

# Oxford Public International Law



## **Judicial Settlement of International Disputes**

**Alain Pellet**

**Content type:** Encyclopedia entries

**Product:** Max Planck Encyclopedia of Public International Law [MPEPIL]

**Article last updated:** July 2013

### **Subject(s):**

Mixed Claims Commissions — Res judicata

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

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## A. Introduction

1 The judicial settlement of international disputes is one of the various means of → *peaceful settlement of international disputes* listed in Art. 33 → *United Nations Charter*.

2 Two different approaches can be followed. Some authorities put both → *arbitration* and the settlement of disputes by permanent → *international courts and tribunals* together under the denomination 'judicial settlement'. Others limit the definition of judicial settlement to the settlement of disputes by permanent international courts and tribunals. The very fact that Art. 33 UN Charter distinctively mentions 'arbitration' on the one hand and 'judicial settlement' on the other hand justifies that they be dealt with separately; however, they indisputably offer some common traits and a margin of possible overlaps is unavoidable (see paras 5-63 below). After a shaky start, the judicial settlement of international disputes thus strictly defined, remained for a long time mainly confined to the → *Permanent Court of International Justice (PCIJ)*, then the → *International Court of Justice (ICJ)*, before the rather anarchical burgeoning of judicial bodies which characterized the end of the 20<sup>th</sup> century (see paras 64-77 below).

3 Moreover, not all those judicial bodies are aimed at settling international disputes. Thus, international criminal courts or tribunals like the → *International Criminal Court (ICC)*, the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)*, and the → *International Criminal Tribunal for Rwanda (ICTR)*, have been instituted to judge the persons accused of international crimes at the international level and only artificially could their verdicts be described as settling an international dispute between the → *international community* (or society) and the accused even if these proceedings are a sign of the international personality of the private persons.

4 Even though the regional courts of human rights testify to the same phenomenon, there are, nevertheless, reasons to include them among the judicial bodies whose function is to settle international disputes properly said: first, they may be seised by States which allege that another State Party has committed a violation of the convention; and, second, since the individuals who make applications against States Parties for breaches of the rights guaranteed by the conventions can themselves be held as being → *subjects of international law*, their claims can be described as bearing on international disputes.

## B. The Characteristics of the Judicial Settlement of International Disputes

5 The international judiciary differs from the domestic organization of justice in two fundamental traits: its decentralization on the one hand—a characteristic which will be dealt with in more detail in the next section (see paras 64-77 below)—and its consensual basis on the other hand, although the latter is probably less absolute than is often alleged (see paras 7-24 below). Besides this essential element, the arbitral and judicial settlements of international disputes share several common characteristics (see paras 25-52 below).

6 The only real differences between both means of settlement consist in the permanence of the judicial body, which, contrary to an arbitral tribunal, is established independently from the parties to a particular dispute or categories of disputes (see paras 53-63 below). However, even these distinctive characters are uncertain with the perpetuation of certain arbitral traits within the judicial settlement of disputes and the growing phenomenon of institutionalization of arbitral bodies.

## 1. The Limits of the Principle of Consent to the Judicial Settlement of International Disputes

7 In the domestic sphere, the judicial settlement of disputes is compulsory or, more exactly, any dispute either between private persons or between a private person and State authorities can be decided by a judicial body; this is certainly one of the main characteristics of the → *rule of law* principle (*État de droit*). The principle of compulsory jurisdiction cannot be transposed to the international level, except partially in the framework of certain organizations or in particular fields (see para. 20 below).

8 As a matter of principle, any recourse to judicial settlement—as to any other means of peaceful settlement of international disputes—is conditioned by an acceptance of the seised court’s jurisdiction by all the States in dispute. ‘This rule ... only accepts and applies a principle which is a fundamental principle of international law, namely, the principle of the independence of States.... Such consent can be given once and for all in the form of an obligation freely undertaken, but it can, on the contrary, also be given in a special case apart from any existing obligation’ (→ *Eastern Carelia [Request for Advisory Opinion]* PCIJ Series B No 5 at 27).

9 Art. 36 PCIJ Statute, then of the ICJ, constitutes an illustration of this principle. The famous optional clause of para. 2 provides that, ‘[t]he States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes’. Absent such an optional declaration by all the parties in dispute, a case may only be brought before the Court (or any other comparable court or tribunal) by their common agreement. Besides a rather obscure mention of ‘all matters specially provided for in the Charter of the United Nations’—which does not correspond to the actual drafting of the UN Charter (see *Aerial Incident of 10 August 1999 [Pakistan v India]* [Jurisdiction of the Court] [2000] ICJ Rep 12 at 32, para. 48)—the general formula of para. 1 (‘[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for ... in treaties and conventions in force’) covers several quite different situations: *i*) those when the parties have concluded a special agreement, or → *compromis*, by which they commit themselves to settle a particular dispute defined in that agreement; *ii*) the cases where the parties have inserted in a treaty a provision by which they accept in advance, the jurisdiction of the Court in any dispute arising about the interpretation or the application of the treaty in which the provision is included (special compromissory clause or, although wrongly named, arbitration clause—*clause compromissoire spéciale*); *iii*) such a clause may be inserted in a comprehensive treaty providing for the peaceful settlement of disputes between two or more States (general compromissory clause—*clause compromissoire générale*); *iv*) the consent of the defendant ‘may also be inferred from acts conclusively establishing it’ (*Rights of Minorities in Upper Silesia [Minority Schools]* [Germany v Poland] PCIJ Series A No 15 at 24; for the ICJ see also → *Corfu Channel Case* and Art. 38 (5) ICJ Rules of the Court—*forum prorogatum*).

10 The ICJ has strictly maintained this requirement of an express or a clear implicit → *consent* to its jurisdiction of all States in dispute: ‘[t]he Court’s jurisdiction depends on the will of the Parties’ (*Rights of Minorities in Upper Silesia [Minority Schools]* 22; see also *Factory at Chorzów [Germany v Poland]* [Claim for Indemnity] [Merits] PCIJ Series A No 17 at 37–38); therefore, ‘the Court can only exercise jurisdiction over a State with its consent’ (*Case of the Monetary Gold removed from Rome in 1943 [Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America]* [Preliminary Question] [Judgment] [1954] ICJ Rep 19 at 32; see also among many examples *Application of the International Convention on the Elimination of all Forms of Racial Discrimination [Georgia v Russian Federation]* [Preliminary Objections] [Judgment] para. 131). In the

*Monetary Gold* case the Court found that, failing the consent of the defendant (or, exceptionally of third indispensable parties whose 'legal interests would not only be affected by a decision, but would form the very subject-matter of the decision'), it refuses to exercise its jurisdiction in that case (*Case of the Monetary Gold removed from Rome in 1943* 32; see also *East Timor [Portugal v Australia]* [1995] ICJ Rep 90 at 105, para. 34).

**11** However, the fundamental principle of consent to the judicial settlement of inter-State disputes is less absolute than it may look.

**12** In the first place, it has never been entirely respected; if only because international courts and tribunals have always benefited from an incidental jurisdiction ('it is permitted for certain types of claim to be set out as incidental proceedings, that is to say, within the context of a case which is already in progress ... in order to ensure better administration of justice, given the specific nature of the claims in question' [*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Counter-Claims) (Order)* (1997) ICJ Rep 243 at 257, para. 30]). Moreover, they also have 'a special jurisdiction, for interpreting their own decision; 'the Court's jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case; and whereas it follows that, even if the basis of jurisdiction in the original case lapses, the Court, nevertheless, by virtue of Article 60 of the Statute, may entertain a request for interpretation' (*Request for the Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals [Mexico v United States of America] [Order]* [2008] ICJ Rep 311 at 323, para. 44; see also the *Ringeisen Case (Interpretation)* [ECtHR] Series A No 16 para. 13). Moreover, it is 'clear that Article 60 of the Statute does not impose any time limit on requests for interpretation' (*Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear [Cambodia v Thailand] [Provisional Measures] [Order]* para. 37). And one can wonder whether they do not enjoy inherent powers in respect to the implementation of their judgments (although in its judgment concerning the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals [Mexico v United States of America] [Judgment]* [2009] ICJ Rep 3 at 20, para. 56, the ICJ seemed to dismiss such a possibility—but the claimant had not based its claim on such a ground).

