Inter-State Arbitration

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Abstract and Keywords

This chapter explores inter-state arbitration, which is largely influenced by two different traditions, drawn from diplomacy and commerce under public and private international law respectively. The recent history of state–state and also, in part, of investor–state arbitration is the history of the Permanent Court of Arbitration (PCA). As intended by the two Hague Conferences more than a century ago, arbitrations under treaties are still marked by the necessity for the parties' consent, including a state's limitation as to the categories of dispute referable to arbitration; a neutral appointing or administering authority; a settled procedure subject to party autonomy; the parties' involvement in the appointment of the tribunal; and the absence of any appeal from an award for an error of law or fact. For inter-state arbitration and (notwithstanding the ICSID and New York Conventions) investor–state arbitration also, the recognition of the award by the losing party is usually made voluntarily. It is the parties' arbitration, the award is the product of their consent and, accordingly, the award has a moral binding force for the parties often absent from non-consensual mechanisms.

Keywords: arbitration, consent to arbitration, history of arbitration, inter-state arbitration, investor-state arbitration, Permanent Court of Arbitration (PCA)

INTER-STATE arbitration is largely influenced by two different traditions, drawn from diplomacy and commerce under public and private international law respectively. At a time when the legitimacy of many forms of arbitration is encountering increasing difficulties (both substantive and procedural),[1] the historical path taken to reach the present practice of arbitration by states may explain the growing hostility towards arbitration shared across the political spectrum, particularly where a bilateral or multilateral treaty imposes an obligation on states to agree to arbitration in advance of a dispute: i.e. 'obligatory' arbitration and not a form of *compromis*.[2]

As to this first diplomatic tradition, from the earliest times of nation-states, princes, potentates, and popes have resorted, upon request or at their own initiative, to different forms of arbitration to settle peacefully existing disputes between states, including a home state's espousal of its national's claim against a host state. The alternative of con-

flict between disputing states was regarded generally as unpalatable, if a diplomatic settlement could resolve the particular dispute. For example, in 1493, Pope Alexander IV decided the geographical dispute between Spain and Portugal over the division of their (p. 217) colonial empires. In modern times, the origin of inter-state arbitration has been attributed to the Jay Treaty of 1796 between the USA and Britain, which provided for arbitration as a quasi-judicial means to end myriad differences outstanding from the American Revolution and the Treaty of Paris of 1783. Its commissions produced more than 500 decisions over five years. These were, however, mixed claims commissions composed of the two states' representatives, not swayed by the appointment of independent arbitrators, a neutral appointing authority, or the use of an established arbitral procedure. It followed an earlier precedent under the Treaty of Münster of 1648 between the Netherland and Spain (as part of the Peace of Westphalia). Moreover, consistent with the historical role of arbitration, the Jay Treaty addressed existing disputes and did not cover future disputes between the two states. If it was arbitration at all, by today's standards, it was arbitration by arbitrators in name only.[3]

The second commercial tradition is older. Transnational arbitration between merchants, before an impartial tribunal of the parties' choosing, under an established procedure, predates the emergence of nation-states. In the nineteenth and twentieth centuries, the increasing use of concession contracts and investment agreements between a host state and a foreign national made use of this commercial tradition in the form of arbitration clauses contractually agreed between the foreigner and the state.[4] Later, when host states established, in their place, nationalized companies or wholly owned foreign trade corporations to contract with foreign nationals (as in the USSR, an example followed by most 'socialist' countries in Europe and China), their arbitration clauses conformed to this second commercial tradition.

The major changes began during the last part of the nineteenth century. The Washington Convention of 1871 between the USA and Britain introduced a significant change to the diplomatic tradition. That treaty primarily addressed existing claims by the USA (for itself and also espousing its nationals' claims) arising from Britain's misconduct as a neutral state during the American Civil War. The USA and Britain there agreed an arbitration tribunal comprising a majority of impartial arbitrators (three), together with the parties' respective representatives (two). It gave rise to the *Alabama Arbitration* in Geneva and its majority award of 1872, thereby precluding a real risk of a third war between these two states. Drawing upon both diplomatic and commercial traditions, the parties and the arbitration tribunal also firmly established the general principle of consensual arbitration as the preferred alternative to armed conflict, even for a major dispute involving matters of honour for both parties.

However, the Washington Convention addressed only existing disputes. By the end of the nineteenth century it was becoming necessary to introduce an arbitration mechanism for future disputes between states, as existed for commercial arbitrations between (p. 218) merchants. Such an obligatory arbitration, agreed by states in advance of a dispute, was addressed at length by the Hague Peace Conferences of 1899 and 1907. These two con-

ferences established both the high- and low-water marks for the peaceful settlement by arbitration of disputes between states.

The 1899 Peace Conference was convened by the Russian Empire on 12 August 1898 in a note (or 'rescript') by the Russian Minister of Foreign Affairs addressed to foreign ambassadors in St Petersburg. It called for an international conference between states to ensure a true and stable peace and, above all, to put an end to the progressive development of modern armaments. It was thus to be primarily a peace conference at a time when several European states maintained standing forces measured in millions of soldiers and sailors, absorbing 25 per cent or more of state revenues. For such states, including Russia, these ruinous and ever-increasing costs threatened national security almost as much as armed conflict. The 1899 Conference was also to take place within living memory of Germany's victory in the Franco-Prussian War 1870–71, with France's lost territories in Alsace and Lorraine still unrecovered, the conflict between Chile and Peru in 1882, the Sino-Japanese War of 1894, the war between Greece and Turkey in 1897, the Spanish–American War of 1898 and, as regards incipient armed conflict, the 'Fashoda incident' between France and Britain also in 1898.

