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2016 LALIVE LECTURE

Choosing between Arbitration and a Permanent Court: Lessons from Inter-State Cases

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It is a privilege and a pleasure to be invited to give this Tenth Annual Lalive Lecture.[2] I thank both Veijo Heiskanen and Marcelo Kohen for their kind words of introduction.

I am grateful to the co-hosts of this lecture, Lalive and the Graduate Institute of International and Development Studies. Both the Graduate Institute and Lalive—Lalive the firm and Lalive the family—are renowned throughout the world of international law. They continue, in outstanding fashion, Geneva's great international law tradition. It is the city of the International Committee of the Red Cross, the city of the League of Nations and now of the United Nations Office at Geneva (and many other international organizations) as well as the seat of the Organization for Security and Co-operation in Europe's Court of Conciliation and Arbitration. It is also, of course, the place where the International Law Commission (ILC) is based. The Commission holds most of its meetings in a specially designed room in the Palais des Nations.

When I studied international law at Cambridge University in the 1960s, under, among others, Eli Lauterpacht, he strongly encouraged us to read the pioneering articles of Jean-Flavien and Pierre Lalive. The name Lalive has much significance for international lawyers throughout the world, not least at the intersection of public and private international law. My other mentor, Clive Parry, regarded this intersection as the place where public international law came alive or, at least, so it seemed to many practitioners at that time.

Earlier today, the Tribunal in the case brought by the Philippines against China concerning the South China Sea delivered its Final Award.[3] This is a long Award; 479 pages long, with 1,203 paragraphs. The *dispositif* itself runs to seven pages. I would draw attention to just one paragraph of the *dispositif*, paragraph 2(B), in which the Tribunal unanimously:

> *declares* that, as between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South

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[2] Tenth Annual Lalive Lecture (Geneva, 12 July 2016).
[3] *South China Sea Arbitration (Philippines v China)* PCA Case No 2013-19, Award (12 July 2016).

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> China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention; and further *declares* that the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein.

China had rejected the Award in the strongest terms, even before it was issued. And, today, after the Award, the Chinese Foreign Ministry solemnly declared 'that the award is null and void and has no binding force. China neither accepts nor recognizes it'.[4]

It is, fortunately for me, too early to comment seriously as a lawyer on this Award—I am no instant blogger. But it is clear that the reverberations of this binding Award will be important—politically, militarily, and for the international legal order—including for the inter-State dispute settlement system.

I. INTRODUCTION

What I do propose to speak about is the choice between arbitration and judicial settlement (by a permanent court). I shall principally speak about inter-State dispute settlement, though at the end I shall touch on recent proposals for the creation of permanent investment courts. I shall not be dealing with international criminal courts and tribunals or human rights bodies, to which very different considerations apply.

I shall speak from the perspective of a practitioner, so my remarks will be largely practical, personal and anecdotal. The title I have chosen refers to the 'choice' between a permanent court and arbitration. This could refer to two different choices. The first is the choice that States have when they initially choose between establishing an international court or making provision for arbitration. At that initial stage, they have to choose between providing for a permanent body, *ad hoc* arbitration, or, as under Part XV of the United Nations Convention on the Law of the Sea (UNCLOS), offering a range of options.[5] The second is the choice that a party to a particular dispute may have between the different forums for dispute settlement that are available and, in particular, between arbitration, on the one hand, and judicial settlement, on the other.

After some introductory remarks, I shall first set out what I, as a practitioner, see as the main differences between arbitration and settlement by permanent courts. These are mostly of a practical nature and are relatively obvious and easy to state. Then I shall describe the similarities, which are perhaps harder to state, but, in my view, more significant than the differences. We tend to focus on the obvious differences and lose sight of the essential similarities. My overall conclusion is that, for inter-State cases, tribunals and permanent courts have more in common than they have dividing them.

[4] Ministry of Foreign Affairs of the People's Republic of China, 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines' (12 July 2016) <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml> accessed 27 October 2016.

[5] United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) (UNCLOS).

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Before concluding, I shall consider what, if any, the lessons may be for current proposals to establish new permanent courts, including in the investment field.

But now, three further preliminary points:

(i) I shall avoid discussing cases that I am involved in. I may mention them, but I do not consider it proper to discuss them.

(ii) Although I shall compare arbitration and permanent courts, to generalize, of course, is to oversimplify. Each permanent court (of which there are now a number, including the International Court of Justice in The Hague (ICJ), the International Tribunal for the Law of the Sea in Hamburg (ITLOS), and the World Trade Organization's (WTO) Appellate Body), and each tribunal, has its own rules, practices, and characteristics. Indeed, there is no hard and fast distinction between arbitration and judicial settlement. In many respects, there is perhaps not so great a difference between a chamber of the ICJ (or of ITLOS, as in the current *Ghana/Côte d'Ivoire* case[6]), and a tribunal. And how is one to classify a body such as the Iran–United States Claims Tribunal or the Eritrea/Ethiopia Claims Tribunal? I was quite surprised to see the Iran–US Tribunal classified as an arbitration. But I suppose that is not so surprising when one remembers the mixed claims commissions of the first half of the last century. Sometimes, the very name of an institution seems designed to sow confusion. This is most obviously the case with the Permanent Court of Arbitration (PCA).