**13** In the second place, it is true that under the optional clause, '[d]eclarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make' and that, '[i]n making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations', and, in particular, that 'it may limit its effect to disputes arising after a certain date; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it' (*Military and Paramilitary Activities in and against Nicaragua [Nicaragua v United States of America] ['Nicaragua Case'] [Jurisdiction and Admissibility]* [1984] ICJ Rep 392 at 418, para. 59). Consequently, it is equally true that, when a State accepts the compulsory jurisdiction of a judicial body, it restricts the exercise of its sovereign rights but does not abandon or limit its sovereignty since, as aptly explained by the PCIJ in the *Wimbledon* case, 'the right of entering into international engagements is an attribute of State sovereignty' (*The 'Wimbledon' [Government of His Britannic Majesty v German Empire]* PCIJ Series A No 1 at 25; → *Wimbledon, The*). This, of course holds true for the acceptance of the judicial settlement of disputes as for any other international engagement.

**14** But this is a rather abstract view. As the Court also made clear in the *Nicaragua Case (Jurisdiction and Admissibility)*: ‘the unilateral nature of declarations [under the optional clause] does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases’ (at para. 59). The consent of the accepting State is given once and for all (until the withdrawal of the optional declaration, but it is subject to restrictive conditions—see *Nicaragua Case [Jurisdiction and Admissibility]* paras 63–65) and this makes the very idea of ‘consent’ rather abstract and formal; it is true, however, that scarcely a little more than one-third of the States Parties to the ICJ’s Statute (66 out of 192 States) had made the declaration provided for in Art. 36 ICJ Statute (see para. 9 above) on 1 June 2011, and that the numerous and far-reaching reservations and limitations to the Court’s jurisdiction made by many of them (see eg the UK or Indian Declarations) undermine the system of the optional clause.

**15** The most striking blow to the consent principle was delivered by the provisions on the jurisdiction of the late → *Central American Court of Justice (1907–18)*, which granted to that Court a general jurisdiction on ‘all controversies or questions which may arise among’ the parties to the Convention for the Establishment of a Central American Court of Justice ‘of whatsoever nature and no matter what their origin may be’ (Art. I), as well as on ‘questions which individuals of one Central American country may raise against any of the other contracting Governments’ (Art. II), and ‘over cases arising between any of the contracting Governments and individuals’ (Art. III), but, in this last case, only when brought ‘by common accord’ of the parties to the dispute. In accordance with these provisions, the Court’s jurisdiction extended to virtually all disputes of an international character which could arise within the Central American Republics and, in the last case, even to litigation of a purely domestic character. This excessively wide competence—which jeopardized the freedom of action of the parties—was the main reason that the Court was not continued after the lapse of the initial ten-year period provided for in the Convention (Art. XXVII).

**16** While since then no such ambitious experience of systematic recourse to judicial settlement has been made, treaties concluded within the framework of regional organizations or in some specialized fields provide for the compulsory settlement of disputes between the members of the organization or the parties to the treaty. Indeed, by entering the organization and/or ratifying the treaty, all the States Parties have ‘consented’ to the jurisdiction of the courts created by the treaty; but this too is rather an abstract view of the meaning of ‘consent’.

**17** The most striking example of such a general acceptance of the judicial settlement of international disputes at the universal level is given by the Understanding on Rules and Procedures Governing the Settlement of Disputes (‘DSU’) annexed to the Agreement Establishing the → *World Trade Organization (WTO)* (‘WTO Agreement’; → *World Trade Organization, Dispute Settlement*). This Understanding institutes a compulsory mechanism for the settlement of the disputes arising from the WTO Agreement, and the annexed multilateral and plurilateral agreements; this system culminates in the adoption by the Dispute Settlement Body (‘DSB’) of the reports prepared by the Appellate Body (Art. 17 (14) DSU).

**18** Similarly, Art. 286 UN Convention on the Law of the Sea also seems to provide for the compulsory settlement of any dispute under the Convention not settled by other means, by the → *International Tribunal for the Law of the Sea (ITLOS)*, its Seabed Disputes Chamber, the ICJ, or an arbitral tribunal constituted in accordance with Annex VII or VIII UN Convention on the Law of the Sea. However, the system is matched by so many exceptions and conditions that it can hardly be described as a global compulsory mechanism for the judicial settlement of disputes, even in the limited field of the law of the sea. It remains that, to the extent that it provides for such a compulsory judicial settlement, the States (and

international organizations) parties to the UN Convention on the Law of the Sea have no choice to consent or not; they must accept the complicated system for the judicial settlement of disputes instituted by the Convention—which allows for no reservation or exception (Art. 309 UN Convention on the Law of the Sea).

**19** The same remarks can be made in respect to the jurisdiction of the various courts and tribunals created at the regional level, mainly in the fields of human rights, or in the framework of regional economic integration organizations.

**20** Thus, when a State adheres to the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* ('ECHR'), it has no other choice but to accept the compulsory jurisdiction of the → *European Court of Human Rights (ECtHR)*, as established by Arts 32–34 ECHR, both for inter-States disputes and for applications referred to it by individuals (since the entry into force of Protocol No 11 to the ECHR on 1 November 1998; before that date, States Parties had the option to accept or not both grounds for the jurisdiction of the Court—former Arts 25 and 46). The optional jurisdiction remains the rule for the → *Inter-American Court of Human Rights (IACtHR)* (Art. 62 → *American Convention on Human Rights [1969]*; 'ACHR'), being noted that '[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization [of American States ('OAS')], may lodge petitions with the [→ *Inter-American Commission on Human Rights (IACommHR)*] containing denunciations or complaints of violation of this Convention by a State Party' (Art. 44). In Africa, the 2004 Protocol to the → *African Charter on Human and Peoples' Rights (1981)* has instituted an → *African Court on Human and Peoples' Rights (ACtHPR)*, which was merged, in 2008, with the → *African Court of Justice (ACJ)* in order to form the African Court of Justice and Human Rights. According to Arts 28–30 Protocol on the Statute of the African Court of Justice and Human Rights, the Court has jurisdiction over: the interpretation and application of the Constitutive Act of the → *African Union (AU)*; the interpretation, application, or validity of other AU Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity; the interpretation and the application of the African Charter on Human and Peoples' Rights and various African human rights treaties; and 'any question of international law', including 'all acts, decisions, regulations and directives of the organs of the Union', submitted to it by a State Party to the Protocol or the Assembly, the Parliament, and other organs of the Union, authorized by the Assembly and various entities including the → *African Commission on Human and Peoples' Rights (ACommHPR)*. The provisions of the Protocol on the Statute of the → *African Court on Human and Peoples' Rights (ACtHPR)* are an interesting combination of all the various possible grounds for compulsory and optional jurisdiction of an international judicial organ.

**21** The European Union ('EU') experience in this matter is less ambitious but more realistic. By ratifying the founding treaties, the Member States accept, *ipso facto* and unconditionally, the exclusive jurisdiction of the Court of Justice of the European Union (composed of the Court of Justice, the General Court, and specialized courts; → *European Union, Court of Justice and General Court*) which acts in some respects as a supreme court in a federal State, thus making it possible to proclaim that the European Communities and, now, the EU, 'is based on the rule of law' (Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339 para. 23 and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 para. 81; although it is to be noted that Art. 24 Treaty on European Union specifies that '[t]he Court of Justice of the European Union shall not have jurisdiction with respect to' the common foreign and security policy; see also Art. 275 Treaty on the Functioning of the EU ['TFEU']). Here again, it will be apparent that the notion of 'consent' to the jurisdiction of the Court is rather abstract—if not moot; it is effective only in respect to Art. 273 TFEU according to which,

'[t]he Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties'.

**22** Most judicial bodies instituted in regional organizations of integration in Europe or in Africa share the same general features as the Court of Justice of the EU: consent to jurisdiction of the court is given once and for all when the State ratifies the constitutive act of the organization, which confers in principle a comprehensive jurisdiction to the court in question for disputes in relation with the subject-matter of the treaty. See, eg, the → *European Free Trade Association (EFTA) Court* (Art. 108 (2) Agreement on the European Economic Area); the Economic Community of West African States Court (see the 2005 Draft Revised Protocol of the Community Court of Justice); the Court of Justice of the → *Central African Economic and Monetary Community (CAEMC)* (see the 1996 Convention Governing the Court of Justice of the CAEMC); the Court of Justice of the Organization for the Harmonization of African Business Law (established by the 1993 Treaty on the Harmonisation of Business Law in Africa ['OHADA Treaty']); and the → *Southern African Development Community (SADC) Tribunal* (Art. 16 Treaty of the Southern African Development Community).