The Russian Note came as a surprise to many, not least to the Russian Minister for War and also its principal international jurist, F. F. Martens, acting as legal adviser to the Russian Ministry of Foreign Affairs (but then away from St Petersburg on holiday).[5] The Russian proposal nonetheless proved immediately popular in many countries; as a result, it could not be ignored by the Great Powers notwithstanding deep suspicions in many places as to Russia's true motives. Later, these were partially dispelled by Russia's proposed programme for the Conference, prepared by Martens for the Russian Ministry of Foreign Affairs. His memoranda of 11 October 1898 and 1 March 1899 proposed a universal conference, open to all 'civilised nations', to be held in St Petersburg (later changed to The Hague as a compromise between Paris, Brussels, Bern, and Copenhagen).[6] His **(p. 219)** memoranda primarily addressed issues of peace and disarmament; but he also proposed the creation of a permanent mechanism for international arbitration for the peaceful settlement of disputes between states. Perceptively, as a practical realist, Martens warned against the creation of an international court binding upon states 'always and in all instances'. That was, in his view, 'utopian'. His proposal excluded compulsory arbitration to prevent a future war or to terminate an existing war, but it included obligatory arbitration for limited categories of future disputes between states.[7]

The first Hague Conference was opened on 6 May 1899, attended by 27 states represented by many well-known international jurists.[8] Its sessions were private, excluding the general public. The conference was closed on 17 July 1899, to broad acclaim as regards its conventions on the laws and customs of war, commissions of inquiry and arbitration.[9] Martens, albeit not the head of the Russian delegation, was regarded as the 'soul' of the conference with his extensive legal, diplomatic and linguistic abilities. For the conference, Martens had submitted a draft outline for a convention on obligatory arbitration of certain categories of dispute 'so far as they do not concern the vital interests nor national honor of the contracting states' (Art. 8 of the Russian proposal). These latter exceptions

were explained in an accompanying note: 'no Government would consent in advance to adhere to a decision of an arbitral tribunal which might arise within the (p. 220) international domain, if it concerned the national honour of a state, or its highest interests, or its inalienable possessions.'[10]

This left disputes for obligatory arbitration as to two broad classes: (i) pecuniary damages suffered by a state or its nationals as a consequence of international wrongs on the part of another state or its nationals; and (ii) disagreements as to the interpretation or application of treaties between states in four defined fields. The latter comprised: (a) treaties relating to posts and telegraphs,[11] railroads, submarine telegraph cables, regulations preventing collisions between vessels on the high seas, and navigation of international rivers and inter-oceanic canals; (b) treaties concerning the protection of intellectual, literary, and artistic property, money and measures, sanitation, veterinary surgery, and phylloxera; (c) treaties relating to inheritance, exchange of prisoners and reciprocal assistance in the administration of justice; and (d) treaties for marking boundaries, so far as they concerned purely technical and political questions (Art. 10 of the Russian proposal).[12]

In the accompanying note, Martens also explained the necessity for obligatory arbitration, without the need for a *compromis* to be agreed by the parties after their particular dispute had arisen:

> The recognition of the obligatory character of arbitration, were it only within the most restricted limits, would strengthen legal principles in relations between nations, would guarantee them against infractions and encroachments; it would neutralize, so to speak, more or less, large fields of international law. For the states obligatory arbitration would be a convenient means of avoiding the misunderstandings, so numerous, so troublesome, although of little importance, which sometimes fetter diplomatic relations without any reason therefor. Thanks to obligatory arbitration, states could more easily maintain their legitimate claims, and what is more important still, could more easily escape from unjustified demands. Obligatory arbitration would be of invaluable service to the cause of universal peace. It is very evident that the questions of the second class, to which alone this method is applicable, very rarely form a basis for war. Nevertheless, frequent disputes between states, even though with regard only to questions of the second class, while not forming a direct menace to the maintenance of peace, nevertheless disturb the friendly relations between states and create an atmosphere of distrust and hostility in which some incident or other, like a chance spark, may more easily cause war to burst forth. Obligatory arbitration, resulting in absolving the interested states from all responsibility for any solution of the difference existing between them, seems to be fitted to contribute to the maintenance of friendly relations, and in that way to facilitate the peaceful settlement of the most serious conflicts which may arise within the field of their most important interests.[13]

(p. 221) The Russian proposal was referred to the conference's third commission, chaired by the French delegate, Léon Bourgeois. It was partly opposed by the USA as regards the

inclusion of treaties concerning rivers and canals; but most of all by Germany with its general objections to any form of obligatory arbitration, supported at different times by Austria, Italy, Turkey, and Romania. Their opposition to obligatory arbitration almost wrecked the work of the third commission. During the third commission's second meeting on 26 May 1899, addressing (inter alia) arbitration, Britain's delegate, Sir Julian Pauncefote, adopted Martens' proposal and took it further (with Martens' support):[14]

> If we want to make a step in advance, I believe it is absolutely necessary to organise a permanent international tribunal which can assemble instantly at the request of contesting nations. This idea being established, I believe that we shall not have very much difficulty in coming to an understanding upon the details. The necessity for such a tribunal and the advantages which it would offer, as well as the encouragement and even impetus which it would give to the cause of arbitration have been set forth with vigour and clearness—and equal eloquence—by our distinguished colleague, Mr Descamps, in his interesting 'Essay on Arbitration' … [15]

This British proposal was subsequently reduced to writing, in the form of seven draft articles. Art. 1 provided for the organization of a private tribunal, governed by a code to be agreed at the Conference; Art. 2 provided for a permanent office and secretariat; Art. 3 required each contracting state to nominate two of its respectable jurists as members of the tribunal; Art. 4 provided for the role of the secretariat in receiving notices from disputing parties and transmitting names for the parties' selections as arbitrators (not limited to names submitted by contracting states); and Art. 5 offered recourse to the tribunal to all states, whether or not contracting states. The remaining articles established a 'Permanent Council of Administration' to control the office and addressed the allocation of expenses between the contracting states and disputing parties.

The 'Essay on Arbitration' cited by Pauncefote included a compilation by Baron Descamps of arbitration clauses in treaties concluded by states attending the Hague Conference. Paradoxically, Descamps opposed Martens' proposal; but he now suggested, perhaps mollified by Pauncefote's diplomatic flattery, that the third commission establish a *comité d'examen* to consider the British and Russian proposals, soon joined by a third proposal by the USA providing (inter alia) for a right of appeal from an award (p. 222) for 'a substantial error of fact or law'. This committee was to comprise an extraordinary group of international jurists: T. M. C. Asser (Netherlands), Baron d'Etournelles (France), F. W. Holls (USA), H. Lammasch (Austria-Hungary), F. F. Martens (Russia), E. Odier (Switzerland), and P. Zorn (Germany), with Baron Descamps (Belgium) as president.[16] Notably, Pauncefote was missing; apart from Holls, all represented European states. The committee met on seventeen occasions; and the third commission considered its work on nine occasions during May to July 1899.[17]

The third commission's committee laboriously addressed the establishment of a permanent court of arbitration and the binding obligation on states, by treaty, to refer to this new arbitral body certain (but not all) categories of dispute, always excluding disputes touching upon a state's dignity and vitally important interests. These proposals were sup-

ported by Russia, the USA, and Britain, but, again, strongly opposed by Germany.[18] Germany eventually moderated its position under the influence of its delegate (Zorn), supported by the USA's delegate (Holls) on their joint consultative visit to Berlin. The committee also considered Martens' proposal for a code of arbitration procedure.

