit.*, at 25–70.

[673] 67 LNTS 100.

No. 15, Article 9 – stipulates: 'The Board of Arbitrators shall give its decisions *ex aequo et bono*'".[674]

There is also a significant number of interstate arbitrations where decisions have been made *ex aequo et bono*. One well-known example is the *Death of James Pugh Arbitration*[675] between Great Britain and Panama. In that case the sole arbitrator was empowered to decide *ex aequo et bono* whether the Panamanian police had used excessive force in arresting the Irishman James Pugh. In the *Charo Boundary Arbitration*[676] between Bolivia and Peru, the Treaty of Peace of 21 July 1938 stipulated that the frontier line between the two countries was to be decided by "arbitrators in equity deciding *ex aequo et bono*". The resulting award contained no detailed reasons in support of the line chosen by the arbitrators, but they rather made general statements to the effect that they were required to give an award in equity acting *ex aequo et bono*.[677]

Although arbitral tribunals generally speaking seem to have decided the merits of a dispute on the basis of *ex aequo et bono* only when they have been explicitly instructed by the parties to do so, in some of the cases arbitrators have not always made a strict distinction between equity and *ex aequo et bono*.[678] In particular there are several cases where arbitrators have determined damages and/or costs *ex aequo et bono* without always having been explicitly authorized to do so. In the *Junghans Arbitration*[679] between Germany and Romania the tribunal determined *ex aequo et bono* certain elements of the compensation due to Germany for expropriated forest property.[680] Another example is the *Major Campbell Arbitration*[681] between Great Britain and Portugal concerning compensation to Major Campbell for damages suffered in Mozambique in relation to a mining concession. The arbitrator was instructed to decide in accordance

[674] 85 U.N.T.S. 350. – Miyoshi, note 668 *supra*, provides an extensive list of treaties containing arbitration clauses referring to *ex aequo et bono*.

[675] Reports of International Arbitral Awards, Vol. III (1949) 1441. The arbitrator decided that excessive force had been used; *id.* at 1446.

[676] Reports of International Arbitral Awards, Vol. III (1949) 1819.

[677] *Ibid.*, at 1824.

[678] But *see* e.g. the *British Claims in Spanish Morocco Case* (Reports of International Arbitral Awards, Vol. II (1949) 615) decided by Professor Huber, and which concerned a series of claims submitted by the British and Spanish Governments. The arbitrator clearly stated that it was his duty to resolve the issues on the basis of international law, since he had not been authorized to decide *ex aequo bono*; *ibid.*, at 651. On the other hand, he did take equitable considerations into account when deciding the issues, *see* e.g. *ibid.*, at 682 and 727.

[679] Reports of International Arbitral Awards, Vol. III(1949) 1885.

[680] *Ibid.*, at 1889–1891.

[681] Reports of International Arbitral Awards, Vol. II (1949) 1147.

with the principles of justice and equity. In concluding that compensation was to be paid by Portugal, the arbitrator stated that such compensation must be paid *ex aequo et bono*, since it could not be precisely appreciated.[682]

In the *Orinoco Steamship Company Case*[683] reviewing the original award rendered by the United States – Venezuelan Claims Commission of 1903, the arbitral tribunal in question reached a different result than the Claims Commission and decided to grant the United States partial compensation for costs, a claim which had been denied by the Claims Commission. The tribunal fixed the amount to be paid *ex aequo et bono*.[684]

3.5 Summary and Concluding Remarks

The first important conclusion to be drawn on the basis of the foregoing discussion is that party autonomy plays a dominant role in international arbitration, commercial as well as interstate.[685] This is neither a surprising nor a revolutionary conclusion. Rather, it follows from the consensual nature of arbitration: if the parties have not agreed to arbitrate there can be no arbitration. In my view it is important to note that party autonomy seems to be equally important in interstate and commercial arbitration.[686] This state of affairs raises the intriguing question whether this aspect of international arbitration is an example of cross-fertilization between the two forms of arbitration.[687] In my view it is not possible to draw any conclusion in this respect; there is no direct and unequivocal evidence to this effect. The more likely situation is that interstate and commercial arbitration have developed in parallel in this respect. The discussion above shows that party autonomy has from a very early stage been an essential part of both forms of arbitration. As mentioned above, this parallel development follows, it is submitted, from the consensual nature of arbitration.

[682] *Ibid.*, at 1157–1158. – *See* also the *Norwegian Shipowners' Claims Case* (Reports of International Arbitral Awards, Vol. I (1948) 309) where certain elements of the compensation due was determined *ex aequo et bono*; *id.* at 338–339 and at 341–342. Again no reference was explicitly made to *ex aequo et bono*, but rather to the principles of law and equity.

[683] Scott, The Hague Court Reports (1916) 226.

[684] *Ibid.*, at 234.

[685] *See* p. 78 *et seq.*, and p. 134 *et seq.*, *infra*.

[686] As will be discussed below this does not mean that there are no differences between interstate and commercial arbitration in this respect.

[687] *See* p. 24 *et seq.*, *supra*.

In international commercial arbitration party autonomy enjoys widespread, indeed universal acceptance.[688] It has occasionally been characterized as "a general principle of law recognized by civilized actions".[689] As far as interstate arbitration is concerned, there has been some criticism, albeit relatively mild and indirect, of unfettered party autonomy. This criticism proceeds from the policy orientation of the so-called New Haven School and seems to say that an international arbitral tribunal must take account of "public order interests".[690] This criticism does not seem to have left many traces in arbitral practice, nor in doctrinal writings. This does not mean, however, that there are no restrictions on party autonomy. In interstate as well as in commercial arbitration such restrictions do exist. Before addressing such restrictions, a further similarity between interstate and commercial arbitration should be noted, *viz.*, the obligation of arbitrators to respect party autonomy.[691] In other words, arbitrators *must* apply the law and/or rules agreed on by the parties, provided that none of the restrictions on party autonomy is applicable.[692] Should the arbitrators fail to respect party autonomy, the resulting award may be set aside on the ground that the arbitrators have exceeded their powers.[693] The situation is thus similar with respect to both categories of arbitration. There is one difference, however, *viz.*, that in commercial arbitration it is usually possible to find a national court of law which has jurisdiction with respect to nullification proceedings, whereas in interstate arbitration there is no court, tribunal or other entity vested with the authority to try nullity claims.[694] As far as the question of cross-fertilization is concerned in this respect, in my view it is again a situation where there has been a parallel development, rather than cross-fertilization.

As indicated above, there are certain restrictions on party autonomy in both interstate and commercial arbitration. As far as the latter category is concerned, there are three restrictions which are generally accepted, *viz.*, national public policy, mandatory rules of municipal law and international public policy.[695] While there is general acceptance at the conceptual level, there is significant uncertainty as to the practical application of the restrictions, in particular with respect to international public policy.[696]

[688] *See* p. 78 *et seq.*, *supra*.
[689] *See* note 36, *supra*.
[690] *See* p. 148 *et seq.*, *supra*.
[691] *See* p. 101 *et seq.*, and p. 152 *et seq.*, *supra*.
[692] *Ibid.*
[693] *Ibid.*
[694] *See* pp. 156–157, *supra*.
[695] *See* p. 106 *et seq.*, *supra*.
[696] *See* p. 128 *et seq.*, *supra*.

Moreover, the overriding issue of the role of the arbitrator in international commercial arbitration – i.e. the fact that he is under no obligation to apply any national law *a priori*, with the exception of the law chosen by the parties – is addressed differently both by arbitrators and national courts of law, thus adding to the uncertainty.[697]

The limitations on party autonomy in interstate arbitration are fewer. In fact, at the present stage of development of international law, it is possible to identify only one such limitation, *viz.*, *ius cogens*.[698] International public policy, which is mentioned from time to time also with respect to interstate arbitration, has not played any role in practice as a limitation on party autonomy, nor in legal writings.[699] Given the differences between municipal law and public international law, it is not surprising that there is no equivalent to national public policy and mandatory rules of municipal law in public international law. In view of the central role played by the UN Charter, and by the Security Council, a potential candidate to the equivalent of mandatory rules of municipal law could have been resolutions of the Security Council.[700] Having reviewed the role and function of the Security Council, the limitations on its competence and the circumstances under which Security Council resolutions are binding, I conclude, however, that Security Council resolutions do not, and cannot, constitute a limitation on party autonomy exercised with a view to agreeing on the law and/or rules to be applied to resolve a dispute.[701]

In the final section of this Chapter, there is a brief discussion of the situation when the parties to an interstate dispute have not exercised their party autonomy.[702] The traditional approach for arbitral tribunals is to apply public international law.

[697] *See* p. 108, *supra.*
[698] *See* p. 158 *et seq.*, *supra.*
[699] *See* p. 162, *et seq.*, *supra.*
[700] *See* p. 181 *et seq.*, *supra.*
[701] *See* pp. 204–208, *supra.*
[702] *See* p. 209 *et seq.*, *supra.*

CHAPTER 4 – Extinctive Prescription and Public international Law

4.1 Introduction

Most municipal legal systems contain rules with respect to the effect of lapse of time on claims and other rights. It would also seem to be the case that such rules have usually been in existence for long periods of time, albeit with different, or at least varying, contents over time. Rules on extinctive prescription often seem to have their origin in Roman law.[1] Also with respect to extinctive prescription in international law Roman law seems to play an important part.[2] By way of introduction, it is therefore worthwhile briefly to look at prescription in Roman law.[3]

With respect to prescription in international law it is important to distinguish between *acquisitive* prescription and *extinctive* prescription. The former is an instrument for the acquisition of property (territory). It operates "positively" in the sense that it brings about the transfer of title to territory.[4]

Extinctive prescription, on the other hand, operates in a "negative way", by bringing about the extinction of stale claims and obsolete titles.[5]

[1] *Cf.* e.g. Lindskog, Preskription (1989) 36–37.

[2] *See* discussion on p. 262 *et seq.*, *infra*.

[3] The extent to which Roman law concepts can and/or should serve as a subsidiary "source" of – or perhaps rather inspiration for – international law is a much debated question. Generally speaking, this issue raises the more fundamental question of the role of private law concepts in international law. As far as the role of Roman law in relation to international law is concerned, there seems to be a difference between Anglo–American lawyers and lawyers from continental Europe. As pointed our by Lauterpacht, the importance of Roman law in this respect has "become one of the characteristic features of British international jurisprudence", Lauterpacht, Private Law Sources and Analogies of International Law (1927) 24. It is interesting to note that while lawyers whose municipal legal systems have been rather reluctant in adopting Roman law are inclined to adopt Roman law notions for international law, lawyers whose municipal legal systems are based on Roman law seem to be more reluctant to do so; *cf.* Blum, Historic Titles In International Law (1965) 8, footnote 1.

[4] *See* Johnson, Acquisitive Prescription in International Law, British Yearbook of International Law (1950) 332 *et seq.*, and references in footnote 17, *infra*.

[5] This form of prescription is sometimes referred to as "limitation" in English and American law; the corresponding French term is "prescription liberatoire". In Black's Law Dictionary "statute of limitation" is defined as follows:

"A statute prescribing limitations to the right of action on certain described causes of action or criminal prosecutions; that is, declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued. Statutes of limitation are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced. In criminal cases, however, a statute of limitation is an act of grace, a surrendering by sovereign of its right to prosecute." – Black's Law Dictionary (5th ed. 1979) 835.

"Prescription" is given the following definition:

"Prescription is a preemptory and perpetual bar to every species of action, real or personal, when creditor has been silent for a certain time without urging his claim. Jones v. Butler, La.App., 346 So.2d. 790, 791." – *Ibid.*, at 1064.

As far as English law is concerned, Osborn's Concise Law Dictionary defines "statutes of limitation" in the following way:

"The Statutes which prescribe the periods within which proceedings to enforce a right must be taken or the right of action will be barred; *viz.*, the Limitation Act 1623; the Real Property Limitation Act 1833 and 1874; the Limitation Act 1939; the Law Reform (Limitation of Actions, etc.) Act 1954; the Limitation Act 1963 and the Limitation Act 1975. The time limits provided are as follows:

Actions founded on simple contract or tort (other than a tort involving personal injuries), or claims for rent: six years.

Actions for personal injuries: in general, three years, subject to any order of the court (Limitation Act 1939, ss. 2A, 2D; Limitation Act 1975, s. 1).

Actions for the recovery of land, or money charged on land, or due upon a covenant: 12 years. Where adverse possession of land is taken against the owner in possession, time begins to run immediately.

There is a 30-year period applicable to the Crown, etc.:

Actions claiming contribution between joint tortfeasors: two years (Act of 1963, s. 4).

The date from which time begins to run may be postponed for disability, fraudulent concealment, or mistake. It may be started running afresh by a signed written acknowledgement of the plaintiff's title, or by a part payment.

The defendant must plead the statutes is he desires to rely on them: the court will not of its own motion take notice that an action is out of time." – Burke, Osborn's Concise Law Dictionary (6th. ed. 1976) 205–206, and "prescription" is defined as follows:

"The vesting of a right by reason of lapse of time. Negative prescription is the divesting of a right by the same process. In Roman law the *praescriptio* was a clause placed at the head of the formula or pleadings (*prae*, before and *scribere*, to write). *Praescriptio* was also a variety of *usucapio*, i.e. a mode of acquiring property by undisturbed possession of a certain length of time.

At common law, a title by prescription was acquired by the enjoyment of a right from time immemorial, or time out of mind, from which an original grant was implied. Such *user* would be presumed from evidence of long actual *user*, but the presumption might be rebutted by proof that the enjoyment had in fact but *commanded* within legal memory. The doctrine of the lost modern grant overcame this difficulty by presuming from a long user than an actual grant of the easement or profit was made at some time subsequent to 1189, but prior to the user supporting the claim, and that unfortunately this grant had been lost." *Ibid.*, at 261.

As will be discussed below, much of the confusion in this area of public international law seems to stem from more or less pre-conceived notions, definitions and distinctions with respect to extinctive prescription, prescription and limitation. For purposes of this Study I shall generally use the term extinctive prescription when referring to international law and limitation or extinctive prescription when discussing municipal law.

In Roman law the concept of prescription seems to have been first introduced with respect to *acquisition* of property. Acquiring property as a result of lapse of time was originally called *usucapio.*

Usucapio meant that ownership of property was acquired by the continued possession of the property in question for a specified period of time.[6] To acquire ownership to property in this way it was necessary for the possessor to have a *justus titulus* and to have obtained possession *bona fide*. With respect to real property, possession had to last for two years and with respect to moveable property one year.[7] Originally *usucapio* was available only concerning property situated within the Roman empire proper, and only to Roman citizens. At a later stage this method of acquiring property was extended to the provinces and became known as *praescriptio longi temporis*. The difference was that *praescriptio* stipulated a longer time period and that acquisition of property did not occur *ipso iure,* but required an *exceptio*. Justinian brought these two forms of prescription together and introduced uniform rules to the effect that acquisition of moveable property required a period of three years, whereas with respect to real property the time period was ten years (*inter presentes*) and twenty years (*inter absentes*).[8]

There was yet another form of prescription, *viz.*, *possessio vel praescriptio immemorialis*. It was available when it was impossible to prove the origin of possession. This form of prescription did not confer title to property on the possessor, but merely created a rebuttable presumption of possession in his favor.[9]

Mention must also be made of the concept of *praescriptio actionis* in Roman Law.[10] This form of prescription was applied primarily in relation to claims, as opposed to acquisition of ownership. *Praescriptio actionis* did not bring about extinction of the claim (right) in question, but resulted in a loss of the possibility to institute a court action to enforce the right. One consequence of this, was that the right could be used for set-off purposes even after expiry of the stipulated time period, which seems to have been between 30 and 40 years. The time period was calculated as of the point in time when the claim in question became due.

[6] Mayer–Maly, Römisches Recht (Zweite, erweiterte auflage 1999) 76–81; Jolowicz, Historical Introduction to the study of Roman Law (2nd ed. 1952) 152; Tamm, Romersk rätt och europeisk rättsutveckling (2:a uppl. 1996) 92.

[7] Lee, Elements of Roman Law (3rd ed. 1952) 116; Mayer–Maly, *op. cit.*, at 77.

[8] Lee, *op. cit.*, at 121; Mayer–Maly, *op. cit.*, at 81.

[9] Blum, *op. cit.,* at 9–10.

[10] Nordling, Om präskription enligt svensk allmän förmögenhetsrätt (1877) 9 *et seq.*

When a *state* presents a claim against another *state* before an arbitral tribunal, or another international judicial body, the state must establish that it is qualified to make the claim and that the claim itself is viable. In other words, the claimant state must establish that the claim is *admissible*.[11] The admissibility of the claim in question must be established before a tribunal can address the merits of the claim. However, even before a tribunal can establish the admissibility of a claim it must determine that it has jurisdiction to try the claim. If a jurisdictional objection is successful – e.g. no arbitration agreement is found to exist, or if the arbitration agreement is not applicable to the dispute in question – it means that there will be no further proceedings in the case. Once jurisdiction has been established, however, the tribunal may still dismiss a claim if it is deemed not to be admissible. Admissibility of a state claim can, among other things, turn on the nationality of the claim[12], exhaustion of local remedies[13] and on alleged waiver of the claim.[14] A claim may also be characterized as inadmissible if there has been undue delay in presenting the claim, which is usually referred to as extinctive prescription.[15]

As will be discussed below, today it is usually accepted that the lapse of time may under certain circumstances prevent a claim from being tried on the merits by an arbitral tribunal or cause the claim to be denied on the merits.[16] Generally speaking, such lapse of time either forms part of the principle of extinctive prescription under public international law, or constitutes evidence of abandonment – or waiver – of the claim in question.[17]

[11] *See* e.g. Brownlie, Principles of Public International Law (5th ed. 1998) 506–507.

[12] Generally stated, a state can only file international claims on behalf of individuals having the nationality of the claimant state. The many and difficult aspects of the nationality rule concerning international claims is one of the classic topics of international law and the literature dealing with it is voluminous. In this context suffice it to refer to the discussion on p. 383 *et seq.*, *infra*, and references made there.

[13] The requirement of exhaustion of local remedies means that a claim will not be admissible at the international level unless the individual or entity in question has exhausted the legal remedies available to him in the state which caused the alleged injury. *See* discussion on p. 385 *et seq.*, *infra*, and references made there.

[14] *See* e.g. Brownlie, *op. cit.*, 505–506.

[15] *Ibid.*

[16] *See* p. 320 *et seq.*, *infra*; also with respect to the question whether extinctive prescription under public international law is of a procedural or substantive character.

[17] As will be discussed *infra*, p. 305 *et seq.*, there is a distinction to be made between waiver, or abandonment of a claim, on the one hand, and prescription of a claim, on the other. As mentioned above, there is also a distinction to be made between extinctive prescription and acquisitive prescription. While both deal with the effect of lapse of time under international law and while similar considerations at least partially underpin the two

Even though international tribunals had for some time been confronted with issues relating to extinctive prescription, it was not until 1924–1925 that the principle of extinctive prescription was made the object of a thorough scholarly study performed under the auspices of the Institut de Droit International.[18] In the report, reference is often made to international arbitral practice. To a large extent such arbitral practice at that time consisted of cases involving states in the Americas, many of which have been reported by Moore[19] and Ralston.[20] The latter has also published a number of monographs on international arbitration in general, covering also issues related to extinctive prescription.[21]

In 1953 Cheng published his well-known book *General Principles of Law (as applied by international courts and tribunals)*. His book contains a separate chapter on extinctive prescription, focusing on – as the title of the book implies – extinctive prescription as a general principle of law.[22]

While several additional articles have been published dealing with extinctive prescription in modern public international law,[23] the aforementioned works remain the most comprehensive and important ones.

As I have mentioned above, public international law will generally be applied by an international tribunal if the parties have not agreed otherwise. The purpose of this chapter is to discuss what public international law has to say about extinctive prescription. Before addressing the details of extinctive prescription – which is done in Sections 4.5 through 4.9 – it is necessary first to ascertain whether the *principle* of extinctive prescription

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concepts, the latter form of prescription is exclusively concerned with the creation of title over territory; *see* e.g. Verykios, La prescription en droit international publique (1934); Jennings, Acquisition of Territory (1963) 20–23; Pinto, 87 Hague Recuil (1955, I); Sörensen, La prescription en droit international, 3 NTIR (1932) 145–170; Blum, *op. cit.*, at 12–37.

[18] The report is discussed on p. 263 *et seq.*, *infra*. It was published in Annuaire de l'Institut de Droit International, Vol. 32 (1925) 2.

[19] *See*, in particular, Moore, History and Digest of the International Arbitrations to which the United States has been a party. 6 vols. (1898).

[20] *See* e.g. Ralston–Doyle, Venezuelan Arbitrations of 1903 (1904), also published as Senate Document No. 316, Fifty-eighth Congress, second session. A supplement to this volume is Report of French–Venezuelan Mixed Claims Commission of 1902 (1906), also published as Senate Document No. 533, Fifty-ninth Congress, first session.

[21] *See* in particular Ralston, The Law and Procedure of International Tribunals (1926), with a supplement published in 1936 (Supplement to 1926 Revised Edition).

[22] Cheng, General Principles of Law as applied by international courts and tribunals (1953), chapter 18.

[23] *See* notes 95, 101 and 102, *infra*. "Modern" in this context refers to writings published in the 20th century.

does indeed exist in public international law (Section 4.3) and also to examine the rationale underlying the principle, assuming it does exist (Section 4.4). As a background to the discussion of extinctive prescription under international law it is helpful briefly to touch upon certain aspects of prescription in municipal law, which is done in the following section (Section 4.2).

4.2 Extinctive Prescription (Limitation) in Municipal Law

4.2.1 Introduction

The purpose of this subsection is not to provide an exhaustive analysis of extinctive prescription (limitation) under the municipal laws of various jurisdictions, but rather to describe the general background to rules on limitation in municipal law. In my submission such a background is helpful in this Study for a number of reasons. *First*, it gives a general idea of the policy considerations underlying limitation under municipal law (Section 4.2.2). Such policy considerations may help to understand the principle of extinctive prescription under international law and problems associated with this principle. *Second*, municipal law solutions may generally serve as a source of inspiration in trying to find solutions to problems in international law; in particular it may be useful to understand how questions related to limitation are addressed in conflict of laws situations (Section 4.2.3). *Finally*, as I have discussed above, municipal law is one of the component parts of the "general principles of law recognized by civilized nations" which is referred to in Article 38(c) of the Statute of the International Court of Justice, and extinctive prescription is sometimes characterized as a general principle of law.[24] Municipal law rules on limitation may therefore have an impact on the principle of extinctive prescription under international law, since both concepts deal with the effect of lapse of time on claims.

4.2.2 Substantive Law Aspects

When rules on prescription with respect to claims were first introduced in municipal law systems, such rules were often derived from rules on acquisitive prescription with respect to real property.[25] Over time separate

[24] *See* Cheng, note 22, *supra*.

[25] This was, for example, the case with respect to Sweden, *see* Lindskog, Preskription (1989) 37–38.

rules on the prescription of claims were introduced.[26] Modern municipal legislation on prescription of claims varies as to content and scope of application. One critically important aspect is the time period, the expiry of which triggers prescription of a claim. This time period varies in different countries. In Sweden for example, it is ten years,[27] in Germany and France thirty years,[28] in England six years[29] and in the Russian Federation three years.[30] In addition to these time periods of general application, most municipal law systems have shortened time periods with respect to specific types of claims.

There are two additional aspects of municipal law rules on prescription of claims which stand out as being of utmost importance, *viz.*, the point in time as from which the time period in question is to be calculated and what measures will toll the time period. With respect to the first aspect, the choice is normally between the point in time when the claim arose and when it became due. Other possibilities do, however, exist. As far as the second issue is concerned, acknowledgement of the claim (debt) by the debtor, as well as initiation of legal action, e.g. court proceedings or arbitration proceedings, would normally toll the time period.

Another fundamental aspect of many municipal laws is to determine the scope of application of the rules on extinctive prescription, i.e. do such rules apply with respect to *all* rights and claims or should there be a differentiated approach?[31]

The effect of extinctive prescription is, generally speaking, to extinguish the right of the creditor, and seen from the debtor's perspective, to liberate him from the creditor's claim.[32] This effect is likely to influence the behavior of both the creditor and the debtor. The former will take care to enforce his right and collect his claim prior to expiry of the time period

[26] In the Scandinavian countries such rules were typically introduced during the 17th century, Lindskog, *op. cit.*, at 37–38, 43–44.

[27] § 2 Lagen om preskription.

[28] § 195 of the German Civil Code (Bürgerliches Gesetzbuch) and § 2219 of the French Civil Code (Code Civile).

[29] Sections 2A and 2D of the 1939 Limitation Act and Section 1 of the 1975 Limitation Act.

[30] Article 196 of the Civil Code of the Russian Federation, Part I.

[31] In Scandinavian legal doctrine, for example, there has for a long time been a consensus to the effect that extinctive prescription is not applicable with respect to rights *in rem*, but only in relation to rights and claims falling under the law of obligations. *See* e.g. Rohde, Obligationsrätt (1956) 653 *et seq.*; Braekhus & Haeveaus, Norsk tingsret (1964) 614 and Holmboe, Foreldelse av fordringer (1946) 26 *et seq.*

[32] This statement proceeds from the assumption that extinctive prescription is a question of substantive law, rather than procedural law; *cf.* discussion on p. 257 *et seq.*, *infra* concerning English and US law.

in question. Alternatively, he would attempt to toll the time period by taking appropriate measures under the relevant municipal law. As far as the debtor is concerned, he will probably dispose of receipts, invoices and other documents when the time period in question expires. On the other hand, and more importantly, he will probably keep such documents during the entire time period and not dispose of them prior to its expiry.

For the purposes of the present Study, it is of interest to discuss, albeit briefly, the grounds and reasons – the rationale – underlying municipal law rules on extinctive prescription.[33] This can be done from two perspectives, *viz.*, proceeding from the interests of the parties in question, or focusing on the public interest.[34]

As far as the interests of *the parties* are concerned, the *creditor* is primarily concerned with the possibility to enforce his rights. This means, *inter alia*, that rules on extinctive prescription must be formulated such that the creditor will not lose his right unexpectedly and that it should not be unnecessarily complicated to toll the time period in question. Generally speaking, however, it would seem that the interest of the *debtor* stands in focus in matters relating to extinctive prescription. From a practical point of view, the debtor has a need to be able to dispose of receipts and other evidence of payment after a certain period of time. After the

[33] For a discussion of the rationale underlying extinctive prescription in public international law, *see* p. 280 *et seq. infra*.

[34] The following discussion is to a large extent based on ideas expressed in the legal literature of the Scandinavian countries. In the opinion of the present author it is reasonable to assume that similar reasons for the existence of rules on extinctive prescription are to be found in most other legal systems, albeit sometimes expressed in a different way and using a different terminology. With respect to the Scandinavian countries, *see* e.g. Lindskog, *op. cit.*, at 53–61; Rohde, *op. cit.*, at 650–651 and Holmboe, *op. cit.*, at 16 *et seq.* As far as English law is concerned *see* Oughton–Lowry–Merkin, Limitation of Actions (1998) 3–10. With respect to Swiss law, *see* e.g. Girsberger, Adjudication of Claims: The Statute of Limitation, in Karrer (ed.), The Claims Resolution Process on Dormant Accounts in Switzerland (Swiss Arbitration Association Special Series No. 13, 2000) 80, with references. *Cf.* Also the following statement by Lauterpacht concerning the concepts of estoppel, prescription and laches: "Apart from the differences in terminology and from the fact that in common law countries the doctrine has received a more thorough and systematic treatment, there is nothing that would justify us in asserting that the position is radically different in various systems of law", Lauterpacht, Private Law Sources and Analogies of International Law (1927) 204. (As I shall explain in the following a distinction must, however, be made between extinctive prescription and estoppel, *see* p. 305, *et seq.*, *infra*). – While the distinction between the interests of the parties and the public interest is – it is submitted – useful with a view to shedding light on the reasons underlying extinctive prescription in municipal law, it must be emphasized that too far-reaching conclusions must not be drawn on the basis of this distinction. It goes without saying, that there is some overlap between the two categories, in the sense that rules based primarily on the public interest will often be beneficial also to parties, and *vice versa*. The distinction between the two categories is based on the *typical* interest of the parties and the *typical* public interest.

expiry of a specified period of time there is no need for him to keep any evidence in this respect. Another important aspect for the debtor is to be able to rely on the fact that he will not be asked to pay the amount in question to the creditor after expiry of the specified time period. It may be, for example, that the creditor's claim is doubtful from a legal point of view, or that the creditor has simply forgotten to claim payment from the debtor. For the debtor to plan his commercial and economic activities, he must be able to rely on the fact that the expiry of the time period in question will release him from further obligations.

As far as the *public interest* is concerned there are primarily three aspects which must be mentioned.

First, it would seem to be in the public interest to limit the evidence presented in courts to such evidence which can reasonably be expected to be reliable and capable of bringing about a just outcome of disputes. Generally speaking, the older the evidence is, the more unreliable it is. The introduction of a specific time period, the expiry of which makes it unnecessary to keep evidence, typically ensures that courts do not need to base their decisions on evidence which is old and unreliable.

Second, there would generally seem to be a public interest to have parties settle their legal relationships without undue delay. This applies in particular with respect to legal relationships where some form of uncertainty exists. This uncertainty will then be eliminated by having the legal relationship settled. By introducing a specific time period the legislator ensures that certainty is created at the latest at the expiry of said period. In this way extinctive prescription sets an ultimate limit for how long a legal relationship can stay dormant.

Finally, it is in the public interest to bring about harmonization between the factual situation and the legal situation. Put differently: the legal situation ought to be adapted to the factual situation. By providing for the extinction of a right after a certain period of time – assuming that the right has not been exercised, nor relied on, during the same period of time – the legal situation is adapted to the factual one. By not relying on, nor exercising, the right during the time period in question, a presumption against its existence could be said to arise; to the general public it would appear as if the right in question did not exist. It is in the public interest to create order, certainty and predictability by ensuring that the legal situation corresponds to the factual situation.

4.2.3 Conflict of Laws Aspects

As far as conflict of laws rules are concerned, the discussion has traditionally focused on whether extinctive prescription is a matter of substantive law or procedural law.

In common law countries, extinctive prescription has traditionally been characterized as a matter of procedural law and thus governed by *lex fori*. One consequence of this approach is that a foreign cause of action is not allowed if the action is time-barred under *lex fori*. Conversely, such an action is admissible if *lex fori* provides for a longer period of limitation than *lex causae*. This approach, i.e. applying *lex fori* to extinctive prescription, would typically seem to encourage forum-shopping, with a view to finding the longest possible time period. As far as US law is concerned attempts have been made to limit the possibilities of forum-shopping.[35] For example, US courts have from time to time distinguished between extinctive prescription effecting *the right* as such, on the one hand, and only *the remedy*, on the other. When the foreign rule is intended to extinguish the right, it will be characterized as a substantive rule and thus be applied by the court of the forum.[36] In addition, most states in the US have introduced so-called borrowing statutes, representing a modification of the traditional approach and also aiming at preventing forum-shopping.[37] Typically, a borrowing statute provides that the cause of action will be barred in the forum, assuming it is barred in the state where it arose. Such statutes normally borrow the foreign limitation period as well as the foreign tolling provisions.[38] The borrowing statutes seem to have been a rather efficient way of limiting forum-shopping.

[35] *See* generally, Wurfel, Statute of Limitations in the Conflict of Laws, North Carolina Law Review (1974) 489; Grossman, Statutes of Limitation and the Conflict of Laws: Modern Analysis, Arizona State Law Journal (1980) 1.

[36] For a discussion and analysis of cases supporting this approach, *see* Scoles & Hay, Conflict of Laws (1982) 60–62. – The traditional approach under US law, however, has been to characterize extinctive prescription as a procedural matter, *see* Restatement of Conflict of Laws (1934) §§ 603, 604.

[37] An example of such a borrowing statute is the following provision in the law of the State of Illinois:

"When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and, by the laws thereof, an action therein cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state"

(Ill.Rev.Stat. ch. 83, par. 21 (1979), as quoted in Scoles & Hay, *op. cit.*, at 62 n. 2 – For comments on borrowing statutes *see* e.g. Ester, Borrowing Statutes of Limitation and Conflicts of Law, University of Florida Law Review (1962) 33; Vernon, Statutes of Limitation in the Conflict of Laws: Borrowing Statutes, Rocky Mountain Law Review (1960) 287 and Note, Legislation Governing the Applicability of Foreign Statutes of Limitation, Columbia Law Review (1935) 762.

[38] *See* Scoles & Hay, *op. cit.*, at 63.

Since the statutes vary as to contents and since they have been interpreted and applied differently by different courts, the borrowing statutes have not, however, been capable of solving all problems in this connection. For this reason some jurisdictions have re-evaluated the old approach of characterizing extinctive prescription as a procedural matter and now characterize it as substantive in nature. The leading case in this connection is *Heavner v. Uniroyal, Inc.*[39]

Despite the developments described above, some courts still adhere to the traditional characterization of extinctive prescription as procedural. US law therefore still presents a mixed picture. This notwithstanding and considering that the Restatement, Second has abandoned the "procedural" v. "substantive" terminology, it is more likely than not that extinctive prescription would be viewed today as a matter of substantive law.[40]

With respect to international commercial arbitration it is worthwhile noting an interesting decision by a US court. In *Hanes Corp v. Millard*[41] French citizens had assigned patents to an American citizen. Eventually the French citizens initiated arbitration proceedings pursuant to the contract, claiming royalties. The respondent (the assignee) brought suit in the federal courts asking, *inter alia*, for a declaration that the claim was time-barred by the statute of limitations. The court noted that it could be argued that limitation was based on "the statutory law of remedies rather than the substantive rights created by contract".[42] This notwithstanding, the court referred the dispute to arbitration, relying, *inter alia*, on the strong federal policy favoring commercial arbitration, particularly in the international field. In this connection, the court said:

> "... the agreement to arbitrate may represent, if not a designation by the parties of a particular statute of limitation to govern all claims, at least a commission of the authority to select and apply the statute to an arbitrator expected to be sensitive and sympathetic to the peculiar needs of international commerce".[43]

[39] 63 N.J. 130, 305 A. 2d 412 (1973). For a discussion of the case *see* Scoles & Hay, *op. cit.*, at 65–67. In concluding that *lex fori* should not be applied but rather the "foreign" law (North Carolina), the court took account of five factors, *viz.*, that (i) the cause of action arose in another jurisdiction, (ii) the parties were present there and amenable to jurisdiction there, (iii) New Jersey had no substantial interest in the matter, (iv) the substantive law of the foreign state was to be applied and that (v) the period of prescription had expired in the foreign state; *id.*

[40] Scoles & Hay, *op. cit.*, at 67.

[41] 531 F. 2d 585 (D.C. Cir. 1976).

[42] *Id.*, at 598.

[43] *Id.*, at 599.

In *England* the traditional approach was also to classify issues of extinctive prescription as procedural and thus governed by *lex fori*. This approach is based on the reasoning that the limitation rule in question takes away the remedy only. If both the remedy and the right as such are taken away, the limitation rule would be characterized as substantive and governed by *lex causae*.[44] The traditional position taken by English courts also seems to have prevailed in international commercial arbitrations taking place in England, at least in one reported case.[45] By the introduction of the 1984 Foreign Limitation Periods Act, however, the position of English law has changed fundamentally.[46] The main rule under the Act is that the limitation rules of *lex causae* are to be applied in court actions in England. This means that English rules on prescription are to be applied only if English law is *lex causae*. There is one exception, however, to the main principle: Pursuant to Section 1 of the Act, it cannot be applied if it conflicts with English public policy. Section 2(2) of the Act goes on to define public policy as causing undue hardship for the party in question.[47] Such hardship was found to exist in a case where the defendants had agreed to an extension of the limitation period which turned out to be ineffective under *lex causae*.[48] Undue hardship was found present in another case where the (foreign) limitation period was 12 months and the defendant had spent some time in hospital and had been led to believe that the claim would be satisfied.[49] The 1990 Contracts (Applicable Law) Act confirms the position taken in the 1984 Foreign Limitation Periods Act in that it gives effect to articles 3 to 6 and 10 of the 1980 EC Convention on the Law Applicable to Contractual

[44] Dicey and Morris (ed. Collins), The Conflict of Laws (12th ed. 1993) 45–46.

[45] *Cf.* e.g. *Licensor Oy (Finland) v. Licensee Pty (Australia)* reported in Journal of International Arbitration (1985)75 – In this case English rules of extinctive prescription were applied despite the fact that neither party was English and that English law had not been chosen by the parties to govern the contract. The only connection with England was the fact that the agreement provided for arbitration in London.

[46] The act is based on the recommendations of the Law Commission: Classification of Limitation in Private International Law. Law Commission No. 114 (1982) For a commentary on the Act, *see* e.g. Carter, The Foreign Limitation Periods Act 1984, 101 Law Quarterly Review (1985) 68. – A few years ago the Supreme Court of Canada rejected the traditional classification of limitation rules as procedural. In *Tolofson v. Jensen* (1994) 120 D.L.R. (4th) 299 (Sup. Ct. Can.) it held that periods of limitation are to be characterized as substantive and thus governed by *lex causae*.

[47] Section 2(2) reads:

"The application of Section 1 above in relation to any action or proceeding shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be, a party to the action or proceeding".

[48] Dicey & Morris, *op. cit.*, at 187.

[49] *Ibid.*

Obligations.[50] Article 10 of the Convention stipulates that the proper law of the contract, as determined pursuant to the rules of the Convention "shall govern in particular ... (d) the various ways of extinguishing obligations, and prescription and limitation of actions".[51]

In civil law countries extinctive prescription is generally classified as a matter of substantive law and thus governed by *lex causae*, i.e. in the case of contracts by the proper law of the contract. This means that the rules on extinctive prescription of *lex causae* are incorporated into the contract, including the period of limitation as well as rules on extension and tolling of the time period.[52] Also under civil law systems questions relating to extinctive prescription may – at least theoretically – raise public policy concerns, in particular, perhaps, if the rules of *lex fori* are more restrictive than those of *lex causae*. It may then be tempting for the forum court to reject *lex causae*. Generally speaking, however, it would – in the opinion of the present author – seem highly unlikely that a mere difference in limitation periods would constitute a violation of public policy.[53]

For the civil law countries of Europe, the 1980 EC Convention On the Law Applicable to Contractual Obligations is of importance. As mentioned, Article 10.1 (d) of the Convention makes it clear that it firmly puts questions concerning extinctive prescription in the substantive – as opposed to procedural – category and thus governed by *lex causae*.

[50] De Europeiske Fællesskabers Tidende L 266, 9 October 1980.

[51] It is interesting to note that application of the governing law under the 1990 Contracts (Applicable Law) Act may be refused if it would be *manifestly* contrary to English public policy, Article 16, whereas in the 1984 Foreign Limitation Periods Act reference is made to "undue hardship" as constituting English public policy. It would seem, however, that the "undue hardship" test adequately expresses the relevant public policy rule of English law and that, consequently, the addition of "manifestly" does not change this conclusion, *see* Dicey & Morris, *op. cit.*, at 1268.

[52] For example, in German law this is laid down in Article 32, par. 1, item 4 of the promulgation law of the Civil Code (EGBGB), *see* e.g. Kropholler, Internationales Privatrecht (2nd. ed. 1994) 102–103. In the case of France, *see* Holleaux – Foyer – de la Pradelle, Droit international privé (1987) 400. For some time French courts seemed inclined to apply the law of the debtor's domicile rather than the proper law of the contract. This approach has now been abandoned in favour of *lex causae*, *see* Battifol, Droit international privé (6th ed. 1976) Vol. II 303–305. In the case of Switzerland, the traditional civil law approach is enshrined in Article 148(1) of the 1987 Swiss Law on Private International Law. As far as Sweden is concerned this follows from a decision by the Swedish Supreme Court in an inheritance matter, NJA 1930 p. 692; *cf.* Bogdan, Lärobok i svensk internationell privat- och processrätt (5th ed. 1999) 66–67.

[53] *Cf.* Delaume, Transnational Contracts. Applicable Law and Settlement of Disputes (1989) 34 where it is said: "Civil law courts appear generally reluctant to consider rules of prescription as a matter of public policy in the international, as opposed to the domestic, sense". – In the case of Sweden, *cf.* Lindskog *op. cit.*, at 619.

In this connection, mention must also be made of the 1974 Convention on the Limitation Period in the International Sale of Goods.[54] The Convention provides for a general limitation period of four years for international sales transactions,[55] calculated as from the date when a claim accrues.[56]

The Convention attempts to bring about a harmonization of *substantive rules* on extinctive prescription. Consequently, it does not address conflict of laws aspects at all. Rather, Article 3(2) of the Convention stipulates:

> "Unless the Convention provides otherwise, it shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law."

This provision notwithstanding, the Convention surprisingly refers to the "law applicable to the contract"[57] and to the "law governing the arbitration proceedings".[58]

While drafting the U.N. Convention on Contracts for International Sale of Goods it became clear that the draft convention differed in several respects from the 1974 Convention. Therefore, in a Protocol annexed to the new convention, the 1974 Convention was amended. Article I of the Protocol deletes Article 3(2) of the 1974 Convention and replaces Article 3(1) with the following language, *inter alia*, introducing the conflict of laws dimension:

> "1. This Convention shall apply only:
>
> a) if, at the time of the conclusion of the contract, the places of the business of the parties to a contract of international sale of goods are in contracting states; or
>
> b) if the rules of private international law make the law of the contracting state applicable to the contract of sale."[59]

[54] The Convention entered into force on 1 August 1988 and has now been ratified by twenty states; for general comments, *see* e.g. Smit, Convention On the Limitation Period. UNCITRAL's First Born, American Journal of Comparative Law (1975) 337.

[55] Article 8 of the Convention.

[56] Article 9(1) of the Convention.

[57] Articles 12(1) and 22(3) of the Convention.

[58] Article 14(1) of the Convention.

[59] The Protocol entered into force on 1 August 1988. As yet, no member state of the European Union has signed the Convention or the Protocol. If this will be the case, interesting potential problems may arise in relation to the 1980 EC Convention on the Law Applicable to Contractual Obligations. Article 10 of the latter stipulates, as previously mentioned, that extinctive prescription is governed by the proper law of the contract and Article 2 provides that any law specified by the Convention "shall be applied whether or not it is the law of a contracting state".

It would thus seem that the objective of the 1974 Convention, *viz.*, to harmonize the substantive rules on extinctive prescription with respect to the international sale of goods, has not yet been obtained, but that there is still a need to resort to conflict of laws rules.

With these general remarks on extinctive prescription (limitation) in municipal law, I now turn to public international law.

4.3 Does Extinctive Prescription Exist Under Public International Law?

4.3.1 Introduction

As discussed in Section 3.4, even though Article 38 of the Statute of the International Court of Justice strictly speaking is an instruction to the Court, it is generally recognized as the most authoritative statement concerning the sources of international law.[60] There are no international conventions of general applicability dealing with extinctive prescription.[61] The discussion below thus focuses on decisions rendered by international tribunals and on writings of publicists. This is primarily a consequence of the fact that issues relating to extinctive prescription seldom arise in practice unless there is a dispute between two states and that such issues are seldom squarely addressed unless the dispute is resolved by a judicial body. The resulting awards and decisions are then subsequently

[60] *See* Brownlie, *op. cit.*, at 3, and Hudson, The Permanent Court of Justice (1943) 601 *et seq.* – The sources of international law is needless to say one of the most fundamental questions of international law and it has been the subject of many learned writings. It is not proposed to enter into this discussion here, but merely to provide some points of departure for the following discussion; *cf.* also discussion on p. 202 *et seq.*, *supra*. The literature on the sources of international law is truly overwhelming; suffice it in this context to refer to the following works of a general nature: Brownlie, *op. cit.*, at 1–32, Parry, The Sources and Evidences of International Law (1965); Lauterpacht, International Law: Collected Papers, Vol. 1 (1970) 58–135; Tunkin, Theory of International Law (1970) 89–203; Jennings, 121 Hague Recueil (1967, II); Rosseau, Droit International Public, Vol. 1 (1971) 55–443; Verzijl, International Law in Historical Perspective, Vol. 1 (1968); Virally, The Sources of International Law, in Manual of Public International Law (ed. Sørensen) (1968) 116 *et seq.* and Higgins, Sources of International Law: Provenance and Problems, in Problems and Process. International Law and How We Use It (1994) 17–38.

[61] For a discussion of – predominantly bilateral – treaties containing provisions relating to time limits for the presentation of claims, *see* King; Prescription of Claims in International Law, 15 British Yearbook of International Law (1934) at 84–87; – *See* p. 372 *et seq.* for a discussion of the lack of provisions on extinctive prescription, and on time limits for the presentation of claims, in multilateral and bilateral treaties.

commented upon by legal scholars.[62] It is true that neither judicial decisions nor writings of publicists are primary sources of international law, since Article 38(1) (d) of the Statute of the International Court of Justice refers to them as "subsidiary means for the determination of rules of law".[63] On the other hand, it is submitted that from a practical point of view judicial decisions play a very important role as *evidence* of the *contents* of international law and have in some cases been considered as authoritative evidence of the state of international law.[64] Judicial decisions often fulfill the role of constituting evidence of international law both with respect to international custom[65] and the general principles of law.[66] In fact, as far as extinctive prescription is concerned, being an issue which, typically, arises in a procedural context, it is probably difficult to find other evidence than judicial decisions, and writings of publicists commenting upon them.

4.3.2 Opinions of Writers

4.3.2.1 From Grotius to the Institut de Droit International

Even though questions concerning extinctive prescription had been raised from time to time in international arbitrations and in scholarly works, as mentioned above, it was not until 1925 that extinctive prescription was

[62] Reports by expert bodies – such as e.g. the Institut de Droit International, *see* note 18, *supra* and accompanying text, fall into a category of their own, but are at least analogous to writings of publicists; *cf.* Brownlie, *op. cit.,* at 25.

[63] *Cf.* p. 237 *et seq., supra.*

[64] Brownlie, *op. cit.,* at 19, who adds that the practical importance of the label "subsidiary means" should not be exaggerated.

[65] It will be recalled that establishing the existence of international custom requires that four criteria are met, *viz.*, (i) a certain duration of the practice in question, (ii) uniformity and consistency of the practice, (iii) generality of the practice and (iv) *opinio juris et necessitatis*, i.e. a generally held opinion to the effect that the practice constitutes a legal obligation. *Cf.* e.g. Brownlie, *op. cit.,* at 4–11. For a discussion of custom in international law, *see* also D'Amato, The Concept of Custom in International Law (1971); Akehurst, Custom as a Source of International Law, 47 British Yearbook of International Law (1974–75) 1 *et seq.*; Thirlway, International Customary Law and Codification (1972); Wolfke, Custom in Present International Law (1964); De Lupis, The Concept of International Law (1987); *cf.* the discussion on p. 217 *et seq., supra.*

[66] According to Oppenheim, International Law, Vol. 1 (9th ed. 1996) at 36–37, the reference to general principles was intended "to authorize the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States". *Cf.* also McNair, The General Principles of Law Recognised by Civilised Nations, British Yearbook of International Law (1957) 1 *et seq.* and Lauterpacht, Private Law Sources and Analogies in International Law (1927); and Cheng, note 22 *supra,* at 1–29 and 373–397; *cf.* discussion on p. 222 *et seq., supra.*

made the object of a thorough scholarly study performed under the auspices of the Institut de Droit International.[67]

Before I discuss the report of the Institut de Droit International, it is worthwhile to take a brief look at the opinions of some of the classic writers on international law. In doing so I will include the opinions of such writers on acquisitive prescription in international law. I do so because rules on extinctive prescription have to a certain extent developed on the basis of rules on acquisitive prescription and because similar considerations, at least partially, form the basis of these two concepts.[68] This being said, it should, however, be emphasized that acquisitive and extinctive prescription, respectively, are indeed two separate and distinct concepts in modern international law which fulfill different functions.[69] It is therefore advisable not to draw too far-reaching conclusions from discussions on acquisitive prescription when analyzing extinctive prescription.[70]

Starting then with Grotius, we note that in his *Mare Liberum*, published in 1609, he rejected the idea of international prescription, taking the view that this was a matter of municipal law. In his famous *De Jure Belli ac Pacis*, published in 1625, however, he modified his position so as to accept the Roman law concept of immemorial possession and suggested that possession of property for a century should be sufficient to transfer ownership.[71] While accepting immemorial possession, he continued to reject *usucapio*[72] at the international level.[73] Vattel, however, in his *Droit des gens*, published in 1758, took the position that *usucapio* was part of the law of nations. He explained it in the following way:

[67] *See* note 18 *supra*.

[68] *Cf.* note 17 *supra*. – The tribunal in the *Williams Case* – as reported in Moore, *op. cit.*, Vol. 4, at 4183 – when discussing various authorities on extinctive prescription said, *inter alia*: "... and further, that while the texts will be seen largely to relate to territorial acquisitions, the principles announced comprehend the acquisition and loss of personal property, and pertain to other rights as well".

[69] As noted at p. 240 *supra*, extinctive prescription brings about the extinction of claims, whereas acquisitive prescription has a "positive" function in that it effectuates transfer of title to territory.

[70] *See* p. 280 *et seq.*, *infra*, for a discussion of the rationale underlying extinctive prescription in international law.

[71] Grotius, De Jure Belli ac Pacis (ed. Scott) (1925) book II, chapter IV, section IX, as quoted by Blum, *op. cit.*, at 16.