**23** In Latin America, it seems paradoxical that the most advanced process of economic integration, → *MERCOSUR*, is the one which has instituted the least compelling judicial system. By contrast, the → *Central American Court of Justice (CACJ)*, the Court of Justice of the Andean Community (→ *Andean Community of Nations, Court of Justice*), and the more recent → *Caribbean Court of Justice (CCJ)*, all endowed with statutory jurisdiction to settle disputes either on request from the Member States or private persons and to provide uniform interpretation of the founding treaties, have become important vectors for integration within their respective organizations. Nonetheless, it is striking that, even within the MERCOSUR, the mechanism for the settlement of disputes is progressively losing its rather archaic arbitral character to evolve towards a more strictly judicial approach (see the evolution from the 1991 Treaty of Asunción, to the 2002 Protocol of Olivos, with the intermediate stages marked by the 1991 Brasilia and 1994 Ouro Preto Protocols), thus confirming the usual view that the development and consolidation of a compulsory, truly judicial system goes hand in hand with the intensification of economic integration.

**24** It is largely true that the judicial settlement of international disputes remains characterized by the large role played by consent in establishing the courts' jurisdictions. However, it is noticeable that the usual belief in the absolute consensual character of international justice is not entirely founded. And this certainly is an element of differentiation between judicial settlement proper and arbitral settlement of disputes.

## **2. Common Characters of the Judicial and the Arbitral Settlements of International Disputes**

**25** However, judicial settlement *stricto sensu*, on the one hand, and arbitral settlement, on the other hand, share several characters. In both cases, *i*) a body composed of independent and impartial members, *ii*) is called to take a decision binding upon the parties to the dispute, *iii*) after an adversarial procedure during which the parties benefit from an equality of rights, and, *iv*) in both cases, the decision—usually an award in the case of arbitration, a judgment when given by a permanent body—will generally be based on exclusively legal

consideration but might be founded on pure equity (→ *ex aequo et bono*) if the parties so agree.

**(a) The Independence and Impartiality of the Members of the Deciding Body**

**26** Although the parties have their say in the appointment of the arbitrators much more than in the designation of the members of permanent judicial bodies (see para. 59 below), in contrast with the politicization of the composition of arbitral tribunals in the past, one of the common traits of both means of settlement in the modern world is the impartiality imposed on the members of the court or tribunal—whether arbitral or judicial. These requirements also apply to the ‘national judges’ or ‘judges ad hoc’, who can be appointed by the parties before some international courts and tribunals (*The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland (Reasoned Decision on Challenge)* [30 November 2011] PCA registered arbitration).

**27** The requirement for freedom and independence of the members of the international judiciary has been underlined by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals which adopted, in June 2004, the Burgh House Principles on the Independence of the International Judiciary which underline that:

the following principles of international law [are] of general application:- to ensure the independence of the judiciary, judges must enjoy independence from the parties to cases before them, their own states of nationality or residence, the host countries in which they serve, and the international organisations under the auspices of which the court or tribunal is established;

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judges must be free from undue influence from any source;

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judges shall decide cases impartially, on the basis of the facts of the case and the applicable law;

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judges shall avoid any conflict of interest, as well as being placed in a situation which might reasonably be perceived as giving rise to any conflict of interests;

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judges shall refrain from impropriety in their judicial and related activities.

**28** These principles are expressed—in different words—in the statutes of most, if not all, international courts and tribunals and have, for example, the following consequences: *i*) more and more frequently, the procedure of nomination or election of international judges is conceived as guaranteeing their competence and impartiality (see para. 59 below); *ii*) once appointed, they are called to make a solemn declaration according to which they will exercise their duty impartially (see Art. 20 ICJ Statute; Art. 11 ITLOS Statute; Rule 14 ICTR Rules of Procedure; Art. 11 IACtHR Statute; Art. 5 Protocol on Tribunal and the Rules of Procedure Thereof [SADC]; Art. 34 OHADA Treaty; Art. 11 Protocol on the Statute of the African Court of Justice and Human Rights [(adopted 1 July 2008, not yet entered into force) (2009) 16 IHRR 599], while the ICC, the ECtHR, and the CCJ adopted formal codes of judicial ethics); *iii*) their term is sufficiently long to limit the pressure stemming from frequent renewals (nine years in the ICJ, ITLOS, ECtHR, or ICC, and six years in the Court of Justice of the EU, the IACtHR, and the African Court of Justice and Human Rights) and, in some cases, no renewal is permitted (the ICC and the ECtHR); *iv*) in principle, they are not supposed to engage in other occupations of a professional nature (see Art. 16 ICJ Statute

and UN General Assembly Resolution 50/216 (IV) of 23 December 1995, Art. 21 (3) ECHR, or Art. 18 IACtHR Statute); or at least, when only employed and paid when the Court sits, not to get involved in activities considered as being incompatible with their office (Art. 7 ITLOS Statute or Art. 13 Protocol on the Statute of the African Court of Justice and Human Rights); it is to be regretted that, in practice, this rule is often interpreted with some laxity; v) if their impartiality is at risk of being put into doubt, they must recuse themselves (see Art. 24 ICJ Statute); the parties can take the initiative of recusing a judge, but in this case, the court or tribunal decides (see Art. 17 ICJ Statute or Art. 28 (2) (b) ECHR).

## **(b) Adversarial Proceedings and Equality between the Parties**

**29** Just as when before the domestic judiciary, the proceedings before international courts and tribunals (whether judicial or arbitral) are contradictory and conceived in such a way as to maintain the equality between the parties. This is easier to achieve in inter-States disputes than in proceedings opposing a private party to a sovereign State.

**30** As for the former, the ICJ emphasized in the *Nicaragua Case [Merits]* ([1986] ICJ Rep 14) that ‘the equality of the parties to the dispute must remain the basic principle for the Court’, including in a case of non-appearance (Art. 53 ICJ Statute; → *International Courts and Tribunals, Non-Appearance*). And it added: ‘[t]he provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent’s contentions’ (para. 31; see also, eg *Territorial Jurisdiction of the International Commission of the River Oder [United Kingdom v Poland]* PCIJ Series A No 23 at 45).

**31** The equality between the parties is secured in particular by the applicable rules

relating to the system of evidence ... devised to guarantee the sound administration of justice, while respecting the equality of the parties. The presentation of evidence is governed by specific rules relating to, for instance, the observance of time-limits, the communication of evidence to the other party, the submission of observations on it by that party, and the various forms of challenge by each party of the other’s evidence (*Nicaragua Case [Merits]* para. 59).

A more pragmatic approach to the equality of arms principle led the UN General Assembly to create, in 1989, the Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice, in order to provide financial assistance to States for expenses occurred in an ICJ procedure (UN Doc A/59/372).

**32** Interestingly, the ICJ also had opportunities to implement the principle of equality between the parties in cases involving individuals, at the occasion of its advisory opinions in cases concerning judgments of international administrative tribunals. Thus, in its → *Judgments of the Administrative Tribunal of the International Labour Organization (Advisory Opinion)* of 1956, the Court noted that the question of equality between the → *United Nations Educational, Scientific and Cultural Organization (UNESCO)* and the officials concerned, arose in connection with the actual procedure before, and thus flew from the provisions of the Statute of the Court: ‘The judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court’ ([1956] ICJ Rep 77 at 86), which is not the case since, contrary to the organization, the officials could not appear and express their views. ‘The difficulty was met, on the one hand, by the procedure under which the observations of the officials were made available to the Court through the intermediary of UNESCO and, on the other hand, by dispensing with oral proceedings’ (ibid). Similarly, in the cases concerning reviews of judgments of the UN Administrative Tribunal (→ *United Nations Administrative Tribunal, Applications for Review [Advisory Opinions]*) the Court declared that, since, under Article 11 of the Statute of the UN Administrative Tribunal, ‘the staff member is entitled to have his views transmitted to the Court without any control being exercised over the contents by the Secretary-General’, the principle of equality was preserved (*Application for Review of Judgment No 158 of the United Nations Administrative Tribunal [Advisory Opinion]* [1973] ICJ Rep 166 at 180, para. 35; see also *Application for*

*Review of Judgment No 273 of the United Nations Administrative Tribunal [Advisory Opinion]* [1982] ICJ Rep 325 at 338–40, paras 29–32 or *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development [Advisory Opinion]* [1 February 2012] ICJ General List No 146, para. 46; the Court relying on its inherent power).