The eventual result was a consensus in the form of The Hague Convention on the Peaceful Settlement of International Disputes, which entered into force on 19 September 1900 (the 1899 Hague Convention). It created the Permanent Court of Arbitration (PCA), which was neither a court nor an arbitration tribunal, still less a permanent court or arbitration tribunal. It was nonetheless a permanent mechanism comprising a secretariat, a registry, and a chamber of senior jurists appointed by the contracting states as potential arbitrators. Its name and functions were, inevitably, a compromise to achieve unanimity. As to the PCA's name, Germany had proposed 'Permanent Organisation for Arbitration', or 'Permanent List of Arbitrators', or 'Permanent Court of Arbitrators' (but not 'Arbitral Court'); when these were all opposed, it proposed 'Permanent Court of Arbitration', which was accepted. This was the high-water mark. As to the PCA's function, Germany (Zorn) adamantly refused to accept any form of obligatory arbitration, supported by Italy (Nigra). Martens, Descamps, and Pauncefote intervened to no avail. As explained by Zorn: 'To hasten this evolution too greatly would be to compromise the very principle of arbitration, towards which we are all sympathetic.' This was, after so much effort by Martens and such an expenditure of goodwill by other states, the low-water mark.

The results of the second 1907 Hague Peace Conference were somewhat disappointing as regards obligatory arbitration. The original proposal for this second conference on peace, the rules of war, and disarmament had come from the USA's President (p. 223) Theodore Roosevelt prior to the Russo-Japanese War in 1905. However, after the Portsmouth Peace Conference putting an end to that war, the USA diplomatically left the formal invitation to Russia and the Netherlands. The groundwork was again prepared by F. F. Martens, at the request of the Russian Ministry of Foreign Affairs. Martens proposed (inter alia) improving the provisions for inter-state arbitration in the 1899 Hague Convention. After an audience with Tsar Nicholas II, Martens (with B. E. Nolde, a former student, as his secretary)[19] visited Berlin (twice), Paris, London, Rome, Vienna, and The Hague for preparatory consultations. In a mark of the respect accorded to him personally, Martens was received by the German Emperor Wilhelm II, the French President (Armand Falkier), King Edward VII and the British Prime Minister and Foreign Secretary (Sir Henry Campbell-Bannerman and Sir Edward Grey), the Queen of the Netherlands, King Victor Emmanuel III (with the Italian Prime Minister), Emperor Franz Josef (with the Austro-Hungarian Minister of Foreign Affairs); and then again by the German Emperor on his return to Russia for a further audience with Nicholas II. For an international jurist and arbitrator (particularly a commoner from a modest background with no aristocratic status in Russia), these consultations were unprecedented.

The second Peace Conference was opened at The Hague on 15 June 1907, attended by 44 states and 232 delegates. It now included several Latin American states. The Conference's work was concluded on 18 October 1907. Its achievements were limited by

new rivalries between Britain, France, and Russia on the one side and, on the other, Germany and Austria-Hungary. The Conference led to the replacement of the 1899 Convention with the 1907 Convention for the Pacific Settlement of International Disputes (the 1907 Hague Convention). The issue of obligatory arbitration was again raised by the delegations from the USA and Portugal supported by Martens (Russia) and Léon Bourgeois (France). It was again strongly opposed by Germany. There was to be no permanent international court and no obligatory arbitration.

The Conference nonetheless confirmed the role of inter-state arbitration under Art. 37 of the 1907 Convention, as first recorded in Art. 15 of the 1899 Convention: 'International arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for law.' Art. 38 of the 1907 Convention, restating Art. 16 of the 1899 Convention, provided:

> In questions of a legal nature, and especially in the interpretation or application of international Conventions, arbitration is recognised by the Signatory Powers as the (p. 224) most effective, and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.

The Conference also maintained, in theory but certainly not in practice, the principle of obligatory inter-state arbitration on the unilateral demand of one state for questions 'which may arise eventually' (i.e. future disputes), subject to the disputing parties' agreement (Art. 39 and 40 of the 1907 Convention). As the German representative commented: 'It is difficult to say less in more words.'[20] The delegates agreed to hold a third Hague Peace Conference in 1915. By the end of this second Conference, Martens was exhausted and seriously ill. As he noted in his diary: 'The Second Peace Conference has ended, and in all likelihood I will not be at the Third.'[21] Martens died in 1909. With the outbreak of the World War in August 1914, there was to be no third Hague Conference in 1915.

The PCA was first housed at Prinsengracht 71, The Hague from 1901 to 1913 and thereafter to the present day at the Peace Palace. Its existence for more than a century marks the development of modern inter-state arbitration.[22] Its work began almost immediately. The first arbitrations under the 1899 Convention were the *Pious Fund Arbitration* (1902) and the *Venezuela Preferential Arbitration* (1904).[23] The first commission of inquiry addressed the dispute between Great Britain and Russia over the *Doggerbank Incident* (1904).[24] The selection of arbitrators was not limited to the individual members of the PCA, as shown by the composition of the tribunal in *Russian Claim for Indemnities*.[25] Between 1899 and 1914, under the 1899 and 1907 Hague Conventions, there were eight references to arbitration before the PCA, together with two commissions of inquiry. There was also a change in the practice of several states agreeing bilateral treaties providing for obligatory arbitration in conformity with the Russian proposal at the first Hague Conference. For example, Art. 1 of the 1911 Franco-Danish treaty provided that future differences of a juridical character shall be submitted to (p. 225) arbitration provided that 'they do not affect the vital interests, independence or honour of either of the contracting parties nor the interests of third Powers'; and Art. 2 of the treaty excluded from this proviso

disputes over pecuniary claims, contractual debts due to nationals of the other party, the interpretation and application of commercial and navigation treaties, and all conventions relating to industrial (intellectual) property, copyrights, posts and telegraphs, etc.