[72] For a description of *usucapio*, *see* p. 250, *supra*.

[73] Blum, *op. cit.*, at 16. – As pointed out by Blum, however, *ibid.*, at 17, the distinction drawn by Grotius between *usucapio* and immemorial possession would seem to have little practical relevance.

> "After having shown that usucaption and prescription are founded in the law of nature, it is easy to prove that they are equally a part of the law of nations and ought to take place between different states. For the law of nations is but the law of nature applied to nations in a manner suitable to the parties concerned. And so far is the nature of the parties from affording them an exemption in the case, that usucaption and prescription are much more necessary between sovereign states than between individuals."[74]

Approximately one hundred years later Wheaton said the following, in his Elements of International Law, first published in 1836:

> "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it is called the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other; in the same manner as by the law of nature, and the municipal code of every civilized nation, a similar possession of the individual excludes the claim of every other person to the article of property in question."[75]

There are a number of writers at the beginning of the 20th century who also confirm the existence of prescription in international law.[76] These include Fauchille,[77] Hershey,[78] Nys[79] and Westlake.[80] Even though many writers at this time seemed to be in favor of upholding international prescription, there were – in fact ever since Grotius – writers who did not

[74] Droits des gens, Book 2, chapter 11; as quoted by the tribunal in the *Williams case*, *see* Moore, note 19, *supra,* at 4184.

[75] Elements of International Law (6th ed.) 218; as quoted by the tribunal in the *Williams Case*, *see* note 74 *supra,* at 4183. – At about the same time Phillimore in his Commentaries upon International Law, first published in 1854, took the same view; he added with respect to the time period: "... and it will, on the other hand, be found both inexpedient and impracticable to attempt to define the exact period within which it can be said to have become established, or, in other words, to secure the precise limitation of time which gives validity to the title of national possessions"; as quoted by the tribunal in the *Williams Case*, *see* note 74, *supra,* at 4184. – Other 19th century writers supporting the existence of prescription in international law include, Audinet, De la prescription acquisitive en droit international public, 3 Revue Générale de Droit International Public (1896) 313 and Hall, Treatise on International Law (8th ed. 1924) 143 (first published in 1880).

[76] As pointed out by Blum, *op. cit.,* at 17, the advocates of international prescription by and large followed the views of Vattel, whereas the opponents – *see* p. 264, *infra* – sought guidance from Grotius.

[77] Fauchille, Traité de droit international public (8th ed. 1925) Vol. I, 757.

[78] Hershey, The Essentials of International Public Law (1912).

[79] Nys, Le droit international (1912) Vol. II 40.

[80] Westlake, International Law (2nd ed. 1910) 94.

accept this idea. For example, Crallé in the first edition of Digest of International Law, published in 1886, said:

> "There is no statute of limitation as to international claims, nor is there any presumption of payment or settlement from the lapse of twenty years. Governments are presumed to be always ready to do justice, and whether a claim be a day or a century old, so that it is well founded, every principle of natural equity, of sound morals, requires it to be paid."[81]

Other writers denying the existence of prescription in international law include von Liszt and Hold-Ferneck.[82] It would seem that this view is based on considerations of sovereignty and equality in international law. The underlying philosophy seems to be that a claim which has arisen with a sovereign state will continue to exist without any limitation, unless the sovereign state in question has agreed otherwise. Any other solution would infringe on the sovereignty of the state and create an unequal situation in that the state is treated differently than other states.[83] For other writers denying the existence of prescription in international law the crux of the matter seems to have been that there are no fixed time periods laid down in international law, and therefore – they argue – there cannot be any prescription. Pomeroy, for example, states that prescription has been denied in public law because it has "no definite fixed limit".[84] It is quite possible that this difficulty stems from the possibility that there may have been confusion between "limitation", as this term was used in municipal law,[85] and prescription as understood in inter-

[81] As quoted by the tribunal in the *Williams Case*, *see* note 74, *supra,* at 4190. Crallé was Assistant Secretary of State. – In the second edition, issued in the following year, however, he took a different view and said, *inter alia*: "A government can not any more rightfully press against a foreign government a stale claim, which the party holding declined to press when the evidence was fresh, than it can permit such claims to be the subject of perpetual litigation among its own citizens." *Ibid.*

[82] *See* Sörensen, La Prescription en Droit International, 3 NTIR (1932) 147, 148. – For a list of writers who do not accept international prescription, *see* Verykios, La prescription en droit international public (1934) 201–203.

[83] *See* the Report of l'Institut de Droit International, *supra*, note 18, at 3, 11–12 and Roch, La Prescription Libératoire s'applique-t-elle en droit international publique?, 27 Revue de Droit International (1949) 254.

[84] As quoted by the tribunal in the *Williams Case*, *see* note 74 *supra* at 4193. – Writers such as Heffter (Das europäische Völkerrecht der Gegenwart (8th ed. 1888) 38, de Louter (Le droit international public positif (1920, Vol. I, 341) and Rivier (Principes du droit des gens (1896, Vol. I, 182–183) seem to have the same problem with international prescription; *see* Blum, *op. cit.*, at 17. As pointed out by Blum, however, the three aforementioned writers do accept the existence of immemorial possession in international law. We have already noted in note 75 *supra* that the difference between immemorial possession and international prescription (*usucapio*) as explained by these writers – and Grotius – was probably of little practical significance.

[85] *See* note 5, *supra*.

national law, the former being based on fixed time limits, whereas the latter also takes account of other circumstances than the flux of time.[86] Against this background the opposition to international prescription would seem to have been more apparent than real.[87] This would also seem to be confirmed by the fact that some of the writers opposing international prescription do nevertheless accept the concept of immemorial possession.[88]

4.3.2.2 The Institut de Droit International and Onwards

At its session in 1924, the Institut de Droit International decided to take up the question of extinctive prescription in public international law. Messrs. Politis and de Visscher were appointed rapporteurs. A preliminary report was prepared and sent to a number of experts in public international law – together with a questionnaire – for comments.[89] On the basis of the preliminary report and comments from the experts, the final report was published in 1925. Comments from some of the experts were attached to the report.[90]

[86] *See* discussions on p. 285 *et seq.*, *infra*.

[87] *See* the *Williams Case*, note 74, *supra,* at 4190.

[88] *See* note 75 *supra*.

[89] The preliminary report and the questionnaire were sent to the following persons: Messrs. Alberic Rolin, Alvarez, Anzilotti, Diena, Niemeyer, Nolde, Scott, Strisower, Basdevant, Bourquin and Gide. The questions were as follows:

1) Y a-t-il des raisons pour appliquer le principe de la prescription libératoire aux obligations entre Etats?
2) Dans l'affirmative, une réglementation de la matière, est-elle recommandable? Si oui, conviendrait-il d'y procéder d'emblée, par la conclusion d'une convention générale, ou graduellement, par des traités particuliers ou bilatéraux?
3) Y a-t-il lieu d'approuver la distinction faite au point de vue de la prescription libératoire par la jurisprudence arbitrale entre les dettes d'origine publique et les dettes d'origine privée?
4) Y a-t-il lieu d'approuver et éventuellement de généraliser la distinction faite par la jurisprudence arbitrale relativement aux dettes de nature délictuelle entre le retard apporté à la production de la réclamation diplomatique et celui qui s'applique à son renouvellement?
5) S'agissant d'une dette d'origine privée, dans quelle mesure les règles de prescription applicables à cette dette doivent-elles réagir sur le sort de la réclamation diplomatique qui a pour objet d'en assurer le recouvrement? La production d'une réclamation diplomatique est-elle une cause d'interruption de la prescription de la dette – si oui, quel est l'effet de cette interruption?
6) Un accord entre Etats sur les délais de la prescription libératoire apparaît-il comme possible? Si oui, sur quelle base pourrait-on le concevoir? *See*, Annuaire de l'Institut de droit International, Vol. 32 (1925) 2.

[90] The report is published in the 1925 Annuaire de l'Institut de Droit International, *see* note 18, *supra*. – Comments were received from Messrs. Alberic Rolin, Niemeyer, Strisower and Bourquin. They are reproduced in the Annuaire on p. 24 *et seq.* All these experts answered the first question in the questionnaire – *see* note 89, *supra* – in the affirmative, thus acknowledging the principle of extinctive prescription.

One conclusion arrived at in the study was that extinctive prescription was a general principle of law and should be accepted as such by international courts and tribunals.[91] This was expressed in the report in the following way:

> "I. Des considérations pratiques d'ordre, de stabilité et de paix, depuis longtemps retenues par la jurisprudence arbitrale, doivent faire ranger la prescription libératoire des obligations entre l'Etats parmi les principes généraux de droit reconnus par les nations civilisées, dont les tribunaux internationaux sont appelés à faire application."[92]

The report goes on to set forth the following general rules with respect to prescription:

> "II. A défaut de régle conventionnelle en vigueur dans les rapports des États en litige, fixant le délai de la prescription, sa détermination est une question d'espèce laisèe à la souveraine appréciation du juge international, qui, pour admettre le moyen tiré du laps de temps, doit discerner dans les circonstances de la cause l'existence d'une des raisons par lesquelles la prescription s'impose.
>
> III. Parmi les éléments propres à éclairer la réligion (*sic*) du juge international, il convient de retenir:
>
> (1) L'origine publique ou privée et le caractère contractuel ou délictuel de la dette qui fait l'objet du litige, la prescription devant, en règle générale, être plus difficilement admise pour les dettes publiques que pour les dettes d'origine privée, pour les dettes contractuelles que pour les dettes délictuelles;
>
> (2) La circonstance que le retard de la réclamation s'applique à sa production ou simplement à son renouvellement, la prescription ne devant plus être admise dans la deuxième hypothése s'il est établi en fait que l'inaction subséquente de l'État réclamant est imputable à la partie adverse ou à un cas de force majeure.
>
> IV. La prescription d'une créance d'origine privée, conformément à le loi interne compétente, rend irrevocable la réclamation internationelle, à moins que l'on ne puisse mettre en discussion, d'après les règles du droit international, le bien-fondé de cette prescription elle-même.
>
> V. Le juge international ne peut suppléer d'office le moyen tiré de la prescription."[93]

[91] *See* discussion at p. 272 *et seq.*, *infra*.
[92] Note 18, *supra*, at 22–23.
[93] *Id.*, at 23.

Many of the conclusions in the report of the Institut de Droit International were directly and indirectly confirmed by the League of Nations Committee of Experts for the Progressive Codification of International Law in its report of 1928. The decision of the Committee was, however, not to attempt to prepare treaty provisions on extinctive prescription, a decision which was based more on the practical problems of trying to codify international law than on a denial of the existence of the principle of extinctive prescription.[94] A number of writers during the period between the two world wars did also express the opinion that the principle of prescription did exist in international law.[95]

[94] League of Nations Committee Of Experts For the Progressive Codification of International Law (1925–1928). Minutes, at 312–314. The Rapporteur to the Committee was Prof. de Visscher who was also involved in the work of the Institut de Droit International. In his explanations to the Committee de Visscher, *inter alia*, said the following:

"He was quite sure that the codification of international law in the matter of prescription would be extremely desirable, because deferred claims often constituted a source of friction between States, and were all the more dangerous and difficult to settle in that proof became, in the course of time, more and more difficult to obtain. While recognising that such codification would be desirable, he realized that it was not at present possible. There were not yet sufficient data available in international practice to allow of even a first step towards codification. He might, for instance, quote the example of arbitral awards in which the claims of States had been rejected by the arbitrators on account of the length of time which had elapsed. After studying these awards he had concluded that the arbitrators had rejected the claim of the applicant State not on the strength of prescription in the true sense of the word, but because they had concluded that the delay in putting forward the claim must be interpreted as a sign of bad faith. It might indeed be assumed that the claimant would have long since pressed his claim if he had not been conscious of the weakness of his case. In other cases claims had been rejected because the length of time which had elapsed justified a presumption of tacit renunciation on the part of the creditor Government. While he recognized that it was on a presumption of bad faith or tacit renunciation that the general theory of prescription was based, he noted at the same time that there was no case in which the applicant's claim had been declared inadmissible on the ground of prescription.

There was also no international agreement as to the periods for prescription. These varied considerably from country to country. They also varied in different leading cases. One of the most essential preliminaries, therefore, would be an agreement concerning the periods of prescription.

He therefore concluded that, although it might be noted that case-law was gradually evolving a law of international prescription, and although it was clear that one day this process would produce a jurisprudential custom in the matter which might serve as the basis for codification (and that, in his opinion, would be a very interesting example of the evolution of a body of law previous to codification), it was not yet possible even to think of elaborating a convention on the international law in this domain." *Id.* at 313.

[95] See e.g. Sørensen, La prescription en droit international 3 NTIR (1932) 145–170; Verykios, La prescription en droit international public (1934); King, Prescription of claims in international law, British Yearbook of International Law (1934) 82–97; Borchard, Diplomatic Protection (1915) 825–832; Hackworth, Digest of International Law, Vol. 5 (1940) 713–718; Politis, La prescription libératoire en droit international, 3 Revue de Droit

As mentioned previously, in 1953 Cheng published his work General Principles of Law – as applied by International Courts and Tribunals. The purpose of his study was to determine what the general principles of law – as referred to in Article 38 of the Statute of the International Court of Justice[96] – were "in substance and the manner in which they have been applied by international tribunals".[97] Under the general heading "General Principles of Law in Judicial Proceedings" Cheng devotes a separate chapter – chapter 18 – to extinctive prescription.[98] As indicated by the title of his study, his approach is to review and analyze judgments and arbitral awards with a view to ascertaining the general principles of law. Already at the first page of chapter 18, Cheng makes the following statement: "The cases cited herein show that, in fact, the principle [i.e. the principle of extinctive prescription] has often been invoked and applied in international adjudications as part of positive international law".[99] In summing up his review and analysis of judgments and awards he states, *inter alia*, that: "When not expressed in formulated rules, the principle is directly applicable to the facts of life whether intranational or international, wherever those circumstances justifying its raison d'être obtain".[100]

Most writers who have pronounced a view on prescription in international law after the Second World War are of the opinion that the principle does exist.[101] This is confirmed in most modern textbooks and standard

International (1925) 3–10; Witenberg, Recevabilité des réclamations devant les juridictions internationales. 41 Hague Recueil (1932) 9–30; Ripert, 42 Hague Recueil (1933, II) 642; Fauchille, Traité de Droit International Public, Vol. I, 390, and Ralston, note 21, *supra*.

[96] *See* discussion on p. 222 *et seq.*, *supra*, as to the general principles of law.

[97] Cheng, General Principles of Law – as applied by International Courts and Tribunals (1953) 6.

[98] *Ibid.*, at 373–386.

[99] *Ibid.*, at 373, note 1.

[100] *Ibid.*, at 386. – For a discussion of the rationale underlying extinctive prescription in international law, *see* p. 280 *et seq.*, *infra*.

[101] *See* e.g. Schwarzenberger, International Law (3rd ed.) 565–570; de Visscher, La presciption extinctive des reclamations internationales d'origine privée, in Hommage d'une generation des juristes au President Basdevant (1960) 525–533; Simpson & Fox, International Arbitration (1959) 122–126; Garcia–Amador, Yearbook International Law Commission 1958, ii. 61 (Art. 23); Oppenheim, International Law, (ninth ed. 1996) Vol. I 526–527; Institut de Droit International: Retard et negligence dans la présentation d'une réclamation 36 Annuaire (1931), 435–441; Roch, La prescription libératoire s'applique-t-elle en droit international public? 27 Revue de Droit International (1949) 254–264.

works on international law.[102] It should be noted, however, that public international law does not contain any specific, positive rule with respect to extinctive prescription. In particular, there are no *definite* time limits as are usually found in most municipal systems, a fact which may, generally speaking, present serious practical difficulties. The only post-war scholar who seems to have taken a critical view of extinctive prescription is Pinto. In his Hague lectures, published in 1955,[103] he is much more skeptical than his contemporaries. He states, *inter alia*, with respect to *acquisitive prescription*, that "/d/ans l'ensemble, les decisions internationales ne consacrent pas l'institution de la prescription"[104]; a statement which runs counter to the thitherto accepted interpretation of several arbitral awards.[105] He is similarly critical in relation to extinctive prescription. After having described the generally alleged doctrinal view of extinctive prescription, he states that "/e/lle ne semble pas avoir été consacrée par la jurisprudence internationale"[106]. It is interesting to note that this statement is made without discussing Cheng's conclusions in this field of law published two years earlier.[107] Pinto's rather critical approach seems to be based on three factors, *viz.*, (i) he makes a clear distinction between *private* and *public* claims – private claims being advanced by a state on behalf of its citizens and public claims resulting directly from state activity – in the sense that private claims are in his view not really

[102] *See* e.g. Oppenheim, International Law, (ninth ed. 1996) Vol. I 526–527; Rousseau, Droit International Public, Vol. 5 (1983) 178–182; Brownlie, *op. cit.*, at 504–505, Dahm–Delbrück–Wolfrum, Völkerrecht Band I/1 (2nd ed. 1988) 64 and Reisman, Nullity and Revision (1971) 375–396 (primarily discussing the effect of lapse of time on the authority of international tribunals); *see* also the following statement in Restatement of the Law, Third, The foreign Relations Law of the United States (1987) Vol. 2 346: "*Lapse of time.* No general rule of international law limits the time within which a claim can be made. However, international tribunals have barred claims because of a delay in presentation to the respondent state if the delay was due to the negligence or laches of the claimant state". No change in this position is recorded in the Cumulative Annual Supplement For Use in 1997, which covers the time period through June 1996.

[103] Pinto, 87 Hague Recueil (1955, I) 392 *et seq.*

[104] *Id.*, at 435.

[105] In arguing against Verykios' position, for example – to the effect that certain awards confirm the principle of acquisitive prescription, *see* Verykios, *op. cit.*, at 46 – Pinto simply states that the decisions in question "peuvent être interprétées sur la base de la coutume, et non de la presciption", *id.*, at 435, n. 1.

[106] *Id.*, at 439. In a footnote to this statement he reproduces the following quote: "Il n'y a aucune décision judiciaire ou arbitrale favorable à la prescription libératoire", without, however, indicating the source. Later on he makes the following statement: "Quant aux obligations internationales, au sens strict, la jurisprudence n'en consacre pas l'extinction en faissant appel à la prescription libératoire"; *id.*, at 440.

[107] *Cf.* note 21, *supra*.

international claims and thus do not fall under public international law[108] (ii) he makes another distinction between prescription as a *procedural* concept, addressing primarily admissibility of international claims on the one hand, and extinctive prescription as a matter of *substantive* law, i.e. leading to the extinction of the right as such and not only the remedy. He seems to take the view that "true" extinctive prescription can only be of a substantive nature, and since most international awards and judgments in his view deal with admissibility, there is no support in case law for extinctive prescription[109] and (iii) when there is a *true international claim*, i.e. directly between two states, there is no room for extinctive prescription, at least not so as to bring about the non-admissibility of a claim, because the (arbitral) tribunal has been instructed by the parties to resolve the dispute on the merits.[110]

While Pinto thus is rather critical of the notion of extinctive prescription in public international law, he does accept that rights and obligations may become extinguished under public international law, not as a result of extinctive prescription but rather on the basis of custom.[111] Even though Pinto attaches a very specific meaning to the term "extinctive prescription", it is clear that he accepts that the lapse of time – together with other circumstances – may influence the possibility of successfully raising international claims before international tribunals.

4.3.3 Decisions Rendered by International Tribunals

As is evident from the account of opinions of writers, international tribunals have had numerous occasions to address issues relating to prescription in international law. Many of the writers referred to above have commented on such decisions. With respect to extinctive prescription the most comprehensive review is found in Cheng's work.[112] As mentioned

[108] In discussing the *Gentini Case* – *see* p. 274 *infra* – he comments that the claim "n'avait pas le caractère d'une véritable obligation internationale", *id.*, at 441.

[109] *Id.*, at 442.

[110] *Id.*, at 443.

[111] *Id.*, at 445.

[112] For an overview of decisions concerning *acquisitive* prescription, *see* Blum, *op. cit.*, at 20–24; *cf.* also Brownlie, *op. cit.*, at 150–156, with references. It should be noted, however, that Brownlie takes a differentiated – and critical, it would seem – approach to the doctrine of acquisitive prescription as such, prompting him to conclude that "one may doubt whether there is any role in the law for a doctrine of prescription as such", *ibid.*, at 156. It is worthwhile noting that several of the cases mentioned by Blum – and generally considered as evidence of acquisitive prescription – are in Pinto's view not at all examples of the same, *inter alia*, because many of them never mention the term "prescription", Pinto, *op. cit.*, at 397–398.

above, his conclusion is *that* the principle of extinctive prescription does exist in international law, *that* it has been applied by international tribunals *and that* it constitutes a general principle of law.[113]

For the purpose of discussing the existence of the principle of extinctive prescription in international law, it is proposed to deal only with a few – leading – cases.[114]

One of the leading cases is the *Williams Case* decided in 1885 by the United States–Venezuelan Claims Commission.[115] In that case an American businessman – John H. Williams – sold and delivered to the Government of Venezuela certain mirrors to be installed in the government house in Caracas. The contract was signed in 1841 and the mirrors were duly delivered and received in the same year. It was not until 1868, however, that Mr. Williams presented a claim in the amount of approximately USD 7,000, including interest, against the Government of Venezuela. Thus, the claim was not presented until 26 years after its inception. By way of introduction the Tribunal noted that the nature and amount of the claim were such that one would have expected a claim to be made by Mr. Williams rather soon after delivery. The Tribunal continued:

> "By lapse of time the means of defense have been impaired, and there is total want of excuse for the long delay by claimant. Under such circumstances what does the law require at our hands?"[116]

In its opinion, the Tribunal embarks on a lengthy discussion of the opinions of various writers, including many of the classic writers on international law[117], as well as some writers on municipal law, and also certain decisions by United States courts of law[118]. The Tribunal accepted that the principle of extinctive prescription was to be applied with respect to interstate claims and consequently disallowed Mr. Williams's claim. In conclusion the Tribunal noted:

> "It [the claim] was withheld too long. The claimant's verification of the old urgent account of 1841, twenty-six years after its date, without cause for the delay, supposing it to be competent testimony, is not sufficient under the circumstances of the case to overcome the presumption of settlement."[119]

[113] *See* notes 95, 101 and 102, *supra*.
[114] A more detailed discussion of the circumstances under which the principle is applicable, and of cases relating thereto, follows on p. 285 *et seq.*, *infra*.
[115] *See* note 74, *supra*.
[116] Note 74, *supra,* at 4182.
[117] *Cf.* p. 263 *et seq.*, *supra*.
[118] *Cf.* note 74, *supra,* at 4186–4187, 4192–4193.
[119] Note 74, *supra*, at 4199.

In another case decided by the United States–Venezuelan Claims Commission, *viz.*, the *Carlos Butterfield Case*,[120] while the Tribunal found that the claim was *not* prescribed, it is clear that the Tribunal accepted the principle of extinctive prescription *per se*.[121] In yet another case decided by the United States–Venezuelan Claims Commission it unequivocally endorses the principle of extinctive prescription in international law. In the *Cadiz Case*, the United States–Venezuelan Mixed Claims Commission, referred to extinctive prescription as "a universally recognized principle", "equally obligatory upon every tribunal seeking to administer justice". The Commission explained that:

> "Time itself is an unwritten statute of repose. Courts of equity constantly act upon this principle, which belongs to no code or system of municipal judicature, but it is as wide and universal in its operation as the range of human controversy. A stale claim does not become any less so because it happens to be an international one, and this tribunal in dealing with it cannot escape the obligation of a universally recognized principle, simply because there happens to be no code of positive rules by which its action is to be governed."[122]

The Commission discussed the claim relying on the principle of extinctive prescription, saying that claimants had been "sleeping on their rights for nearly half a century"[123] without trying to collect the claim.

In the *Gentini Case* – another leading case – decided by the Italian–Venezuelan Claims Commission,[124] the Commission dismissed a claim presented for the first time after thirty years since its alleged occurrence, because "claimant has so long neglected his supposed rights as to justify a belief in their non-existence".[125]

There are other cases, however, which seem to point in the other direction, i.e. that extinctive prescription does *not* exist in international law. Nonetheless, there are on the whole few pronouncements made in reported decisions of international tribunals to the effect that extinctive prescription does *not* exist in international law. The earliest reported decision where such a statement is found is the *King & Gracie Case*.[126]

[120] Moore, *op. cit.*, at 1205.
[121] *Ibid.*
[122] Moore, *op. cit.*, at 4203.
[123] *Ibid.*
[124] Ralston–Doyle, *op. cit.*, at 720.
[125] *Ibid.*, at 730. – Earlier on in the decision the Commission defines extinctive prescription by quoting Vattel: "When a right of action becomes extinguished because the person entitled thereto neglects to exercise it after a period of time, this extinction of the right is called prescription of action". *Ibid.*, at 726.
[126] Moore, *op. cit.*, at 4179.

This was a dispute between Great Britain and the United States originating in a treaty between the two states of 3 July 1815. Under Article II of that treaty, the parties agreed not to charge higher, or other duties, for the export of goods from each other, than from any other country. Apparently, export duties had been exacted by British authorities in contravention of the treaty. Eventually claims for the refund of duties paid from 1815 to 1823 were submitted to a commission established on the basis of a treaty of 8 February 1853 between the two countries. At the outset of the proceedings the commission had to address the question whether the claims were "internationally barred by lapse of time".[127] The commission stated the following:

> "The first question arising for the consideration of the commission is, whether any legal bar on account of lapse of time exists against sustaining the claim for a return of the duties. This seems now hardly to be contended for. Where a treaty is made between two independent powers, its stipulations can not be deferred, modified, or impaired by the action of one party without the assent of the other. If the parties, by their joint act, have established no barrier in point of time to the prosecution of any claims under a treaty made by them, then neither country can interpose such limit. The case admits of no other judicial construction."[128]

Proceeding, from this reasoning the commission ordered the duties to be refunded.

An almost identical question arose with respect to import duties regulated in another provision of Article II of the 1815 treaty. Such duties had apparently been improperly exacted by the United States. Relying on the same reasoning as with respect to the export duties, the commission ordered the duties to be refunded to the British subjects concerned, saying, *inter alia*, that "no statutes of limitation can be pleaded in bar of claims arising under treaties".[129]

It is worthwhile noting that the commission seems to have interpreted the treaty of 1815 as constituting an agreement between the parties to the effect that no time limits were to apply with respect to the presentation of claims under the treaty. It would seem, however, that the treaty itself did not include any provision, explicitly addressing this issue. In general it would seem clear that if parties have in fact agreed that there should be no time limit with respect to the presentation of claims, an international tribunal must respect this agreement. This follows from the principle of party autonomy.[130]

[127] *Ibid.*
[128] Moore, *op. cit.*, at 4179–4180.
[129] Moore, *op. cit.*, at 4180.
[130] *See* p. 134 *et seq.*, *supra*.

Since the commission in the *King & Gracie Case* relied so heavily on the purported agreement of the parties, it is in the opinion of this author doubtful if one can characterize this decision as an example of denial of the existence of the principle of extinctive prescription in international law.[131] It would rather seem that the case mostly referred to with a view to proving that extinctive prescription does not exist in international law is the *Pious Fund Case*.

In the *Pious Fund Case* – between the United States and Mexico, decided by an arbitral tribunal constituted under the auspices of the Permanent Court of Arbitration[132] – various donors during the 17th and 18th centuries created a fund for spreading the catholic religion in California. These funds were initially administered by the Jesuits in Mexico. The funds were confiscated by the Mexican government in 1842. The government continued, however, to pay an annual interest of 6 per cent to the Jesuits. As a result of the peace treaty of 1848 between the United States and Mexico, the northern part of California was ceded to the United States. The payment of interest with respect to that part of California then stopped, as a result of which the archbishop of San Francisco instituted arbitration proceedings against Mexico. The government of the United States eventually intervened in the arbitration on behalf of the archbishop. Mexico argued that the claim for interest – with respect to certain time periods – was subject to extinctive prescription since the claim had not been raised before Mexican courts within a period of 20 years as required by Mexican legislation. The tribunal rejected this argument and held that:

> "The rules of prescription related exclusively to the domain of civil law and could not be applied to the international dispute between the United States and Mexico".[133]

The *Pious Fund Case* has, as mentioned above, sometimes been relied upon as a proof that the principle of extinctive prescription is not recog-

[131] On the other hand, the reasoning of the commission could perhaps be understood to mean that unless parties have agreed on the application of extinctive prescription, neither party can rely on it. Read this way, the commission could be said to have rejected – at least implicitly – the existence of the principle of extinctive prescription in public international law. For a critical view of the commission's reasoning, *see* Reisman, *op. cit.*, at 391. For a discussion of treaty interpretation as distinguished from the principle of extinctive prescription, *see* p. 319 *et seq.*, *infra*. – As discussed on p. 299, *infra*, the outcome of this case can also be explained by the fact that there were presumably official records available evidencing that export and import duties had been exacted in contravention of the 1815 treaty. The *absence* of a record of facts is usually considered as one of the requirements for the application of the principle of extinctive prescription, *see* p. 296 *et seq.*, *infra*.

[132] The Hague Court Reports (1916) Vol. 1, 429.

[133] *Ibid.*, at 727.

nized in public international law. This was, *inter alia*, argued by Italy in the *Gentini Case* before the Italian–Venezuelan Mixed Claims Commission.[134] However, Jackson H. Ralston, the Umpire of that Commission and the agent of the United States in the *Pious Fund Case*, pointed out that what the United States had contended in the Pious Fund Case – and what the arbitration tribunal upheld – was that the claim of the United States before the tribunal could not be defeated by *Mexican* statutes of limitation, since such municipal statutes did not enjoy any authority whatsoever before international tribunals.[135] Ralston went on to say that the tribunal in the *Pious Fund Case* had never denied the existence of the principle of extinctive prescription, a principle well recognized in international law, and that it was fair to believe that it would never do so.[136]

It is the quoted language of the tribunal in the *Pious Fund Case* which has sometimes been relied upon in support of the proposition that extinctive prescription is not recognized in public international law.[137] In addition to the above-mentioned pronouncements by Ralston – arguing against this point of view – he referred to the distinction between *rules* of prescription, which were such as would be established by a government, and the *principle* of prescription which he said was "well recognized in international law", and could be applied as well to a conflict in which a state was a party as to a conflict between individuals.[138]

Another case sometimes referred to in support of the alleged non-recognition in public international law of extinctive prescription is the *Alsop Case* decided in 1911.[139] In that case the tribunal said:

> "The principle of limitation of action does not, in our opinion, operate as between states. It is based upon the theory that the party had a right of action capable of being enforced by legal proceedings, neglect of which should in time relieve the debtor from further liability, but as against, or between, sovereign states this rule does not apply, and it would be unreasonable that the creditor's rights should suffer because he realises that his only course is to wait until the financial position of the debtor improves. The liability of Bolivia under the Wainright Contract remains, in our view, unaffected."[140]

[134] United States Agent's Report, Pious Fund Case, 17, 876.

[135] For a discussion of the relationship between municipal statutes of limitation and public international law, *see* p. 324 *et seq.*, *infra*.

[136] Ralston–Doyle, note 20, *supra*, at 725.

[137] The school of thought advocating this point of view seems to proceed from concepts of sovereignty and equality in international law; *cf.* p. 266, *supra*.

[138] Ralston–Doyle, note 20, *supra*, at 720.

[139] American Journal of International Law (1911) 1079.

[140] *Id.*, at 1100. – *Cf.* the statement made by Mr. Crallé quoted in the *Williams Case* on p. 266, *supra*.

With respect to the *Alsop Case* it should be observed, however, that some commentators have considered it not to stand for the proposition that extinctive prescription does not exist in international law, but rather for the proposition that it will not run against a claim which has been duly notified, but not continually prosecuted, assuming there is a plausible reason for this.[141]

In 1929, the Greco–Bulgarian Mixed Arbitral Tribunal decided the *Sarropoulos Case*. In doing so it said that "positive international law has not so far established any precise and generally accepted rule either as to the principle or the duration of prescription", but continued by stating that "prescription, an integral and necessary part of every system of law, is deserving of recognition in international law".[142]

Given the many previous decisions rendered by international tribunals accepting extinctive prescription – and against the background of the Report of the Institut de Droit International – this statement is rather surprising and seems to be the only reported case in the 20th century where the existence of extinctive prescription has been denied.[143] It is possible that the tribunal was inspired by the Report of the League of Nations Committee of Experts for the Progressive Codification of International Law.[144]

I must also briefly mention the *Ambatielos Case*, decided in 1956.[145] While the tribunal did not *apply* the principle of extinctive prescription, it clearly accepted it as forming part of international law. On this issue the tribunal said:

> "It is generally admitted that the principle of extinctive prescription applies to the right to bring an action before an international tribunal. International tribunals have so held in numerous cases. (Oppenheim–Lauterpacht – *International Law*, 7th Edition, I, paragraph 155c; Ralston – *The Law and Procedure of International Tribunals*, paragraphs 683–698, and *supplement*, paragraphs 683(a) and 687(a)). *L'Institut de Droit International* expressed a view to this effect at its session at The Hague in 1925".[146]

[141] *Cf.* Cheng, note 22, *supra*, at 385–386, and Ralston, The Law and Procedure of International Tribunals (1926) 380. For a discussion of the distinction between *presenting* and *prosecuting* a claim, *see* p. 293 *et seq.*, *infra*.

[142] Recueil des Decisions des Tribunaux arbitraux mixtes institués par les Traités de Paix, Vol. XII(1928), 51.

[143] As suggested above neither the *Pious Fund Case* nor the *Alsop Case* – properly read and construed – in the opinion of this author stands for the proposition that extinctive prescription is not recognized in international law.

[144] *Cf.* p. 269, *supra*. – This explanation is suggested by Cheng, *op. cit.*, at 373.

[145] The case is discussed more in detail on p. 295 *et seq.*, *infra*.

[146] Commission of Arbitration, Ambatielos Case, Greece v. United Kingdom – Award (with annexes) March 6th 1956 (Her Majesty's Stationary Office 1956) 12; *see* also Reports of International Arbitral Awards, Vol. XII (1963) 85.

In this connection, it is worthwhile to mention also the decisions rendered by the Iran–United States Claims Tribunal.[147] In a number of decisions rendered by the Tribunal it has addressed different aspects of extinctive prescription, albeit not in interstate disputes. For present purposes, suffice it to mention *Iran National Airlines Co. v. The Government of the United States of America*[148] decided in 1987. In this case, the Tribunal stated, *inter alia*, the following:

> "With respect to Respondent's alternative argument, the Tribunal recognizes that extinctive prescription is an established principle of public international law which has been applied by international tribunals. I. Brownlie, *Principles of Public International Law* 505–06 (3rd ed. 1979). Given the commercial nature of the transactions at issue, however, the Tribunal does not consider it appropriate to apply the principle of extinctive prescription as a matter of public international law. Therefore, the Tribunal decides the issue by reference to whether there has been any unreasonable delay by the Claimant in notifying the Respondent of its claim such that it would be unfair to require the Respondent to answer to such stale claims. In this connection, the Tribunal recognizes that one purpose of time limitations in commercial practice is to allow parties to discard their records after they are no longer necessary, such as when no dispute has arisen and the specified period has expired."[149]

On the basis of this brief overview we can safely say – it is submitted – that the principle of extinctive prescription in international law has been accepted *per se* by international tribunals. This fact notwithstanding, it must be emphasized that there are a number of issues – indeed uncertainties – with respect to the *application* of this principle in practice. Before

[147] *See* p. 88 *et seq.*, *supra*, for a general discussion of the Iran–United States Claims Tribunal.

[148] Award No. 335–B9–2 (30 November 1987), reprinted in 17 Iran–U.S. Claims Tribunal Reporter, 214.

[149] *Ibid.*, at § 13, 17 Iran–U.S. Claims Tribunal Reporter at 218–219. – *See* also *Harnischfeger Corp.* v. *Ministry of Roads and Transportation et al.*, (Award No. 144–180–3, 13 July 1984, at 46; reprinted in 7 Iran–U.S. Claims Tribunal Reporter, 90, 116) where the Tribunal rejected a claim as being presented too late, and stated: "Although the Tribunal recognizes that it is not bound by local statutes of limitations, this Tribunal has discretion to determine whether or not there has been an unreasonable delay in presenting a claim to a competent forum". – It should be noted that the Iran–United States Claims Tribunal enjoyed wide discretion in determining the applicable law. Article V of the Claims Settlement Declaration stipulated as follows: "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."

– With respect to extinctive prescription, *cf.* Aldrich, The Jurisprudence Of The Iran–United States Claims Tribunal. An analysis of the Decisions of the Tribunal (1996) 480–483.

I discuss these issues, I shall briefly discuss the reasons – the rationale – underlying the principle of extinctive prescription.

4.4 The Rationale Underlying Extinctive Prescription in International Law

4.4.1 Introduction

As I have discussed above with respect to extinctive prescription under municipal law, the reasons underlying extinctive prescription may conveniently be divided into two categories, *viz.*, (i) interests of the parties and (ii) the public interest.[150] I have also noted that from a historical perspective municipal law rules on extinctive prescription have often developed on the basis of rules on acquisitive prescription, which in turn often go back to Roman law concepts.[151] It may therefore be worthwhile briefly to look at the rationale underlying *acquisitive* prescription in international law, before turning to extinctive prescription. In doing so, it is essential to keep in mind that while both forms of prescription deal with the effect of lapse of time – combined with other circumstances – and could perhaps as a result thereof be said to rest on the same fundamental considerations, extinctive prescription deals with the relationship between *two* states – typically involved in a dispute – whereas acquisitive prescription is concerned with title to territory and thus affects *all* states. This fundamental difference prompts the scholar to be cautious in drawing conclusions on the basis of acquisitive prescription.

4.4.2 Acquisitive Prescription

First and foremost among the reasons for acquisitive prescription is the need to preserve international order and stability. This reason was identified already by Grotius who said that without rules on prescription "contests about Kingdoms and the boundaries of Kingdoms would never come to an end with lapse of time".[152] This reason has been given by almost all writers on the subject since Grotius.[153]

[150] *See* p. 253 *et seq.*, *supra*.
[151] *See* pp. 250–251 and 253–255, *supra*.
[152] Grotius, De Jure Belli ac Pacis (ed. Scott) (1925) book II, Chapter IV, Section I, as quoted by Blum, *op. cit.*, at 12.
[153] *See* e.g. Blum, *op. cit.*, at 12–14 and Johnson, *op. cit.*, at 333–334.

An additional reason advanced by Grotius[154] and others,[155] is the idea of the presumed voluntary abandonment of the former owner's/possessor's rights, i.e. by not exercising his rights for a significant period of time he is presumed to have abandoned his rights.[156] Tied to this idea is often the notion that he who has not exercised his rights has been negligent and that the rules on acquisitive prescription "punishes" the negligent by allowing someone else to acquire title to the territory in question.[157]

It has also been suggested that considerations with respect to evidence are a reason for prescription, the idea being that the lapse of time makes it difficult for a party to provide reliable oral and documentary evidence concerning title to territory.[158]

There have thus been several suggestions as to what policy considerations underlie – or should underlie – acquisitive prescriptions in international law. The multitude of suggested reasons notwithstanding, one commentator concluded that "the reasons for the existence of a doctrine of acquisitive prescription in international law are so cogent that few authors have denied the existence of the doctrine".[159]

4.4.3 Extinctive Prescription

Turning then to the policy considerations underlying extinctive prescription in international law I start with a passage from one of the leading cases.

The *ratio legis* of the principle of extinctive prescription was described in the *Gentini Case* by Ralston in the following way:

> "On examining the general subject we find that by all nations and from the earliest period it has been considered that as between individuals an end to disputes should be brought about by the afflux of time. Early in the history of the Roman law this feeling received fixity by legislative sanction. In every country have periods been limited beyond which actions could not be

[154] *See* note 154, *supra*, as referred to by Blum, *op. cit.*, at 13.

[155] *Cf.* Blum, *op. cit.*, at 13 and Johnson, *op. cit.*, at 333.

[156] This theory has been heavily criticized by a number of writers – *see* Blum, *op. cit.*, at 14 – primarily on the ground that acquisitive prescription is based on the idea that the previous possessor has *not* abandoned his right.

[157] *See* Blum, *op. cit.*, at 13; *cf.* Pinto, *op. cit.*, at 400 *et seq.*

[158] Verykios, *op. cit.*, at 36.

[159] Johnson, *op. cit.*, at 333 – It should be emphasized that the comments above refer to the reasons for – the policy considerations underlying – acquisitive prescription in international law. This must be distinguished from the *method of transforming* the policy considerations into international law, or rather *how* such considerations become part of international law. Pinto, *op. cit.*, at 392, 400, 448 and Blum, *op. cit.*, at 13–15 emphasize the importance of custom in this respect. Brownlie has even suggested that "... one may doubt whether there is any role in the law for a doctrine of prescription as such.", Brownlie, *op. cit.*, at 156.

brought. In the opinion of the writer these laws of universal application were not the arbitrary acts of power, but instituted because of the necessities of mankind, and were the outgrowth of a general feeling that equity demanded their enactment; for very early it was perceived that with the lapse of time the defendant, through death of witnesses and destruction of vouchers, became less able to meet demands against him, and the danger of consequent injustice increased, while no hardships were imposed upon the claimant in requiring him within a reasonable time to institute his suit. In addition, another view found its expression with relation to the matter in the maxim *interest republica ut sit fines litium.*

As appears to the writer, all the arguments in favour of it as between individuals exist equally as well when the case of a national is taken up by his government against another, subject to considerations and exceptions noted at the end of this opinion. For may not a government equal with an individual lose its vouchers, particularly when, if any exist, they are in the hands of far distant subordinate agents? ... May the claimant against the government, with more justice than if he claimed against his neighbor, virtually conceal his supposed cause of action till its investigation becomes impossible. Does equity permit it?"[160]

As appears from the quoted language, prescription is considered as a principle founded on equity and aimed at the attainment of justice: earlier in the award it was said that "the principle of prescription finds its foundation in the highest equity – the avoidance of possible injustice to the defendant".[161] Prescription has, in the opinion of Ralston, grown out of the necessities of mankind and has been sanctioned by the general juridical feeling of all nations since the earliest times, and, he continues, it may be said that these are the considerations which properly import to the principle its character of universal validity.[162] It is interesting to note, that the reasons referred to in the foregoing quote are very similar to the considerations underlying municipal law rules on extinctive prescription;[163] Ralston then simply states that "all the arguments in favor of it as between individuals exist equally as well when the case of a national is taken up by his government against another ...".[164]

[160] Ralston–Doyle, note 20, *supra*, at 726–727. Jackson H. Ralston was the Umpire of the Italian–Venezuelan Mixed Claims Commission.

[161] *Id.*, at 720.

[162] *Id.*

[163] *See* p. 253 *et seq.*, *supra.*

[164] A similar way of describing the reasons for extinctive prescription in international law was employed already by Vattel. In his Law of Nations, Book 2, Chapter 11, he said, *inter alia*, the following: "After having shown that usucaption and prescription are founded in the law of nature, it is easy to prove that they are equally a part of the law of nations and

Proceeding from Ralston's statement in the *Gentini Case*, I divide the policy considerations underlying extinctive prescription under international law into two categories, *viz.*, (i) considerations addressing the interests of the parties involved and (ii) considerations relating to the public interest.[165]

As far as the *interest of the parties* is concerned, it is primarily the interests of the respondent which stand in focus. The lapse of time without presenting a claim brings about the risk that evidence – both oral and documentary – disappears or is forgotten, thus making it difficult to ascertain the facts of the case.[166] This may be particularly detrimental to the respondent who may thus be deprived of the possibility to prepare his

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ought to take place between different states. For the law of nations is but the law of nature applied to nations in a manner suitable to the parties concerned. *And so far is the nature of the parties from affording them an exemption in the case, that usucaption and prescription are much more necessary between sovereign states than between individuals*", as quoted by the tribunal in the *Williams Case*, *see* note 76, *supra,* at 4184 (emph. added).

[165] *See* p. 253 *et seq.*, *supra*, for the proposition that these two categories are relevant with respect to municipal law. – When the public interest in the context of public international law is discussed, it is important to keep in mind the differences between municipal law and public international law as systems of law. The international community of states is very different from the national jurisdictions which are primarily governed by their respective municipal legislation. In the international community of states there is no central legislature with general law-making authority and there is no executive institution to enforce law. In addition, there is no international court with general, comprehensive and compulsory jurisdiction. With respect to all three aforementioned aspects, the United Nations and its organs – particularly the General Assembly, the Security Council and the International Court of Justice – play a very important role for the development and enforcement of public international law. The rules and principles governing the activities and conduct of States – the primary, but not exclusive, addressees of public international law – are, however, to varying degrees dependant on the acceptance by the States. These differences between municipal law and public international law have led to skepticism about the nature and effectiveness of public international law.

Some observers have gone so far as to suggest that public international law is not "law" at all, since – it is said – public international law lacks in specificity, detail and binding character. While public international law can be said to be an imperfect legal order – if compared to many systems of municipal law – "/s/tates not only recognize the rules of international law as legally binding in innumerable treaties, but affirm constantly the fact that there is a law between themselves" (Oppenheim, International Law (ninth ed., Vol. I (1996) 13). Generally speaking, public international law attempts to regulate the behavior and conduct of States – and other subjects of international law – with the ultimate purpose of promoting order, peace and stability. When I talk about the "public interest" in the following, the focus is thus on the interest of the international community of States at large.

[166] *Cf.* Institut de Droit International, note *supra* 18 at 6 and de Visscher, note 101, *supra*, at 523. In the *Case Concerning Certain Phosphate Lands in Nauru* (I.C.J. Reports (1992) 240), for example, Australia, when raising the objective that the application in question had not been submitted whithin a reasonable time, referred to documentation which had been lost and also to changes in the law which allegedy made it more difficult to determine the obligations of the parties; *ibid.*, at 253-254.

defense. These considerations are ultimately based on equity, in the sense that it would be inequitable to allow the claimant to benefit from his failure to present a claim and at the same time place the respondent at a corresponding disadvantage. Taking this reasoning one step further, it is possible to view this as a question of equality of the parties to a dispute: to allow the claimant to benefit from the lapse of long time, would be tantamount to treating the parties in a dispute differently which would militate against one of the fundamental principles of international arbitration, indeed of any judicial activity, *viz.*, equality of treatment of the parties.[167]

As mentioned above, no fixed time periods are laid down in international law with respect to extinctive prescription, whereas such time periods are one of the most distinctive features in municipal law and which – presumably – guide the behavior of parties. The lack of such time periods notwithstanding, it would seem to be equally important for states as parties – as it is for individuals operating under municipal law – to be able to proceed from the assumption that after a certain period of time claims cannot be filed against them.[168]

With respect to *considerations of public interest*, extinctive prescription of international claims meets important social and economic requirements by providing for a certain amount of order and stability in relations between states in that claims are prevented from surviving for ever.[169] From a public interest point of view it is also important for the international community that claims cannot be successfully filed after long lapse of time. It is this consideration which is enshrined in the Latin maxim *interest republica ut sit finis litium.*[170] As mentioned above – when discussing the reasons underlying municipal law rules on extinctive prescription[171] – it is in the public interest to bring about harmonization between the factual and the legal situation. Such harmonization is –

[167] The principle of equality in arbitral proceedings is well–established and globally accepted; *cf.* e.g. Redfern and Hunter, International Commercial Arbitration (1986) 226 *et seq.*; Cheng, *op. cit.*, at 290 *et seq.*; Mustill and Boyd, Commercial Arbitration (1982) 263 *et seq.*; David, Arbitration in International Trade (1985) 291 *et seq.*, and Rosenne, The International Court of Justice (1961) 380 *et seq.*

[168] *Cf.* e.g. Institut de droit international, note 18, *supra,* at 6; de Visscher, note 101, *supra* at 523; Alberic Rolin, in Institut de droit international, *id.,* at 24–25; Bourquin, *id.*, at 39–40; King, note 95, *supra*, at 93.

[169] *Cf.* Institut de droit international, note 18, *supra,* at 6, in particular Alberic Rolin's comment: "Il importe au bien-être de la société, au point de vue économique, que les comptes soient réglés, que les situations respectives de creancier et de débiteur ne s'éternisent pas".

[170] In Institut de droit international, note 18, *supra* at 6; Alberic Rolin in Institut de droit international, *id.*, at 25–26; Niemeyer, *id.*, at 26–27.

[171] *See* p. 253 *et seq.*, *supra.*

it is submitted – also of interest at the international level since it typically provides for order and stability in relations between states.[172]

Unless specific agreements exclude application of the principle of extinctive prescription – as in the *Macedonian Case*[173] – it is applicable whenever the circumstances calling for its application exist.[174]

Having thus concluded that the generally held opinion is that the principle of extinctive prescription *does* exist in public international law[175] and having discussed the reasons underlying this principle, I now turn to a discussion of the circumstances calling for the application of the principle in practice.

4.5 When is the Principle of Extinctive Prescription Applicable?

4.5.1 Generally

Based on an analysis of international arbitral practice, it is believed that the application of the principle of extinctive prescription presupposes – at least *prima facie* – the *simultaneous* existence of four criteria, *viz.*, (a) unreasonable delay in the presentation of a claim, (b) imputability of delay to the negligence of the claimant, (c) absence of a record of facts and (d) the respondent must be placed at a disadvantage in establishing his defense.[176]

[172] This aspect is of even greater importance with respect to acquisitive prescription, dealing as it does with title to territory and is thus of importance to *all* states; *cf.* Oppenheim, International Law (6th ed. 1947) Vol. I 527, where it is stated: "The basis of prescription in International Law is nothing else than general recognition of a fact, however unlawful in its origin, on the part of the members of the Family of Nations". *See* also the latest edition of Oppenheim, where it is said that "/e/very system of law, if only in the interests of stability, accepts the possibility of the creation of rights by long-continued exercise or possession", Oppenheim, International Law (ninth ed. 1996) Vol. I 707.

