THE FUNCTIONS AND LIMITS OF ARBITRATION AND JUDICIAL SETTLEMENT UNDER PRIVATE AND PUBLIC INTERNATIONAL LAW

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INTRODUCTION

When drafting international agreements, be they contracts or treaties, lawyers often provide for resolution of future disputes, usually by selecting arbitration or judicial settlement.[1] For contracts likely to produce international commercial disputes among private parties, the modern shift from litigation to arbitration has assumed legendary proportions. Unfortunately, that development has become so engrained in the public consciousness that many have ignored an important countertrend. For controversies among states involving their exercise of sovereign powers and the application of public international law, dispute settlement has taken the opposite course: away from arbitration towards judicial settlement.

Partially documenting the trajectory of dispute settlement involving states under public international law, one study has reviewed the decline of arbitration from 1945 through 1990.[2] By contrast, no one

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1. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (indicating that a "contractual provision specifying in advance the forum in which disputes shall be litigated . . . is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction"); GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS 2 (1999) (indicating that it is "almost always advisable to include a contractual dispute resolution provision in any international contract," which may "take the form of: (1) forum selection clauses, or (2) arbitration agreements"); Michael D. Mann & William P. Barry, *Developments in the Internationalization of Securities Enforcement*, 39 INT'L LAW. 937, 945 (2005) (opining that the "ability to decide in advance on an acceptable forum for disputes is . . . an essential element of international commercial transactions").

2. Christine Gray & Benedict Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, 1992 BRIT. Y.B. INT'L L. 97.

has performed a corresponding analysis of the conscious effort to promote judicial settlement, launched in the nineteenth century, completed after the First World War, and reinforced after the Second World War. Virtually no one has examined the goals the leaders of that movement sought to accomplish. Likewise, virtually no one has compared that movement to the opposite direction taken by international commercial disputes. As a result, few people appreciate the substantially different functions and limits of arbitration and judicial settlement under private and public international law.

Seeking to fill the gaps just identified, Part I briefly reviews the celebrated shift from litigation to arbitration for international commercial disputes among private parties. In so doing, it recounts the functions served by arbitration, the limits of that process, and the correspondingly important role still played by judicial settlement in the resolution of international commercial disputes. Turning to the resolution of disputes among states under public international law, Part II documents four landmarks in the decisive shift from arbitration towards judicial settlement, as well as the goals pursued or accomplished at each stage. Having discussed the conscious promotion and apparent triumph of judicial settlement, Part III identifies the limits of that process and the correspondingly important role still played by arbitration for inter-state disputes having strong political dimensions. Building on the insights developed in Part III, Part IV seeks to explain the otherwise puzzling reluctance of states to embrace judicial settlement in the context of investment treaty disputes.

I. INTERNATIONAL COMMERCIAL DISPUTES: FROM LITIGATION TO ARBITRATION

For international commercial disputes involving private parties, judicial settlement represents a logical starting point because most states possess experienced courts that have compulsory process over non-resident aliens,[3] subject to permissive rules on personal jurisdiction.[4] During their formative years, many of those courts viewed arbitration as unwelcome competition[5] and, therefore, adopted doctrines

3. *See* JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 4 (2003).

4. *See* JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION 18 (1997); Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L LAW. 21, 23 (1992).

5. *See* S. Rep. No. 68-536, at 2-3 (1924); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 29 (1994); LEW ET AL., *supra* note 3, at 18; Earl S.

calculated to arrest its development.[6] As a result, judicial settlement remained the predominant form of adjudication for domestic and international commercial disputes until well into the twentieth century.[7]

Although courts have grown more favorably disposed to arbitration, judicial settlement remains the default venue for international commercial disputes in the sense that parties who wish binding decisions and who have not provided otherwise must resolve their differences in municipal courts,[8] often in two or more courts,[9] with parallel submissions on jurisdiction, *forum non conveniens*, antisuit injunctions, and even the merits.[10] Given the awful financial consequences,[11]

Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 141-42 (1934).

6. For example, U.S. and English courts "refused to grant specific enforcement of arbitration agreements, and permitted their revocation at any time." BORN, *supra* note 5, at 29. According to Professor Carbonneau, such practices were "characteristic of most developed Western legal systems" and were "manifestly intended to discourage party recourse to arbitration and to prevent the non-judicial framework from acquiring a legitimate institutional stature." Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 266-67 (1988). As a result, the courts "substantially limited the efficacy of arbitration as a means of commercial dispute resolution." BORN, *supra* note 5, at 29.

7. *See* BORN, *supra* note 5, at 17 (referring to the "apparent dearth of international commercial arbitrations" following adoption of the Geneva Protocol on Arbitration Clauses in 1923 and adoption of the Geneva Convention for the Execution of Foreign Arbitral Awards in 1927). *See also* CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 41 (1996) (explaining that "[u]ntil shortly after World War II, only occasional cases of international commercial arbitration existed outside the traditional fields of commodities and maritime arbitration in centers such as London or Hamburg").

8. *See* BORN, *supra* note 1, at 3; ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 22 (4th ed. 2004).

9. *See* N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 609 (2006) (explaining that "although an action has been brought initially in the courts of country A, frequently one of the parties to that action, whether the original plaintiff or defendant, will decide, for whatever reason of perceived advantage, to bring a subsequent action in the courts of country B"). *See also* BÜHRING-UHLE, *supra* note 7, at 17 (observing that international commercial litigation is often "conducted in the courts of several countries at the same time").

10. One may define parallel proceedings as litigation of the same dispute by the same parties in two or more courts. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 473 (3d ed. 1996) (emphasizing the overlap between parties and issues as a characteristic of parallel proceedings). Thus, for parallel proceedings to occur, two or more courts must decide that they possess jurisdiction, often a subject raised during the first round of dispositive motions. *See* Eugene J. Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479, 482 (1993). With jurisdiction established in both fora, judges must then decide whether to terminate one of the actions based on principles of abstention (forum non conveniens or comity) or robust assertions of primacy (antisuit injunctions). *See* Teitz, *supra* note 4, at 31-38. Assuming that both courts adhere to the general rule of allowing the parallel actions to continue, submissions on the merits will proceed in both venues until one court issues a final judgment, which may then serve to termi-

the threat of decentralized judicial settlement serves as an incentive to conclude agreements expressly providing for dispute settlement in a single forum, either through litigation or arbitration.[12]

Because they long served as the predominant venue for adjudication and, presumably, developed corresponding levels of expertise, one might understandably consider municipal courts as the natural choice for adjudicating commercial disputes.[13] While the assumption may remain valid for domestic controversies,[14] litigation in municipal courts entails serious drawbacks for parties to international transactions. For example, recourse to national judicial systems tends to confer strategic advantages on the local party.[15] Aside from the threat of parochial bias, which remains a problem in the United States and elsewhere,[16] hometown litigation allows local parties to engage their regular counsel,[17] employ familiar procedures,[18] present evidence and

nate the remaining action as res judicata. *See* Laker Airways Ltd. v. Sabena, Belg. World Airlines, 731 F.2d 909, 926-27 (D.C. Cir. 1984); BORN, *supra*, at 460, 472-73. Thus, if the parties pursue every opportunity to avoid and to terminate parallel proceedings and if courts follow the general rule allowing parallel proceedings, one can easily imagine parallel submissions on jurisdiction, *forum non conveniens*, antisuit injunctions, and the merits.

11. *See* BORN, *supra* note 1, at 8; BÜHRING-UHLE, *supra* note 7, at 20.

12. *See* BORN, *supra* note 1, at 4 (emphasizing the role of such contractual provisions in avoiding the threat of "parallel or multiplicitous litigation of the same dispute in two or more forums at the same time").

13. *See* REDFERN & HUNTER, *supra* note 8, at 22 (acknowledging the cogency of the view that "if parties wish a dispute to be decided in a binding way, they should normally have recourse to the established courts of law"). *See also* LEW ET AL., *supra* note 3, at 4, 17 (opining that the "most obvious *fora* for all disputes are national courts," which are "specifically established by the state to . . . determine all forms of dispute").

14. In "purely domestic" situations, disputing parties may be relatively more inclined to select litigation over arbitration. *See* REDFERN & HUNTER, *supra* note 8, at 26. However, even in this context, the choice may be "finely balanced" and may depend on the reputation of the particular court and the practices within specific industries. *See id.* (emphasizing the need to consider the reputations of judicial systems); ANDREW TWEEDDALE & KEREN TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES 39 (2005) (indicating that arbitration agreements have become standard for aviation agreements, construction contracts, engineering contracts, insurance contracts, and shipping contracts).

15. *See* BORN, *supra* note 1, at 6.

16. *See* Loewen Group, Inc. v. United States, 42 I.L.M. 811, 812, 821-22, 823, 829, 830, 833 (2003) [hereinafter Loewen Final Award] (involving an investment treaty dispute based on Mississippi state court proceedings, which the arbitral tribunal called a "disgrace" because the trial judge "repeatedly" permitted "extensive irrelevant and highly prejudicial" references to a foreign investor's race and nationality). *See also* BÜHRING-UHLE, *supra* note 7, at 22-23; LEW ET AL., *supra* note 3, at 5; WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 6, 8 (1995); Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT'L L.J. 138, 163 (2007).

17. REDFERN & HUNTER, *supra* note 8 at 22. *See also* BÜHRING-UHLE, *supra* note 7, at 23.

18. *See id*.

arguments in their native languages,[19] and appear before judges who share their business and legal culture.[20] As a result, local parties may reap advantages bearing little relation to the merits of the case.

While one might level the playing field by providing for litigation in a third state,[21] that approach can lead to neutrality of the worst kind, placing the disputing parties in equally bad positions: denying them both the opportunity to engage their regular counsel, to employ familiar procedures, to use their native languages, or to appear before decision-makers accustomed to their business and legal cultures. Furthermore, the judicial procedures of third states may not be well designed for international commercial disputes,[22] the judges may lack relevant expertise,[23] and their judgments will not enjoy worldwide enforcement in summary proceedings.[24]

As practiced today, international commercial arbitration eliminates many of the drawbacks associated with hometown litigation.[25] For example, while parties from developing states might complain about the supposedly Western orientation of major arbitration institutions,[26] one probably cannot accuse them of the strong parochial biases often embedded in national judicial systems. To the extent that parties from developing states remain concerned about the cultural orientation of major arbitration institutions, they may insist on *ad hoc* arbitration under the UNCITRAL Arbitration Rules, approved by the United Nations General Assembly,[27] in which developing, non-Western states enjoy a preponderant voice. In addition, the increas-

19. *Id*.

20. *See* REDFERN & HUNTER, *supra* note 8, at 22.

21. *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10-12 (1972); BORN, *supra* note 1, at 3; BÜHRING-UHLE, *supra* note 7, at 23; PARK, *supra* note 16, at 14.

22. BORN, *supra* note 1, at 9; REDFERN & HUNTER, *supra* note 8, at 22, 26.

23. BORN, *supra* note 1, at 9; LEW ET AL., *supra* note 3, at 5; REDFERN & HUNTER, *supra* note 8, at 26.

24. As noted by most standard texts, there are few regional treaties and no global treaties requiring enforcement of foreign judgments. BORN, *supra* note 1, at 13, 105-06; COE, *supra* note 4, at 61; REDFERN & HUNTER, *supra* note 8, at 23. Although the Hague Conference on Private International Law adopted a Convention on Choice of Court Agreements, which would require enforcement of judgments rendered by courts selected by contractual agreement in international commercial disputes, only one state has acceded to that instrument, which has not entered into force. *See* Convention on Choice of Court Agreements (2005), http://www.hcch.net/index_en.php?act= conventions.text&cid=98.

25. *See* PARK, *supra* note 16, at 15.

26. *See* BORN, *supra* note 5, at 7; REDFERN & HUNTER, *supra* note 8, at 196.

27. G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976), *available at* http://www.uncitr-al.org. *See also* BORN, *supra* note 1, at 56.

ing harmonization of international arbitration rules[28] and laws[29] means that all parties can reap the benefits of familiar procedures specifically designed for international commercial disputes. Furthermore, those instruments generally allow parties to employ their regular counsel without regard to bar membership at the place of arbitration.[30] Finally, the opportunity to appoint an arbitrator, and the New York Convention's widespread ratification help to ensure that tribunal members will have relevant expertise,[31] that they will collectively appreciate the business and legal cultures of the disputing parties,[32] and that their awards can be enforced in summary proceedings under uniform standards from "Albania to Zimbabwe."[33] Thus, because it combines neutrality with high levels of convenience for both parties, and because it promotes finality through worldwide guarantees of enforcement,[34] arbitration has eclipsed judicial settlement as the predominant means of adjudicating international commercial disputes.[35]

Given the pronounced shift towards arbitration, one often forgets that the process has substantial limitations,[36] including a conspicuous vulnerability to sabotage.[37] Thus, because arbitration depends on the consent of the parties,[38] unwilling respondents may disrupt the process simply by withholding cooperation. For example, they may not respond to demands for arbitration.[39] They may contest

28. *See* JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW 46 (1999); REDFERN & HUNTER, *supra* note 8, at 47; TWEEDDALE & TWEEDDALE, *supra* note 14, at 39. *See also* BORN, *supra* note 5, at 39.

29. TWEEDDALE & TWEEDDALE, *supra* note 14, at 39. *See also* BORN, *supra* note 5, at 37-38.

30. LEW ET AL., *supra* note 3, at 542; REDFERN & HUNTER, *supra* note 8, at 472.

31. BORN, *supra* note 1, at 9; LEW ET AL., *supra* note 3, at 8; REDFERN & HUNTER, *supra* note 8, at 22.

32. *See* BÜHRING-UHLE, *supra* note 7, at 84; LEW ET AL., *supra* note 3, at 7.

33. LEW ET AL., *supra* note 3, at 693-94. *See also* COE, *supra* note 4, at 61 (emphasizing the convention's "wide acceptance" and the consequent standardization of the "general approach taken to foreign arbitral awards by contracting states").

34. *See* LEW ET AL., *supra* note 3, at 6-7; REDFERN & HUNTER, *supra* note 8, at 22-23, 25-26.

35. *See* BÜHRING-UHLE, *supra* note 7, at 37, 38; REDFERN & HUNTER, *supra* note 8, at 1; TWEEDDALE & TWEEDDALE, *supra* note 14, at 39.

36. *See* REDFERN & HUNTER, *supra* note 8, at 26 (suggesting that the strong shift towards arbitration has resulted in fewer critical examinations of that processes).

37. *See id.* at 288 (observing that "delay and disruption became important issues in international commercial arbitration" during the final two decades of the twentieth century).

38. TWEEDDALE & TWEEDDALE, *supra* note 14, at 41.

39. BORN, *supra* note 5, at 184; BÜHRING-UHLE, *supra* note 7, at 149.

the validity of arbitration agreements.[40] They may refuse to appoint their own arbitrators.[41] They may challenge the independence or impartiality of other tribunal members.[42] They may object to the tribunals' jurisdiction over some or all components of the disputes.[43] Finally, they may not voluntarily satisfy awards.[44] Barring outside intervention, any one of these steps could obstruct the arbitral process and transform it into a pointless exercise. As a safeguard against that misfortune, however, modern arbitration statutes empower national courts to prevent collapse by enforcing arbitration agreements,[45] appointing arbitrators,[46] deciding challenges,[47] reviewing jurisdictional decisions,[48] and enforcing awards.[49] Thus, judicial assistance supplies the coercion needed to guarantee arbitration's long-term viability as the preferred means of adjudicating international commercial disputes.[50]

II. DISPUTES AMONG STATES UNDER PUBLIC INTERNATIONAL LAW: FROM ARBITRATION TO JUDICIAL SETTLEMENT

For inter-state disputes involving sovereign activities and the application of public international law, arbitration represents a logical starting point in the sense that it preceded judicial settlement and remained the normal means of adjudication until well into the twentieth

40. BORN, *supra* note 5, at 184.

41. BÜHRING-UHLE, *supra* note 7, at 149.

42. BORN, *supra* note 5, at 67; BÜHRING-UHLE, *supra* note 7, at 149.

43. BORN, *supra* note 5, at 382-83, 384.

44. *See* TWEEDDALE & TWEEDDALE, *supra* note 14, at 407 (recognizing that an award "is no more than a piece of paper" that "does not guarantee payment from the other party").

45. *See, e.g.*, Model Law on International Commercial Arbitration of the U.N. Commission on International Trade Law, G.A. Res. 40/72, art. 8, U.N. GAOR 40th Sess., Supp. No. 53, at 308, U.N. Doc. A/40/53 (Dec. 11, 1985) [hereinafter UNCITRAL Model Law]. *See also* REDFERN & HUNTER, *supra* note 8, at 331.

46. *See, e.g.*, UNCITRAL Model Law, *supra* note 45, art. 11. *See also* LEW ET AL., *supra* note 3, at 241-44; REDFERN & HUNTER, *supra* note 8, at 331.

47. *See, e.g.*, UNCITRAL Model Law, *supra* note 45, art. 13(3). *See also* LEW ET AL., *supra* note 3, at 310-13; REDFERN & HUNTER, *supra* note 8, at 331.

48. *See, e.g.*, UNCITRAL Model Law, *supra* note 45, art. 16(3). *See also* LEW ET AL., *supra* note 3, at 337-39; REDFERN & HUNTER, *supra* note 8, at 332.

49. *See, e.g.*, UNCITRAL Model Law, *supra* note 45, art. 35. *See also* REDFERN & HUNTER, *supra* note 8, at 349-56, 431, 432-34.

50. *See* REDFERN & HUNTER, *supra* note 8, at 328 (emphasizing that arbitration remains "wholly dependent on the underlying support of the courts who alone have the power to rescue the system when one party seeks to sabotage it").

century.[51] Nevertheless, the modern history of inter-state adjudication reveals a steady shift from arbitration towards judicial settlement. In recounting this transition, one may identify four landmarks, each of which reflects the crystallization of a new stage: (1) the formation of quasi-diplomatic joint commissions under the Jay Treaty of 1794; (2) the establishment of an independent and impartial tribunal to resolve the *Alabama Claims* in 1871; (3) the harmonization of procedural rules following inauguration of the Permanent Court of Arbitration by the Hague Peace Conferences of 1899 and 1907; and (4) the consistent development of substantive international law following establishment of a truly Permanent Court of International Justice (PCIJ) and an International Court of Justice (ICJ) after the First and Second World Wars.[52]

A. The Jay Treaty Commissions: The Quasi-Diplomatic Practice of Arbitration

Virtually all writers trace the modern history of international tribunals to the General Treaty of Friendship, Commerce and Navigation between the United States and Great Britain, commonly known as the Jay Treaty of November 19, 1794.[53] Seeking to resolve a num-

51. Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919, 922 (1999); Gray & Kingsbury, *supra* note 2, at 102.

52. *See* MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS: PAST AND FUTURE 3 (1944).

53. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty]. *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 672 (6th ed. 2003); COLLIER & LOWE, *supra* note 28, at 32; THOMAS M. FRANCK, JUDGING THE WORLD COURT 13 (1986); WARREN F. KUEHL, SEEKING WORLD ORDER 23 (1969); HOWARD N. MEYER, THE WORLD COURT IN ACTION 2 (2002); JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO, at vii, 191 (1929) [hereinafter RALSTON, ATHENS TO LOCARNO]; JACKSON H. RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS, at xxvi (rev. ed. 1926) [hereinafter RALSTON, LAW AND PROCEDURE]; ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 2 (6th ed., Terry D. Gill ed., 2003) [hereinafter ROSENNE'S THE WORLD COURT]; 1 JAMES BROWN SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, at 210, 224 (1909) [hereinafter SCOTT, THE HAGUE PEACE CONFERENCES]; MALCOLM N. SHAW, INTERNATIONAL LAW 952 (5th ed. 2003); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 118 (1998); Gray & Kingsbury, *supra* note 2, at 97; Mark W. Janis, *The International Court*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 13, 14 (Mark W. Janis ed., 1992); Richard B. Lillich, *The Jay Treaty Commissions*, 37 ST. JOHN'S L. REV. 260, 261-62 (1963); John Bassett Moore, *The Organization of the Permanent Court of International Justice*, 22 COLUM. L. REV. 497, 497-98 (1922); Robert Pietrowski, *Evidence in International Arbitration*, 22 ARB. INT'L 373, 376 (2006); M.C.W. Pinto, *The Prospects for International Arbitration: Inter-State Disputes*, *in* INTERNATIONAL ARBITRATION: PAST AND PROSPECTS 63, 66 (A.H.A. Soons ed., 1990); Georg Schwarzenberger, *Present-Day Relevance of the* Jay Treaty *Arbitrations*, 53 NOTRE DAME L. REV. 715, 715 (1978); Bette Shifman, *The Per-*

ber of differences left outstanding after the War of Independence,[54] that instrument established three arbitral commissions,[55] whose membership consisted exclusively of U.S. citizens and British subjects.[56]

The first commission, established under Article V of the Jay Treaty, had the task of identifying the location of the St. Croix River, designated as the northeast boundary of the United States in the treaty ending the War of Independence.[57] While the mandate appears relatively simple, the drafters of the earlier treaty lacked personal knowledge of that "largely unsurveyed" region,[58] relied on an inaccurate map,[59] referred to the name of a river unknown to contemporary inhabitants of that region,[60] and left no record by which one might have ascertained the river they intended to designate as the border of the United States.[61] Notwithstanding the difficulties that it confronted, the first commission had the fortune to reach a unanimous decision.[62]

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manent Court of Arbitration: An Overview, *in* THE HAGUE: LEGAL CAPITAL OF THE WORLD 128, 128 (Peter J. van Krieken & David McKay eds., 2005); Stephen W. Schwebel, *The Reality of International Adjudication and Arbitration*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 359, 363 (2004); L. B. Sohn, *International Arbitration in Historical Perspective: Past and Present*, *in* INTERNATIONAL ARBITRATION: PAST AND PROSPECTS, *supra* at 9, 11; Draft of a Memorandum Approved by U.S. Sec'y of State Philander C. Knox, proposing the Establishment of the Court of Arbitral Justice recommended by the Second Hague Peace Conference of 1907 (Nov. 25, 1912) [hereinafter Knox Memorandum], *reprinted in* JAMES BROWN SCOTT, AN INTERNATIONAL COURT OF JUSTICE 6, 6 (1916) [hereinafter SCOTT, AN INTERNATIONAL COURT OF JUSTICE].

54. J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION 1 (1959); ROSENNE'S THE WORLD COURT, *supra* note 53, at 2; Janis, *supra* note 53, at 14; Shifman, *supra* note 53, at 128.

55. HUDSON, *supra* note 52, at 3; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 191.

56. HUDSON, *supra* note 52, at 3; J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 89 (3d ed. 1998); ROSENNE'S THE WORLD COURT, *supra* note 53, at 2; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 218-19; Gray & Kingsbury, *supra* note 2, at 105.

57. 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 563, at 116 (1922); 1 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 5-6 (1898); ROBERT C. MORRIS, INTERNATIONAL ARBITRATION AND PROCEDURE 42-45 (1911); RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 191; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxvi; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 216; SIMPSON & FOX, *supra* note 54, at 1; Lillich, *supra* note 53, at 266; Schwarzenberger, *supra* note 53, at 720.

58. PHILIP C. JESSUP, THE PRICE OF INTERNATIONAL JUSTICE 26 (1971); MOORE, *supra* note 56, at 1-2; MORRIS, *supra* note 57, at 41.

59. MOORE, *supra* note 57, at 2; MORRIS, *supra* note 57, at 41.

60. MOORE, *supra* note 57, at 3; MORRIS, *supra* note 57, at 42.

61. MOORE, *supra* note 57, at 2, 24; MORRIS, *supra* note 57, at 41, 44.

62. HUDSON, *supra* note 52, at 3; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 191; SIMPSON & FOX, *supra* note 54, at 1; Pinto, *supra* note 53, at 66.

The second commission, established under Article VI, faced the task of resolving claims by British merchants for debts incurred by U.S. citizens,[63] which remained outstanding due to legal impediments imposed by former colonies during the War of Independence.[64] After the claims proved much larger than expected by the United States[65] and thus increased the stakes beyond a comfortable scale, doctrinal[66] and interpersonal[67] quarrels broke out among commissioners, causing the American members to withdraw,[68] thereby bringing a halt to the proceedings in July 1799.[69] Three years later, the United States settled the remaining claims of British merchants by treaty for $2,664,000.[70]

The third arbitral commission, established under Article VII, faced the task of settling the claims of U.S. citizens for losses resulting from British detention or condemnation of ships and cargo bound for French ports during a period of armed conflict between Britain and France.[71] During the course of its proceedings, the third commission confronted difficult questions regarding the scope of its jurisdiction[72]

63. MOORE, *supra* note 57, at 271-76; MORRIS, *supra* note 57, at 62.

64. RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 191; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxvi; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 216; SIMPSON & FOX, *supra* note 54, at 1-2; Lillich, *supra* note 53, at 270-71.

65. MOORE, *supra* note 57, at 286, 288.

66. *Id.* at 283-85, 287, 288-91. *See also* MORRIS, *supra* note 57, at 62; Lillich, *supra* note 53, at 272-73.

67. MOORE, *supra* note 57, at 293; MORRIS, *supra* note 57, at 62-63; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 216-17; Lillich, *supra* note 53, at 274, 275; Pinto, *supra* note 53, at 67.

68. MOORE, *supra* note 57, at 292; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 192; Lillich, *supra* note 53, at 273-74.

69. MOORE, *supra* note 57, at 290-92; MORRIS, *supra* note 57, at 62; SIMPSON & FOX, *supra* note 54, at 2. *See also* HUDSON, *supra* note 52, at 3; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxvi.

70. JESSUP, *supra* note 58, at 26; MOORE, *supra* note 57, at 298. *See also* HUDSON, *supra* note 52, at 3; MORRIS, *supra* note 57, at 63; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxvi; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 217; SIMPSON & FOX, *supra* note 54, at 2; David J. Bederman, *The Glorious Past and Uncertain Future of International Claims Tribunals*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY, *supra* note 53, at 161, 164; Lillich, *supra* note 53, at 274-75.

71. Jay Treaty, *supra* note 53, art. VII. *See also* MOORE, *supra* note 57, at 299-310; MORRIS, *supra* note 57, at 60; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 192; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxvi; SIMPSON & FOX, *supra* note 54, at 2; Lillich, *supra* note 53, at 276.

72. MOORE, *supra* note 57, at 324; MORRIS, *supra* note 57, at 61; Lillich, *supra* note 53, at 277-78.

and the exhaustion of local remedies.[73] On two occasions, withdrawal of the British commissioners forced the tribunal to suspend its proceedings.[74] Despite these setbacks, the commission eventually resumed its work[75] and, in the course of eight years,[76] rendered over 530 awards in favor of U.S. claimants,[77] who received some $11,650,000 in compensation.[78]

The significance of the Jay Treaty commissions lies in their revival of arbitration,[79] which had fallen into disuse during at least one,[80] or more centuries,[81] of European conflicts over religion, territory, and the consolidation of nation-states.[82] Furthermore, departing from the tradition of arbitration by monarchs and ecclesiastical figures who

73. MOORE, *supra* note 57, at 332-33; Lillich, *supra* note 53, at 278-79.

74. MOORE, *supra* note 57, at 324, 337-39; Lillich, *supra* note 53, at 277-78, 279; Pinto, *supra* note 53, at 67.

75. MOORE, *supra* note 57, at 332, 339; Lillich, *supra* note 53, at 277-78, 279-80.

76. RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxvi.

77. *See* HUDSON, *supra* note 52, at 3 (553 awards); MOORE, *supra* note 57, at 342-43 (553 awards); Bederman, *supra* note 70, at 164, 167 (536 awards); Janis, *supra* note 53, at 14 (536 awards).

78. JESSUP, *supra* note 58, at 25; MOORE, *supra* note 57, at 343-44; MORRIS, *supra* note 57, at 60-61; Lillich, *supra* note 53, at 280. *See also* RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxvi (mentioning the award of "a net sum considerably in excess of $11,000,000").

79. HUDSON, *supra* note 52, at 3; KUEHL, *supra* note 53, at 23; 1 JOHN BASSETT MOORE, INTERNATIONAL ADJUDICATIONS, at x (1929); MEYER, *supra* note 53, at 3; REDFERN & HUNTER, *supra* note 8, at 63; JAMES BROWN SCOTT, THE JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 47 (1927); SIMPSON & FOX, *supra* note 54, at 1; David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 9 (2000); Lillich, *supra* note 53, at 261; Moore, *supra* note 53, at 497-98; C.G. Roelofsen, *"The Jay Treaty and All That"; Some Remarks on the Role of Arbitration in European Modern History and Its "Revival" in 1794*, *in* INTERNATIONAL ARBITRATION: PAST AND PROSPECTS, *supra* note 53, at 201, 201; Memorandum accompanying Letter from James Brown Scott, Director, Division of International Law, Carnegie Endowment for International Peace, to H.E. Jonkheer J. Loudon, Minister of Foreign Affairs, The Netherlands (Jan. 12, 1914) [hereinafter Scott Memorandum], *reprinted in* SCOTT, AN INTERNATIONAL COURT OF JUSTICE, *supra* note 53, at 25, 26.

80. HUDSON, *supra* note 52, at 3; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 210; SIMPSON & FOX, *supra* note 54, at 1.

81. MOORE, *supra* note 79, at x; MORRIS, *supra* note 57, at 14-15; MEYER, *supra* note 53, at 3; Abi-Saab, *supra* note 51, at 921; Geoffrey Best, *Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After*, 75 INT'L AFF. 619, 628 (1999); Moore, *supra* note 53, at 497; William L. Penfield, *International Arbitration*, 1 AM. J. INT'L L. 330, 337 (1907); Scott Memorandum, *supra* note 79, at 26 n.1.

82. *See* MOORE, *supra* note 79, at x; MORRIS, *supra* note 57, at 14. *See also* REDFERN & HUNTER, *supra* note 8, at 63 (observing that arbitration "fell into disuse with the rise of the modern state").

stated no reasons for their awards,[83] the Jay Treaty afforded the first prominent example of arbitration by collegial tribunals issuing reasoned awards based on the application of legal principles.[84] Finally, the Jay Treaty extended the use of arbitration beyond the traditional scope of territorial disputes to include the resolution of numerous claims involving injuries to aliens under the law of state responsibility.[85]

While not detracting from their significance, the Jay Treaty arbitrations also illustrate the ways in which the membership of the commissions and their rules of procedure led to a combination of legal proceedings and diplomatic negotiations, with a heavy emphasis on the latter. For example, one should recall that the Jay Treaty led to establishment of commissions drawn exclusively from citizens of the disputing parties.[86] Understanding that they served in a representative capacity,[87] commission members tended to view their mandates as

83. Observers frequently mention the practice of certain European polities, during the Middle Ages, of submitting their disputes to arbitration by the Pope, the Holy Roman Emperor, or other sovereigns. *See, e.g.*, ANTONIO SANCHEZ DE BUSTAMANTE, THE WORLD COURT 3 (Elizabeth F. Read trans., 1925); HUDSON, *supra* note 52, at 17; MERRILLS, *supra* note 56, at 89; MORRIS, *supra* note 57, at 7-12; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 55, 174, 181-82; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxv; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 200-10; Gray & Kingsbury, *supra* note 2, at 97 n.1; Manfred Lachs, *The Development and General Trends of International Law in Our Time*, 169 RECUEIL DES COURS 9, 224 (1980). Unwilling to expose the sufficiency of their analysis to outside critique, the Pope, the Holy Roman Emperor and other sovereign arbitrators typically provided no reasons for their decisions, thus casting doubt on the legal basis for their awards. *See* MERRILLS, *supra* note 56, at 89; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 55, 91-92; Abi-Saab, *supra* note 51, at 921-22.

84. *See* Schwarzenberger, *supra* note 53, at 716, 724 (using the Jay Treaty arbitrations to mark the point at which "international judicial organs" received the entitlement to "settle international disputes on the basis of international law," and opining that the awards rendered by two of the commissions achieved an "impressive" level of quality); Shifman, *supra* note 53, at 128-29 (observing that the Jay Treaty "was a milestone because it showed that quasi-judicial procedures applying international legal principles could be used to settle disputes between nations").

85. *See* Charney, *supra* note 53, at 118 (concluding that the awards issued under Article VII of the Jay Treaty "played an important role in the development of State Responsibility law").

86. *See supra* note 56 and accompanying text.

87. *See* HUDSON, *supra* note 52, at 19 (explaining that the practice of appointing nationals to joint commissions conferred a "representative capacity" on tribunal members); RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 57 (emphasizing that mixed tribunal members "were apt to regard themselves and be regarded by others as simply the representatives of the nations in dispute and therefore serving in no judicial function"). *See also* Schwarzenberger, *supra* note 53, at 726 (opining that the legal opinions of members from two Jay Treaty commissions "were determined by their . . . views on the national interests of their own countries").

an extension of diplomacy.[88] Furthermore, while the membership of commissions inclined the process towards negotiation of acceptable outcomes,[89] their rules of procedure reinforced that orientation. For example, Articles VI and VII empowered their respective commissions to render decisions by majority vote, but required the presence of at least one party-appointed member from each side to conduct business.[90] Under these circumstances, the party-appointed members from either side held a collective veto, which they could exercise by withdrawing and bringing the proceedings to a temporary or permanent halt.[91] Needless to say, this arrangement encouraged a "high-level of consensus-seeking" among tribunal members.[92] Thus, although they rendered awards founded on legal principles,[93] these joint commissions worked best when their members blended the functions of judges and negotiators, reconciling the demands of justice with the expediency of compromise.[94]

88. *See* MERRILLS, *supra* note 56, at 89 (indicating that these "early Anglo-American commissions were not judicial tribunals in the modern sense, but were supposed to blend juridical with diplomatic considerations to produce . . . a negotiated settlement"); ROSENNE'S THE WORLD COURT, *supra* note 53, at 2 (opining that the composition of the Jay Treaty commissions contradicted "any idea of third-party settlement," and describing the proceedings as more "diplomatic . . . than judicial in character"). *See also* COLLIER & LOWE, *supra* note 28, at 226 (explaining that in "the early days of arbitration . . . arbitrators were regarded as exercising an essentially diplomatic function"); RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 22-23 (noting that mixed commissions tend to "recall their diplomatic origin and strive always to make a bargain between the opposite pretensions of the parties" (quoting SLAVCO STOYKOVITCH, DE L'AUTORITE DE LA SENTENCE ARBITRALE EN DROIT INTERNATIONAL PUBLIC 6 (1924)); R. Y. Hedges, *The Juridical Basis of Arbitration*, 1926 BRIT. Y.B. INT'L L. 110, 113 (asserting that during the first half of the nineteenth century, "arbitration was largely of a diplomatic character," meaning that tribunals based their awards on "calculations of national interest rather than on a true balance of arguments").

89. *See* Gray & Kingsbury, *supra* note 2, at 106 (suggesting that "tribunals with a majority of national arbitrators are more likely to turn to compromise, whereas tribunals composed of non-national arbitrators are likely to operate strictly on the basis of law"); Scott Memorandum, *supra* note 79, at 28 (asserting that "the practice of arbitration since the negotiation of the Jay treaty in 1794" has led many to conclude that "arbitration is too often synonymous with compromise; that it is 'an adjustment' of difficulties rather than 'a judicial decision' of controversies").

90. *See* Jay Treaty, *supra* note 53, art. VI (collection of pre-war debts), art. VII (unlawful seizures of ships and cargoes).

91. *See supra* notes 68-69, 74-75 and accompanying text.

92. *See* Bederman, *supra* note 70, at 164.

93. COLLIER & LOWE, *supra* note 28, at 32; ROSENNE'S THE WORLD COURT, *supra* note 53, at 2. *See also* RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 56 (recognizing that one of the commissions' "decisions were generally just and always well-fortified by reasoning").

94. SIMPSON & FOX, *supra* note 54, at 3. *See also* Lillich, *supra* note 53, at 280-81; Pinto, *supra* note 53, at 71.

B. The Alabama Claims: Arbitration Becomes a Judicial Process

Despite the Jay Treaty's revival of arbitration, many writers regard the *Alabama Claims* as the greatest arbitration in modern history.[95] Commenced under the Treaty of Washington of May 8, 1871,[96] that arbitration famously sought to resolve an accumulation of claims alleging British violations of neutrality involving the construction of armed vessels for the Confederacy during the American Civil War.[97] While it sounds almost incredible to the modern ear, the volatile mix of British actions and U.S. recriminations brought the two states closer to the brink of war than at any time since 1814.[98]

After years of unsuccessful efforts to negotiate a rapprochement,[99] the United States and Great Britain agreed to submit the *Ala-*

95. *See, e.g.*, BUSTAMANTE, *supra* note 83, at 51; ADRIAN COOK, THE ALABAMA CLAIMS 9 (1975); H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 9 (1933); MORRIS, *supra* note 57, at 60; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 197; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxvii; ROSENNE'S THE WORLD COURT, *supra* note 53, at 2; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 241; Best, *supra* note 81, at 629; Janis, *supra* note 53, at 14; Schwebel, *supra* note 53, at 364. *See also* Abi-Saab, *supra* note 51, at 922 (describing the *Alabama Claims* as the "real beginning of modern international arbitration, in the technical sense").

96. Treaty between the United States and Great Britain. Claims, Fisheries, Navigation of the St. Lawrence, & c.; American Lumber on the River St. John; Boundary, U.S.-Gr. Brit., May 8, 1871, 17 Stat. 863 [hereinafter Treaty of Washington]. *See also* HUDSON, *supra* note 52, at 5.

97. COLLIER & LOWE, *supra* note 28, at 32; HUDSON, *supra* note 52, at 5; HYDE, *supra* note 57, § 564, at 120; JESSUP, *supra* note 58, at 2; MOORE, *supra* note 57, at 495-96; MORRIS, *supra* note 57, at 74; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 197; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxvii; REDFERN & HUNTER, *supra* note 8, at 63; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 241; SIMPSON & FOX, *supra* note 54, at 8; Caron, *supra* note 79, at 9; Janis, *supra* note 53, at 14; Stephen M. Schwebel, *The Performance and Prospects of the World Court*, 6 PACE INT'L L. REV. 253, 254 (1994).

98. *See* Moore, *supra* note 53, at 495. *See also* Cook, *supra* note 95, at 19; FRANK WARREN HACKETT, REMINISCENCES OF THE GENEVA TRIBUNAL OF ARBITRATION 1872: THE ALABAMA CLAIMS 18 (1911); Meyer, *supra* note 53, at 1; Schwebel, *supra* note 97, at 254. In fact, there had been a "widespread" fear that "Union victory would be followed by a war of revenge against Britain." Cook, *supra* note 95, at 29. *See also* Meyer, *supra* note 53, at 2 (quoting Lincoln's Secretary of the Navy for the proposition that "the English . . . are more apprehensive of war than they are willing to confess, and hostilities may be nearer than our people suppose").