(iii) Among the permanent courts, I shall focus on the ICJ and ITLOS. Among inter-State tribunals, I shall focus on those established under UNCLOS. Indeed, UNCLOS could be viewed as a great experiment that illustrates many of the points I shall be raising.

Before turning to the differences, I should make some general remarks about inter-State arbitration and permanent courts. As you all know, arbitration is the older institution. Its development in modern times is usually traced back to the Jay Treaty of 1794 and the other arbitral arrangements between Great Britain and the United States of America, such as those in the Treaty of Ghent that ended the War of 1812 and—of course, how can one not mention it in this city—the *Alabama Claims* case in 1869, about which so much has been written.[7]

In the early days, arbitration was seen more as a diplomatic means of dispute settlement than as a legal one. As late as 1920, in a speech to the Advisory Committee of Jurists that prepared a draft of the Statute of the Permanent Court of International Justice, Leon Bourgeois stated:

> This Permanent Court [of International Justice] will not be . . . a Court of arbitration, but a Court of justice. . . . There is between the sentence in an arbitration and the judgment of a tribunal an essential difference, a difference as profound as that which exists between equity and justice. Arbitration can take account of a thousand elements of fact and a

[6] *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No 23.

[7] For a recent contribution, see VV Veeder, 'The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator – From Miami to Geneva' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 127.

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thousand contingencies, and often of certain necessities of a political kind. The decrees of justice take account only of a rule defined and fixed by law.[8]

There are still occasional echoes of this thinking today, but they are very faint. And even back in the 1920s, it is well to remember that some, like Manley Hudson, had thought that:

> [t]here is no inherent quality of lawlessness in arbitration. And whether an international tribunal be called a court of arbitration or a court of justice it will probably travel along very much the same roads to reach its conclusions.[9]

In 1953, the ILC, in its topic on arbitral procedure, described arbitration in the following terms:

> According to established law and practice, international arbitration is a procedure for the settlement of disputes between States by a binding award on the basis of law and as the result of an undertaking voluntarily accepted.[10]

II. DIFFERENCES

I now turn to the differences. First, permanent courts may be seen to have higher standing than *ad hoc* tribunals. This is particularly so with the ICJ. It may be politically harder to reject or ignore a judgment of the ICJ—the principal judicial organ of the United Nations (UN)—than an arbitral award (though, of course, both are legally binding on the parties). This can be crucial when it comes to compliance. Indeed, a State that for whatever reason wants the dispute resolved and off its agenda, even if it may lose, may prefer the ICJ because it can present the judgment as coming from an august body, with which no one can argue and with whose decision everyone must comply. On the other hand, a permanent tribunal inevitably has a history. A State may have already had what it thinks is a bad experience with a particular court or tribunal. And, some, such as the ICJ, are part of a greater political project/organization and this might deter politicians who do not want to be told how to act 'by a United Nations court', for example. To them, an *ad hoc* tribunal may be seen as being free of political baggage.

The point I have just mentioned may be important to the disputing States on a political level. But there are other, more immediate and practical differences that are important when advising a client on which forum to submit to. Of course, there often is not a choice. The respondent usually does not have a choice, and, quite often, the applicant does not either. There may well be only one (if any) forum open to the applicant. But, where there is a choice, a number of essentially practical matters come into play.

The most obvious and visible difference is in the size and composition of the tribunal. So far as size is concerned, there is an obvious difference between a court of 15 (or even 17) judges—or, in the case of ITLOS, 21 (or 23) judges—and a tribunal of, say, three or five arbitrators. Clearly, 17 or 23 is a very large bench and

[8] Permanent Court of Justice (PCIJ), Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee* (1920) 8.

[9] Manley Ottmer Hudson, 'The Permanent Court of International Justice' (1922) 35 Harvard L Rev 245, 254.

[10] ILC YB 1953, vol 2, 202.

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may be more likely to lead to compromise reasoning that may even appear arbitrary because it is so brief (although a very large majority may also lend weight to the legal position adopted). A tribunal of five, or three, might still be prone to compromise, but the reasoning may be more detailed and thus convincing. I have already mentioned the length of today's *Philippines v China* Award.[11]

Of course, the option of forming, by agreement, a chamber of a permanent court may seem to give the parties the best of both worlds. They can have the benefits of a standing court (known authority, greater procedural foreseeability, lower costs) but with some of the benefits of a smaller, hand-picked tribunal (party control of the membership of the chamber for the particular dispute and the efficiency and rigour of reasoning that is easier to achieve with a smaller bench).

When States are deciding whether or not to create a new permanent court, the method of election or appointment is of critical importance. It will be recalled that it was the inability to agree on how to appoint or elect the judges of a permanent court (together with uncertainty as to the law that it would apply) that led to the failure of efforts to establish such a court in the early years of the last century. All that could be agreed upon was the Permanent Court of Arbitration, which is often said to be neither a court nor permanent. It was only in the 1920s, when States designed the 'double election' procedure, by the Council and Assembly of the League of Nations, that the question of composition was resolved.