After the 1914–18 World War, there was still no third Hague Conference. There were, however, indirect results from the Hague Conferences: the creation of the Permanent Court of International Justice (1925) and, after the Second World War, the International Court of Justice (1946), with their jurisdictions capable of agreement prior to a dispute under Art. 36 and 36(2) respectively. Although such legal proceedings before the PCIJ and ICJ were not arbitrations, as observed by Professor P. J. Baker in regard to the PCIJ, it was on the doctrine embodied in the Russian proposal at the Hague Conferences 'that all subsequent development, both of theory and practice, was based'.[26] In 1928, the League of Nations sought to establish a universal treaty for inter-state arbitration, the 'Geneva General Act', but it came to nothing, despite attempts by the UN General Assembly to revive it in 1947-1949.[27]

These developments included the continued rejection by states of appellate appeals from the merits of an award, the eventual agreement of many states to different forms of obligatory arbitration, and the participation of non-state actors in arbitrations against states. As to the first, the finality of arbitration awards was an important issue at the first and second Hague Conferences. As already noted, the USA's delegate at the first Hague Conference (Holls) proposed a right of appeal from an adverse award, exercisable within three months, for a substantial error of fact or law (Art. 7 of the USA proposal). The committee rejected this proposal. The Dutch delegate (Asser) proposed a limited form of revision for an award. In a modified form (if agreed by the disputing parties), the committee adopted the latter proposal for revision by a bare majority.

Martens strongly opposed both proposals, particularly the USA's proposal. His address merits citing at length because it remains relevant today:[28]

> … in what does the importance of this question consist? Is it true that a rehearing of a judicial award based upon error or upon considerations not sufficiently founded is not desirable? Ought we not, on the contrary, to wish to have an error corrected by new documents or new facts which may be discovered after the close of the arbitration? No, gentlemen, it would be most unsatisfactory and unfortunate to have an arbitral award, duly pronounced by an international tribunal, subject to reversal by a new judgment. It would be profoundly regrettable if the arbitral award did not terminate, finally and forever, the dispute between the litigating nations, but should provoke new discussions, inflame the passions anew, and menace once more the peace of the world. A rehearing of the arbitral award, as provided for in Article 55, (p. 226) must necessarily have a disastrous effect. There should not be left the slightest doubt on this point. The litigating Power against which the arbitral award has been pronounced will not execute it, certainly not during the three months, and it will make every effort imaginable to find new facts or documents. The litigation will not have been ended, but it will be left in suspense for

> three months with the serious aggravation that the Government and the nation which have been found guilty will be drawn still more into recrimination and dangerous reciprocal accusation. That is the explanation of the significant fact that in the committee of examination Article 54 [*sic*] was adopted by only five votes to four. The end of arbitration is to terminate the controversy absolutely. The great utility of arbitration is in the fact that from the moment when the arbitral judgment is duly pronounced everything is finished, and nothing but bad faith can attack it. Never can an objection be raised against the execution of an arbitral award. Now, if we accept the principle of a hearing, what will be the role of the arbitrators before and after the award? At the present time they are able to end forever an international dispute, and experience has shown that as soon as the award has been rendered, newspapers, legislative chambers, public opinion, all bow in silence to the decision of the arbitrators. If, on the contrary, it is known that the award is suspended for three months, the state against which judgment has been given will do its utmost to find a new document or fact. In the meantime the judgment will be delivered over to the wrangling of public opinion. It will not settle or put an end to the matter. On the contrary, it will raise a storm in the press and parliament. Everything will be attacked—the arbitrators, the hostile Government, and above all the home Government. They will be accused of having held back documents and concealed new facts. For three months the discussion upon the judgment will be open. Never can a judgment given under such conditions have a moral binding force which is the very essence of arbitration …

The USA's proposal for an appeal on the merits was also rejected by the third commission. As a result, the 1899 Hague Convention precluded any appeal from an award.[29] Conversely, the commission accepted the committee's draft on revision, resulting in Art. 55 of the 1899 Hague Convention.[30] The second Hague Conference likewise rejected any appeal from an award.[31] However, it introduced the possibility of referring back to the arbitration tribunal any dispute as to the award's interpretation or execution, as well as restating the earlier provision on revision.[32] There is a significant practical difference between an appeal on legal and factual merits from an award (p. 227) and other attacks on the finality of an award, whether in the form of interpretation, revision, remission, or even annulment for want of jurisdiction or other significant defect in the arbitral procedure.

The Hague Conferences accepted this difference, as did the International Court of Justice. The court has no general or inherent jurisdiction to adjudicate upon the validity of an arbitral award between states, still less between a state and a non-state party. As regards states, when the PCIJ was being established, a proposal was made to empower it as a court of review for claims of nullity of awards between states on the basis that the PCIJ was to be considered as a higher authority and the guarantor of impartial decisions.[33] In 1929, the Assembly of the League of Nations adopted a resolution inviting the Council to consider the procedure whereby states could refer to the PCIJ a complaint that an international arbitral tribunal had exceeded its jurisdiction.[34] In 1958, a limited jurisdiction to review awards (but not by way of appeal on the merits) was considered in the ILC's Mod-

el Rules on Arbitral Procedure.[35] Art. 35 of these Model Rules provided: 'The validity of an award may be challenged by either party on one or more of the following grounds: (a) That the tribunal has exceeded its powers; (b) That there was corruption on the part of a member of the tribunal; (c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure; (d) That the undertaking to arbitrate or the compromis is a nullity.' Seven years later, its terms influenced the drafting of Art. 52 of the ICSID Convention 1965 on the grounds for annulment of an ICSID award under the ICSID Convention.