99. When the U.S. minister to London made a conciliatory proposal to arbitrate the *Alabama Claims* in 1863, the British foreign minister waited nearly two years before replying that "Her Majesty's Government [were] the sole guardians of their own honor" and that he viewed the proposal as incompatible with the "dignity and character of the British Crown." *See* JESSUP, *supra* note 58, at 3; MOORE, *supra* note 57, at 496. In 1868, the new U.S. minister to London negotiated a plan to arbitrate the *Alabama Claims*. MOORE, *supra* note 57, at 501-04. *See also* COOK, *supra* note 95, at 51-61. Following an intemperate speech by the chair of its Foreign Relations Committee, the Senate rejected the treaty by a vote of 44 to 1. *See* COOK, *supra* note 95, at 95, 99 (describing the speech as a "dangerously exaggerated and unbalanced piece of work," which dragged the dispute "back into the hysterical atmosphere of the war years"); Tom Bing-

bama Claims to arbitration before a tribunal of five jurists, one each to be appointed by the President of the United States, the Queen of England, the King of Italy, the President of the Swiss Confederation, and the Emperor of Brazil.[100] After conducting hearings in Geneva during the summer of 1872, the tribunal rendered an award in favor of the United States in the amount of $15,500,000,[101] an enormous sum by prevailing standards.[102] Although its party-appointed arbitrator submitted a lengthy and vitriolic dissent,[103] the British government fully, if ironically, satisfied the award by tendering bonds issued by the U.S. government to finance its expenses during the Civil War.[104]

Reviewing its significance, many writers emphasize that the *Alabama Claims* arbitration removed a cause of war[105] between two great powers[106] with a history of difficult relations,[107] thus proving that arbi-

ham, *The Alabama Claims Arbitration*, 54 INT'L & COMP. L.Q. 1, 12 (2005) (indicating that the speaker "used his customary rhetoric and invective to savage the convention"); *The Geneva Arbitration, and Its Results*, 7 AM. L. REV. 193, 213 (1873) (opining that the speaker "expressed his convictions in a tone of exaggeration which is not common in the public acts of statesmen"). *See also* MOORE, *supra* note 57, at 508; Bingham, *supra*, at 13 (describing the overwhelming vote against the draft treaty).

100. Treaty of Washington, *supra* note 96, art. I; COOK, *supra* note 95, at 185; CALEB CUSHING, THE TREATY OF WASHINGTON 22 (1873); HUDSON, *supra* note 52, at 5; MOORE, *supra* note 57, at 548, 557; MORRIS, *supra* note 57, at 74; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 56, 197-98; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxvii; Janis, *supra* note 53, at 14.

101. CUSHING, *supra* note 100, at 163; HACKETT, *supra* note 98, at 341-47; HYDE, *supra* note 57, § 564, at 121; JESSUP, *supra* note 58, at 23-24; MOORE, *supra* note 57, at 658-59; MORRIS, *supra* note 57, at 75; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 200; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxvii; Best, *supra* note 81, at 629; Bingham, *supra* note 99, at 1; Janis, *supra* note 53, at 14.

102. Converted directly into real dollars, that amount exceeds $300 million. Bingham, *supra* note 99, at 1. Stated as a proportion of the British government's annual budget (approximately 5 percent), the modern equivalent approaches $300 billion. *See id.*

103. CUSHING, *supra* note 100, at 128-30; HACKETT, *supra* note 98, at 356-57; MOORE, *supra* note 57, at 652, 659-61; Bingham, *supra* note 99, at 22-23; *The Geneva Arbitration, and Its Results*, *supra* note 99, at 233-34.

104. MOORE, *supra* note 57, at 665-66; Bingham, *supra* note 99, at 23. *See also* JESSUP, *supra* note 58, at 24-25.

105. THOMAS BALCH, INTERNATIONAL COURTS OF ARBITRATION 24-25, 31-32 (4th ed. 1912); SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 319.

106. *Compare* COOK, *supra* note 95, at 9 (describing the Union's army as the largest "in the history of the world"), *and* CUSHING, *supra* note 100, at 17 (emphasizing that "[w]e had on the sea hundreds of ships of war or of transport; we had on land hundreds of thousands of veteran soldiers under arms; we had officers of land and sea, the combatants in a hundred battles"), *with* Bingham, *supra* note 99, at 24 (describing Great Britain as "the world's leading nation, in the plentitude of its power," at the relevant time).

tration could resolve controversies of the first order.[108] More importantly for the development of international tribunals, Great Britain and the United States did not merely resort to arbitration; they altered its character. Instead of establishing a quasi-diplomatic joint commission, the disputing parties consented for the first time in history[109] to arbitration before a panel of jurists appointed mostly by neutral governments, charged with a mandate to apply specific legal rules, and having the capacity to transact business by majority vote.[110] In so doing, they marked a turning point in the development of international adjudication:[111] from then on, the trajectory of arbitration shifted decisively towards a judicial model.[112]

107. In less than a century before the American Civil War, the United States and Great Britain had fought each other in two major wars. MEYER, *supra* note 53, at 1; Bingham, *supra* note 99, at 1.

108. CUSHING, *supra* note 100, at 185-86; MICHAEL DUNNE, THE UNITED STATES AND THE WORLD COURT, 1920-1935, at 11-12 (1988); HYDE, *supra* note 57, § 564, at 121; ROSENNE'S THE WORLD COURT, *supra* note 53, at 3; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 242 (quoting Professor Moore); Janis, *supra* note 53, at 15. *But see* Caron, *supra* note 79, at 9 (opining that the *Alabama Claims* arbitration "was somewhat exaggeratedly credited with defusing the potential conflict between the United States and Great Britain").

Because the three substantive rules on neutrality set forth in the Treaty of Washington essentially determined the question of liability in the *Alabama Claims*, one may say that the United States and Great Britain actually settled that issue by negotiation. *See* HUDSON, *supra* note 52, at 106; LAUTERPACHT, *supra* note 95, at 151; J.L. Brierly, *The Judicial Settlement of International Disputes*, 4 J. BRIT. INST. INT'L AFF. 227, 227 (1925); Mr. Choate's Address on the Anglo-American Project of International Arbitration (Oct. 5, 1907) [hereinafter Choate's Address of Oct. 5, 1907], *reprinted in* AMERICAN ADDRESSES AT THE SECOND HAGUE PEACE CONFERENCE 44, 49 (James Brown Scott ed., 1910) [hereinafter AMERICAN ADDRESSES]. Thus, the arbitration served mainly to settle the amount of damages. RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 199.

109. *See* Bingham, *supra* note 99, at 24 (explaining the *Alabama Claims* arbitration's significance as involving "one of the very few instances in history when the world's leading nation . . . has agreed to submit an issue of great national moment to the decision of a body in which it could be, as it was, heavily outvoted"). *See also* RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 56, 197 (emphasizing the "distinctive" and "unusual" structure of the tribunal); SIMPSON & FOX, *supra* note 54, at 8 (describing the "new type of tribunal" constituted to hear the *Alabama Claims*).

110. Treaty of Washington, *supra* note 53, arts. I, II, VI; CRAWFORD MORRISON BISHOP, INTERNATIONAL ARBITRAL PROCEDURE 2 (1930); MERRILLS, *supra* note 56, at 91.

111. BISHOP, *supra* note 110, at 2; COLLIER & LOWE, *supra* note 28, at 32; MERRILLS, *supra* note 56, at 91. *See also* ROSENNE'S THE WORLD COURT, *supra* note 53, at 3 (opining that the significance of the *Alabama Claims* "lies in the nature of the tribunal").

112. *See* Hedges, *supra* note 88, at 113 (opining that "the judicial element of arbitration may be said to have taken root" following the *Alabama Claims* arbitration). *See also* BROWNLIE, *supra* note 53, at 672; COLLIER & LOWE, *supra* note 28, at 33; SIMPSON & FOX, *supra* note 54, at 10.

C. The Hague Peace Conferences: The PCA and Harmonization of Procedural Law

In 1899, Tsar Nicholas II of Russia convened the first Hague Peace Conference[113] with the objective of terminating or curtailing the European arms race,[114] which had assumed monumental proportions.[115] Since the proposal attracted little enthusiasm among European governments,[116] which depended on military power to perpetuate colonial empires,[117] Nicholas added arbitration to the conference's agenda,[118] which drew a more favorable response.[119]

113. David J. Bederman, *The Hague Peace Conferences of 1899 and 1907*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY, *supra* note 53, at 9, 9; Best, *supra* note 81, at 621; Janis, *supra* note 53, at 15; James Brown Scott, *The Work of the Second Hague Peace Conference*, 2 AM. J. INT'L L. 1, 8 (1908); Detlev F. Vagts, *The Hague Conventions and Arms Control*, 94 AM. J. INT'L L. 31, 33 (2000).

114. BUSTAMANTE, *supra* note 83, at 41; JOSEPH H. CHOATE, THE TWO HAGUE CONFERENCES 6 (1913); SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 42, 43; SCOTT, *supra* note 79, at 47-48; Bederman, *supra* note 113, at 9; Best, *supra* note 81, at 621; Amos S. Hershey, *Convention for the Peaceful Adjustment of International Differences*, 2 AM. J. INT'L L. 29, 29 (1908); Scott, *supra* note 113, at 8; Knox Memorandum, *supra* note 53, at 6. *See also* Message of the Czar, Aug. 24, 1898, *reprinted in* DOCUMENTS RELATING TO THE PROGRAM OF THE FIRST HAGUE PEACE CONFERENCE 1-2 (1921).

115. *See* Paul M. Kennedy, *The First World War and the International Power System*, INT'L SECURITY, Summer 1984, at 7, 7-8 (noting that the First World War was preceded by an "arms race of staggering proportions," during which "military expenditures more than doubled" in Germany and Austria-Hungary); Vagts, *supra* note 113, at 32 (describing the growing military budgets of major European powers from 1894 to 1913, including a 117 percent increase by Great Britain, a 91.5 percent increase by France, a 158 percent increase by Germany, and a 160 percent increase by Austria). *See also* GEORGE ELIAN, THE INTERNATIONAL COURT OF JUSTICE 15 (1971) (asserting that "after 1870, the arms race quadrupled the military expenses in the first ten great states in the world"); Best, *supra* note 81, at 621 (opining that "Europe was beginning to look like an armed camp"); Jörg Manfred Mössner, *Hague Peace Conferences of 1899 and 1907*, *in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 671, 671 (Rudolph Bernhardt ed., 1995) (observing that "[m]ilitary budgets increased enormously during the last decade of the 19th century").

116. KUEHL, *supra* note 53, at 44-45; SCOTT, *supra* note 79, at 47-48; Scott, *supra* note 113, at 8. *See also* Best, *supra* note 81, at 622 (recounting that "the chancelleries of Europe handled [the Tsar's invitation] like a parcel that might contain a bomb").

117. *See* Best, *supra* note 81, at 619.

118. BUSTAMANTE, *supra* note 83, at 41-42; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 44-46; SCOTT, *supra* note 79, at 48; Arthur Eyffinger, *Living Up to a Tradition*, *in* THE HAGUE: LEGAL CAPITAL OF THE WORLD, *supra* note 53, at 29, 36; Scott, *supra* note 113, at 8-9. *See also* Circular Note of Count Mouravieff to the Diplomatic Representatives Accredited to the Court at Petrograd ¶ 8 (Dec. 30, 1898), *reprinted in* DOCUMENTS RELATING TO THE PROGRAM OF THE FIRST HAGUE PEACE CONFERENCE, *supra* note 114, at 2, 3 [hereinafter Circular Note of Count Mouravieff].

119. *See* Scott, *supra* note 113, at 9 (observing that the provisions on arbitration described in the second circular were "much better received"). *See also Instructions to the American Delegates to the Hague Conference of 1899* [hereinafter *Instructions to the American Delegates in*

Because a "decided" worldwide movement already favored the creation of a permanent international tribunal,[120] which "could not be ignored,"[121] several delegations arrived in The Hague with instructions to make proposals on the topic.[122] For example, the United States favored a continuously sitting international court,[123] staffed by eminent jurists and modeled on the U.S. Supreme Court.[124] The British preferred a permanent institution without a fixed bench,[125] but with the capacity to establish tribunals quickly when disputes arose between states.[126] Russia added a plan to make arbitration mandatory for certain categories of disputes.[127] By contrast, Germany opposed most of the plans on practical grounds: unlike its potential adversaries, Germany could mobilize its army in a matter of days,[128] giving it an unmatched capacity to launch preemptive strikes.[129] Under these cir-

1899], *in* INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONFERENCES AND THEIR OFFICIAL REPORTS 6, 8 (James Brown Scott ed., 1916) [hereinafter INSTRUCTIONS TO THE AMERICAN DELEGATES] (expressing the opinion that the proposals regarding arbitration seemed to "open the most fruitful field for discussion and future action").

120. HUDSON, *supra* note 52, at 6. *See also* Caron, *supra* note 79, at 4 (referring to the "popular belief circulated at the end of the century that the establishment of a permanent international court would be an important step toward a world free of war").

121. HUDSON, *supra* note 52, at 6. *See also* SIMPSON & FOX, *supra* note 54, at 12 ("By the end of the nineteenth century, arbitration had become a widely spread international custom; and it was natural that its discussion should occupy a considerable place in the deliberations of the Hague Peace Conferences of 1899 and 1907.").

122. HUDSON, *supra* note 52, at 6; Caron, *supra* note 79, at 15.

123. BUSTAMANTE, *supra* note 83, at 43; MORRIS, *supra* note 57, at 137; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 72, 278; SCOTT, *supra* note 79, at 52-53; Caron, *supra* note 79, at 15, 17; *Instructions to the American Delegates in 1899*, *supra* note 119, at 14-16; *Report to the Secretary of State of the Delegates to the First Hague Conference* [hereinafter *Report of the Delegates to the First Hague Conference*], *in* INSTRUCTIONS TO THE AMERICAN DELEGATES, *supra* note 119, at 17, 22.

124. MORRIS, *supra* note 57, at 137; *Report of the Delegates to the First Hague Conference*, *supra* note 123, at 22.

125. BUSTAMANTE, *supra* note 83, at 43; FREDERICK W. HOLLS, THE PEACE CONFERENCE AT THE HAGUE 238 (1900); MORRIS, *supra* note 57, at 137; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 279; Caron, *supra* note 79, at 15.

126. BUSTAMANTE, *supra* note 83, at 42; HOLLIS, *supra* note 125, at 236; MORRIS, *supra* note 57, at 137; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 279; Hans Jonkman, *The Role of the Permanent Court of Arbitration in International Dispute Resolution*, 279 RECUEIL DES COURS 9, 18 (1999).

127. MORRIS, *supra* note 57, at 138; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 321-22; Caron, *supra* note 79, at 15-16; Hershey, *supra* note 114, at 32-33.

128. MORRIS, *supra* note 57, at 136; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 72-73 (quoting 2 ANDREW WHITE, AUTOBIOGRAPHY OF ANDREW DICKSON WHITE 265 (1905)); BARBARA W. TUCHMAN, THE PROUD TOWER 264 (1st Ballantine Books ed. 1996).

129. *See* MEYER, *supra* note 53, at 16. *See also* HOLLS, *supra* note 125, at 1, 5 (noting that German Chancellor Otto von Bismarck, who died just before the first Hague Peace Conference,

cumstances, Germany feared that potential targets would use the ponderous machinery of arbitration to buy time and, thus, neutralize Germany's military advantage.[130]

While some have claimed that German resistance abated,[131] thus permitting agreement on a Convention for the Pacific Settlement of International Disputes,[132] one might say that Germany relented only after it prevailed on the important points.[133] As adopted, the convention created no permanent international tribunal[134] and did not subject any category of dispute to mandatory arbitration.[135] Thus, while the convention established the so-called Permanent Court of Arbitration (PCA) in The Hague,[136] that institution does not represent a court in the traditional sense.[137] It has no fixed bench.[138] To the contrary, it

had pursued a policy of "consistent and continually increasing preparation for war . . . and the avowed determination to be ready to strike the first blow . . . with greater swiftness than any possible opponent").

130. MORRIS, *supra* note 57, at 136; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 73; TUCHMAN, *supra* note 128, at 264; Caron, *supra* note 79, at 16.

131. RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 256; Caron, *supra* note 79, at 16; Janis, *supra* note 53, at 15.

132. Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779 [hereinafter Hague Convention of 1899].

133. *See* SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 309 (describing the concessions made to Germany as "surrender" rather than "compromise").

134. Caron, *supra* note 79, at 16-18.

135. CHOATE, *supra* note 114, at 36; MORRIS, *supra* note 57, at 138-39; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 76-77, 310; Caron, *supra* note 79, at 16-17; Janis, *supra* note 53, at 16.

136. Hague Convention of 1899, *supra* note 132, art. 20.

137. ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 444 (2005); BROWNLIE, *supra* note 53, at 673; CHOATE, *supra* note 114, at 80; ALEXANDER P. FACHIRI, THE PERMANENT COURT OF INTERNATIONAL JUSTICE: ITS CONSTITUTION, PROCEDURE, AND WORK 22 (1925); KUEHL, *supra* note 53, at 46; MEYER, *supra* note 53, at 18; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxviii; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 281, 442; SHAW, *supra* note 53, at 953; William E. Butler, *The Hague Permanent Court of Arbitration*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY, *supra* note 53, at 43, 44; R. Floyd Clarke, *A Permanent Tribunal of International Arbitration: Its Necessity and Value*, 1 AM. J. INT'L L. 342, 343-44 (1907); Hershey, *supra* note 114, at 30; Manley O. Hudson, *The Permanent Court of Arbitration*, 27 AM. J. INT'L L. 440, 445 (1933); Moore, *supra* note 53, at 498; Scott, *supra* note 113, at 11; Louis B. Sohn, *The Function of International Arbitration Today*, 108 RECUEIL DES COURS 1, 22 (1963); Mr. Choate's Address on the American Project for a Permanent Court of Arbitral Justice (Aug. 1, 1907) [hereinafter Mr. Choate's Address of Aug. 1, 1907], *reprinted in* AMERICAN ADDRESSES, *supra* note 108, at 78, 81.

For almost a century, writers have repeated the clever observation that the Permanent Court of Arbitration is neither "permanent" nor a "court." COLLIER & LOWE, *supra* note 28, at 35; FRANCK, *supra* note 53, at 17; HUDSON, *supra* note 52, at 8; MORRIS, *supra* note 57, at 137-38; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 260; ROSENNE'S THE WORLD COURT, *supra* note 53, at 5; Bederman, *supra* note 113, at 10; Shabati Rosenne, *The International Court*

encompasses three elements: (1) a list of individuals nominated by states parties from whom they may choose arbitrators in the event of a dispute,[139] (2) a small International Bureau or secretariat that provides registry services to *ad hoc* tribunals,[140] and (3) a set of procedural rules that apply in the absence of contrary agreements by the disputing parties.[141] In other words, the PCA represents an optional facility for arbitration that states may activate as desired.[142]

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of Justice at the Beginning of the Twenty-First Century, *in* THE HAGUE: LEGAL CAPITAL OF THE WORLD, *supra* note 53, at 183, 185; Knox Memorandum, *supra* note 53, at 7.

138. Léon Bourgeois, *Report on the Organisation of a Permanent Court of International Justice*, 1 LEAGUE OF NATIONS O. J. 33, 35 (1920); SHAW, *supra* note 53, at 953; Clarke, *supra* note 137, at 343; Scott, *supra* note 113, at 11; Knox Memorandum, *supra* note 53, at 7.

139. Hague Convention of 1899, *supra* note 132, arts. 23-24. *See also* Bourgeois, *supra* note 138, at 35; BUSTAMANTE, *supra* note 83, at 45; BROWNLIE, *supra* note 53, at 673; CHOATE, *supra* note 114, at 37; COLLIER & LOWE, *supra* note 28, at 36; FACHIRI, *supra* note 137, at 22; FRANCK, *supra* note 53, at 17; HUDSON, *supra* note 52, at 7; 2 PHILIP C. JESSUP, ELIHU ROOT 75 (1938); JESSUP, *supra* note 58, at 34; FRANCES KELLOR & MARTIN DOMKE, ARBITRATION IN INTERNATIONAL CONTROVERSY 44 (1944); KUEHL, *supra* note 53, at 46; MORRIS, *supra* note 57, at 138; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 260; RALSTON, LAW AND PROCEDURE, *supra* note 53, at xxviii; ROSENNE'S THE WORLD COURT, *supra* note 53, at 5; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 281, 442; SHAW, *supra* note 53, at 953; SIMPSON & FOX, *supra* note 54, at 12; Bederman, *supra* note 113, at 10; Clarke, *supra* note 137, at 344; Hershey, *supra* note 114, at 30; Moore, *supra* note 53, at 498.

140. Hague Convention of 1899, *supra* note 132, arts. 22, 26. *See also* BROWNLIE, *supra* note 53, at 673; CHOATE, *supra* note 114, at 37-38; COLLIER & LOWE, *supra* note 28, at 36; HYDE, *supra* note 57, § 564, at 130; KELLOR & DOMKE, *supra* note 139, at 43; ROSENNE'S THE WORLD COURT, *supra* note 53, at 5; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 281; SHAW, *supra* note 53, at 953; SIMPSON & FOX, *supra* note 54, at 13; Butler, *supra* note 137, at 45; Hudson, *supra* note 137, at 443; Shifman, *supra* note 53, at 132.