At the same time, as with international organizations, so with permanent courts, the 'Frankenstein effect' may come into play; having created permanent courts, States may lose control over them. As recently as the 1970s, at the United Nations Conference on the Law of the Sea, the fear of a permanent court was encapsulated in the expression, *préconstitué c'est mal constitué*—a favourite of the leader of the French delegation, the then Legal Adviser at the Quai d'Orsay (and later member and vice-president of the ICJ), Guy Ladreit De Lacharrière. This may explain why arbitration is the fall-back position under UNCLOS. On this story, I can recommend the 2014 Hague Academy Lectures by Brooks Daly, Deputy Secretary-General and Principal Legal Counsel of the PCA.[12]

With tribunals as with courts, lawyers and their clients pay great attention to who the judges or arbitrators will be. We all 'know' this is crucial. But how far is this really so? Yes, there may be some people one might rule out for a particular case because of their known opinions, for example, in the investment field. That is the easy part. But most often, and in many (though perhaps not all) inter-State cases, choosing a member of the tribunal is largely guesswork. The person selected is very unlikely to have taken a position on the particular subject matter. Trying to guess how an independent-minded individual will decide a case can be a fool's errand. At most, one may be reasonably confident that a particular individual will understand the law and the facts and apply the law to the facts fairly. Clients, and sometimes their lawyers, tend to forget that what matters more than anything is to have a good case on the law and, above all, on the facts.

In the case of a permanent court, the composition is already fixed (except for the appointment of one or more *ad hoc* judges or where the matter is referred by agreement to a chamber). In the case of arbitration, as I said at the recent

[11] *Philippines v China* (n 3).
[12] Brooks Daly, 'The Renaissance of the Inter-State Arbitration' (2014) (to be published in Recueil des Cours).

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Symposium in honour of Lucius Caflisch, held in this very room,[13] many people have a good deal of experience in choosing persons to be arbitrators and in working as or with appointing authorities. But few have shared their experience. A good deal has been written about the equally delicate matter of the appointment or election of 'permanent' judges (often quite critical). Much less has been written about the selection of *ad hoc* judges or arbitrators.

From the point of view of the parties, a wide range of considerations arise when selecting an arbitrator. Without being exhaustive, it seems to me that at a minimum these will include the following.

First, *availability*, since potential arbitrators are often busy people. They may already be involved in a number of arbitrations or court cases and have other activities (such as teaching). This may be a concern for the parties to the dispute, who in principle want arbitrators to invest time and effort, indeed give priority to their case.

Second, the arbitrator's *knowledge of, experience in, and views on* the legal fields in question are important. People are often well known in particular fields, and counsel hardly need to do a great deal of research. But, nevertheless, 'due diligence' requires meticulous background research (for example, looking into what the arbitrator has published and the cases he or she has decided in the past). It is obviously important to try to check his or her likely views on the subject matter of the arbitration. But often there is little to go on.

Third, the *nationality* of the arbitrator may be important, in a positive or negative sense, chiefly for symbolic or political reasons.

Fourth, there are potential *conflicts of interest*. This can turn out to be a very important matter, and the greatest care is needed on the part not only of the appointing State but also of the potential arbitrator himself or herself. Challenging arbitrators has become a regular practice, a bit like jury challenges in the USA.

Fifth, there is the knowledge of relevant *languages*. This may be important for several reasons. States may want arbitrators to understand documents in the original language, as meaning may sometimes be distorted through translation.

And, finally, one quality to which I would attach a good deal of importance is *common sense*. I like to recall that, in the case *In re Piracy jure gentium* (1934), the Privy Council, when considering some peculiar definitions of piracy, opined, with what might be seen as British understatement, '[T]heir Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law'.[14]

In any case, no matter how careful a State and its lawyers are in this regard—however much 'due diligence' they may engage in—choosing an arbitrator is not an exact science; one can never be sure how the arbitrator will ultimately decide on a case.

In the case of a permanent court, it may be possible for one or more parties to appoint a judge *ad hoc*. In that case, the considerations will be similar to what I have just said about arbitrators, though there may be particular additional restrictions. (In my view, and I do not think I am alone in this, the ICJ rules on *ad hoc* judges are in some respects unduly restrictive.) In any event, the institution of *ad hoc* judges affords parties, at least to some extent, a measure of control over the

[13] Graduate Institute of International and Development Studies, 'Symposium in Honor of Professor Lucius Caflish' (20 May 2016).
[14] *In re Piracy jure gentium* [1934] AC 586.

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composition of the court. And there is even more choice where the parties agree to go to a special chamber of a permanent court.

On a more general level, it is often said that with arbitration there is party control over the proceedings. This is true up to a point, but only at the initial stage of agreeing to arbitration and, thereafter, provided that the parties agree among themselves. Otherwise, the parties are very much in the hands of the tribunal (and rules agreed upon in advance) and that is so without the reasonable certainty and predictability that exist with a permanent tribunal. (I must say that, personally, I often feel more at ease before a permanent tribunal, where I know the rules and practices, than before an arbitration, where it often seems to me anything can happen—and often does.)