**33** Whereas the courts whose main mission is to settle disputes between a priori equal States—like the ICJ—function on the adversarial proceedings model, the human rights courts are more inclined to apply inquisitorial proceedings, in order to compensate for inequalities between the parties from the outset. This is especially true before the IACtHR, where the victim of the alleged violation is not formally a party to the proceedings (Art. 61 (1) ACHR). Thus, the ECtHR and the San José Commission can request information from the government (Art. 38 ECHR and Art. 48 ACHR), undertake investigations (Rule A1 ECtHR Rules), rely on presumptions and thus reverse the burden of proof (*Tomasi v France* [ECtHR] Series A No 241 para. 109; *Selmouni v France* [ECtHR] Reports 1999-V 149 para. 106), and draw adverse inferences for a State in case of a lack of cooperation (*Timurtas v Turkey* [ECtHR] Reports 2000-VI 303 para. 67; Art. 39 IACtHR Rules of Procedure; *Aloeboetoe Case [Judgment]* IACtHR Series C No 15 [10 September 1993] para. 64). With the same purpose of compensating for inequality between the parties, it is noteworthy that the ECtHR provides for legal aid to the applicants that have insufficient means (Rule 101 ECtHR Rules). The procedures being mainly written, the adversarial principle is complied with by allowing the parties the possibility to respond to the arguments submitted, within equal time-limits.

**34** The same principles of equality and adversarial proceedings apply before the Court of Justice of the European Union (Art. 20 ECJ Statute). The procedure is both written and oral, this latter phase being especially suited for an adversarial dialogue, under the guidance of questions asked by the judges or the General Advocate (Art. 32 ECJ Statute and Art. 57 ECJ Rules of Procedure). The Court has had, at times, the occasion to restate the importance of strict compliance with the adversarial principle, irrespective of the status of the parties before it (the EU institutions and the Member States being considered as ‘privileged’ applicants only in the sense that they do not have to prove the existence of an interest in order to introduce proceedings; a condition which, on the contrary, applies to the private persons—cf Art. 263 TFEU: ‘The Community Courts must ensure that the rule that the parties should be heard is respected in proceedings before them and that they themselves respect that rule’ [see Case C-459/03 *Commission v Ireland* [2006] ECR I-04635 paras 51 and 54]).

### **(c) A Decision Binding upon the Parties**

**35** The main distinctive character of both arbitration and judicial settlement, as compared with the usual diplomatic means of peaceful settlement, is the binding character of the solution decided by the arbitral or judicial body. Being binding upon the parties, the decisions of any judicial body must ‘have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations’ (→ *Northern Cameroons Case [Cameroon v United Kingdom] [Preliminary Objections]* [1963] ICJ Rep 15 at 34). As explained by the ICJ in the *Northern Cameroons Case*: ‘[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore’ (at 29); ‘the function of a court [is not] merely to provide a basis for political action if no question of actual legal rights is involved’ (at 37), it ‘is to state the law, but it may pronounce judgment only in connection

with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties' (at 33–34; see also *Nuclear Tests [New Zealand v France]* [1974] ICJ Rep 457 para. 23).

**36** The power of the judicial body to decide, with binding force, for the parties is a fundamental element of 'the basic function of judicial settlement of international disputes' (*LaGrand [Germany v United States of America] [Judgment]* [2001] ICJ Rep 466 para. 102—in that case, the Court concluded that its orders on provisional measures under Art. 41 ICJ Statute had a binding effect [at 502–03, para. 109]). As a result, the awards rendered by an arbitral tribunal, as well as the judgments of an institutionalized court, are → *res iudicata* between the parties, which means, in the words of Art. 59 ICJ Statute, which expresses it negatively, that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case' (see also Art. 94 (1) UN Charter) —but for the parties, subject to exceptional limited recourses, '[t]he judgment is final and without appeal' (Art. 60 ICJ Statute; see also Art. 46 ECHR and Art. 62 ACHR). As explained by the ICJ: 'the applicable principle is *res iudicata pro veritate habetur*, that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v Serbia and Montenegro] [Merits]* [2007] ICJ Rep 43 para. 120); as a consequence, when a determination has been made by a judicial body, 'whether on a matter of the merits of a dispute brought before it, or on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case' (ibid 101, para. 138) and for the judicial body itself in the context of that case.

**37** 'There is no doubt that *res iudicata* is a principle of international law, and even a general principle of law within the meaning of Article 38 (1) of the Statute of the International Court of Justice' (*Waste Management Inc v Mexico No 2* [Decision of 26 June 2002] ICSID Case No ARB(AF)/00/3 [NAFTA], 2002 para. 39). Frequently recalled by arbitral tribunals (see, eg *Trail Smelter [United States of America v Canada]* [1941] III RIAA 1950; *Laguna del Desierto [Argentina v Chile]* 113 ILR 1 at para. 68), the principle *res iudicata* has been forcefully asserted by the ICJ: 'It is a well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the parties to the dispute' (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal [Advisory Opinion]* [1954] ICJ Rep 47 at 53; *Territorial and Maritime Dispute [Nicaragua v Colombia] [Application by Honduras for Permission to Intervene]* ICJ Doc 2011 General List No 124 paras 66–67).

**38** However, the conditions for this *res iudicata* effect of judicial decisions are strict. As has been expressed with great clarity by an → *International Centre for Settlement of Investment Disputes (ICSID)* Tribunal: 'a judicial decision is only *res iudicata* if it is between the same parties and concerns the same question as that previously decided' (*Waste Management Inc v Mexico No 2* para. 39; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Croatia v Serbia] [Preliminary Objections]* [2008] ICJ Rep 428 para. 53; *Case C-507/08 Commission v Slovak Republic* [2010] paras 59–60). Traditionally a third condition was required: the identity of 'causes of action', which implies that the facts and the law on which the claim is based must be identical. In the contemporary world, characterized by a wide variety of decentralized means of settlement with no hierarchical link (see paras 65–70 below), this condition is hardly tenable any more. For their part, however, courts operating in a highly integrated system, like the European

Union, underline the absolute *res judicata* effect of their judgments having annulled secondary legislation:

Contrary to the view taken by the Court of First Instance, the *BAI v Commission* judgment did not only have relative authority preventing merely new actions from being brought with the same subject-matter, between the same parties and based on the same grounds. That judgment was invested with the force of *res judicata* with absolute effect and prevented legal questions which it had already settled from being referred to the Court of First Instance for re-examination. (Joined Cases C-442/03 and C-471/03 *P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission of the European Communities* [2004] ECR I-04845 para. 41)

This position shows the quite extraordinary power of the ECJ to annul acts, a power that no other international judicial body has.

**39** Only '[t]he operative part of a judgment of the Court [or other judicial bodies] possesses the force of *res judicata*' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v Serbia and Montenegro]* para. 123). However, '[t]hat authority is not attached only to the operative part .... It is also attached to the *ratio decidendi* of that judgment which is inseparable from it' (*P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission of the European Communities* para. 44; see also *Request for Interpretation of the Judgment of 11 June 1998 in the Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections [Cameroon v Nigeria]* [1999] ICJ Rep 35 para. 10).

**40** When the conditions are met, the court or tribunal seised will decline to exercise its jurisdiction (*non bis in idem*): 'the judicial truth within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v Serbia and Montenegro]* para. 139). Similarly, a request for interpretation cannot be a pretext for putting into question what has been decided with *res iudicata* effect: 'This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided' (*Request for Interpretation of the Judgment of November 20<sup>th</sup>, 1950, in the Asylum Case [Colombia/Peru]* [1950] ICJ Rep 395 at 402; see also *Velásquez Rodríguez Case [Interpretation of Compensatory Damages Judgment (Article 67 American Convention on Human Rights)]* IACtHR Series C No 9 [17 August 1990] para. 36). Before the courts for human rights, whether European or Inter-American, the principle of *res iudicata* is considered to be a bar to the seising of the Court, which will consider that an application, the object of which is 'substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement' (Art. 35 (2) (b) ECHR), is inadmissible (see also Art. 47 (d) ACHR). As for the Court of Justice of the EU, its jurisdiction is exclusive in several respects: first, the Court considers that it is the only competent body to control the legality of the EU's acts and actions and to ensure uniform interpretation of EU law (Opinion 1/09 *Creation of a Unified Patent Litigation System* [8 March 2011] paras 60-89); second, it appreciated that Art. 344 TFEU (ex Art. 292 Treaty Establishing the European Community) imposed upon Member States 'not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'. In the → *MOX Plant Arbitration and Cases*, invoking this provision, the European Commission considered that the dispute between Ireland and the UK on the construction of a MOX facility and the potential risk it poses to the environment of the Irish Sea related to the application of community law and that Ireland had ignored the exclusive jurisdiction of the ECJ by seising