One may use the phrase "*ad hoc* tribunal" in two different senses. First, in the context of international commercial arbitration, writers often use the phrase to identify tribunals not operating under the proprietary rules of an arbitration institution. *See, e.g.*, BORN, *supra* note 1, at 44; LEW ET AL., *supra* note 3, at 32; REDFERN & HUNTER, *supra* note 8, at 47; TWEEDDALE & TWEEDDALE, *supra* note 14, at 62; Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 54 (2005). Second, in the context of public international law, writers often use the phrase to identify tribunals that lack a permanent existence and that serve only to resolve a particular dispute or a series of existing disputes. *See* Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 65-68, 70-71, 73, 75, 89, 91, 93 (2003) [hereinafter Brower, *Legitimacy*]; Charles N. Brower et al., *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L 414, 430 (2003). For avoidance of ambiguity, the author refers to the second understanding of "*ad hoc* tribunals."

141. Hague Convention of 1899, *supra* note 132, arts. 30-57. *See also* BROWNLIE, *supra* note 53, at 673; CHOATE, *supra* note 114, at 38; COLLIER & LOWE, *supra* note 28, at 36; SIMPSON & FOX, *supra* note 54, at 13; Hudson, *supra* note 137, at 441; Mössner, *supra* note 115, at 673-74, 677; Scott, *supra* note 113, at 11.

142. AUST, *supra* note 137, at 444; BROWNLIE, *supra* note 53, at 673; HUDSON, *supra* note 52, at 8; SHAW, *supra* note 53, at 953; Hudson, *supra* note 137, at 445; Butler, *supra* note 137, at 44.

When Nicholas II convened a Second Hague Peace Conference in 1907, the prospects for international adjudication had improved. For example, while arbitration had slipped onto the agenda "almost as an afterthought" in 1899,[143] it dominated the negotiations in 1907.[144] Furthermore, when the United States renewed its efforts to establish a permanent international tribunal with a fixed bench,[145] the proposal drew support even from the German delegation.[146] However, the project failed when a rift opened between large and small states on the principles for judicial appointments. Whereas larger states demanded permanent representation on the court,[147] smaller states insisted on a system reflecting the juridical equality of all states.[148] Unable to reconcile these conflicting views, negotiations for a permanent interna-

143. Bederman, *supra* note 113, at 9. *See also* MORRIS, *supra* note 57, at 126.

144. MORRIS, *supra* note 57, at 132-33. *See also* MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 4 (1925).

145. BUSTAMANTE, *supra* note 83, at 46-47; CHOATE, *supra* note 114, at 77; DUNNE, *supra* note 108, at 19; FACHIRI, *supra* note 137, at 4; HUDSON, *supra* note 52, at 25; HUDSON, *supra* note 144, at 4; JESSUP, *supra* note 139, at 75-76, 420; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 129, 430, 440; SCOTT, *supra* note 79, at 52-53; TUCHMAN, *supra* note 128, at 287; Moore, *supra* note 53, at 499; Hans-Jürgen Schlochauer, *Permanent Court of International Justice*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 988, 988 (Rudolph Bernhardt ed., 1997); Schwebel, *supra* note 97, at 255; Stephen M. Schwebel, *Reflections on the Role of the International Court of Justice*, 61 WASH. L. REV. 1061, 1062 (1986); Draft of an Identic Circular Note Proposed to and Approved by Secretary of State Knox, to be sent to the American Ambassadors at London, Berlin, and Paris (Nov. 25, 1912) [hereinafter Knox Circular Note], *reprinted in* SCOTT, AN INTERNATIONAL COURT OF JUSTICE, *supra* note 53, at 18, 21; Knox Memorandum, *supra* note 53, at 8; *Instructions to the American Delegates to the Hague Conference of 1907* [hereinafter *Instructions to the American Delegates in 1907*], *in* INSTRUCTIONS TO THE AMERICAN DELEGATES, *supra* note 119, at 67, 79-80; Scott Memorandum, *supra* note 79, at 66; Mr. Choate's Address of Aug. 1, 1907, *supra* note 137, at 81.

146. SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 129, 434; Schlochauer, *supra* note 145, at 988; Knox Circular Note, *supra* note 145, at 21; Scott Memorandum, *supra* note 79, at 66-67; Mr. Scott's Report to the Conference Recommending the Establishment of a Court of Arbitral Justice (Oct. 16, 1907) [hereinafter Mr. Scott's Report of Oct. 16, 1907], *reprinted in* AMERICAN ADDRESSES, *supra* note 108, at 112, 122; Report to the Secretary of State of the Delegates of the United States to the Second Hague Conference [hereinafter Report to the Secretary on the Second Hague Conference], *reprinted in* INSTRUCTIONS TO THE AMERICAN DELEGATES, *supra* note 119, at 86, 135.

147. SCOTT, *supra* note 79, at 65. *See also* JAMES BROWN SCOTT, THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS: REPORT AND COMMENTARY 29 (1920); Mössner, *supra* note 115, at 676; Schwebel, *supra* note 97, at 255.

148. SCOTT, *supra* note 147 at 29; *The Constitution of an International Court of Justice: Remarks by Hon. Elihu Root Before the Advisory Committee of Jurists at The Hague, June, 1920*, 15 AM. J. INT'L L. 1, 2 (1921) [hereinafter *The Constitution of an International Court*].

tional court fell short of completion in 1907.[149] As a result, delegates concentrated on revisions to the Convention for the Pacific Settlement of International Disputes,[150] adjusting its provisions in light of experience,[151] but leaving the fundamental structure untouched.[152]

While some have expressed disappointment at the failure to achieve more at the Hague Peace Conferences[153] and others have offered tepid endorsements of the PCA,[154] state practice suggests a much higher level of enthusiasm, at least until establishment of the Permanent Court of International Justice in 1920.[155] During the relevant period, states concluded roughly 120 new treaties providing for

149. *Meeting of the Advisory Committee of Jurists*, 1 LEAGUE OF NATIONS O.J. 226, 236 (1920) (address by Baron Descamps, President of the Committee); Bourgeois, *supra* note 138, at 36; BROWNLIE, *supra* note 53, at 677; CHOATE, *supra* note 114, at 77-79; DUNNE, *supra* note 108, at 19; FACHIRI, *supra* note 137, at 4; HUDSON, *supra* note 144, at 4; MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, at 82 (1943); HYDE, *supra* note 57, § 572, at 140; JESSUP, *supra* note 139, at 420; KUEHL, *supra* note 53, at 104; MEYER, *supra* note 53, at 29; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 456; SCOTT, *supra* note 147, at 13; Bederman, *supra* note 113, at 11; Caron, *supra* note 79, at 21; Moore, *supra* note 53, at 499; Mössner, *supra* note 115, at 676; Knox Circular Note, *supra* note 145, at 21; Scott Memorandum, *supra* note 79, at 66.

150. Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199 [hereinafter Hague Convention of 1907].

151. SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 254; Knox Memorandum, *supra* note 53, at 6; Report to the Secretary on the Second Hague Conference, *supra* note 146, at 93, 100.

152. Jonkman, *supra* note 126, at 23; Knox Memorandum, *supra* note 53, at 6; James Brown Scott, The Second Hague Conference: A Peace Conference, Address at The George Washington University (Dec. 21, 1907), *reprinted in* AMERICAN ADDRESSES, *supra* note 108, at xxxi, xxxviii.

153. Hershey, *supra* note 114, at 48. *See also* David Jayne Hill, *The Net Result at The Hague*, *in* S. DOC. 60-433, at 3 (1908) (observing that "[t]he Hague Conferences have been saluted with contempt on the one hand, and satire on the other"); SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 1 (indicating that the "great public" felt that the lack of agreements on disarmament and compulsory arbitration "involved the failure of the Conference"); Moore, *supra* note 53, at 498-99 (recognizing that the PCA "failed to meet the expectations which many had indulged"); Joseph H. Choate, Progress at the Second Hague Conference, Address to the New York State Bar Association (Jan. 24-25, 1908), *reprinted in* AMERICAN ADDRESSES, *supra* note 108, at xiii, xiii (lamenting the "general disposition" of journalists to "belittle and depreciate the work" of the Second Hague Conference).

154. *See* BROWNLIE, *supra* note 53, at 673; JESSUP, *supra* note 58, at 34; Mr. Scott's Address on the Elements Entering into the Composition of an International Court of Arbitral Justice (Aug. 1, 1907) [hereinafter Mr. Scott's Address of Aug. 1, 1907], *reprinted in* AMERICAN ADDRESSES, *supra* note 108, at 84, 86.

155. *See* HUDSON, *supra* note 52, at 7 (discussing recourse to the PCA, and its decline following establishment of the PCIJ in 1920).

arbitration.[156] They also brought some 14 disputes before tribunals constituted by the PCA,[157] making that institution the center of gravity for arbitration among states during the first two decades of the twentieth century.[158]

Although it did not endure, one may attribute the PCA's season of popularity to two practical, if modest, features. First, while arbitration had been *possible* for over a century, the Hague Conventions made it *simple* by providing the necessary ingredients: a pool of arbitrators, a set of procedures, and a competent registry.[159] Second, by supplying rules of procedure, the conventions neutralized a previous tendency towards "extreme informality" in arbitration,[160] and initiated the broad harmonization[161] (but not detailed standardization)[162] of procedural rules, for which arbitration later became famous.[163]

156. *Id.*; ROSENNE'S THE WORLD COURT, *supra* note 53, at 7; Janis, *supra* note 53, at 16. *See also* CHOATE, *supra* note 114, at 40 (alluding to the conclusion of more than 144 "standing arbitration treaties" between 1899 and 1913).

157. HUDSON, *supra* note 52, at 7; KELLOR & DOMKE, *supra* note 139, at 44; ROSENNE'S THE WORLD COURT, *supra* note 53, at 7; Janis, *supra* note 53, at 16.

158. BROWNLIE, *supra* note 53, at 673; Jonkman, *supra* note 126, at 26.

159. *See* WILLIAM EVANS DARBY, INTERNATIONAL TRIBUNALS 474-75 (3d ed. 1899). *See also* Hudson, *supra* note 137, at 459 (emphasizing the importance of the PCA's International Bureau, which "has served . . . as an impartial body through which negotiations and communications may be conducted; it has offered a *locus* in which tribunals may have their seats; and it has furnished trained personnel upon which tribunals may rely"). *But see* SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 426 (quoting Professor Asser, a founder and member of the PCA, for the proposition that the process was "difficult, time-consuming and expensive to set in motion," at least when compared to a traditional court permanently in session).

160. SIMPSON & FOX, *supra* note 54, at 13.

161. Before 1899, there were no commonly accepted rules of procedure for arbitrations between states. *Meeting of the Advisory Committee of Jurists*, *supra* note 149, at 234 (address by Baron Descamps, President of the Committee); BISHOP, *supra* note 110, at 12-13. According to one source, the absence of clear procedures led to fears, complications, and delays for consumers of arbitration. BISHOP, *supra* note 110, at 12-13. As amended in 1907, the rules of procedure adopted by the Conventions for the Pacific Settlement of International Disputes still comprise a routine point of departure for drafting arbitration agreements and for framing arguments on disputed procedural points. SIMPSON & FOX, *supra* note 53, at 13.

162. *See* HYDE, *supra* note 57, § 570, at 134 (emphasizing that the procedural rules "are mainly descriptive of the general steps to be followed"). *See also* HUDSON, *supra* note 52, at 84 (explaining that "[u]nlike the procedure in some national courts," procedures before international tribunals have not "congealed within the confines of strict and rigid rules"); Bederman, *supra* note 70, at 174 (discussing unsuccessful efforts to "standardize" the procedures of international tribunals); Charney, *supra* note 53, at 125 (recounting the failed effort to promulgate a rigid procedural code for arbitration among states, and concluding that states prefer the flexibility traditionally afforded by arbitration).

163. *Cf.* Charles H. Brower, II, *Reflections on the Road Ahead: Living with Decentralization in Investment Treaty Arbitration*, *in* THE FUTURE OF INVESTMENT ARBITRATION (forthcoming 2008) (asserting that the New York Convention, the UNCITRAL Model Law and increasingly

Nevertheless, the PCA's growing popularity soon exposed the limitations of that system. As the number of cases increased and became simpler to track within a single institutional process, it became clear that tribunals formed by the PCA saw their mandate as resolving particular disputes, and not as developing a consistent body of jurisprudence for the benefit of all states.[164] Under these circumstances, the procession of *ad hoc* tribunals never developed the continuity required to support an accumulation of precedent[165] and, thus, to confer the jurisprudential benefits of stability,[166] coherence[167] and certainty.[168] As one prominent observer exclaimed "each case [was] decided as if it were an isolated problem, sporadic, never occurring before and never to occur again," with the result that "Chaos" and "Chance" sat as umpire and arbitrator.[169]

To summarize, while the Hague Peace Conferences led to the harmonization of procedural rules for arbitrations between states, recourse to the PCA left the development of substantive principles in disarray. The desire to remedy this flaw not only justified the pro-

harmonized procedural rules have marked commercial arbitration as the rare example in which international law and practice have established clear rules, universally and consistently enforced across the globe).

164. SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 6 (1958); Caron, *supra* note 79, at 13; Scott Memorandum, *supra* note 79, at 25, 38, 39, 41.

165. *Meeting of the Advisory Committee of Jurists*, *supra* note 149, at 235 (address by Baron Descamps, President of the Committee); *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice* (Feb. 10, 1944), *reprinted in* 39 AM. J. INT'L L. SUPP. 1, 34 (1945) [hereinafter *Report of the Inter-Allied Committee*]; BROWNLIE, *supra* note *53*, at 677; HUDSON, *supra* note 52, at 162, 246-47; HUDSON, *supra* note 149, at 80; HUDSON, *supra* note 144, at 283; HYDE, *supra* note 57, § 572, at 138 n.7; LAUTERPACHT, *supra* note 164, at 6; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 427 (quoting Joseph Choate); Clarke, *supra* note 137, at 345, 401; Hudson, *supra* note 137, at 458-59; Moore, *supra* note 53, at 499; Scott Memorandum, *supra* note 79, at 41, 43; Mr. Choate's Address of Aug. 1, 1907, *supra* note 137, at 81; Mr. Choate's Remarks on Introducing the Proposed Court of Arbitral Justice (Aug. 13, 1907) [hereinafter Mr. Choate's Remarks on the Proposed Court of Arbitral Justice], *reprinted in* AMERICAN ADDRESSES, *supra* note 108, at 97, 98. *See also* RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 30; Penfield, *supra* note 81, at 332.

166. Bourgeois, *supra* note 138, at 35; DUNNE, *supra* note 108, at 19.

167. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 294 (7th rev. ed. 1997).

168. *See* LAUTERPACHT, *supra* note 164, at 6. *See also* Moore, *supra* note 53, at 499.

169. Scott Memorandum, *supra* note 79, at 37 (quoting Harvard Professor Eugene Wambaugh). *See also* Clarke, *supra* note 137, at 400 (lamenting that the "evanescent and fugitive character" of such tribunals led to a "great contradiction in their rulings" on nearly identical questions).

posals for a permanent tribunal in 1907,[170] it also represented a principal reason for continued interest in judicial settlement through the end of the Great War.[171]

D. The PCIJ and the ICJ: The Consistent Development of International Law

Although the Hague Conferences billed arbitration as a means for securing peaceful settlement of disputes,[172] its availability did not prevent Germany from exhibiting her military prowess in two World Wars.[173] Nevertheless, the unprecedented destruction wrought by those conflicts[174] called forth a new demand for international institutions designed to prevent war,[175] including a permanent court engi-

170. *See, e.g.*, Mr. Choate's Address of Aug. 1, 1907, *supra* note 137, at 81 ("Let us . . . seek to develop . . . a permanent court, . . . which shall consist of the same judges, . . . pay due heed to its own decisions, . . . and gradually build up a system of international law, definite and precise, which shall . . . regulate the conduct of nations.").

171. LAUTERPACHT, *supra* note 164, at 6. *See also* Scott Memorandum, *supra* note 79, at 42-43 (quoting Elihu Root).

172. Hague Convention of 1907, *supra* note 150, arts. 1, 37-38; Hague Convention of 1899, *supra* note 132, arts. 1, 20. *See also* Schwebel, *supra* note 97, at 254 (explaining that the peace movement of the late nineteenth and early twentieth centuries was "transfixed" with the idea that recourse to arbitration could prevent armed conflict).

173. *See* Moore, *supra* note 53, at 499 (recognizing that the PCA's "inability to prevent the recurrence of war was soon demonstrated"). *See also* REDFERN & HUNTER, *supra* note 8, at 59 (expressing regret that the PCA "did not avert the great conflicts of the twentieth century").

174. Fought from 1914 to 1918, World War I took more lives than all wars fought from 1790 to 1913. Christopher M. Petras, *The Use of Force in Response to Cyber-Attack on Commercial Space Systems—Reexamining "Self-Defense" in Outer Space in Light of the Convergence of U.S. Military and Commercial Space Activities*, 67 J. AIR L. & COM. 1213, 1235 (2002). *See also* Patricia Viseur Sellers, *The Cultural Value of Sexual Violence*, 93 AM. SOC'Y INT'L L. PROC. 312, 318 (1999) ("World War I produced destruction previously unseen and unimagined by Western society."). However, World War II became the world's most destructive war, claiming at least 50 to 55 million lives. Francis A. Gabor, *Qou Vadis Domine: Reflections on Individual and Ethnic Self-Determination Under an Emerging International Legal Regime*, 33 INT'L LAW. 809, 820 (1999); Carol D. Rasnic, *Germany's Legal Protection for Women Workers Vis-a-Vis Illegal Employment Discrimination in the United States: A Comparative Perspective in Light of* Johnson Controls, 13 MICH. J. INT'L L. 415, 417 (1992).

175. *See* Jackson Nyamuya Maogoto, *Walking an International Law Tightrope: Use of Military Force to Counter Terrorism—Willing the Ends*, 31 BROOK. J. INT'L L. 405, 406 (2006) (asserting that the destruction of World War I prompted establishment of the League of Nations as a means of securing international peace); Petras, *supra* note 174, at 1235-36 (describing the "immense destruction" wrought by World War I and identifying establishment of the League of Nations as an effort to ensure that such wars could not recur); Karin G. Tackaberry, *Time to Stand Up and Be Counted: The Need for the United Nations to Control International Terrorism*, ARMY LAW., July 2007, at 1, 20 (explaining that the "widespread death and destruction" of World War II "served as a catalyst for the creation of the UN" in order to "'save succeeding generations from the scourge of war'").

neered to secure the peaceful settlement of international disputes.[176] As explained below, however, the legacy of that court, and of its successor, became the consistent development of international law.

While it technically did not establish a judicial organ for League of Nations, Article 14 of the Covenant instructed the organization's Council to "formulate and submit to the members of the League . . . plans for the establishment of a Permanent Court of International Justice."[177] To that end, the Council summoned a group of distinguished jurists.[178] Ten individuals accepted the invitation,[179] thus forming an Advisory Committee of Jurists consisting of five citizens from the so-called "Great Powers" and five citizens from smaller states.[180]

From start to finish, the Committee's work represented the direct continuation of efforts launched during the Second Hague Peace Conference. To begin with, a substantial minority of the Committee had participated in the First or Second Hague Conferences, including Elihu Root who, as Secretary of State, had instructed the U.S. delegation to seek a permanent international court in 1907.[181] Furthermore,

176. *See* SHAW, *supra* note 53, at 960 (explaining that the first permanent international court "was intended . . . to prevent outbreaks of violence"). *See also* LAUTERPACHT, *supra* note 164, at 3 (describing the Court's "primary purpose" as the maintenance of peace "in so far as this aim can be achieved through law"); Rosenne, *supra* note 137, at 191 (identifying "the avoidance or the settlement of disputes" as the PCIJ's "prime objective").