An important aspect of party control may be their control over intervention by third States. Intervention may be welcome, it may be unwelcome. It may be welcome to one party and unwelcome to the other. At the ICJ, and at the ITLOS, there are reasonably clear and well-understood provisions in the respective statutes for intervention by third States (as well as case-law on the matter).

Such provision is usually absent in the case of arbitration, and it seems to be widely thought that intervention is not possible in inter-State arbitration. Yet I am not aware of any principle of arbitration that precludes third-party intervention.[15] In fact, '[t]he very concept of intervention was first addressed in Article 56 of the Hague Convention for the Pacific Settlement of International Disputes of 1899' in the context of arbitration.[16] Article 84 of the 1907 Hague Convention followed the same approach, and the Hague Conventions were the origin of the provisions on intervention in the ICJ Statute.[17] Notwithstanding the lack of practice, it is not to be excluded that an inter-State tribunal may have the power to permit a third State to intervene in the proceedings. In which case, in exercising any such power, a tribunal should have regard to various factors, including the principle of good administration of justice. And were it to exercise such a power, it is likely to follow the practice of the ICJ on the matter.

Requests for provisional (or interim) measures are an increasingly important feature of inter-State litigation. The law and practice of the ICJ and ITLOS on this matter are clear. Whether provisional measures are available in arbitration, and if so under what conditions, is a matter to be regulated case by case, often in the rules of procedure. More importantly, perhaps, is that provisional measures cannot be granted until the tribunal is fully composed and in a position to act. This could be some months after the initiation of proceedings. If a matter is submitted to a permanent court, provisional measures may be sought on the day of submission. That could be one important advantage of going to a permanent court.

Under UNCLOS, which, as we have seen, accords arbitration a privileged position, this problem was addressed by providing in essence that, pending the constitution of a tribunal, ITLOS may prescribe provisional measures in

[15] A point recognized as early as the *Affaire du Guano*, Award (5 July 1901), reprinted in UNRIAA, vol 15, 315.

[16] Andreas Zimmermann, 'International Courts and Tribunals, Intervention in Proceedings' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol 5 (OUP 2012) 571, para 2. Hague Convention for the Pacific Settlement of International Disputes of 1899 (opened for signature 29 July 1899, entered into force 4 September 1900).

[17] Hague Convention for the Pacific Settlement of International Disputes of 1907 (opened for signature 18 October 1907, entered into force 26 January 1910). Statute of the International Court of Justice (opened for signature 26 July 1945, entered into force 24 October 1945) (ICJ Statute).

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accordance with the Convention if it considers that, *prima facie*, the tribunal to be constituted would have jurisdiction and that the urgency of the situation so requires.[18] This provision has been used quite a few times, most recently in August 2015 in the *Enrica Lexie* case between Italy and India.[19] Under Part XV of UNCLOS, arbitration and a permanent court may be mutually reinforcing; a permanent court may act in support of an arbitral process pending establishment of the tribunal, thus removing one disadvantage of *ad hoc* arbitration.

The treatment of preliminary objections to jurisdiction and admissibility may be very different in the case of arbitration. The ICJ Statute and Statute for ITLOS[20] provide for the automatic bifurcation of the proceedings if one party raises preliminary objections. The main proceedings are immediately suspended, and a separate jurisdictional phase, written and oral, takes place. In the case of arbitration, there is no such automaticity. The matter is usually governed by the rules of procedure, which may provide for a bifurcation hearing—that is, a short hearing at which the parties, having exchanged written pleadings on the matter, plead orally on whether or not the proceedings should be bifurcated. Two important examples are *Guyana/Suriname* and *Mauritius v United Kingdom*.[21] In each case, the Tribunal declined to bifurcate.

In the interests of time, I will just list some further practical differences, which are important but rather obvious:

- *Cost*: a permanent tribunal is usually free at the point of use (apart from the party's own costs, counsel's fees, and so on); the costs of an arbitration can be large. They are almost invariably split in two,[22] though there is always a risk that a non-participating party might refuse to pay its share, notwithstanding its legal obligation to do so.
- *Registry*: a permanent court will have its own experienced registry, which can be relied upon to conduct the proceedings efficiently, professionally and fairly. This is a big job, where resources and experience are essential. In the case of arbitration, a registry has to be appointed for each case. Increasingly, States are calling upon the PCA, which now has a wealth of experience and excellent facilities (at the Peace Palace or, should the parties so wish, elsewhere). It is also reasonably low-cost for the parties.
- *Rules of procedure*: the rules of procedure (Rules of Court) are known already when recourse is had to a permanent court (though there may be some flexibility in their application, and some decisions have to be taken, such as in regard to time limits). With respect to arbitration, one of the first things the parties and the tribunal have to do is to determine the rules of procedure. This is not always straightforward and can be time consuming, notwithstanding the existence of many precedents and model rules.
- *Confidentiality or openness (transparency)*: one of the perceived advantages of arbitration is that it can be held in private. Indeed, the very fact that an

[18] UNCLOS (n 5) art 290.5.