[173] Moore, note 19, *supra,* Vol. 2, at 1449. A treaty of 1858 between the United States and Chile, concerning the submission to arbitration of the Macedonian claims stipulated, *inter alia*, that the arbitrator was not to consider the exception of prescription. This is believed to be a very rare case of excluding extinctive prescription. – For a discussion of treaties containing provisions barring certain claims, *see* King, note 96, *supra*, at 84 *et seq.*

[174] *See* discussion on p. 281 *et seq.*, *infra.*

[175] *See* p. 262 *et seq.*, *supra.*

[176] *Cf.* King, note 95, *supra*, at 87 *et seq.* and Cheng, *op. cit.*, at 379 *et seq.* – The four criteria mentioned above in fact constitute a consolidation of the positions of King and Cheng. King describes these criteria as positive requirements, whereas Cheng refers only to delay and imputability of the delay to the negligence of the claimant as positive requirements for

4.5.2 Unreasonable Delay

Generally speaking, proceeding from municipal law concepts, prolonged delay in presenting a claim could perhaps itself be regarded as a sufficient reason for accepting extinctive prescription in public international law. However, no cases have been found where delay in and of itself has been deemed sufficient.[177] Generally speaking, tribunals seem very reluctant to allow a delay in presenting a claim, *simpliciter*, – irrespective of its duration – to constitute extinctive prescription.

Rather than relying merely on the delay as such, arbitral tribunals seem inclined to rely on two typical presumptions arising from such delay. *First*, the delay gives rise to a presumption against the existence of the alleged right on which the claim is based.[178] *Second*, it raises a presumption in favor of the defense. It is generally considered that long lapse of time typically destroys or obscures the evidence of the facts. Consequently, delay in presenting the claim places the respondent in a disadvantageous position with respect to gathering evidence and preparing its defense[179]. But, under what circumstances do these two above-mentioned presumptions appear, or in other words, *how long* must a delay persist in order to bring about these presumptions, to be characterized as "unreasonable"?

An attempt to answer this question was made in the *Williams Case*:

> "A definite answer would be difficult to frame. But in general we should say, where, all the evidence considered, it appears from long lapse of time and as a result thereof ordinarily to have been apprehended, that material facts including means of ascertainment pertaining to support or defense are lost, or so obscure as to leave the mind, intent and ascertaining the truth, reasonably in doubt about them, or in 'danger of mistaking the truth', a basis for the presumption exists."[180]

In arbitral practice there are several examples where long periods of time have been allowed to lapse *without* bringing about extinctive prescription. In the *Roberts Case*[181] 28 years was held no bar against presenting a

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the application of extinctive prescription and characterizes the existence of a record of facts as an exception to the principle of extinctive prescription; Cheng does not explicitly treat the disadvantage at which the defendant is placed as a requirement for the application of extinctive prescription. As will be discussed below, however, this requirement is in the opinion of this author one of the cornerstones of the principle of extinctive prescription.

[177] *Cf.* Brownlie, *op. cit.*, at 506–507.

[178] *See* e.g. the *Spader Case*, Ralston–Doyle, note 20, *supra*, at 162.

[179] *See* e.g. the *Gentini Case*, Ralston–Doyle, note 20, *supra*, at 726; *cf.* p. 280 *et seq.*, *supra*, as to the rationale for the principle of extinctive prescription.

[180] Moore, note 19, *supra*, at 4196.

[181] Ralston–Doyle, note 20, *supra*, at 144.

claim. In the *Taggliaferro Case*[182] 31 years had elapsed before presentation of the claim, and in the *Giacopini Case* 32 years had elapsed before a claim was presented.[183] On the other hand, in the *Spader Case*[184] 43 years was held too long a period after which to present a claim, and in *Loretta & Barberie v. Venezuela*[185] 15 years was held to be an unreasonable delay. In the *Ambatielos Case*,[186] however, a delay of 15 years in presenting a claim was held not to be sufficient for prescription.

In contrast to municipal law rules on extinctive prescription, fixed time limits have not been laid down in international law, either by writers or in arbitral practice. On the contrary, it is generally accepted that this is left to the discretion of the tribunal on the basis of the circumstances in the individual case.[187]

Even though delayed presentation of a claim is a constitutive element of extinctive prescription under international law, such delay is only a presumption for prescription. The presumptions arising from delayed presentation of a claim are, however, presumptions of fact and as such rebuttable. They do not themselves constitute a sufficient reason for barring an action. This requires that the additional three criteria mentioned above are met.[188]

Moreover, the delay in presenting the claim must be *unreasonable*. The requirement of unreasonableness has never been *explicitly* laid down in arbitral practice. On the other hand, as mentioned above, it would seem clear that the mere delay in presenting a claim is not sufficient.[189] The delay must be accompanied by other circumstances which may conveniently be characterized as resulting in an unreasonable situation for the respondent. Only if a delay in presenting a claim can be said to be unreasonable, will it create a presumption for extinctive prescription.

When does a delay then become unreasonable? First, as already mentioned, long delay itself is not sufficient. Furthermore, it is submitted that the unreasonableness is intimately linked with the disadvantage at which the respondent is placed as a result of the delay. Only if such disadvantage results will the delay be considered as unreasonable. Arbitral practice

[182] *Id.*, at 764.
[183] *Id.*, at 765.
[184] *Id.*, at 162.
[185] Moore, note 19, *supra* at 4181.
[186] *See* p. 278 *et seq.*, *infra*.
[187] *Cf.* e.g. the Report of the Institut de Droit Internationel, note 18, *supra,* at 23 where it said, *inter alia*, that "... fixant le délai de la prescription, sa détermination est une question d'espèce laissée à la souveraine appréciation du juge international."
[188] *See* p. 285, *supra*.
[189] *Ibid.*

shows that the disadvantage in question always relates to the possibilities of the respondent to establish his defense. This aspect of extinctive prescription will be discussed in detail below.[190]

In this connection it is important to make a distinction between *delay in presenting a claim*, as constituting part of the principle of extinctive prescription on the one hand, and *lapse of time* – combined with other circumstances – as bringing about abandonment of a claim, or acquiescence, on the other. In fact, a number of cases which are sometimes treated as examples of extinctive prescription actually deal with lapse of time rather as an element of acquiescence or abandonment of a claim.[191] One such case is the *Sarropoulus Case*,[192] decided in 1927. In this case there was no dispute as to the facts, nor as to the responsibility of Bulgaria, the respondent state. Furthermore, the claim had been the subject of a diplomatic note in 1906 and there had been general negotiations between the two countries – Greece and Bulgaria – on two occasions, in 1912 and 1913, respectively.[193] However, the request for arbitration was not made until 1921. Under these circumstances, the Mixed Greco–Bulgarian Arbitral Tribunal held that:

> "... ni la nature de ce Tribunal, ni la caractère d'exception qui lui est attribué par la Traité de Neuilly, ne le désignent pour évoquer une affaire qui remoute à une periode de 18 ans, alors que les Puissances intéressées au règlement du conflit et qui, à deux reprises, ont en l'occasion de fair aboutir ce règlement, n'ont pas pris soin d'en faire l'objet ni d'une solution ni même d'une réserve, et que, par la suite, le même silence a été observé par ces Puissances."[194]

It is true that the tribunal admitted the defense of prescription in this case, even though there was no dispute as to the facts, nor as to the responsibility of Bulgaria.[195] To accept the case – against this background – as an example of extinctive prescription in public international law, would be tantamount to accept the lapse of time *simpliciter* as a sufficient ground for prescription. It is the view of this author that this is not even today the

[190] *See* p. 301 *et seq.*, *infra.*

[191] *Cf.* Brownlie, *op. cit.*, at 507. *See* p. 305 *et seq., infra,* for a discussion of abandonment, acquiescence, estoppel and waiver as distinguished from extinctive prescription.

[192] Sarropoulos v. Bulgarian State, Recueil des décisions des tribunaux arbitraux mixtes, Vol. XII (1928) 47.

[193] These negotiations resulted in the Treaty of Alliance of 16 May 1912 and the Treaty of Bucharest of 1913, respectively.

[194] *See* note 192, *supra* at 55.

[195] *See* the four criteria referred to on p. 285, *supra.*

position of public international law, let alone in 1927.[196] The better interpretation of the *Sarropoulos Case* is that the tribunal meant to say that the claim had been *waived.*[197] Given the conduct of Greece during the years preceding the request for arbitration, it would not be difficult to reach the conclusion that the claim had been waived. From a conceptual, as well as from a practical, point of view, it is important to distinguish between extinctive prescription, on the one hand, and abandonment or acquiescence on the other, although the end result may admittedly be the same, i.e., that the claim in question is not admissible and is thus not tried on the merits. With respect to extinctive prescription, lapse of time combined with the other criteria mentioned above[198] are decisive and necessary, whereas in the case of abandonment and acquiescence the actual conduct of the parties, and evidence thereof, is paramount. If a party has waived or abandoned his claim, that fact *alone* is sufficient to prevent the claim from being successfully tried by a tribunal. In the case of extinctive prescription, however, inactivity for a significant period of time may – together with other circumstances – constitute extinctive prescription; consequently, the conduct of the party in question is but one of several relevant factors.[199]

4.5.3 Imputability of Delay to the Negligence of the Claimant

The unreasonable delay in presenting a claim must be attributable to the negligence of the *claimant.* At the outset, it should be noted that when the delay has been caused by the *respondent* there can be no extinctive prescription. To hold otherwise would be to allow the respondent to benefit from his own negligent conduct.[200]

[196] As mentioned on p. 285, *supra*, *absence* of a record of facts is a requirement for applying the principle of extinctive prescription; *see* further p. 296 *et. seq.*, *infra.*

[197] The tribunal itself seems, however, to have been very much preoccupied by the principle of extinctive prescription in international law, *cf.* the statement made by the tribunal quoted above.

[198] *See* p. 285, *supra.*

[199] *Cf.* Brownlie, *op. cit.*, at 507. – In this connection it is worthwhile noting that the Institut de Droit International treats waiver and abandonment as being part of the principle of extinctive prescription, indeed as constituting one of the reasons for applying this principle, *cf.* e.g. Annuaire, note 18, *supra*, at 8, and Niemeyer, *id.*, at 27. This view was probably prevailing at the time when the Annuaire was published and probably explains why cases of waiver and abandonment have sometimes been referred to as examples of extinctive prescription. It is submitted, however, that the better and more modern view is to distinguish between these two situations; *see* discussion on p. 305 *et seq.*, *infra.*

[200] *See* e.g. the *Stevenson Case*, Ralston–Doyle note 20 at 327, where it was said, *inter alia,* that: "it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent government."

When there is a valid reason for the claimant to withhold his claim, the delay is not deemed to be negligent. In the *Williams Case*, "incapacity, disability, want of legal agencies, prevention by war, well-grounded fear and the like" were deemed to constitute valid reasons for withholding a claim.[201]

A valid reason would also seem to exist when there is impossibility. A delay in presenting a claim is deemed not to be negligent when it has in fact been impossible to *present* a claim, but possible only to file a *protest.* Under such circumstances the protest is sufficient to stay the running of time. In the *Chamizal Case*, the tribunal said:

> "In private law, the interruption of prescription is effected by a suit, but in dealings between nations this is of course impossible, unless and until an international tribunal is established for such purpose. In the present case, the Mexican claim was asserted before the International Boundary Commission within a reasonable time after it commenced to exercise its functions, and prior to that date the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment. Under these circumstances the Commissioners have no difficulty in coming to the conclusion that the plea of prescription should be dismissed."[202]

What then constitutes negligence? It is not possible to give a clear-cut definition of negligence in this connection. However, it would seem to be generally accepted that a long delay in presenting a claim creates a *presumption* of negligence, which, on the other hand, is rebuttable,[203] for example, if the claimant can show a valid cause for withholding the claim, as suggested by the quote above from the *Williams Case*. However, even if the claimant cannot show valid cause, it does not *automatically* follow that the delay is deemed negligent for purposes of applying the principle of extinctive prescription. If there is a record of facts, for example, the delay may be without importance.[204] As explained by Commissioner Little in the *Williams Case*:

> "To withhold causelessly a demand for goods until the witnesses to the transaction and other usual means of ascertaining the facts have, in the ordinary course, passed away, is negligent conduct; while to withhold a bond issued by public authority and of which presumably a public register is kept for a like time after maturity may not be".[205]

[201] Moore, note 19, *supra,* Vol. 4, at 4195.

[202] American Journal of International Law, (1911) 807.

[203] *See* pp. 286–287, *supra.*

[204] *See* p. 296 *et seq.*, *infra*, for a discussion of the importance of an established record of facts.

[205] Moore, note 19, *supra*, at 4194.

Stated in a general fashion: what amounts to negligence will depend on the facts of each individual case, whereby broad considerations of equity and justice seem to play an important role.

Just as in the case of the requirement of unreasonableness with respect to the delay in presenting a claim discussed above,[206] the requirement of negligence is intimately linked with the *disadvantage* at which the respondent is placed as a result of the delay, in the sense that if no disadvantage results from the delay, it is unlikely that the delay would be characterized as negligent. This may be illustrated by the following passage, again from the *Williams Case*, when the tribunal attempted to answer the question of how long a delay must be to justify prescription:

> "A definitive answer it would be difficult to frame. But in general, we should say, where, all the evidence considered, it appears from long lapse of time and as a result thereof ordinarily to have been apprehended, that material facts including means of ascertainment pertaining to support or defense are lost, or so obscured as to leave the mind, intent on ascertaining the truth, reasonably in doubt about them, or in danger of mistaking the truth, a basis for the presumption exists. If such situation be fairly imputed to a claimant's laches in withholding his demand, or, in Vattel's phrase, 'when by his own fault he has suffered matters to proceed to such a state that there would be danger of mistaking the truth', prescription operates and resolves such facts against him; but if not so imputable, what the finding must be becomes a question of the preponderance of testimony merely, leaving each party to the misfortune time may have wrought for him in the support or in the defense of the claim".[207]

It would thus seem that it is difficult to provide a clear-cut, separate and independent definition of 'negligent delay'. Rather, it must be judged against the disadvantage at which the respondent is put.[208] From a more formal point of view, it is helpful to distinguish between different situations when the issue of negligent delay has arisen.

(i) Where a government presents a claim on behalf of its citizens, it is necessary to distinguish between negligence of the citizen(s) in question and that of the government.

In the *Cayuga Indians Case*,[209] decided in 1926, it was held that negligence of the government only was *not* sufficient to prescribe the claims. On this issue, the tribunal held:

[206] *See* p. 285 *et seq.*, *supra*.

[207] Moore, note 19, *supra*, at 4196. (emph. added).

[208] *See* p. 301, *et seq.*, *infra*, for a discussion of the disadvantage at which the defendant must be put.

[209] Nielsen, American and British Claims Arbitrations, under the special agreement concluded between the United States and Great Britain August 18, 1910 (1926) 203.

> "No laches can be imputed to the Canadian Cayugas, who in every way open to them have pressed their claim to share in the annuities continuously and persistently since 1816. In view of their dependent position, their claim ought not to be defeated by the delay of the British Government in using the matter on their behalf. Nor can New York be said to have been prejudiced by the delay after 1849, at which time the facts of the case had been brought to the notice of the legislature and a public commission had recommended that justice be done. On the general principles of justice on which it is held in the Civil Law that prescription does not run against those who are unable to act, on which in English speaking countries persons under disability are excepted from the operation of statutes of limitation, and on which English and American courts of equity refuse to impute laches to persons under disability, we must hold that dependent Indians, not free to act except through the appointed agencies of a sovereign which has a complete and exclusive protectorate over them, are not to lose their just claims through the laches of that sovereignty, unless, at least there has been a complete and *bona fide* change of position in consequence of that laches as to require such a result in equity."[210]

The Cayuga Indians had done what they could to present their claims, i.e. notified them to the specifically appointed agencies, and were consequently not deemed to have been negligent. It is quite possible, however, that claims of this nature – i.e. protective claims on behalf of dependent peoples – fall into a category of their own.[211] This notwithstanding, the *Cayuga Indians Case* is usually referred to as an example of the rule that negligence of the government only will not be sufficient to prescribe claims presented by it on behalf of its citizens.[212] On the other hand, one should probably not draw too far-reaching conclusions from this case since the facts of the case had been brought to the notice of the respondent, the United States, and the claims were held to be admissible a certain date after such notification; in addition a public commission had investigated the facts and recommended payment of the amounts in question, i.e. there does not seem to have been an absence of a record of facts.[213]

[210] *Id.*, at 330.

[211] *Cf.* Brownlie, *op. cit.*, at 507.

[212] *See* King, note 94, *supra*, at 88–89.

[213] As mentioned on p. 285, *supra*, and as will be discussed below, p. 296 *et seq.*, *infra*, a requirement for application of the principle of extinctive prescription is that there is an absence of a record of facts. Cheng summarizes the holding in the *Cayuga Indians Case* as follows: "Thus looking at the substance of the case, its position agrees with the general principle of prescription in international law. The Tribunal did apply it when a defendant was not put on notice. It refused to apply it when it had been notified, even by the private claimant, or when the facts had been clearly established"; Cheng, *op. cit.*, at 385, note 48, *in fine*.

(ii) Another distinction to be made is that between negligence in *presenting* a claim and negligence in *pursuing*, or *prosecuting*, a claim which has already been presented in a timely fashion. Negligence in the latter respect will not prescribe the claim. This was recognized in the *Carlos Butterfield & Co Case*, decided in 1890 between the United States and Denmark. In this case the tribunal stated, *inter alia*, that:

> "The Danish Government, on the other hand, argues, in the first place, that, setting side the original merits of the case altogether, the amount of time which was allowed to elapse before the claim was first presented, and the intermittent manner in which it was subsequently pressed, constitute in themselves a conclusive objection to the validity of the claim although neither Butterfield & Co nor the United States government have used due diligence in the prosecution of the claim, and have thereby exposed themselves to the legitimate criticism of the Danish government on their dilatory action, the delay caused thereby cannot bar the recovery of just and reasonable compensation for the alleged injuries, should the further consideration of the merits of the case result in the decision that such compensation is due."[214]

In this case there was a delay of six years between the events complained of and the *presentation* of the claim. However, during a period of 30 years the claim had from time to time been taken up and allowed to fall again.[215] It follows from the holding in the *Carlos Butterfield & Co Case* that negligence in *prosecuting* a claim cannot be relied on as a ground for invoking extinctive prescription.[216] Arbitral practice in this respect is succinctly summarized by Commissioner Little in the *Willams Case* when he said:

> "There are so many things that may induce one government not to *press pending demands against another*, disconnected with the demands themselves, consideration for the condition and welfare of the debtor state itself being prominent among them, that we are disposed to think the true and, so far as we are advised, the usual way is to regard time in such cases, in the absence of circumstances evidencing abandonment, as no respecter of persons."[217] (emph. added)

Arbitral practice with respect to delay in prosecuting a claim rests on the assumption that the claim has been duly *presented*, thereby giving the respondent sufficient notice to prepare his defense. On this background,

[214] Moore, note 19, *supra*, Vol. 2, at 1205.
[215] *Id.*, at 1187–1189.
[216] Ralston, The Law and Procedure of International Tribunals (1926) 381.
[217] Moore, note 19, *supra*, Vol. 4, at 4199.

it does not really matter whether the failure to *prosecute* a claim is negligent or not. Even if such failure could be characterized as negligent, it would not alone prescribe the claim, assuming, of course, that it had been *presented* in a timely fashion. This is the holding of the Tribunal in the *Carlos Butterfield & Co Case.*

The same holding is to be found in the *Canada Case*,[218] decided in 1870. The American vessel Canada ran aground in the territorial waters of Brazil in 1856. The crew was prevented by Brazilian soldiers from saving the vessel. Instead, the Brazilian authorities seized the cargo and sold it as well as some of the vessel's equipment. Without delay the owner of the Canada filed a claim for damages through official diplomatic channels. The Brazilian answer was negative. As a result of the American ambassador leaving Rio de Janeiro to go back to the United States, and following the outbreak of the American Civil War, the claim was not prosecuted, nor renewed, for some ten years. In the ensuing arbitration the Brazilian Government argued that this silence meant that the claim had been abandoned. The arbitral tribunal, however, said that:

> "It has been argued that the claim is barred because a note of the imperial government was left unanswered for some years. The undersigned cannot acquiesce in this opinion. The claiming government may suspend its action from consideration from the other government, in which it sees no disposition to yield to the influence of reason, and with which it has no wish to have recourse to forces or itself may be engaged with other matters and unable to attend to the claim of its citizens. But this is no proof that the claim has been waived, and the undersigned has too much confidence in the justice of the Brazilian Government to suppose that it would avail itself of such an argument; indeed it has itself declared that it does not pretend to do so."[219]

The same position was taken in the *Stevenson Case*,[220] where the claim was filed forthwith in 1869. The Venezuelan Government, however, announced that it could not arrange for payment of it due to civil warfare in the country. Subsequent thereto, the British Government brought up the claim with the Venezuelan Government again and put it on the list of "unrecognized claims". The British Government then waited for a suitable occasion to act again and took advantage of the first opportunity to present the claim anew. The Venezuelan Government raised the objection

[218] Moore, note 19, *supra,* at 1733.
[219] *Id.,* at 1745.
[220] Ralston–Doyle, note 20, *supra,* at 327.

of extinctive prescription. In rejecting this objection the tribunal stated, *inter alia*, the following:

> "The delay has been either in the inability or the unwillingness of Venezuela to respond to this claim. The occasion of this unwillingness and the reasons why it was placed on the list of 'unrecognized' claims are properly matters for proof and consideration before this commission, but it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent government".[221]

The distinction between *presenting* and *prosecuting* the claim is thus firmly enshrined in arbitral practice. On the other hand, it would seem clear that this distinction must not be relied upon *in absurdum*, that is to say, that even if a claim has once been presented, it would not seem unfair to require some activity, or measures, within a reasonable period of time, which must be determined on the basis of the facts in the individual case. In the opinion of the present author, it does not appear reasonable that *presentation* of a claim should make the claim immune from extinctive prescription for eternity.[222]

(iii) A third distinction to be made in this connection is that between the claim as such – the prayer for relief – and the *legal basis* relied on in support of the claim. This issue was addressed by the arbitrators in the *Ambatielos Case*, decided in 1956.[223]

In 1919 Mr. Ambatielos, a Greek shipowner ordered nine steamships from the British Government. Differences of opinion concerning the contract led to litigation in British courts. Subsequent thereto, the Greek

[221] *Id.*, at 327. Yet another case in the same vein is the *Roberts Case* also decided by the American–Venezuelan Commission. The claim had been filed in 1871, within a few days after the inception of the claim, but had not been prosecuted for 20 years. The arbitrators, in rejecting the objection of extinctive prescription, stated, *inter alia*, the following: "The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan government to reap advantage from its own wrong in failing to make just reparation to Mr Quirk at the time the claim arose." *Id.*, at 142.

[222] *Cf.* Strisower, in Annuaire de l'Institut de Droit International (1925) 35–36; and Roch, note 101, *supra*, at 263.

[223] Commission of Arbitration, Ambatielos Case, Greece v. United Kingdom – Award (with annexes) March 6th 1956 (Her Majesty's Stationary Office 1956). – The case is reported in Reports of International Arbitral Awards, Vol. XII (1963) 85. For comments on the Ambatielos Arbitration, *see* e.g. American Journal of International Law, (1956) 674; Annuaire français de droit international (1956) 402; Hambro, The Ambatielos Arbitral Award, Archiv des Völkerrechts 1956–1957; Honig, Der Schiedsspruch im Ambatielos-Fall vom 6. März 1956, Zeitschrift für ausländisches Recht und Völkerrecht (1956) 133; Hulme, The Ambatielos Case, Melbourne University Law Review, (1957) 64; Johnson, The Ambatielos Case, The Modern Law Review, (1956) 510; Lipstein, The Ambatielos Case. Last phase, International & Comparative Law Quarterly, (1957) 643 and Pinto, La Sentence Ambatielos, Journal du droit international (1957) 540.

Government commenced the diplomatic phase of the dispute by sending a note through its legation in London to the British Government on 12 September 1925. Further notes were sent in 1933, 1934, 1939 and 1940. The case rested from 1940 to 1945 and was brought before the International Court of Justice in 1951. This court eventually referred the parties to arbitration.[224] In the arbitration proceedings, the British Government argued that the claim of the Greek Government ought to be rejected by reason of undue delay in its presentation. It should be noted, however, that the undue delay imputed to the Greek Government did not relate to the claim – the prayers for relief – as such, but to the use of the Treaty of Commerce and Navigation between Greece and Great Britain of 1886 as the *legal basis* for the claim. It was an undisputed fact that until 1939 the claim of the Greek Government was based solely on general international law and that the Treaty of 1886 was relied upon in support of the claim for the first time in a note sent in 1939.[225] The claims – the prayers for relief – of the Greek Government had, however, remained unchanged since they were first raised in 1925.

The arbitrators concluded that a change of the legal basis of a claim could *not* affect the principle of extinctive prescription; in other words, extinctive prescription is only applicable with respect to the prayers of relief and not to the legal basis relied on in support thereof. One exception was mentioned, however, *viz.*, that such change would bring about results which in themselves would justify application of the principle of extinctive prescription, such as, for example, presenting difficulties to Great Britain in preparing and presenting its defense.[226] In this connection the arbitrators stated that since the facts had remained unchanged from the beginning of the dispute, it was difficult to see that Great Britain had been caused any difficulties in preparing its defense.[227]

4.5.4 Absence of a Record of Facts

No cases have been found in arbitral practice in which extinctive prescription has been accepted when a clear record of the facts was available

[224] The Greek Government initiated proceedings against Great Britain before the International Court of Justice in 1951. In 1952 the Court ruled that it was without jurisdiction to decide on the merits of the dispute but that it did have jurisdiction to decide whether or not Great Britain was under an obligation to submit to arbitration. With respect to the latter issue the Court decided in 1953 that Great Britain was under an obligation to submit to arbitration. (I.C.J. Reports (1953) 19). *See* Reports of International Arbitral Awards, note 223, *supra,* at 94–97.

[225] Reports of International Arbitral Awards, note 223, *supra,* at 103.

[226] *Id.*, at 103; *see* discussion on p. 301 *et seq.*, *infra.*

[227] *Id.*

to the respondent. In other words, only if there is *no* clear record of facts will the principle of extinctive prescription be applied. This rule was relied on in two cases decided by the Italian–Venezuelan Commission in 1903. In the *Giacopini Case*[228] – where 32 years had lapsed prior to the presentation of the claim – the tribunal found that proofs had been taken in the presence of a governmental officer shortly after the incident complained of. The officer in question had cross-examined the witnesses and had been given a copy of the evidence. Thus, the respondent government had knowledge of the facts and the claim already at this stage and thus had ample opportunity to prepare its defense. The tribunal ruled that:

> "Examination of the *expedient* in the present case shows that the tribunal before which the proofs were made (in November, 1872), directed notice to the fiscal of the nation before their taking; that he was present and vigorously cross-examined the witnesses; that he was asked and was accorded by the judge a copy of the evidence. The government knowing in this manner of the existence of the claim had ample opportunity to prepare its defense. As was stated in the *Gentini Case*; 'The principle of prescription finds its foundation in the highest equity – the avoidance of possible injustice to the defendant'. In the present case, full notice having been given to the defendant, no danger of injustice exists, and the rule of prescription fails."[229]

In the *Taggliaferro Case*,[230] although the claim was 31 years old and had not previously been presented to the respondent, it was held that extinctive prescription did not apply. The acts complained of were connected with the unjust imprisonment of a person by the military authorities of the respondent state (Venezuela) and with the failure of its authorities to grant redress. It was said that judicial, military and prison records must exist to demonstrate whether the claim was groundless or not.

The tribunal stated:

> "The injured party at once appealed to the justice authority which denied relief, and then to the immediate representative of the nation, who, upon a subterfuge, refused his assistance. The responsible constituted authorities knew at all times of the wrong doing, and if the complaint was baseless – an impossible conclusion under the evidence – judicial, military and prison records must exist to demonstrate the fact. When the reason for the rule of prescription ceases, the rule ceases, and such is the case now."[231]

[228] Ralston–Doyle, note 20, *supra*, at 765.
[229] *Id.*
[230] Ralston–Doyle, note 20, *supra*, at 764.
[231] *Id.*

An earlier case pointing to the same direction is the *Carlos Butterfield & Co Case*[232], decided in 1890, which in this connection stands for the proposition that the delay in presenting a claim must have caused the evidence to become so obscured so as to create a risk of not being able to ascertain what has in fact taken place. When such a situation has not yet been reached, a delayed claim will not be prescribed.[233] In this case there was a gap of less than six years between the events complained of and the presentation of the claim.

Judging from a *dictum* in the *Williams Case*, it may even be sufficient to prevent prescription that the facts are not *disputed*, i.e. it would not be necessary with a *clear* record of the facts. In this connection, the tribunal said:

> "It is said there are old claims about which there is and can be no dispute as to the facts. It is enough to say as to such, that the present holding does not stand in their way. The statement of Mr. Crallé, Acting Secretary of State, to which our attention has been directed, namely, 'Governments are presumed always ready to do justice; and whether a claim be a day or a century old, so that it is well founded, every principle of natural equity and of sound morals requires that it should be paid' may not in itself perhaps be opposed to prescription. Conceded that a claim 'is well founded', there would seem to be no occasion for prescriptive or other evidence in regard to it. The objection to the remark, in the connection in which it was employed, is, that it assumed the truth of the matter in controversy, to wit, the validity of the claim, for the ascertainment of which the principle was invoked. As to *any admitted or indisputable fact*, the public law, not resting 'upon the niceties of a narrow jurisprudence, but upon the enlarged and solid principles of state morality', we are inclined to think, *would not oppose the lapse of time*, except for the protection of intervening rights, should there be such, even where municipal prescription might."[234]

There is one case which could be interpreted as possibly standing in the way of the above mentioned rule – that prescription requires absence of a record of facts – *viz.*, the *Sarrapoulos Case*.[235] In this case there was no

[232] Moore, note 19, *supra,* Vol. 2, at 1185.

[233] *Id.*

[234] *Id.*, Moore, note 19, *supra* Vol. 4 at 4197–4198 (emph. added). – *See* also the *Roberts Case*, tried by the American–Venezuelan Commission, where it was said: "*The essential facts* which fixed the liability of Venezuela *were not then and are not now denied.* The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan government to reap advantage from its own wrong in failing to make just reparation to Mr. Quick at the time the claim arose", Ralston–Doyle, note 20, *supra,* at 142 (emph. added).

[235] *See* note 192, *supra.*

dispute as to the facts, nor as to the responsibility of the Bulgarian state. This notwithstanding, the tribunal did not try the claim. As explained above, however,[236] the *Sarrapoulos Case* is generally not considered as an example of application of the principle of extinctive prescription, but rather of a claim having been waived and/or abandoned.[237]

It follows from the foregoing that when a respondent state has, or may reasonably be expected to have, in its possession evidence in the form of *public* records, it is possible that the principle of extinctive prescription will not be applied, the underlying theory being that the respondent has, in such a situation, access to evidence enabling him to establish his defense. This may be the case, for example with respect to public bonds, claims for taxes and duties paid. One possible illustration is the *King & Gracie Case*[238] which concerned a dispute between the United States and Great Britain regarding export duties. The two states had agreed in a treaty of 1815 not to charge higher export duties in relation to each other than to third countries. Great Britain agreed to reimburse the higher duties in fact charged by it as from 1823, but refused to do so for the period between 1815–1823. Presumably on the basis of official records, it was conceded that there had in fact been an inequality in duties in violation of the treaty. This being the case, and since the treaty did not provide for the lapse of time as a bar to presenting claims, the tribunal concluded that Great Britain must repay the duties.[239]

Generally speaking, evidence in the form of various public records is typically most likely to be available with respect to so-called public claims, i.e. claims of the state itself, as opposed to so-called private claims, which are claims presented for and on behalf of a national of the state, typically resulting from transactions of a commercial and contractual nature or from events giving rise to tort claims.[240]

The distinction between public and private claims is recognized by the Institut de Droit International in its report. With respect to elements to be taken into account in deciding matters of extinctive prescription, the report says that:

[236] *See* p. 289, *supra.*
[237] *See* p. 307 *et seq.*, *infra.*
[238] Moore, note 19, *supra,* at 4179.
[239] *Id. See* also Roch, note 101, *supra*, at 266–268. – As discussed at 267–268, *supra*, the King & Gracie Case is often referred to as confirmation of the non-existence of the principle of extinctive prescription in public international law.
[240] For further discussion of these concepts, see p. 346 *et seq., infra.*

"(i) L'origine publique ou privée et la caractère contractuel ou délictuel de la dette que fait l'objet du litige, la prescription devant, en règle générale, être plus difficilement admise pour les dettes publiques que pour les dettes privées, pour les dettes contractuelles que pour les dettes délictuelles."[241]

Many of the cases referred to and discussed above typically fall in the private claims category, i.e. claims raised by the state for and on behalf of a national of the state. Fewer are concerned with interstate claims proper, i.e. claims arising directly out of interstate relations. With respect to the latter category it has been said that extinctive prescription does not apply to them, whereas it applies to private claims.[242] It is true that most arbitration cases where issues of prescription have been discussed seem to concern private claims. However, most arbitrators, commentators and scholars – while recognizing *per se* the distinction between private and public claims – do not restrict extinctive prescription only to the former category of claims.[243]

Moreover, there are examples in international arbitral practice of claims between states – public claims – having been prescribed. One such case is the *Russian Indemnity Case* decided in 1912.[244] When signing the peace treaty of 1879, Turkey agreed to pay reparations to Russia. Since Turkey was in delay in making payments, Russia demanded default interest. However, this claim was made after the last payment of the capital amount had been effected. In 1902 approximately 35,000 French francs remained of a total of 6 million francs. Payment of the remaining amount was offered by Turkey. Russia, however, refused to release Turkey from its obligations, since it considered itself entitled to default interest as of 1879. The Russian Government had requested interest in 1890 and 1891, but not in any of the following years, despite the fact that payment of the reparations had been the subject of several diplomatic notes. The Russian Government had not explicitly renounced any right to default interest. This notwithstanding, the tribunal refused to award default interest, saying, *inter alia*, that:

[241] *See* note 18, *supra,* at 23.

[242] *Cf.* Annuaire de l'Institut de Droit International Vol. 32 (1925) 7–9, and the views expressed by Pinto, p. 262–264, *supra.*

[243] This is the position of the commentators referred to in notes 95, 101 and 102 *supra.* However, Strisower is of the opinion that there is no need to make a distinction between public and private claims, at least not as far as the *principle* of extinctive prescription is concerned, *see* Strisower in Annuaire de l'Institut de Droit International, note 18, *supra,* at 37.

[244] Scott, The Hague Court Reports Vol. I (1916) 322. For a general discussion of the Russian indemnity and claims, *see* Wynne, State insolvencies and foreign bondholders, Vol. II (Case Histories) (1951) 456–458.

"... for 11 years and more and up to a date after the payment of the balance of the principal there had not only been no question of interest between the two governments, but mention had been made again and again of only the balance of the principal."[245]

The tribunal did not explicitly refer to the principle of extinctive prescription, but the case is usually referred to as an example of prescription with respect to interstate claims.[246] On the other hand, however, the *Russian Indemnity Case* is by some commentators regarded as an example of waiver or acquiescence of a claim.[247] Even if there is much to be said in favor of the latter interpretation, there seems to be little doubt today that extinctive prescription applies as a matter of principle also with respect to public claims. It is quite another thing that in practice application of the principle of extinctive prescription may be excluded with respect to such claims as a result of there being a record of facts, or that the facts of the particular case are acknowledged or undisputed. Even if we accept, as a matter of principle, that evidence and information with respect to public claims may typically more often be found in public records than with respect to private claims, this is in all likelihood less true today than at the turn of the century, when most cases addressing this issue were decided. Today states do not seldom participate in commercial transactions, or otherwise establish commercial relations with other states which do not reach any public records.[248] It would therefore seem that the distinction between private and public claims *in this respect* is fading away. Whether or not there is a record of facts must be decided on the basis of the *actual* facts and circumstances of each individual case.

4.5.5 The Respondent Must be Placed at a Disadvantage in Establishing its Defense

The requirement that the respondent must be placed at a disadvantage in establishing his defense is another requirement for the application of the principle of extinctive prescription in public international law. It is the

[245] *Scott, op. cit.*, at 322. In the opinion of Scott "/t/he tribunal considered this to be a renunciation of the claim for interest, and held that, after the principal had been paid in full to Russia or placed at its disposal, the Russian Government was, by the interpretation which had been accepted and practised in its name by its Embassy, estopped from reopening the question", *ibid.*, at 297–298.

[246] *Cf.* e.g. Annuaire de l'Institut de Droit International, note 18 *supra*, at 8 and Fauchille, note 95, *supra*, at 391.

[247] *Cf.* e.g. King, *supra*, note 94, at 94, note 6, Lauterpacht, Private Law Sources and Analogies of International Law (1927) at 261, note 2 and Scott, note 245, *supra*.

[248] *Cf.* p. 346 *et seq.*, *infra*.

opinion of this author that the four criteria referred to above[249] in fact boil down to two, *viz.*, (i) delay in presenting a claim and (ii) the delay must put the respondent at a disadvantage. The other requirements are really different aspects – sub-categories – of these two requirements. As discussed above, the requirement that the delay in presenting a claim be *unreasonable* is impossible to transform into a specific number of years; fixed time limits for prescription do not exist under customary public international law. On the other hand, it is generally accepted that the mere *delay* in presenting a claim is not sufficient. In order for a delay to be unreasonable, it must put the respondent at a disadvantage.

The same reasoning applies with respect to the requirement that the delay must be imputable to the negligence of the claimant. Again: the question whether or not the claimant has been negligent, is unlikely to be answered without reference to the effect the delay may have on the respondent. Unless the delay results in the respondent being put at a disadvantage, the claimant will not be held negligent.

Even the third requirement mentioned above – i.e. that there must be an absence of a record of facts – leads back to concerns with respect to the situation of the respondent. If there is *no* record of facts, the respondent will not be able to prepare his defense. On the other hand, if there *is* a record of facts, the respondent will – at least theoretically – have the possibility to prepare its defense and is thus not deemed to have been put at any disadvantage.

The extent to which the delay puts the respondent at a disadvantage is thus – it is submitted – the ultimate test in determining whether or not the claim is to be prescribed. Even though arbitral practice does not seem to have so stated, at least not explicitly, several arbitral awards contain language – mostly in the form of *obiter dicta* – supporting this conclusion.

In the *Williams Case*, the tribunal said:

> "The causeless withholding of a claim against a state until in the natural order of things, the witnesses to the transaction are dead, vouchers lost, and *thereby the means of defence essentially curtailed, is in effect an impairment of the right to defend.*"[250]

In another case, *Loretta G. Barberie* v. *Venezuela*, where 45 years had lapsed before the claim was presented, the arbitrators stated:

> "Great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence by which the equality

[249] *See* p. 285, *supra*.

[250] Moore, note 19, *supra*, Vol. 4 at 4195 (emph. added).

> of the parties is disturbed or destroyed, and as a consequence renders the accomplishment of exact or even approximate justice impossible".[251]

By the same token, where there is *no risk* of injustice being imposed on the respondent, the principle of extinctive prescription does *not* apply. Accordingly, in the *Taggliaferro Case* the arbitrators concluded:

> "The responsible constituted authorities knew at all times of the wrongdoing ... judicial, military and prison records must exist to demonstrate the fact. When the reason for the rule of prescription ceases, the rule ceases, and such is the case now."[252]

Existing arbitral practice does not allow for a clear-cut definition of *when* the defendant is at a disadvantage. As mentioned above, public international law does not contain any hard and fast rules on extinctive prescription, but merely a principle to the effect that under certain circumstances the lapse of time may cause a claim to be prescribed. It follows from the foregoing that in applying this principle the facts and circumstances of the individual case play an important role. This probably explains why arbitrators generally tread with caution in this field and take care to anchor their decisions in the factual context of the particular case. The various criteria referred to above[253] and the presumptions underpinning the principle of extinctive prescription are often applied simultaneously and in a cumulative fashion – but not always consistently – so as to make it difficult, if not impossible, to determine precisely which criteria and circumstances the arbitrators have relied on in reaching their decision.[254] The lasting impression is that general considerations of justice and equity play a decisive role.[255] In applying such general considerations it would seem that arbitral tribunals seek guidance from the basic foundations underlying the principle of extinctive prescription. The two cornerstones described above, on which the application of the principle rests in the opinion of this author, put the interests of the defendant in the center. As

[251] Moore, note 19, *supra,* at 4203. This case was, however, dismissed on other grounds.
[252] Ralston–Doyle, note 20, *supra,* at 764–765.
[253] *See* p. 285, *supra.*
[254] *Cf.* e.g. de Visscher, note 101, *supra,* at 532.
[255] *Cf.* e.g. the rules proposed by the Institut De Droit International. Section II of the proposal reads: "A défaut de règle conventionelle en vigeur dans les rapports des Etats en litige, fixant le délai de la prescription, sa détermination est une question d'espèce laissée à la souveraine appréciation du juge international, qui, pour admettre le moyen tiré du laps de temps, doit discerner dans les circonstances de la cause l'existence de l'une des raisons (fraude, renonciation, impossibilité de preuve) par lesquelles la prescription se justifie et s'impose." Annuaire de l'Institut de Droit International (1925) 23.

already mentioned, in the *Gentini Case* the tribunal explained the philosophy underlying the principle of extinctive prescription as follows:

> "The principle of prescription finds its foundation in the highest equity – the avoidance of possible injustice to the defendant."[256]

A similar approach was taken in *Faulkner* v. *Mexico*, decided by the United States and Mexico General Claims Commission, where it was said:

> "International tribunals have in some instances declared that one government should not call upon another government to respond in damages when such action, after a long lapse of time, *clearly puts the respondent government in an unfair position in making its defense, particularly in the matter of collecting evidence*, and raises a presumption of a non-existence of a just claim which would have been presented had it ever existed."[257]

The objective is thus to prevent the respondent from being put in an unfair, disadvantageous position. This would be the case in particular if the delay in presenting a claim would prevent him from preparing his defense in the dispute, for example, with respect to gathering evidence.

If he is deprived of the possibility to prepare his defense the arbitration proceedings would be perceived as unfair, not affording the respondent the opportunity to present his case. Thus, when the respondent is deprived of the possibility to establish his defense as a result of the delay in presenting the claim, he is deemed to be at a disadvantage. To allow a claim to be tried on the merits under such circumstances, would be tantamount to accept injustice being imposed on the defendant.[258]

[256] Moore, note 19, *supra*, Vol. 4, at 4179. The case is discussed by Ralston, note 21 *supra*, at 381–2 and by Roch, note 101, *supra*, at 261.

[257] United States and Mexico General Claims Commission. Opinion of Commissioners (1927) 96 (emph. added).

[258] As discussed above – *see* p. 284 – this situation could be considered as a case of equality of the parties in a dispute. Equal treatment of the parties to a dispute is one of the fundamental principles of international arbitration, the violation of which may lead to the setting aside of an arbitral award. The principle of equal treatment of the parties is enshrined in the latin maxim *audiatur et altera pars*. This maxim finds its expression, *inter alia*, in Article 34(1)(a)(ii) of the UNCITRAL Model Law on International Commercial Arbitration, which stipulates that an arbitral award may be set aside if a party has not been able to present his case. With respect to arbitral awards falling under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(1) (b) stipulates that an award may be refused recognition and enforcement if the party against whom the award is invoked can prove that he was unable to present his

4.6 Extinctive Prescription Distinguished

4.6.1 Introduction

As mentioned above,[259] there are several examples in arbitral practice where extinctive prescription has been confused with waiver and/or abandonment of claims. Waiver and abandonment are in turn closely connected with the concepts of acquiescence and estoppel in international law. Generally speaking, it is fair to say – at least in a preliminary fashion – that there seems to be a certain degree of overlap between these concepts in international law, at least in so far as they are concerned with the effect of lapse of time. As discussed above[260] lapse of time is a central element of the principle of extinctive prescription in international law. Lapse of time plays an important role also with respect to the concepts of waiver, abandonment, acquiescence and estoppel. Is it possible that the arbitral decisions discussed above as examples of the principle of extinctive prescription[261] may be explicable on other grounds, such as the aforementioned concepts of international law? In search of an answer to this question – and with a view to determining the scope of application of the principle of extinctive prescription – it is proposed briefly to discuss these general concepts. The purpose of this discussion is *not* to review and analyze these concepts in any detail, but only to focus on such elements of the concepts which may interact or overlap with extinctive prescription.[262]

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case. The public policy defense provided for in Article V(2) (b) of the Convention may also be available for a party who was unable to present his case. For a discussion of these articles of the Convention, *see* van den Berg, The New York Arbitration Convention of 1958 (1981) 306–311 and 376–382. It must be emphasized, however, that while the Convention enshrines the principle of equal treatment of the parties, little guidance can be gained from it with respect to interstate arbitrations and the application of the principle of extinctive prescription in such arbitrations, primarily because the Convention is usually considered to be applicable to awards rendered on the basis of a national (municipal) arbitration law, which is typically not the case with interstate arbitrations, unless the parties have so agreed. For a discussion of the field of application of the Convention in this respect, *see* van den Berg, *op. cit.*, at 29 *et seq.*

[259] *See* pp. 288–289, *supra.*

[260] *See* p. 285 *et seq.*, *supra.*

[261] *See* pp. 267–278 and 285–304, *supra.*

[262] These concepts are indeed fundamental elements of international law and have been discussed in many learned writings, the most important of which will be referred to in the following. Article 46 of the Draft Articles on State Responsibility addresses the issue of loss of the right to invoke responsibility. The article reads:

While there are close links between several of these concepts, it must be emphasized that there are significant differences, both theoretical and practical, even if it is sometimes difficult in practice to draw unambiguous dividing lines between them.[263] The close links between the concepts are in the opinion of the present author at least partially explained by the fact that they have a common ground in that they, to varying degrees, proceed from the notion of consent, or minimally that they are reflections of the explicit or implicit will of a state. At the outset, it must also be noted that this author views these concepts – irrespective of terminology – as being concerned with evaluating *the conduct of states* and with determining the legal significance to be attached to such conduct.

In addition to the aforementioned concepts, I shall also briefly discuss interpretation of treaties as a possible alternative ground to explain extinctive prescription. When a dispute between two states arises from, or in connection with, a treaty entered into, it is, at least theoretically, possible that extinctive prescription is simply a matter of interpreting the treaty between the two states.[264]

"The responsibility of a State may not be invoked if: (a) The injured State has validly waived the claim in an unequivocal manner; (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim". – This wording was adopted at the fifty-second session of the International Law Commission in 2000. As far as subsection (b) of Article 46 is concerned the text proposed by the Special Rapporteur was different, *viz.*, "(b) the claim is not notified to the responsible State within a reasonable time after the injured State had notice of the injury, and the circumstances are such that the responsible State could reasonably have believed that the claim would no longer be pursued".

The proposal put forward by the Special Rapporteur encapsulated some of the distinctive features of extinctive prescription, even though the term was not used. During the ensuing discussion, while the principle of extinctive prescription was confirmed, doubts were expressed as to the exact scope of applicability of the principle; in addition some members of the commission considered the reference to a "reasonable time" too vague; see Report of the International Law Commission, Fifty-Second Session (A/55/10) (2000) 75, 82–83, 85–87. The deliberations of the Commission resulted in Article 46 as quoted above, i.e. referring to waiver and acquiescence as grounds for losing the right to invoke responsibility.

[263] *See* the following statement by the Chamber of the International Court of Justice in the *Gulf of Maine Case*: "The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion." – I.C.J. Reports (1984), 305.

[264] *See* the *King & Gracie Case* discussed at pp. 274–275 and 299, *supra*.

4.6.2 Waiver and Abandonment

There is little doubt that a state may waive a claim. This holds true both for claims of its own as well as for claims put forward as a result of the state exercising its right of diplomatic protection of its nationals. The latter category, while the claim derives from injury to private persons – legal as well as physical – is nevertheless a claim for violation of an international obligation and thus an international claim.[265] As a consequence thereof the *state* may waive the claim without obtaining approval from the injured person, and, conversely, a waiver of the claim by the person in question does not bind the state.[266]

A waiver by the state can be explicit, in which case it will generally cause few problems. Waivers fall into the broader category of unilateral acts by states, a category which is generally accepted as being capable of having legal effects under international law.[267] In the *Nuclear Tests Cases*, the International Court of Justice made the following statements:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the state making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the state being thenceforth legally required to follow a course of conduct consistent with the declaration. ------ Of course, not all unilateral acts imply obligations; but a state may choose to take up a certain position in relation to a particular matter with the intention of being bound – the intention is to be ascertained by interpretation of the act. When states make statements by which their freedom of action is to be limited, a restrictive interpretation is called for. ------ One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. ------ Just as the principle of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration".[268]

[265] *See* discussion on pp. 271–272, *supra*.