177. League of Nations Covenant art. 14. *See also* FACHIRI, *supra* note 137, at 1; MEYER, *supra* note 53, at 40; SCOTT, *supra* note 79, at 62; SCOTT, *supra* note 147, at 2; Moore, *supra* note 53, at 500.

178. FACHIRI, *supra* note 137, at 2; MEYER, *supra* note 53, at 41; Schlochauer, *supra* note 145, at 989. *See also* SCOTT, *supra* note 79, at 63; SCOTT, *supra* note 147, at 2-3; Moore, *supra* note 53, at 500.

179. JESSUP, *supra* note 139, at 419; SCOTT, *supra* note 79, at 63.

180. SCOTT, *supra* note 79, at 63.

181. *See* JESSUP, *supra* note 139, at 420; SCOTT, *supra* note 147, at 13 (both describing Root's participation in the Second Hague Conference). In addition to Root, the Committee included Baron Edouard Descamps, who represented Belgium at the First Hague Conference, Francis Hagerup, who represented Norway at the Second Conference, and Arturo Ricci-Busatti, who had served as secretary to Italy's delegation at the Second Conference. *Compare* Bourgeois, *supra* note 138, at 36-37 (listing the individuals proposed for membership in the Committee), *with* REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907, at 15, 205, 211 (James Brown Scott ed., 1917) (identifying the relevant delegates to the First and Second Hague Conferences). *See also* CALVIN DEARMOND DAVIS, THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE 360 (1975) (describing Ricci-Busatti's role).

The League's Council had also extended invitations to Luis Drago, who represented Argentina at the Second Hague Conference, and Henri Fromageot, who represented France at the Second Hague Conference. *Compare* Bourgeois, *supra* note 138, at 36-37 (listing the individuals proposed membership in the Committee), *with* REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907, *supra*, at 206, 209 (identifying Drago and Fromageot as delegates to the and Second Hague Conference). In the end, neither gentleman accepted the honor.

despite plans to meet in London, Committee members gathered in The Hague after the Dutch government drew their attention to the "undying memories" of the Peace Conferences[182] and invited them to complete the work left unfinished in 1907. To greet Committee members in that historic city, the League's Council dispatched Léon Bourgeois,[183] a former French prime minister,[184] the head of the French delegation to both Hague Conferences,[185] and president of the commission on pacific settlement of disputes at both Hague Conferences.[186] In addressing the Committee, Bourgeois called for establishment of a "true permanent court," not controlled by the disputing parties but having the "mandate" and "duration" needed to establish a "real jurisprudence."[187] To that end, Bourgeois expressed the hope that Committee members would take the reports of the previous work in the Hague as their point of departure.[188]

Heeding Bourgeois' admonition, Elihu Root proposed a resolution identifying the acts and resolutions of the Second Hague Conference as the foundation for the Committee's work.[189] In so doing, he aimed to reassure observers that the Committee did not seek to advance the interests of its members or their home states, but to complete an undertaking supported by the community of states.[190] While

See Meeting of the Advisory Committee of Jurists, *supra* note 149, at 226 (identifying the "membership of the Committee, after certain changes in the original list necessitated by the inability of some of those first appointed to serve"); BUSTAMANTE, *supra* note 83, at 95 (describing the Committee's final composition after some of the preliminary invitees proved "unable or unwilling to serve").

182. SCOTT, *supra* note 147, at 5.

183. BUSTAMANTE, *supra* note 83, at 96.

184. DUNNE, *supra* note 108, at 17; TUCHMAN, *supra* note 128, at 252.

185. SCOTT, *supra* note 147, at 6; James Brown Scott, *Léon Bourgeois—1851-1925*, 19 AM. J. INT'L L. 774, 775-76 (1925). *See also Meeting of the Advisory Committee of Jurists*, *supra* note 149, at 227 (address by M. van Karnebeek, Dutch Foreign Minister); TUCHMAN, *supra* note 128, at 252.

186. *Meeting of the Advisory Committee of Jurists*, *supra* note 149, at 227 (address by M. van Karnebeek, Dutch Foreign Minister); SCOTT, *supra* note 147, at 6; Scott, *supra* note 185, at 775-76. *See also* BUSTAMANTE, *supra* note 83, at 42; TUCHMAN, *supra* note 128, at 257. Bourgeois also received the Nobel Peace Prize in 1920. MEYER, *supra* note 53, at 59; Scott, *supra* note 185, at 776.

187. *Meeting of the Advisory Committee of Jurists*, *supra* note 149, at 230 (address by M. Léon Bourgeois). *See also* BUSTAMANTE, *supra* note 83, at 96; SCOTT, *supra* note 147, at 7; Caron, *supra* note 79, at 26.

188. Bourgeois, *supra* note 138, at 36.

189. JESSUP, *supra* note 139, at 419-20; SCOTT, *supra* note 147, at 13; *The Constitution of an International Court*, *supra* note 148, at 1-2. *See also* MEYER, *supra* note 53, at 41.

190. SCOTT, *supra* note 147, at 14; *The Constitution of an International Court*, *supra* note 148, at 1-2. *See also* JESSUP, *supra* note 139, at 420 (emphasizing Root's desire to "show the con-

not adopting the text of Root's proposal,[191] Committee members accepted its substance,[192] thus enabling completion of their task in the remarkably brief period of less than six weeks.[193]

Following adoption of its statute and organization of its work, the PCIJ began to hold regular sessions in The Hague in 1922.[194] Over the course of nearly two decades, it rendered thirty-two judgments in contentious cases[195] and twenty-seven opinions in advisory proceedings.[196] While most of those decisions involved relatively technical questions of treaty interpretation[197] and did not prevent the outbreak of World War II or other wars,[198] they stood out for their high quality[199] and for the unprecedented accumulation of practice by an international tribunal.[200] Thus, the PCIJ represented a "tremendous"[201] or "decisive"[202] advance not by preventing war,[203] but by producing volumes of reasonably coherent jurisprudence[204] that, for the first time,

tinuity between [the Committee's] labors in 1920 and the progress which had been made before").

191. SCOTT, *supra* note 147, at 15. *See also* SCOTT, *supra* note 79, at 64.

192. JESSUP, *supra* note 139, at 420. *See also* BUSTAMANTE, *supra* note 83, at 97; SCOTT, *supra* note 79, at 64; Schlochauer, *supra* note 145, at 990.

193. BUSTAMANTE, *supra* note 83, at 98; FACHIRI, *supra* note 137, at 4; MEYER, *supra* note 53, at 43.

194. FACHIRI, *supra* note 137, at 18-19; HUDSON, *supra* note 52, at 11; Moore, *supra* note 53, at 506; Schlochauer, *supra* note 145, at 992. *See also Report of the Rapporteur of Committee IV/1* (June 12), 13 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 381, 382 (1945) [hereinafter UNCIO DOCS.]; Janis, *supra* note 53, at 18; Helmut Steinberger, *Judicial Settlement of International Disputes*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 42, 43 (Rudolph Bernhardt ed., 1997).

195. HUDSON, *supra* note 52, at 11; KELLOR & DOMKE, *supra* note 139, at 45; MALANCZUK, *supra* note 167, at 25; ROSENNE'S THE WORLD COURT, *supra* note 53, at 11.

196. HUDSON, *supra* note 52, at 11; MALANCZUK, *supra* note 167, at 25; ROSENNE'S THE WORLD COURT, *supra* note 53, at 11; Janis, *supra* note 53, at 19; Schwebel, *supra* note 145, at 1063.

197. ROSENNE'S THE WORLD COURT, *supra* note 53, at 12, 236; Eduardo Jiménez de Aréchaga, *The Work and Jurisprudence of the International Court of Justice 1947-1986*, 1987 BRIT. Y.B. INT'L L. 1, 31.

198. Schwebel, *supra* note 97, at 257.

199. Schwebel, *supra* note 145, at 1063. *See also* Schwebel, *supra* note 97, at 257 (complimenting the PCIJ's judgments for their "sound and sensible" resolution of disputes).

200. ROSENNE'S THE WORLD COURT, *supra* note 53, at 11.

201. *Id*.

202. Laurent Jully, *Arbitration and Judicial Settlement: Recent Trends*, 48 AM. J. INT'L L. 380, 380 (1954).

203. Schwebel, *supra* note 97, at 257.

204. *See* HUDSON, *supra* note 52, at 11 ("[T]he results of the Court's work have been generally hailed with satisfaction throughout the world, and the volumes of its jurisprudence constitute a notable contribution to the development of international law.").

marked case law as a significant factor in the development of substantive international law.[205]

Although the German invasion of The Netherlands forced the PCIJ to suspend its work in 1940,[206] the Court's strong track record ensured that it emerged from World War II with its reputation largely intact.[207] Thus, while negotiations regarding the post-war order aimed for replacement of the League with a more effective organization,[208] they produced an equally strong sentiment favoring retention of a world court based on the favorable experiences of the past.[209] Although some argued for direct continuation of the PCIJ so as not to interrupt the continuity of its jurisprudence,[210] the Charter's drafters elected to form a new International Court of Justice (ICJ) as one of the principal organs of the United Nations Organization.[211]

Despite the formal inauguration of a new court, the Charter's drafters sought to preserve continuity with the PCIJ at the functional level.[212] For example, they constituted the ICJ under a Statute almost

205. *See* SIMPSON & FOX, *supra* note 54, at 19; Jully, *supra* note 202, at 380. *See also* ELIAN, *supra* note 115, at 6 (concluding that the activity of the PCIJ "brought a significant contribution to the development of international law"); Schwebel, *supra* note 145, at 1063 (describing the PCIJ's importance in terms of its significant contributions so the "progressive development of international law").

206. UNCIO DOCS., *supra* note 194, at 382; HUDSON, *supra* note 52, at 11, 140; Manley O. Hudson, *The Succession of the International Court of Justice to the Permanent Court of International Justice*, 51 AM. J. INT'L L. 569, 569 (1957).

207. *See* UNCIO DOCS., *supra* note 194, at 382 (recognizing that the PCIJ's decisions "in several scores of cases produced a general satisfaction throughout the world"); United Nations Comm. of Jurists, *Report of Rapporteur on Draft of Statute of an International Court of Justice* (Apr. 25, 1945), *in* U.S. DEP'T OF STATE, THE INTERNATIONAL COURT OF JUSTICE: SELECTED DOCUMENTS RELATING TO THE DRAFTING OF THE STATUTE 113, 113 (1946) [hereinafter United Nations Comm. of Jurists] (recalling that the PCIJ "had functioned for twenty years to the satisfaction of the litigants and that, if violence had suspended its activity, . . . th[e] institution had not failed in its task"). *See also* U.S. DEP'T OF STATE, REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE BY THE CHAIRMAN OF THE UNITED STATES DELEGATION, THE SEC'Y OF STATE 139 (1945) [hereinafter REPORT TO THE PRESIDENT] (describing the "unanimous agreement" that the PCIJ had "rendered effective service and had made an excellent record").

208. Schwebel, *supra* note 97, at 257.

209. Rosenne, *supra* note 137, at 191; Schwebel, *supra* note 97, at 257; Schwebel, *supra* note 145, at 1063.

210. *See, e.g.*, HUDSON, *supra* note 52, at 143. *See also* United Nations Comm. of Jurists, *supra* note 207, at 113 (recalling the PCIJ's effective performance and indicating a subtle preference for its continuation under an amended statute).

211. UNCIO DOCS, *supra* note 194, at 381, 383, 385, 387; MEYER, *supra* note 53, at 88.

212. *See* UNCIO DOCS, *supra* note 194, at 384 (emphasizing that the "creation of the new Court will not break the chain of continuity with the past" and listing some of the practical steps taken to ensure that "continuity in the progressive development of the judicial process will be

identical to that of its forerunner.[213] Furthermore, the ICJ established its seat in The Hague, moving into the same facilities previously used by the PCIJ,[214] where it employed virtually the same staff members,[215] and exercised jurisdiction under treaties that referred to the PCIJ.[216] Furthermore, when the ICJ formally inaugurated its work, the leadership of the World Court did not change: Judge José Guerrero, the PCIJ's last president, became the ICJ's first president.[217] From that time on, the ICJ has applied the PCIJ's decisions interchangeably with its own,[218] thus maintaining a continuous jurisprudence.[219] Under these circumstances, observers have come to regard the two courts as a single organizational unit.[220]

Despite the continuity of jurisprudence, observers have called attention to the fact that the transition from the PCIJ to the ICJ entailed a notable decline in the rate of judicial activity, which began in 1945 and lasted for many decades.[221] Thus, in the first thirty-five years of its existence, the ICJ rendered only twenty-six judgments in con-

amply safeguarded"); Schwebel, *supra* note 145, at 1063 ("Every effort was made to maintain continuity between the two courts."). *See also* REPORT TO THE PRESIDENT, *supra* note 207, at 140-41.

213. BROWNLIE, *supra* note 53, at 678; SHAW, *supra* note 53, at 960; Janis, *supra* note 53, at 19; Hans-Jürgen Schlochauer, *International Court of Justice*, *in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1084, 1084 (Rudolph Bernhardt ed., 1995). *See also* MALANCZUK, *supra* note 167, at 281; Schwebel, *supra* note 97, at 257; Schwebel, *supra* note 145, at 1063. In order to facilitate reliance on precedents regarding application of the PCIJ's Statute, the drafters of the ICJ Statute even retained the same numbering of articles. UNCIO DOCS, *supra* note 194, at 384; Schwebel, *supra* note 97, at 258.

214. MEYER, *supra* note 53, at 88; Schwebel, *supra* note 97, at 258.

215. *Id.*

216. Statute of the International Court of Justice art. 37, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute]. *See also* BROWNLIE, *supra* note 53, at 678; MALANCZUK, *supra* note 167, at 281.

217. MEYER, *supra* note 53, at 92; Schwebel, *supra* note 97, at 258.

218. LAUTERPACHT, *supra* note 164, at 11; Janis, *supra* note 53, at 30.

219. BROWNLIE, *supra* note 53, at 678; SHAW, *supra* note 53, at 960.

220. *See, e.g.*, BROWNLIE, *supra* note 53, at 677, 678; MALANCZUK, *supra* note 167, at 281; J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 127 (4th ed. 2005); MEYER, *supra* note 53, at 98; SHAW, *supra* note 53, at 960; Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 791 (1999); Janis, *supra* note 53, at 19. *See also* UNCIO DOCS, *supra* note 194, at 384 (encouraging consideration of the ICJ as "successor" to the PCIJ); REPORT TO THE PRESIDENT, *supra* note 207, at 141 (asserting that the "new court" effectively constitutes "only a 'revised court,' the successor of the old").

221. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 731 (3d ed. 1979). *See also* MERRILLS, *supra* note 220, at 176 (indicating that "the ICJ has heard only a trickle of contentious cases" since its establishment in 1945).

tentious cases,[222] a rate of less than one per year and not comparable to the thirty-two judgments issued by the PCIJ in roughly half the time.[223] Although the situation did not improve during the 1980s,[224] the following decade saw an increase in Court's workload.[225] By about its sixtieth anniversary, the ICJ had rendered ninety-two judgments in contentious cases[226] and regularly had a docket of ten or more pending cases,[227] thus marking the busiest period in the combined history of the two courts.[228]

Moving from quantitative to qualitative assessments, observers have drawn attention to another change that accompanied the transition from the PCIJ to the ICJ. Whereas the PCIJ's decisions concentrated on relatively technical questions of treaty interpretation,[229] the ICJ's decisions have focused more on the application and development of customary international law.[230] Furthermore, when compared to its predecessor, the ICJ has addressed a greater variety of weighty and cutting-edge matters,[231] including the use of force,[232] credible alle-

222. MALANCZUK, *supra* note 167, at 290.

223. *See supra* note 195 and accompanying text.

224. *See* MALANCZUK, *supra* note 167, at 290.

225. One may use the publications of Judge Stephen M. Schwebel to track the growth of cases on the ICJ's docket. As of his elevation to the bench in 1981, the Court had only one active case. Stephen M. Schwebel, *The Docket of the World Court*, 37 COLUM. J. TRANSNAT'L L. 1, 2 (1998) [hereinafter Schwebel, *The Docket of the World Court*]; Schwebel, *supra* note 53, at 359. As of 1994, the number had grown to roughly one dozen. Schwebel, *supra* note 97, at 258. Although the number of pending cases fell to nine during 1998, it later rebounded and stood at twenty-three when Judge Schwebel left the bench in 2000. Schwebel, *The Docket of the World Court*, *supra*, at 2; Schwebel, *supra* note 53, at 359.

226. *Report of the International Court of Justice (1 Aug. 2006-31 July 2007)*, para. 8, U.N. GAOR, 62d Sess., Supp. No. 4, U.N. Doc. A/62/4 (Aug. 1, 2007) [hereinafter *Report of the ICJ*]. The ICJ rendered thirty of those judgments in the last ten years. *Id.*

227. MERRILLS, *supra* note 220, at 176. *See also* BROWNLIE, *supra* note 53, at 694 (recognizing that "the Court has had a consistently full calendar of contentious cases" in recent years). As of July 31, 2007, the number of pending cases stood at twelve. *Report of the ICJ*, *supra* note 226, para. 9.

228. ROSENNE'S THE WORLD COURT, *supra* note 53, at 238.

229. *See supra* note 197 and accompanying text.

230. Jiménez de Aréchaga, *supra* note 197, at 31.

231. *See* Rosenne, *supra* note 137, at 202 (explaining that many cases brought before the ICJ "have been weightier, and of greater general importance than those brought before the Permanent Court"). *See Report of the ICJ*, *supra* note 226, para. 11 (emphasizing the "cutting-edge" issues raised by cases on the Court's docket).

232. *See, e.g.*, Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), at 1 (Judgment of Dec. 19, 2005), *available at* http://www.icj-cij.org/docket/files/116/10455.pdf (last visited Mar. 27, 2008); Legality of Use of Force (Serb. & Mont. v. U.K), 2004 I.C.J. 1307, 1307 (Dec. 15); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 161 (Nov. 6), *available at* http://www.icj-

gations of genocide,[233] and the cooperative exploitation of shared natural resources.[234] Despite these new challenges and some notable criticisms relating to particular cases,[235] observers continue to express a high regard for the quality of the ICJ's work.[236]

Beyond fluctuations in their activity and in the character of issues submitted for decision, no assessment of the PCIJ and the ICJ would be complete without a comparison of goals to performance. As in all things, expectations tend to influence one's conclusions. For example, many people expected the PCIJ and the ICJ to play leading roles in the maintenance of international peace and security by providing a substitute for armed conflict.[237] Because neither Court has made significant contributions to that idealistic goal,[238] one might assess their combined track record in disappointing terms. Nevertheless, one should recall that many have described the establishment of a continuous jurisprudence and the progressive development of international law as important (perhaps the most important) justifications for establishment of the PCIJ and its successor, the ICJ.[239] In this regard,

cij.org/docket/files/90/9715.pdf; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S), 1986 I.C.J. 14, 14 (June 27).

233. *See, e.g.*, Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), at 1-5 (Judgment of Feb. 26, 2007), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf.

234. *See, e.g.*, Pulp Mills on River Uruguay (Arg. v. Uru.), paras. 2-4 (Order of July 13, 2006), *available at* http://www.icj-cij.org/docket/files/135/11235.pdf (last visited Mar. 27, 2008).

235. *See* José E. Alvarez, *Burdens of Proof*, ASIL NEWSL. (ASIL, Washington, D.C.), Spring 2007, at 1, 7 (discussing the ICJ's recent judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* and concluding that "the majority of the ICJ's judges appear in need of a basic course in Fact-Finding 101"). *See also* BROWNLIE, *supra* note 53, at 693 (listing three judgments criticized by British publicists as being "too radical").

236. *See* Schwebel, *supra* note 97, at 258; Steinberger, *supra* note 194, at 45.

237. *See* UNCIO DOCS, *supra* note 194, at 393; ELIAN, *supra* note 115, at 5; LAUTERPACHT, *supra* note 164, at 3; SHAW, *supra* note 53, at 960; Rosenne, *supra* note 137, at 191.