[19] *"Enrica Lexie" Incident (Italy v India)*, ITLOS Case No 24, Provisional Measures (24 August 2015).

[20] ICJ Statute (n 17); UNCLOS (n 5), annex IV.

[21] *Guyana v Suriname*, PCA Case No 2004-04, Order No 2, Preliminary Objections (18 July 2005); *In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, PCA Case No 2011-03, Procedural Order No 2 (15 January 2013).

[22] In inter-State cases, international courts and tribunals seem to have been reluctant, so far, to do other than apportion costs equally.

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arbitration is taking place can be kept secret, though this would be very unusual with an inter-State case. Increasingly, however, States seem to want a degree of publicity for inter-State arbitration, be it in press releases or in making the written pleadings and the transcripts of the hearing public (following the practice of the ICJ and ITLOS) or even using web-streaming as in the *Abyei Arbitration (Sudan v Sudan People's Liberation Movement)* at the PCA.[23] The Peruvian authorities transmitted the public hearings of the *Peru v Chile* case at the ICJ live on television, with Spanish interpretation.

Before turning to the similarities, I shall touch on one point that is often said to represent an important difference between a permanent court and arbitration, but which in my view is not really so, at least not in the case of inter-State arbitration. That is the position of the court or tribunal within the international legal system and, in particular, its contribution to the understanding or development of the law. It is often said, as, for example, John Merrills has recently written, that 'to the extent that the avoidance and settlement of disputes are assisted by the development of international law, a permanent body has the potential to contribute more to legal progress than intermittent arbitrations'.[24]

There may be some truth in this, but arbitral awards also have made major contributions to the law. One only has to think of *Island of Palmas (Netherlands v United States)*,[25] with that great Swiss lawyer and diplomat, Max Huber, as sole arbitrator, which taught us all we need to know, or at least all that we do know, about sovereignty. Annex VII arbitrations under UNCLOS have been of high quality and greatly assist our understanding of the Convention. This may be seen in the context of a quite recent development, in the law of the sea and elsewhere, of interaction and mutual respect between the permanent courts and tribunals. Other courts and tribunals frequently cite decisions of the ICJ, and the ICJ itself now seems increasingly willing to consider and refer to the judgments and awards of other courts and tribunals. It seems that, as is natural, when deciding inter-State cases, international courts and tribunals see themselves as serving the same international legal system. And, to a great extent, they contribute to a consistent body of law. By way of example, I might mention the interaction and mutual reinforcement in the field of international environmental law that can be seen in the *Iron Rhine Arbitration (Belgium v Netherlands)*[26] and in *Pulp Mills (Argentina v Uruguay)* before the ICJ[27] and then in the *Indus Waters Kishenganga Arbitration (Pakistan v India)*.[28]

A related point that may be thought to be a significant difference is the attachment of permanent tribunals to their own case-law. Although there is no doctrine of *stare decisis* in international law, a permanent court, in fact, is for the most part going to follow its earlier case-law. *Ad hoc* tribunals in inter-State cases, on the other hand, may not feel quite so constrained since a tribunal has no

[23] *Abyei Arbitration (Government of Sudan v Sudan People's Liberation Movement/Army)*, PCA Case No 2008-07, Arbitral Award (22 July 2009).

[24] John G Merrills, 'The Place of International Litigation in International Law' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP 2014) 3, 11.

[25] *Island of Palmas Case (Netherlands v United States)*, Award (April 1928), reprinted in UNRIAA, vol 2, 829.

[26] *Iron Rhine Arbitration (Belgium v Netherlands)* Award (24 May 2005), reprinted in UNRIAA, vol 27, 35.

[27] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14.

[28] *Indus Waters Kishenganga Arbitration (Pakistan v India)* PCA Case No 2011-01, Final Award (20 December 2013).

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history. Indeed, nor does it have any future beyond its final award. But most tribunals, most of the time, are well aware of the need for unity and consistency in the international legal order (and, in particular, of the ICJ's role in it). They do not readily depart from previous settled jurisprudence.

III. SIMILARITIES

Article 33 of the UN Charter provides a non-exhaustive list of means for settling disputes.[29] These are traditionally divided into diplomatic means, on the one hand (negotiation, mediation, enquiry, and conciliation), and legal means, on the other (arbitration and judicial settlement).

In discussing some of the supposed differences, we have seen that frequently they are not in fact significant. But turning to clear similarities, the first, and most fundamental, one (however much some may regret it), is that the jurisdiction of an international court or tribunal depends upon consent. Consent may be given in general terms—for example, in a multilateral, regional, or bilateral treaty. Often under a treaty, consent is optional, as under the Optional Clause in the ICJ Statute. But it may be a requirement of joining the treaty, as is the case with the WTO and (with certain limitations and exceptions) with UNCLOS. Consent may also be given *ad hoc*, of course, through a *compromis* or otherwise.