an OSPAR arbitral tribunal (Art. 32 Convention for the Protection of the Marine Environment of the North-East Atlantic ['OSPAR Convention']; *Dispute concerning Access to Information under Article 9 of the OSPAR Convention-Ireland v United Kingdom* Permanent Court of Arbitration [2 July 2003] 23 RIAA 59) and the ITLOS (Art. 290 (5) UN Convention on the Law of the Sea; *MOX Plant Case [Ireland v United Kingdom] [Order]* ITLOS Case No 10 [3 December 2001]; Case C-459/03 *Commission v Ireland* para. 59). In light of this precedent, it is understandable why, in the case of *Jurisdictional Immunities of the State (Germany v Italy) (Application)* ([23 December 2008] ICJ Doc 2008 General List No 44), Germany made clear in its application, instituting proceedings before the ICJ, that '[t]he present dispute is not covered by any of the jurisdictional clauses of the Treaty of Nice (Art. 227 EC)' (at para. 6). It can thus be considered that these EU judicial principles prevent any attempt to have a matter for which the ECJ has competence being settled by another international tribunal. However, as an ICSID arbitral tribunal stated, it 'is well known and recognised by the ECJ, such an exclusive jurisdiction does not prevent numerous other courts and arbitral tribunals from applying EU law, both within and without the European Union' (*Electrabel SA v Republic of Hungary [Decision on Jurisdiction, Applicable Law and Liability]* [30 November 2012] ICSID Case No ARB/07/19, para. 4.147).

**41** There can be no doubt that the judgments and other decisions of judicial bodies are binding upon the parties. However, taking into account the sovereignty of the State, 'the Judgment leaves it to the [State] to choose the means of implementation' (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals [Mexico v United States of America] [Judgment]* para. 44; see also *Arrest Warrant of 11 April 2000 [Democratic Republic of the Congo v Belgium]* [2002] ICJ Rep 32 para. 76; *Ringeisen Case [Interpretation of the judgment of 22 June 1972]* [1973] 16 ECtHR Series A, para. 15).

**42** The binding nature of the decision does not prevent the parties to a dispute, put before a judicial organ, from negotiating about the subject-matter of the dispute. Negotiations may occur before or during the proceedings, or after the decision is made.

**43** '[A]s the Permanent Court of International Justice observed, and the present Court has reiterated, "the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; ... consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement" (*Free Zones of Upper Savoy and the District of Gex*, PCIJ Series A No 22, at 13 [see also *Frontier Dispute* (1986) ICJ Rep 577 para. 46]); [therefore], pending a decision of the Court on the merits, any negotiation between the Parties with view to achieving a direct and friendly settlement is to be welcomed' (→ *Passage through the Great Belt Case [Finland v Denmark]* [1991] ICJ Rep 12 at 20, para. 35), since, '[w]hile judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony' (*Northern Cameroons* [1963] ICJ Rep 15, at 38; *Nuclear Tests (Australia v France)* [1974] ICJ Rep 457 at 477, para. 58; *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457 at 477, para. 61).

**44** If such a settlement occurs (formally or informally), the case is discontinued at the request of the claimant (see → *Certain Phosphate Lands in Nauru Case [Nauru v Australia]* [1993] ICJ Rep 322; see also *Barcelona Traction, Light and Power Co Ltd [Belgium v Spain] [Preliminary Objections]* [1964] ICJ Rep 6 at 17-21)—at least when the respondent does not object (see eg Arts 88-89 ICJ Rules of Court), but the court may be called to ascertain the reality of the claimant's will (see → *United States Diplomatic and Consular Staff in Tehran Case [United States of America v Iran]* [1981] ICJ Rep 45) and, in the case of human rights courts, whether the requested discontinuance is pursuant to a friendly settlement (Art. 39

ECHR) or if 'the matter has been [otherwise] resolved' (Art. 37 (1) ECHR), the Court must nonetheless be 'satisfied that the settlement is based on respect for human rights as defined in the Convention or its Protocols (Article 37 § 1 *in fine* of the Convention and Rule 62 § 3 of the Rules of Court)' (*Becker v Germany* [ECtHR] App 8722/02 para. 15) before taking the decision to strike the case out (see also Arts 48 (1) (f) and 49 ACHR).

**45** Equally, once the decision is made, the parties are free to negotiate, with a view not only to implementing it (see, eg, the Agreement between the Republic of Cameroon and the Republic of Nigeria concerning the Modalities of Withdrawal and Transfer of Authority in the Bakassi Peninsula [signed and entered into force 12 June 2006] 2542 UNTS [Reg No I-45354]) but also, if need be, to depart from it, in whole or in part: judicial decisions are binding, they are not peremptory (→ *ius cogens*). This is made clear in the ICJ judgment *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v Libyan Arab Jamahiriya)* ([1985] ICJ Rep 192):

While the Parties requested the Court to indicate "what principles and rules of international law may be applied for the delimitation of the area of the continental shelf", they may of course still reach mutual agreement upon a delimitation that does not correspond to that decision. Nevertheless, it must be understood that in such circumstances their accord will constitute an instrument superseding their Special Agreement (at para. 48).

Failing such an agreement 'the obligation still rests upon both Parties to carry out the Special Agreement to the very end, and to have the 1982 Judgment implemented so that the dispute is finally disposed of' (ibid at 229, para. 68) and 'the terms of the Court's Judgment are definitive and binding' (ibid at 222, para. 48).

**46** The binding nature of the decisions made by judicial bodies must be distinguished from their (absence of) enforceability. At the universal level, absent any public authority above the States, the awards and judgments rendered by arbitral or judicial bodies can only be voluntarily implemented by the parties (at least as far as States or international organizations are concerned). However, Art. 94 (2) UN Charter provides that '[i]f any party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement'. Very carefully drafted, this provision, which could permit an enforcement of a judgment of the ICJ by the UN Security Council—including by the use of force in conformity with Chapter VII UN Charter—has only been invoked once (and without success), by Nicaragua for the application of the judgment of 27 June 1986 in the *Nicaragua Case* (see UNSC 'Provisional Verbatim Record of the 2718<sup>th</sup> Meeting' [28 October 1986] UN Doc S/PV.2718 at 51 and UNSC 'Congo, Ghana, Madagascar, Trinidad and Tobago and United Arab Emirates: Draft Resolution' [28 October 1986] UN Doc S/18428). However, generally speaking, judgments of the ICJ, as well as other international courts and tribunals (see → *Judgments of International Courts and Tribunals*), are complied with (this does not seem to be the case for the provisional measures it indicates under Art. 41 ICJ Statute and which are deemed to be binding [see the *LaGrand Case* (2001) ICJ Rep 466 at 502-506, paras 102-09], and this might be a source of problems in the future). It can be noted that if the non-implementation of any judicial decision was to be determined by the Security Council as a threat to the peace under Art. 39 UN Charter, it would be open to the Council to decide enforcement measures in conformity with Chapter VII UN Charter.

**47** The enforceable nature of the decisions of certain regional courts within the domestic legal order of the States Parties is provided for by their statutes. Thus, Art. 260 TFEU not only provides that the State has a direct obligation ‘to take the necessary measures to comply with the judgment’ (Art. 260 (1) TFEU), but also that the Court can impose a penalty upon the recalcitrant State, in case of non-compliance (Art. 260 (2) TFEU). As for the judgments of the ECtHR, an effective system of collective guarantee is in place: the Committee of Ministers has the responsibility of supervising the execution of the Court’s judgments. As the ECtHR explained,

by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent state a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see, *mutatis mutandis*, the *Papamichalopoulos and Others v. Greece (14556/89) (Article 50)* judgment of 31 October 1995, Series A no. 330-B, pp. 58–59, § 34). Furthermore, subject to monitoring by the Committee of Ministers, the respondent state remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment. (*Scozzari and Giunta v Italy* [ECtHR] Reports 2000-VIII 401 para. 249; for the supervision of the execution of this judgment, see Committee of Ministers Interim Resolution ResDH (2001) 151).

In the inter-American system, except for a loose mechanism of reporting non-compliance to the General Assembly of the Organization of American States (Art. 65 ACHR), no other monitoring mechanism is provided. Faced with such a gap, the IACtHR considered that its inherent jurisdiction ‘is not restricted to stating the law, but also encompasses monitoring compliance with what has been decided. It is therefore necessary to establish and implement mechanisms or procedures for monitoring compliance with the judicial decisions, an activity that is inherent in the jurisdictional function’ (*Baena-Ricardo v Panama [Judgment] [Competence]* IACtHR Series C No 104 [28 November 2003] para. 72).