[266] Brownlie, *op. cit,*. at 507–508. – With respect to an international claim for the violation of the human rights of an individual, however, the view is taken by the author of the Third Restatement of Law that it is not possible for the state to waive the claim without the consent of the individual in question, *see* Restatement of the Law Third. The Foreign Relations Law of the United States (1987), Vol. 2, 179.

[267] *See* Oppenheim, International Law (ninth ed. 1996), Vol. 1, 1187 *et seq.*, and references therein, in particular Suy, Les actes juridiques unilateraux en droit international publique (1962), and Jacqué, Elements pour une théorie de l'acte juridique en droit international publique (1972).

[268] I.C.J. Reports (1974) 253 (Australia v. France).

As appears from the quote, unilateral acts by states call for a restrictive interpretation, the purpose of which must be to ascertain the intention of the state. Waiver of a claim amounts to deliberate renunciation, abandonment, of the claim.[269] As mentioned above, an *explicit* waiver of a claim, be it in writing or oral, does not typically create problems.[270] Once a claim has been waived, it cannot be resuscitated.[271]

More difficult questions arise when a waiver is *not explicit*, but rather implicit. In such a situation careful attention must be paid to the circumstances surrounding the waiver and to the conduct of the state making the waiver, when determining the legal significance of the state's conduct. Generally speaking, it would seem fair to state that absence of a reasonable level of activity could be tantamount to an implicit waiver. Inactivity by a state is also a central element of acquiescence. In practice the dividing line between implicit waiver and acquiescence is often blurred; in fact the characterization of such a situation – it is submitted – is reduced to a question of terminology.

The crucial question in distinguishing between extinctive prescription, on the one hand, and waiver and abandonment on the other, is whether lapse of time in and of itself is sufficient to constitute a waiver or abandonment of a claim.[272] This is so because in relation to extinctive prescription the typical situation is that the claimant state has remained inactive, silent, for a certain period of time.[273]

[269] Even though there may be distinctions to be made between "waiver" and "renunciation" this author will use the terms interchangeably; for a discussion of this terminology, *see* Oppenheim, *op. cit.*, at 1195, n. 1.

[270] The expression "explicit waiver" is used to describe a waiver which is specific enough so as to leave no doubt with respect to the addressee, the identity of the claim nor the intention of the state making the waiver. Under such circumstances a unilateral declaration in the form of a waiver is clearly binding on the state making the waiver. When the waiver is not specific, but rather *erga omnes*, it is necessary to review and analyze the facts carefully before concluding that such waiver has a binding effect.

[271] On the other hand, it would seem reasonable to assume that a claim which has been waived on the basis of false or incorrect assumptions could be brought back to life when the true state of affairs has been learnt by the waiving state.

[272] This issue will only arise when the circumstances are such that the state may have made an *implicit* waiver. An *explicit* waiver, assuming it is *not erga omnes* – would typically resolve all doubts as to the intention of the state.

[273] An attempt to answer this question is made on pp. 312–313, *infra*, proceeding from the view that an implicit waiver is to be put on an equal footing with acquiescence.

4.6.3 Acquiescence and Estoppel

4.6.3.1 General

The dictionary meaning of acquiescence is usually that of tacit agreement or tacit consent.[274] In public international law the term acquiescence is mostly used to describe forms of silence, or absence of protest, "in circumstances which generally call for a positive reaction signifying an objection".[275] Without jumping to conclusions, one can sense, already from this definition, conceptual difficulties to apply acquiescence to the typical situation relative to extinctive prescription, i.e. that the claimant state simply remains silent and does not present its claim to the alleged debtor state. Generally speaking, there would not seem to be anything for the claimant state to protest against.[276]

In arbitral and judicial practice, the concept of acquiescence is most commonly referred to in boundary and territorial disputes.[277] Moreover, in such cases acquiescence is usually relied on together with the concept of estoppel. As mentioned above[278] there are close links between these two concepts, leading sometimes to confusion with respect to their respective spheres of applicability.[279] In the opinion of the present author there are, however, at the conceptual level clear distinctions between the two terms. This follows already from the traditional definition of estoppel, *viz.*, that it "operates so as to prevent a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit".[280] The understanding of these

[274] *See*, the Concise Oxford Dictionary (7th ed. 1982) 9, "acquiesce: agree, esp. tacitly; raise no objection".

[275] Mac Gibbon, The Scope of Acquiescence in International Law, British Yearbook of International Law (1954) 143; Brownlie, *op. cit.*, at 157 describes the concept as follows: "Acquiescence has the same effect as recognition, but arises from conduct, the absence of protest when this might reasonably be expected." *See* also Shaw, International Law (3rd ed. 1991) 298 referring to Brownlie with approval.

[276] *See* discussion on pp. 312–313 *et seq.*, *infra*.

[277] *See* e.g. Sinclair, Estoppel and acquiescence, in Lowe & Fitzmaurice (eds), Fifty Years of the International Court of Justice (1996) 104.

[278] *See* p. 308 *et seq.*, *supra*.

[279] *See* the critical comments of Sinclair with respect to the reasoning of the Permanent Court of International Justice in the *Serbian Loans Case*, Sinclair, *op. cit.*, at 107.

[280] Bowett, Estoppel Before International Tribunals and its relation to Acquiescence, British Yearbook of International Law (1957) 176. – Just as the concept of acquiescence would seem difficult to apply with respect to extinctive prescription – *see* p. 313, *infra* – so would estoppel seem ill fit for application to the typical situation in which the question of extinctive prescription arises.

two concepts – and the differences between – is facilitated if one views estoppel as the possible *consequence* of acquiescence rather than as an equivalent concept.[281]

4.6.3.2 Acquiescence

In the past it has sometimes been suggested that consent of a state cannot be tacit or passive. Fauchille, for example, took the position that acquiescence means express consent and doubted that consent of a state could be implied from the *inactivity* of a state.[282] Acceptance of this view would completely deny the validity of any doctrine of acquiescence in public international law. Moreover, such a view does run counter to the generally held opinion today.[283] There is little doubt that acquiescence in the form of silence and absence of protest, when activity is called for, fulfills important functions in international law.[284] Generally speaking, it serves as evidence of recognition or acceptance of factual circumstances which typically have legal consequences. Thus, acquiescence is an important element of *interpretation.*[285] The subsequent conduct of the parties to a treaty, e.g. inactivity, may be important to determine the intention of the parties with respect to unclear provisions of the treaty in question. As mentioned above, acquiescence may also in the appropriate circumstances result in estoppel.[286] Acquiescence is also an important element in the *development of rules of customary international law.* One commentator has observed that "/t/he doctrine of acquiescence is as significant a factor in the development of a customary right as is the *opinio juris*

[281] *See* Mac Gibbon, Estoppel in International Law, International & Comparative Law Quarterly (1958) 475. *See* also the separate opinion of Judge Fitzmaurice in the *Temple of Preah Vihear Case* where he made the following statement: "The principle of preclusion is the nearest equivalent in the field of international law to the commonlaw rule of estoppel ... is quite distinct theoretically from the notion of acquiescence. But acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights, and can be regarded as a representation to that effect ....''; I.C.J. Reports (1962) 63.

[282] Fauchille, Traité de droit international publique (8th ed. 1925), Vol. I, Part 2, 382; *See* also Moore, *op. cit.*, Vol. 2, at 1736, discussing the *Canada Case* and describing one argument put forward by Brazil, *viz.*, that "the acquiescence of a sovereign government can never be assumed from lapse of time".

[283] *See* Mac Gibbon, note 275, *supra,* at 145, with references.

[284] The philosophy underlying the concept of acquiescence has been explained as follows: "The far-reaching effect of creating legal obligations by silence and inaction is an essential element in the promotion of stability in international relations, and is intended to prevent States from playing 'fast and loose', *see* Müller & Cottier, Acquiescence, in Bernhardt (ed.), Encyclopedia of Public International Law Vol. 7 (1984) 5".

[285] Mac Gibbon, note 275, *supra,* at 146.

[286] *See* note 281, *supra.*

in the formation of a customary obligation".[287] It would seem that in practice the concept of acquiescence has played its most important role with respect to *acquisitive prescription* and *historic rights* to territory. This has been illustrated in a number of arbitral and judicial decisions concerning disputed title to territory.[288] For present purposes, and by way of example, suffice it to mention one of the more significant cases, *viz.*, the *Anglo–Norwegian Fisheries Case*. The dispute concerned the Norwegian system of delimiting the outer limits of its territorial waters. In examining the legal validity of the Norwegian delimitation system, the International Court of Justice said:

> "Norway has been in a position to argue without contradiction that neither the promulgation of the Delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign states ... The general toleration of foreign states with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government ... in no way contested it".[289]

The Court went on to say the following:

> "The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.
>
> The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.
>
> The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of Governments bears witness to the fact that they did not consider it to be contrary to international law"[290]

It is noteworthy, that in these two much-quoted passages the term "acquiescence" is not used. On the other hand, it is submitted that the phrase "general toleration" used by the Court is tantamount to a reference to

[287] Mac Gibbon, note 275, *supra,* at 151. For a full discussion of this function of acquiescence, *see* Mac Gibbon, Customary International Law and Acquiescence, British Yearbook of International Law (1957) 115.

[288] *See* Mac Gibbon, note 275, *supra*, at 156–162 and the decisions discussed there; *see* also Blum, *op. cit.*, at 67–78 and Johnson, Acquisitive prescription in international law, British Yearbook of International Law (1950) 340–342.

[289] I.C.J. Reports (1951) 138.

[290] *Ibid.*, at 139.

acquiescence.[291] One commentator has described the importance of this case in the following way: "In none of the other cases discussed did acquiescence assume so significant a place as in the *Fisheries* case".[292]

While it seems clear that acquiescence – taken to mean tacit agreement or consent – fulfills important functions in international law, it would seem equally clear that acquiescence is to be restrictively interpreted.[293] This is – it is submitted – particularly true with respect to *silence* as proof of acquiescence, since there may be many reasons for a state to be silent. Generally speaking, whether silence is tantamount to acquiescence or not will depend on the circumstances in which a state remains silent. Acquiescence in the form of silence can only create a *presumption* of consent which may, of course, be rebutted by evidence indicating a different intention. In the view of the present author the ultimate test in this connection must be to ascertain that silence reflects the true intention of the state in question, i.e. that silence *de facto* signifies agreement or consent. Needless to say, this is easier said than done, since – as mentioned above – there may be many reasons for a state to maintain silence. One such reason could be that the disputing parties have agreed explicitly or implicitly – for example by continuing discussions or negotiations – to leave the issue(s) in question open.[294] Other reasons may include indifference, lack of interest and a desire to maintain good relations.[295]

It is important to keep in mind another element of the doctrine of acquiescence, which tends to limit its application, *viz.*, that acquiescence presupposes some form of knowledge on the part of the acquiescing state of the facts to which the alleged acquiescence relates.[296] That knowledge is a prerequisite of acquiescence follows from the general definition of

[291] *See* Mac Gibbon, note 275, *supra,* at 160 note 3; for a different view, *see* Johnson, The Anglo–Norwegian Fisheries Case, International & Comparative Law Quarterly (1952) 165, note 33.

[292] Mac Gibbon, note 275, *supra,* at 162. – Another case in point decided by the International Court of Justice is *The Minquiers and Ecrehos Case*, I.C.J. Reports (1953) 48, where considerable importance was attached to the fact that objections from France were absent, or limited, with respect to British claims of sovereignty. For an analysis of this case, *see* Roche, The Minquiers and Ecrehos Case (1959).

[293] Mac Gibbon, note 275, *supra* at 168.

[294] *Ibid., at* 172.

[295] With respect to the latter reason, *see* the *Minquiers and Ecrehos Case* in which France argued that it had not protested because it was unwilling to risk the good relations then existing between France and Great Britain; Mac Gibbon, note 275, *supra,* at 171, note 3.

[296] *See* Mac Gibbon, note 275, *supra,* at 173. This is illustrated, *inter alia*, by Article 45 of the Vienna Convention on the Law of Treaties, which reads: "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts

acquiescence mentioned above,[297] *viz.*, silence or absence of protest in circumstances which would generally call for a positive reaction signifying an objection. If the state in question is not aware of the relevant circumstances, there is – from the state's perspective – nothing to protest against.[298]

Silence and lapse of time are important elements of the doctrine of acquiescence as well as of the principle of extinctive prescription. The doctrine of acquiescence has been developed with respect to situations when a state is silent, but some form of activity would normally be expected of the allegedly acquiescing state. This is not the typical situation when the principle of extinctive prescription is invoked, since a state having a claim against another state would not, generally speaking, be expected to protest against this state of affairs. In addition, as discussed above silence (lapse of time) is but one of several requirements for the application of the principle of extinctive prescription.[299]

4.6.3.3 Estoppel

In international law the term estoppel is generally used to describe a legal principle which precludes a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other party has acted to his detriment or the party making the statement has secured some benefit.[300]

While the term "estoppel" has its origin in Anglo–American municipal legislation, lawyers from other countries would normally achieve the same results by relying on the legal principles underpinning the well-

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(a) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be". (emph. added).

[297] *See* p. 309, *supra*.

[298] It would seem clear that formal notification of claims is not required to constitute knowledge in this connection, but rather that constructive knowledge may be sufficient, which in turn raises the question of the extent to which, and under which circumstances, a state may plead excusable ignorance; for a discussion of these issues, *see* Mac Gibbon, note 275, *supra*, at 176 *et seq.*

[299] *See* p. 258 *et seq.*, *supra*.

[300] *See* Bowett, note 280, *supra*. For similar definitions, *see* e.g. Thirlway, The Law and Procedure of the International Court of Justice, 1960–80, British Yearbook of International Law (1989) 29; Martin, L'estoppel en droit international publique (1979) 259–260; and Weeramantry, Estoppel and the preclusive effects of inconsistent statements and conduct: The practice of the Iran–United States Claims Tribunal,Netherlands Yearbook of International Law (1996) 117.

known Latin maxims "*allegans contrario non audiendus est*" and "*venire contra factum proprium*". In the past there seems to have existed some hesitancy to apply the doctrine of estoppel in international law.[301] Nowadays, however, the doctrine is usually accepted as a general principle of international law.[302]

The ultimate effect of estoppel is to bring about a binding preclusion.[303] This effect requires that certain conditions are fulfilled, *viz.*,

(a) The statement of fact in question must be clear and unambiguous;

(b) The statement of fact must be voluntary, unconditional and must be authorized, and

(c) There must be reliance in good faith on the statement either to the detriment of the party so relying on the statement, or to the advantage of the party making the statement.[304]

[301] Mac Gibbon, Estoppel in International Law, International & Comparative Law Quarterly (1958) 468.

[302] *See* Brownlie, *op. cit.,* at 646 (with references) where it is stated: "A considerable weight of authority supports the view that estoppel is a general principle of law, resting on principles of good faith and consistency, and shorn of the technical features to be found in municipal law "(footnote omitted); Cheng, *op. cit.,* at 141–149 discusses the doctrine in a chapter devoted to the principle of good faith under the heading *Allegans Contraria Non Est Audiendus* and shows its wide application before international tribunals. For a discussion of arbitral and judicial decisions, *see* also Mac Gibbon, note 301, *supra*, at 479 *et seq.*, and with respect to international commercial arbitration, Gaillard, L'interdiction de se contredire au détriment d'autrui comme un principe général du droit commerce international, Revue d l'arbitrage (1985) 241.

[303] It should be noted that the doctrine of estoppel fulfills an important function in international law as a rule of *evidence* in situations where the prerequisites for its application as a rule of preclusion are not present. In fact, it would seem that this role played by the doctrine of estoppel was long considered to stand in the way of its acceptance as a general principle of international law, *see* Mac Gibbon, note 301, *supra*, at 478.

[304] Bowett, note 280, *supra,* at 202. – Reisman suggests a more elaborate – but essentially the same – explanation of the requirements of estoppel under international law: ".... procedural estoppel in international law is more complex than municipal estoppel and must recognize factors that are largely absent on the domestic level. The essential elements of international estoppel may be stated as follows: (1) the right was apparently actionable; (2) the party actually seized of the right ought to have been aware that it was actionable; (3) that party ought to have been aware that his silence might be construed by others as a communication of assent to their behaviour, arguably contrary to the right; (4) that party ought to have communicated, unequivocally in all process available to him, that he did not accede to such behaviour and that he reserved his right of action; (5) under the circumstances, others could not have been expected to be informed of such intentions or to consider them serious or prima facie valid; (6) others did not, manifestly or tacitly, attempt to defer or prevent authoritative resolution of the claims; (7) subsequent action on the initial right will be prejudicial to the interests of either the community or to its individual members." (footnotes omitted), Reisman, Nullity and Revision (1971) 385–386.

With respect to the *first condition*, it must be noted that the statement of fact may be explicit, or may be implied from conduct signifying that the state is of the opinion that a certain fact exists. It goes without saying that the requirement that the statement be clear and unambiguous presents particular difficulties when a statement is implied from conduct. Generally speaking, this question must be resolved by applying established rules of interpretation. A tribunal would, for example, not take a phrase, or particular conduct, out of its context but would rather evaluate it against the background of all relevant circumstances.[305] Already with respect to this first condition, we surmise that there may be difficulties in relation to extinctive prescription. As discussed above, the typical situation with respect to extinctive prescription is that the claimant state is silent for a certain period of time. There may be several reasons for the state in question to remain silent. As a consequence, it would typically seem difficult to conclude that such silence is tantamount to a clear and unambiguous statement.

As far as the *second condition* is concerned it would seem clear that the reference to a *voluntary* statement rules out statements resulting from fraud or duress and perhaps also statements made in situations when the state making the statement was unable to act otherwise.[306]

It follows from the requirement that the statement be *unconditional* that any statement made conditionally cannot create a binding estoppel. In practice, before claims between states reach the arbitration stage they are made the subject of discussions and negotiations, diplomatic or otherwise. During the course of such discussions or negotiations a state may agree to withdraw a claim, or otherwise refrain from pressing the claim. In most cases such statements will depend on certain conditions being fulfilled by the other state. A statement of such nature made by the first state would normally not be characterized as unconditional and thus not be capable of creating a binding estoppel.

With respect to the third element of this, the second, condition, *viz.*, that the statement be *authorized*, problems would not ordinarily arise in relation to statements made with express authority. In cases of implied authority, however, difficulties could arise, the resolution of which will depend on an interpretation of the status of the individual actually making the statement.

Trying to apply this condition to the typical situation with respect to extinctive prescription, the crucial question will be – again – to evaluate

[305] Bowett, note 280, *supra,* at 189.

[306] *Ibid.*, at 190–191, referring to the *Serbian Loans Case*, P.C.I.J. Reports (1929), series A, Nos. 20/21, 5.

the claimant state's silence in relation to the three elements of the condition. For example, how does one determine whether or not silence is "authorized"?

The *third condition*, mentioned above, highlights the fact that the principle of good faith underlies the doctrine of estoppel.[307] The state, having made the statement, must thereby secure an advantage for itself, or the other party, acting in reliance on the statement must have suffered some detriment as a result thereof. In the *Temple of Preah Vihear Case*, Thailand argued that Siam had not accepted the validity of certain maps from 1907, delimiting the frontier in the disputed area. In this connection, the Court made the following statement:

> "Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is *now precluded by her conduct* from asserting that she did not accept it. She has, for fifty years, *enjoyed such benefits* as the Treaty of 1904 conferred on her ... *It is not now*

[307] *Cf.* e.g. statements by Judge Alfaro in his separate opinion in the *Temple of Preah Vihear Case*, in which he discussed at length the doctrine of estoppel. He said, *inter alia*, that "the primary foundation of this principle is good faith that must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a state to the prejudice of another is incompatible with good faith", I.C.J. Reports (1962) 42. He added that "this principle, known to the world since the days of the Romans, is one of the 'general principles of law recognized by civilized nations' applicable and in fact frequently applied by the International Court of Justice in conformity with Article 38, para. 1(c), of its Statute"; *ibid.*, at 43. – *See* also Mac Gibbon, note 301, *supra*, at 468, who describes the underpinnings of the doctrine of estoppel in the following way: "Underlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation. Such a demand may be rooted in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of State conduct. It may be, and often is, grounded on considerations of good faith". – Müller & Cottier seem to take the view that neither prejudice nor detrimental reliance is required, *see* Müller & Cottier, Estoppel, in Bernhardt (ed.), Encyclopedia of Public International Law (Vol. 7 1984) 79; on the other hand, they confirm that "restrictive notions of estoppel prevail today", *ibid.* The International Court of Justice has, however, in the North Sea Continental Shelf Cases referred to both reliance and prejudice; when discussing the notion of estoppel, the Court said, *inter alia*, the following: "...only the existence of a situation of estoppel could suffice to lend substance to this contention [it was argued that certain provisions of the 1958 Geneva Convention on the Continental Shelf had become binding on Germany by virtue of its conduct], – that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations etc., which not only clearly and consistently evidenced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case.", I.C.J. Reports (1969) 3.

open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it."[308]

Also with respect to this condition, it is, in the opinion of the present author, difficult to see how it could reasonably be applied in relation to extinctive prescription. If we assume that the "statement" made by the claimant state is its silence, the reliance by the debtor state on this "statement" would result in an *advantage* for it – i.e. the claim being extinguished – rather than a disadvantage. Moreover, the detriment would be suffered by the state making the "statement", since it would lose the claim it previously had against the other state. It is perhaps theoretically possible to envision situations where this third condition could be applied to a fact pattern relating to extinctive presumption. Let us assume, for example, that the debtor state has relied on the silence of the claimant state so as to take certain financial and economic steps and measures on the assumption that the claimant state would not enforce its claim. Should the claimant state after a certain period of time, nevertheless try to enforce its claim, the debtor state could find itself in a less favorable situation and could thus be said to have suffered the detriment required by the doctrine of estoppel. It is submitted, however, that in a situation like the one described, it is unlikely that the reliance of the debtor state on the silence of the claimant state could, or indeed should, be characterized as reliance in good faith. Rather, the debtor state is taking a risk, the consequences of which it must bear itself.

As mentioned above,[309] on the assumption that the aforementioned three conditions are met, the result of estoppel is a binding preclusion for the state having made the initial statement. The state in question is thus

[308] I.C.J. Reports (1962) 32 (emph. added). – Similar ideas were expressed by the Court in the Arbitral Award Made By the King of Spain Case – for a brief account of the facts, *see* p. 154 *et seq.*, *supra* – where the Court made the following pronouncement: ".... having regard to the fact that the designation of the King of Spain as arbitrator was freely agreed to by Nicaragua, that no objection was taken by Nicaragua to the jurisdiction of the King of Spain as arbitrator either on the ground of irregularity in his designation as arbitrator or on the ground that the Gómez–Bonilla Treaty had lapsed even before the King of Spain had signified his acceptance of the office of arbitrator, and that Nicaragua fully participated in the proceedings before the King, it is no longer open to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the Award", I.C.J.: Reports (1960) 192. – Other cases where the International Court of Justice has addressed the doctrine of estoppel – often together with the doctrine of acquiescence – include: Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports (1984) 246; Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility), I.C.J. Reports (1984) 392; Elettronnica Sicula S.p.A. (ELSI). I.C.J. Reports (1989) 15 and the Land, Island and Maritime Frontier Dispute (Application to Intervene), I.C.J. Reports (1990) 92.

[309] *See* p. 313 *et seq., supra.*

prevented from taking a position different than the one following from the initial statement. This may result in holding a state to a representation which *in fact* does not correspond to its real intention.[310] The function of estoppel – as such doctrine has been described above – is in the opinion of the present author *procedural in nature* in the sense that it is not *per se* concerned with the merits of a dispute, even though it may, of course, have *consequences* for the merits. One circumstance which supports the proposition that estoppel is procedural in nature, is the fact that estoppel applies only to the parties to a dispute; it can only affect the position of the parties to the dispute in question, not the position of other states.[311]

Pronouncements have been made, however, which indicate that estoppel is viewed as a rule of substantive law rather than as a procedural rule. For example, Judge Alfaro in his separate opinion in the *Temple of Preah Vihear Case* made the following statement:

> "The principle is substantive in character. It constitutes a presumption *juris et de jure* in virtue of which a state is held to have abandoned its right if it ever had it, or else that such a state never felt that it had a clear legal title on which it could base opposition to the right asserted or claimed by another state. In short, the legal effects of the principle are so fundamental that they decide by themselves alone the matter in dispute and its infraction cannot be looked upon as a mere incident of the proceedings."[312]

In my opinion statements like this, and other statements characterizing estoppel as a rule of substantive law, would in fact seem to focus more on acquiescence than on the doctrine of estoppel, as such doctrine has been described above. While there is little doubt that there are close links between acquiescence and estoppel,[313] and that acquiescence may in appropriate circumstances have the *effect* of estoppel,[314] there is, it is

[310] Brownlie, *op. cit.*, at 158.

[311] *See* Bowett, note 280, *supra*, at 200.

[312] I.C.J. Reports (1962) 41–42. Judge Fitzmaurice in his separate opinion in the same case took a similar position in saying that "the principle of preclusion ... is certainly applied as a rule of substance and not merely as one of evidence or procedure". *Ibid.*, at 62.

[313] *See* pp. 309–310, *supra*.

[314] As discussed above, the doctrines of acquiescence and estoppel are often referred to in various categories of territorial and boundary disputes. In this context Bowett has made the following suggestion as to the conditions which must be met before acquiescence becomes tantamount to estoppel: (i) The purported acquisition of some right or interest by state A in ignorance of state B's conflicting right or interest; (ii) actual or constructive knowledge by State B that state A purports to be acquiring some right or interest in conflict with its own right or interest; (iii) silence or inaction by state B as to lead state A to suppose it possessed no conflicting right or interest; and (iv) some detriment to state A as

submitted, a clear distinction to be made between the two doctrines at the conceptual level.[315]

4.6.4 Interpretation of Treaties

As mentioned above,[316] it is theoretically possible that the principle of extinctive prescription may in certain circumstances be explained as the result of the interpretation of a treaty between the two states in question. This is clearly the situation when questions concerning extinctive prescription have been explicitly regulated in a treaty.[317] It is not unusual that treaties set forth provisions concerning time limits for the presentation of claims arising under the treaty in question.[318] There can be little doubt – it is submitted – that such time-limits are, as a matter of principle, binding on the parties to the treaty. To the extent that disputes arise with respect to the meaning and/or scope of application of such time-limits, it will generally speaking be necessary to interpret the treaty. This interpretation would typically follow the generally accepted rules of treaty interpretation.[319] When treaties provide for time-limits for the

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a result of reliance upon the silence or inaction of state B, or some gain to state B as a result of state A's action; Bowett, note 282, *supra,* at 200 (footnotes omitted); *see* also Blum, *op. cit.,* at 96–98 for a discussion of the reasons for distinguishing between acquiescence and estoppel when it comes to the formation of historic title to territory in international law.

[315] For a discussion of the distinction between rules of substantive and procedural law in international law, *see* p. 320 *et seq.*, *infra.*

[316] *See* p. 306, *supra.*

[317] For a discussion of the principle of extinctive prescription in relation to *ius cogens*, *see* p. 328 *et seq.*, *infra.*

[318] *See* King, note 95, *supra,* at 84 *et seq.*; Seidl–Hohenveldern, The Austrian–German Arbitral Tribunal (1972) 89, where it is said that the underlying treaty – the Austrian–German Treaty of 15 June 1957, concerning the Settlement of Property Relations – "operated in general with preclusive time-limits in order to reach a speedy settlement of all outstanding claims"; a more modern example is the 1972 Convention on International Liability for Damage Caused by Space Objects, U.N.T.S. Vol. 196, 187. Article X(1) of this convention stipulates that claims for compensation must be presented to the launching state within one year of the occurrence of the damage. If the occurrence is not known to the claiming state, Article X(2) enables it to present a claim within one year following the date on which it learned of the occurrence. These time limits apply even if the full extent of the damage is unknown, with the possibility, however, to revise a claim and submit additional documentation until one year after the full extent of the damage is known, Article X(3); *cf.* also Aldrich, The Jurisprudence of the Iran–United States Claims Tribunal (1996) 412 *et seq.*, discussing the time-limits for presenting claims before the Iran–United States Claims Tribunal. *See* further discussion on p. 373 *et seq.*, *infra.*

[319] Generally speaking, it is fair to say that Articles 31–33 of the Vienna Convention On the Law of Treaties encapsulates the general principles of customary international law with respect to treaty interpretation; *see* Sinclair, The Vienna Convention On the Law of Treaties (2nd ed. 1984) 153; *cf.* also the decision of the International Court of Justice in the dispute

presentation of claims, few – if any – questions relating to the principle of extinctive prescription would typically arise; we are rather dealing with traditional interpretation of treaties. There is one situation, however, where there may be some overlap between traditional treaty interpretation and the principle of extinctive prescription, *viz.*, when there is a treaty between the disputing parties on the basis of which claims are made, but the treaty does not address the question of time-limits for the presentation of claims, nor otherwise the principle of extinctive prescription. Does the silence of the treaty in this respect mean that the general rules of extinctive prescription in international law will apply,[320] or does it mean that no time-limits at all apply with respect to the presentation of claims?[321] Generally speaking, the answer to this question will depend on the interpretation of the treaty as well as on other relevant circumstances such as, for example, the conduct of the parties both prior and subsequent to the signing of the treaty. Proceeding from the assumption that the principle of extinctive prescription does indeed exist in international law, it would seem reasonable to conclude that the mere silence of a treaty in this respect could hardly be taken to mean that the parties have agreed not to apply this principle. Needless to say, however, the ultimate answer to this question will turn on an interpretation of all relevant circumstances in the individual case.

4.7 Is Extinctive Prescription Procedural or Substantive in Nature?

As far as extinctive prescription in municipal law is concerned, a debated issue has been whether or not it is to be characterized as a rule of *procedural* law or of *substantive* law. Such characterization may have important

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between Hungary and Slovakia concerning the Gabcikovo–Nagymaros Project, Judgment, rendered on 25 September 1997. Treaty interpretation is a topic which has generated much learned writing as well as doctrinal dispute. This is not the place to discuss, nor review, the voluminous literature on treaty interpretation; suffice it for present purposes to refer to Sinclair's work mentioned above and the references made therein. Nevertheless, it is worthwhile to recall the general rule of interpretation set forth in Article 31(1) of the Vienna Convention, *viz.*, that "/a/ treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

[320] This refers to the conditions for the application of the principle of extinctive prescription discussed at p. 285 *et seq.*, *supra*.

[321] This seems to have been the conclusion of the tribunal in the *King & Gracie Case* discussed at pp. 274–276 and 299, *supra*.

consequences in the conflict of laws context.[322] If extinctive prescription is a rule of procedural law it would be governed by *lex fori*. On the other hand, if it is a rule of substantive law it would be governed by *lex causae*. In England, as well as in the United States the traditional approach was to characterize extinctive prescription as procedural, proceeding from the idea that prescription would only take away the *remedy*, while the right as such would continue to exist. The position of English law has, however, changed, such that prescription is now characterized as a rule of substantive law[323] which has been the traditional position of most civil law countries.[324] Case law in the United States seems to indicate that also American law is developing in this direction.[325]

On the assumption that extinctive prescription is a rule of substantive law, thus affecting not only the remedy but the right as such, one consequence ought to be that the right in question is extinguished for all purposes. This is, however, not necessarily the case. Under Swedish law, for example, a claim which has been extinguished as a result of the rules on extinctive prescription will in certain respects "survive" and may for example be used for set-off purposes.[326]

From a practical point of view the characterization of extinctive prescription as procedural or substantive may have important consequences for the law to be applied to prescription.[327]

As far as public international law is concerned there are two questions which must be addressed: *viz.*, (i) is extinctive prescription of a procedural or substantive nature, and, more importantly, (ii) is the distinction between procedural and substantive rules relevant?

With respect to the first question, the present author has no doubt that the principle of extinctive prescription is *procedural in nature*, in the sense that it, assuming that the conditions for its application are fulfilled, prevents a claim from being tried on the merits.

[322] *See* discussion on p. 257 *et seq.*, *supra*.
[323] *See* p 259 *et seq.*, *supra*.
[324] *See* p. 260, *supra*.
[325] *See* p. 259 *et seq.*, *supra*.
[326] *See* Lindskog *op. cit.*, at 564 *et seq.* – While Swedish conflict of laws rules clearly characterize extinctive prescription as a matter of substantive law *see* Bogdan, note 52, *supra* – the Swedish Act on Extinctive Prescription (Preskriptionslagen) describes the legal effect of prescription as "a loss of the right to demand payment of the claim", language which rather seems to indicate that prescription is of a procedural nature. For critical comments on this language, *see* Lindskog, *op. cit.*, at 475–476.
[327] *See* note 272 *et seq.*, *supra*.

In all the cases discussed above,[328] the function of extinctive prescription has been to *preclude* the claim in question from being tried on its merits, assuming, again, that the principle of extinctive prescription is to be applied. A rule, or principle, which has this function cannot be characterized as anything else than procedural in nature. By contrast, a rule of substantive law is typically intended to resolve a dispute on the merits. In legal literature extinctive prescription is by the same token often referred to as a ground of inadmissibility of state claims.[329] Questions of admissibility of state claims may sometimes be closely related to the merits of a case, in particular perhaps with respect to exhaustion of local remedies and the nationality of claims.[330] This notwithstanding, the concept of admissibility of state claims – it is submitted – fulfills a procedural function in interstate disputes.

Having thus concluded that extinctive prescription is of a procedural nature, I turn to the second question posed above, *viz.*, is it relevant to distinguish between procedural and substantive rules in public international law? Generally speaking, it would seem that there is no "fully developed theory of international procedural law, defining its sources, for example".[331] This does not mean, however, that procedural issues play an insignificant role in international law and interstate disputes. We need only look to the statute of the International Court of Justice to realize the importance of procedural issues, such as for example, jurisdiction (Article 36), provisional measures (Article 41) and intervention (Articles 62 and 63).

Resolution of issues relating to the aforementioned procedural aspects do of course raise a number of questions of a procedural nature. It would seem that such procedural questions are not treated differently than other questions of international law, but rather as a fully integrated field of public international law.[332] The important distinction between procedural

[328] *See* p. 272 *et seq.*, *supra.*

[329] *See* Brownlie, *op. cit.*, at 479 where it is said that "/a/n objection to the substantive admissibility of a claim invites the tribunal to reject the claim on a ground distinct from the merits – for example, undue delay in presenting the claim". *See* also Fitzmaurice, *op. cit.*, at 438–439, and Simpson & Fox, *op. cit.*, at 104, 122–123; Blum, *op. cit.*, at 90 also seems to view extinctive prescription as procedural in nature.

[330] *See* p. 385 *et seq.*, *infra*, (exhaustion of local remedies) and p. 383 *et seq.*, *infra* (nationality of claims).

[331] Thirlway, Procedural Law and the International Court of Justice, in Lowe & Fitzmaurice (eds.) Fifty Years of the International Court of Justice (1996) 389. Thirlway goes on to say that one can assume that the sources of law enumerated in Article 38 of the Statute of the International Court of Justice are also relevant for international procedural law as part of international law, *ibid.*

[332] One possible ground of explanation could be that with respect to several procedural concepts in international law there is a close link to the merits of the dispute in question,

and substantive rules found in the conflict of laws in municipal law – and the important consequences following from such distinction – does not find its counterpart in public international law.

Nonetheless, it might still be meaningful to characterize extinctive prescription as being of a procedural nature, if this meant that the view was taken that extinctive prescription only affected the remedy, but that the right, the claim, remained. If this were the case, the claim could theoretically still be used for set-off purposes, at least if one proceeds *ex analogia* from municipal law.[333] To find an answer to this question in public international law it is necessary to go back to the reasons underlying the principle of extinctive prescription. As I have discussed above, the considerations underlying extinctive prescription may conveniently be divided into considerations concerning the interests of the parties and considerations concerning the public interest, respectively.[334] As far as the first category is concerned, it is primarily the interests of the respondent which stand in focus.[335] Now, if one assumes that the respondent has a claim against the claimant – whose claim as a matter of principle has been extinguished – and the claimant would be allowed to rely on his extinguished claim for set-off purposes, the respondent would again be faced with the same problems which were the reason for the extinction of the claimant's claim in the first place. Consequently, there would not seem to be any reason to allow an extinguished claim to be used for set-off purposes when one considers the interests of the parties. With respect to the second category – the public interest – it is primarily motivated by the interest of the international community to prevent claims from

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a fact which sometimes makes it difficult and not meaningful, to distinguish between substance and procedure; *see* Arangio–Ruiz, The Plea of Domestic Jurisdiction before the International Court of Justice: substance or procedure?, in Lowe & Fitzmaurice (eds.), *op. cit.*, at 452 *et seq.* – Indeed, there may perhaps even exist a certain degree of "unwillingness" in international law to attach too much significance to procedural consequences, *see* e.g. the following statement: "The 'new' International Court of the post – *Namibia* (1971) era has an evident commitment to problem-solving, with general implications from this in a number of points, – among these, a principle of non-prolongation of disputes and then both of facilitating access to judicial review and also of not avoiding substantive-legal issues on narrowly technical, adjectival-law grounds. Procedure, in this sense, should be subordinated to substance and not stand in the way of problem-solving in major conflict-situations. The approach is implicit in the long-accepted maxim of Common Law, *Ubi jus, ibi remedium*", Mc Whinney, Judge Shigeon Oda and the Progressive Development of International Law (1993) 93.

[333] *See* p. 321, *supra.*

[334] *See* p. 281 *et seq.*, *supra.*

[335] *See* p. 283 *et seq.*, *supra.*

surviving for ever.[336] If one were to allow an extinguished claim to be used for set-off purposes in the situation described above, it would lead to continued disputes with respect to the claim in question. In other words, even the public interest militates against allowing an extinguished claim to survive for set-off purposes.

Proceeding from the foregoing, it is my opinion that even though extinctive prescription in international law is of a procedural nature – and could thus theoretically be said to affect the remedy only, and not the right *per se* – its *consequences* are of a substantive nature, in the sense that the claim in question does not survive: it is extinguished once and for all. This conclusion is prompted by the rationale underlying the principle of extinctive prescription in international law.[337] This leads to the further conclusion that with respect to international law, it is not necessary, nor meaningful, to try to characterize extinctive prescription as a rule of either procedural or substantive nature.

4.8 Municipal Statutes of Limitation and Extinctive Prescription under Public International Law

In a good number of arbitrations discussed above, addressing extinctive prescription, the disputes concern cases where the state in question is acting for and on behalf of one of its citizens, i.e. international claims of a private origin.[338] Typically, in such situations the state is exercising its *ius protectionis*. Since the rights of individuals are at issue in these cases, the question of the relationship between municipal statutes of limitation and the principle of extinctive prescription under public international law often arises. Due to the different natures of municipal statutes of limitation and the principle of extinctive prescription, respectively, this question can be of critical importance. Generally speaking, municipal statutes of limitation are applied automatically, i.e. whenever the limitation period has expired, the claim in question is prescribed without the need for the fulfillment of other requirements. Under public international law,

[336] *See* p. 284 *et seq.*, *supra*.

[337] The possible "survival" of an extinguished claim has not been discussed in any of the cases referred to in this Study. It would therefore not seem warranted to say that this conclusion is supported by arbitral practice. On the other hand, the fact that the possible survival of extinguished claims has not been discussed cannot – it is submitted – be devoid of legal significance, since, had it been the opinion of a tribunal that an extinguished claim may, under certain circumstances survive, it would have been natural for such tribunal to point this out, at least *obiter dicta*.

[338] *See* p. 272 *et seq.*, *supra*.

however, lapse of time *simpliciter* is not sufficient for a claim to be prescribed.[339] While many of the considerations underlying, and concepts used in connection with, extinctive prescription in municipal and international law are similar, it is necessary to distinguish between them. In the *Williams Case*,[340] the United States–Venezuelan Claims Commission offered the following explanation:

> "Prescription is confounded with limitation.... They are always distinct. The former relates to substance, is the same in all jurisdictions, and aims at justice in every case, while the latter pertains to process, varies in all jurisdictions, and from time to time often arbitrarily in the same one, and admits occasional individual injustice ... As before seen, prescription was recognized when limitation was yet unknown. Bracton knew of it at common law before the English statutes on the subject. Courts of equity, where limitation acts do not apply, have invariably given lapse of time due weight in adjudications. They have always refused to enforce stale demands without undertaking to fix precise times for imparting the infirmity. Each case is left, under general principles, to be adjudged, as to time, according to its own character and circumstances. And the doctrine has been applied to the State acting for its citizens... It is this prescription which underlies, varies from, antedates and, as Phillimore says, forms the model for municipal limitation regulations that the writers asserting the existence of the doctrine in the international law refer to and treat of".[341]

When discussing international claims of a private origin, one is faced with two different categories of claims at the same time. The private claim finds its original basis in municipal law and is as such subject to the municipal law in question. When the state of the claimant presents the claim for and on behalf of the national at the international level it is transformed into an international claim, albeit of a private origin and character. As of this moment the claim is subject to international law and becomes, as a matter of principle, a separate, autonomous international claim. The private claim under municipal law does, however, continue to exist. The same claim thus has a dual character and is subject both to municipal and international law at the same time, but at different and parallel levels.[342] This notwithstanding, it is conceivable that municipal law

[339] As explained on p. 285 *et seq.*, *supra*, several additional requirements must be met before the principle of extinctive prescription can be applied.

[340] Moore, note 19, *supra*, at 4181.

[341] Moore, note 19 *supra*, at 4191, 4192, 4193, 4194.

[342] Strisower, in Institut de Droit International, note 18, *supra,* at 46. The situation discussed here is one where the state is presenting a claim on behalf of one of its citizens in exercising its *ius protectionis*. As pointed out in Institut de Droit International, *id.*, at 9, this situation must be distinguished from the one where the rights of the individual and the

statutes on extinctive prescription may influence the international claim in different respects. Given the differences between prescription under municipal and international law, respectively, it is clear that in the case of private claims it is important to keep them apart. In this respect, international arbitral practice has chiseled out a number of rules of thumb.

At the outset, it should be noted that as a matter of general principle municipal statutes on extinctive prescription cannot bar a claim which is based on international law,[343] *provided* that the claim is not properly governed by municipal law, which may be the case if, for example, the two disputing states have agreed to apply the municipal law of a specified jurisdiction. On the other hand, it is generally accepted that a claim of a private origin which is barred by the municipal law of a state cannot be presented at the international level; it cannot be adopted by the state of the claimant as an international claim, provided that the municipal period of limitation has expired prior to the presentation of the international claim.[344] To accept such claims would be tantamount to allowing diplomatic intervention to create a more favorable situation for the individual in question than would result from the application of the relevant municipal law.[345]

There is, however, one exception from this generally accepted rule. If the legal ground underlying prescription under the municipal statute can be put in issue on the basis of *international law*, it would seem possible for the state of the claimant to present the claim at the international level *even if* the claim is already barred under municipal law.[346] For example,

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state are *independent* from each other. The example offered there is a customs treaty granting individuals exemption from customs duties. The fact that the claim of an individual for recovery of customs duties wrongfully charged may be barred as a result of municipal law statutes of limitation, does not prevent the state from presenting a claim against the other state based on the fact that this other state has violated the customs treaty, since in the latter situation we are dealing with a claim *between states*, whereas in the former the claim is made by an individual against a state. *See* also Strisower, *id.*, at 34–35.

[343] *Cf.* e.g. the *Spader Case*, where it was said that "it is doubtless true that municipal statutes of limitation can not operate to bar an international claim", Ralston–Doyle, note 20, *supra,* at 162. In the *Cook Case* it was stated that "/t/he United States is not now debarred by any Mexican statute of limitations from recovering money wrongfully withheld from the claimant", quoted from Ralston, The Law and Procedure of International Tribunals. Supplement (1936) 185. Perhaps the most well known case establishing this rule is the *Pious Fund Case*, *see* pp. 276–277 *supra.*

[344] *See*, e.g. Institut de Droit International, note 18 *supra,* at 9–10 and King, note 95, *supra,* at 95, note 1. – All the experts consulted by the Institut de Droit International when preparing its report, took this position in answering question No. 5 in the questionnaire, *see* note 18 *supra*, the reason for this position being that in the situation described, there is no injury to the state in question.

[345] *Cf.* Institut de droit international, note 18, *supra,* at 10.

[346] *Id.*, and King, note 95, *supra.*

in the *Cayuga Indians Case*,[347] the dependent Indians could only present their claims through specially appointed bodies of the sovereign which exercised the complete and exclusive protectorate over them, i.e. the British Government. They were thus themselves deprived of the possibility to honor municipal periods of extinctive prescription, but had to rely on the specially appointed bodies to honor such periods; in the circumstances, however, such bodies, failed to do so.[348] Other examples of this exception include the situation where there is no local remedy available, as a result of which it may be impossible to toll the time period under the municipal statute on extinctive prescription. It is possible, at least theoretically, that municipal courts could take the position that they lack jurisdiction to try cases concerning their own activities, i.e. with respect to claims for compensation as a result of maltreatment by the court. A foreign party would then have no other choice than to present the claim at the international level.[349] This exception is conveniently summarized in the Latin maxim: *contra non valentem agere non currit praescriptio.*

A related situation arises when an individual is inflicted an injury or suffers prejudice, but such events do not give rise to a claim under the relevant municipal law, while they might well form the basis for an international claim.[350] Does expiry of the limitation period under municipal law pre-empt an international claim in such a situation? Proceeding from the idea underlying the exception discussed above,[351] it is submitted that the answer must be in the negative; from a technical-legal point of view, no right or claim has ever arisen under municipal law, and consequently there is nothing which could be prescribed. Expressed differently: such a claim is not of a private origin, but is a truly international claim, i.e. it is based exclusively on international law.

There is also the possibility that the presentation of an international claim may influence municipal law statutes on extinctive prescription. There do not seem to exist any arbitral awards addressing this issue. Among legal scholars opinions differ. Some take the position that the presentation of an international claim of a private origin does indeed toll a municipal law period of prescription.[352] Others, on the contrary say that it does not.[353] Advocates of the latter position do, however, accept that a

[347] *See* p. 291 *et seq., supra.*
[348] *Id.*
[349] *Cf.* Institut de Droit International, note 18, *supra,* at 18–19.
[350] *Cf.* Bourquin, in Institut de Droit International, note 18, *supra,* at 47–48.
[351] *See* p. 327, *supra.*
[352] *See* e.g. Institut de Droit International, note 18, *supra,* at 17.
[353] *See* Bourquin and Strisower, in Institut de Droit International, note 18, *supra,* at 48 and 36–38, respectively.

municipal law period of prescription is tolled if a claim presented by a state on behalf of its citizen is *tried* by an arbitral tribunal or other judicial body, in which case the period of limitation does not run as long as the arbitral or judicial procedure is going on.[354]

4.9 Extinctive Prescription and *Ius Cogens*

4.9.1 Introduction

As mentioned above, peremptory norms of international law may set aside a choice of law, and/or rules, made by the parties to a dispute.[355] For the purposes of this Study it is therefore necessary to find out whether or not the principle of extinctive prescription under public international law forms part of the peremptory norms of international law. *If* that is the case, the principle of extinctive prescription must be applied *even if* the parties have chosen a municipal law to govern their contract, or if they have agreed on rules on prescription other than those following from the principle of extinctive prescription under public international law. This aspect of *ius cogens* and extinctive prescription will be discussed in Section 4.9.2 below.[356] There is yet another aspect of extinctive prescription and *ius cogens* which must be explored, *viz.*, the possible exception from the principle of extinctive prescription for acts which constitute violations of *ius cogens*; in other words, if State A files a claim against State B which is based on a violation of *ius cogens*, can State B successfully raise the principle of extinctive prescription, assuming that all other requirements for its application are met?[357] This question will be addressed in Section 4.9.3 below.

As I have mentioned above, the *concept* of *ius cogens* is based on the acceptance of certain fundamental and superior values in the system of public international law.[358] The concept of *ius cogens* proceeds from the assumption that there are certain norms of international law which are of such a fundamental character that it is legally impermissible to derogate from them. In certain respects *ius cogens* is similar to the concept of *ordre public*, or public policy, in municipal legal systems.[359]

[354] Strisower, *id.*, at 36–37

[355] *See* p. 111 *et seq.*, *supra*, and p. 164 *et seq.*, *supra*.

[356] For a detailed discussion of *ius cogens* as a restriction on party autonomy in general, *see* reference in note 355, *supra*.

[357] For a discussion of these requirements, *see* p. 285 *et seq.*, *supra*.

[358] *See* p. 167, *supra*.

[359] For a discussion of public policy and *ordre public*, *see* p. 111, *supra*.

The previous discussion has shown that although there are different opinions as to the actual contents of *ius cogens*, there is today no doubt that the concept enjoys widespread acceptance and that there is a role for *ius cogens* in public international law.[360]

4.9.2 Does Extinctive Prescription Form Part of *Ius Cogens*?

For purposes of determining whether or not the principle of extinctive prescription belongs to the category of *ius cogens* norms, it may, by way of introduction, be worthwhile to consider the following definition of *ius cogens*:

> "The body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong to such an extent that the subject of law may not, under pain of absolute nullity, depart from them in virtue of particular agreements".[361]

The proposed function of *ius cogens* is apparently to limit the freedom of the parties, so as to protect the international community of states from harmful effects of agreements between two states. This then presupposes that an agreement between two, or several states affects values, interests and rights which are deemed to be essential to the international community of states.[362] In its work preceding the adoption of the Vienna Convention, the International Law Commission made an attempt to identify potential *ius cogens* norms.[363]

It gave the following examples:

1. A treaty contemplating an unlawful use of force contrary to the principles of the UN Charter;
2. A treaty contemplating the performance of any other act criminal under international law; and
3. A treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to co-operate.