238. *See* BROWNLIE, *supra* note 53, at 693 (acknowledging that the Court "has not been at all prominent in the business of keeping the peace"); LAUTERPACHT, *supra* note 164, at 4 ("[I]t would be an exaggeration to assert that the Court has proved to be a significant instrument for maintaining international peace."). *See also* Schwebel, *supra* note 97, at 257 ("[T]he hope of the peace movement of the late 19th and early 20th centuries, that international adjudication was the substitute for war . . . was ill-founded and unduly idealistic.").

239. *See* FACHIRI, *supra* note 137, at 92; HUDSON, *supra* note 144, at 16; LAUTERPACHT, *supra* note 164, at 5, 6, 8; Georges Abi-Saab, *The International Court as a World Court*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 3, 9 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); Jiménez de Aréchaga, *supra* note 197, at 1. *See also* REPORT TO THE PRESIDENT, *supra* note 207, at 138 ("[The] International Court of Justice . . . has an important part to play in developing international law just as the courts of England and America have helped to form the common law."); Permanent Court of Arbitration, Circular Note of the Secre-

it bears repeating that the practice of referring to and building on past decisions has remained a conspicuous part of their combined work product,[240] with the result that the two courts have established a continuous and reasonably consistent jurisprudence,[241] which by all accounts has made a significant contribution to the clarification and development of international law.[242]

In sum, whereas the PCA inaugurated the broad standardization of procedural rules for arbitration of disputes among states, the PCIJ and the ICJ consolidated that work and extended it to the consistent and progressive development of international law.

III. DISPUTES AMONG STATES UNDER PUBLIC INTERNATIONAL LAW: THE LIMITS OF JUDICIAL SETTLEMENT

While observers have long discussed the declining stream of PCA arbitrations, which slowed to a trickle following inauguration of the PCIJ[243] and, then, nearly ceased during several decades of the ICJ's existence,[244] Professors Gray and Kingsbury documented a broader drop in recourse to arbitration for inter-state disputes over the period from 1945 to 1990.[245] During the same time, the number of

tary General (Mar. 3, 1960), *reprinted and translated in* 54 AM. J. INT'L L. 933, 934 (1960) [hereinafter Circular Note of the Secretary General] (discussing the "great advantages" of permanent international courts, including their capacity to develop a "permanent and uniform jurisprudence"); MERRILLS, *supra* note 220, at 181 ("[P]ermanent courts, with their ability to develop a consistent jurisprudence, may be expected to contribute more to legal progress than occasional arbitrations."); Christian Tomuschat, *International Courts and Tribunals*, *in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1108 (Rudolph Bernhardt ed., 1995) ("[The] basic idea underlying the creation of ICTs is for them to function as permanent bodies . . . capable of ensuring a certain degree of continuity of legal reasoning.").

240. *See* LAUTERPACHT, *supra* note 164, at 9, 11.

241. *Id.* at 18.

242. *See* BROWNLIE, *supra* note 53, at 693; LAUTERPACHT, *supra* note 164, at 5; SHAW, *supra* note 53, at 1005; Steinberger, *supra* note 194, at 45.

243. *See* COLLIER & LOWE, *supra* note 28, at 36; HUDSON, *supra* note 52, at 7; SHAW, *supra* note 53, at 958; Hudson, *supra* note 137, at 459. *See also* Jonkman, *supra* note 126, at 26; Sohn, *supra* note 53, at 15; Sohn, *supra* note 137, at 1 (all describing the decline of recourse to the PCA starting in the 1920s).

244. *See* BROWNLIE, *supra* note 53, at 673; Janis, *supra* note 53, at 16, 35; Jonkman, *supra* note 126, at 27-28; P.H. Kooijmans, *International Arbitration in Historical Perspective: Past and Present (Comments on a Paper by Professor L.B. Sohn)*, *in* INTERNATIONAL ARBITRATION: PAST AND PROSPECTS, *supra* note 53, at 23, 25; Shifman, *supra* note 53, at 135, 141-42.

245. *See* Gray & Kingsbury, *supra* note 2, at 99-100.

international courts grew sharply,[246] suggesting a nearly complete transition from arbitration to judicial settlement.

Since the appearance of Gray's and Kingsbury's work, however, arbitration involving states has experienced a revival on two fronts. Beginning in mid-1990s, demand for the PCA's services and those of its International Bureau increased dramatically.[247] A decade later, the list of pending arbitrations hovered at ten to twelve per year, marking one of the busiest periods in the PCA's history.[248] In a related field,[249] the number of arbitrations brought against states under investment treaties also jumped from single digits to scores of pending claims.[250] While surprising to many, the popularity of arbitration for particular categories of disputes might not have surprised proponents of judicial settlement in 1907 or 1920. As explained below, they foresaw the limits of judicial settlement and, thus, contemplated a substantial role for

246. *See, e.g.*, SHAW, *supra* note 53, at 1011 (describing the "proliferation of judicial organs on the international and regional level"); D.W. Bowett, *Contemporary Developments in Legal Techniques in the Settlement of Disputes*, 180 RECUEIL DES COURS 169, 178-79 (1983-II) (recognizing the appearance of "several new courts" at the international level); Caron, *supra* note 79, at 24 (mentioning the recent growth of "international adjudicative bodies"); Dupuy, *supra* note 220, at 792 (referring to the "proliferation of international courts and tribunals").

247. *See* SHAW, *supra* note 53, at 953-54; Jonkman, *supra* note 126, at 17, 29-30, 40-42; Shifman, *supra* note 53, at 141-44.

248. *See* Shifman, *supra* note 53, at 142. *See also* AUST, *supra* note 137, at 444.

249. *See infra* notes 281-285 and accompanying text (discussing the relevance of investment treaty arbitration in testing and reinforcing hypotheses about the limits of judicial settlement in claims involving states, their sovereign acts, and the application of public international law).

250. In 1995, the International Centre for the Settlement of Investment Disputes (ICSID) had five pending claims with $15 million in controversy. Roberto Daniño, *Remarks in Honor of Antonio R. Parra*, NEWS FROM ICSID (Int'l Ctr. for Settlement of Inv. Disputes, Wash., D.C.), Apr. 26, 2005, at 12, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLetersRH&actionVal= ShowDocument&DocId=DC4. Ten years later, the list of pending cases had grown to ninety with more than $25 billion in controversy. *Id. See also* MEG N. KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, Gen. Section at 26 (2006) (comparing the total of three BIT claims registered at ICSID as of 1994 with the total of 106 treaty-based claims filed as of 2004); CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 5 (2007) (recounting the "exponential" growth in investment treaty arbitration from the first registered case in 1987 to the current total of more than 200 disputes); REDFERN & HUNTER, *supra* note 8, at 476-77 (comparing the eight ICSID cases registered and the 19 ICSID cases pending in 1998 with the 30 new cases registered and 63 cases pending in 2003); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 4 n.11, 30 (2007) (comparing the 35 claims registered by ICSID from 1966 to 1996 with the 166 claims registered by ICSID from 1996 to 2005); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1538-39 (2005) (describing the "exponential explosion" of claims from a rate of one claim per year at ICSID during the 1980s to a rate of one or two claims per month in 2001).

arbitration of claims having a particular gravity or involving the discretionary allocation of valuable resources.

When designing a Court of Arbitral Justice in 1907 and when finally establishing the PCIJ in 1920, sponsors had to define the relationship between those institutions and the machinery already supplied by the PCA. Despite calls for termination of the PCA,[251] leading proponents of judicial settlement favored its continuation,[252] going so far as to memorialize that objective in the Draft Convention for the Establishment of the Court of Arbitral Justice [253] and in the PCIJ's Statute.[254] Emphasizing the need for parallel institutions, they explained that judicial settlement would lend itself to adjudication of "purely legal" disputes,[255] but that arbitration would remain a more suitable forum for controversies having strong "political" dimensions.[256] To understand the distinction, one must explore the charac-

251. For example, in anticipation of the PCIJ's inauguration, the Argentine delegation unsuccessfully called for the PCA's termination during the first Assembly of the League of Nations. HUDSON, *supra* note 149, at 36; Jully, *supra* note 202, at 381 n.3.

252. FACHIRI, *supra* note 137, at 21; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 435-36, 442; SCOTT, *supra* note 147, at 41; *The Constitution of an International Court*, *supra* note 148, at 4, 11; Mr. Choate's Address of Aug. 1, 1907, *supra* note 137, at 84; Mr. Choate's Remarks on the Proposed Court of Arbitral Justice, *supra* note 165, at 97; Mr. Scott's Report of Oct. 16, 1907, *supra* note 146, at 122-24 (quoting H.E. Léon Bourgeois); Letter from James Brown Scott, Director, Division of International Law, Carnegie Endowment for Int'l Peace, to H.E. Jonkheer J. Loudon, Minister of Foreign Affairs, The Netherlands (Jan. 12, 1914) [hereinafter Scott Letter], *in* SCOTT, AN INTERNATIONAL COURT OF JUSTICE, *supra* note 53, at 1, 3.

253. Draft Convention for the Establishment of the Court of Arbitral Justice art. I, *reprinted in* AMERICAN ADDRESSES, *supra* note 108, at 212, 212.

254. Statute of the Permanent Court of International Justice art. 1, Dec. 16, 1920, 6 L.N.T.S 379 [hereinafter PCIJ Statute]. *See also* FACHIRI, *supra* note 137, at 21; Jully, *supra* note 202, at 380-81 & n.2.

255. *See* SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at, 425, 436; James Brown Scott, *The Organization of International Justice*, *in* PEACE THROUGH JUSTICE 51, 65 (1917) [hereinafter Scott, *The Organization of International Justice*]; Mr. Scott's Report of Oct. 16, 1907, *supra* note 146, at 114, 123 (quoting Léon Bourgeois). *See also* Hedges, *supra* note 88, at 110. For a description of Bouregois' participation in the Hague Peace Conferences and in establishment of the PCIJ, see *supra* notes 183-88 and accompanying text. For a description of James Brown Scott's participation in the Second Hague Peace Conference and in establishment of the PCIJ, see George A. Finch, *James Brown Scott, 1866-1943*, 38 AM. J. INT'L L. 183, 200-04 (1944).

256. *Meeting of the Advisory Committee of Jurists*, *supra* note 149, at 230 (address by Léon Bourgeois); SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 425 (quoting Léon Bourgeois); Scott, *The Organization of International Justice*, *supra* note 225, at 64, 65 (quoting Léon Bourgeois); Mr. Scott's Report of Oct. 16, 1907, *supra* note 146, at 114 (quoting Léon Bourgeois); Scott Letter, *supra* note 252, at 3. *See* SCOTT, *supra* note 147, at 41; *The Constitution of an International Court*, *supra* note 148, at 11 (recounting Elihu Root's discussion of the respective functions of the PCIJ and the PCA, indicating that Root viewed judicial settlement as useful in resolving questions of "strict" law, and suggesting that he viewed arbitration as useful

ter and limits of judicial settlement contemplated at the relevant times.

In 1907[257] and 1920,[258] supporters of an international court clearly favored a judicial body having the continuity required for the consistent and progressive development of international law. They also sought to ensure that the court's decisions would gain worldwide acceptance.[259] Therefore, in 1907 and 1920, Elihu Root and other U.S. officials argued that the bench of a permanent international court should represent the world's major juridical systems.[260] One gets the feeling that they meant "representation" in a literal sense: the court would not merely have a diverse bench, but would also have a mandate to develop universal principles for the benefit of mankind.[261]

Although the concept of a representative bench had appeared in the 1907 Draft Convention for the Establishment of the Court of Ar-

to resolve controversies based on broader principles of "justice"). *See also* HUDSON, *supra* note 149, at 36 (quoting records from the League of Nations' First Assembly and indicating that the PCA "would still have a role to fill in certain international disputes" which did not lend themselves to decisions "based on strict rules of law").

257. Draft Convention for the Establishment of the Court of Arbitral Justice, *supra* note 253, art. I; Bourgeois, *supra* note 138, at 35; BROWNLIE, *supra* note 53, at 677; BUSTAMANTE, *supra* note 83, at 63; DUNNE, *supra* note 108, at 19; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 443-44; SCOTT, *supra* note 147, at 13; Clarke, *supra* note 137, at 406-07, 408; Mr. Choate's Address of Aug. 1, 1907, *supra* note 137, at 81; Mr. Choate's Remarks on the Proposed Court of Arbitral Justice, *supra* note 165, at 98; Mr. Scott's Report of Oct. 16, 1907, *supra* note 146, at 126-27.

258. *See Meeting of the Advisory Committee of Jurists*, *supra* note 149, at 230 (address by Léon Bourgeois); HUDSON, *supra* note 149, at 630; LAUTERPACHT, *supra* note 164, at 5, 8.

259. *See* Mr. Choate's Address of Aug. 1, 1907, *supra* note 137, at 81.

260. For a discussion of the issue in 1907, see BUSTAMANTE, *supra* note 83, at 46-47, 63; JESSUP, *supra* note 140, at 76; SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 443; SCOTT, *supra* note 147, at 12-13; Mr. Choate's Address of Aug. 1, 1907, *supra* note 137, at 82; Mr. Choate's Remarks on the Proposed Court of Arbitral Justice, *supra* note 165, at 98; Mr. Choate's Remarks on the Selection of the Judges of the Court of Arbitral Justice by the Principle of Election (Sept. 18, 1907), *reprinted in* AMERICAN ADDRESSES, *supra* note 108, at 109, 110; Mr. Scott's Address of Aug. 1, 1907, *supra* note 154, at 91-92; Mr. Scott's Report of Oct. 16, 1907, *supra* note 146, at 127. For a discussion of the issue in 1920, see JESSUP, *supra* note 139, at 421; SCOTT, *supra* note 147, at 62-64.

261. *See* Mr. Choate's Address of Aug. 1, 1907, *supra* note 137, at 81 (advocating a court that could "speak with the authority of the united voice of the nations" and, thus, "command the approval" of all nations); Mr. Scott's Report of Oct. 16, 1907, *supra* note 146, at 126 (describing the indispensability of a court whose composition would reflect "the different judicial systems of the world, would be fitted to ascertain and develop a system of international law based upon a large and liberal spirit of equity in touch with the needs of the world"). *See also* SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 443 ("[A]n international court should represent the various juridical systems of the world, for it is only by judges trained in these various system[s] that we can hope to create and develop that international equity which would be at once the honor and the justification of the court.").

bitral Justice,[262] the issue became a serious point of contention among members of the Advisory Committee of Jurists, some of whom viewed it as an effort to secure permanent representation for large and powerful states on the bench of the PCIJ.[263] However, when Root described his goal as enriching the range of perspectives brought to bear on cases before the court, the proposal received the Committee's approval,[264] became part of the PCIJ Statute,[265] and carried over to the ICJ Statute.[266]

In related step, the drafters of the PCIJ Statute established a system of periodic judicial elections conducted simultaneously, but independently, by the two principal political organs of the League of Nations,[267] which carried over to the ICJ Statute under the United Nations.[268] While many have emphasized[269] and even criticized[270] the resulting politicization of elections, the process may encourage judges to look beyond the resolution of particular cases and to articulate legal principles designed to serve the interests of all member states.

Taken together, a representative bench and periodic elections by political organs tend to enlarge the range of interests that international courts bring to bear on the decision of controversies. To illustrate the point, one may compare the range of perspectives involved in arbitration and judicial settlement. As *ad hoc* tribunals with no continuing existence, no affiliation with intergovernmental organizations having political mandates, and no capacity to affect the legal interests of third states, arbitral tribunals may see the disputing parties as their sole audience, and the resolution of the particular dispute as their sole task.[271] By contrast, as permanent tribunals with a represen-

262. Draft Convention for the Establishment of the Court of Arbitral Justice, *supra* note 253, art. I.

263. SCOTT, *supra* note 147, at 62-63.

264. *Id.* at 64-65.

265. PCIJ Statute, *supra* note 254, art. 9.

266. ICJ Statute, *supra* note 216, art. 9.

267. PCIJ Statute, *supra* note 254, art. 8.

268. ICJ Statute, *supra* note 216, art. 8.

269. *See* BROWNLIE, *supra* note 53, at 679-80; SHAW, *supra* note 53, at 961; W. M. Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 RECUEIL DES COURS 9, 51 (1996).

270. *See* BROWNLIE, *supra* note 53, at 680; SCOTT, *supra* note 147, at 38-39 (quoting Mr. Justice Loder, Dutch Supreme Court); SHAW, *supra* note 53, at 962.

271. *See* Charney, *supra* note 53, at 126; Gray & Kingsbury, *supra* note 2, at 115. *See also* Hans-Jürgen Schlochauer, *Permanent Court of Arbitration*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 981, 986 (Rudolph Bernhardt ed., 1997) (indicating that arbitral tribunals

tative bench, organic links to intergovernmental organizations, and mandates to develop a jurisprudence for the benefit of all member states, international courts will not see the disputing parties as their sole audience, or resolution of the particular dispute as their sole task.[272] As explained below, the broader orientation of judicial settlement may not appeal to states for certain categories of disputes.[273]

In contrast to the broad perspective of a representative bench elected by the international community, Léon Bourgeois identified a class of disputes for which all states—"big or small"—would find it "essential" to take a more "active part" in "choosing *their* judges"[274] by selecting arbitration and, thus, narrowing the tribunal's orientation to focus on the interests of the disputing parties.[275] According to Bourgeois, states would choose this path for "controversies of a political nature," which he defined in 1907 as including "all cases of a peculiar gravity."[276] Somewhat later, Elihu Root indicated that judicial settlement might prove impossible for issues either not governed by international law, or governed by principles so broad that their application essentially required the exercise of discretion and political judgment.[277] Likewise, when addressing the Advisory Committee of

focus primarily on persuading the parties to settle their particular differences and, therefore, devote less attention to the application of international law).

272. *See* Abi-Saab, *supra* note 51, at 929-30; Abi-Saab, *supra* note 239, at 7; Charney, *supra* note 53, at 126; Dupuy, *supra* note 220, at 801-05; Gray & Kingsbury, *supra* note 2, at 114-15; Reisman, *supra* note 269, at 52.

273. *See* Caron, *supra* note 79, at 27-28 (predicting that if international courts emphasized progressive development of the law instead of the correct resolution of particular disputes, the enthusiasm of "some states" to appear before them would decrease).

274. SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 425; Scott, *The Organization of International Justice*, *supra* note 255, at 64-65; Mr. Scott's Report of Oct. 16, 1907, *supra* note 146, at 114; Scott Memorandum, *supra* note 79, at 32 (emphasis added).

275. *See* Brierly, *supra* note 108, at 229 (indicating that disputing parties will choose arbitration when they "desire to subordinate questions of pure law" to the demands of the particular case); Charney, *supra* note 53, at 126 (opining that states "may have the perception" that ad hoc tribunals "will focus on the . . . interests of the parties before them"). *See also* Circular Note of the Secretary General, *supra* note 239, at 935 (recognizing that a "more restricted tribunal, on the constitution of which parties have decided by common accord, may more fully enjoy their confidence than a tribunal of fifteen judges, representing juridical systems from all over the world").

276. SCOTT, THE HAGUE PEACE CONFERENCES, *supra* note 53, at 425; Scott, *The Organization of International Justice*, *supra* note 255, at 64-65; Mr. Scott's Report of Oct. 16, 1907, *supra* note 146, at 114; Scott Memorandum, *supra* note 79, at 32. *See also* Scott Letter, *supra* note 252, at 3.

277. Thus, in a 1915 letter to Professor Lassa Oppenheim, Root asserted:

> There can be no court without a law to guide it. Otherwise the judges would be irresponsible sovereigns. There can be no police force without the judgments of a court to enforce. Otherwise the police force would be the agent of an irresponsible majority re-

Jurists in 1920, Bourgeois echoed the sentiment that the existence of "precise" and "defined" legal norms might represent a condition precedent for judicial settlement by permanent courts.[278] Far from controversial, the views of Bourgeois and Root reflected prominent strands in contemporaneous work on the distinction between "legal" and "political" disputes.[279] They also coincide with the assessments of

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> ducing all sovereigns to vassalage and destroying national independence. At the basis of all reform . . . lies an agreement upon certain, definite, specific rules of national conduct, very general and very rudimentary at first but capable of being enlarged by continual additions.