Art. 36(1) of the ILC's Model Rules also provided: 'If, within three months of the date on which the validity of the award is contested, the parties have not agreed on another tribunal, the International Court of Justice shall be competent to declare the total or partial nullity of the award on the application of either party.' The rationale for this proposal was explained by the Special Rapporteur, Professor George Scale, in his Third Report: 'In our view, intervention by the International Court of Justice must be maintained in this case as the only acceptable solution, since the Court's prestige, as also the exceptional nature of the proceedings, is likely to prove reassuring.'[36]

The Special Rapporteur's Fourth Report proposed that the ICJ should act as a court of cassation: 'Among the precedents for this we may mention a resolution adopted by the Institute of International Law at its session in 1929 held at New York; more particularly, the discussions held in the Council and Assembly of the League of Nations under the chairmanship of Rundstein, the eminent Polish jurist, between 1928 and 1931; and lastly, Art. 67 of the rules of the International Court of Justice.'[37] That proposal also went nowhere, save as regards arbitration awards referred for annulment to the ICJ by the disputing parties' ad hoc consent, as in *Guinea-Bissau v Senegal* (1989) and *Honduras v* *(p. 228)* *Nicaragua* (1960).[38] Accordingly, the ICJ's jurisdiction over disputed arbitration awards must still be established ad hoc, by special agreement or submission, or, possibly, through declarations made under Art. 36 of the ICJ's Statute. In short, the disputing state parties must by some means or another consent to the ICJ's reviewing the award.[39] What remains significant is that there was no support in the ILC, PCIJ, ICJ, or ICSID for any appeal on the merits of an award, be it for errors of law or errors of fact.

As to the eventual agreement of many states to different forms of obligatory arbitration, between 1899 and 1999, 33 disputes were referred to the PCA and, from 1999 to 2016, a further 180 disputes. These included many obligatory arbitrations. Even where there exists a permanent international court as an alternative forum, several states have preferred inter-state arbitration under Annex VII of UNCLOS administered by the PCA, to inter-state litigation before ITLOS in Hamburg.[40] The PCA's membership has increased from 71 contracting states in 1970 to 122 contracting states in 2020.

As to disputes involving a state and a foreign national, as already indicated, Martens had proposed at the first Hague Conference obligatory arbitration for future disputes between states relating to 'pecuniary damages suffered by a state or its nationals as a consequence of international wrongs on the part of another state or its nationals'. At first,

the PCA would not accept for arbitration a dispute between state and non-state. It did so gradually, beginning in 1935 with *Radio Corporation v China*.[41] In 1962, the PCA changed its arbitration rules, expressly permitting the reference of such disputes under the 1907 Hague Convention.[42] In 1970, the first PCA arbitration between a state and a foreign national took place between Sudan and the English construction company, (p. 229) Turiff, under a *compromis* applying to a dispute arising from their construction contract. It led eventually to an award in Turiff's favor.[43] In 1993, the PCA introduced its 'Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State'.[44] By this date, many states had acceded to the 1965 ICSID Convention providing for the obligatory arbitration of investor-state disputes agreed by states.[45] Collectively, these were massive developments.

The 1965 ICSID Convention did not expressly address treaty-based disputes between investors and contracting states. Such a category of disputes was entirely missing from the Executive Directors' Report on the Convention.[46] The first bilateral investment treaty made between the Federal Republic of Germany and Pakistan in 1959 contained a provision for inter-state arbitration, but no provision for investor–state arbitration. Such an inter-state arbitration provision allowed the home state to espouse against the host state the investor's claim as its national, but the investor was not a party to that inter-state arbitration.

From about 1962 onwards, under bilateral investment treaties and later the ICSID Convention, the investor could initiate an arbitration under the treaty in its own name, thereby suspending diplomatic protection by the home state (as provided by Art. 26(1) of the ICSID Convention). The first investor–state dispute under a bilateral investment treaty was referred to ICSID arbitration in 1987: *AAPL v Sri Lanka*.[47] UNCTAD has since identified more than 1000 treaty-based disputes referred to investor–state arbitration, (p. 230) producing 444 final awards (up to 2019).[48] Inter-state arbitration reached its apogee with the Iran–US Claims Tribunal, established in 1981 under the Algiers Declaration of 19 January 1981. Its work began at the Peace Palace in the PCA's Japanese Room and Small Arbitration Room; and it remains incomplete after more than 35 years. The principal change, however, has come from the practice of states since 1965 in agreeing bilateral and multilateral investment treaties providing for obligatory investor–state arbitration, including the Energy Charter Treaty, NAFTA, CAFTA, and more than 3,000 bilateral investment treaties.

Such a form of arbitration does not fit easily into the traditional forms of inter-state arbitration or international commercial arbitration. In the *Loewen* award (2003), under NAFTA's Chapter 11, the NAFTA tribunal characterized the right of the investor under a treaty to refer its claim to arbitration against the host state in its own name as deriving from the right of its home state against the host state:

> There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted *for convenience* to enforce what are in origin the rights of Party states.[49]

Other arbitration tribunals have adopted different analyses. In *Mondev* (2002), the NAFTA tribunal rejected the USA's objection *ratione temporis*:

> Nor do Articles 1105 or 1110 of NAFTA effect a remedial resurrection of claims a Canadian investor might have had for breaches of customary international law occurring before NAFTA entered into force. It is true that both Articles 1105 and 1110 have analogues in customary international law. But there is still a significant difference, substantive and procedural, between a NAFTA claim and a diplomatic protection claim for conduct contrary to customary international law (a claim which Canada has never espoused).[50]

In *Corn Products*, the NAFTA tribunal decided:

> … when a State claimed for a wrong done to its national it was in reality acting on behalf of that national, rather than asserting a right of its own. The pretence that it was asserting a claim of its own was necessary, because the State alone enjoyed access to international dispute settlement and claims machinery. However, there is no need to continue that fiction in a case in which the individual is vested (p. 231) with the right to bring claims of its own. In such a case there is no question of the investor claiming on behalf of the State. The State of nationality of the Claimant does not control the conduct of the case. No compensation which is recovered will be paid to the State. The individual may even advance a claim of which the State disapproves or base its case upon a proposition of law with which the State disagrees.[51]

Whichever of these views are correct, it is manifest that investor–state arbitration under a treaty is a form of both inter-state arbitration and international commercial arbitration that is subject to public international law.[52] By and large, that form has worked well for its users. Over the last 20 years, whether fish or fowl or neither of these, investor–state arbitration has been widely supported by many states. As Judge Schwebel has observed, 'What is clear is that investor/State arbitration has proved to be a significant and successful substitute for the gunboat diplomacy of the past. It represents one of the most progressive developments of international law in the whole history of international law.'[53]