In trying to identify the criteria for *ius cogens*, Hannikainen describes four categories of norms constituting obligations in relation to the international community of states, *viz.*, (i) obligations necessary for the maintenance of international peace and security, (ii) obligations the violation of which constitute international crimes, (iii) basic humanitarian obligations

[360] *See* p. 167 *et seq.*, *supra*.
[361] Suy, The Concept of Ius Cogens in International Law (1969) 18.
[362] *Cf.* Rozakis, The Concept of Ius Cogens in the Law of Treaties (1976) 2.
[363] *See* p. 168, *supra*.

and (iv) obligations with respect to the status, order and stability of sea, air and space areas outside national jurisdiction.[364]

As I have explained above,[365], norms of *ius cogens* are such norms of international law which are *fundamental* to the existence of the international community of states. They are necessary, *inter alia*, for the survival of peaceful interstate relations. Generally speaking, it would in the opinion of this author be difficult to characterize the principle of extinctive prescription as falling into this category. Furthermore, as stipulated in Article 53 of the Vienna Convention On the Law of Treaties, *ius cogens* norms must be accepted and recognized by the international community of states as a whole as peremptory norms. The threshold is thus very high. In addition, *ius cogens* rules have effect *erga omnes*, without consideration being taken of possible dispositions taken by two or several individual states.[366]

Extinctive prescription, on the other hand, is primarily concerned with legal relationships between two individual states, typically involved in a dispute. Even if the outcome of the dispute in question may influence and have consequences for other states, extinctive prescription, as a legal concept, is predominantly of a bilateral character. In so far as prescription of claims is concerned, disputing parties would normally be deemed to have the right to agree on such matters without being deemed to jeopardize the rights of any third parties and without negatively influencing the fundamental norms of the international community of states. Consequently, international judicial and arbitral practice has accepted that disputing parties may agree on matters concerning extinctive prescription.[367]

To shed more light on the principle of extinctive prescription and its relation to *ius cogens*, it may be helpful to consider how the principle of *pacta sunt servanda* has been viewed in this context.[368] One commentator, van der Heydle, recognizes three categories of *ius cogens* norms in international law, one of them being norms which are essential to the existence of any legal order, e.g. the principle of *pacta sunt servanda*.[369]

[364] Hannikainen, Peremptory Norms (Ius Cogens) in International Law. Historical Development, Criteria, Present Status (1988) 282–292.

[365] *See* p. 165 *et seq.*, *supra*.

[366] *See* p. 173, *supra*.

[367] *See* discussion at 272 *et seq.*, *supra*.

[368] The principle of *pacta sunt servanda* is considered to be a general principle of law, *see* e.g. Cheng, *op. cit.*, at 112 *et seq.* It will be recalled that the principle of extinctive prescription is also characterized by Cheng as a general principle of law, *see* Cheng, *op. cit.*, at 386.

[369] van der Heydle, Die Erscheinungsformen des zwischenstaatlichen Rechts: *ius cogens* und *ius dispositivum* im Völkerrecht, 16 Zeitschrift für Völkerrecht (1932) 471.

Sztucki, on the other hand, characterizes a derogation from the principle of *pacta sunt servanda* as a "virtual logical impossibility".[370] A derogation from this principle would indeed appear to be a logical impossibility, since an agreement to derogate therefrom would depend on the very norm which it purports to set aside.[371] Thus, even though the principle of *pacta sunt servanda* is a general principle of international law and accepted by all as such – and indeed accepted as a cornerstone of all legal systems – it would seem difficult to characterize it as a *ius cogens* norm. In the opinion of the present author, the same reasoning applies to the principle of extinctive prescription. Perhaps Crawford identifies the crux of the matter in saying that *ius cogens* is concerned only with substantive rules and not structural rules of international law.[372]

4.9.3 Does *Ius Cogens* Form an Exception to the Principle of Extinctive Prescription?

As mentioned above, the situation to be addressed here is whether a state can file a claim based on a violation of *ius cogens* without running the risk that the respondent state can successfully invoke the principle of extinctive prescription. The answer to this question involves the weighing of the rationale underlying extinctive prescription[373] against the policies underpinning the concept of *ius cogens*.[374]

As discussed above, the policy considerations underlying the principle of extinctive prescription fall into two categories, *viz.*, (i) interest of the policies involved, whereby the interests of the respondent stand in forms and (ii) considerations of public interest, which are usually thought to be encapsulated in the Latin maxim *interest republica ut sit finis litium*.[375] Generally speaking, it could in my opinion be argued that these policy

[370] Sztucki, *Ius Cogens* and the Vienna Convention On the Law of Treaties. A Critical Appraisal (1974) 80.

[371] *Cf.* Sinclair, The Vienna Convention On the Law of Treaties (2nd ed. 1984) 207 and 215.

[372] Crawford, The Concept of Statehood in International Law (1979) 79–80. – It is submitted that this conclusion holds true, even if one were to characterize extinctive prescription as a matter of substantive law rather than procedural law. (For a discussion of this issue, *see* p. 320 *et seq.*, *supra.*) Proceeding on the basis of a municipal law approach – in particular as enshrined in the area of conflict of laws – the principle of *pacta sunt servanda*, to use this principle as an illustration, again – is probably to be characterized as a principle of substantive law. This does not automatically mean, however, that it must so be characterized in public international law; a rule or principle of a substantive nature *per se* may very well have a predominantly structural function in the legal system regulating relations between states.

[373] *See* p. 280 *et seq.*, *supra.*

[374] *See* p. 164 *et seq.*, *supra.*

[375] *See* p. 284 *et seq.*, *supra.*

cosiderations should apply with equal force also with respect to claims based on the violation of *ius cogens* rules. On the other hand, I have concluded that, in the final analysis, general considerations of justice and equity play a decisive role with respect to the principle of extinctive prescription.[376] Since *ius cogens* addresses the very fundamental norms of international law, it is clear that *ius cogens* rules have the potential of affecting the application of extinctive prescription. Few commentators have addressed this particular aspect of *ius cogens* and extinctive prescription. Without further explanation, Brownlie has, however, declared the following:

> "Apart from the law of treaties the specific content of norms of this kind [*ius cogens* rules] involves the irrelevance of protest, recognition, and acquiescence: prescription cannot purge this type of illegality."[377]

If one were to accept this conclusion, a claim based on the violation of *ius cogens* – e.g. compensation for damages caused by acts constituting genocide – would never be prescribed, but would survive for ever.

Even though there are no direct statements, either in scholarly writings or in arbitral and judicial practice, confirming this conclusion, there are statements and international documents indirectly confirming it. Most of them relate to war crimes and crimes against humanity.

The so-called Nuremburg Tribunal was set-up by an agreement between the Allied Forces after the Second World War to try the German leaders.[378] Article 6 of the Charter of the Tribunal referred to crimes against peace, war crimes and crimes against humanity as falling within the jurisdiction of the Tribunal. Article 6 of the Charter is now regarded as part of international law.[379] The General Assembly of the United Nations unanimously approved the principles of international law recognized by the Charter of the Tribunal and the judgment of the Tribunal, in a resolution of December 1946.[380] The acceptance of the concept of crimes against humanity lead the United Nations to continue work in this field and to prepare the 1948 Genocide Convention.[381] The International

[376] *See* pp. 303–304, *supra.*

[377] Brownlie, *op. cit.*, at 516. – *Cf.* Vadapalas & Zalys, The Secret Protocols of the Soviet-German Treaties of 1939 And the Problem of Prescription In International Law, Proceedings of the Estonian Academy of Sciences. Social Sciences (1990) 126.

[378] The charter of the International Military Tribunal was an attachment to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed on 8 August 1945. (The text is reproduced in 39 American Journal of International Law (1945) Suppl. 258.)

[379] *See* e.g. Brownlie, *op. cit.*, at 565 and Shaw, *op. cit.*, at 412.

[380] General Assembly Resolution 95(I).

[381] The Convention On the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 278.

Law Commission has also been involved in projects in this field, for example, to prepare a draft code on Crimes against Peace and Security of Mankind and to create a permanent international criminal court to try war crimes.[382] It was not until the tragic events in former Yugoslavia and Ruanda, however, that significant progress was made, with respect to these issues.[383]

That war crimes and crimes against humanity may warrant special considerations also with respect to the time factor is evidenced, *inter alia,* by the Convention On the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by the United Nations General Assembly in 1968. Since it has not been ratified by the required number of states, it has not, however, entered into force.[384]

Although war crimes, crimes against peace and crimes against humanity deal with the criminal responsibility of *individuals* – and not of states – the foregoing brief discussion does in my view lend support to the proposition that the principle of extinctive prescription does not apply with respect to violations of *ius cogens*. The explanation is simply that the policy considerations underlying *ius cogens* – fundamental as they are to the system of international law – take precedence over the rationale supporting the principle of extinctive prescription; it is in my view not surprising that the balancing of interests comes out in favor of *ius*

[382] With respect to the Draft Code, *see* e.g. Yearbook of the International Law Commission (1986) Vol. II, part 2, 30 and Ferenz, Crimes Against Humanity, in Bernhardt (ed.), Encyclopedia of Public International Law (Vol. I 1992) 869; the permanent international criminal court is discussed, *inter alia*, by Ferenz, International Criminal Court in Bernhardt (ed.) *op. cit.* (Vol. II 1995) 1123.

[383] Acting under Chapter VII of the UN Charter, the Security Council in its resolution 827 of 25 May 1993 decided to establish an *ad hoc* international criminal tribunal to deal with the breaches of international humanitarian law committed in the former Yugoslavia, *see* International Legal Materials (1993) 1203. In November 1994, the Security Council decided, in its resolution 995 of 8 November, to establish a similar criminal tribunal to address the crimes committed in connection with the massacre in Rwanda, *see* International Legal Materials (1994) 1602. – As mentioned above, work has been performed to create a permanent international criminal court, primarily based on a draft statute for such a court prepared by the International Law Commission and submitted to the UN General Assembly in the fall of 1999, *see* e.g. Suikkari, Debate in the United Nations on the International Law Commission's Draft Statute for an International Criminal Court, Nordic Journal of International Law (1995) 205. In the summer of 1998, at the so-called Rome Conference, this work lead to the adoption of a convention establishing the International Criminal Court. – The Statute of the International Criminal Court is available at the United Nations homepage <htpp://www.un.org>

[384] *Cf.* e.g. Weiss, Time Limits for the Prosecution of Crimes Against International Law, British Yearbook of International Law (1982) 163.

cogens.[385] While this exception from the principle of extinctive prescription seems reasonable and acceptable at the conceptual level, it suffers from the unpredictability and uncertainty which follow from *ius cogens*, to wit, the difficulty to determine the contents of *ius cogens*.[386]

4.10 Summary and Concluding Remarks

The first important conclusion to be drawn from the above discussion is that the principle of extinctive prescription *does* exist under international law,[387] despite the fact that there have, from time to time, been discussions as to its existence.[388] While there is general agreement on the existence of the principle, the prerequisites for its application have been, and continue to be, more uncertain. I have noted that fulfillment of the following four criteria is necessary for its application,[389] *viz.*,

(i) unreasonable delay;
(ii) imputability of delay to the negligence of the claimant;
(iii) absence of a record of fact;
(iv) the respondent must be placed at a disadvantage.

In my opinion, however, arbitral practice and doctrinal writings warrant the conclusion that the four criteria mentioned above can in fact be reduced to two: (i) delay in presenting a claim and (ii) disadvantage for the respondent resulting from such delay.[390]

In applying the first criterion – i.e. delay in presenting a claim – there are two distinctions to be made[391] *viz.*, (i) between presentation and prosecution of a claim and (ii) between the claim as such and the legal basis for it.

[385] As I have discussed above, *see* pp. 176–179, the concept of "international crime" as defined in Article 19 of the Draft Articles on State Responsibility was narrower than the concept of *ius cogens*; *ius cogens* thus describes a wider circle than "international crime". Consequently, the exception to the principle of extinctive prescription for *ius cogens* would have applied *a fortiori* with respect to "international crimes" as such were defined in Article 19 of the Draft Articles.

[386] *See* p. 164 *et seq.*, *supra*.

[387] *See* p. 262 *et seq.*, *supra*.

[388] *See* p. 264 *et seq.*, *supra*.

[389] *See* p. 285 *et seq.*, *supra*.

[390] *See* p. 301, *supra*.

[391] On p. 291 *et seq.*, *supra*, yet another distinction is discussed, *viz.*, that it is necessary to separate between the negligence of a government and that of its citizens when claims are being presented on behalf of them. The *Cayuga Indians Case*, however, which seems to be the only case serving as the basis for this distinction, presented rather peculiar facts, dealing as it did with protective claims of dependent peoples. One should therefore not draw too far-reaching and general conclusions from this case.

With respect to the first distinction, it is now accepted that the decisive element is the *presentation* of the claim. If it has been presented in a timely fashion, it is of little consequence that it is not being diligently prosecuted.[392] On the other hand, it is submitted that a claim once presented, cannot reasonably remain immune from extinctive prescription forever; it would not be unreasonable to require some degree of activity from the claimant state to prevent extinctive prescription from being applied with respect to an already presented claim. It is possible to view presentation of a claim as an event "tolling" the running of the time period and as serving as the starting point for a new period of time.[393] Having said this, it must be emphasized that no specific time periods exist in international law, while at the same time the lapse of time – unspecified as it is – is a central element of extinctive prescription.

As far as the second distinction is concerned, it was explained by the arbitrators in the *Ambatielos Case*[394] that the important thing is to present *the claim as such* and that the legal basis for the claim may be presented and changed at a later stage.

The ultimate test – and the second criterion referred to above – in determining whether or not a claim is to be prescribed is the disadvantage at which the respondent is put as a result of the delay in presenting the claim. Even though arbitral practice has not developed any generally accepted definition of disadvantage in this connection, the underlying philosophy is to prevent the respondent from being put in an unfair, disadvantageous situation.[395] This is very much in line with the rationale underlying the principle of extinctive prescription.[396] The concerns underlying it may conveniently be divided into two categories *viz.*, (i) the interest of the parties and (ii) considerations of public interest.

With respect to the interests of the parties, it is clearly the interests of the respondent which stand in focus, and which must be protected. As far as the public interest is concerned, it is perhaps best summarized in the ambitions of the international community of states to bring about order and stability in international relations, an ambition which is partially reflected in the Latin maxim *interest republica ut sit finis litium.* It is worthwhile observing that the considerations underlying extinctive

[392] *See* p. 293 *et seq.*, *supra.*

[393] *See* pp. 336–337, *infra,* as to the tolling of limitation periods.

[394] *See* p. 295 *et seq.*, *supra.*

[395] *See* p. 301 *et seq.*, *supra.*

[396] *See* p. 280 *et seq.*, *supra*, i.e. the interests of the parties and considerations of public interest, respectively.

prescription (limitation) under municipal law[397] are very similar to the rationale underpinning the principle of extinctive prescription in international law. Thus, while municipal law and international law operate in very different environments, and at different levels, extinctive prescription and limitation are intended to serve similar purposes. As the discussion above has shown, however, there are significant differences between extinctive prescription and limitation, the most important one being that international law does not set forth any specific time period within which a claim must be presented, whereas such time periods constitute the distinctive feature of limitation rules in municipal law.[398] Generally speaking, it is fair to say that the major difference of a general nature is the fact that the principle of extinctive prescription is considerably less detailed and specific than limitation rules in municipal law. For example, neither arbitral practice nor scholarly writings have developed rules as to when the time period in question – the delay – starts to run; even if international law does not stipulate any specific time periods, the calculation of the delay must start at some point in time; is it when the claim arose – and, when does a claim arise – or is it when it became due? The absence of rules in this respect is probably a consequence of the lack of specific time periods with respect to extinctive prescription in international law.[399]

Another important element of limitation in municipal law is the tolling of the time period in question. Measures which toll the limitation period would typically include acknowledgement of a claim by the debtor and

[397] *See* p. 253 *et seq.*, *supra.*

[398] *See* p. 254, *supra.*

[399] Some of these issues have been touched upon by the International Law Commission (ILC) in its attempts to codify the law of state responsibility. When analyzing the breach of an international obligation, the ILC Draft Articles on State Responsibility make a distinction between breaches not extending in time and breaches extending in time (Article 14). As far as wrongful acts are concerned – and in particular for purposes of defining the responsibility resulting from wrongful acts – there is one decisive moment in time, *viz.*, the point in time at which an international obligation has been breached. Generally speaking, this point in time – "the moment of the breach" – would seem to be the natural starting point for the period of prescription. At least this would seem to be the case with respect to breaches not extending in time, where the moment of the breach can be only at the time when the act in question – i.e. the act constituting the breach – is performed; this is laid down in the first paragraph of Article 14. As for the other category of breaches, i.e. those extending in time, the situation is more complicated, as to when the period of prescription should start to run. There would seem to be at least three possibilities, *viz.*, (i) the moment of the breach of the obligation; (ii) the end of the wrongful act in question – e.g. the cessation of an illegal occupation of territory; and (iii) the moment when the damage occurred. Article 14 of the Draft Articles mentions yet another category of international obligation, *viz.*, the obligation to prevent a given event. In this situation the wrongful act consists of the failure to prevent the event in question.

initiation of legal proceedings.[400] By contrast, international law has not developed any rules, nor principles in this respect. This is also explained by the fact that there are no specific time periods for extinctive prescription in international law; if there is no time period, there is nothing to toll. On the other hand, arbitral practice indicates that the *presentation* of a claim in international law may have the same effect as tolling the time period in municipal law. The presentation of a claim may be brought about by filing a request for arbitration with respect to the claim in question, or by raising the claim in diplomatic negotiations, or by otherwise making the claim known to authorized representatives of the respondent state. Once a claim has been duly and timely presented, it need not be prosecuted; lack of prosecution does not effect the claim. This presumably means that presentation of a claim tolls whatever time period there is under international law. A further consequence of this ought to be that a new time period starts to run as of the date of presentation, and that claimant ought to be active in relation to the claim – i.e. prosecute it – lest lapse of time extinguish it. These two latter consequences have not, however, been identified by international tribunals, nor by scholars.

A third fundamental aspect of limitation in municipal law is the determination of the scope of application of limitation rules; it is possible, for example, that they do not apply to all categories of claims.[401] International law has not developed any rules, nor principles, in this respect.[402] While in practice[403] most cases where questions of extinctive prescription arise deal with claims for payment of sums of money – there is nothing in international law which prevents the principle from being applied also to other categories of claims, e.g. for a declaratory award in a border dispute, or in a dispute concerning title to territory.

Article 14, para. 3 stipulates that "/t/he breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with what is required by that obligation". Consequently, the time of commission of the wrongful act ceases only when the event in question ceases. It is possible that the most appropriate starting point for the period of prescription in such a situation would be the cessation of the event in question. – For a general discussion of the time factor, *see* Karl, The time factor in the law of State responsibility, in Spinedi & Simma (eds.), United Nations Codification of State Responsibility (1987) 95.

[400] *See* p. 254 *et seq.*, *supra*.

[401] In the Scandinavian countries, limitation rules are not applicable with respect to rights *in rem*, but only to rights and claims falling under the law obligations, *see* note 31, *supra*.

[402] There is one exception however, to the principle of extinctive prescription, at least *de lege ferenda*, *viz.*, with respect to claims based on violations of *ius cogens*, see p. 329 *et seq.*, *supra*.

[403] *See* the cases discussed on p. 272 *et seq.*, *supra* and p. 285 *et seq.*, *supra*.

A distinction is from time to time made between private and public claims, the former being claims of individuals presented by the State on their behalf, while the latter category represents claims arising directly out of interstate relations. This distinction is recognized by the Institut du Droit International.[404] Both categories are international claims and as such subject to extinctive prescription, but it may be that different considerations should apply with respect to each category.[405] One commentator has, however, suggested that private claims are not "true international claims" and are therefore not subject to extinctive prescription.[406] This position runs counter to the characterization of such claims today.[407]

It follows from the foregoing that the practical application of extinctive prescription very little resembles limitation in municipal law; it has been suggested that it is rather like laches in English equity law.[408] Despite the fact that limitation under municipal law and extinctive prescription in international law operate in different environments, and at different levels, there are certain situations when the two concepts meet.[409] For example, if a private claim is barred by municipal legislation on limitation, a state cannot present that claim at the international level.[410] There is, however, one exception from this general rule, *viz.*, if the legal basis for limitation under the municipal legislation in question can itself be put in issue under international law; under such circumstances it may still be possible to present the claim at the international level.[411] One example could be, for example, if there is no local remedy available and therefore it may not be possible to toll the limitation period under municipal law. The reverse situation is also possible, i.e. that the presentation of an international claim may toll the limitation period under municipal law. Arbitral practice is silent, however, and scholarly writings divided.[412]

[404] *See* p. 299 *et seq.*, *supra*.

[405] This is the recommendation of the Institut de Droit International, *ibid.*

[406] This is the position of Pinto, *see* p. 271 *et seq.*, *supra;* for further discussion of "public" and "private" claims in the context of extinctive prescription, *see* p. 369 *et seq., infra.*

[407] *See* p. 369 *et seq.*, *infra.*

[408] *See* King, *op. cit.,* at 95. The doctrine of laches is defined as neglect to assert one's right or claim, which taken together with lapse of time and other circumstances causing prejudice to the adverse party, operates as a bar in a court of equity. It is a delay in the enforcement of one's right until the condition of the other party has become so changed that he cannot be restored to his former state; *see* Black's Law Dictionary (5th ed. 1979) 787.

[409] Generally, *see* p. 324 *et seq.*, *supra*.

[410] *See* p. 325 *et seq.*, *supra*.

[411] *Ibid.*

[412] *Ibid.*

Extinctive prescription in international law would ultimately seem to rest on notions of justice and equity.[413] As a consequence thereof, the principle of extinctive prescription in practice becomes a relatively unpredictable and uncertain concept. The uncertainty and unpredictability are to a certain extent reinforced by the overlap between extinctive prescription and other concepts of international law, such as, in particular, waiver and acquiescence.[414] While there are relatively clear distinctions at the conceptual level between these terms, in practice the demarcation lines are often blurred. Under certain circumstances, it may also be difficult to distinguish between treaty interpretation and extinctive prescription.[415] The uncertainty and unpredictability surrounding extinctive prescription may be overcome by parties if they agree to apply specific detailed rules to such issues or to chose a municipal law to govern their relationship, including extinctive prescription. There is little doubt that states have the right *per se* to agree between themselves on matters of this nature.[416] It is equally clear that extinctive prescription is not a rule of *ius cogens*.[417] On the other hand, as discussed above, *ius cogens* could prevent the application of the principle of extinctive prescription.[418]

As far as municipal law is concerned, in particular conflict of laws rules, the characterization of extinctive prescription (limitation) as either procedural or substantive in nature was discussed for several years in the United States and Great Britain.[419] This debate has lost some of its importance, since Great Britain and, to a certain extent, also the United States now characterizes limitation as a matter of substantive law.[420] As far as extinctive prescription in public international law is concerned, it is clear that it is procedural in nature, but with important – mostly decisive – consequences for the merits of a case. The distinction between procedural rules and those of a substantive nature does not, however, play a significant role in international law.[421] This characterization is redundant when it comes to questions of applicable law in interstate arbitrations. If

[413] *See* p. 303–304, *supra*.
[414] *See* p. 305 *et seq.*, *supra*.
[415] *See* p. 319 *et seq.*, *supra*.
[416] *See* p. 327 *et seq.*, *supra*.
[417] *See* p. 328 *et seq.*, *supra*.
[418] *See* p. 331 *et seq.*, *supra*.
[419] *See* p. 257 *et seq.*, *supra*.
[420] *Ibid.*
[421] *See* p. 320 *et seq.*, *supra*.

parties have *not* made any choice of law, or rules, however, they will be left with the unpredictability and uncertainty of the principle of extinctive prescription in international law. It is this situation that I will address in the concluding chapter.

CHAPTER 5 – Refining the Principle of Extinctive Prescription

5.1 Introduction

On the basis of the discussion so far in this Study, it can be concluded that the principle of extinctive prescription does exist in public international law and that it differs in many respects from extinctive prescription, or limitation, under municipal law. I have noted that extinctive prescription is considerably less precise, and thereby less predictable, than limitation under municipal law.[1] This is particularly true with respect to the absence of specific time periods for extinctive prescription in international law. I have also observed that there may sometimes be a certain overlap between extinctive prescription and other concepts of international law, such as waiver, abandonment, acquiescence and estoppel.[2] All these circumstances taken together mean that there is still a problematic degree of uncertainty and unpredictability as to the applicability of extinctive prescription in practice, despite the fact that the principle has for a long time been a well-established concept in international law.

This state of affairs, automatically raises the question whether there is a need to refine the principle of extinctive prescription in international law. Is it really adapted to and suitable for interstate arbitrations of today? If the answer to the first question is affirmative, a further questions arises, *viz.*, *how* should the principle of extinctive prescription be refined? It is proposed to address these two issues in the following. In doing so, I proceed from the assumption that the parties have *not* chosen the law and/or the rules to be used to resolve the dispute, including questions relating to extinctive prescription, because if they have made such a choice, the arbitrators must apply the law and/or the rules chosen by the parties.[3]

[1] *See* p. 338 *et seq.*, *supra*.

[2] *See* p. 305 *et seq.*, *supra*.

[3] *See* p. 152, *supra*. This assumes that party autonomy is not subject to any limitation, *see* discussion at p. 158 *et seq.*, *supra*.

5.2 Is There a Need to Refine the Principle of Extinctive Prescription?

To answer the question if there is a need to refine the principle of extinctive prescription in international law, it is necessary to evaluate two aspects, *viz.*, (i) the nature of extinctive prescription, including the *prerequisites* for its application and the *scope* of its application, and (ii) different categories of interstate disputes where the application of the principle of extinctive prescription may be called for, based on the assumption that different categories of disputes may raise different issues.

5.2.1 The Nature of the Principle of Extinctive Prescription

To say that international law is different from municipal law is to restate the obvious. Without entering into a discussion of the very fundamental – and from a philosophical point of view, difficult – question of what international law really is,[4] it is submitted – by way of simplification – that international law governs relations between states, and sometimes between a state and the citizens of another state. States are thus the principal – but by no means the exclusive – subjects of international law. International law purports to govern *all aspects* of relations between states. It is easily understood that international law has a wider range of subjects and a more comprehensive list of topics to cover than municipal law.[5]

The most important differences – having far-reaching consequences – between international law and municipal law are of a "structural" nature, *viz.*, international law has no legislature, there is no unified system of courts in international law and there is no executive, or governing, entity in the system of international law. In fact, the states themselves – the principal subjects of international law – make the rules, interpret them and enforce them. This is in stark contrast to the typical structure of a municipal law system. These structural differences have consequences for the nature and quality of the norms of international law. Few would dispute that norms of international law are typically more rudimentary, less detailed and less specific than rules of municipal law. International law has even been described as a "primitive" legal system[6] and as an "imperfect legal order"[7]. That there is a difference between municipal

[4] *See* e.g. Higgins, Problems and Process. International Law and How We Use It (1994) 1–16, and the references made therein.

[5] *See* De Lupis, The Concept of International Law (1987) 36.

[6] Kunz, The Distinctiveness of the International Legal System in a Changing World of Nations (1968) 30, but, *see contra* De Lupis, *op. cit.*

[7] Oppenheim's International Law (9th ed.) Vol. I (1996) 11.

law and international law in this respect is not surprising; it is a necessary consequence of the structural differences between the two systems of law. The undisputable progress of international law over the last decades notwithstanding,[8] this basic and fundamental difference remains, and, it is submitted, will always remain. As a result thereof, international law will always have inherent flaws and weaknesses, in the sense that international law cannot solve all problems to the last detail, nor have detailed answers to all questions however important they may be. On the other hand, it has been suggested that international law can now be regarded as a complete system,[9] *not* in the sense that there is always a specific rule applicable, but rather that "every international situation is capable of being determined *as a matter of law*, either by the application of specific legal rules where they already exist, or by the application of legal rules derived, by the use of known legal techniques, from other legal rules or principles."[10]

Having thus noted the inherent difference between norms of international law and municipal law provisions, there is one further aspect to take note of, at this stage, *viz.*, the distinction between *rules* of international law, on the one hand, and *principles* of international law on the other.[11]

In the *Gentini Case*[12] the tribunal described the difference as follows:

> "A rule ... is essentially practical and, moreover, binding; there are rules of art as there are rules of government, while principle expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence."[13]

Without drawing too far-reaching conclusions from the suggested definition above, it would seem clear that a "principle" is generally speaking more general and abstract in its nature than a "rule", which is typically intended to address practical and concrete concerns; indeed rules may be described as the "practical formulation of the principles".[14]

[8] *See* Oppenheim, *op. cit.*, at 11–13.

[9] *Id.*, at 12.

[10] *Id.*, at 13.

[11] Having said this, the present author does not wish to take sides in – in fact not even enter – the discussion whether international law is a body of rules or a legal decision – making process, *cf.* Higgins, *op. cit.*, at 2–4.

[12] Ralston–Doyle, Venezuelan Arbitrations of 1903 (1904) 720.

[13] *Ibid.*, at 725.

[14] Cheng, General Principles of Law (as applied by international courts and tribunals) (1953) 376.

In the foregoing, I have been discussing the *principle* of extinctive prescription in international law, without focusing on its character as a *principle*, rather than as a *rule*, of international law. On the other hand, the preceding chapter will have made it clear that no precise *rule* of international law exists with respect to extinctive prescription. This state of affairs must not necessarily be viewed as a drawback; one commentator has observed:

> "The application of the principle to the infinitely varying circumstances of practical life aims at bringing about substantive justice in every case; the application of rules, however, results only in justice according to law, with the inescapable risk that in individual cases there may be a departure from subjective justice".[15]

With these general observations in mind, and having thus concluded that extinctive prescription is a *principle* of international law, I now turn to its distinctive features. Recalling that the fundamental philosophies underlying extinctive prescription and rules of limitation under municipal law are very similar,[16] I shall contrast the distinctive features of extinctive prescription with those of limitation.

The most striking feature of extinctive prescription in international law is the fact that there are *no fixed time periods*. In municipal law, on the other hand, fixed time periods constitute the backbone of rules on limitation.[17] This distinctive feature of extinctive prescription does at the outset create practical problems when it comes to the application of the principle in individual cases. While it is clear that there must be a delay in presenting a claim for extinctive prescription to be applicable, it is not clear *how long* the delay must be.[18]

The answer to this question is – at least partially – provided by the second criteria for the application of extinctive prescription discussed above,[19] *viz.*, that the delay must result in a disadvantage for the respondent. In applying the principle of extinctive prescription to individual disputes – proceeding from the two aforementioned criteria – arbitral tribunals have addressed and analyzed various situations where the criteria have been met and consequently applied the principle.[20] It is submitted, that arbitral practice has not developed hard and fast rules, nor principles,

[15] *Ibid.*
[16] *See* p. 253 *et seq.*, *supra* and p. 280 *et seq.*, *supra*.
[17] *See* p. 253 *et seq.*, *supra*.
[18] *See* p. 285 *et seq.*, *supra*.
[19] *See* p. 301 *et seq.*, *supra*.
[20] *See* p. 285 et *seq.*, supra.

in this respect. Rather, one is left with the impression that the approach of tribunals is very much *ad hoc* in nature. Even though doctrinal writings have addressed various aspects of extinctive prescription, they too have failed to develop hard and fast rules on extinctive prescription. One is thus forced to conclude that in practice the meaning and application of the principle of extinctive prescription remain uncertain and unpredictable. In the final analysis, it would ultimately seem to be subject to notions of justice and equity. Again, this is generally in stark contrast to the rules on limitation in municipal law which typically are of a very precise – sometimes even rigid – character. It is worthwhile noting that while the rationale for municipal rules on limitation and the principle of extinctive prescription in international law, respectively, is very similar,[21] the practical application comes out very differently. On the other hand, this is not surprising – nor necessarily something to be regretted – given the different spheres of application of the two systems.

The lack of detail and precision inherent in the principle of extinctive prescription is also manifested by the *absence of rules and/or principles with respect to the tolling of the time period in question*[22] – which is a necessary consequence of the fact that there are no fixed time periods – and by the absence of rules and/or principles concerning the *categories of claims*[23] which may be extinguished by the lapse of time.

Thus, compared with municipal law rules on limitation, the principle of extinctive prescription is much less precise, and consequently its applicability less predictable. In this sense, the principle of extinctive prescription does not typically differ from other rules and principles of international law; indeed as mentioned above, international law has sometimes been characterized – rightly or wrongly – as a "primitive" system of law.[24]

The uncertainty and unpredictability referred to above, is compounded by the fact that the principle of extinctive prescription is sometimes mixed up with other concepts of international law such as acquiescence, estoppel and waiver.[25] There are several examples in arbitral practice of tribunals not distinguishing between these concepts, on the one hand, and extinctive prescription, on the other.[26]

[21] *See* note 16, *supra*.
[22] *See* p. 336 *et seq.*, *supra*.
[23] *Ibid.*
[24] *See* note 6, *supra*.
[25] *See* p. 305 *et seq.*, *supra*.
[26] *Ibid.*

The foregoing prompts the conclusion that the principle of extinctive prescription is – at least as applied in practice – imprecise and unpredictable, certainly if compared with municipal law rules on limitation. The important question, however, I submit, is: *does it matter*? To answer this question it is necessary to discuss the different categories of disputes where the principle of extinctive prescription may become applicable. It is possible that the uncertainty and unpredictability are of no consequence in certain disputes, whereas in other disputes they may constitute a major problem. There is, however, one additional aspect of extinctive prescription which must be addressed at this stage, *viz.*, whether the principle is of a procedural or substantive nature.[27] It should be recalled that in the preceding chapter, I have concluded that extinctive prescription in international law is of a procedural *nature*, but that its *consequences* are of a substantive nature, in the sense that a claim with respect to which the principle of extinctive prescription is applicable is extinguished once and for all.[28] This means that application of the principle of extinctive prescription will have very dramatic and definitive consequences for the claimant: it will bring about the immediate end of the dispute in question, or at least of the claims with respect to which the principle is applied.

5.2.2 Different Categories of Disputes

5.2.2.1 Introduction

The discussion of different categories of interstate dispute will first focus on one of the classic issues of international law, *viz.*, the distinction between political and legal disputes. The discussion will show that this categorization is of little relevance for the issues being analyzed in this Study. The next category of disputes – commercial and economic disputes – is central, however, in trying to determine whether or not the principle of extinctive prescription needs to be refined. Consequently, it is important to define and identify such disputes. This constitutes the major part of Section 5.2.2. Before final conclusions are drawn, it is necessary to discuss two additional possibilities to characterize interstate disputes, *viz.*, as public or private disputes, and as contractual or tort disputes.

[27] *See* p. 320 *et seq.*, *supra*.
[28] *See* pp. 322–323, *supra*.

5.2.2.2 Political and Legal Disputes

One distinction which has been almost constantly discussed in the field of international adjudication is that between political and legal disputes,[29] the starting point being that international courts and tribunals can only resolve legal disputes, but not political disputes. This distinction is reflected, *inter alia*, in Article 36(2) of the Statute of the International Court of Justice, which expressly mentions *legal* disputes.[30]

Article 36(3) of the UN Charter also refers to legal disputes by providing that "/i/n making recommendations under this Article the Security Council should also take into consideration that *legal disputes* should as a general rule be referred by the parties to the International Court of Justice...." (emph. add.)

It would seem clear that the distinction between legal and political disputes – at least conceptually – plays an important role in international adjudication. This notwithstanding, neither the Charter of the UN nor the Statute of the International Court of Justice contains definitions of these concepts. This may at least partially be explained by the fact that the terminology – political v. legal – is unfortunate, in the sense that many – if not most – international disputes have both political and legal aspects. Since states by their very nature are political entities, it is hardly surprising that disputes between them have political dimensions. In view of the terminological difficulties with respect to political v. legal disputes, it is submitted that a better terminology would be *justiciable* and *non-justiciable* disputes. The question remains, however, how to distinguish between the two categories. In its practice, the International Court of Justice has had several occasions to address the question when a dispute is of a legal nature – and thus justiciable – and when it is not. The most

[29] *See* e.g. Chapel, L'arbitrabilité des différends internationaux (1967); von Mangoldt, Die Schiedsgerichtsbarkeit als Mittel internationaler Streitschlichtung (1974) 117 *et seq.*, 173 *et seq.*; Mc Whinney, Judicial Settlement of International Disputes (1991) 16–55, with references made therein; Pazartzis, Les Engagements Internationaux en matière de Règlement Pacifique des Différends entre États (1992) 230–240, and Higgins, Problems and Process. International Law and How We Use It (1994) 195–197.

[30] The Statute of the Permanent Court of International Justice contained a similar provision in Article 36. For an interesting historical survey of the concept of legal and political disputes, *see* the dissenting opinion of Judge Oda in the Nicaragua Case, I.C.J. Reports (1986) 220 *et seq.*, where he discusses, among other aspects, the 1899 and 1907 Hague Conventions for the Peaceful Settlement of International Disputes, as well as the 1903 bilateral treaty between France and Great Britain which provided for compulsory referral of international disputes to arbitration with the exception of disputes affecting "the vital interests, the independence, or the honour of the two Contracting States" and disputes concerning "the interests of third Parties", *id.*, at 224.

recent pronouncement is found in the *East Timor Case*, where the Court took the following practical and realistic approach:

> "The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see *Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2, p. 11; Northern Cameroons, I.C.J. Reports 1963, p. 27;* and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1998*, p. 27 para. 35). In order to establish the existence of a dispute, 'It must be shown that the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections, I.C.J. Reports 1962,* p. 328); and further, 'whether there exists an international dispute is a matter for objective determination', *(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950,* p. 74).
>
> For the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the 'real dispute' is between Portugal and Indonesia rather than Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.
>
> On the record before the Court, it is clear that the Parties are in disagreement, both on the law and on the facts, on the question whether the conduct of Australia in negotiating, concluding and initiating performance of the 1989 Treaty was in breach of an obligation due by Australia to Portugal under international law.
>
> Indeed, Portugal's Application limits the proceedings to these questions. There nonetheless exists a legal dispute between Portugal and Australia. This objection of Australia must therefore be dismissed".[31]

Perhaps the position of the Court is best summarized by stating that the Court will try disputes which may be resolved by the application of the rules and principles of international law.[32] Only such disputes can thus be resolved by the International Court of Justice. There would seem to be one exception, however, from this general rule, *viz.*, if the disputing

[31] I.C.J. Reports (1995) 99–100.

[32] *See* e.g. Merrills, International Dispute Settlement (3rd ed. 1998) 155. – In his separate opinion in the *Nicaragua Case* Judge Oda traces this definition to arbitration treaties concluded by the United States in the years 1928–1930 for the submission of disputes to the Permanent Court of International Arbitration, I.C.J. Reports (1984) 232. Such treaties stipulated arbitration with respect to international disputes "which are justifiable in their nature by reason of being susceptible of decision by the application of the principles of law or equity", *ibid.*, as quoted by Oda. – Higgins, *op. cit.*, at 196, explains that the Court "has adhered to the definition first provided by the Permanent Court in the Mavrommatis Case"; in that case it was said that "/a/ dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons", P.C.I.J. Series A, No. 2 (1924) 11.

parties have *agreed* that the Court may decide a dispute *ex aequo et bono* pursuant to Article 38(2) of its Statute.[33] This provision may be viewed as allowing the Court to try disputes which are not justiciable, as such term has been defined in the foregoing.[34]

As far as interstate *arbitration* is concerned, the distinction between justiciable (legal) and non-justiciable (political) disputes plays a very limited role, if any at all. This is explained by the very fundamental principle of arbitration, *viz.*, the principle of party autonomy which leaves the ultimate say with the parties. In other words, if the parties agree to submit a political (non-justiciable) dispute to arbitration, they have the right to do so and the arbitrators would be under an obligation to try the dispute, assuming that they accept the submission in question.

Thus, with respect to extinctive prescription in interstate arbitration, being a principle of international law, it is clear that it will mostly come into play with respect to legal (justiciable) disputes, but it may also be applied in a non-justiciable dispute assuming that the parties have so agreed.

5.2.2.3 Commercial and Economic Disputes

5.2.2.3.1 Preliminary Comments

Having thus concluded that the focus must be put on justiciable (legal) disputes, there is a further potentially important distinction to be made for the purposes of this discussion, *viz.*, between economic and commercial interstate disputes, on the one hand, and other interstate disputes on the other. In the following the terms "economic" and "commercial" disputes will be discussed and defined. These two terms will be used only as a *method* to identify certain categories of interstate disputes for the purposes of this Study. The fact that a particular dispute would fall within or outside these categories can thus not serve as a basis *per se* for conclusions of a legal nature.

The distinction between economic and commercial disputes on the one hand and other interstate disputes on the other is made on the basis of two assumptions, *viz.*, (i) *that* questions related to extinctive prescription arise more frequently in economic and commercial disputes than in other disputes and (ii) *that* extinctive prescription typically plays a more important role for parties to economic and commercial disputes than to parties in other disputes.

[33] *See* discussion on p. 240 *et seq.*, *supra*, concerning *ex aequo et bono*.
[34] *Ibid.*

The relevance of these two assumptions, however, depends to a large extent on how the terms "economic" and "commercial" disputes, respectively, are defined. The terms will be discussed separately below although there is a significant overlap between the two. This overlap is explained by the fact that both terms denote disputes where the subject-matter of the dispute is economic rights and obligations. As I shall explain below the concept economic rights and obligations is used in a broad sense.[35] While economic rights and obligations thus constitute the least common denominator between commercial and economic disputes there are nevertheless differences between the two categories of disputes which warrant separate treatment of them for the purposes of this Study.

5.2.2.3.2 Commercial Disputes

At the outset, it must be noted that there is no generally accepted definition of the terms "commercial", and "commercial dispute", respectively, in international law.

With respect to sovereign immunity attempts have been made to distinguish between sovereign acts (*acta iure imperii*) and commercial acts (*acta iure gestionis*).[36] These attempts are the result of the so-called restrictive theory of sovereign immunity. Stated in general terms, this theory stipulates that if a state engages in commercial activities it does not enjoy immunity for such activities.[37] This theory is to be contrasted with the more traditional absolute theory of sovereign immunity, which means that a state always enjoys immunity, unless it has waived it.[38] Generally speaking, the restrictive theory is the more modern approach to sovereign immunity. Much of the debate during the last decades has focused on how to distinguish between commercial and sovereign acts for the purposes of applying the restrictive theory.

Several attempts have been made – in municipal codifications and otherwise – to define "commercial acts" in so far as immunity is concerned. The British State Immunity Act, for example, defines "commercial transactions" as:

> "(a) any contract for the supply of goods or services;

[35] *See* p. 361 *et seq.*, *infra*.

[36] *See* e.g. Badr, State Immunity: An analytical and Prognostic View (1984) 21 *et seq.*; Schreuer, State Immunity: Some Recent Developments (1988) 10 *et seq.*

[37] *Ibid.*

[38] For a general discussion of the absolute theory of immunity, *see* Badr, *op. cit.*, at 34 *et seq.* One state which traditionally adhered to the theory of absolute immunity was the former Soviet Union, *see* Boguslavsky, Mezhdunarodnoe chastnoe pravo (1989) 148–154, 178–182.

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transactions or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority."[39]

The US Foreign Sovereign Immunities does not in fact try to define "commercial activity", but states that the commercial character of an activity is to be determined by reference to the *nature* of the activity in question, rather than to its *purpose*.[40]

The 1972 European Convention On State Immunity[41] also attempts to define commercial transactions or activities. In Article 7, for example, the following is said:

> "1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, *in the same manner as a private person, in an industrial, commercial* or *financial activity*, and the proceedings relate to that activity of the office, agency or establishment."[42] (emph. added.)

Thus even though commercial activities are referred to, and partially qualified – "in the same manner as a private person" – no definition of the term is provided. Article 7 is supplemented by Article 4 which addresses contractual obligations. It reads:

> "1. Subject to the provisions of Article 5 [which deals with employment contracts], a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which by virtue of a contract, falls to be discharged in the territory of the State of the forum.
>
> 2. Paragraph 1 shall not apply;
> a) in the case of a contract concluded between States;

[39] Section 3 (3) of the State Immunity Act 1978.

[40] Section 1603 (d) of the Foreign Sovereign Immunities Act.

[41] European Treaty Series No. 74; for general comments *see* e.g. Damian, European Convention on State Immunity, in Bernhardt (ed.) Encyclopedia of Public International Law, Vol. 2 (1995) 197–201; Sinclair, The European Convention On State Immunity, International & Comparative Law Quarterly (1973) 254; Strebel, Staatenimmunität. Die Europaratskonvention und die neuen Gesetze der Vereinigten Staaten und Grossbritanniens, Rabels Zeitschrift für ausländisches und internationales Privatrecht (1980) 66.

[42] *See* note 41, *supra*.

b) if the parties to the contract have otherwise agreed in writing;
c) if the State is party to a contract concluded on its territory and the obligation of the State is governed by its administrative law."[43]

Both the International Law Commission and the International Law Association have prepared draft articles on sovereign immunity, including definitions of "commercial activity" and/or "commercial contracts". Generally speaking, these definitions follow the pattern of modern municipal statutes, such as the British and US statutes, and do not really define these concepts.[44] That it is difficult to find a comprehensive and workable definition is evidenced, *inter alia*, by the fact that many definitions have a circular character in that they themselves include the word "commercial". The problem is compounded by the controversy over the nature v. the purpose test: is the classification as commercial and sovereign, respectively, to be done on the basis of the *nature* of the act, or on the basis of the *purpose* of the act? It would seem that the prevailing view today is that it is to be done on the basis of the *nature* of the act; taken to

[43] *Ibid.*

[44] Article 2(1)(g) of the International Law Commission Draft Articles defines "commercial contract" as:

> "(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
>
> (ii) any contract for a loan or other transaction of a financial nature, including any obligation or guarantee in respect of any such loan or of indemnity in respect of any such transaction;
>
> (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons". The Draft Articles are published in 30 International Legal Materials (1991) 1563; a commentary to the Draft Articles is found in Yearbook of the International Law Commission (1991) Vol. II, 1 et seq.; for a comment on certain aspects of execution against state-owned property, see Byers, State Immunity: Article 18 of the International Law Commission's Draft, 44 International & Comparative Law Quarterly (1995) 882.

Article I C of the draft articles prepared by the International Law Association defines "commercial activity" as follows:

> "The term 'commercial activity' refers either to a regular course of commercial conduct or a particular commercial transaction or act. It shall include any activity or transaction into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority and in particular:
>
> 1. Any arrangement for the supply of goods or services;
>
> 2. Any financial transaction involving lending or borrowing or guaranteeing financial obligations.

In applying this definition, the commercial character of a particular act shall be determined by reference to the nature of the act, rather than by reference to its purpose", Report of the Sixtieth Conference, Montreal 1982 (1983) 328.

its extreme, the *purpose* test could lead to finding a public (i.e. sovereign) purpose behind most acts taken by a state.[45]

While it may be useful as a general background to consider the distinction between acts *de iure imperii* and *de iure gestionis*, it does not give much guidance when it comes to distinguishing between commercial and non-commercial interstate arbitrations. This is primarily explained by the fact that rules on sovereign immunity are focused on the difference between acts by a sovereign in its capacity as a sovereign on the one hand, and acts of private entities, or of the sovereign acting in a non-sovereign capacity, on the other. In this Study, however, the very starting point is a dispute between *two sovereigns*, typically acting as independent and equal states.[46] This fact might prompt some observers to conclude that there can be no commercial transactions – and thus no commercial disputes – between two sovereigns. I submit that this is not only possible, but that it is a fact of life in the international community of today.

For the purposes of defining "commercial" in the present context, more useful guidance may be had from the UNCITRAL Model Law On International Commercial Arbitration. The Model Law does not contain a definition *strictu senso* of the term "commercial". However, in a footnote to Article 1(1), "commercial" is described as follows:

> "Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road".[47]

[45] *See* Schreuer, *op. cit.*, at 15, and Damian, Staatenimmunität und Gerichtszwang (1985) 102 – *Cf.* also the US Foreign Sovereign Immunities Act – note 40, *supra* – and the draft articles prepared by the International Law Association, note 44, *supra*.

[46] This fundamental difference becomes apparent when considering Badr's suggested distinction between public and private acts of the state. "The substance of a public act of the state", Badr suggests, "is a vertical and unequal relationship reflecting the superiority of one party (the state) over others (parties within the state's jurisdiction who are potential targets of the institutionalised coercion inherent in the public act). By contrast, a private act of the state (and we are here using the example of a transnational contract as the most frequent instance of pleas of immunity) involves a bilateral relationship on a footing of equality between the state and a party or parties not within the state's own jurisdiction. It is a horizontal relationship which carries no superiority for the state and no possibility of including compliance by the other party or parties, through coercive measures available to the state", Badr, *op. cit.*, at 65.

[47] This "definition" is provided as a consequence of the fact that Article 1(1) stipulates that the Model Law is applicable to "international commercial arbitration".