A second important similarity is that, in general, international courts and tribunals have the power to determine their own jurisdiction—*compétence de la compétence* or *Kompetenz-Kompetenz*. This principle is essential if a tribunal is to function properly. It is often expressly provided for in the statutory instruments agreed by the parties, but even where this is not done, it is generally considered that the power is inherent. I would draw your attention in this regard to the recent Partial Award, given two weeks ago, in an arbitration between Slovenia and Croatia. Following an extensive review of the case-law and practice on *compétence de la compétence*, the tribunal 'arrive[d] at the conclusion that, in the absence of any agreement to the contrary, an arbitral or judicial tribunal has, under general international law, jurisdiction to determine its own jurisdiction'.[30]

I raise, but will not attempt to answer, the question whether there are any inherent limits on the power of a court or tribunal to determine its own jurisdiction.

A third, equally fundamental, similarity is that the award of a tribunal in an inter-State case, and the judgment of a permanent international court, are binding on the parties. And they are usually final in the sense that they are not subject to appeal (though they may be subject to a strictly limited process of revision or interpretation).

The final and binding nature of the judgment or award is usually expressly provided for by treaty. Under Article 94 of the UN Charter, each member of the UN undertakes to comply with the decision of the ICJ in any case to which it is a party. And the ICJ Statute provides that the judgment of the Court is final and without appeal.[31] I leave aside the interesting question of the effect of Article 103

[29] Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

[30] *Arbitration between the Republic of Croatia and the Republic of Slovenia*, PCA Case No 2012-04, Partial Award (30 June 2016) para 157.

[31] ICJ Statute (n 17) art 60.

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of the UN Charter, which provides that, in case of conflict, obligations under the Charter prevail over obligations under any other international agreement. This presumably applies to the UN Charter obligation to comply with ICJ decisions, just as it applies to the Charter obligation to accept and carry out the decisions of the UN Security Council.[32]

We find similar provisions in connection with arbitration. To take UNCLOS as an example, Article 296 deals with the ICJ, ITLOS and arbitration together in the following terms: 'Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.' In addition, Article 11 of Annex VII to UNCLOS provides that '[t]he award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute'.

A fourth similarity is that the judgment or award will, in most cases, be based on international law. Some might point to applicable law as one of the main differences between arbitration and judicial settlement. It was and still is sometimes thought that with arbitration it is easier to secure a decision based on extralegal considerations, equity and the like, than in the case of a permanent court. But, in most cases, the tribunal or court will be required to decide, and will in fact decide, on the basis of international law. Only exceptionally, and by the express agreement of the parties, will other matters come into consideration. Indeed, as I have already said, depending of course on the composition of the tribunal, a case could be made for expecting a more rigorous approach to the facts and law by a carefully chosen panel of three or five judges than by a much larger permanent court.

Be that as it may, Article 38 of the ICJ Statute is clear. Paragraph 1 states that the function of the Court is 'to decide *in accordance with international law* such disputes as are submitted to it' (emphasis added). Then comes the well-known list of sources of international law, which is widely regarded as an agreed and authoritative statement of sources for all purposes. But paragraph 2 of Article 38 shows that even the ICJ may, with the parties' agreement, go outside the law. It reads: 'This provision [that is, paragraph 1] shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties so agree.'

The provisions governing ITLOS are similar.[33] Of course, these *ex aequo et bono* provisions have never been used, but they are there. When we turn to arbitration, the position is not so different. Arbitration under Annex VII of UNCLOS is subject to the same provisions as ITLOS. The applicable law is the Convention and other rules of international law not incompatible with the Convention, but this provision does not prejudice the power of the court or tribunal having jurisdiction under UNCLOS to decide a case *ex aequo et bono*, if the parties so agree.[34]

Even in the case of inter-State arbitration, there are few examples of tribunals being authorized to apply anything but the law. But there are some. I shall mention just two. First, there is a case that had its origins here in Geneva, at the Hotel President Wilson to be precise. You may recall the incident involving the

[32] UN Charter (n 29) art 25.
[33] UNCLOS (n 5) art 293.1.
[34] ibid art 293.2.

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arrest by the Geneva police of Hannibal Kaddafi, following complaints of ill-treatment made by two of his staff. Two Swiss businessmen were then prevented from leaving Tripoli for an extended period. The ensuing major diplomatic row was eventually diffused with the signing of a remarkable arbitration agreement in Tripoli on 20 August 2009. This Agreement, between the Great Socialist People's Libyan Arab Jamahiriya and the Swiss Confederation, provided for a tribunal that was to apply 'relevant national laws, international conventions, international custom, as well as evidence of general practice accepted as law, and the general principles of law and courtesy recognized by civilized nations'.[35] A distinguished three-member tribunal was on the point of beginning its work but never did so because of changes in Libya in early 2011. So we shall never know how they would have fulfilled their remarkable mandate.

The second case I would mention is the *Arbitration between the Republic of Croatia and the Republic of Slovenia*.[36] This is an *ad hoc* inter-State tribunal set up by bilateral treaty. The Treaty provides, under Article 4, that the tribunal shall apply '[i]nternational law, equity and the principle of good neighbourly relations in order to achieve a fair and just result'.[37]

Before moving on to proposals for new tribunals, I will summarize my thinking on the differences and similarities between the settlement of inter-State disputes by arbitration and by permanent courts. While the practical differences are considerable, and obviously important for States parties to a dispute, the similarities between arbitration and judicial settlement seem to me to be greater than the differences. As a general matter, both aim to settle disputes with binding effect and to do so on the basis of international law. So my overall conclusion is that, except in practical (and sometimes political) terms, the choice between arbitration and judicial settlement is not particularly significant.