JESSUP, *supra* note 139, at 375; DUNNE, *supra* note 108, at 20.

278. *See Meeting of the Advisory Committee of Jurists*, *supra* note 149, at 231 (address by M. Léon Bourgeois).

279. For example, several writers of that era defined political disputes to include controversies of particular importance to the disputing states. LAUTERPACHT, *supra* note 95, at 139-42, 168; RALSTON, ATHENS TO LOCARNO, *supra* note 53, at 35-36 (quoting Thomas W. Balch, XXI REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 181 (1914)); 1 JOHN WESTLAKE, INTERNATIONAL LAW 302-04 (2d ed. 1910); Robert Yorke Hedges, *Justiciable Disputes*, 22 AM. J. INT'L L. 560, 561 (1928).

Other writers defined political disputes to include controversies not governed by established principles of international law. HYDE, *supra* note 57, § 559 at 112-13; LAUTERPACHT, *supra* note 95, at 7, 51; WESTLAKE, *supra*, at 358; Charles G. Fenwick, *The Distinction Between Legal and Political Questions*, 18 AM. SOC'Y INT'L L. PROC. 44, 46 (1924); Hedges, *supra* note 88, at 119. This would include situations where the principles were so broad or so hotly contested as to require tribunals to exercise a substantial degree of political judgment and discretion in rendering their awards. WESTLAKE, *supra*, at 363; Fenwick, *supra*, at 46.

While they used similar criteria to identify the "political" dimensions of inter-state disputes, one should bear in mind that Bourgeois and his contemporaries often applied those labels to support different theories. For example, most writers of that era regarded "political" disputes as non-justiciable. LAUTERPACHT, *supra* note 95, at 4; Fenwick, *supra*, at 44; Mr. Scott's Address of Aug. 1, 1907, *supra* note 154, at 88. That view has become discredited in the technical sense that (1) all disputes among states have a political element, and (2) international courts can issue legal opinions in cases having strong political overtones. LAUTERPACHT, *supra* note 95, at 153, 169-72; MERRILLS, *supra* note 220, at 167-170; Gray & Kingsbury, *supra* note 2, at 102. *See also* MALANCZUK, *supra* note 167, at 302. On the other hand, that view remains valid in the more practical sense that legal opinions may not address the political elements of controversies, with the result that they may not bring the parties to closure. MERRILLS, *supra* note 220, at 170-71, 178.

Unlike many of his contemporaries, Bourgeois seems to have assumed that disputes with strong political components might be justiciable, but that the parties would consent more readily to adjudication in an arbitral forum. *Cf.* WESTLAKE, *supra*, at 368 (explaining that "some questions of politics and honour" might be suitable for arbitration "where the questions are not of vital importance, and where the arbitrators are carefully chosen with a view to the special nature of the difference").

Professor Louis Sohn later advanced the hypothesis that states would submit "political" disputes to arbitration and "legal" disputes to judicial settlement. Sohn, *supra* note 137, at 33-40. In so doing, he seems to have gone much farther than Bourgeois. Whereas Bourgeois seems to have contemplated arbitration of *legal* disputes having strong political overtones, Sohn predicted that states would arbitrate claims based on interests having absolutely no foundation in

today's leading writers regarding the situations in which states may favor arbitration over judicial settlement.[280]

Thus, building on the insights of its architects, one may say that centralized judicial settlement possesses the capacity to make case law an important factor in the consistent and progressive development international law. Building on the same insights, however, one may also predict that judicial settlement will hold less appeal for states in disputes involving high stakes, matters of political principle, or broad legal standards subject to a controversial range of application. In these situations, the desire to maximize control over political choices or to emphasize local interests can lead states to prefer arbitration, even if it undermines the development of international law.

IV. INVESTMENT TREATY DISPUTES: TESTING THE LIMITS OF JUDICIAL SETTLEMENT

Building on Part III, one may use the insights developed in that section to explain the otherwise puzzling reluctance of states to embrace judicial settlement in the context of investment treaty disputes. Though some might object to the exercise on the grounds that investment treaty arbitration falls within a procedural framework designed for international *commercial* arbitration,[281] one must recall that investment treaties also include a substantive component negotiated by states, embodied in treaties among states, and designed to regulate their exercise of sovereign powers.[282] Thus, in substance, most in-

legal norms. *Id*. at 36. *But see* Gray & Kingsbury, *supra* note 2, at 102-03 nn.26-27 (indicating that Sohn's prediction has not found confirmation in state practice).

280. *See* Reisman, *supra* note 269, at 52 (emphasizing that arbitration provides states with a "significant degree of control over the composition of the tribunal" and asserting that "for certain sensitive cases, the assurance of this control over the tribunal's membership is an important factor in the decision to accede to arbitration"). *Cf.* MERRILLS, *supra* note 220, at 319 (explaining that that adjudication becomes attractive "where there is broad agreement about the relevant law," but that it becomes "totally unsuitable for disputes in which there is fundamental disagreement about what the law is, or should be").

281. *See* MCLACHLAN ET AL., *supra* note 250, at 65; Charles H. Brower, II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT'L L. 465, 467, 473-76 (2002); Charles H. Brower, II, *Investor-State Disputes Under NAFTA*: *The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 72-74 (2001) [hereinafter Brower, *Empire Strikes Back*]; Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement: An Overview*, Organization for Economic Co-Operation and Development, Working Papers on Int'l Investment No. 2006/1, para. 1, http://www.oecd.org/dataoecd/3/59/36052284.pdf [hereinafter OECD, *Improving the System*].

282. *See* Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1389-90 (2003). *See also* MCLACHLAN ET AL., *supra* note 250, at 6-7; VAN HARTEN, *supra* note 250, at 6;

vestment treaty arbitrations resemble classic inter-state disputes because they encompass claims against states involving their sovereign activities and the application of public international law.[283]

According to some, investment treaty arbitrations do not just resemble but, in fact, constitute traditional inter-state disputes because the treaties create no substantive rights for investors, but simply invest them with the procedural capacity to enforce the obligations owed to their home states.[284] While the author does not subscribe to that view, the point remains that one can draw fair comparisons between the substance of investment treaty disputes and the substance of traditional inter-state disputes. Given the resemblance and the tendency of states to treat the two categories as functional equivalents,[285] examination of state practice regarding investment disputes may prove useful in testing and reinforcing the insights developed in Part III.

When discussing investment disputes, one should recall that most of the roughly 2,500 investment treaties entail bilateral arrangements between capital-exporting states and capital importing states.[286] To

Brower, *supra* note 163; Bernardo M. Cremades & David J.A. Cairns, *The Brave New World of Global Arbitration*, 2 J. WORLD INVESTMENT 173, 183 (2002); Franck, *supra* note 140, at 69.

283. *See* Zachary Docuglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 2003 BRIT. Y.B. INT'L L. 151, 185 (recognizing that one cannot treat the liabilities imposed by investment tribunals as mere civil or private wrongs because the obligations stem from treaty provisions, and proposing to treat investment disputes as a sub-system of state responsibility, which shares many of the rules contained in the inter-state system of state responsibility). One should, however, recognize that the resemblance to inter-state disputes does not extend to the narrow category of investment claims brought under the so-called "umbrella clauses" of certain treaties, which arguably empower investors to bring treaty claims for what would otherwise constitute mere contractual disputes. *See* R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES 1008 (2005); MCLACHLAN ET AL., *supra* note 250, at 92, 111, 115-17; REDFERN & HUNTER, *supra* note 8, at 498-99; NOAH RUBINS & N. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE 234-40 (2005).

284. *See* Loewen Final Award, *supra* note 16, para. 233, 42 I.L.M. 811, 848-49 (2003); Amended Memorandum of Fact and Law para. 67, Attorney General of Canada v. S.D. Myers, Inc., No. T-225-01 [2001] F.C. 317 (Can.), *available at* http://www.international.gc.ca/assets/trade agreementsaccordscommerciaux/pdfs/Myersamend.pdf; Petitioner's Outline of Argument ¶¶ 72-73, *In re* Arbitration Pursuant to Chapter Eleven of NAFTA Between Metalclad Corp. & United Mexican States [2001] BCSC 664 (Can.); Transcript of Proceedings, *In re Metalclad, supra*, at 61, http://www.international.gc.ca/as-sets/trade-agreements-accords-commerciaux/pdfs/ trans-19fe.pdf; J. Christopher Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433, 444 n.48 (2002). *But see* Republic of Ecuador v. Occidental Exploration and Production Co., [2006] Q.B. 432, 450 (Eng. & Wales); MCLACHLAN ET AL., *supra* note 250, at 63-64; Douglas, *supra* note 283, at 168, 182, 184.

285. *See* Douglas, *supra* note 283, at 153, 163.

286. Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 194-95 (2001). *See also*

promote the flow of capital from "North" to "South,"[287] these treaties provide substantive and procedural safeguards against harmful measures directed at foreign investors by the governments of host states. Substantively, most investment treaties prohibit: (1) expropriation of investments without compensation based on market value;[288] (2) discrimination in the form of treating foreign investors less favorably than local investors (national treatment) or investors from third states (MFN treatment);[289] and (3) denials of "fair and equitable treatment."[290] Though less common worldwide, U.S. and Canadian treaties also emphasize the restriction of "performance requirements," which force investments to serve the interests of host states, for example by exporting a percentage of products or by achieving a certain level of domestic content.[291] Procedurally, most investment treaties secure these obligations by empowering investors to bring claims for alleged treaty violations before *ad hoc* arbitral tribunals formed under

Jeswald Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 656 (1990).

287. *See* Brower & Steven, *supra* note 286, at 194-95 (noting that "the overwhelming majority of BITs to date have been North to South").

288. *See* Canadian Model Foreign Investment Protection and Promotion Agreement (FIPA) (2004), art. 13, http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/2004-FIPA-model-en.pdf; Dutch Model Agreement on Encouragement and Reciprocal Protection of Investments [hereinafter Dutch Model BIT], art.6, *reprinted in* MCLACHLAN ET AL., *supra* note 250, at 423, 425; German Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments (2005) [hereinafter German Model BIT], art. 4(2), *reprinted in* MCLACHLAN ET AL., *supra* note 250, at 417, 418; United Kingdom Model Agreement for the Promotion and Protection of Investments (2005) [hereinafter U.K. Model BIT], art. 5, *reprinted in* MCLACHLAN ET AL., *supra* note 250, at 379, 381; United States Model BIT (2004), art. 6, *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf. *See also* BISHOP ET AL., *supra* note 283, at 1009, 1109-33; MCLACHLAN ET AL., *supra* note 250, at 265-313, 316-19; REDFERN & HUNTER, *supra* note 8, at 493-96; RUBINS & KINSELLA, *supra* note 283, at 200-12; M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 239-46 (2d ed. 2004); TWEEDDALE & TWEEDDALE, *supra* note 14, at 470.

289. *See* Canadian Model FIPA, *supra* note 288, arts. 3-4; Dutch Model BIT, *supra* note 288, art. 3(2); German Model BIT, *supra* note 288, arts. 3(1)-(2); U.K. Model BIT, *supra* note 288, art. 3; United States Model BIT, *supra* note 288, arts. 3-4. *See also* BISHOP ET AL., *supra* note 283, at 1008-09, 1133-65; MCLACHLAN ET AL., *supra* note 250, at 251-57; REDFERN & HUNTER, *supra* note 8, at 496-97; RUBINS & KINSELLA, *supra* note 283, at 225-34; SORNARAJAH, *supra* note 288, at 233-35, 236-37; TWEEDDALE & TWEEDDALE, *supra* note 14, at 470.

290. Canadian Model FIPA, *supra* note 288, arts. 5(1)-(2); Dutch Model BIT, *supra* note 288, art. 3(1); German Model BIT, *supra* note 288, art. 2(2); U.K. Model BIT, *supra* note 288, art. 2(2); United States Model BIT, *supra* note 288, arts. 5(1)-(2). *See also* BISHOP ET AL., *supra* note 283, at 1007-08, 1010-48; MCLACHLAN ET AL., *supra* note 250, at 226-47; REDFERN & HUNTER, *supra* note 8, at 489-92; RUBINS & KINSELLA, *supra* note 283, at 212-24.

291. Canadian Model FIPA, *supra* note 288, art. 7; United States Model BIT, *supra* note 288, art. 8. *See also* SORNARAJAH, *supra* note 288, at 237-38.

the ICSID Convention,[292] the ICSID Additional Facility Rules,[293] or the UNCITRAL Arbitration Rules.[294]

As should be manifest to informed observers, investment treaty arbitration thus proceeds under a system redolent of the PCA.[295] Like the PCA, the ICSID system essentially comprises a list of arbitrators,[296] a small secretariat that provides registry services to *ad hoc* tribunals,[297] and a set of procedural rules.[298] Like the PCA during its sea-

292. Canadian Model FIPA, *supra* note 288, art. 27(1)(a); Dutch Model BIT, *supra* note 288, art. 9; German Model BIT, *supra* note 288, art. 11 (Model I); U.K. Model BIT, *supra* note 288, art. 8 [Preferred]; United States Model BIT, *supra* note 288, art. 24(3)(a). *See also* LEW ET AL., *supra* note 3, at 768; RUBINS & KINSELLA, *supra* note 283, at 193 n.19; SORNARAJAH, *supra* note 288, at 251; TWEEDDALE & TWEEDDALE, *supra* note 14, at 471; Douglas, *supra* note 283, at 157; Franck, *supra* note 250, at 1541; Franck, *supra* note 140, at 54.

The "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention], which creates a mechanism for the arbitration of investment disputes brought against a state party by nationals of another state party.

293. Canadian Model FIPA, *supra* note 288, art. 27(1)(b); U.K. Model BIT, *supra* note 288, art. 8(2)(a) [Alternative]; United States Model BIT, *supra* note 288, art. 24(3)(b). *See also* TWEEDDALE & TWEEDDALE, *supra* note 14, at 472; Douglas, *supra* note 283, at 157.

The ICSID Additional Facility Rules provide a mechanism by which the International Centre for the Settlement of Investment Disputes can administer arbitrations that fall outside the scope of the ICSID Convention because *either* the state party to the dispute *or* the investor's home state has not ratified the ICSID Convention. *See* Int'l Centre for the Settlement of Investment Disps. [ISCID], Additional Facility Rules, art. 2(a), http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp; LEW ET AL., *supra* note 3, at 803; VAN HARTEN, *supra* note 250, at 35.

294. Canadian Model FIPA, *supra* note 288, art. 27(1)(c); U.K. Model BIT, *supra* note 288, art. 8(2)(c) [Alternative]; United States Model BIT, *supra* note 288, art. 24(3)(c). *See also* RUBINS & KINSELLA, *supra* note 283, at 193 n.19; TWEEDDALE & TWEEDDALE, *supra* note 14, at 471; Douglas, *supra* note 283, at 158; Franck, *supra* note 250, at 1541; Franck, *supra* note 140, at 54.

295. *See* COLLIER & LOWE, *supra* note 28, at 60 (drawing a loose comparison between the PCA and ICSID in the sense that both encompass mechanisms designed to facilitate arbitration and conciliation).

296. *See* ICSID Convention, *supra* note 292, arts. 12-16. *See also* Paul E. Comeux & N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabalization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 1, 22 (1994); W. Michael Reisman, *Control Mechanisms in International Dispute Resolution*, 2 U.S.-MEX. L.J. 129, 132 (1994); Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 258 n.388 (1988) [hereinafter Vandevelde, *BIT Program*]; Kenneth J. Vandevelde, *Reassessing the Hickenlooper Amendment*, 29 VA. J. INT'L L. 115, 164 n.233 (1988) [hereinafter Vandevelde, *Reassessing Hickenlooper*].

297. *See* ICSID Convention, *supra* note 292, arts. 9-11. *See also* Brower, *Empire Strikes Back*, *supra* note 281, at 79; Clyde C. Pearce & Jack J. Coe, Jr., *Arbitration Under NAFTA Chapter 11: Some Pragmatic Reflections upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311, 321 (2000); Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 86 CORNELL L. REV. 956, 1024-25 (2000); J. Christopher Thomas, *Investor-State Arbitration Under NAFTA Chapter 11*, 1999 CAN. Y.B. INT'L L. 99, 121.

son of popularity,[299] ICSID has represented a center of gravity for arbitration of claims against states at the end of one century and the beginning of the next.[300] Just as states continued to arbitrate substantial numbers of disputes outside the PCA framework even during its season of popularity,[301] investors continue to bring a substantial minority of claims outside the ICSID framework.[302] Just as the growing number of PCA arbitrations raised concerns about the inability of *ad hoc* tribunals to promote the consistent development of international law,[303] the recent proliferation of investment treaty claims before *ad hoc* tribunals has unveiled a similar lack of consistency[304] and called

298. *See* ICSID Convention, *supra* note 292, arts. 36-55. *See also* Vandevelde, *BIT Program*, *supra* note 296, at 258 n.388; Vandevelde, *Reassessing Hickenlooper*, *supra* note 296, at 164 n.233.

299. *See supra* note 158 and accompanying text.

300. *See* Franck, *supra* note 140, at 88 n.156; Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 39-40 (2007) [hereinafter Franck, *Empirically Evaluating Claims*]; Franck, *supra* note 250, at 1542 n.78; Eric Gottwald, *Leveling the Playing Field: Is It Time For a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 247 n.45, 273 (2007); Salacuse, *supra* note 16, at 149. *See also* TWEEDDALE & TWEEDDALE, *supra* note 14, at 451 ("[A]rbitration under the auspices of ICSID is one of the most common features for the settlement of investment disputes.").

301. HUDSON, *supra* note 52, at 7; ROSENNE'S THE WORLD COURT, *supra* note 53, at 7.

302. Franck, *Empirically Evaluating Claims*, *supra* note 300, at 39-49; Franck, *supra* note 250, at 1542 n.78. *See also* Luke Eric Peterson, *Investment Treaty News: 2006-A Year in Review* 2-3 (Int'l Inst. for Sustainable Dev. 2007), *available at* http://www.iisd.org/pdf/2007/itn_year_review_2006.pdf (indicating that investors have submitted a majority of new investment treaty claims to ICSID over the past twenty years, but also reporting that 2006 marked a shift, with 15 new claims submitted to ICSID and 21 new claims submitted to arbitration in other venues).

303. *See supra* notes 164-69 and accompanying text.

304. *See* MCLACHLAN ET AL., *supra* note 250, at 202; REDFERN & HUNTER, *supra* note 8, at 25-26, 489; José E. Alvarez, *The Emerging Foreign Direct Investment Regime*, 99 AM. SOC'Y INT'L L. PROC. 94, 97 (2005); Brower, *Legitimacy*, *supra* note 140, at 66-68; Franck, *supra* note 140, at 59-69; Franck, *supra* note 250, at 1558-82; Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 340, 347-52 (2004); Gabrielle Kaufmann-Kohler, *Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?*, *in* ANNULMENT OF ICSID AWARDS 189, 219-21 (Emmanuel Gaillard & Yas Banifatemi eds., 2004); Joseph E. Stiglitz, *Multilateral Corporations: Balancing Rights with Responsibilities*, 101 AM. SOC'Y INT'L L. PROC. 3, 51 (2007); Gebriel Egli, Comment, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1064-80 (2007); Johanna Kalb, Comment, *Creating an ICSID Appellate Body*, 10 UCLA J. INT'L L. & FOREIGN AFF. 179, 186-204 (2005); Louis T. Wells, Letter to the Editor, *Private Justice System Can only Survive if Parties Consider It Just*, FIN. TIMES, Nov. 19, 2007, at 12. *See also* Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1, 68 (2006) (recalling the tendency of scholars to "denounce the inconsistency of arbitral decisions in matters of foreign investment"); Ibironke T. Odumosu, *The Antinomies of the*

forth a literature that questions the legitimacy of a legal process marked by conflicting outcomes in similar cases.[305] Just as a popular movement sought a permanent international tribunal to avoid the vicissitudes of *ad hoc* arbitration before the PCA,[306] a rich vein of scholarship now encourages the inauguration of an appellate body or other permanent court to reduce the heterogeneity of outcomes in investment treaty disputes.[307] At first and second glance, the congruence between past and present seems almost startling.