This definition is broad and would, generally speaking, seem to cover most transactions and relationships of a commercial, economic and financial nature.[48] The examples provided in the definition are probably more frequent in transactions between private parties. On the other hand, nowadays it is not unusual for states to become involved in commercial, economic, trade and financial arrangements and/or transactions both with private entities and other states. The increased activities of states in this field is evidenced, *inter alia*, by the ever growing number of mixed arbitrations, either under the auspices of ICSID, or otherwise.[49]

Proceeding from the definition of "commercial" used in the UNCITRAL Model Law, it would seem clear that nowadays the number of *relationships* between two states having a commercial character is steadily increasing.[50] As a consequence thereof, the potential number of interstate *disputes* of a commercial character is also increasing.

[48] It should be emphasized that this definition of "commercial" is independent in the sense that it is not linked to any particular municipal law system. In English law, for example, the term "commercial" would seem to have a narrower meaning than the one suggested here, in particular as such term relates to the jurisdiction of the Commercial Court, *see* Kerr, Commercial Dispute Resolution: The Changing Scene, in Liber Amicorum For the Rt. Hon. Lord Wilberforce (1987) 112–113. It must also be pointed out that the definition of "commercial" suggested in this study is not intended to be the ultimate and definitive definition of such term, rather it is used as a tool to identify a certain category of interstate disputes for the purposes of the study.

[49] *Cf.* Toope, Mixed International Arbitration (1990) 3–9, 219 *et seq.*, and Hirsch, The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes (1993) 1–7.

[50] Sucharitkul concluded as far back as 1959 in the introductory chapter to his work "State Immunities and Trading Activities in International Law" that: "It is now evident that the ever-increasing activities of States in the domain of international trade are likely to continue to progress and expand in the foreseeable future", *ibid.*, at 18; in 1957 Mann, referring to the activities of States in the sphere of international economic relations, said that states "have gone into business and entered into contractual arrangements which in many respects do not fundamentally differ from what private traders have practised over the centuries", *see* Mann, Reflections on A Commercial Law of Nations, British Yearbook of International Law (1957) 20. He goes on to discuss a number of examples from British state practice where the British Government has entered into commercial treaties, including sales and purchase transactions, barter transactions, loans, leases and contracts for work and labor, *id.*, at 23–29.

See also Mann, The Proper Law of Contracts Concluded By International Persons, British Yearbook of International Law (1959) 35 where it is said: "For international persons have everywhere gone into business. They have on the footing of both public international law and municipal law, formed corporate bodies to engage in banking, render rivers navigable or finance the supply of railway material. Furthermore, on the footing of public international law, they enter into transactions of a commercial character" (footnotes omitted). *Cf.* Rubin, Avoidance and Settlement of International Investment Disputes: Overview, in Rubin & Nelson (eds.), International Investment Disputes: Avoidance and Settlement (1985) 1.

One such area with a potential for a large number of interstate disputes is represented by the practice of concluding *bilateral investment protection treaties*. Following the Second World War private foreign capital has, generally speaking, played an important role in the economies of developing countries. With a view to safe-guarding private foreign investment, capital-exporting countries started to conclude bilateral investment protection treaties. One of the primary purposes of such agreements is – as indicated by the term itself – to protect the investment of a private party in the host state. The substantive areas covered by such agreements usually include admission and treatment of foreign investments, as well as protection against expropriation. In addition, most agreements contain provisions for the settlement of disputes.[51] The first modern bilateral investment protection treaty was signed in 1959 between the Federal Republic of Germany and Pakistan.[52] As of September 1994 more than 700 such agreements had been signed[53] and by October 1997 more than 1,100[54] and by 1 May 2001 around 1800[55].

Most agreements contain two forms of dispute settlement mechanisms, *viz.*, disputes between the contracting parties, i.e. the two states in question, and disputes between the host state and the foreign investor. Virtually all of the agreements provide for arbitration as the method for resolving disputes.[56] As far as the former category is concerned, it thus constitutes interstate arbitrations. Given the fact that approximately 2000 bilateral investment protection treaties are in force, it is clear that the potential for interstate arbitrations in this field is huge.[57] A significant

[51] *See* Dolzer & Stevens, Bilateral Investment Treaties (1995) xii. This publication has a comprehensive bibliography, listing articles and books addressing various aspects of investment protection treaties.

[52] *Id.*, at 1.

[53] *Ibid.*, and Section B and C of Annex II.

[54] Statement by Dr. Ibrahim Shihata, General Counsel of the World Bank, at a meeting in Stockholm on 22 October 1997.

[55] Information obtained by the author from Secretariat of ICSID..

[56] Dolzer & Stevens, *op. cit.*, at 119, *see* also Broches, Bilateral investment protection treaties and arbitration of investments disputes, in Schultsz & van den Berg (eds.), The Art of Arbitration (1982) 63.

[57] A multilateral convention with similar provisions on arbitration is the Energy Charter Treaty. It was signed on 17 December 1994 in Lisbon after several years of negotiation. By June 1995 the treaty had been signed by 49 states as well as by the European Union, *see* Wälde, Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation, Arbitration International, No. 4 (1996) 429. The text of the treaty is reproduced in International Legal Materials (1995) 509. Article 27 of the treaty provides for interstate arbitration of all disputes concerning the interpretation and application of the treaty before an *ad hoc* tribunal operating under the UNCITRAL Arbitration Rules with the Hague as the place of arbitration. For comments, *see* Wälde, *ibid.*

number of agreements provide for interstate arbitration concerning the *interpretation and application* of the agreement in question. Disputes falling into this category are many and varied. One example is when the state in question exercises its *ius protectionis* in relation to investors of its nationality. A company which has had its investment confiscated in the host state may decide not to initiate a claim for compensation on its own against the host state, but rather to turn to the relevant government body in its home state and ask it to advance a claim against the host state. A dispute of this kind is an interstate dispute of a commercial nature.

Another example of such disputes are disputes arising out of *agreements for the construction of embassies*, or other diplomatic missions, entered into between two sovereigns. In 1958, for example, Sweden and the then Soviet Union entered into an agreement for the construction of embassies in Stockholm and Moscow, respectively.[58] The Governments of the states agreed to make available in Stockholm and Moscow, respectively, sites with permanent tenure for the construction of embassies.[59] The Swedish embassy in Moscow was to be constructed by the Central Board for the Construction of Dwelling Houses and Public Buildings in the City of Moscow of the Moscow City Soviet of workers deputies[60] and the Soviet embassy in Stockholm by the Swedish State Building Board.[61] The agreement goes on to describe how the construction works are to be carried out and refers to an annex which describes in detail how the financial settlements between the two parties are to be effected. Disputes under an agreement like this would be very similar to disputes under construction contracts entered into between two privately owned companies. In 1960 the Soviet Government informed its Swedish counterpart that the site envisioned for the Swedish embassy in Moscow was no longer available.[62] This caused problems to the Swedish government since its calculations were based on the assumption that the first site would be used. This potential dispute was resolved through further negotiations between the parties, resulting in an amendment to the 1958 agreement. The embassies were eventually handed over by and to the respective sides in March of 1972. In connection with reconstruction work in 1986 eavesdropping equipment was discovered in the Swedish Embassy in Moscow. The Swedish Government filed a protest with the Soviet Government

[58] United Nations Treaty Series 1962, No. 6184.

[59] *Ibid.*, Article 1.

[60] *Ibid.*, Article 2(2).

[61] *Ibid.*, Article 2(4).

[62] SOU 1993:26. Handläggningen av vissa säkerhetsfrågor, at 22. For the following account of events, *see* pp. 22–25 in the aforementioned publication.

stating, *inter alia*, that the installation of eavesdropping equipment violated the 1958 Agreement as well as the 1961 Vienna Convention on Diplomatic Relations.[63] However, no further action seems to have been taken in the matter, either from the Swedish side, or from the Soviet side. Had this situation developed into a dispute, the dispute as such would probably have been very much like a construction dispute between two private parties.

Although no statistical information is available, the arrangement described above with respect to Sweden and the Soviet Union does not seem to be an unusual way for states to agree on the construction of embassies; in particular it seems to have been the standard procedure for the then Soviet Union, at least for a period of time. As mentioned above,[64] a similar arrangement was entered into between the United States and the Soviet Union. In 1972 an agreement was signed by the United States and the then Soviet Union for the construction of embassies in Washington D.C. and Moscow, respectively. It was later discovered that eavesdropping equipment had been installed in the chancery of the US Embassy in Moscow.[65] This eventually led the United States to commence arbitration proceedings in Stockholm claiming damages of USD 29 million basing the claims on intentional faults and bad workmanship and also asking the Soviet Union to take certain measures with respect to the equipment. In the arbitration it was argued that the claims put forward were time barred under Soviet law. The American side argued, however, that Soviet law was not applicable, but rather public international law and its rules on extinctive prescription which were said not to bar the claims.[66] The dispute has reportedly been settled through diplomatic channels.[67]

A third category of interstate disputes of a commercial character includes disputes arising out of *international economic co-operation and/or regulation* with respect to, *inter alia*, infrastructure, utilities and transportation. An example falling in the latter group is the arbitration between the United States and the United Kingdom concerning the Heathrow Airport user charges. The dispute arose out of an agreement of 1977 between the two states concerning air services.[68] The agreement stipulated, *inter alia*, that air port charges would not discriminate

[63] 500 United Nations Treaty Series 95.
[64] *See* p. 13 *et seq., supra.*
[65] The Independent, 1 December 1988, at page 3.
[66] *Ibid.* and Svenska Dagbladet 30 October 1988 at p. 12 and p. 13, *supra.*
[67] *See* Dobrynin, In Confidence (1995) 128 and note 2 at p. 13, *supra.*
[68] United Kingdom Treaty Series No. 76 (1977) Cmnd. 7016.

between domestic air lines and those of the other party and that the parties must use their best efforts to calculate the charges pursuant to certain principles laid down in the agreement.[69]

Following court actions in England initiated by various American airlines, which resulted in a settlement agreement, the United States initiated arbitration against the British government pursuant to the arbitration clause in the agreement between the two states.[70] The US Government asked the arbitral tribunal to determine whether the UK Government had used its best efforts, as required by the agreement, and to determine what remedy, or relief, should be awarded.[71] An award was rendered in November of 1992 concluding that the UK Government had failed to use its best efforts. Thereafter negotiations were started with a view to finding which remedies, if any, were appropriate, which proceedings have reportedly been settled.[72] It is interesting to note that the parties agreed to use procedural rules adapted from the rules of the International Centre for Settlement of Investment Disputes (ICSID)[73] and that the reason for doing so was apparently the complex economic issues involved in the arbitration.[74]

The United States has been involved in several similar previous arbitrations, for example with France.[75]

In the treaty practice of the Federal Republic of Germany the rule seems to be to include arbitration clauses in treaties relating to air transportation; as per the end of 1981 65 such treaties had been entered into, 61 of which provided for arbitration as the dispute settlement mechanism.[76]

Other examples of interstate transactions of a commercial character include *transactions concerning arms and military equipment and sovereign loans.*

[69] Skilbeck, The US/UK Arbitration Concerning Heathrow Airport User Charges, International & Comparative Law Quarterly (1995) 171; *see* also Witten, The US–UK arbitration concerning Heathrow Airport user charges, American Journal of International Law (1995) 174.

[70] Skilbeck, *supra,* note 69, at 172.

[71] *Ibid.*

[72] Skilbeck, *supra*, note 69, at 173. The award is said to be in the public domain, but does not seem to have been published; *Id.*, at 172, note 2.

[73] *See* pp. 88–89, and 101 *et seq., supra.*

[74] Witten, *supra,* note 69, at 182–183. – In recent negotiations between Britain and the United States on a new air treaty, difficulties to agree on arbitration in the event of pricing disputes was referred to as one issue which brought the negotiations to a halt; The Wall Street Journal Europe, 8 October 1998 at page 5.

[75] *See* e.g. Damrosch, Retaliation or arbitration – or both? The 1978 United States–France aviation dispute, American Journal of International Law (1980) 785.

[76] *See* Wühler, Die internationale Schiedsgerichtsbarkeit in der völkerrechtlichen Praxis der Bundesrepublik Deutschland (1985) 79, with further references.

In November 1956, for example, a treaty was signed by and between Great Britain and the Republic of Lebanon concerning a free loan of arms, ammunition and equipment to the latter.[77] A more recent example is the so-called Case No. B1 tried by the Iran–United States Claims Tribunal.[78] Iran raised a number of claims arising from Iran's purchases of military equipment and services from the Department of Defense. The Iranian armed forces had reportedly spent more than USD 20 billion on purchases of military equipment.[79] Under Article II, Paragraph 2 of the Claims Settlement Agreement "official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services" were to be tried by the Full Tribunal. Claim B1 constituted a series of claims arising from Iran's purchases of military equipment and services. The claim was divided into six parts. With respect to one of the claims, Claim 4 – concerning the return to Iran of military equipment sold to it – but which for different reasons remained in the possession of the United States – the Full Tribunal issued a partial award confirming that Iran's purchases were made pursuant to contractual arrangements for purchase and sale of goods and services and that, consequently, the Tribunal had jurisdiction over Iran's claims.[80] The Tribunal eventually proceeded to decide claim B1 on the merits.[81]

Further examples in this category include various agreements entered into by Sweden concerning cooperation with respect to defense related matters. In 1994, for example, a memorandum of understanding was entered into with the Government of Australia on "defense material cooperation",[82] covering, *inter alia*, research, development, production, marketing and export of defense material; in this particular case probably submarines, even though this is not explicitly said in the agreement. In 1991 an agreement was entered into with the Federal Republic of

[77] *See* Mann, The Proper Law of Contracts Concluded by International Persons, British Yearbook of International Law (1959) 36. As pointed out by Mann such an arrangement would typically raise many issues of a commercial nature, e.g. the borrower's obligation to bear the cost of repairing equipment, to replace lost equipment and to pay compensation therefor. Mann also mentions a treaty entered into with Turkey concerning the purchase by the Turkish Government of certain ships from the British Reserve Fleet, *ibid.*, at 35.

[78] *See* Aldrich, The Jurisprudence of the Iran–United States Claims Tribunal. An Analysis of the Decisions of the Tribunal (1996) 484–485, 510 *et seq.*

[79] Aldrich, *op. cit.*, at 510.

[80] The Islamic Republic of Iran v. The United States of America, Partial Award No. 382-B1-FT (31 August 1988), reprinted in 19 Iran–U.S. Claims Tribunal Reporter.

[81] *See* Aldrich, *op. cit.*, at 511–519.

[82] SÖ 1994:21 (Memorandum of Understanding between the Government of the Kingdom of Sweden and the Government of Australia on defence material cooperation).

Germany relating to the secrecy of primarily inventions of importance to the defense industry.[83] This agreement was probably entered into as a result, or in anticipation, of Sweden's purchase of tanks manufactured in the Federal Republic of Germany. In connection with Sweden's efforts to sell the JAS fighter plane, agreements have been entered into with Hungary[84] and Chile[85] on cooperation and exchange of information concerning defense related matters.[86]

Sovereign lending – as well as state insolvencies – has been a feature of international relations from time immemorial. As far as defaults on foreign loans are concerned, four time periods stand out since the Napoleonic Wars,[87] *viz.*, 1825–1835, involving many Latin American states, the 1870's, the 1930's, largely as a result of the depressions, and the period following the Second World War.[88] In the 1980's there was a new wave of state insolvencies leading to the rescheduling of the state debts of many countries in Eastern Europe, Africa and Latin America.[89] Rescheduling of government debt is usually done within the framework of the so-called Paris Club and on the basis of the principles laid down in this connection.[90] Government debt typically results either from direct state to state, i.e. intergovernmental, lending, or from the calling of export credit guarantees.[91] The end – result of rescheduling efforts is usually a number of bilateral treaties based on the multilateral guidelines of

[83] SÖ 1991:45 (Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung des Königreichs Schweden über die gegenseitige Geheimhaltung von Patent- oder Gebrauchsmusteranmeldungen verteidigungswichtiger Erfindungen).

[84] SÖ 1995:78 (Memorandum of Understanding between the Government of the Kingdom of Sweden and the Government of the Republic of Hungary on Defence Industrial Co-operation and Exchange of Views concerning certain Defence Matters) and SÖ 1997:3 (Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Hungary concerning security measures for the protection of classified military data).

[85] SÖ 1997:9 (Memorandum of Understanding between the Government of the Kingdom of Sweden and the Ministry of Defence of the Republic of Chile on Co-operation in Defence Related Matters).

[86] Interestingly enough all the agreements referred to in the foregoing either contain no clause on dispute settlement or explicitly states that all disputes are to be settled by consultations between the parties, to the exclusion of arbitration or any other third party dispute settlement mechanism. These provisions notwithstanding, the parties would of course be free to agree on arbitration, once a dispute has arisen, should the consultations between the parties not result in a resolution of the dispute.

[87] Wood, Project Finance, Subordinated Debt and State Loans (1995) 147–150.

[88] For comprehensive discussions of the period prior to 1951, *see* Wynne, State Insolvency and Foreign Bondholders (1951) 2 vols.

[89] Wood, *op. cit.*, at 149.

[90] *Id.*, at 161.

[91] *Ibid.*

the Paris Club.[92] Generally speaking, a rescheduling agreement is very similar to a commercial syndicated loan agreement and would typically give rise to similar legal issues.[93]

5.2.2.3.3 Economic Disputes

Just as there is no generally accepted comprehensive definition of "commercial disputes", there is no generally accepted definition of "international economic disputes". An obvious starting point is that international economic disputes arise out of international economic transactions. It has been suggested that such transactions fall into the following categories: international movements of goods, services, persons, capital and international payments with respect thereto.[94] A slightly different, and broader, suggested definition of international economic transactions is: "Trade and movement of money across national frontiers, and access to and acquisition of resources, natural and human."[95]

Proceeding from these two broad definitions, it is clear that disputes arising out of such transactions can be of many kinds. One example would be the disputes handled within the framework of the dispute settlement mechanism of the WTO.[96] This category includes disputes over international trade in goods, services, trade-related investments and intellectual property. As far as international trade disputes are concerned, such as the ones falling within the WTO system, many of them seem to concern economic and trade *policy decisions* of the disputing states. To the extent that policy considerations are involved, such disputes will not be characterized as economic disputes for the purposes of this Study. As mentioned above, I shall use the term economic disputes for disputes where the subject-matter of the dispute is economic rights and obligations, i.e. where the existence, meaning, scope, interpretation and enforcement of such rights and obligations are involved. Using this

[92] *Ibid.*

[93] *Ibid.*; *see* also Carreau, Bilan de Recherches de la Section de la langue française du Centre D'Etude et De Recherche de L'Academie, in Centre D'Etude et De Recherche de Droit International et de Relations Internationales La Dette Extèrieure (1992) 17 and Feliciano, The Present State of Research Carried Out by the English-Speaking Section of the Centre For Studies and Research, *ibid.*, 43. Feliciano points out, 68–70, that rescheduling seems to be done without much litigation and/or arbitration, and that one explanation may be that rescheduling *negotiations* seem to work well and efficiently in practice. Needless to say, these circumstances do not *per se* reflect on the legal character of such transactions, or legal relationships.

[94] Petersmann, Constitutional functions and constitutional problems of international economic law (1991) 1–2.

[95] Fawcett, International Economic Conflicts. Prevention and Resolution (1977) 2.

[96] *See* p. 74 *et seq., supra.*

approach as the ultimate benchmark for the definition of an economic dispute, it is clear that many of the categories of disputes which have been defined above as commercial disputes also fall into the category of economic disputes. On the other hand, there would seem to exist economic disputes which are *not* to be characterized as commercial disputes, for example, international trade disputes covered by the WTO dispute settlement mechanism and which are not concerned with policy decisions. As an illustrative example, suffice it to mention the widely publicized case concerning the European Communities' Regime for the importation, sale and distribution of bananas. In February of 1996 Ecuador, Guatemala, Honduras, Mexico and the United States challenged the EC regime with respect to bananas. After consultations, the complainants requested the establishment of a panel within the framework of the WTO dispute settlement system. They requested that the panel establish that the EC regime was inconsistent with the GATT in several respects, *inter alia*, in *that* the quota structure applied was discriminatory tariff treatment, *that* the allocation of market shares was discriminatory and violated obligations as to most-favored-nation treatment, *and that* the licensing system imposed by the EC was discriminatory and violated obligations with respect to market access. In its report, issued in April of 1997, the panel found that the EC import regime for bananas was inconsistent with several provisions of the GATT, as a result of which the benefits which the claimants were entitled to were undermined or nullified.[97] The Appellate Body issued its report in September 1997 confirming most of the findings of the Panel.[98] As of the time of writing – 1 May 2001 – the WTO Dispute Settlement Understanding has been resorted to in 231 cases since its inception on 1 January 1995.[99] Of these cases, 49 have reached the final stage of the dispute settlement mechanism, the aforementioned case concerning bananas being one of them.[100]

In his study of how the Permanent Court of International Justice and the International Court of Justice have handled economic conflicts, Wellens lists all cases where economic rights and obligations have been the subject matter of a dispute before the two courts.[101] The list starts with the very first case decided by the Permanent Court, i.e. the *SS*

[97] WT/DS 27/9.

[98] WT/DS 27/AB/R.

[99] WTO Dispute Bulletin Website (1 May 2001) 1.

[100] *Id.*

[101] Wellens, Economic Conflicts and Disputes Before the World Court (1992–1995). A Functional Analysis. (1996) 170–174. – In his study Wellens distinguishes between three categories of economic conflicts and disputes. The *first* category addresses disputes where economic facts, factors and circumstances have been relevant, but outside the scope of the

Wimbledon Case,[102] decided in 1923, and mentions another forty-nine cases, the last being the *Certain Phosphate Lands in Nauru Case*,[103] where the International Court of Justice never reached the merits of the case, since the parties agreed on a settlement of the dispute. Most of the cases appearing on this list fall into the category of commercial disputes, as such category is defined above.[104] Some of the cases, however, fall outside the category of *commercial* disputes, but would nevertheless be characterized as *economic* disputes, since economic rights and obligations of the parties constitute the subject-matter of the dispute. One such case is the *SS Wimbledon Case*, where France, Japan and the United Kingdom asked for compensation for damage incurred as a result of the steamship Wimbledon having been denied access to the Kiel Canal. A modern variation of the same theme is the dispute between Finland and Denmark concerning passage through the Great Belt,[105] which was settled by the disputing states before the court reached the merits of the case.

Another group of cases on the above-mentioned list includes disputes related to questions of customs regimes. The first case in this group was the dispute between France and Switzerland concerning the customs regime of the free zones of Upper Savoy and the district of Gex decided by the Permanent Court of International Justice in 1932.[106] Other cases falling into this category is the Advisory Opinion rendered in 1931 on the customs regime between Germany and Austria[107] and the *Rights of Nationals of the USA in Morocco Case* between France and the United States, decided by the International Court of Justice in 1952.[108]

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judical function of the courts, *ibid.* 87–95. The *second* category deals with cases where economic facts, factors and circumstances have been relevant, but have not constituted the core of the dispute, *ibid.* 97–131. The *third* and final category discusses cases where economic rights and obligations have been the subject-matter of the dispute, *ibid.*, 133–174. It is this final category of disputes which is of interest for this Study.

[102] P.C.I.J. Series A, No. 1 (1923).

[103] Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports (1992) 240.

[104] *See* p. 350 *et seq.*, *supra*.

[105] Passage through the Great Belt (Finland v. Denmark), Provisional Measures, order of 29 July 1991, I.C.J. Reports (1991) 12.

[106] Free Zones of Upper Savoy and the District of Gex, P.C.I.J. Series A/B No. 46 (1932). – The judgment of the court was preceded by two orders issued by the court in 1929 and 1930, respectively.

[107] Customs Regime between Germany and Austria, P.C.I.J. Series A/B No. 41 (1931).

[108] Rights of Nationals of the United States of America in Morocco (France v. United States of America) I.C.J. Reports (1992) 176.

As the examples above show, the significant overlap between commercial and economic disputes notwithstanding, there are several kinds of disputes which are not commercial, but where the subject-matter of the dispute are nevertheless economic rights and obligations of the parties.

5.2.2.3.4 Commercial and Economic Disputes and the Principle of Extinctive Prescription

As the examples discussed above show, there are several categories of interstate disputes which are of an economic and commercial character and which would typically seem to give rise to the same, or similar, problems as would arise in an economic or commercial dispute between two private parties.[109] One issue which might arise in such disputes is that of extinctive prescription. When an interstate dispute is of a commercial or economic nature there would seem to be a need for extinctive prescription to play a role similar to limitation in a commercial dispute between two private parties to which municipal legislation is to be applied. The rationale underlying extinctive prescription (limitation) in municipal law – which has been developed on the basis of commercial and/or quasi-commercial legal relationships[110] – would seem to apply with equal force to commercial and economic transactions between sovereigns. There would not seem to be anything inherently different with commercial and economic transactions between sovereigns in this respect. Against this background, it is questionable if the principle of extinctive prescription, as developed in international law, should be applied with respect to interstate disputes of a commercial and economic character. It could be argued that any such dispute, interstate as well as private, is better

[109] A telling illustration of how commercial considerations – or rather behavior – may penetrate even the highest levels of interstate negotiations is offered by Anatoly Dobrynin, long time Soviet ambassador to the United States, in his account of the negotiations between the United States and the Soviet Union on the Soviet lend-lease debt with respect to American supplies during the Second World War. The negotiations took place during the 1972 summit meeting between Nixon and Brezhnev. The United States claimed USD 1.2 billion, while the Soviet side was prepared to pay USD 200 million. The gap was narrowed in the following manner according to Dobrynin: "Kosygin, who handled the issue for the Soviet side, proposed to settle in a businesslike manner and said that the Soviet Union was prepared to offer another USD 100 million. Nixon immediately agreed to bargain, reducing the American claim by a corresponding USD 100 million. Then, with complete silence in the room, they began as if they were at an auction, with Kosygin raising the amount in bids of USD 100 million while Nixon cut it by the same figure. It took them half a minute to reach a comprise for a dispute that had lasted for a generation. They met each other about halfway and settled for a payment of USD 722 million", Dobrynin, *op. cit.*, at 258.

[110] *See* p. 253 *et seq.*, *supra.*

resolved by applying more detailed and specific rules on extinctive prescription, for example, such as those found in most municipal laws.

As mentioned above,[111] extinctive prescription in international law is not a hard and fast *rule* of international law, in fact it is not even a rule, but rather a *principle* of international law which is rather fragmentary as to its constituent elements and which is ultimately subject to general considerations of equity.[112] As a consequence, the principle, and its application, could be said to be uncertain and unpredictable, which is typically anathema to any participant in a transaction of a commercial or economic nature.[113] It would seem to be a restatement of the obvious to say that there is a need for legal security in international economic cooperation.[114] It has been suggested that one possible explanation of the fact that few international economic disputes have been submitted to the International Court of Justice, and its predecessor, could be that that dispute settlement system does not provide the required legal security with respect to such disputes. Jaenicke noted:

> "/T/he remarkable fact is that no such conflict [international trade conflict] has ever been submitted to the Permanent Court of International Justice or the International Court of Justice. Both courts have never had the opportunity to pronounce themselves on such important legal principles as most-favoured-nation treatment and non-discrimination. The reluctance of states to submit a conflict of this kind to the Court is also apparent from the limited number of commercial treaties which contain a compromissory clause providing for the jurisdiction of the Court in respect to trade conflicts proper".[115]

[111] *See* p. 334 *et seq.*, *supra*.

[112] *Ibid.*

[113] *Cf.* e.g. Ramberg, Foreseeability in Swedish Arbitration Contracts, Swedish and International Arbitration (1982), 37, where he states that "/f/oreseeability is the key word in commercial transactions", and goes on to say that "/t/he corollary to foreseeability is certainty".

[114] *See* e.g. Petersmann, who traces this fundamental factor to the philosopher Immanuel Kant; Petersmann, From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System, Journal of International Economic Law (1998) 175.

[115] Jaenicke, International Trade Conflicts before the Permanent Court of Justice, in Petersmann & Jaenicke (eds.), Adjudication of International Trade Disputes in International and National Economic Law (1992), 44 – Similar views, i.e. that the International Court of Justice is perhaps not a suitable forum for international economic disputes, have also been expressed by Dolzer, Formen der Streitbeilegung im multilateralen Wirtschaftsrecht, Jahrbuch für die Praxis der Schiedsgerichtsbarkeit (1986) 41. Wellens, however, comes to the opposite conclusion in this study. He states: "The main observation to be made here is that the prophecy, the hypothesis, the assumption – which over a period of time and during a particular period turned out to be self-fulfilling – withholding this category of disputes from the Court – was and still is totally unjustified", Wellens, *op., cit.*, at 5.

Proceeding from these general considerations, it is submitted that it is necessary to reconsider the application of the principle of extinctive prescription in interstate disputes of a commercial or economic nature. No such need would typically seem to exist, however, with respect to other interstate disputes. This category includes many and varied disputes, such as boundary and territorial disputes, acquisition of territory, use of force etc. I refer to such disputes as "sovereign disputes", in the sense that they primarily concern different aspects of the exercise of sovereign (state) authority. The need for certainty, predictability and precision typically is not usually as great in sovereign disputes; rather, the flexibility and adaptability inherent in international law in general, and in the principle of extinctive prescription in particular may probably be conducive to the resolution of such disputes.[116] As I have stated previously, the principle of extinctive prescription in international law is ultimately subject to general considerations of equity and justice.[117] It is probably safe to assume that the dependency on equity is one important factor providing for flexibility and adaptability; to paraphrase Higgins: equity oils the wheels of international law.[118] The situation is different, however, it is submitted, with respect to commercial and economic interstate disputes. As previously mentioned, with respect to such disputes the key words are certainty and predictability. It is not difficult to see that the principle of extinctive prescription as understood and applied in international law does not meet these requirements.

When discussing the rationale underlying the principle of extinctive prescription, I have concluded that considerations addressing the interests of the parties as well as considerations relating to the public interest play important roles.[119] With respect to the first category, it is primarily the interests of the respondent which ought to be taken account of. If, for example, specific time periods were to apply in international law – as is the case in municipal law – it is difficult to escape the conclusion that this would enhance the position of respondent: it would know that after a certain period of time it would no longer be under the particular obligation, and there would be no need for the respondent to save documents, records, documentation and other evidence beyond that period of time.

[116] As explained by Wellens – see Wellens, *op. cit.*, at 97–123 – also in such other interstate disputes economic considerations may, however, be relevant, and indeed play an important role, and have been so treated by the International Court of Justice, but without constituting the subject-matter of the dispute in question.

[117] *See* p. 334 *et seq.*, *supra.*

[118] *See* Higgins, *op. cit.*, Oiling the Wheels of International Law: Equity and Proportionality, *ibid.*, at 219 *et seq.*

[119] *See* p. 280 *et seq.*, *supra.*

Arbitral practice has shown a great variety of time periods ranging from six years in the *Carlos Butterfield & Co Case*[120] to 43 years in the *Spader Case*.[121] It is submitted that a fixed time period would better safeguard the interests of the respondent. As far as time periods are concerned, the public interest would also – it is submitted – be better served by having fixed time periods. As previously mentioned, the public interest is primarily to provide for order and stability, which includes preventing claims from surviving for ever.[122]

Proceeding from the two aforementioned categories of considerations underpinning the principle of extinctive prescription – its *rationale* – it is submitted that the more uncertainties that are removed, the better would the considerations in question be served. It goes without saying, that it cannot be an objective in and of itself to leave open questions relating to tolling of time periods, categories of claims with respect to which the principle is applicable and possible legal consequences resulting from the procedural nature of the principle of extinctive prescription.[123]

5.2.2.4 Contractual Disputes v. Tort Disputes

Another distinction which could be relevant in determining whether or not the principle of extinctive prescription needs to be refined is the distinction between disputes arising out of contracts on the one hand, and tort disputes on the other.[124] This distinction was made by the Institut de Droit International in its report on extinctive prescription.[125] In its proposal the Institute suggested that extinctive prescription would be more difficult to apply with respect to contractual claims than with respect to tort claims.[126] The reasoning behind this suggestion was that a contract entered into by a state, or its Government, would typically be a public act and thus – at least theoretically – accessible and known to everyone. This idea reflects one of the traditional requirements with respect to extinctive prescription, *viz.*, that there be an absence of a record of facts.[127] As

[120] *See* p. 293, *supra*.
[121] *See* p. 287, *supra*.
[122] *See* p. 284, *supra*.
[123] *See* p. 334 *et seq.*, *supra*.
[124] The term "tort disputes" is used herein to denote all disputes which do not arise out of contractual arrangements, whether or not such arrangements are in the form of treaties, conventions or agreements between governmental bodies.
[125] *See* note 18, at p. 243.
[126] *Ibid.*, at 23.
[127] *See* p. 296 *et seq.*, *supra*.

discussed above,[128] it is probably less true today, than in 1925 when the Institute published its report, that contracts and agreements entered into by states and Governments reach public records. Even to the extent they do, the *total* number of such public acts would be truly overwhelming, which in practice would make it virtually impossible to keep track of such public acts. It would not be realistic to presume knowledge of contracts or agreements entered into by states on the basis of the idea that they constitute public acts and would therefore – theoretically – be accessible to everyone.

Thus, it would not seem warranted today to draw the conclusion that application of the principle of extinctive prescription is *automatically* ruled out in situations where two states have entered into an agreement which gives rise to a dispute, on the assumption that the agreement has entered public records. Whether or not the principle of extinctive prescription is to be applied must be determined on the basis of all relevant circumstances in the individual case, where the determinative factor will ultimately be if the respondent has been put at a disadvantage.[129] On the other hand, *if in fact* an agreement has been registered in a public record, and *if in fact* the respondent in question has knowledge, or perhaps ought to have knowledge, of the agreement, it is probably fair to assume that the risk of the respondent being put at a disadvantage is relatively small – since he would typically have had time to prepare his case – although even in this situation this risk cannot completely be ruled out.

As far as tort disputes are concerned, the respondent would typically not have any prior knowledge of claims advanced against it. Therefore, with respect to such disputes, there would generally speaking never be a record of facts which could prevent the application of the principle of extinctive prescription. From this perspective – and stated as a general, abstract rule – it is submitted that the suggestion of the Institute mentioned above still holds true. For the purposes of determining if extinctive prescription needs to be refined, however, it is submitted that too far-reaching conclusions must not be drawn from the distinction between contractual disputes and tort disputes. Such an approach seems to be supported by the International Law Commission in its work to codify the law of State responsibility. The origins of a breach of international law – tort, contract, treaty or custom – are not regarded as decisive.[130] Rather, the

[128] *See* pp. 299–301, *supra*.
[129] *See* discussion at p. 301 *et seq.*, *supra*.
[130] *Cf.* Articles 1 and 2 of the Draft Articles on State Responsibility.

watershed is between economic and commercial interstate disputes on the one hand, and other interstate disputes on the other: with respect to both contract disputes and tort disputes of an economic or commercial character there is in my view – as explained above[131] – a need to refine the principle of extinctive prescription.

5.2.2.5 Private v. Public Disputes

As I have discussed above, a distinction is sometimes made between private and public claims.[132] Private claims are presented by a state on behalf of its citizens, usually in exercising its *ius protectionis*; a typical modern example are claims presented by a Government – on behalf of its citizens – under bilateral investment protection treaties.[133] Public claims, on the other hand, are claims arising *directly* out of interstate relations.[134] While the distinction between private and public claims is generally accepted at the conceptual level, it must be remembered *that* also private claims are *international* claims, in the meaning of a claim presented by one state against another state *and that* the principle of extinctive prescription is applicable both to private and public claims.[135] The underlying philosophy is that it is the claimant State itself which suffers a loss when one of its citizens is injured, rather that the citizen in question. The claimant State is under no obligation to press a claim, but may decide to waive the claim or to reach a settlement with the respondent. In the *Barcelona Traction Case*, the International Court of Justice concluded that:

> "... a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law."[136]

Having said this, one is probably justified in assuming that private international claims resemble private commercial claims governed by municipal law more often than public international claims. This is probably one

[131] *See* p. 349 *et seq.*, *supra*.
[132] *See* p. 299 *et seq.*, *supra*.
[133] *See* p. 355 *et seq.*, *supra*.
[134] *See* p. 299 *et seq.*, *supra*.
[135] *See* p. 299 *et seq.*, *supra*. *See*, however, Pinto, p. 271 *et seq.*, *supra*, who seems to take the position that private claims do not really constitute international claims and therefore do not fall under public international law.
[136] I.C. J. Reports (1970) 44.

of the reasons underlying the recommendations of the Institut de Droit International to the effect that the principle of extinctive prescription be more restrictively applied with respect to public claims than with respect to private claims.[137] By the same token, economic and commercial interstate disputes would more often seem to be similar – but *not* identical[138] – in nature to interstate disputes generated by private claims than such disputes generated by public claims. With respect to economic and commercial disputes – contractual as well as tort – I have suggested that the uncertainty and unpredictability inherent in the principle of extinctive prescription prompt a reconsideration of the principle. For the same reasons I submit that the principle of extinctive prescription also needs refinement with respect both to private and public claims in so far as they are economic or commercial in nature.

5.2.3 Conclusion

The principle of extinctive prescription has long been a part of public international law. It was developed at a time when economic and commercial relations between states were more "sovereign" than they are today. As put by Mann, states have nowadays "gone into business".[139] The two giant forces which are transforming almost every aspect of modern life – rapid technological change, and globalization – are propelling states into economic and commercial transactions of many different kinds. Consequently, as discussed above, a large number of potential interstate disputes are economic or commercial in nature. While there are also other categories of interstate disputes,[140] it is submitted that on the basis of the foregoing discussion, the most relevant categories of interstate disputes, in so far as a need for refinement of the principle of extinctive prescription is concerned, are the economic and commercial disputes as defined above.[141]

[137] *See* note 135, *supra*. It must be noted, however, that the Institut offers very little in the form of explanations to its recommendation. On the other hand, it is probably fair to assume that another reason prompting this recommendation was the notion that a public claim usually meant that there was a record of fact with respect to the claim, a circumstance which is regarded as precluding the application of the principle of extinctive prescription, *see* p. 296 *et seq.*, *supra*.

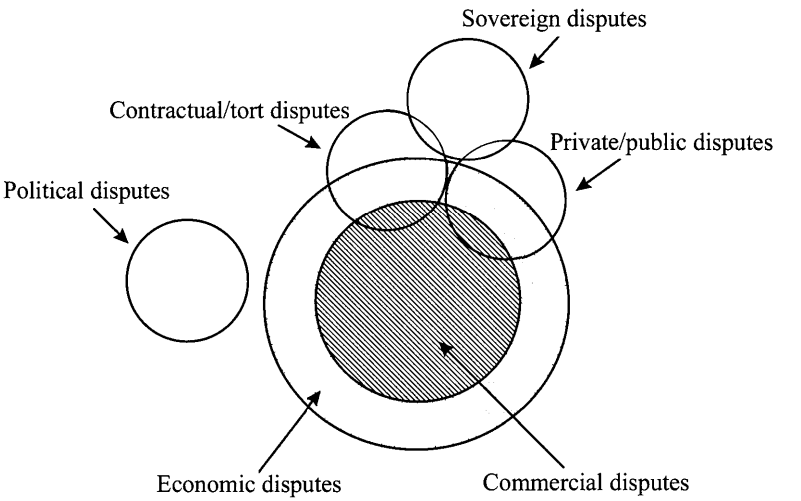
[138] While most private claims would in all likelihood be of a commercial nature – as such category has been defined above – economic and commercial interstate disputes may be generated both by private and public claims.

[139] *See* note 50, *supra*.

[140] *See* p. 346 *et seq.*, *supra*.

[141] *See* p. 349 *et seq.*, *supra*.

The different categories of interstate disputes discussed above are illustrated in the following way.



As I have explained above, the distinctive feature which is of decisive importance is the commercial and/or economic nature of the dispute. The diagram presented above is of a conceptual nature in the sense that it does not attempt to reflect the different ways in which the categories may overlap with respect to a particular dispute. While there *may* be overlap, it is only if and when a tort dispute, let us say, is of a commercial or economic nature, wholly or partially, that it has specific significance with respect to extinctive prescription. As the diagram above illustrates, political disputes and sovereign disputes are of peripheral importance for the present discussion.

With respect to economic and commercial interstate disputes, it is in the opinion the present author necessary to refine the principle of extinctive prescription. As indicated above, this follows from the nature of the principle – it is too general, too uncertain and too unpredictable – from the fact that arbitral practice has not supplemented the principle by developing detailed rules[142] and from the need for legal security and stability. States involved in economic and commercial transactions would typically seem

[142] *See* p. 272 *et seq.*, *supra*, and p. 285 *et seq.*, *supra*.

to have the same need for certainty and predictability as private commercial men.[143] The principle of extinctive prescription, as currently understood and applied, does not provide this.

Having thus concluded that there is a need to refine the principle of extinctive prescription in so far as interstate disputes of a commercial and economic nature are concerned, I now turn to the question of *how* this is to be done.

5.3 How to Refine the Principle of Extinctive Prescription

5.3.1 Introduction

Generally speaking there would seem to be three principal methods by which the principle of extinctive prescription could be refined, *viz.*, (i) by concluding one or several multilateral treaties, (ii) by developing and/or supplementing customary international law or (iii) by drawing on municipal law statutes, and other sources – e.g. case law – on limitation.

One of the questions in the questionnaire prepared by the Institut de Droit International concerned the possibility of preparing an international treaty on extinctive prescription. The conclusion of the Institute was in the negative, proceeding from the responses to the questionnaire and from other comments received. Even though the role and importance of states as participants in international economic and commercial transactions has grown immensely since 1925, thereby increasing the potential of interstate disputes of an economic and commercial nature and thereby increasing the need for more detailed rules on extinctive prescription, it is in the view of the present author not realistic to expect the conclusion of an international convention addressing this issue within a foreseeable future.

Generally speaking, it would seem clear that one or several multilateral treaties on extinctive prescription would be the best solution, assuming

[143] This does not exclude the possible need to refine the principle of extinctive prescription also with respect to other categories of disputes, i.e. sovereign disputes. As mentioned previously, in the opinion of the present author the principle is vague and unpredictable. It would seem that – at least in general – it can never be a disadvantage to bring clarity and predictability to a legal rule or principle. From this perspective, a general "improvement" of the principle of extinctive prescription would be warranted. The greatest need for improvement, however, is to be found with respect to economic and commercial interstate transactions and disputes.

that a large number of states were to sign and ratify them.[144] Comprehensive treaties would create the desired certainty and predictability. A treaty on extinctive prescription should, in the opinion of the present author, as a minimum address the following aspects: scope of applicability of treaty (all interstate relations or only economic and commercial?), *numerus clausus* on claims,[145] the actual limitation period, the possibility of having shortened limitation periods for certain types of claims, calculation and tolling of the limitation period.

Few *multilateral* treaties seem to include provisions on extinctive prescription, or on time limits for the presentation of claims. One notable exception is the 1971 Convention On International Liability For Damage Caused By Space Objects[146] which generally speaking addresses questions of international responsibility and liability of states for their activities in space. Article X of this Convention stipulates, *inter alia*, the following:

> "1. A claim for compensation of damage may be presented to a launching State not later than one year following the date of the occurrence, of the damage or the identification of the launching State which is liable".[147]

The wording of the provision is confusing in that it uses "may" rather than "shall" which would have been the normal way of indicating that the time period is mandatory. It is thus somewhat unclear what the true meaning and effect of this provision is.[148]

[144] In the view of the present author, the International Law Commission will have a golden opportunity to address, codify and develop the principle of extinctive prescription in its work in preparing Draft Articles On State Responsibility. While this would not have the same effect as a multilateral convention, it would nevertheless represent a significant step forward; *cf.* p. 16 and p. 305, *supra*.

[145] Should there be any restrictions as to type of claims, *cf.* ownership rights and rights *in rem* under Swedish law, *see* p. 253 *et seq.*, *supra*.

[146] U.N.T.S. Vol. 961, 187.

[147] The provision is further refined in the subsequent two paragraphs:

"2. If, however, a State does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence.

3. The time-limits specified in paragraphs 1 and 2 of this article shall apply even if the full extent of the damage may not be known. In this event, however, the claimant State shall be entitled to revise the claim and submit additional documentation after the expiration of such time-limits until one year after the full extent of the damage is known."

[148] The 1971 Liability Convention is the only one of the UN space treaties which has a provision on the presentation of claims; the other treaties are the 1967 Outer Space Treaty, U.N.T.S. Vol. 610, 205, the 1967 Rescue Agreement, U.N.T.S. Vol. 672, 119, the 1974

Generally speaking, it would typically seem more likely that conventions and treaties addressing questions of liability and compensation for damages would set forth provisions dealing with time limits for the presentation of claims and extinctive prescription, than other treaties and conventions. The 1971 Liability Convention mentioned above would seem to confirm this assumption. With a view to seeking further confirmation thereof, I have looked at the major international conventions dealing with liability with respect to the peaceful use of nuclear energy[149] and with respect to oil pollution.[150] It must be emphasized that all the conventions deal with *civil* liability rather than *state* liability, i.e. the claims in question are by individuals, or corporate entities, rather than by states.

Registration Convention, U.N.T.S. Vol. 1023, 15 and the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty); the text of the latter is published in International Legal Materials (1979) 1434–1441. – In 1984 the Space Law Committee of the International Law Association adopted, at its meeting in Paris, the ILA Paris Convention On The Settlement Of Disputes Related to Space Activities. A revised version of this Convention was adopted at the sixty-eighth Conference of the ILA in 1998 in Buenos Aires, *viz.*, the Final Draft of the Revised Convention On the Settlement Of Disputes Related to Space Activities, the text of which is reproduced in the Report of the Sixty-Eight Conference (1998) 249–267. Neither the original draft nor the revised draft contains provisions on extinctive prescription or time limits for the presentation of claims.

[149] 1960 and 1963 Conventions on Third Party Liability in the Field of Nuclear Energy – International Legal Materials (1963) 685; 1963 Vienna Convention on Civil Liability for Nuclear Damage – International Legal Materials (1963) 727; 1971 Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material – 974 United Nations Treaty Series 255.

[150] 1954 International Convention for the Prevention of Pollution of the Sea by Oil – 327 United Nations Treaty Series 3; 1969 International Convention on Civil Liability for Oil Pollution Damage – International Legal Materials (1970) 45; 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties – International Legal Materials (1970) 45; 1990 Convention of the International Maritime Organization on Oil Pollution, Preparedness, Response and Co-operation – International Legal Materials (1991) 733; 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter – International Legal Materials (1972) 1294; 1973 International Convention for the Prevention of Pollution from Ships – International Legal Materials (1973) 1319; 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft – International Legal Materials (1972) 262; 1974 Convention on the Prevention of Marine Pollution from Land-Based Sources – International Legal Materials (1975) 352; 1976 Convention for the Protection of the Mediterranean Sea Against Pollution – International Legal Materials (1976) 290; 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area – International Legal Materials (1974) 546; 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution – International Legal Materials (1978) 511; 1992 Convention on the Protection and use of Transboundary Water Courses and International Lakes – International Legal Materials (1992) 1313; 1979 Geneva Convention on Long-Range

This notwithstanding, it is of interest for purposes of the present study to dwell – albeit briefly – on relevant provisions of such conventions.

As far as the first category – peaceful use of nuclear energy – is concerned, there are provisions in the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, which deal with time limits for the presentation of claims.

Article 8 of this Convention stipulates that the right to compensation is extinguished unless an action is brought within ten years from the date of the nuclear incident. Under certain circumstances, described in this provision, national legislation may establish longer or shorter periods for the extinction of the right to compensation. Similar provisions are found in Article VI of the 1963 Vienna Convention on Civil Liability for Nuclear Damage. As mentioned above, however, neither these two conventions, nor the other conventions in this category set forth provisions relating to extinctive prescription of interstate claims.

In the second category of conventions referred to above – i.e. conventions relating to oil pollution – there are some provisions relating to time periods for the presentation of claims. In the 1969 International Convention on Civil Liability for Oil Pollution Damage, for example, Article VIII provides for a three year limitation period. In the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, there is a provision laying down a time limit for the commencement of arbitral proceedings. Article 13(2) of the Annex to this Convention – the Annex addresses conciliation and arbitration – stipulates that a request for arbitration must be filed within 100 days of an unsuccessful conciliation. The provisions on conciliation do not, however, set forth any time limits for presenting claims within conciliation proceedings.

As far as *bilateral* agreements are concerned, I have focused on bilateral investment protection agreements. Given the constantly growing importance of international trade and investment the number of such treaties is regularly growing.[151] As explained above[152], most such agreements provide for arbitration as the dispute settlement mechanism. The

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Transboundary Air pollution – International Legal Materials (1979) 1442; 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal – International Legal Material (1981) 652; 1991 OAU Bamako Convention on the Ban of the Import into Africa and Management of Hazardous Waste within Africa – International Legal Material (1991) 775.

[151] As mentioned above, p. 355, the total number of bilateral investment protection treaties is estimated to approximately 1800 as per 1 May 2001. It should be noted, however, that there is no official statistical information on the number of such treaties.

[152] *See* p. 355, *supra*.

potential for interstate disputes on the basis of such agreements must be said to be large given the number of such treaties. I have reviewed all bilateral investment protection treaties published by the International Center for the Settlement of Investment Disputes in the series "Investment Treaties of the World". The total number of published treaties is 1064 treaties as per 1 May 2001.[153] None of these treaties contains provisions dealing with extinctive prescription or time periods for submitting claims.