IV. LESSONS WITHIN AND BEYOND INTER-STATE LITIGATION

Before concluding, I should say something about proposals to establish new 'permanent' courts. The idea of a world environmental court has been around for some time but seems to get nowhere.[38] Likewise, the proposal for a World Court of Human Rights, described by Philip Alston as 'a truly bad idea', is unlikely to prosper anytime soon.[39] And then there is the recent initiative for an International Constitutional Court. There are some obvious difficulties with such proposals, which may be seen as utopian. Many will also see them as unrealistic, inefficient, and immensely costly. The same could have been said, perhaps still is said in some quarters, about the International Criminal Court. An important consideration is that such institutions, particularly in fields like the environment, may tend to divide international law artificially into a host of separate fields, each with its own

[35] Agreement between the Great Socialist People's Libyan Arab Jamahiriya and the Swiss Confederation (signed 20 August 2009) <http://www.news.admin.ch/NSBSubscriber/message/attachments/16549.pdf> accessed 27 October 2016.

[36] *Croatia v Slovenia* (n 30).

[37] Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia (signed 4 November 2009).

[38] Ole W Pedersen, 'An International Environmental Court and International Legalism' (2012) 24 J Envtl L 547.

[39] Philip Alston. 'Against a World Court for Human Rights' (2014) 28 Ethics & Intl Affairs 197.

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approach, its own experts, its own enthusiasts, and its own detractors. The same may happen when a court or tribunal has jurisdiction under a particular treaty (though, in some cases, such as the WTO, such a dispute settlement body may seem entirely justified). As far as States are the relevant parties, that is not my vision of international law. As the ILC said in its so-called 'fragmentation' study, which was really about how to avoid fragmentation, '[i]nternational law is a system'.[40]

Then, just at the moment, there is the issue whether to move from *ad hoc* investment arbitration to some form of permanent investment court, with an appellate level. Many of the considerations I have set out in this talk may be relevant to this ongoing debate. Dissatisfaction with investment dispute settlement is hardly new. In light of domestic experience, it is hard to disagree in principle with calls for an appeal system. There would presumably be merit in resolving competing lines of cases on, among others, coverage of most-favoured-nation clauses, on the meaning of umbrella clauses, on the meaning of a fair and equitable treatment standard. At the same time, appeals mean extra cost and delay, finality deferred. One of the great merits of arbitration, it is said, is speed and finality.

Proposals to reform the current system of investment dispute settlement are not new. They date back at least as far as 2004, with the International Centre for the Settlement of Investment Disputes' initiative to create an appeals facility.[41] Most recently, the debate has received something of a boost, or a jolt, last year with the European Commission's remarkable proposal for an 'Investment Court System' that—it is said—will replace the existing investor-to-state dispute settlement (ISDS) mechanism in all ongoing and future European Union (EU) investment negotiations, including the EU–USA talks on a Transatlantic Trade and Investment Partnership (TTIP).[42] According to the European Commission, the new 'public' court system would be composed of a first instance tribunal and an appeal tribunal. The appeal tribunal would 'be operating on similar principles to the WTO Appellate Body'. The 'ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the base of gender, race or religion, or nationality, expropriation without compensation, or denial of justice'. Governments' right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements.[43]

In addition, and in parallel to the proposal for a tribunal within each investment treaty (such as within the TTIP), the European Commission has said that it will start work on setting up a single permanent 'International Investment Court'.[44] The European Commission's objective is that over time the 'International Investment Court' would replace all investment dispute resolution mechanisms provided in EU agreements, EU Member States' agreements with third countries, and in trade and investment treaties concluded between non-EU countries. This,

[40] ILC YB (2006) vol 2(2), 177, para 251, conclusion (1).

[41] ICSID, 'Discussion Paper of the ICSID Secretariat on Possible Improvements of the Framework for ICSID Arbitration' (2004) <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> accessed 27 October 2016.

[42] Transatlantic Trade and Investment Partnership (draft dated 12 November 2015).

[43] European Commission, 'Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations,' European Commission Press Release (16 September 2015) <http://europa.eu/rapid/press-release_IP-15-5651_en.htm> accessed 27 October 2016.

[44] ibid.

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again according to the European Commission, will further increase the efficiency, consistency, and legitimacy of the international investment dispute resolution system.

This is not a matter I have been following closely, and so I shall try to avoid taking sides. The practical difficulties are obvious, including the question where all these high quality judges will come from. As we all know, it is not always easy to find the right people for the many existing courts and tribunals. And will they really be any different from those experts in the field who regularly sit in investor–State arbitrations?