Despite the robust sense of déjà vu, the lines of experience maintain their parallel orientation only until the critical endpoint, where they diverge along remarkably different vectors. Whereas the arbi-

(Continued) Relevance of ICSID to the Third World, 8 SAN DIEGO INT'L L.J. 345, 380 (2007) (noting the "difficulty of adopting consistent decisions in investment treaty arbitration").

305. *See* Brower, *Legitimacy*, *supra* note 140, at 52-53, 66-68; Franck, *supra* note 140, at 59-67; Franck, *supra* note 250, at 1582-87. *See also* Jack J. Coe, *Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1353 n.80 (2006) ("Large quantities of ink and paper have been devoted to the question of the 'legitimacy' of the investor-state dispute process."); Andrea K. Bjorklund, *Foreword to Syposium on Romancing the Foreign Investor: BIT by BIT*, 12 U.C. DAVIS J. INT'L L. & POL'Y 1, 4 (2005) (recalling "[c]oncerns about the legitimacy of the process and the quality and predictability of the jurisprudence" in investment treaty arbitration); Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014, 1015-16 (2007) (recognizing that the stability and predictability of tribunal decisions affect the perceived legitimacy of international investment law); Nick Ranieri & James R. Holbein, *Balancing Investors' Rights with Public Policy in the NAFTA Context*, *in* NAFTA CHAPTER 11 INVESTOR-STATE ARBITRATION, Booklet C.19.3, at 11 (Nick Ranieri & James R. Holbein eds., 2007) (describing the role of unpredictability in creating a legitimacy crisis for NAFTA's investment chapter).

306. *See supra* notes 170-71, 187, 257-58 and accompanying text.

307. VAN HARTEN, *supra* note 250, at 180-84; Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT'L & COMP. L. REV. 303, 308 (2000); Coe, *supra* note 282, at 1451-52; William S. Dodge, *International Decision:* Metalclad Corp. v. Mexico, 95 AM. J. INT'L L. 910, 918 (2001); Franck, *supra* note 250, at 1610, 1617-25; David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39, 40 (2006) [hereinafter Gantz, *Appellate Mechanism*]; David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 762-63 (2004); Garcia, *supra* note 304, at 367; Barton Legum, *Trends and Challenges in Investor-State Arbitration*, 19 ARB. INT'L 143, 147 (2003); Robert K. Paterson, *A New Pandora's Box? Private Remedies for Foreign Investors Under the North American Free Trade Agreement*, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 77, 123 (2000); Stiglitz, *supra* note 304, at 14, 53-54; Jeffrey T. Cook, *The Evolution of Investment-State Dispute Resolution in NAFTA and CAFTA: Wild West to World* Order, 34 PEPP. L. REV. 1085, 1125-30 (2007); Erin E. Gleason, *International Arbitral Appeals: What Are We so Afraid of?*, 7 PEPP. DISP. RESOL. L.J. 269, 277-86 (2007); Kalb, *supra* note 304, at 219-20; Jessica S. Wiltse, Comment, *An Investor-State Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven*, 51 BUFF. L. REV. 1145, 1190 (2003); R. Doak Bishop, *The Case for an Appellate Panel and Its Scope of Review*, TRANSNAT'L DISP. MGMT., Apr. 2005, at 8, 10; Wells, *supra* note 304, at 12.

tration of disputes among states crept slowly but surely along a path towards judicial settlement, investment treaty disputes appear unlikely to follow that course. In fact, surveys conducted by ICSID[308] and the OECD[309] reveal that states have little interest in pursuing a single permanent appellate body for investment treaty arbitration. Thus, despite commentary recommending judicial settlement as the foundation for consistent development of international investment law, states seem content to forego that route even if it means the perpetuation of conflicting decisions and a commensurate sacrifice of legitimacy.

While it may seem puzzling in light of history and foolish in light of the lost opportunity for development of coherent jurisprudence in a field that craves certainty,[310] the reluctance to embrace judicial settlement of investment disputes might not have surprised Léon Bourgeois and his contemporaries. As explained above, they predicted that states would continue to prefer arbitration for disputes having strong political dimensions.[311] Applying the criteria suggested by Bourgeois and his contemporaries, one can easily identify the strong political elements embedded in most investment disputes. Many claims put hundreds of millions of dollars in controversy.[312] Some claims essentially threaten to bankrupt states following periods of

308. *See* ICSID, *Suggested Changes to the ICSID Rules and Regulations* 4 (May 12, 2005), *available at* http://www.worldbank.org/icsid/highlights/052505-sgmanual.pdf (referring to a discussion paper that raised the possibility of establishing an appellate mechanism, but explaining that most members of ICSID's Administrative Council regarded the undertaking as "premature"). *See also* Gantz, *Appellate Mechanism*, *supra* note 307, at 40 (describing the status of ICSID's proposal as "subsequently recanted and now in limbo").

309. *See* OECD, *Improving the System*, supra note 281, paras. 3, 28, 56 (referring to discussions within the OECD's Investment Committee regarding the advantages and disadvantages of establishing an appellate mechanism, but explaining that consultations "produced no consensus").

310. *See* Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT'L LAW. 87, 104 (2005) (explaining that stability and predictability of legal requirements represent issues of fundamental importance to foreign investors who commit significant capital resources to their host states for a period of years or decades). *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) ("[O]rderliness and predictability [are] essential to any international business transaction."); Fernando R. Téson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 77 (1992) ("[I]nternational business transactions require stability and predictability to be successful.").

311. *See supra* notes 256, 274-80 and accompanying text.

312. Franck, *Empirically Evaluating Claims*, *supra* note 300, at 57-58; Salacuse, *supra* note 16, at 141-42. *See also* LEW ET AL., *supra* note 3, at 763 (explaining that investment disputes often place "remarkable" amounts in controversy); Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 165 (2007) (referring to a "litigation explosion" involving "billions of dollars").

economic and political turmoil.[313] Virtually all involve points of principle that have long supplied the foundation for conflict and discord[314] from Carlos Calvo,[315] to Cordell Hull,[316] to the New International Economic Order.[317]

Despite the temptation to regard some of the underlying debates as ancient history, the fact remains that today's investment disputes continue to raise fundamental points of principle because their legal framework emerged from the crucible of existential (and sometimes unresolved) conflicts about decolonization, industrialization, socialist

313. *See* William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 309-11 (2008). *See also* VAN HARTEN, *supra* note 250, at 7 (explaining that a single award against the Czech Republic roughly equalled the state's entire health-care budget); Salacuse, *supra* note 16, at 142 (explaining that investment treaty awards may prove "onerous" in relation to the budgets and financial resources of developing states). Even when successful, the defense of investment treaty claims can place serious pressure of the national budgets of many states. *See* VAN HARTEN, *supra* note 250, at 123 n.13 (indicating that the cost of defending a single claim consumed roughly half of the respondent state's annual budget for the department of justice). *See also* Salacuse, *supra* note 16, at 145-46. According to one study, states should expect to pay for the defense of unsuccessful claims because tribunals generally decline to shift the costs of legal representation in investment treaty disputes. *See* Franck, *Empirically Evaluating Claims*, *supra* note 300, at 69 (concluding that tribunals declined to shift responsibility for legal fees in forty-one out of fifty-four awards).

314. Many standard works emphasize the intensity of debates, which began in the nineteenth century and continued through much of the twentieth century, concerning the existence and scope of customary international law rules governing the protection of foreign investments. *See* MCLACHLAN ET AL., *supra* note 250, at 7, 204, 216-17; RUBINS & KINSELLA, *supra* note 283, at 153-71. *See also* BISHOP ET AL., *supra* note 283, at 2-6.

315. Argentine jurist and diplomat Carlos Calvo articulated the doctrine that foreign investors should enjoy no right to better treatment than their local counterparts. *See* BISHOP ET AL., *supra* note 283, at 3; KINNEAR ET AL., *supra* note 250, Gen. Section at 24; REDFERN & HUNTER, *supra* note 8, at 474; SORNARAJAH, *supra* note 288, at 38 & n.9; VAN HARTEN, *supra* note 250, at 17 & n.28. *See also* Amos S. Hershey, *The Calvo and Drago Doctrines*, 1 AM. J. INT'L L. 26 (1907). Despite strong opposition from capital-exporting states, the Calvo Doctrine attracted widespread support throughout Latin America, Africa, and Asia. BISHOP ET AL., *supra* note 283, at 3; SORNARAJAH, *supra* note 288, at 38.

316. The so-called "Hull Doctrine" emerged from a famous exchange of letters, in which U.S. Secretary of State Cordell Hull asserted, and his Mexican counterpart rejected, the proposition that international law requires "prompt, adequate, and effective" compensation for the nationalization of foreign investment property. RUBINS & KINSELLA, *supra* note 283, at 158; SORNARAJAH, *supra* note 288, at 38 & n.8; VAN HARTEN, *supra* note 250, at 91 & n.120.

317. *See* Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9559 (May 1, 1974). *See generally* JAGDISH N. BHAGWATI, THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH-SOUTH DEBATE (1977). *See also* SORNARAJAH, *supra* note 288, at 1, 212, 270 (describing the United Nations General Assembly's adoption of several resolutions "calling for the establishment of a New International Economic Order, the aim of which was to ensure fairness in trade to developing countries as well as control over the process of foreign investment").

revolution, nationalism, racism, protection of the environment, the rise of multinational corporations, and the emergence of non-governmental organizations as direct participants in the international legal process.[318] Furthermore, even among the inner core of capital-exporting states, the recent Dubai ports fiasco suggests the capacity of foreign investment to stir powerful emotions more likely to demand political solutions than consistent application of universal rules.[319] Viewed in this light, investment disputes tend to entail the gravity thought to infuse controversies with a strong political dimension.[320]

Turning to a second hallmark of political disputes, one should observe that many principles of international investment law lack a clear, detailed, and universally accepted content.[321] For example, as recently as 1964, the United States Supreme Court implied that it could not identify a prohibition on uncompensated takings of investment property under customary international law.[322] More recently, a

318. *See* SORNARAJAH, *supra* note 288, at 1, 22, 26, 36, 66-67, 74, 77-81, 86; VAN HARTEN, *supra* note 250, at 8-9, 14, 44.

319. In early 2006 Dubai Ports World, a state-controlled company from the United Arab Emirates, proposed to make a corporate acquisition that would have given it control over leases to manage cargo terminals at six U.S. seaports. In the emotionally charged atmosphere of the so-called "Global War on Terror," the prospect of a state-owned Arab company managing local port facilities triggered political furor in the United States. Although the Executive Branch previously approved the transaction as required by law, Republican and Democratic members of Congress united in a bipartisan effort to scuttle the deal. *See* David S. Cloud, *Port Deal's Collapse Stirs Fears of Repercussions in Mideast Ties*, N.Y. TIMES, Mar. 11, 2006, at A10; David S. Cloud & David E. Sanger, *Dubai Company Delays New Role at Six U.S. Ports*, N.Y. TIMES, Feb. 24, 2006, at A1; Carl Hulse, *G.O.P. Leaders Vowing to Block Ports Agreement*, N.Y. TIMES, Mar. 8, 2006, at A1; Carl Hulse, *In Break with White House, House Panel Rejects Port Deal*, N.Y. TIMES, Mar. 9, 2006, at A20; Carl Hulse & David E. Sanger, *Coast Guard Had Concerns About Ports Deal, Papers Show*, N.Y. TIMES, Feb. 28, 2006, at A15; Simon Romero & Heather Thomas, *A Ship Already Sailed; America Ceded Its Seaport Terminals to Foreigners Years Ago,* N.Y. TIMES, Feb. 24, 2006, at C1; David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES, Mar. 10, 2006, at A1.

One commentator found it "hard to imagine a more ignorant, bogus, xenophobic, [and] reckless debate than the one indulged in by both Republicans and Democrats around this question of whether an Arab-owned company might oversee loading and unloading services in some U.S. ports." Thomas L. Friedman, Op-Ed., *Dubai and Dunces*, N.Y. TIMES, Mar. 15, 2006, at A27.

320. *See* LEW ET AL., *supra* note 3, at 763 (indicating that the issues raised by investment disputes often have "considerable political implications"); Salacuse, *supra* note 16, at 141 (explaining that investor-state disputes are "political in nature," that they "often become highly politicized," and that "it is the political dimension of such conflicts that primarily preoccupy host government officials").

321. *See* MCLACHLAN ET AL., *supra* note 250, at 218-19 (describing the failure to reach multilateral consensus on substantive principles).

322. In applying the so-called "act of state doctrine," the Supreme Court reviewed the lack of a consistent or generalized state practice on compensation for the expropriation of foreign

series of negotiations for multilateral treaties on foreign investment have collapsed without reaching agreement, including serious efforts by OECD members,[323] WTO members,[324] and states within the Americas.[325] Thus, from the multilateral perspective, doubt and controversy remain the emblems most associated with discussions regarding the international legal obligations of states with respect to foreign investment.[326]

While capital-exporting states have established some governing principles for investment disputes[327] by concluding roughly 2,500 bi-

investments, and opined that there are "few if any issues in international law today on which opinion seems to be so divided." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-30 (1964). Scholars have interpreted that statement to recognize the unsettled character of customary international law with respect to the treatment of foreign investment. *See* David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 715 & n.337 (2001); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301, 318 n.81 (1999); Stephen M. Schwebel, *Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27, 27 (2004).

323. MCLACHLAN ET AL., *supra* note 250, at 219; SORNARAJAH, *supra* note 288, at 3, 291-92, 297; VAN HARTEN, *supra* note 250, at 21-22; Peter T. Muchlinkski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L LAW. 1033, 1048-49 (2000). According to one observer, the failure of negotiations within the OECD "illustrates that even developed states may disagree on . . . the law of foreign investment." SORNARAJAH, *supra* note 288, at 32.

324. SORNARAJAH, *supra* note 288, at 28, 32, 36, 73; VAN HARTEN, *supra* note 250, at 22-23. *See also* Gantz, *Appellate Mechanism*, *supra* note 307, at 71. Although the WTO system includes an Agreement on Trade Related Investment Measures, that instrument deals only with the narrow issue of investment measures that may disrupt trade in goods (*i.e.*, a limited range of performance requirements). SORNARAJAH, *supra* note 288, at 2-3 n.2, 303; VAN HARTEN, *supra* note 250, at 21 n.55.

325. *See* Gantz, *Appellate Mechanism*, *supra* note 307, at 46-47 & n.31 (noting that problems have led to suspension of negotiations regarding the Free Trade Agreement of the Americas, describing the prospects of their conclusion as "increasingly remote," and opining that extension of the agreement to investment "is even more remote"); Michael D. Goldhaber, *Wanted: A World Investment Court*, AM. LAW., Summer 2004 (FOCUS EUROPE), *available at* http://www.americanlawyer.com/focuseurope/inv-estmentcourt04.html (referring to the stalled negotiations for a Free Trade Agreement of the Americas).

326. *See* SORNARAJAH, *supra* note 288, at 1 ("Few areas of international law attract as much controversy as the law relating to foreign investment.").

327. *See* MCLACHLAN ET AL., *supra* note 250, at 17 ("States have entered into investment treaties precisely in order to remedy perceived gaps . . . in the protection afforded by customary international law in the field of the treatment of aliens."); Salacuse, *supra* note 286, at 659-60 (describing the absence of generally accepted principles under customary international law, the failure to conclude multilateral treaties, and the consequent reliance on bilateral treaties to establish substantive rules for the protection of foreign investment).

lateral treaties[328] on broadly similar terms,[329] those instruments express many commitments at such a high level of indeterminacy,[330] and the rules of treaty interpretation provide so little concrete guidance,[331] that they leave unresolved the essentially political tasks of specifying obligations and, thus, allocating potentially tremendous risks between foreign investors and their host states.[332] Because investment treaties thus tend to delay the allocation of obligations and risks until the point of adjudication, they inevitably require tribunals to exercise substantial amounts of discretion and political judgment.[333]

Bearing in mind the issues in controversy and the tasks assigned to tribunals, the reluctance of states to embrace judicial settlement of investment disputes begins to make sense. Because investment disputes raise grave issues and because they require tribunals to exercise discretion in allocating tremendous risks, they teem with the political elements that Bourgeois predicted would make judicial settlement an unappealing option for states. Furthermore, in acting as Bourgeois predicted by rebuffing calls for judicial settlement of investment disputes, states have tacitly reinforced his views on its functions and limits under public international law: while states appreciate the value of judicial settlement in promoting the consistent and progressive development of international law, they may assign greater value to arbitration's capacity to focus on the immediate needs of parties locked in disputes over grave issues or the discretionary allocation of valuable rights.

328. MCLACHLAN ET AL., *supra* note 250, at 5; Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 LAW & BUS. REV. AM. 155, 156 (2007); Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 76 (2007); Anthony C. Sinclair, *The Substance of Nationality Requirements in Investment Treaty Arbitration*, 20 ICSID REV. FOREIGN INVESTMENT L.J. 357, 357 (2005).

329. *See* BISHOP ET AL., *supra* note 283, at 1, 8; MCLACHLAN ET AL., *supra* note 250, at 5; REDFERN & HUNTER, *supra* note 8, at 489; RUBINS & KINSELLA, *supra* note 283, at 192; SHAW, *supra* note 53, at 747-48; SORNARAJAH, *supra* note 288, at 217; Douglas, *supra* note 283, at 159; Franck, *supra* note 250, at 1529; Franck, *supra* note 140, at 86; Schwebel, *supra* note 53, at 365.

330. *See* Ari Afilalo, *Meaning Ambiguity and Legitimacy: Judicial (Re-) Construction of NAFTA Chapter 11*, 25 NW. J. INT'L L. & BUS. 279, 297-302 (2005); Brower, *Legitimacy*, *supra* note 140, at 59-63; Gottwald, *supra* note 300, at 259-60; Ranieri & Holbein, *supra* note 305, at 11; Olivia Chung, Note, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 959-62 (2007).

331. MCLACHLAN ET AL., *supra* note 250, at 68.

332. *See id.* at 203 ("[T]he appearance of virtual unanimity . . ., which is gleaned from a comparison of the language of the multitude of treaties, masks an absence of any kind of settled agreement over content.").

333. *See* VAN HARTEN, *supra* note 250, at 122.

CONCLUSION

Most observers have examined the relationship between arbitration and judicial settlement from the perspective of international commercial disputes among private parties. In that context, they have emphasized the celebrated shift from judicial settlement to arbitration. Unfortunately, the predominance of that narrative has eclipsed an important countertrend. For disputes among states involving their sovereign activities and the application of public international law, one may document a conscious shift from arbitration to judicial settlement. By contrasting these two phenomena and by introducing the development of state practice with respect to investment disputes, one emerges with a more refined understanding of the functions and limits of arbitration and judicial settlement under private and public international law.

For international commercial disputes among private parties, arbitration promotes neutrality by guaranteeing access to dispute settlement on a level playing field, familiar and suitable for use by all parties. However, because arbitration depends on the consent of the disputing parties, it remains vulnerable to sabotage, with the result that judicial settlement continues to play a vital role in providing assistance at the junctures most likely to witness procedural collapse. In other words, judicial settlement provides the coercion that guarantees the integrity of the arbitral process.

For inter-state disputes involving sovereign activities and the application of public international law, states often favor judicial settlement because it promotes the consistent development of international law. However, the emphasis on systematic development of jurisprudence means that judicial settlement may not address or resolve the political dimensions of cases involving grave issues or the discretionary allocation of valuable rights.[334] As suggested by the architects of judicial settlement and reinforced by state practice, states may prefer to limit the range of interests brought to bear on the decision of such matters by selecting arbitration—even if that means sacrificing stability, coherence, and certainty in development of the law.

334. *See* MERRILLS, *supra* note 220, at 170-71, 178-79 (emphasizing that legal opinions may not address the political elements of controversies, with the result that they may not bring the parties to closure).