Given the definitive and draconian effects of extinctive prescription it is surprising that so very few treaties have provisions thereon. I have been unable to find any pronouncements in the legislative history of the treaties that I have reviewed which could shed light on the lack of provisions in this respect. Against this background, one can only speculate as to the reasons. In my view, it is unlikely that the question of extinctive prescription and/or time limits for presentation of claims has been discussed at all during the negotiations leading to the treaties in question. Had this been the case, such discussions would in all likelihood have been reflected in the legislative history, or otherwise in commentaries on the treaties in question. Surprising as it may seem, that the parties have simply not addressed the issue, it is not unheard of that matters of a more formal nature – in the sense of not dealing with the substantive issues which have been negotiated – are simply forgotten, or neglected by the negotiators, who may not always be lawyers. The fact remains, however, that very few multilateral and bilateral treaties seem to include provisions on extinctive prescription.

Also with respect to the second method to refine the principle of extinctive prescription – developing and/or supplementing customary international law – it is not realistic to expect any progress within the nearest future. After all, the principle of extinctive prescription has for a long time been a part of public international law, but remains rudimentary in character, lacking important details. It will take a long time for customary international law to chisel out further details of that principle. To refine extinctive prescription, at least in the short term perspective, it is necessary, it is submitted, to look elsewhere.

Keeping in mind that the focus is on interstate disputes of an economic and commercial nature, it would seem to be a natural starting point to assume that extinctive prescription must play a role which is meaningful

[153] As mentioned above, the total number of such treaties is estimated to approximately 1800 by the International Centre for the Settlement of Investment Disputes. The agreements that I have reviewed include most of the agreements ratified by Denmark, Finland, France, Germany, Norway, the Russian Federation, Sweden, the United Kingdom and the United States.

in the context of such disputes. To put it differently: the focus must be on the *nature of the legal relationship* – i.e. economic or commercial – rather than on the *nature and status of the parties in question.* It would seem that the most realistic approach – of the three possibilities mentioned above[154] – to the refinement of the principle of extinctive prescription is to draw on municipal statutes and case law on limitation.

Before any detailed suggestions in this respect are made, it is helpful, indeed necessary, to take a broader look at the relationship between public international law and municipal law and at the application and interpretation of municipal law within the framework of public international law.

5.3.2 Public International Law and Municipal Law

5.3.2.1 Introduction

The relation between municipal law and international law has been the subject of much learned discussion and debate. While municipal law and international law generally can be described as two different systems – the former addressing issues between individuals and between individuals and the government, the latter governing primarily the relations between states – there are many situations where the two systems overlap and sometimes collide, and minimally create difficulties for each other. From a theoretical point of view these difficulties are often described as the difference between dualism and monism.[155] The *dualistic* approach

[154] *See* p. 372, *supra.*

[155] For a general discussion of theoretical problems concerning the relationship between municipal law and international, *see* e.g. Fitzmaurice, 92 Hague Recueil (Vol. II 1957) 68–94; Kelsen, 14 Hague Recueil (Vol. IV 1926) 231–329; *id.*, Principles of International Law (1952) 190–196, 401–450; Rousseau, 93 Hague Recueil (Vol. I 1958) 464–474; *id.*, Droit International Public (Vol. I 1971) 37–48; Verzijl, International Law in Historical Perspective (Vol. I 1968) 90–183; von Panhuys, 112 Hague Recueil (Vol. II 1964) 7–87; Lauterpacht, International Law: Collected Papers (Vol. I 1970) 151–177; Virally, Mélanges offerts à Henri Rolin (1964) 488–505; Starke, Monism and Dualism in the Theory of International Law considered from the standpoint of the Rule of Law, 92 Hague Recueil (1957) 70–80. – As discussed by Brownlie, *op. cit.*, at 34–35 (with references), however, a number of commentators have tried to bridge the theoretical differences between monism and dualism by developing theories of coordination. These commentators emphasize practice rather than theory and – stated very generally – take the view that municipal law and international law do not conflict with each other as *systems of law*, since they operate in different spheres. Conflicts may occur, however, with respect to the obligations of a state; if a state does not act at the municipal law level as required by international law, this will not necessarily and automatically have consequences at the municipal law level but will entail the responsibility of the state on the international plane. – *See* also Borchard, The Relations between International Law and Municipal Law, 27 Virginia Law Review (1940) 137 and McDougal, The Impact of International Law upon National Law: A Policy-oriented Perspective, in McDougal, Studies in World Public Order (1960) 157.

emphasizes that international law and municipal law exist separately and cannot influence or affect each other.[156] The *monist* approach to these questions, on the other hand, takes the view that law is a unified system which cannot be separated into different categories.[157]

Whether or not the relation between municipal and international law is best characterized as monistic or dualistic is an open question in the view of the present author. It remains a fact, however, that in the modern world the state is active in many different spheres and in various capacities. The increasingly complex nature of the role of the state means that today many of its actions will have repercussions both in the field of municipal law and international law.[158] This state of affairs is reflected in the activities of international courts and tribunals when resolving disputes between states. It has sometimes been said that international courts and tribunals do not interpret or apply municipal law as such, but merely take account of them as facts. This view seems to stem from the *German Interests in Polish Upper Silesia Case*, decided by the Permanent Court of International Justice in 1926. In this case the Court observed, *inter alia*, the following:

> "From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of states, in the same manner as do legal decisions or administrative measures."[159]

It is submitted that this statement is indeed debatable,[160] nor does it adequately describe what international courts and tribunals in fact do, or what they should do. In the following, several examples will be discussed

[156] Advocates of dualism include: Triepel, Völkerrecht und Landesrecht (1899); *id.*, 1 Hague Recueil (1923) 77–121; Strupp, Elements (2nd ed. 1930); Oppenheim, International Law (Vol. I, 8th ed. 1955) 37; however, in the ninth edition a more differentiated approach is taken, Oppenheim, International Law (Vol. I, 9th ed. 1990) 52–86.

[157] Monism is represented, *inter alia*, by Kelsen, General Theory of Law and the State (1945) 363–380; *id.*, Principles of International Law (2nd ed.1966) 553–588; Verdross, 16 Hague Recueil (Vol. I, 1927) 287–296; *id.*, 30 Hague Recueil (Vol. V, 1929) 290–293; Guggenheim, Traité de droit international public (Vol. I, 2nd ed. 1967) 58–61; Lauterpacht, International Law and Human Rights (1950).

[158] That is one reason why the debate on dualism v. monism in the opinion of the present author is not very fruitful today; it does not lead to any meaningful description of the relationship between international law and municipal law in the modern world.

[159] P.C.I.J. Reports, Series A, No. 7 (1926) 19.

[160] *Cf.* e.g. Jenks, The Prospects of International Adjudication (1964) 552 and Brownlie, *op. cit.*, at 39–41. – This view does not seem to have been confirmed by the Permanent Court of International Justice, nor by the International Court of Justice, in later decisions. There are, however, two cases decided by the Permanent Court of International Justice where similar language has been used, *viz.*, the *Phosphates in Morocco Case*, P.C.I.J.

where international courts and tribunals have interpreted and applied municipal law. The discussion will focus on situations where municipal law has been interpreted and applied to *determine* the rights and obligations of parties in interstate disputes, and where the disputing parties have not chosen municipal law. A distinction is to be made between such cases and cases where international courts and tribunals attempt to *develop* international law on the basis of municipal law analogies and where they *take account* of municipal decisions dealing with issues of international law.[161]

Before I embark on this discussion, it is worthwhile to take another look at Article 38 of the Statute of the International Court of Justice. This article is identical to Article 38 of the Statute of the Permanent Court of International Justice, with one exception. While the Statute of the Permanent Court provides that "the Court shall apply" the sources of international law enumerated in items 1–4, the Statute of the International Court stipulates that "/t/he Court, *whose function it is to decide in accordance with international law* such disputes as are submitted to it, shall apply ...." (emph. added).

Does this change in the language of Article 38 have any bearing on the Court's interpretation and application of municipal law? The short answer to this question, it is submitted, must be no.[162] As will be discussed below,[163] the Permanent Court of International Justice has on several occasions confirmed that it does apply municipal law, indeed has an obligation to do so under certain circumstances. Suffice it at this stage to refer to the *Brazilian Loans Case* where the Court stated that it was "bound to apply municipal law when the circumstances so require".[164] A brief look at the sources of international law enumerated in Article 38 makes clear that the Court may be called upon to interpret and apply municipal law in many situations. For example, pursuant to Article 38(1)(a) the Court is to apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states". Such conventions may of course include references to municipal law as governing rights and obligations of the parties. Furthermore, item (b) of Article 38(1) stipulates that the Court is to apply "international custom as evidence of a general practice accepted by law". Several aspects of inter-

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Reports, Series A/B, No. 74 (1938) 76 and the *Electricity Company of Sofia Case*, P.C.I.J. Reports, Series A/B, No. 77 (1938) 82. As suggested by Jenks, *id.*, at 549, however, too far-reaching conclusions should not be drawn from these two cases.

[161] *Cf.* Jenks, *op. cit.*, at 556.

[162] *Cf.* Jenks, *op. cit.*, at 553.

[163] *See* p. 381 *et seq.*, *infra*.

[164] P.C.I.J. Reports, Series A, Nos. 20/21 (1929) 124.

national custom relating to rights and obligations of parties may very well be governed by municipal law.[165] The Court is also to apply "the general principles of law recognized by civilized nations" pursuant to item (c) of Article 38(1). Such general principles must necessarily include principles and rules of municipal law with respect to different legal issues.[166] It would thus seem that the text itself of Article 38 authorizes the Court to interpret and apply municipal law. It could perhaps be said that the Court applies municipal law because international law so requires, or permits.[167]

If the Court – regulated as its activities are by its statute – is thus authorized to apply and interpret municipal law also when the parties to a dispute have not explicitly so agreed, it must be even more so with respect to arbitral tribunals acting on the basis of an arbitration agreement between the parties, if such agreement instructs the arbitrators to resolve the dispute "in accordance with the principles of law and equity"[168] or "on the basis of respect for law", as stipulated in the 1907 Hague Convention.[169] An illustrative example of the former type of instruction is the *Norwegian Shipowners' Claims Arbitration* between the United States and Norway.[170] The United States argued that the tribunal "should not fail to give effect to the municipal law of the United States, regarding any matters within the jurisdiction of the United States".[171] Norway, on the other hand, was of the opinion that disputes between nations are governed by international law and that "no arbitral tribunal is bound by the municipal law of any of the States which are Parties to the arbitration".[172]

In its award, while not agreeing fully with either party's position, the Tribunal commented on the issue of applicable law as follows:

> "The Tribunal cannot agree, therefore, with the contention of Norway that the Tribunal should be entirely free to disregard the municipal law of the United States, when this has been implicitly accepted by Norwegian citizens in their dealings with American citizens, although this law may be less favourable to their present claims than the municipal laws of certain other civilized countries.
>
> But the Tribunal cannot agree, on the other hand, with the contention of the United States that it should be governed by American statutes wherever the United States claim jurisdiction.

[165] *See* p. 381 *et seq.*, *infra.*
[166] *See* p. 222 *et seq.*, *supra.*
[167] Jenks, *op. cit.*, at 553.
[168] As discussed on p. 34 *et seq.*, *supra*, this instruction, and similar ones, have been quite frequent throughout the history of interstate arbitration.
[169] Article 37, 1907 Hague Convention for the Pacific Settlement of International Disputes.
[170] Reports of International Arbitral Awards, Vol. I (1948) 307–346.
[171] *Ibid.*, at 330.
[172] *Ibid.*, at 330.

> This Tribunal is at liberty to examine if these statutes are consistent with the equality of the two Contracting Parties, with treaties passed by the United States, or with well established principles of international law, including the customary law and the practice of judges in other international courts."[173]

In the following sections I shall discuss several different situations where municipal law has been applied by international courts and tribunals, and various problems related thereto.[174]

5.3.2.2 Interpretation and Application of Municipal Law

As mentioned above,[175] I shall study only examples when international courts and tribunals have interpreted or applied municipal law to *resolve* a dispute pending before them, i.e. to determine rights and obligations of the disputing parties. Consequently, situations when municipal law analogies serve as the bases for the development of international law will not be reviewed,[176] nor decisions of municipal courts on points of international law.[177]

5.3.2.2.1 International Obligations and Municipal Law

It is a well-established rule of international law that a state cannot rely on provisions of its own law as a justification for not fulfilling its international obligations.[178] Without such a principle rights and obligations under international law would be rather meaningless, since allowing a state to provide itself the final test of its international obligations would not afford any protection to other states.

This fundamental rule of international law has been confirmed on several occasions by the Permanent Court of International Justice, e.g. in the

[173] *Ibid.*, at 331.

[174] For a discussion of this issue in general, *see* e.g. Marek, Droit International et Droit Interne (1961); Stoll, L'application et L'interpretation du droit interne par les jurisdictiones internationales (1962); Schwarzenberg, International Law (Vol. I, 1945) 20–30; Brownlie, *op. cit.*, at 36–42.

[175] *See* pp. 378–380, *supra*.

[176] *See* generally e.g. Lauterpacht, Private Law Analogies in International Law (1927); Schwarzenberger, International Law (Vol. I, 1945) 17–20; Rosenne, The International Court of Justice (1961) 420–432. – It should be noted that the following discussion does not include analysis of the judgments of the European Court of Human Rights, even though the very nature of its activity is to interpret municipal legislation against the requirements of the European Convention on the Protection of Human Rights and Fundamental Freedoms.

[177] For a discussion of such court decisions, *see* e.g. Brownlie, *op. cit.*, at 42–43, and Shaw, *op. cit.*, at 106 *et seq.*

[178] *See* e.g. Article 27 of the 1969 Vienna Convention on the Law of Treaties, which codifies this rule. Article 27 reads: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

Treatment of Polish Nationals in Danzig Case and in the *Greco–Bulgarian Communities Case*. In the former case the Court stated:

> "A state cannot adduce as against another state its constitution with a view to evading obligations incumbent on it under international law or treaties in force".[179]

In the latter the Court said:

> "It is a generally accepted principle of international law that in the relations between Powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty".[180]

The International Court of Justice has confirmed this principle on several occasions. For example, in the *Fisheries Case*, in Judge McNair's separate opinion, it was stated that:

> "It is a well-established rule that a state can never plead a provision of, or lack of a provision in, its internal law or an act or omission of its executive power as a defense to a charge that it has violated international law".[181]

While the principle has thus been consistently applied by the two world courts, its recognition goes back as far as the *Alabama Claims Arbitration*.[182] In that case Great Britain had pleaded that under existing legislation the authorities lacked the power to prevent the *Alabama* from leaving a British port. This fact did not, however, absolve Great Britain from responsibility to the United States for the breach of its duties as a neutral.

5.3.2.2.2 Application of Municipal Law by Virtue of the Rules of International Law

In a number of situations the rules of international law necessitate the application of municipal law by international courts and tribunals. Three such situations will be discussed here, *viz.*, nationality of claims, exhaustion of local remedies and denial of justice.[183]

[179] P.C.I.J. Reports, Series A/B, No. 44 (1932) 24.

[180] 1930 P.C.I.J. Reports, Series B, No. 17 (1930) 32. *See* also the *Free Zones Case*, where the Permanent Court of International Justice said: "It is certain that France cannot rely on its legislation to limit the scope of her international obligations", P.C.I.J. Reports Series A/B No. (1932) 167.

[181] I.C.J. Reports (1951) 181. *Cf.* also the *Nottebohm Case*, 1955 I.C.J. Reports (1955) 4 and the *Guardianship of Infants Case*, I.C.J. Reports (1958) 55.

[182] *Cf.* p. 44 *et seq., supra.*

[183] In addition to the situations discussed here, this category also includes the doctrine of domestic jurisdiction, the underlying philosophy of which is that certain matters are governed exclusively by *municipal law*. It is *international law*, however, that determines *what* matters fall into this category and also *that* such matters are governed by municipal law,

5.3.2.2.2.1 Nationality of Claims

When an international court or tribunal is faced with questions concerning diplomatic protection, it will be necessary to determine the nationality of the person, or entity, on whose behalf a state advances a claim.

Nationality can be described as the legal link between the individual, or the entity, and his state as far as rights and obligations are concerned. This legal link is normally defined in the municipal legislation of the state in question. To answer the question if an individual is a citizen of a particular state it is thus necessary to review the legislation of that state.[184]

Under international law a state has a *duty* to protect its nationals and has the *right* to advance claims of its citizens against other states. Once this happens the claim becomes an international claim, i.e. a claim of one state against another. The duty to protect its nationals corresponds to a right to advance claims on behalf of its citizens, but it can only be on behalf of its *own* citizens, not of foreign subjects.[185]

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rather than international law, *see* the *Nationality Decrees in Tunis and Morocco Case*, P.C.I.J. Reports, Series B, No. 4 (1933) 7, 23–24. *Cf.* e.g. Brownlie, *op. cit.*, at 293–294; Rajan, United Nations and Domestic Jurisdiction (2nd ed. 1961) and Fitzmaurice, The Law and Procedure of the International Court of Justice (1986) 592. Other situations calling for the application of municipal law by international courts and tribunals include the determination of nationality of enemy property (*Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers Arbitration*, Reports of International Arbitral Awards, Vol. II (1949) 779) and expropriation of foreign property (*German Interests in Polish Upper Silesia Case*, P.C.I.J. Reports, Series A, No. 7 (1926)).

[184] The point made here is simply that nationality is *primarily* a matter of municipal law. This should not obscure the fact that issues relating to nationality are to a large extent governed by principles of international law. There are many and difficult issues resulting from the interplay between municipal law and international law in this respect; for example, is the concept of nationality used in international law rules identical to nationality under municipal law, is it always the municipal law of the country whose nationality is in question, which is to be applied, does international law have its own concept of nationality? For a discussion of such issues, *see* Watts, Nationality of Claims: Some relevant concepts, in Fifty Years of the International Court of Justice (1996) 424 *et seq.*, and Brownlie, *op. cit.*, at 385–424; 482–496 and references made therein.

[185] Brownlie, *op. cit.*, at 482 *et seq.*; Schwarzenberger, International Law (3rd ed. 1957) 592 *et seq.*; Parry, 90 Hague Recueil (1956, II); Garcia Amador, 94 Hague Recueil (1958, II); Lillich, International Claims: Their Adjudication by National Commissions (1962); *id.*, International Claims: Their Preparation and presentation (1962); Lillich and Weston, International Claims: Contemporary European Practice (1982); de Hochepied, La protection diplomatique des sociétés et des actionnaires (1965); Petrén, 104 Hague Recueil (1963, II); Caflisch, La protection des sociétés commercial et des intérêts indirectes en droit international public (1969); Seidl-Hohenveldern, Corporations in and under international law (1987) 7 *et seq.*

One of the leading cases on nationality is the *Nottebohm Case*,[186] in which the International Court of Justice decided that only when there is a genuine and effective link between the state advancing the claim and the individual in question can the right of diplomatic protection arise.[187] As mentioned above, it should be pointed out that while questions of nationality will by necessity involve interpretation of municipal law, nationality of claims in the context of diplomatic protection is ultimately a matter of international law. In the *Nottebohm Case*, for example, the Court did not consider it necessary to apply the law of Liechtenstein to rule on an objection made by Guatemala to the effect that Nottebohm had not properly acquired Liechtenstein nationality pursuant to Liechtenstein law; in the opinion of the Court this was a matter of international law.[188]

Also with respect to the "nationality" of corporations, municipal law plays an important role. In the *Barcelona Traction Case*, the International Court of Justice, said, *inter alia*, the following:

> "The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments".[189]

On the other hand, it is uncertain if incorporation alone can provide the basis for the right of diplomatic protection. There seems to be support for a requirement that there must be some substantial and effective connection between the corporation and the claimant state.[190]

In the *Barcelona Traction Case*, the Court went on to say:

> "This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some states to give a company incorporated under their law protection solely when it had its seat (*Siege Social*) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the state concerned. Only then, it has been held, does there exist between the corporation and the state in question a genuine connection of the kind familiar from other branches of international law. However, in particular in the field of diplomatic

[186] I.C.J. Reports (1955) 4.

[187] Nottebohm was a German citizen when he applied for naturalization in Liechtenstein in 1939. However, from 1905 until 1943 he had been permanently living in Guatemala and had carried out his business activities there. The Court concluded that the effective nationality was not that of Liechtenstein.

[188] I.C.J. Reports (1955) 16–17.

[189] I.C.J. Reports (1970) 42.

[190] *Ibid.*

> protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance".[191]

The practice of international tribunals and claims commissions contains numerous examples of the application of municipal law for purposes of determining the nationality of claimants. One such example is the practice of the United States–Germany Mixed Claims Commission established as a result of the First World War.[192] In Administrative Decision No. V this Commission said that nationality was "the status of a person in relation to the tie binding such person to a particular sovereign nation" and that such status "was fixed by the municipal law of that nation" and that therefore "the existence or non-existence of American nationality at a particular time must be fixed by the law of the United States".[193]

A recent example of a claims commission addressing nationality issues is the Iran–U.S. Claims Tribunal. The Claims Settlement Declaration stipulates that the Tribunal is established to decide "claims of nationals of the United States against Iran and Claims of nationals of Iran against the United States...".[194]

The Claims Settlement Declaration then goes on to define nationals of Iran and the United States, respectively, in the following manner:

> "(a) a natural person who is a citizen of Iran and the United States; and (b) a corporation or other legal entity which is organised under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock".[195]

To determine whether a natural person is a citizen of Iran or the United States reference is made by the Tribunal to the relevant municipal law,[196] i.e. either Iranian or US law. The same approach is used with respect to legal entities, which means that the corporation, or other entity, must be

[191] *Ibid.*

[192] *Cf.* pp. 60–61, *supra.*

[193] Reports of International Arbitral Awards, Vol. VII (1957) 171. – For additional examples from the practice of this Commission and other Claims Commissions, *see* Jenks, *op. cit.*, at 573–575. *See* also Seidl-Hohenveldern, The Austrian–German Arbitral Tribunal (1972) 80–82.

[194] Claims Settlement Declaration, Article II, paragraph 1, reprinted in International Legal Materials (1981) 224 *et seq.*

[195] *Id.*, Article VII, paragraph 1, reprinted in International Legal Materials (1981) 224 *et seq.*

[196] *See* Brower, 224 Haque Recueil (1990-V) 141.

organized under the laws of the country of which it claims to be a national.[197]

5.3.2.2.2.2 Exhaustion of Local Remedies

In cases of diplomatic protection it is a well established rule of customary international law that a claim will not be admissible on the international plane unless the various remedies available in the state where the alleged injury occurred have been exhausted.[198] The rationale underlying this rule is primarily of a practical nature, *viz.*, to allow the state in question a possibility to redress the wrong which has occurred in that state and within its own legal system. In addition, respect for the sovereignty and jurisdiction of foreign states would seem to require that they be given the possibility to rectify themselves alleged wrongs and thus prevent preemption of their own legal systems. Furthermore, national courts are typically better suited to address situations where breaches of national law have allegedly taken place.[199]

In the *Panevezys – Saldutiskis Railway Case*, for example, the Permanent Court of International Justice considered the relationship between judicial proceedings in Lithuania and proceedings in the Lithuanian Council of State for the purposes of deciding if the claim submitted to it was *res judicata* as the result of decisions by the Lithuanian Courts; in the opinion of the Court it was not.[200] In another case decided by the

[197] *Id.*, at 142. – The second criterion with respect to legal entities – i.e. that there be "an interest" in the corporation and its capital stock, and that it be fifty per cent or more – raises several questions which have proved to be complicated, *see* Brower, at 142 *et seq.*

[198] *Cf.* e.g. Borchard, The Diplomatic Protection of Citizens Abroad (1915) 817–818; Fawcett, British Yearbook of International Law (1954) 453–458; Bagge, British Yearbook of International Law (1958) 165–169; Law, The Local Remedies Rule in International Law (1961); Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law (1983); Amerasinghe, Local Remedies in International Law (1990); Schwarzenberger, International Law (3rd ed. 1957) 602–612; Reuter, 103 Hague Recueil (Vol. II, 1961) 613–619; Chappez, La Règle de l'épuisement de voies de recours internes (1972); Briggs, The Law of Nations: Cases, Documents and Notes (2nd ed. 1952) 632–637. – It is interesting to note that this rule is also enshrined in Article 35 (1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 35 (1) corresponds to Article 26 of the previous version of the Convention, prior to the adoption of Protocol II (European Treaty Series No. 155) as a result of which the structure of the Convention was fundamentally changed. The requirement that local remedies be exhausted remains, however. There is a long string of cases where the Court has decided on the issue of exhaustion of local remedies; for recent cases *see* e.g. Akdivar *et al.* v. Turkey (18 December 1996) and Mentes *et al.* v. Turkey (28 November 1997).

[199] It should be noted that if the act complained of is a breach of an *international* agreement or of customary *international* law the rule of exhaustion of local remedies is not applicable, *see* Brownlie, *op. cit.*, at 497.

[200] 1939 P.C.I.J. Reports, Series A/B, No. 76 (1939) 21.

Permanent Court – the *Electricity Company of Sofia Case* – the Court had to interpret Bulgarian law to find out if a decision rendered by the Sofia Court of Appeal was final when further proceedings were pending in the Court of Cassation.[201]

The International Court of Justice has also been called upon to interpret municipal law in connection with the local remedies rules. In the *Interhandel Case*,[202] the United States made a preliminary objection against an application to the Court made by the Swiss Government. When the application was made, litigation in US Courts had been going on for almost ten years. In upholding the objection based on the local remedies rule, the Court stated, *inter alia*:

> "However, the decision given by the Supreme Court of the United States ... granted a writ of *certiorari* and readmitted Interhandel into the suit. The judgment of that Court ... reversed the judgment of the Court of Appeals dismissing Interhandel's suit and remanded the case to the District Court. It was thenceforth open to Interhandel to avail itself again of the remedies available to it under the Trading with the Enemy Act, and to seek the restitution of its shares by proceedings in the United States Courts. Its suit is still pending in the United States Courts".[203]

In arbitral practice there are also a number of examples where international tribunals have interpreted and evaluated municipal law in applying the local remedies rule. One of the leading examples is the *Finnish Ships Arbitration*.[204] In that case shipowners brought a claim before the British Admiralty Transport Arbitration Board under the 1920 Indemnity Act. The claim was rejected and there was no appeal as to the finding of fact of the Arbitration Board. Appeal was possible, however, on points of law to the Court of Appeal and to the House of Lords. No appeal was taken by the shipowners, since they took the position that an appeal exclusively on points of law was bound to fail. The British and Finnish Governments agreed to submit the question of exhaustion of local remedies to a sole arbitrator, Judge Bagge. He concluded that an appeal on points of law

[201] P.C.I.J. Reports, Series A/B, No. 77 (1939) 78–80.

[202] I.C.J. Reports (1959) 9. – For general comments, *see* Weber, Interhandel Case, in Bernhardt (ed.), Encyclopedia of Public International Law, Vol. II (1995) 1025–1027.

[203] *Id.*, at 26–27. – For a more recent case on the local remedies rule – further clarifying and refining this rule – *see* the *Elettronnica Sicula S.p.A. (ELSI) Case*, I.C.J. Reports (1989) 15; for a comment to this case *see* Adler, The Exhaustion of the Local Remedies Rule After the International Court of Justice's Decision in ELSI, International & Comparative Law Quarterly (1990) 641.

[204] Reports of International Arbitral Awards, Vol. III (1949) 1479.

"obviously would have been insufficient to reverse the decision of the Arbitration Board" and that therefore "there was no effective remedy against this decision".[205] In reaching this conclusion, the sole arbitrator had to interpret and evaluate British law.

Another well-known example in arbitral practice is the *Ambatielos Arbitration*.[206] Greece brought a case against Britain concerning a contract signed by Ambatielos. On appeal to the Court of Appeal, Ambatielos asked to call as a witness the person who had negotiated the contract on behalf of the British Government. This request was denied, but he did not appeal the judgment to the House of Lords. In addition, Ambatielos had failed to avail himself of remedies for unjust enrichment available under English law. The arbitral tribunal concluded, referring, *inter alia*, to these circumstances, that Ambatielos had not exhausted local remedies and therefore dismissed his claim.

As far as international arbitration is concerned, it should be noted that today it is generally accepted that a provision in a treaty, or contract, providing for disputes thereunder to be submitted to arbitration does not require the exhaustion of local remedies. This conclusion may be derived from the Advisory Opinion of the International Court of Justice in the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June* 1947[206 a)].

In this opinion the Court stated, *inter alia*, that "it is evident that a provision of the nature of section 21 of the Headquarters Agreement/the arbitration clause/ cannot require the exhaustion of local remedies as a conditon of its implementation"[206 b)].

5.3.2.2.3 Interpretation of Municipal Law to Determine Compliance with International Law

It may become necessary for an international tribunal or court to interpret municipal law – and to consider the nature of acts purportedly based on provisions of municipal law – to determine if a state is in breach of its obligations under international law. Put differently: municipal law can serve as evidence of compliance or non-compliance with international

[205] *Id.*, at 1535 *et seq.*

[206] Reports of International Arbitral Awards, Vol. XII (1963) 85. – For general comments, *see* Wühler, Ambatielos Case, in Bernhardt (ed.) Encyclopedia of Public International Law, Volume I (1992) 123–125.

[206 a)] I.C.J. Reports (1988) 12.

[206 b)] *Ibid.*, at 29; *see* also comments by Schwebel, Arbitration and the Exhaustion of Local Remedies Revisited, in Schwebel, Justice in International Law (1994) 191 *et seq.*

obligations of a state.[207] In the *German Interests in Polish Upper Silesia Case*, the Permanent Court of International Justice observed that:

> "the Court is certainly not called upon to interpret Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."[208]

It is interesting to note that this statement notwithstanding – and despite the pronouncement by the Court that from the standpoint of international law "municipal laws are merely facts which express the will and constitute the activities of states"[209] – the Court did in fact embark on a detailed discussion of Polish law. True, there is a difference – at least at the conceptual level – between discussing and interpreting municipal law. On the other hand, it is in practice difficult to draw a clear line between these two intellectual operations.

This aspect of municipal law in relation to international law was addressed by Judge Lauterpacht in his separate opinion in the *Norwegian Loans Case*. He stated, *inter alia*:

> "Undoubtedly the question of the interpretation of the contracts between the Norwegian State and the bondholders is primarily a question of Norwegian law. ... However, this does not mean that national law is a matter which is wholly outside the orbit of international law. National legislation ... may be contrary, in its intention or effects, to the international obligations of the state. The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a state to bring a matter under the protective

[207] Another similar function of municipal law in relation to international law is that the former serves as *evidence* of a state's legal position on different issues of international law. In international disputes it may be important to determine the intent of one of the disputing parties. In such situations municipal law may serve as evidence of such intent; *see* e.g. the *Anglo–Iranian Oil Co. Case*, I.C.J. Reports (1952) 93 where the enactment and contents of an Iranian law were admitted as proof of the Iranian Government's intention with respect to compulsory jurisdiction of the Court. – Municipal law can also serve as evidence and/or manifestations of sovereignty with respect to alleged title to territory; in the *Minquiers and Ecrehos Case*, I.C.J. Reports (1953) 47, legislation concerning the islands was admitted as evidence in support of the United Kingdom's claim to sovereignty over the islands; *see* further Jenks, *op. cit.*, at 576–577, and the cases referred to therein.

[208] P.C.I.J. Reports Series A, No. 7 (1926) 19.

[209] *Ibid.*, at 19.

umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law."[210]

It follows from the foregoing that international courts and tribunals may be called upon to consider – and even interpret – municipal law to determine the compliance of municipal law with international law.[211]

The fact that international courts may have to apply municipal law was recognized and accepted also by such critical a commentator as Judge Anzilotti in *the Danzig Legislative Decrees Case*,[212] where he said that the Permanent Court of International Justice may have to "interpret a municipal law ... simply as the law which governs certain facts which the Court is called upon to appraise".[213] In fact he went so far as to say that the "Court has sovereign power of adjudication on this point".[214]

A specific example of the need to interpret municipal law is the concept of denial of justice, which has been employed in a variety of situations to describe certain aspects of an individual state's administration of the international standard of protection to be granted to aliens.[215] As the term itself indicates, the concept is primarily concerned with the administration of justice and the quality of the justice given. There does not seem, however, to be any generally accepted definition of "denial of justice".

In the *Cayuga Indians Case*[216] the representative of the United States described denial of justice as "an obvious outrage – a wrong of such a character that reasonable men cannot differ concerning it".[217]

[210] P.C.I.J. Reports (1957) 37; *cf.* also the *Wimbledon Case* decided by the Permanent Court of International Justice, P.C.I.J. Reports Series A, No. 1 (1923) 29, where the Court, addressing the issue of compatibility with Germany's action under its own Neutrality Orders, concluded that the action taken was not even justified pursuant to those orders.

[211] This is indeed the very purpose of the activities of the European Court of Human Rights entrusted as it is to try complaints that national laws and their application violate the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[212] Judge Anzilotti, in his individual opinion, took the view that the Court should have declined to give any opinion on the matter, which in his opinion, was purely one of Danzig constitutional law, P.C.I.J. Reports Series A/B, No. 65 (1935) 63–64.

[213] P.C.I.J. Reports Series A/B, No. 65 (1935) 63–64.

[214] *Id.* – An interesting example of an international court interpreting municipal law is the European Court of Justice, which, under Article 177 of the Rome Treaty, has the competence to issue opinions in matters pending before municipal courts.

[215] There are different views as to the level of protection to be granted aliens – some argue that there is an "international minimum standard" which must be upheld irrespective of how the state in question treats its own citizens; others argue that there is only a "national treatment standard", i.e. the state must treat aliens as it treats its own nationals, but not better.

[216] Nielsen's Report (1926) 203.

[217] *Id.*, at 250.

A more comprehensive suggestion was made in the Harvard Research Draft which stipulated the following in Article 9:

> "... Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice".[218]

Irrespective of which definition of denial of justice one proceeds from – with the exception of the traditional Latin American approach – it would seem clear that the alleged harm to the alien concerns a breach of municipal law. In such cases it will be for the international court or tribunal to interpret municipal law with a view to determining whether a denial of justice has occurred.[219]

5.3.2.2.4 Residual Application of Municipal Law

There are several situations in which an international court or tribunal may have to apply municipal law, as the residuary law of certain transactions or acts, to resolve a dispute. Application of municipal law in such a situation does not *strictu senso* follow from the rules of international law, but would rather seem to be necessitated by the facts and circumstances in the individual case. For example, in disputes involving corporate bodies which are established on the basis of an international convention, but with a charter registered in a particular state, it may be necessary to interpret and even apply the law of the state of registration.[220] This may be necessary, for example, to determine if a certain transaction is *ultra vires*,

[218] American Journal of International Law (1929), Special Supplement at 173. – Similar definitions are to be found in e.g. Dunn, The protection of nationals (1932) 148; Eagleton, The Responsibility of States in International Law (1928) and Freeman, The International Responsibility of States for Denial of Justice (1938) 97. *See* also the separate opinions of Judges Tanaka and Padilla Nervo in the *Barcelona Traction Case*, I.C.J. Reports (1970) 144, 156 and at 252, 265, respectively. – It should be noted that Latin American states have traditionally taken a much narrower view of the concept of denial of justice, limiting it to a duty to allow foreigners access to courts, but without inquiring into the quality of the justice given by such courts, *cf.* Brownlie, *op. cit.*, at 532.

[219] *See* also Article 17 of the Statute of the International Criminal Court which entitles the Court to try whether proceedings before a national court have been genuine or if the national proceedings were brought for the purpose of shielding the accused from being tried by the Court, or if the national proceedings were not conducted independently or impartially and thus lacked the intent to bring the accused to justice. For the text of the Statute, *see* the United Nations home page http://www.un.org.

[220] There are numerous examples of this in arbitrations between states, on the one hand, and private investors, on the other, so-called mixed arbitrations; *cf.* pp. 25–26, *supra*.

or if the corporate body in question has been duly represented in a specific transaction, or if the corporate body has attained legal personality under any municipal law.[221]

When a treaty affects private rights, it may also be necessary for an international court or tribunal to determine and apply the municipal law underlying the private rights in order to interpret and apply the treaty.

In the *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers Arbitration*[222] between the United States Government and the Reparation Commission, the Standard Oil Company of New Jersey claimed beneficial ownership of nine oil tankers which had been delivered by the German Government to the Reparation Commission in execution of the Treaty of Versailles, paragraph 1 of Annex III to Part VIII. The Tribunal held, however, that the ownership by the Standard Oil Company of the shares of its German subsidiary did not give it any beneficial ownership of the assets of that company, including the oil tankers in question. In reaching its conclusion the Tribunal referred to American, English and French law and said that the view taken by the Standard Oil Company was contradicted by "most doctrine and nearly all jurisprudence, which in all countries accord to the legal entity known as a company a personality and a patrimony entirely distinct from those of its shareholders".[223] The Tribunal also noted that a purported sale of the shares in the German subsidiary to a German citizen was to be governed by German law.

[221] One category of corporate bodies which is of particular interest in this context are the so-called intergovernmental enterprises, i.e. corporate bodies established on the basis of a treaty, but still endowed with legal personality under a municipal law. One example is Eurofina established in 1955 on the basis of a treaty between fourteen states, but incorporated in Switzerland, thus having private law status in Switzerland. (The treaty was signed on 20 October 1955, 378 U.N.T.S. 159); *cf.* also the various actions in England relating to the International Tin Council, where one of the issues was whether or not the Council had acquired legal personality under English law, *see* e.g. Shaw, International Law, *op. cit.*, at 774–776; Seidl–Hohenveldern, Piercing the Corporate Veil of International Organizations: The International Tin Council Case in the English Court of Appeals, German Yearbook of International Law (1989) 43–54; Herdegen, The Insolvency of International Organizations and the Legal Position of Creditors: Some Observations in the Light of the International Tin Council Crisis, Netherlands International Law Review (1988) 135–144, and also the Arab Monetary Fund Case (Arab Monetary Fund v. Hashim (No. 3), International Law Reports Vol. 83 (1990)) 243. – *See generally* Ijalaye, The Extension of Corporate Personality in International Law (1978); Seidl–Hohenveldern, Corporations in and under International Law (1988). – Similar problems may arise with respect to international organizations; *cf.* Jenks, *op. cit.*, at 584. *See* in particular the following standard works on international organizations: Bowett, The Law of International Institutions (4th ed. 1982); Reuter, International Institutions (1958); Kirgis, International Organisations in Their Legal Setting (1977); Morgenstern, Legal Problems of International Organisations (1986).

[222] Reports of International Arbitral Awards, Vol. IV (1951) 779.

[223] *Ibid.*, at 787.

German law stipulated that a sale of registered shares does not take effect until and unless the share certificates were delivered to the purchaser. Since this did not happen, the sale was not valid under German law.[224]

Another example is the *Pensions of Officials of the Saar Territory Arbitration*[225] – which was a dispute between Germany and the Governing Commission of the Saar Territory – the sole arbitrator found that German law was to be applied to resolve the dispute.[226] The dispute concerned the question whether the Governing Commission was entitled to withdraw from the Pensions Reserve Fund the amount by which current pension charges exceeded 17.5 per cent of current compensations.

Another situation where residual application of municipal law has been resorted to is where the rules and principles of international law have not been fully developed and defined, in particular with respect to transactions or relationships between states which remind of transactions or relationships of a commercial nature, or otherwise recognized in municipal law.

In the *Diverted Cargoes Arbitration*[227] between Greece and the United Kingdom the issue was whether the United Kingdom – having granted Greece a credit in British pounds with respect to certain cargoes purchased with US Dollars – was correct in saying that the dollar/sterling conversion rate should be the one existing prior to the devaluation of the British pound in 1949, or whether the post-devaluation conversion rate was to be applied. In arguing their respective cases both states relied on municipal law principles and/or analogies, including rules relating to the position of an unpaid seller, agency, principles governing the *compte courant* (a running account) of French law. The sole arbitrator noted that the transaction was enshrined in "an international agreement of a financial character between two states acting as persons subject to international law".[228] When it came to the interpretation of this agreement, he said:

> "... the principles of international law governing the interpretation of international treaties or agreements and the manner of proof have been evolved by legal writers and more particularly by international case law in close conformity with the rules for the interpretation of contracts adopted among civilised nations."[229]

[224] *Ibid.*, at 784.
[225] Reports of International Arbitral Awards, Vol. V (1952) 1553.
[226] *Id.*, at 1564.
[227] International Law Reports Vol. 22 (1955) 824.
[228] *Ibid.*, at 824.
[229] *Ibid.*, at 825.

Despite this general reference to municipal law, the arbitrator rejected the parties' arguments based on municipal law. In concluding, however, that the rate of conversion from the money of account into the money of payment was that at the date of payment, the arbitrator referred to municipal law authorities – albeit without setting forth any details – and even characterized this conclusion as a general principle of law.[230]

Municipal law has also been applied with respect to claims in tort. One example is the *Trail Smelter Arbitration*[231] which dealt with the responsibility for environmental damage. As already mentioned, in this case the tribunal was concerned with pollution from a Canadian smelter which caused damage to trees and crops on the American side of the border. It must be noted, however, that in this dispute the parties had *agreed* that the tribunal was to apply international law as well as American law relating to environmental protection. In its award the tribunal referred extensively to the American law of tort, in particular with respect to the calculation of damages.[232] On a more general level the Tribunal noted that:

> "in deciding in conformity with international law an international tribunal may, and, in fact, frequently does apply national law, but an international tribunal will not depart from the rules of international law in favor of divergent rules of national law unless, in refusing to do so, it would undoubtedly go counter to the expressed intention of the treaties whereupon its powers are based."[233]

True, in the case of international environmental law the development of rules and principles has been rapid over the last 25 years,[234] but the general proposition for which the *Trail Smelter Arbitration* stands in this context, it is submitted, still holds true.

5.3.2.2.5 Municipal Law and Contracts

As I have indicated above, international courts and tribunals may from time to time be called upon to resolve disputes solely on the basis of municipal law.[235] Such disputes are usually based on contractual claims

[230] *Ibid.*, at 835–837.

[231] Reports of International Arbitral Awards, Vol. III (1949) 1905.

[232] *Ibid.*, 1920, 1925–1926, 1928–1929.

[233] *Ibid.*, 1949–1950.

[234] One of the first important steps was the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment. For a general discussion of modern international environmental law, *see* e.g. Shaw, *op. cit.*, at 530 *et seq.*, and the references made therein; Kiss & Shelton, International Environmental Law (1991); Birnie & Boyle, International Law and the Environment (1992); Ebbesson, Internationell Miljörätt (1993) and Bring–Mahmoudi; Sverige och Folkrätten (1997) 190–218.

[235] *See* pp. 382 *et seq.*, *supra*.

advanced by a state on behalf of its citizens when exercising the right of diplomatic protection.

In the *Serbians Loans Case* decided in 1929 by the Permanent Court of International Justice,[236] the dispute was between French bondholders of certain Serbian loans and the Serb-Croat-Slovene Government. The French Government brought the case against the Serb-Croat-Slovene Government on behalf of the French bondholders. The dispute was brought before the Court by virtue of a special agreement. The Court was faced with the question of which municipal law to apply, French law or Serbian law.[237] The Court found that Serbian law was to be applied with respect to the substance of the debt and concerning the validity of the clause defining the obligations of the debtor state, but with respect to the method of payment, and related questions, French law was applied.[238] One issue of a preliminary character raised in this case was whether or not the Court had jurisdiction to try a case which had to be decided exclusively on the basis of municipal law.

The Court concluded that it did have such jurisdiction, basing this conclusion on Article 36(1) of the Statute which explicitly refers to cases brought by special agreement. The Court also stated that:

> "Article 38 of the Statute cannot be regarded as excluding the possibility of the Court's dealing with disputes which do not require the application of international law, seeing that the statute itself expressly provides for this possibility, all that can be said is that cases in which the Court must apply international law will, no doubt be the more frequent, for it is international law which governs relations between those who may be subject to the Court's jurisdiction."[239]

The *Serbian and Brazilian Loans Cases* have been distinguished from the *Norwegian Loans Case*[240] on the ground that the latter dispute was not submitted to the Court by virtue of a special agreement, but on the basis of the Optional Clause. Accordingly, in that case Norway raised the objection that the Court lacked jurisdiction since it could only decide cases on the basis of international law, whereas the dispute in question was one falling under municipal law.[241] In the event, the Court did not

[236] P.C.I.J. Reports Series A, Nos. 20/21 (1929) 18.

[237] Conflict of laws issues before international tribunals are discussed at p. 401 *et seq.*, *infra*.

[238] P.C.I.J. Reports Series A, Nos. 20/21 (1929) 41.

[239] *Ibid.*, at 18–20. – This position of the Court was confirmed in the *Brazilian Loans Case*, P.C.I.J. Reports Series A No. 21 (1929) 201.

[240] P.C.I.J. Reports (1957) 19.

[241] *Ibid.*, at 13.

deem it necessary to rule on this issue, but decided to rest its decision on another preliminary objection raised by Norway, *viz.*, that of domestic jurisdiction.[242] Since the Court never addressed the issue of applying municipal law to the dispute, it is uncertain what conclusions one is allowed to draw from this case in this respect. The *Serbian* and *Brazilian Loans Cases* make clear, however, that in the case of a dispute being submitted to the Court by virtue of a special agreement, there is nothing preventing the Court from deciding a case exclusively on the basis of municipal law.

Despite the uncertainty surrounding the *Norwegian Loans Case* it is submitted that there are several issues which may arise in disputes of a contractual nature which may require international courts and tribunals to apply municipal law, even when this has not been stipulated by the parties. In the *Panevezys–Saldutiskis Railway Case*,[243] for example, the Permanent Court of International Justice stated, *inter alia*, that:

> "... the property rights and the contractual rights of individuals depend in every state on municipal law and fall therefore more particularly within the jurisdiction of municipal tribunals".[244]

This statement would seem to amount to a recognition of the fact that with respect to contractual claims it may be necessary to apply municipal law to determine e.g. the validity of a contract as well as the character and nature of a contract.[245]

5.3.2.3 Problems Relating to the Application and Interpretation of Municipal Law

As I have mentioned above on several occasions, in interstate disputes international courts and tribunals typically apply public international law. At the same time there are numerous situations where they are called upon to interpret or apply municipal law. In many cases this is an unusual

[242] *Ibid.*, at 23–27.

[243] P.C.I.J. Reports, Series A/B, No. 76 (1939) 18.

[244] *Ibid.*

[245] *Cf.* Jenks, *op. cit.*, at 572 – It is interesting to note, however, that in the *Mavrommatis Jerusalem Concessions Case*. P.C.I.J. Reports, Series A, No. 5 (1925) 29, the Court discussed certain issues relating to the validity of the concession not by referring to the municipal law in question, but by considering "principles which seem to be generally accepted in regard to contracts" and the "probable intentions of the parties", *id.*, at 30. Generally speaking, it would seem difficult – and perhaps not even advisable – to determine the validity of a concession agreement without reference to the municipal law applicable to it, with the possible exception of ascertaining the intentions of the parties which to a large extent may be a purely factual issue.

and novel situation for international courts and tribunals which typically raises a number of problems for them. Below I shall briefly discuss two of the more frequent problems *viz.*, proof of municipal law and the binding force of municipal law and municipal law precedents. A third aspect, indeed the most important one for the purposes of this Study, *viz.*, the selection of the applicable municipal law, will be discussed in Section 5.4 below.

5.3.2.3.1 Proof of Municipal Law

Neither the Permanent Court of International Justice, nor the International Court of Justice has developed any rules with respect to proving the contents of municipal law when it is for the Court to apply such law. Proceeding from the statement in the *German Interests in Polish Upper Silesia Case*[246] that "municipal laws are merely facts"[247] one could have expected the Court to take the position that municipal law must be proved by the parties in the same manner as facts. This is not the case, however. There are some statements which shed at least some light on the question of proof of municipal law.

In the *Brazilian Loans Case*, the Court noted that:

> "... the Court which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries" (and that it may have to obtain knowledge regarding municipal law) "either by means of evidence furnished it by the parties or by means of any researches which the court may think fit to undertake or to cause to be undertaken."[248]

In other words: judicial notice does not apply with respect to municipal law, but the Court will require proof thereof and may even undertake its own investigations to find out about municipal law.[249]

With respect to the *kind of proof* which the parties may submit to the Court, it has also been relatively silent. Ordinarily the Court will accept legal opinions on issues of municipal law. Interestingly enough there

[246] P.C.I.J. Reports, Series A, No. 7 (1929) 19.

[247] *Ibid.*

[248] P.C.I.J. Reports, Series A, Nos. 20/21 (1929) 124.

[249] Note Judge Hudson's separate opinion in the *Société Commerciale de Belgique Case*, P.C.I.J. Reports, Series A/B, No. 78 (1939) 184, where he took the position that the Court had no *obligation* to investigate municipal law. He said, *inter alia*: "Where municipal law is to be applied, a party which asks for relief should furnish to the Court the materials necessary for its finding the applicable law; and whereas in this case no such materials are furnished to the Court, it would seem that the Court is not obliged to institute the research necessary for that purpose, that on the contrary it is free to deny the relief sought without instituting such a research"; *id.* – The idea – which seems to be generally accepted – that

does not seem to be any examples of the Court itself referring questions of municipal law to experts.[250] In the *Peter Pázmány University Case*,[251] decided in 1933 by the Permanent Court of International Justice, the Court found that the University was a legal person under Hungarian law and as such entitled to submit a claim for restitution of property under Article 250 of the 1920 Treaty of Trianon.[252] In reaching this conclusion the Court had to address several issues of municipal law and evaluate evidence submitted to prove municipal law, in the event Hungarian law. One aspect discussed by the Court was the evidentiary weight to be attached to entries in land registers as proof of title to property. The Court does not seem to have accepted such entries as conclusive proof in this respect,[253] but said that one criteria for determining the value thereof was the value attached to such registers under the municipal law in question.[254] Generally speaking, the Court seems to have reserved for itself the right to make a relatively free evaluation of evidence submitted in support of the contents and the meaning of municipal law.