In conclusion, the recent history of state–state and also, in part, of investor–state arbitration is the history of the PCA. As intended by the two Hague Conferences more than a century ago, arbitrations under treaties are still marked by the necessity for the parties' consent (including a state's limitation as to the categories of dispute referable to arbitration), a neutral appointing or administering authority, a settled procedure subject to party autonomy, the parties' involvement in the appointment of the tribunal, and the absence of any appeal from an award for an error of law or fact. For inter-state arbitration and (notwithstanding the ICSID and New York Conventions) investor–state arbitration also, the recognition of the award by the losing party is usually made voluntarily. It is the parties' arbitration, the award is the product of their consent, and, accordingly, the award has a moral binding force for the parties often absent from non-consensual mechanisms. So far, Martens would readily recognize today's practice of arbitration by states. It is also

probable that he and his colleagues at both Hague Conferences would not be surprised by the current opposition to international mechanisms for the obligatory resolution of disputes. In 1999, Judge Shi Jiuyong (later President of the ICJ), wrote: ‘Today, the International Court of Justice and the Permanent Court of Arbitration are complimentary institutions within the community of nations, each having its (p. 232) own unique role to play in the global network of mechanism of third party dispute resolution.’[54] Almost twenty years later, for that role to continue as regards the legitimacy of obligatory arbitration, there is probably a need for a Third Hague Conference on Arbitration attended by states who resort to arbitration in its different forms (whether by themselves or by their nationals), guided by F. F. Martens’ historical sense of practical realism.

Notes:

(1) The USA’s blocking of new members to hear disputes by the WTO’s Appellate Body, thereby compromising the WTO system as a whole, derives from a contempt for ‘unaccountable international tribunals’ as recently expressed by the President of the USA to the UN General Assembly (see *Financial Times*, 2 October 2016, 1). Since 2014, similar political views have been repeatedly expressed by the European Commission. E.g. the European Trade Commissioner (Dr Cecilia Malmström) in 2015 rejected investor–state arbitration (ISDS) for the EU’s new free trade agreements: ‘there is a fundamental and widespread lack of trust in the fairness and impartiality of the old ISDS model’; and, under the EU’s proposal for a new international investment court and appellate body, ‘It will be judges, not arbitrators, who sit on these cases’. See also Sophie Lemaire, ‘Arbitrage d’investissement et Union Européenne’, Rev. arb. 1029 (2016), 1034 ‘elle [EU] propose une révolution du modèle contentieux qui le caractérise.’

(2) The phrase ‘obligatory arbitration’ is here borrowed from the first Hague Peace Conference, where it signified an agreement by states to arbitrate in advance of any dispute, as distinct from a *compromis* agreed after the outbreak of a dispute.

(3) As concluded by J. G. Merrills in regard to the Jay Treaty and its progeny: ‘These early Anglo-American commissions were not judicial tribunals in the modern sense, but were supposed to blend juridical with diplomatic considerations to produce (in effect) a negotiated settlement.’ See *International Dispute Settlement*, 6th edn (Cambridge University Press, 2017), 89.

(4) See Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press, 2018).

(5) Fedor Fedorovich Martens (1845–1909), born in what is now Estonia and also known as Friedrich Fromhold von Martens or Frédéric de Martens (in German and French), had been an arbitrator in the *Bering Sea Arbitration* between Britain and the USA over pelagic seal fishing by Canada (1892–3); the sole arbitrator in the *Costa Rica Packet Arbitration* between Great Britain and the Netherlands (1895–7); and the presiding arbitrator (or ‘umpire’) in the *Anglo-Venezuelan (Guiana) Arbitration* (1897–9) held in the Quai d’Orsay in Paris (sitting with Lord Justice Russell and Lord Collins, appointed by Britain, and Jus-

tices Fuller and Brewer of the U.S. Supreme Court, appointed by Venezuela). Martens spoke fluent German, French, and English (in addition to, of course, Russian). Martens was later appointed as the first Russian representative to the PCA and an arbitrator in the first two arbitrations brought before the PCA under the 1899 Hague Convention: the *Pious Fund Arbitration* (1902) and the *Venezuela Preferential Claims Arbitration* (1904). He helped to negotiate for Russia the arbitration submission between the USA v Russia in 1900 (the '*Asser Arbitration*'). In 1905, he attended the Portsmouth Peace Conference convoked by President Theodore Roosevelt to bring a peaceful end to the Russo-Japanese War.

(6) Although Martens recorded that the choice of The Hague surprised many, he strongly supported that choice given the Netherlands' historically good relations with Imperial Russia and its status as the home of Hugo Grotius (Huig de Groot): see Frédéric Martens, 'La Conférence de la Paix à la Haye' (Arthur Rousseau, 1900), 10.

(7) For Martens' comprehensive biography, see Vladimir Pustogarov, *Our Martens*, trans. W. Butler (Kluwer Law International, 1993, 2000); see also 'Frederic de Martens' (Editorial Comment), 3 American Journal of International Law 983 (1909); Thomas Holland, 'Frederic de Martens', 10 Journal of the Society of Comparative Legislation 10 (1909); Hans Wehberg, 'Friedrich v. Martens und die Haager Friedenskonferenzen', 20 Zeitschrift für Internationales Recht 343 (1910); Lauri Mälksoo, 'Friedrich Fromhold von Martens (Fyodor Fydorovich Martens) (1845–1909)' in Bardo Fassbender and Anne Peters (eds), *Oxford Handbook of the History of International Law* (Oxford University Press, 2012); Rein Müllerson, 'F. F. Martens—Man of the Enlightenment: Drawing Parallels between Martens' Times and Today's Problems', 25 European Journal of International Law 831 (2014). Having been forgotten or spurned for so long, even in Russia, Martens is now the subject of many legal histories, of which only a selection are listed here. Very belatedly and dwarfed by the over-large portrait of Tsar Nicholas II, a bust of Martens is now displayed in the Peace Palace's Small Arbitration Room.

(8) Austria-Hungary, Belgium, Bulgaria, China, Denmark, France, Germany, Britain, Greece, Italy, Japan, Luxemburg, Mexico, Montenegro, The Netherlands, Persia, Portugal, Romania, Russia, Serbia, Siam, Spain, Sweden (with Norway), Switzerland, Turkey and the USA. Korea attempted to attend the Conference but was refused admission, being treated as part of Japan. Apart from Mexico, no Latin American state attended the conference, although many were supporters of general arbitration treaties: see e.g. Art. 4 of the Plan of Arbitration agreed by the Pan-American Congress of 1890 (by 16 of 19 American states), and Art. 1 of the Treaty of Arbitration between Argentina and Italy of 23 July 1898. The majority of states taking part in the 1899 Hague Conference were European.