Such proposals for reform of ISDS have no doubt been the subject of many conferences, in which some of you present here today, far more expert than I, have taken part. In addition, there are already some interesting, and very well-informed, writings on the subject. I would mention, by way of example, Johnny Veeder's 2015 Alexander lecture. His critique of the proposals coming from Brussels covers matters such as the likely huge cost of a permanent investment court, the difficulties in choosing suitable judges for a new court, and the seat.[45] And there is a very recent research paper, by Gabrielle Kaufmann-Kohler and Michele Potestà, on how an International Tribunal for Investments and an appeal mechanism could be set up, based on the model of the Mauritius Convention on Transparency.[46]

The reasons for these calls for an investment court are well known; I have just alluded to some, and I will not attempt to repeat them all here. They include an alleged lack of independence and impartiality of arbitrators (often thought to favour investors), a lack of consistency between awards, a lack of control mechanisms, and high costs. The European Commissioner for Trade, Cecilia Malmström, has even referred to 'a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model'.[47]

The Commission's proposals have been criticized by experts in the field.[48] Some may see this as self-serving. Yet jumping on a media bandwagon or contributing to the 'backlash' is hardly a sound basis for such a radical change. As is said in Kaufmann-Kohler's article, '[o]verall, the discussion has often focused on a few controversial cases, which are not necessarily representative of the regime as a whole'.[49]

What are the significant pros and cons of having such an investment court? It is often argued that there would be more consistency of awards, the legitimacy of the regime would be strengthened, and tenured judges would be more impartial. On the other hand, the main problem, at least from the point of view of the investors, is that the parties will lose the possibility to appoint their own arbitrators; States

[45] John Veeder, 'What Matters – about Arbitration' (Alexander Lecture, London, 26 November 2015) reprinted in (2016) 82 Arb 153.

[46] Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?' (Centre for International Dispute Settlement 2016). United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, not yet entered into force) UN Doc A/CN.9/783.

[47] Cecilia Malmström, 'Proposing an Investment Court System' (*European Commission Blog Post*, 16 September 2015) <http://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en> accessed 27 October 2016.

[48] Veeder (n 45); Three Crowns, 'European Commission Proposal for Permanent Investment Courts,' (Three Crowns LLP Client Brief, December 2015) <https://www.threecrownsllp.com/wp-content/uploads/2015/12/OL2238_3C_Dec_Client-Briefing_013.pdf> accessed 27 October 2016.

[49] Kaufmann-Kohler and Potestà (n 46) para 16.

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would have some sort of advantage. The parties would be faced with the large extra costs and delay inevitably involved in a system of appeal, which one could expect to be frequently invoked. And, depending how the case law of a permanent tribunal developed, investors might well have less confidence in the system, which could be bad for foreign investment.

As I have said, dissatisfaction with the current system of investment arbitration, if it can be called a system, is nothing new. For background, I would refer to an excellent, and balanced, account written some three or four years ago by Chester Brown of the University of Sydney.[50] After describing the (real or feigned) expressions of disquiet with investor–State arbitration, he reviews possible alternative methods for settling investment disputes: negotiation, mediation, conciliation, international commercial arbitration, national courts, and inter-State dispute settlement (through diplomatic protection). Interestingly, although writing only some three or four years ago, he does not consider a permanent court or courts.

I would also point out that, notwithstanding that the European Commission papers and proposals are quite detailed, it is far from clear how they would work in practice. They seem to be inspired to some degree by the WTO system. But inter-State trade disputes concerning the interpretation and application of multilateral WTO treaties are hardly comparable to investor–State investment disputes under more than 3,000 bilateral investment treaties, each with its different wording and negotiating history.

So far, the texts of two treaties have been finalized (early this year), each of which would establish a first instance and appellate tribunal: the Canada–EU Comprehensive Economic and Trade Agreement[51] and the EU–Vietnam Free Trade Agreement.[52] In addition, both envisage the eventual negotiation of a future multilateral investment court. Neither is yet in force. The dispute settlement systems in each Treaty are similar[53] and have been described as a 'significant break with the past' and a 'clear move away from the current investor-State arbitration system'.[54] Whether they will set a trend and, if so, on what time scale, remains to be seen.

V. CONCLUSION

In conclusion, let me return to a point I made at the outset. It is only to a certain extent that one can generalize about permanent courts, on the one hand, and arbitration, on the other. There are great variations within each category, and the advantages and disadvantages of each vary from case to case. I believe that both—indeed, all methods of setting inter-State disputes—play a valuable part in what is a vastly changed, a vastly improved, international dispute settlement system. They

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[50] Chester Brown, 'Resolving International Investment Disputes' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP 2014) 401.

[51] European Commission–Canada Comprehensive Economic and Trade Agreement (signed 30 October 2016, not yet entered into force) ch 8, s F.

[52] European Union–Vietnam Free Trade Agreement (draft as of 1 February 2016), near final copy available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 27 October 2016.

[53] For a brief explanation, see Kaufmann-Kohler and Potestà (n 46) para 48.

[54] ibid para 55.

do so not least by providing States with a choice as to the most appropriate way to settle any dispute or category of disputes in accordance with international law. If there are more ways to achieve this end, we might hope that the end will be achieved more often and that resort to force will be avoided.

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