**(d) A Decision Usually Based upon International Law**

**48** Another common feature of the judicial and arbitral settlement of international disputes in the modern world is that the seised body will usually base itself on international law in order to make its decision. As the PCIJ explained, ‘[f]rom a general point of view, it must be admitted that the true function of the Court is to decide disputes between States ... on the basis of international law: Article 38 of the Statute contains a clear indication to this effect’ (*Payment of Various Serbian Loans issued in France [France v Kingdom of the Serbs, Croats and Slovenes] [Judgment]* PCIJ Series A No 20/21 at 19). To that end, international courts and tribunals are not limited to the arguments exchanged by the parties (see paras 29–34 above): ‘an international judicial organ, is deemed to take judicial notice of international law, and is therefore required ... to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute’ (*Fisheries Jurisdiction [United Kingdom of Great Britain and Northern Ireland v Iceland] [Merits]* [1974] ICJ Rep 3 at 9, para. 17 and *Fisheries Jurisdiction [Federal Republic of Germany v*

*Iceland*] [Merits] [1974] ICJ Rep 175 at 181, para. 18). By the same token, international judicial bodies will, in principle, never apply municipal law, nor moral principles, nor 'equity' as such (for an analysis of the rather nuanced case law of the ICJ in this respect, see however, A Pellet 'Article 38' in A Zimmermann, C Tomuschat and K Oellers-Frahm [eds] *The Statute of the International Court of Justice: A Commentary* [2<sup>nd</sup> edn OUP Oxford 2012] 731–870, at 784–91).

**49** Express or implicit reference to international law as defined by Art. 38 ICJ Statute is extremely usual in the texts providing for the judicial or arbitral settlement of international disputes (see eg Art. 28 General Act for the Pacific Settlement of International Disputes; Art. 38 Revised General Act for the Pacific Settlement of International Disputes; or Art. 10 ILC 'Model Rules of Arbitral Procedure' [1958] vol II UNYBILC 83; see also para. 40 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [(adopted 18 March 1965) (1993) 1 ICSID Rep 23], explicitly giving the meaning of the expression 'international law' in Art. 42 (1) Convention on the Settlement of Investment Disputes between States and Nationals of Other States [opened for signature 18 March 1965, entered into force 14 October 1966] 575 UNTS 159; see also the decision of the ICSID Tribunal decision in *Wena Hotels Ltd v Arab Republic of Egypt* [Decision on the Application for Annulment of 5 February 2002] ICSID Case No ARB/98/4 [2004] 6 ICSID Rep 129 para. 44).

**50** Specialized international courts and tribunals are entailed by their respective statutes with the responsibility to apply the special treaty creating them. Thus, Art. 283 UN Convention on the Law of the Sea provides that 'a court or tribunal having jurisdiction under this section [on compulsory procedures entailing binding decisions] shall apply this Convention and other rules of international law not incompatible with this Convention'. Similarly, Art. 3 (2) DSU provides that the system 'serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. To put it in the words of the Appellate Body, 'the General Agreement is not to be read in clinical isolation from public international law' (WTO *United States—Standards for Reformulated and Conventional Gasoline—Report of the Appellate Body* [29 April 1996] WT/DS2/AB/R para. 16; see also *Korea—Measures Affecting Government Procurement—Report of the Panel* [1 May 2000] WT/DS163/R para. 7.96). And while the only express reference to international law in the procedural part of the ECHR is to the rules concerning the exhaustion of local remedies (Art. 35 (1) ECHR), the ECtHR has considered that

the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part (*Bankovic v Belgium* [ECtHR] Reports 2001-XII 333 at para. 57; see also *Al-Adsani v United Kingdom* [ECtHR] Reports 2001-XI 79 para. 55; *Behrami and Behrami v France* [ECtHR] App 71412/01; *Saramati v France Germany and Norway* [ECtHR] App 78166/01 para. 122).

**51** It goes without saying that, when they are called by their statute or, within the limits of said statute, by the special rules provided for by the parties within the special agreement seising the court or tribunal of a particular dispute, to apply special rules, these rules apply. And this is also true if and when such a court or tribunal is entitled to decide *ex aequo et bono*, as expressly envisaged by Art. 38 (2) ICJ Statute and Art. 293 (2) UN Convention on the Law of the Sea; in such a case the judicial body could disregard strict law and make 'pure equity' prevail. But such a recourse to non-legal rules is so extraneous to the very idea of a 'judicial' settlement that, as the PCIJ put it, 'such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to that effect' (*Free Zones of Upper Savoy and the District of Gex [France v Switzerland] [Second Phase] [Order]* PCIJ Series A No 24 at 10; see also *Continental Shelf [Tunisia/Libyan Arab Jamahiriya]* [1982] ICJ Rep 18 at 60, para. 71; *Continental Shelf [Libyan Arab Jamahiriya/Malta]* [1985] ICJ Rep 13 at 39, para. 45, *Frontier Dispute [Burkina Faso/Republic of Mali]* [1986] ICJ Rep 554 at 567, para. 28 or Article 4 (b) Arbitration Agreement between Slovenia and Croatia, signed on 4 November 2009) and it is dubious that a judicial body could grant a request by the parties to decide *ex aequo et bono* failing an express authorization in its statute. Significantly, such an authorization has never been given to the World Court since the entry into force of the Statute of the PCIJ.

**52** Whether they apply international law in general or the more specific rules of their particular statutes, judicial bodies, as modern arbitral tribunals (although less systematically), are under a strict obligation to motivate their decisions (see eg Art. 56 (1) ICJ Statute; Art. 45 (1) ECHR; Art. 30 (1) ITLOS Statute; or Art. 36 ECJ Statute). The requirement of motivation of judicial decisions has certainly become an absolute requirement for their legitimacy and credibility. Whether the now usual practice (see Art. 57 ICJ Statute) of allowing personal opinions of the members of the court or tribunal, enhances the authority of the decisions of the latter is open to question.

### **3. The Relative Permanence of International Judicial Bodies**

**53** It will be apparent from the developments above, that arbitration and judicial settlement of international disputes *stricto sensu* have much in common. However, they differ in some respects.

**54** The most decisive (although still relative) criterion for distinction between both, is probably that a judicial body enjoys permanence and stability, which is in principle not the case for a truly arbitral tribunal. However, it is not enough to affirm that, by contrast with an arbitral tribunal, a judicial body is a permanent institution. Originally, arbitral tribunals were constituted on a case by case basis but, progressively, a process of 'institutionalizing' arbitral tribunals emerged, while the composition of judicial bodies remains partly controlled by the States Parties. Conversely, the international judicial process remains influenced by its descent quite often.

**55** As stated by Art. 15 of the 1899 Hague International Convention for the Pacific Settlement of International Disputes (reproduced in Art. 37 of the 1907 Hague Convention), '[i]nternational arbitration has for its object the settlement of differences between States by *judges of their own choice*, and on the basis of respect for law' (emphasis added—see also Art. 55 1907 Convention: 'The duties of Arbitrator may be conferred on one Arbitrator alone or on several Arbitrators *selected by the parties as they please*'). This liberty in the choice of the arbitrator is seen with favour by the States to which it gives the guarantee of being judged by persons in whose judgement they are confident. But this is also one of the

weaknesses of the arbitral settlement; the selection of the arbitrators is, in each case, a long and uncertain process which, not exceptionally, comes to a deadlock (see *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania [Advisory Opinion] [Second Phase]* [1950] ICJ Rep 221).

**56** The mechanism of the 'lists' began with the → *Permanent Court of Arbitration (PCA)* instituted by the Hague Conventions of 1899 and 1907 and was also adopted in the 1965 Washington Convention creating the ICSID and the 1992 Stockholm Convention which created the OSCE Court of Conciliation and Arbitration. The precautions taken to ensure the nomination of the panels have limited but not eliminated these inconveniences, which, on the other hand, disappear with the creation of permanent institutions, the members of which are designated independently of the future disputes they might be called to settle. This has been one of the main innovations of the 1920 Protocol creating the Permanent Court of International Justice, only preceded by the ephemeral Central American Court of Justice (see para. 15 above).