(9) For a full account of the Hague Conferences, see Shabtai Rosenne (ed.), *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents* (Asser Press, 2001); Arthur Eyffinger, *The 1899 Hague Peace Conference: The Parliament of Man, the Federation of the World* (Kluwer Law International, 1999); Jean Allain, *A Century of International Adjudication: The Rule of Law and its Limits* (Asser Press

2000); Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 1933), 27, 184; Hans von Mangoldt, 'Development of Arbitration and Conciliation Treaties and Arbitration and Conciliation Practice since The Hague Conferences of 1899 and 1907', in J. Gills Wetter (ed.), *The International Arbitral Process: Public and Private* (Oceana, 1979), 243.

(10) Allain (n. 9), 23; Rosenne (n. 9), 97.

(11) Martens invoked, as the earliest example of obligatory arbitration, Art. 16 of the multilateral Postal Union of 1874, providing for the settlement by arbitration of all disputes between contracting states arising from the interpretation and application of that treaty. This obligation extended to future disputes.

(12) Eyffinger (n. 9), 'The Work of The Third Commission'; Allain (n. 9), 22–3.

(13) Rosenne (n. 9), 97.

(14) Sir Julian Pauncefote (1828–1902), later Lord Pauncefote, had been a member of the English and Hong Kong Bars. After a distinguished career in the British Colonial and Foreign Services (including stints as Attorney-General of Hong Kong), he was appointed in 1889 the UK's ambassador to the USA. In that capacity, Pauncefote negotiated in 1897 the 'Olney–Pauncefote' treaty between Britain and the USA providing for general arbitration, subject to exceptions (albeit never ratified by the USA) and the USA–UK treaty leading to the Bering Sea Arbitration over Canadian pelagic sealing rights. As a practising lawyer and senior diplomat, Pauncefote was undoubtedly familiar with both state–state and private commercial arbitration. There is no biography of Lord Pauncefote; but see his obituary in *The London Times*, 26 May 1902.

(15) Baron Descamps was the Belgian representative and a member of the third commission.

(16) In addition to Martens and Descamps, these comprised T. M. C. Asser of The Netherlands (1838–1913), Baron d'Estournelles of France, F. W. Holls of the USA, H. Lammasch of Austria-Hungary (1853–1920), E. Odier of Switzerland (formerly IDRC secretary), and P. Zorn of Germany.

(17) See Eyffinger (n. 9) for a detailed account.

(18) See the critical account of Germany's conduct in Sabine Konrad, 'The Asser Arbitration', in Ulf Franke, Annette Magnusson, and Joel Dahlquist (eds), *Arbitrating for Peace* (Wolters Kluwer, 2016), 41–4.

(19) Baron B. E. Nolde (1876–1948) was a jurist, diplomat and Baltic German (born in what is now Latvia). He became in 1914 the legal adviser to the Russian Ministry of Foreign Affairs and was appointed to membership of the PCA by Russia in 1914. In 1921, after the October 1917 Revolution, Nolde and his immediate family escaped from Soviet Russia to settle as permanent exiles in Paris. In 1930, Nolde was a co-arbitrator in the

second *Harriman Arbitration* in Paris under the US company's concession agreement agreed with the USSR in 1925: see †V. V. Veeder, 'Looking for Professor B. E. Nolde', in A. I. Muranov et al. (eds), *In Memoriam: V. A. Kabatov and S. N. Lebedev* (Moscow, 2017), 401, revised (in English) in *Jus Gentium* 3(1) (2018), 255.

(20) Baron Marschall von Bieberstein, cited in Lauterpacht (n. 9), 193 (fn. 3).

(21) Pustogarov (n. 7), 327.

(22) See the summaries of arbitration awards under the 1899 and 1907 Hague Conventions in P Hamilton et al. (eds), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution—Summaries of Awards, Settlement Agreements and Reports* (Kluwer Law International, 1999). See also International Bureau of the Permanent Court of Arbitration, *Analyses des sentences* (PCA, 1934).

(23) *The Pious Fund Arbitration* (USA v Mexico), Award, 14 October 1902 (H. Matzen, E. Fry, F. de Martens, T. M. C. Asser, A. P. de S. Lohman), UNRIAA, 14 October 1902, Vol. IX; *Venezuela Preferential Arbitration* (Germany, Great Britain, Italy v Venezuela), Award, 22 February 1904 (N. V. Mouraviev, H. Lammasch, F. de Martens), UNRIAA, 22 February 1904, Vol IX, 107–10; Hamilton (n. 22), 31–5.

(24) The Doggerbank Incident (1904) brought Britain and Russia to the brink of war when the Russian fleet, on its voyage from the Baltic to the Sea of Japan during the Russo-Japanese War (1904–5) mistook British unarmed fishing-boats for Japanese warships in the North Sea. It was the first Inquiry under the 1899 Hague Convention: see The Dogger Bank Report, 26 February 1905 (Spaun, Fournier, Dombassoff, L. Beaumont, Ch. H. Davise); Hamilton (n. 22), 297.

(25) *Russian Claim for Indemnities* (Russia v Turkey), Award, 11 November 1912 (Ch. E. Lardy, M. de Taube, A. Mandelstam, A. Arbro Bey, A. Réchid Bey); Hamilton (n. 22), 81–7. André Mandelstam was not a member of the PCA.

(26) P. J. Baker, 'The Obligatory Jurisdiction of the Permanent Court of International Justice', 6 BYIL 68 (1925), 84.

(27) See von Mangoldt (n. 9), 247–50.

(28) Eyffinger (n. 9), 'To the Rescue of Arbitration'.

(29) Art. 54 of the 1899 Hague Convention provided: 'The award, duly pronounced and notified to the agents of the parties at variance, puts an end to the dispute definitively and without appeal.' (Art. 81 of the 1907 Hague Convention provided: 'The award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal.')

(30) Art. 55 of the 1899 Hague Convention provided: 'The parties can reserve in the compromise the right to demand the revision of the award … It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence on

the award, and which, at the time the discussion was closed, was unknown to the Tribunal and the party demanding the revision … ’

(31) Art. 81 of the 1907 Hague Convention restated, in different wording, Art. 54 of the 1899 Hague Convention (see n. 29).

(32) Arts. 82 and 83 of the 1907 Hague Convention.