5.3.2.3.2 The Binding Force of Municipal Law and Municipal Law Precedents

It goes without saying that an international court or tribunal would rarely have problems in applying municipal law if a clear answer to a municipal law question was to be found in a code or other legislative act. It is equally clear that this is seldom the case in practice, in particular when a dispute has arisen. The more realistic situation is where an international

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the Court may *sua sponte* investigate municipal law even far beyond the submissions and arguments of the parties, raises – it is submitted – problematic aspects with respect to the actual procedure before the Court, at least when the Court is trying a case on the basis of a special agreement; this right of the Court may result in a case "growing" far beyond the expectations and plans of the parties.

[250] *See* Jenks, *op. cit.*, at 590. – Simpson & Fox, *op. cit.*, at 146, state that an international tribunal "frequently makes its findings as to municipal law on the basis of counsel's speeches (citing authorities) and its own researches" and refer to the *George W. Cook Case*, Reports of International Arbitral Awards, Vol. V (1954) 663. With respect to the Permanent Court of International Justice and the International Court of Justice, however, Jenks notes that "there is little evidence in the decisions as to the extent to which, and manner in which, the Court undertakes its own research into questions of municipal law"; Jenks, *op. cit.*, at 589.

[251] P.C.I.J. Reports, Series A/B, No. 61 (1933) 228.

[252] *Cf.* p. 60, *supra.*

[253] By contrast, in the *German Interests in Polish Upper Silesia Case*, P.C.I.J. Reports, Series A, No. 7 (1926) 42, the Court seems to have accepted an entry in a land register as conclusive proof of title to property; *id.*

[254] P.C.I.J. Reports, Series A/B, No. 61 (1933) 234–235.

court or tribunal is faced with the need to consider – and interpret – case law or customary law developed on the basis of municipal statutes.

As far as decisions of municipal courts are concerned, the Permanent Court of International Justice has adopted a principle pursuant to which it will regard such decisions as binding on it, as far as the contents and meaning of municipal law are concerned. This was first explicitly acknowledged in the *Serbian Loans Case*. The Court said:

> "For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members. It would be a most delicate matter to do so, especially in cases concerning public policy – a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself – and in cases where no relevant provisions directly relate to the question at issue. It is French legislation, as applied in France, which really constitutes French law, and if that law does not prevent the fulfillment of the obligations in France in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant."[255]

This general principle was confirmed in the *Brazilian Loans Case*.[256] This case is particularly interesting because in the special agreement the parties instructed the Court that:

> "in estimating the weight to be attached to any municipal law of either country which may be applicable to the dispute, the Permanent Court of International Justice shall not be bound by the decisions of the respective courts."[257]

The Court, however, concluded that it was not under an *obligation* to follow the decisions of the courts of the country in question, but that it had the *possibility* to do so, if it so deemed appropriate. The court went on to say:

> "Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems to be no doubt that it must seek to apply it as it would be applied in that country. It would not be

[255] P.C.I.J. Reports, Series A, Nos. 20/21 (1929) 46.
[256] P.C.I.J. Reports, Series A, Nos. 20/21 (1929) 124.
[257] *Ibid.*

> applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force."[258]

In practice, however, it may be a difficult task to ascertain exactly how the municipal courts have decided a particular issue; moreover, case law may be divided. Keeping this in mind, the Court in the *Brazilian Loans Case* added:

> "Of course the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law."[259]

The position taken by the Permanent Court of International Justice was subsequently confirmed by the International Court of Justice in the *Fisheries Case*,[260] where the Court concluded that a decision of the Norwegian Supreme Court concerning a Norwegian statute constituted "final authority for this interpretation".[261]

The above-mentioned principle, which has thus been accepted by the two world courts, has also been accepted by international arbitral tribunals. In the *Kronprins Gustav Adolf Arbitration*,[262] for example, the sole arbitrator Professor Borel, accepted a decision by the United States Court of Claims as final and binding as to the true interpretation of the United States Espionage Act.

[258] *Ibid.*

[259] *Id.* – The Court thus has some flexibility in following decisions by municipal courts. It should be noted, however, that an international court or tribunal cannot bring about the invalidity of a municipal law – at the municipal level – by declaring it invalid, within the framework of an interstate dispute; this follows from the doctrine of domestic jurisdictions (*cf.* note 178, *supra*); *see* the *Interpretation of the Statute of the Memel Territory Case*, P.C.I.J. Reports, Series A/B, Nos. 49 (1932) 336, and the *Barcelona Traction Case*, the separate opinion of Judge Morreli, I.C.J. Reports (1970) 234.

[260] I.C.J. Reports (1951) 131.

[261] *Ibid.*, at 134 – In his dissenting opinion Judge McNair said that the Court was "bound by the interpretation given in the St. Just decision of Norwegian internal law" a fact which "in no way precluded it from examining the international implications of that law"; *ibid.*, at 181 – Reference should also be made to the dissenting opinion of Judge Klaestad in the *Nottebohm Case (Second Phase)*, I.C.J. Reports (1955) 28–29, where he stated, *inter alia*: "The Court is not deemed to know the national law of the different states. It would hardly be possible for it to place its own construction upon the provisions of the Liechtenstein Nationality Law and to disregard the interpretation and application made by the competent local authorities".

[262] Reports of International Arbitral Awards, Vol. II (1948) 1239–1305.

Generally accepted as the principle is, there may nevertheless be exceptions to it.[263] It has been suggested[264] that there are two exceptions *viz.*, a) municipal decisions interpreting a constitution which is subject to an international guarantee are not considered as binding,[265] and b) a municipal decision on a question of municipal law rendered after an international court or tribunal has already decided the matter in a different way, will not bind the court or the tribunal if it is presented with the issue again.[266]

Against the background of the generally accepted principle discussed above, it would seem natural for international courts and tribunals to interpret contracts governed by municipal law pursuant to the rules and principles of such municipal law. On the other hand, the Permanent Court of International Justice, has in certain situations felt free to try to ascertain what it considers to be a "reasonable interpretation" without referring to any particular municipal law. This is the case particularly when the Court has attempted to determine the intention of the parties. In the *Serbian and Brazilian Loans Cases* the Court interpreted the bonds in question with a view to determining the intention of the parties without any reference to a municipal law. In the *Serbian Loans Case*, for example, even before discussing the law to be applied to the bonds, the Court determined "the meaning which, on a *reasonable construction*, is to be attached to the terms of the bonds"[267] (*emph. added*).

Also in the *Lighthouses Case*[268] the Court interpreted the intention of the parties with respect to the scope of the contract in question without discussing the relevant municipal law, which was Ottoman law. Only thereafter did the Court apply Ottoman law to determine the validity of the contract.

Based on the quoted passages of the cases discussed above, one may venture the conclusion that the Court feels free *not* to apply municipal

[263] The principle is at least partially based on the doctrine of domestic jurisdiction. As a consequence thereof international courts and tribunals will not *anticipate* decisions of the competent municipal courts, *see* Jenks, *op. cit.*, at 594, referring to the *Panevezys–Saldutiskis Railway Case*, P.C.I.J. Reports, Series A, No. 17 (1928) 33 and to the *Interhandel Case*, I.C.J. Reports (1959) 28.

[264] Jenks, *op. cit.*, at 593–594.

[265] *Cf.* the *Danzig Legislative Decrees Case*, P.C.I.J. Reports, Series A/B, No. 65 (1935) 63–64.

[266] *Cf.* the *Chorzow Factory (Indemnity) Case*, P.C.I.J. Reports, Series A, No. 17 (1928) 33.

[267] P.C.I.J. Reports, Series A, Nos. 20/21 (1929) 40. In the *Brazilian Loans Case* the Court again interpreted the bond without referring to the municipal law in question, which was Brazilian law, P.C.I.J. Reports, Series A, Nos. 20/21 (1929) 116.

[268] P.C.I.J. Reports, Series A/B, No. 62 (1934) 18–19.

law when it comes to determining the *intentions* of the parties to a contract governed by municipal law, but that it *does* apply municipal law in determining the *validity* of a contract governed by municipal law.[269] As pointed out above,[270] this is in all likelihood explained by the fact that determining the intention of the parties may to a large extent be a *factual* issue rather than a legal issue.

5.4 Suggested Approach

5.4.1 Selection of the Applicable Municipal Law – General

As I have discussed above, there are several situations where international courts and tribunals apply municipal law. In some of these situations it is more or less clear which municipal law is to be applied. This is the case, for example, when a court or a tribunal must rule on the issue of nationality of claims,[271] exhaustion of local remedies[272] and denial of justice.[273] In other situations, it is less clear which municipal law the court or tribunal should apply, for example, with respect to claims based on contracts, or otherwise of a commercial nature. If the parties have agreed on the applicable municipal law, the court or the tribunal is under an obligation to apply such law.[274] If no such choice of law has been made by the parties, the court or the tribunal is faced with the question of *selecting* the applicable municipal law. In essence the nature of this question is identical to the question with which national courts are faced in resolving disputes of an international character. The national court in question then resorts to the conflict of laws rules of the *lex fori*. Such rules form part of the municipal legal system of each state. Unlike national courts, however, international courts and tribunals do not have any *lex fori*, and thus no conflict of laws rules automatically to rely on. Consequently, they must develop their own method for selecting the applicable municipal law.

It would seem that the only case where the Permanent Court of International Justice has explicitly addressed this issue is the *Serbian Loans Case*. The choice which the Court had to make was between French and Serbian law. The Court said the following:

[269] *Cf.*, however, note 245, *supra,* with respect to the *Mavrommatis Jerusalem Concessions Case*.
[270] *See* note 245, *supra,* discussing the *Mavrommatis Jerusalem Concessions Case*.
[271] *See* p. 383 *et seq.*, *supra*.
[272] *See* p. 386 *et seq.*, *supra*.
[273] *See* p. 390 *et seq.*, *supra*.
[274] This follows from the principal of party autonomy, *see* p. 134 *et seq.*, *supra*.

> "The Court, which has before it a dispute involving the question as to the law which governs the contractual obligations at issue, can determine what this law is only by reference to the actual nature of these obligations and to the circumstances attendant upon their creation, though it may also take into account the expressed or presumed intention of the Parties. Moreover, this would seem to be in accord with the principles of municipal courts in the absence of rules of municipal law concerning the settlement of conflicts of law."[275]

Given the fact that this is the only pronouncement made by the Court on this issue, and taking into account the fact that the discipline of conflict of laws has undergone extensive development since 1929, it is not easy to draw conclusions from the statement of the Court which would be relevant today.[276]

In discussing the question of selection of municipal law it is important to distinguish this situation from the situation where an international court or tribunal is called upon to apply and interpret a *treaty* containing conflict of laws provisions. In the latter case, which was the situation in the *Guardianship of Infants Case*,[277] the court or tribunal is engaged in the determination of compliance by a state of international obligations undertaken by virtue of the treaty in question.

The first question which falls for consideration when discussing methods of selecting municipal law, is whether public international law contains any conflict of laws rules. Generally speaking, there would seem to exist at least two situations when this question becomes relevant, *viz.*, when states take up cases of their subjects within the framework of *ius protectionis* and when states act as states but in transactions which are of

[275] P.C.I.J. Reports, Series A, No. 20 (1929) 41.

[276] When the Court refers to the nature of the obligations in question and to the circumstances surrounding their creation, one is inclined to view this as a reference, albeit veiled, to the so-called center of gravity test, the purpose of which is to find the legal system with which the legal relationship is most closely connected, by weighing the different connecting factors, such as, for example, the nature of the obligation in question; for a discussion of the center of gravity test *see* p. 413 *et seq.*, *infra*. On the other hand, the reference to the presumed intention of the parties would seem to indicate acceptance of the doctrine of the hypothetical will of the parties which has to a large extent been replaced by the center of gravity test in modern conflict of laws theory.

[277] I.C.J. Reports (1958) 55. In this case the issue was whether the provisions of the 1902 Hague Convention concerning the Guardianship of Infants – which provides that the guardianship of an infant is governed by the national law of the infant (in the event Dutch law) – prevented the application to a foreign infant of the Swedish law on the protection of children. A number of judges deemed it necessary to discuss the concept of *ordre public* as generally understood in private international law. It must be emphasized, however, that the court was *not* faced with the issue of *which municipal law* to select with a view to resolving the dispute.

a private law – commercial – character.[278] The question above echoes the discussions between the "national" and "international" schools with respect to private international law.[279] This is not the place to discuss in detail the positions of the respective schools of thought. Suffice it for present purposes to state in general terms that the national school regards the conflict of laws as a branch of municipal law, and that the international school takes the view that public international law does set out certain requirements with respect to conflict of laws rules in municipal law,[280] and also that there exist rules of public international law with respect to conflict of laws matters.[281]

The modern view is that the conflict of laws forms part of municipal law rather than constituting a separate part of public international law.[282] On the other hand, there are occasional pronouncements which indicate that some commentators still take the view that public international law does contain conflict of laws rules.[283] The fact remains, however, that as of today there are no generally accepted conflict of laws rules in public

[278] For a general discussion of this question, *see* e.g. Kahn, Abhandlungen zum internationalen Privatrecht I (1928) 286; Beale, Conflict of Laws, III (1935) 1948–1957; De Lapradelle, De la delimitation du droit international public et du droit international privé; Nouvelle Revue de droit international privé (1934) 9 *et seq.*; Arminjon, Hague Recueil, 21 (1928) 433 *et seq.* – This discussion has mostly focused on whether or not public international law prescribes the application of specific rules of *municipal* conflict of laws rules. As discussed on p. 405 *et seq.*, *infra*, however, other approaches are also possible.

[279] For a general discussion of the national and international schools of thought, *see* e.g. Gihl, Den internationella privaträttens historia och allmänna principer (1951) 279 *et seq.*, and references made therein.

[280] Lipstein mentions three such requirements, *viz.*, (a) every state must have a system of private international law, (b) states may not exclude the application of foreign law altogether and (c) no state may impose its own rules as to status upon persons who are merely temporary residents, Lipstein, Conflict of Laws before International Tribunals, Transactions of the Grotius Society, Vol. XXVII (1941) 146.

[281] Lipstein, *ibid.*, mentions *lex rei sitae* as the law applicable with respect to immoveables, and *lex loci actus* concerning form; *see* also Gutzwiller, Internationalprivatrecht (1930) 1554 *et seq.*; Gihl, *op. cit.*, at 304 also mentions the international standard as a principle of public international law which may have some relevance for the conflict of laws.

[282] *Cf.* e.g. Gihl, *op. cit.*, at 293; Bogdan, Svensk internationell privat- och processrätt (5th ed. 1999) 19, 26–27: Eek, Lagkonflikter i tvistemål (1972) 15–17; Scoles–Hay, Conflict of Laws (1982) 1 and Shaw, *op. cit.*, at 1–2.

[283] *See* e.g. the *TOPCO* v. *Libya* Arbitration decided in 1977 (International Law Reports Vol. 53 (1979) 445) where the sole arbitrator Professor Dupuy seems to have endorsed this view, and the LIAMCO Arbitration also decided in 1977 (*Libyan American Oil Company* v. *The Government of the Libyan Arab Republic*, International Legal Materials (1981) 42) where Dr. Mahmassani, also sole arbitrator, seems to have assumed the existence of such conflict of laws rules.

international law.[284] This notwithstanding, there are, as I have discussed above, numerous situations in interstate arbitration where the tribunal is faced with the issue of selecting one, or several municipal laws. How do international tribunals then cope with this problem? In my view, in the absence of directions and instructions from the parties, there are at least three possible approaches *viz.*, (i) the comparative approach, (ii) the municipal law approach and (iii) the international approach.

The *comparative approach* means that the arbitrators compare two or more possibly applicable municipal systems of conflict of laws rules with a view to *reconciling* such systems. In other words, the arbitrators try to reach the conclusion that the different municipal systems contain the same conflict of laws rules. Assuming that such a conclusion is indeed correct, the arbitrators will avoid having to choose a particular conflict of laws system, but could rather refer to "general principles of conflict of laws" or to conflict of laws rules "accepted in most countries", or by the "two states concerned". A variation of this approach would be to review the rules of *substantive law* of the municipal law systems concerned. If the tribunal then finds that the substantive rules are identical, there would be no need to deal with conflict of laws issues at all. The tribunal would simply apply the rules of substantive law which are identical. Put differently: there is no conflict between the different substantive laws, therefore the tribunal may proceed to apply the appropriate rule of substantive law directly.

It is clear that this approach will be of no help if the conflict of laws rules – or the substantive rules – in fact differ. Furthermore, even if the same conflict of laws rule exist in two or more municipal systems, it is quite possible – in fact very likely – that case law has modified, or refined, the rule in question such that in fact the rules are no longer identical.

[284] *Cf.* Akehurst, Jurisdiction in International Law, 46 British Yearbook of International Law (1972–1973) 222, where he states that: "Attempts to discover choice of law rules laid down by public international law have not been successful." It is possible, however, at least theoretically, that the international conventions in the field of conflict of laws have been ratified by such a large number of states that they have acquired the status of customary international law. It must be noted, however, that this proposition raises many of the traditional issues concerning international custom, general principles of law and general principles of international law which ordinarily means that it would in practice be quite cumbersome to determine whether or not a particular conflict of laws rule has become part of international law. On the other hand, if two disputing states have ratified a specific international convention addressing certain conflict of laws issues, it would seem reasonable to assume that an international court or tribunal would apply the rules set forth in the convention in question; *see* p. 217 *et seq.*, *supra*, with references, for a discussion of the creation of customary international law.

The *municipal law approach* means that the tribunal seeks to identify a municipal system the conflict of laws rules of which it should apply. If such a municipal system can be found, it could be a convenient solution for the tribunal, at least in the sense that it could then rely on and apply a developed system of conflict of laws rules. Generally speaking, this would typically make it easier for a tribunal to tackle conflict of laws issues. On the other hand, it is difficult to see what criteria the international tribunal should apply to choose the municipal system in question. In my view there is a real risk that any such choice would be arbitrary. Furthermore, it could create a number of complications. For example, despite the fact that international tribunals have no *lex fori*, a tribunal employing this approach would be putting itself in the position of a municipal court and apply the conflict of laws rules of the country in which that court is located. This could mean that the tribunal would have to apply the public policy rules of that municipal system, possibly leading to the exclusion of a substantive law which would otherwise have been applicable. It is not immediately understandable, however, why an international tribunal should be the guardian of the public policy of any particular country.[285]

The two approaches discussed above both have their disadvantages, and – it is submitted – cannot be recommended to international tribunals faced with conflict of laws issues. Rather, it would seem that the third possibility – the *international approach* – is the least unrealistic approach, at least at the conceptual level. This approach means that international tribunals develop their own conflict of laws rules adapted to and taking account of the interstate character of the dispute before them. This seems to be the true meaning of the pronouncements made by the Permanent Court of International Justice in the *Brazilian Loans Case*.[286] The problem with this approach, however, is that there does not seem to be any multitude of arbitral awards where tribunals have in fact embarked on a discussion of conflict of laws issues.[287] Lipstein[288] and others[289]

[285] *Cf.* the discussion on p. 111 *et seq.*, *supra*.

[286] *See* p. 399 *et seq.*, *supra*.

[287] *Cf.* e.g. Akehurst, note 284, *supra*.

[288] Lipstein, note 281, *supra*, at 146 *et seq.*

[289] *See* e.g. Basdevant, Revue de droit international privé, I (1905) 817–832; Blühdorn, Hague Recueil 41 (1932) 226; Gutzwiller, Jahrbuch des Schiedsgerichtswesen 3 (1931) 123–152; Hammarskjöld, Revue critique de droit international 29 (1934) 315–344; Niboyet, Hague Recueil, 40 (1932) 157–231; Rabel, Zeitschrift für ausländisches und internationales Privatrecht 1 (1927) 33–47; Neumeyr, Juristische Wochenschrift (1922) 753; Oppenheim, International Law (6th ed, 1940) Vol. 2) 51; Geier, Das internationale Privatrecht des gemischten Schiedsgerichtshöfe (1930); Weselowski, Les conflits de lois devant la justice internationale (1936).

have, however, attempted to evaluate this aspect of the practice of the mixed arbitral tribunals set up in the wake of the First World War. Lipstein concludes that international tribunals have worked out conflict of laws rules which he calls "rules of international conflict of laws" and that such rules have two major distinctive features, *viz.*, a) there is no *lex fori* which, *inter alia*, avoids the problems relating to *renvoi* and classification and b) the emphasis on nationality, in particular in questions of status.[290]

It is noteworthy, however, that Lipstein does not mention any body of more traditional conflict of laws rules, for example, with respect to different kinds of contracts and transactions or specific legal issues. In fact, apart from the two distinctive features mentioned in the foregoing, it is difficult to escape the conclusion that the practice of the mixed arbitral tribunals studied by Lipstein is rather vacillating and even contradictory. This seems to confirm the opinion that, in fact, there are no conflict of laws rules in general public international law. The practice of the Iran–United States Claims Tribunal[291] – which can be said to constitute a modern variant of the mixed arbitral tribunals – also seems to support this view.

Article 33 of the Tribunal Rules is based on Article 33 of the UNCITRAL Arbitration Rules, but has been adapted to Article 5 of the Claims Settlement declaration.[292] Article 33(1) of the Tribunal Rules reads:

> "The arbitral 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 arbitral tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances".

As can be seen from the language of the article, the Tribunal enjoys a considerable amount of freedom and discretion in finding the applicable substantive law. This fact finds its reflection in the practice of the Tribunal, in the sense that it is difficult to find a coherent pattern in its treatment of conflict of laws issues. In some cases, the Tribunal refers to generally accepted conflict of laws rules and principles. For example, in *American Bell International* v. *The Islamic Republic of Iran,* the Tribunal said:

[290] Lipstein note 281, *supra,* at 175.

[291] *See* p. 88 *et seq., supra*, for a general discussion of the Iran–United States Claims Tribunal.

[292] *See* p. 88 *et seq., supra.*

> "It is a *generally accepted principle of private international law* that the formation of and the requirements as to the form of a contract are governed by that law which would be the proper law of the contract, if the contract was validly concluded."[293] (emph. added)

In other cases, however, the Tribunal has resolved disputes without referring to conflict of laws issues and the applicable substantive law. Thus, in a dispute where issues concerning limitation were addressed – the parties arguing that U.S. law and Iranian law, respectively, was to be applied – the Tribunal, referring to certain previous decisions, stated;

> "... the Tribunal finds that it is able to resolve all issues by reference to the practice of the Parties and to the terms of the contractual documents themselves, without entering into a discussion of the applicable law."[294]

The flexibility which Article V accords the Tribunal has resulted in a variety of approaches to conflict of laws issues; indeed sometimes one has the impression that there is a new approach with respect to each claim presented to the Tribunal. The underlying philosophy seems to have been to try to avoid conflict of laws problems as much as possible and rather refer to rules of public international law, "principles of commercial and international law" and to "relevant usages of the trade".[295] While the Tribunal has made important contributions to public international law – e.g. with respect to treaty interpretation and expropriation of property rights – its contribution to the theory and practice of conflict of laws is meager. This state of affairs has been confirmed by one commentator – and judge of the Tribunal – in stating that "the Tribunal will not be a source of intellectual inspiration so far as conflict of laws analysis is concerned".[296]

As the foregoing shows, there is little guidance to be derived from previous arbitral practice.

[293] Iran–United States Claims Tribunal Reports, Award No. ITL 41-48-3 of 11 June 1984, (Vol. II 1984) 97–98. – *Cf.* also *Economy Forms Corp.* v. *The Islamic Republic of Iran* where the Tribunal stated; "... *under general choice of law principles*, the law of the United States, the jurisdiction with the most significant connection with the transaction and the parties, must be taken to govern in this specific case" (*emph. added*); Iran–United States Claims Tribunal Reports, Award No. 55-165-1 of the 14 June 1983, (Vol. II 1983) 47–48.

[294] *American Bell International Inc.* v. *The Islamic Republic of Iran*, Final Award No. 255-48-3 of 19 September 1986, Iran–United States Claims Tribunal Report (Vol. III 1986) 186–187.

[295] *See* Aldrich, *op. cit.*, at 156–157

[296] Brower, 224 Hague Recueil (1990 – V) 236; *see* also Aldrich, note 289, *supra*.

5.4.2 Extinctive Prescription and the Applicable Municipal Law

I have argued above, that the only realistic method of refining the principle of extinctive prescription in interstate arbitration is to draw on municipal law sources.[297] This conclusion immediately raises the question of *how* to select the municipal law(s) to be applied. Generally speaking, this is a conflict of laws issue, albeit in a public international law context. As stated above, previous arbitral practice does not provide much guidance in this respect. None of the three approaches discussed above – the comparative, municipal and international approaches – is fully satisfactory. In the following, I shall therefore suggest an approach which could be used by international arbitral tribunals faced with the question of which municipal law to apply to extinctive prescription.

Before I explain the suggested approach, there are three preliminary aspects which must be addressed.

First, the search for the applicable municipal law is prompted by the need to *refine* the principle of extinctive prescription as opposed to *creating* a rule or principle in this respect. In the foregoing I have described situations where international tribunals have applied municipal law.[298] They have done so because, in the situations described, it is either necessary to do so to resolve the dispute before them, or because the rules of public international law require them to do so. With respect to extinctive prescription the situation is different: there *is* a principle of extinctive prescription, but it is not a satisfactory one in so far as interstate disputes of a commercial or economic nature are concerned. Refining the principle of extinctive prescription would thus entail *replacing* an existing principle of public international law with rules of municipal law. This leads to the further question – which will be addressed below[299] – whether or not an international tribunal has the authority to apply municipal in an interstate dispute where the parties have not chosen any municipal law.

Second, it is important to keep in mind that extinctive prescription in its municipal law form, and in a conflict of laws setting, is a legal concept of a general nature which is applied in connection with a variety of legal transactions. In most municipal legal systems extinctive prescription is qualified as a matter of substantive law rather than procedural law.[300] From a conflict of laws perspective this means that there are no separate choice of law rules with respect to extinctive prescription as such, but the

[297] *See* pp. 376–377, *supra*.
[298] *See* p. 377 *et seq.*, *supra*.
[299] *See* p. 417 *et seq.*, *infra*.
[300] *See* p. 257 *et seq.*, *supra*.

law applicable in general to the legal transaction in question will be applied also with respect to extinctive prescription. It is true that in modern conflict of laws codifications so-called *dépeçage* is accepted, i.e. the right of parties to select different laws to be applied to different parts of a contract. Article 3(1) of the 1980 EU Convention on the Law Applicable to Contractual Obligations, for example, stipulates that the parties "can select the law applicable to the whole or a part only of the contract". In situations where the parties have made no choice of law, the main rule under the Convention is, however, that the contract is governed by the law of *one* country. Even in this situation, however, it is possible to apply different laws to the same contract, provided that a severable part of the contract has a closer connection with another country than the rest of the contract.[301] It is clear, however, that this is an exception from the main rule. It is also clear from the legislative history of the Convention that this exception is to be applied restrictively.[302] Pursuant to the provisions of the Convention, the law applicable to the contract in question shall govern also questions relating to prescription and limitation of actions.[303] The foregoing thus means that questions related to extinctive prescription "follows" the law applicable to the contract in question. From a conflict of laws perspective this approach seems natural, since conflict of laws rules are usually developed with respect to different categories of contracts used in international transactions.

As far as interstate transactions are concerned, however, it is theoretically possible that such an approach is less fruitful, since such transactions do not necessarily follow the same patterns as international transactions between private parties. Keeping in mind, however, that the need for refinement of the principle of extinctive prescription arises with respect to commercial and economic interstate disputes, as defined above, it is submitted that this particular feature of conflict of laws rules does not *per se* pose a problem for the search of the applicable substantive law.

The reason is that in my view interstate disputes of a commercial or economic nature can reasonably be presumed to resemble commercial

[301] The relevant provision is Article 4(1), second sentence, which reads: "Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of another country".

[302] Giuliano–Lagarde, Report on the Convention on the law applicable to contractual obligations, Official Journal of the European Communities (1980 C 282) 23.

[303] Article 10(1) of the Convention reads, in relevant parts: "The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular: .... (d) the various ways of extinguishing obligations, and prescription and limitation of actions".

transactions between private parties to such an extent that the categorization of contracts used, for example, in the Convention can be employed in a meaningful way also with respect to interstate transactions of a commercial or economic nature.

As indicated above, the foregoing is based on the assumption that extinctive prescription is a matter of substantive law rather than procedural law. As I have explained above, this is indeed the position of most municipal legal systems today,[304] and is explicitly laid down in the 1980 EU Convention, Article 10(1) (d).[305] In public international law it has generally not been necessary to characterize extinctive prescription as either procedural or substantive in nature. I have concluded that extinctive prescription is procedural in nature, but has substantive law consequences.[306] If one were to characterize extinctive prescription as procedural, the *lex fori* would be applied to it, even if the *lex contractus* were different.[307] Since an arbitral tribunal does not have any *lex fori*, the *lex arbitri* – which is generally accepted to be the law of the place of arbitration[308] – would probably be applied to extinctive prescription. While the place of arbitration plays an important role in commercial arbitrations, it plays a much more limited role – if indeed any – in interstate arbitrations, conducted as they are between two sovereigns. For this reason, and due account taken of the position of many conflict of laws systems, I do not approach extinctive prescription as a procedural matter – and will thus not suggest the application of the *lex fori/lex arbitri* – in looking for the applicable municipal law.

The *third* preliminary issue which must be addressed is the possibility of avoiding the need to select a particular municipal law. If, in an interstate dispute, the municipal laws of the two disputing states are identical, or if there are only minor differences, there is typically no need to choose between them. For practical purposes, it would typically be satisfactory to apply the rules in question. It is submitted, however, that in real life this is seldom the case with respect to extinctive prescription, in particular in so far as the actual time periods are concerned.[309] In addition, it is probable that case law has modified, refined and interpreted statutory provisions, the language of which are similar, to such an extent that there

[304] *See* p. 257 *et seq.*, *supra*.
[305] For the text of this provision, *see* note 303, *supra*.
[306] *See* p. 320 *et seq.*, *supra*.
[307] *See* p. 257 *et seq.*, *supra*.
[308] *See* p. 85, *supra*, in particular note 31.
[309] As explained above, *see* p. 257 *et seq.*, *supra*, the actual limitation periods vary considerably between different legal systems.

is in fact a conflict between the provisions in the laws of the two countries in question. It is submitted, that this approach would seldom be a workable solution. On the other hand, *if* municipal law provisions are indeed identical, or substantially similar, I submit that an arbitral tribunal should apply those provisions. It is not meaningful unnecessarily to complicate the issue. A variation of the situation described in the foregoing is the search for a common denominator among two or several potentially applicable municipal law provisions. For example, if the limitation period in country A is 20 years and in country B 10 years, it might be tempting to apply a limitation period of 15 years. This potential approach does, however, create two major problems. *First*, as I have already pointed out, the limitation periods vary considerably between different legal systems. Using the least common denominator therefore comes across as an artificial solution which runs the risk of surprising the parties to the dispute. This becomes even more apparent if there, are three, or more, municipal systems which are potentially applicable. This may be the case, for example, if states A and B have entered into a treaty concerning a project in state C, and perhaps in state D as well. If a dispute arises between states A and B, it is quite possible – depending on the nature of the dispute and the circumstances of the case – that the municipal laws of all four states are potentially relevant in the dispute. Resorting to a mathematical calculation of the limitation periods in all four states, would in my opinion not be a satisfactory solution. *Second*, this approach would not solve other issues which may arise in connection with extinctive prescription, such as, for example, the question of which acts, legal and/or factual, constitute a tolling of the limitation period and the question of which categories of claims, or legal relationships, are covered by provisions on limitation.

In the search for an approach, the ambition must in my view be to try to find an approach of a general nature which could be applied in a satisfactory manner in most situations and which would meet the disputing parties' needs for predictability and certainty. As mentioned above,[310] the best solution would needless to say be to conclude one or several multilateral treaties on extinctive prescription, or for states to include provisions thereon in bilateral treaties. The conclusion of multilateral treaties remains, however, Utopia. As explained above, very few treaties, multilateral as well as bilateral, seem to include provisions on extinctive prescription, or even on time limits for the presentation of claims.[311]

[310] *See* p. 372 *et seq.*, *supra*.
[311] *Ibid.*

Consequently, other solutions must be found. In looking for such solutions a logical starting point would be the rules and principles of the modern conflict of laws. It is logical because, if modern conflict of laws rules are found to provide a useful and acceptable mechanism for selecting the applicable municipal law also in interstate arbitrations, there is no need to create a separate such mechanism for interstate arbitrations. Such an approach necessitates a distinction between contracts and torts.[312]

5.4.2.1 Contracts

In modern conflict of laws codifications the most commonly used approach to select the applicable law – when the parties have made no choice of law – is often referred to as the center of gravity test, the underlying philosophy of which is to find the country with which the contract is most closely connected.[313] The center of gravity of a legal relationship is to be found by weighing all objective factors of such relationship, including, for example, nationality of the parties, place of signing the contract, place of performance of the contract, language of the contract, currency to be used etc. There is no fixed bench-mark value for the different connecting factors, but a court must determine the relative weight and importance of each connecting factor against the circumstances of each individual case. Needless to say, this introduces an element of

[312] As pointed out above, *see* note 124, *supra*, the concept of torts is not used in a strict legal-technical sense, but simply to denote claims which are *not* based on a contract or treaty. – I would also like to point out that my conclusion above on p. 372 *et seq.*, to the effect that the distinction between contracts and torts is largely irrelevant, relates to the *characterization* of different categories of interstate disputes where the dividing line is between commercial and economic disputes on the one hand and other interstate disputes on the other. As I have mentioned, this conclusion does not negate the fact that there are both contractual and tort disputes in interstate arbitration. It is precisely this fact which necessitates a distinction between contracts and torts when it comes to developing a workable approach for the selection of the applicable municipal law.

[313] In the *Federal Republic of Germany*, for example, Article 28(1) of Einführungsgesetz zum Bürgerlichen Gesetzbuch reads as follows: "Soweit das auf den Vertrag anzuwendende Recht nicht nach Artikel 27 vereinbart worden ist, unterliegt der Vertrag dem Recht des Staates, mit dem er die engsten Verbindungen aufweist."

In *Austria*, Article 1(1) of the Bundesgesetz von 15 Juni 1978 über das internationale Privatrecht stipulates that: "Sachverhalte mit Auslandsberührung sind in privatrechtlicher Hinsicht nach der Rechtsordnung zu bearbeiten, zu der die stärkeste Beziehung besteht".

In *Switzerland* a similar provision is found in Article 117 of the Private International Law Statute.

As far as the *United States* are concerned, the American Law Institute's Second Restatement of Conflict of Laws, published in 1971, suggests in § 188 as a general rule the law of the most significant relationship. *See* also Scoles and Hay, Conflict of Laws (1982) 647 *et seq.* With respect to *English* law, *see* Dicey and Morris (ed. Collins) On The conflict of Laws (12th ed. 1993) Vol. 2, 1230 *et seq.*

unpredictability and uncertainty in the search for the applicable law.[314] This uncertainty and unpredictability notwithstanding, the method seems to have been accepted in most legal systems. The center of gravity test is also the starting point in the 1980 EU Convention On the Law Applicable to Contractual Obligations. This is made clear in Article 4(1), first sentence, where it is said that the contract "shall be governed by the law of the country with which it is most closely connected".

To overcome the difficulties associated with this general approach, the Convention introduces a system of presumptions to be used in determining the center of gravity. There is a general presumption which is supplemented with further presumptions with respect to different categories of contracts. The general presumption is based on the idea of the most characteristic performance under a contract. Accordingly, Article 4(2) of the Convention stipulates that a contract is presumed to be "most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration".

Generally speaking, the idea is to find the party who is to perform the most complex, costly, time-consuming and far-reaching acts and measures under the contract, since its role under the contract is more likely than the role of the other party to give rise to legal issues.[315] The Convention does not provide any definition of "the most characteristic performance", but the official commentary has the following to say with respect to how to go about identifying the most characteristic performance:

> "... in bilateral (reciprocal) contracts whereby the parties undertake mutual reciprocal performance, the counter performance by one of the parties in a modern economy usually takes the form of money. This is not of course the characteristic performance of the contract. It is the performance for which the payment is due ... which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction."[316]

[314] This aspect of the center of gravity test has been heavily criticized and the test has been described as "Prinzip der Prinzipenlosigkeit", *see* the reference in Karlgren, Kortfattad Lärobok i internationell privat- och processrätt (5th ed. 1974) 99. As far as the application of the center of gravity test in Sweden is concerned, *see* Göranson, A Swedish Centre of Gravity Test? – Law, Fact and Fiction on the individualizing method, in Melander (ed.), Liber Amicorum Lennart Pålsson – Modern Issues in Euopean Law, Nordic Perspectives (1997) 47; he takes a very critical view as to the very existence of the test in Swedish law; for different views, *see* e.g. Bogdan, *op. cit.*, at 241 *et seq.* and Pålsson, *op. cit., at* 53–54.

[315] For an explanation of the philosophy underlying this presumption, *see* eg. Lando, Kontraktsstatutet (3rd ed. 1981) 188–190, and Pålsson, *op. cit.*, at 55–56.

[316] Giuliano–Lagarde, *op. cit.*, at 22.

This general presumption means, for example, that in the case of sales and purchase transactions, it is the law of the seller which will be applied, in the case of financial services transactions, including loan transactions, it is the law of the bank, or financial institution in question, in licensing transactions, the law of the licensor.[317]

Articles 4(3) and 4(4) of the Convention set forth special presumptions for rights to immovable property and contracts for the carriage of goods, respectively. In the former case, the presumption is that "the contract is most closely connected with the country where the immovable property is situated".[318]

Article 4(5) is important in that it makes clear that the presumptions will *not* prevail, if the circumstances show that the contract has a closer connection with another country. The article reads:

> "Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."

One practical example of possible application of Article 4(5) could be construction contracts. The general presumption under Article 4(2) would normally lead to application of the law of the contractor. In many, if not most, construction projects, however, the law of the country where the construction takes place is usually deemed to have a stronger connection to the construction contract.

The system laid down by the Convention – i.e. a main rule, the center of gravity test, with rebuttable presumptions – in my view represents a modern and flexible approach to conflict of laws issues with respect to contracts.[319] Indeed, it could perhaps be argued that the approach is too flexible, such that it does not provide the desired predictability and certainty. It is submitted, however, that if the presumptions are applied as a rule and deviations from them are made only by way of exception, the system created in the Convention will provide predictability.[320]

In my view, the approach taken in the Convention is the most suitable one for arbitral tribunals to take in selecting the municipal law to be

[317] *Cf.* Pålsson, *op. cit.*, at 57–62.

[318] With respect to contracts for the carriage of goods the presumption points to the country of the carrier, but only under the conditions specified in Article 4(4).

[319] The Convention does, of course, address a number of other important issues, some of which have been referred to in the foregoing, *see* p. 84 *et seq.*, *supra* (party autonomy) and p. 116 *et seq.*, *supra* (mandatory rules), but which have no relevance for the discussion in this section.

[320] *Cf.* e.g. Göranson, note 314, *supra,* at 73–75.

applied to questions of extinctive prescription in interstate disputes of a commercial and economic nature. I am not suggesting the *formal* application of the Convention, but rather the use of the Convention's approach as a *method* to select the applicable municipal law. By following the provisions of Article 4 of the Convention, an arbitral tribunal would in most cases be able to select the applicable municipal law in a consistent and predictable manner. In addition, arbitral tribunals will be able to seek further guidance from municipal case law interpreting and refining the relevant provisions of the Convention.

5.4.2.2 Torts

Since the Convention deals only with contractual obligations, no guidance may be had from it when it comes to torts.

The traditional rule in the conflict of laws of most countries with respect to torts is to apply the *lex loci delicti commissi*, i.e. the law of the country where the wrong in question was committed.[321]

The place of the wrong is often the place where the injury occurred. In situations where the wrongful act and the injury occur in the same place (country), the aforementioned rule would seem to work reasonably well. The rule is predictable, certain and typically easy to apply.

The certainty of the *lex loci* rule may often be elusive, however. For one thing, it presupposes that it is possible to locate the wrongful act to a particular country. This may, however, be quite problematic when the wrongful conduct has occurred in several countries which may be the case with respect to defamation, unfair competition, fraud in different forms and invasion of privacy.[322] In such a situation there would seem to be two possibilities: *either* to choose the place where the last event necessary to make the actor liable occurred, *or* to choose the country where the most significant parts of the wrongful act were taken; the latter approach is equivalent to a "center of gravity" test to determine the place where the wrongful act occurred. In the view of the present author, the latter approach is to be preferred. To rely exclusively on the last event necessary to create liability may give single and fortuitous acts a decisive role

[321] *See* e.g. Bogdan, Svensk internationell privat- och processrätt (5th ed. 1999) 266–270; Strömholm, Torts in the Conflict of Laws (1961) 77–115; Scoles–Hay, Conflict of Laws (1982) 550–630; Kegel, Internationales Privatrecht (4th ed. 1977) 307; Battifol–Lagarde, Droit international privé, Vol. 2 (1976) 220.

[322] Difficult problems related to the localisation of wrongful acts arise also in connection with events taking place on the high seas and in the air space, *cf.* Bogdan, *op. cit.*, at 269. For a discussion of the closely related problem of localization of crime – from an international law perspective – *see* Cameron, The Protective Principle of International Criminal Jurisdiction (1994) 52 *et seq.*

which may be totally disproportionate to the entire sequence of events. In addition, to determine "the last event" will often entail a legal assessment and characterization of one or several factual events for which legal rules are necessary, the search for which is the very purpose of a conflict of laws rule. Thus, this approach will often be circular. The center of gravity approach is more stable and reliable. It is an approach which can be used in most situations and which is likely to produce a reasonable result in most of them.

Other problems connected with the *lex loci* rule arise in situations where the *wrongful act* occurs in one state, but the *injury* occurs in another state. It is not self-evident that the law of the country where the wrongful act occurred should be applied, rather than the law of the country where the injury occurred. Sometimes it may be reasonable to apply the latter, for example, when the acts of the wrongdoer could reasonably have been contemplated to have harmful effects at the place where the injury resulted. Illustrations of this include the use of explosives – e.g. for the construction of a dam – in one state which causes damages in another state and environmentally dangerous activities close to the border between two states. Depending on the circumstances in each individual case it would probably be possible to present good arguments for the application of both approaches. When weighing the interests of parties in a tort dispute against each other, it would generally speaking seem fair to assume that the interests of the injured party should be at the forefront. Therefore, it would in my view be reasonable to allow the injured party to choose the law which is the more favorable to him in this situation.[323]

As explained above there are a number of complications connected with application of the *lex loci delicti commissi*.[324] On balance, however, it is in my view difficult to find a better general approach to select the municipal law applicable to torts. Consequently, I submit that the law of the country where the wrongful act occurred should be applied as a general rule. In identifying the place of the wrong, a center of gravity test ought to be applied, when necessary. In situations where the injury resulted in another country than the country where the wrongful act occurred, the victim should have right to choose the law which is the more favorable to him.

[323] *See* e.g. Bogdan, *op. cit.*, at 268.

[324] Partly as a result of these complications, the traditional *lex loci* rule has been abandoned by most courts in the United States as the *exclusive* test in tort situations and is usually replaced by a *combination* of alternative approaches depending on the circumstances of the individual case, *see* Scoles–Hay, *op. cit.*, at 550–630.

5.4.2.3 Authority to Apply Municipal Law

As explained above,[325] the suggested approach would result in the application of municipal law in a situation where the parties to the dispute in question have not chosen any municipal law. In interstate arbitration the traditional formula prescribes application of public international law when the parties have made no choice of law. This raises the question whether it is reasonable, or even possible, for an arbitral tribunal to apply municipal law to issues of extinctive prescription, in particular against the background that there is a principle of extinctive prescription in public international law.

While there is a principle of extinctive prescription in public international law, as mentioned above, the way in which this principle is understood and applied makes it unsuitable for interstate disputes of a commercial and economic nature.[326] Many, if not most, issues related to extinctive prescription in such disputes will not be capable of resolution on the basis of the principle of extinctive prescription under public international law. That is why it is necessary to resort to municipal law.

The need to refine the principle of extinctive prescription has been explained in detail in the foregoing,[327] as well as the possible ways of refining it.[328] I have also explained that international tribunals do have the authority to apply municipal law[329] – sometimes even the obligation to do so[330] – and that they indeed have done so in the past.[331]

One situation where international tribunals have applied municipal law is when it has been necessary to do so to resolve a dispute, for example, because public international law has not developed rules or principles with respect to a specific issue,[332] or because no solution can otherwise be found in international law with respect to a specific issue.[333] In situations like this, municipal law is applied to "fill the gaps" of international law. In my submission, there is sufficient support for an international

[325] *See* p. 409 *et seq.*, *supra*.
[326] *See* p. 370 *et seq.*, *supra*.
[327] *See* p. 341 *et seq.*, *supra*.
[328] *See* p. 370 *et seq.*, *supra*.
[329] *See* p. 381 *et seq.*, *supra*.
[330] *See* e.g. the *Brazilian Loans Case*, where the Permanent Court of International Justice said that it was "bound to apply municipal law when the circumstances so require", (P.C.7.). Report, Series A, Nos. 20/21 (1929) 124.
[331] *See* p. 381 *et seq.*, *supra*.
[332] *See* p. 391 *et seq.*, *supra*
[333] *See* p. 394 *et seq.*, *supra*, discussing disputes of a contractual nature.

arbitral tribunal to apply municipal law to solve problems related to extinctive prescription in interstate disputes of a commercial and economic nature.

5.5 Concluding Observations

As I have explained above, the principle of extinctive prescription does exist under international law. I have discussed the need to refine the principle and have come to the conclusion that there is such a need, at least with respect to interstate disputes of a commercial and economic nature. This conclusion is based on the view that states involved in international commercial and economic transactions have the same need for certainty and predictability as private participants in such transactions.

The best method of achieving this certainty and predictability with respect to extinctive prescription would be to conclude one or several multilateral treaties. Such a solution is not, however, realistic.

The second best method, which is both realistic and practical, is, in my submission, to draw on municipal law sources. As I have outlined above, international tribunals would draw on municipal law sources in two ways, viz., (i) by applying municipal law statutes on limitation to questions relating to extinctive prescription and (ii) by using conflict of laws rules found in municipal legal systems as the method to select the municipal law(s) to be applied.

By using this method international tribunals would in my view improve the quality of dispute resolution in the form of interstate arbitration in disputes of a commercial and economic nature; they would also contribute to the cross-fertilization between interstate arbitration and international commercial arbitration. Indeed, in my view, this is a field where such non-fertilization would be unusually rewarding.

Abbreviations

Hague Recueil	Recueil des Cours de l'Academie de droit international de La Haye
IPrax	Praxis des internationalen Privat- und Verfahrensrechts
L.N.T.S.	League of Nations Treaty Series
NJA	Nytt Juridiskt Arkiv, avd. I (Swedish Supreme Court reports)
NTIR	Nordisk Tidskrift for Internationel Ret (Nordic Journal of International Law)
SOU	Statens offentliga utredningar (Official Reports of the Government of Sweden)
SÖ	Sveriges internationella överenskommelser (Bilateral treaties entered into by Sweden)

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[In general the volume numbers of publications and periodicals have been indicated only exceptionally – where it has been deemed necessary.]

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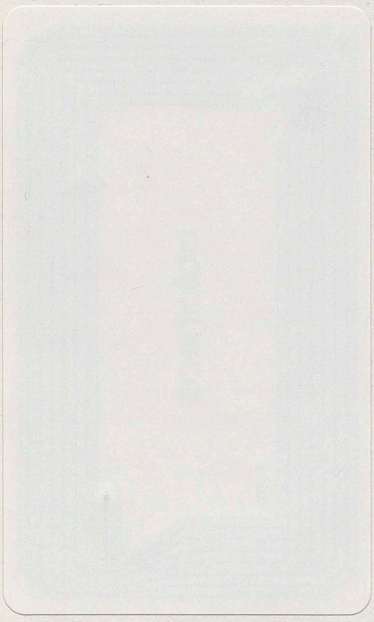

Disputes between states based on claims arising out of factual circumstances or legal relationships constitute an integral and unavoidable part of international relations. For centuries arbitration has played – and continues to play – an important role in the resolution of such disputes. In this Study the author discusses one fundamental element of international arbitration, viz., the law to be applied to resolve the dispute in question. The focus of the discussion of applicable law is on party autonomy in selecting the law, or rules, to be applied and on the restrictions on party autonomy. With a view to enabling a detailed discussion of applicable law in interstate arbitration, the author has chosen the principle of extinctive prescription as an illustrative example. A fresh look is taken at the concept of extinctive prescription in international law so as to identify and crystallize the relevant rules in this respect. The author then addresses the question whether the principle of extinctive prescription, as understood and applied today, is appropriate and suitable for interstate arbitration in the 21st century. Proceeding on the basis of an analysis of different categories of interstate disputes, the author discusses a suggested approach to the refinement of the principle of extinctive prescription in interstate arbitration.

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