**57** According to the new 'model', an institution composed of permanent judges of different nationalities is made available for the settlement of disputes between the parties to its statute or, on certain conditions, involving non-parties (see Art. 35 (2) ICJ Statute). Frequently—but not systematically—these judicial bodies are created as organs of a wider organization. This is the case of the ICJ, which is the 'principal judicial organ of the United Nations' (Art. 92 UN Charter and Art. 1 ICJ Statute), and of Art. IV (3) WTO Agreement, Arts 251–281 TFEU, and Art. 33 ACHR; but the PCIJ was distinct from the League of Nations and so is the ITLOS, created by the UN Convention on the Law of the Sea as an international organization of its own.

**58** The modalities of nomination of the judges are unequally in the hands of the States Parties to the statutes of the various courts or tribunals. In some cases, their role might seem to be rather limited, as is the case for the judges of the ICJ who are 'elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration' (Art. 4 (1) ICJ Statute); however, de facto, the Governments play an important role in the nomination of the candidates. Most frequently, the candidates are nominated by the governments and elected by the assembly of the States Parties (see Art. 4 (1) ITLOS Statute; see also Art. 17 (2) DSU, which provides that '[t]he DSB shall appoint persons to serve on the Appellate Body' without specifying any rule as for their nomination). The judges of the Court of Justice of the EU and of the General Court are 'appointed by common accord of the governments of the Member States' (Arts 253–254 TFEU), after consultation of a panel comprising 'seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament' (Art. 255 TFEU). For their parts, the judges of the ECtHR are elected by the Parliamentary Assembly on a list of three names presented by the governments of the State Members of the Council of Europe (Art. 22); the Assembly can reject the list in whole should it consider that the candidates or one of them are not fulfilling the requirements set out by the Convention.

**59** However, it is quite clear that States, if not always individually, at least globally, maintain a leading role in the appointment of the international judiciary. This is even more apparent with the possibility open to a litigant State having no judge of its nationality upon the bench to designate a person of its choice to sit as judge (cf Art. 31 (2)–(3) ICJ Statute; Art. 17 (2)–(3) ITLOS Statute). Even more oddly, Art. 26 ECHR provides that: '[t]here shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by

that Party shall sit in the capacity of judge’—a provision all the more shocking since it clearly breaches the equality between the claimant and the defendant (that is the State of which the ‘*ex officio* judge’ has the nationality).

**60** These national precautions are reminiscent of the traditional inter-State arbitration which made room and space for the State’s sovereignty in its most traditional meaning. Another remnant of it can be found in the pressure exercised by States parties to disputes submitted to a chamber of the ICJ in order to control the composition of the chamber as much as they can (see in particular Art. I and II Agreement—additional to the Special Agreement submitting the case to a Chamber in *Gulf of Maine*—between Canada and the United States of 29 March 1979).

**61** On the other hand, arbitration tends to be more and more institutionalized, thus blurring the line between judicial and arbitral settlements of disputes at the international level. If it is certainly true that, in spite of its name, the PCA (see para. 56 above) is not a court, let alone a permanent court, its constitutive treaty—the 1907 Hague Convention for the Pacific Settlement of International Disputes—creates a permanent secretariat and it offers ‘ready-made’ rules of procedure to the parties to a dispute which desire to submit to arbitration, not to speak of material facilities at the Peace Palace in The Hague. Moreover, the creation of arbitral tribunals vested with the task of settling many categories of disputes between two countries, much in favour during the first quarter of the 19<sup>th</sup> century (cf the Mixed Claims Commission between Venezuela [1903] or Mexico [1922] and several European States or the Mixed Arbitral Tribunals created after World War I [the post-World War II ‘Conciliation Commissions’]), has regained popularity, notably with the (now dormant) OSCE Court of Conciliation and Arbitration, and, in the field of ‘mixed arbitration’ between States and private persons, the → *Iran-United States Claims Tribunal*, and the ICSID.

**62** These ‘institutionalized arbitrations’ also move closer to the judicial settlement of disputes from the point of view of their rules of procedure, which are established in advance and for all the disputes submitted to the arbitral tribunal while, in the traditional arbitral mode, the tribunal took its rules of procedure from the parties which usually included them in their arbitration treaty. However, in this respect, the arbitral procedure remains more confidential and less transparent than the judicial procedure—but this again is only partially true: arbitration becomes more transparent (the awards are more and more often published and, in some cases, the written, and even in some cases the oral, pleadings are made available to the public) and some judicial procedures are entirely confidential (this is the case for the proceedings before the WTO panels and the Appellate Body; however, their decisions or their reports are public).

**63** Globally, these trends point to a growing ‘predictability in the legal process’ (see Bowett 181-203), which is, however, sometimes seen as partly endangered by the anarchical burgeoning of judicial bodies in the international sphere.

## **C. The Anarchical Burgeoning of Judicial Bodies in the International Sphere**

**64** Although not exempt from difficulties, the multiplication of international judicial bodies (see paras 65-70 below) has globally positive effects and is, in any case, a fact of life in the modern world (see paras 71-77 below).

## 1. The Multiplication of International Courts and Tribunals

**65** In modern times, the slow expansion of arbitration in the international sphere started with the → *Jay Treaty* (1794), and, from the → *Alabama Arbitration* (1872), profited from technical improvements which confirm that there is no discontinuity between the traditional ‘bilateral justice’, represented by the ancient form of arbitral settlement of international disputes, and the contemporary judicial resolution of differences between States or between one or several private persons and one or several States. This evolution is characterized by an expansion of the object of the disputes which can be submitted to an impartial third party vested with the authority of taking binding decisions and by the progressive institutionalization of the settlement organ and process—this evolution has been described in paras 5–63 above. These are striking changes. But the overall context has not changed, and this relative stability partially explains the persistence of strong elements of differentiation with the domestic judicial systems. As a result, judicial settlement has expanded ‘horizontally’ but not ‘vertically’.

**66** In other words, there has been a remarkable diversification of the scope of possible, and sometimes compulsory (see paras 12–23 above), recourse to judicial settlement in the international sphere, but, at the same time, it has expanded on a ‘matter by matter’ basis; for its part, the only existing ‘general’ international court—the ICJ—has been maintained without important changes. Even the transformation of the PCIJ into the ICJ in 1945 was not the occasion of very substantive changes in its Statute, in spite of its transformation into the ‘principal judicial organ of the United Nations’ (see para. 57 above). But this means neither exclusivity nor superiority. Being the ‘principal’ judicial organ of the UN, the Court is not the only one, and, indeed, others have been created, such as the UN Administrative Tribunal, the Administrative Tribunal of the International Labour Organization, the ICTY, and the ICTR, created on an ad hoc basis by the UN Security Council. Additionally the ICJ has no power of appeal vis-à-vis their judgments and its competence concerning the review of the judgments of the UN Administrative Tribunal—which, in spite of the reluctance of the Court was perfectly fitted with its character of the principal judicial organ of the UN—has been abolished with the adoption of the new UN international justice system (UNGA Res 62/228 ‘Administration of Justice at the United Nations’ [22 December 2007]).

**67** Moreover, while remaining the sole judicial organ with a ‘general’ jurisdiction at the universal level, ‘the Hague Court is increasingly cut off from a growing and very important part of the international law system’ (Anand [2001] 19). In effect, its competence *ratione materiae* is virtually unlimited (in spite of the wording of Art. 36 (2) ICJ Statute there is no point in distinguishing ‘legal disputes’ from ‘political disputes’ [see eg C Tomuschat ‘Article 36’ in A Zimmermann, C Tomuschat, and K Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (OUP Oxford 2006) 598–601 and A Pellet ‘Le glaive et la balance —Remarques sur le rôle de la Cour internationale de Justice en matière de maintien de la paix et de la sécurité internationales’ in Y Dinstein (ed) *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff Dordrecht 1989) 553–54]), but, in the exercise of its contentious function, it is limited *ratione personae* to States only (Art. 34 ICJ Statute). In other words, important actors of international relations (and subjects of international law—see para. 4 above), are excluded from the courtroom. Intergovernmental organizations may seise the Court (under rather restrictive conditions) but only of legal questions and for (non-binding) advisory opinions (Art. 96 UN Charter and Art. 65 ICJ Statute), whilst private persons, including → *non-governmental organizations* are entirely excluded.