(33) Karin Oellers-Frahm, ‘Judicial and Arbitral Decisions, Validity and Nullity’, *Max Planck Encyclopaedia of Public International Law*, §20.

(34) Lauterpacht (n. 9), 206 (fn. 2).

(35) ILC Report, A/3859, 83ff.

(36) A/CN.4/109 and Corr. 1, §76.

(37) A/CN.4/113, §26.

(38) *Guinea-Bissau v Senegal*, Award, 31 July 1989, Judgment, [1991] ICJ Reports 53; *Honduras v Nicaragua*, Award, 23 December 1960, Judgment, [1960] ICJ Reports 192. (Art. 64 of the 1965 ICSID Convention provides that any dispute between contracting states concerning the interpretation or application of the convention (but not the finality of an ICSID award) shall be referred to the ICJ unless the concerned states agree otherwise. To date, there has been no such reference.) See, generally, W. Michael Reisman, *Nullity and Revision* (Yale University Press, 1971).

(39) In the absence of any mechanism for the review of an award, the dispute over the award may compound that of the original dispute: see the unresolved controversy over the Final Award of 29 June 2017 in *Arbitration between Croatia and Slovenia* (where the PCA acted as the registry).

(40) E.g., as to obligatory arbitration, *The Barbados v Trinidad and Tobago Arbitration* (2004), *The Guyana v Surinam Arbitration* (2007), *The Bangladesh v India Arbitrations* (2009, 2014), *The Bangladesh v Myanmar Arbitration* (2014), *The Chagos Arbitration between the United Kingdom and Mauritius* (2015), *The Philippines v China Arbitration* (2016), *The Duzgit Integrity Arbitration (Malta v São Tomé and Príncipe*) (2016); *The Ukraine v Russia Arbitration* (2017), and, pending, *The Arctic Sunrise Arbitration (Netherlands v Russia),* and *The ‘Enrica Lexie’ Incident (Italy v India)*. As to obligatory conciliation, on 11 April 2016, pursuant to Art. 298 and Section 2 of Annex V of UNCLOS, Timor-Leste initiated compulsory conciliation proceedings against Australia (pending).

(41) *Radio Corporation of America v China*, Award, 13 April 1935 (J.A. van Hammel, A. Hubert, R. Farrer), under an arbitration clause in the parties’ agreement. Hamilton, (n. 22), 145.

(42) The PCA's 1982 'Rules of Arbitration and Conciliation for Settlement of Investment Disputes between Two Parties of Which Only One is a State; see Wetter (n. 9), 53; Antonio Parra, *The History of ICSID* (Oxford University Press, 2012), 17.

(43) *Turiff Construction (Sudan) Limited v Sudan*, Award, 23 April 1970, decided under the law of Sudan; Erades, 17 *N.T.I.R.* 200 (1970); Hamilton (n. 22), 164. The eventual tribunal comprised L. Erades (President), R. J. Parker and K. Bentsi Enchill, respectively a judge from the Netherlands, a QC from England (later a judge in the Court of Appeal of England and Wales), and, as appointed by the President of the ICJ in default of appointment by Sudan, a Ghanaian jurist. The Parties' Counsel included many English specialists in international commercial arbitration, including R. A. MacCrindle QC and (as they became later) Sir Michael Kerr, Lord Mustill, and Lord Saville, with Messrs Redfern, Hunter, and (Geoffrey) Lewis. It was not the first PCA arbitration between a foreign national and a host state: see *Radio Corporation v China* (1935).

(44) The PCA has now several sets of Optional Rules: The most recent, the PCA Arbitration Rules 2012, is a consolidation of four sets of PCA procedural rules which separately remain extant: the Optional Rules for Arbitrating Disputes between Two States (1992); the Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (1993); the Optional Rules for Arbitration Between International Organizations and States (1996); and the Optional Rules for Arbitration Between International Organizations and Private Parties (1996) (see 'PCA Model Clauses and Submission Agreements', available on the PCA's website: <pca-cpa.org>).

(45) The ICSID Convention introduced investor–state arbitration by ICSID to replace an informal role performed by the World Bank in diplomatically resolving investment disputes between states involving one state's national: see Parra (n. 42), 21.

(46) Thus, para 23 of the Executive Directors' Report refers to domestic 'investment promotion legislation', '*compromis*', and an 'investment agreement' between the disputing parties providing for the submission to the Centre of future disputes arising out of that agreement. There is no reference to any bilateral or multilateral investment treaty.

(47) *Asian Agricultural Products Limited v Sri Lanka*; Award, 27 June 1990 (El-Kosheri, Asante and Goldman), ICSID Case No ARB/87/3, 4 ICSID Rep 250; see also Franke et al. (n. 18), 191. (The respondent host state did not contest the ICSID tribunal's jurisdiction.)

(48) UNCTAD, 'World Investment Report 2015: Reforming International Investment Regime', (2015), Ch. IV. UNCTAD, 'World Investment Report 2020' (forthcoming 2020).

(49) *Loewen Group and Loewen v USA,* ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (Mason, Mustill, Mikva), para. 233 (emphasis added). State courts have taken different views, e.g. the Court of Appeal of England and Wales: 'The award on this point in Loewen is controversial' in *Occidental v Ecuador* 2005 EWCA (Civil) 116; [2006] QB 432, para 22, dismissing Occidental's appeal from the Commercial Court (Aikens J) (2005) EWHC 774 (Comm).

(50) *Mondev v USA* (N. Stephen, J. Crawford, S. Schwebel), Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2, para. 74.

(51) *Corn Products v Mexico* (C. Greenwood, A. Lowenfeld, J. Alfonso Serrano de la Vega), Decision on Responsibility, 15 January 2008, ICSID Case No. ARB(AF)/04/01, para. 173.

(52) In *Occidental v Ecuador,* the Court of Appeal acknowledged that 'under English private international law, an agreement to arbitrate may itself be subject to international law rather than the law of a municipal legal system' (paras. 33–4). See also Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', 74 BYIL 151 (2003); José Alvarez, 'Are Corporations 'Subjects' of International Law?', 9 Santa Clara Journal of International Law 1 (2011); Johnathan Bonnitcha, Lauge Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017), 65–6; Anthea Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights', 56 Harvard International Law Journal 353 (2015).

(53) Stephen Schwebel, 'Introduction', in Franke et al. (n. 18), 6.

(54) Hamilton (n. 22), xii.

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