**68** These important limitations in the World Court's competence partly explain the creation of numerous judicial bodies competent to make judgments on cases involving private persons, either as claimants, respondents, or accused persons (see eg the ECtHR and the IACtHR, the EU Court of Justice, or the ICC, and the administrative tribunals of international organizations). Moreover, rightly or wrongly, the ICJ is seen as badly equipped to deal with technical matters like the law of investments, trade law, and environmental law, and this justifies the booming of the ICSID and 'ICSID-like' arbitrations, the institution of the dispute settlement mechanism within the WTO, and the recurrent proposals for the creation of an International Court for the Environment, in spite of the ICJ's valiant efforts to maintain a 'Chamber for environmental matters' between 1993 and 2008, which was never seized. (For a clear and concise explanation of the complex and intricate reasons for the composite system of settlement of disputes in the UN Convention on the Law of the Sea, see G Eiriksson 'The Role of the International Tribunal for the Law of the Sea in the Peaceful Settlement of Disputes' (1997) 37(3) IJIL 347-55.)

**69** Moreover, submission of disputes to an international body vested with the power to make binding decisions, even if by no means an 'abandonment of sovereignty' (see para. 13 above), is often a serious political decision, which is easier to be made in favour of a regional forum than of a World Court. This has been all the more true in a not so remote past, where the unfortunate 1966 judgment in → *South West Africa/Namibia (Advisory Opinions and Judgments)* has kept African States (and more generally Third World countries) off the Court for nearly two decades and, for their part, several important 'usual clients' of the Court have deeply resented some (less controversial) judgments of the Court (in particular France after the 1974 judgments in the → *Nuclear Tests Cases*, and the United States following the 1984 judgment on its preliminary objections in the *Nicaragua Case*, both of them then withdrawing their respective optional declaration—see para. 9 above). These factors (and others—see the extremely abundant literature concerning the growing number of international courts and tribunals, some of it being listed below), combined with the need for bodies specialized in rather technical matters, explain the multiplication and the global success of regional courts, usually competent in specific fields (see, eg, the Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa instituted by the OHADA Treaty [see para. 22 above]; or the EU Civil Service Tribunal created in 2004 by the Council of the European Union, in application of Art. 257 TFEU).

**70** This multiplication can generate a phenomenon of competition among the international tribunals. In particular, regional courts may attempt to defend their jurisdiction against what they perceive as an undue interference from the universal jurisdiction. The intention of the → *African Union* to endow the African Court of Justice and Human Rights with competence to prosecute individuals for international crimes is an example of an attempt to limit the possibilities for the ICC to judge African authorities (Assembly of the African Union 'Decision on the Implementation of the Decisions on the International Criminal Court (ICC)' [16 July 2012] Assembly/AU/Dec.419(XIX); also Draft Protocol on Amendments to the Protocol on the Statute of The African Court of Justice and Human Rights [15 May 2012] Exp/Min/IV/Rev.7, not adopted).

**71** It can happen that an international court or tribunal disappears (the disappearance of the first Central American Court of Justice—see para. 15 above—is an example; see also the examples given by S Karagiannis 'La multiplication des juridictions internationales: un système anarchique?' in *Société française pour le droit international* [2003] 15-16) or remains dormant for years (see *ibid* 123-24 and P Couvreur 'L'organisation et les moyens des juridictions internationales face au contentieux international' in *ibid* at 480) and then 'awake' after a long hibernation, as has happened with the ICSID. But globally, the trend is in favour of the creation of new judicial bodies (even though it seems to have rather slowed

down during the last ten years—probably as a result of the heightening of tensions in contemporary international relations). This is a sign that they do answer the needs of the States which create them, fund them, and, in large part, ‘feed them’ with new cases.

## 2. A Comforting Vivacity

**72** The effects of the ‘proliferation’ (for those who criticize it) or the ‘multiplication’ (for its supporters) of international courts and tribunals has led to a new ‘religious war’, in which eminent practitioners take part besides academics—which is unusual and seems to indicate that the issues are more of a practical than of a doctrinal nature or, at least, that the debate has important practical implications. This article is not the proper place to summarize in details the arguments advanced from both sides. Suffice it to very briefly recall the main ones.

**73** The warning bell was first raised by two (now former) Presidents of the ICJ in rather resounding speeches before the UN Security Council. In 1999, President Schwebel acknowledged that ‘[t]he more international adjudication there is, the more there is likely to be; the “judicial habit” may stimulate healthy imitation’. But, at the same time, he warned against the possibility ‘of significant conflicting interpretations of international law’ which could constitute a threat to the unity of international law (‘Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M Schwebel, President of the ICJ’ [26 October 1999]). His successor followed suit in the following years (see eg Speech by His Excellency Judge Gilbert Guillaume, President of the ICJ, to the Sixth Committee of the General Assembly of the United Nations ‘The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order’ [27 October 2000]) and in an article published in 2004, he stressed the negative consequences of the ‘proliferation of courts’: ‘[f]irst, it increases the risk of overlapping jurisdiction between competing courts’, thus ‘opening the way for forum shopping’; and second, it increases ‘the risk of conflicting decisions when a case may be brought before two courts simultaneously ... thus undermining the unity of international law, or even its certainty’. Thus he concluded that: ‘the growing specialization of international courts involves the serious risk of losing sight of the global perspective’ (Guillaume 301–02).

**74** Two other former Presidents of the World Court do not share these views. Thus President Bedjaoui defines the multiplication of judicial bodies as ‘the good fortune of international law’ and notices that the ICJ could simply not ‘monopolize’ the whole judicial activity at the international level, if only for practical reasons, but also because of the very conception which presided over its creation: a solemn, costly, and slow justice and ‘*la multiplication des instances juridictionnelles doit être regardée comme autant d’occasions fécondes de faire reculer le domaine fauve de la jungle internationale*’ (‘the multiplication of judicial instances must be seen as many fruitful occasions to reduce the barren domain of international jungle’; translation by the author; in *Société française pour le droit international* [2003] 534–35). President Rosalyn Higgins seems to largely share these views as shown, for example, by her speech to the UN General Assembly on 26 October 2006 where she affirmed that the concerns concerning the ‘growth in the number of new courts and tribunals ... have not proved significant’ and, she added: ‘[t]he authoritative nature of ICJ judgments is widely acknowledged. It has been gratifying for the International Court to see that these newer courts and tribunals have regularly referred, often in a manner essential to their legal reasoning, to judgments of the ICJ with respect to questions of international law and procedure. Just in the past five years, the judgments and advisory opinions of the ICJ have been expressly cited with approval’ by a great number of

international courts and arbitral bodies ('Speech by HE Judge Rosalyn Higgins, President of the International Court of Justice, to the General Assembly of the United Nations' [26 October 2006]; see also 'Speech by HE Judge Rosalyn Higgins, President of the International Court of Justice, at the Tenth Anniversary of the International Tribunal for the Law of the Sea' [29 September 2006]).

**75** This 'Presidents' dialogue'—to be added to the 'Judges' dialogue' all of them favour—rather clearly establishes the relevant issues.

**76** It is certainly fully unrealistic to envisage compulsory—and probably even flexible and voluntary—mechanisms aiming at ensuring the unity of international law through the 'institutional pre-eminence' of the ICJ. Failing a radical change in its functioning, staffing, and funding, the ICJ simply does not have the concrete means of such ambitions. Moreover, such an unrealistic reform does not seem useful: concretely, the differences of jurisprudence between international courts and tribunals are minor and the prestige of the World Court remains high and sufficient to insure its *de facto* leadership when differences occur regarding general international law issues, if, at least, it is seized of the issue, which, of course is left to fortune. If it is not, it is one of two things: either this would indicate that the issue is not that controversial or crucial; or, it would always be possible for one or the other of the organs or organizations which can make a request for an advisory opinion (see para. 32 above) to do so.

**77** More importantly, these questions are certainly among those which fascinate the 'world of International Justice' (J-P Cot 'Le monde de la justice internationale' in *Société française pour le droit international* [2003] 511-22), but their importance must be put in perspective. First, the judicial settlement of international disputes, important as it is for the development of international law, only plays a limited—even miniscule—role in inter-State relations (and certainly so at the universal level), but also in the more general modern system for the peaceful settlement of international disputes where it is but 'an alternative to the direct and friendly settlement ... between the Parties' (see paras 43-44 above). Second, there is nothing to be regretted (nor, probably, to be done) in respect of the dispersion of the international judicial bodies which simply reflects one of the fundamental characters of the international society: its decentralization.

**78** When the 'executive' and 'legislative' powers are scattered between nearly 200 sovereign States, it is rather futile to envisage that the judiciary could or should be centralized, concentrated, or hierarchized. A dispersed judiciary certainly is progress compared with no judicial power or one limited to an eminent but rather inactive court, and it is interesting to note that the World Court's list grows as and when the 'offer' of judicial settlement increases. At a modest scale, this parallel vivacity is comforting.

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